What Do You Mean?

"May" Means "Must" in Some Construction Arbitration Agreements

By Matthew DeVries

You are reviewing a contract sent to you by an owner or a subcontract sent to you by a general contractor. As you begin to make changes to the contract, you don't always say what you mean. And, sometimes, you don't always mean what you say.

In construction contracts, parties traditionally use plain and ordinary words to describe their respective obligations. For example, when the parties use the word "shall" in their agreement, they generally understand that the obligation specified is ***mandatory***. Or when parties use the word "may" in their contract, performance is ***permissive*** or ***optional*** given the plain meaning of the word. Consider the following construction contract provisions:

- "If the Owner fails to make payment for a period of 30 days, the Contractor *may*, after seven days written notice, terminate the Contract and recover from the Owner payment for Work performed."
- "The Work *may* be suspended by the Owner as provided in Article 14 of the General Conditions."
- "Payments *may* be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, or (3) failure to carry out the Work in accordance with the Contract Documents."

In all of theses examples, it seems clear that the parties agreed to allow—but not require—the specified performance. The word "may" was permissive in nature.

Some courts have reached an opposite result in the context of arbitration provisions in construction contracts. For example, in the 2002 case of *TM Delmarva Power v. NCP of Virginia*, the Supreme Court of Virginia held that the parties' use of the word "may" in the dispute resolution provision of their construction contract required mandatory participation in arbitration at the election of one of the parties. The arbitration agreement provided:

> "If any material dispute, disagreement, or controversy concerning this Agreement is not settled in accordance with the procedures set forth in [previous section] . . . then either Party may commence arbitration hereunder by delivering to the other Party a notice of arbitration."

The court held that the above provision was mandatory at the election of one of the parties: "The word "may" . . . means that either party may invoke the dispute resolution procedures, but neither party is compelled to invoke the procedures. . . . *[But] once a party invokes the arbitration provision, the other party is bound to arbitrate*."

The *Delmarva* court reasoned that the disputes provision would be "rendered meaningless" if the word "*may*" was interpreted as permissive because parties to a commercial contract can always choose to submit their disputes to arbitration. The Fourth Circuit reached the same decision in the case of *United States v. Bankers Insurance Company* in a flood insurance dispute in 2000.

Given the fact that courts have interpreted the term "*may*" as "*shall*" in the context of arbitration agreements, parties to a construction contract must be careful in understanding both the plain, ordinary meaning and the legal meaning of the particular words used. In the above examples, if the parties wanted arbitration of disputes to be permissive and non-mandatory, they could have clarified their contract by including more explicit language (i.e., "any and all disputes, *upon mutual agreement*, may be arbitrated" or "*with the consent of the other party*, either party may commence arbitration"). It is important in contract drafting that you say what you mean and you mean what you say. ■

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