



# MAY THE CLAUSE BE WITH YOU<sup>SM</sup>

**Order of Precedence – Uniform Contract Format  
52.215-8**

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## Meet Your Instructor!



- **Tim Sullivan** has spent 45 years in the Government contracting world. He is a co-founder of the Public Contracting Institute and has lectured and written on Government contracting topics, both nationally and internationally, since 1983. He has dealt with the full range of Government contracting issues and has successfully litigated both bid protests at the GAO and the U.S. Court of Federal Claims and contract claims before the boards of contract appeals and the U.S. Court of Federal Claims.
- Tim spent his last 19 years of practice as a partner at Thompson Coburn LLP, where he chaired the Government Contracts Group. Tim has represented numerous prominent companies, such as Google and Rolls-Royce, and he is widely acclaimed for his lectures on contract negotiations.
- Tim earned a bachelor of arts degree from the University of Michigan and his Juris Doctor degree from Georgetown University Law Center, where he was a member of the Georgetown Law Journal. Tim also served as a counterintelligence agent for the U.S. Army and as a contract negotiator for the Central Intelligence Agency.

## What is an “Order of Precedence” Clause?

- It is a contract clause that guides both parties in trying to resolve conflicts within a solicitation or a contract



# Why is this clause important?

- Because words matter
- Because the reader does not always understand what the writer intended
- Because solicitations often contain conflicting information
- Because the rules are harsh for offerors who fail to conduct the proper analysis and take the necessary steps
- Because the courts and the boards treat an “Order of Precedence” clause as something that the parties *have agreed on* as a way of resolving conflicts within a contract

# Sample Clauses

- This is a good example of what some people call contract “boilerplate”
- A boilerplate clause is one that is considered standard
- Boilerplate is used when the terms and conditions of the contract are set by one of the parties and the other party has little or no ability to negotiate better terms
- Although boilerplate has a somewhat negative connotation, don't be deceived—it's enforceable!

# Supply contracts

- FAR 52.215-8, “Order of Precedence”

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications).
- (b) Representations and other instructions.
- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications.

# Construction contracts

- FAR 52.236-21, “Specifications and Drawings for Construction,” includes the following:

Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of differences between drawings and specifications, the specifications shall govern.



# Commercial-item contracts

- FAR 52.212-4 contains the following “Order of Precedence” clause:  
Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:
  - (1) the schedule of supplies/services;
  - (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause;
  - (3) the clause at 52.212-5;
  - (4) addenda to this solicitation or contract, including any license agreements for computer software;
  - (5) solicitation provisions if this is a solicitation;
  - (6) other paragraphs of this clause;
  - (7) the Standard Form 1449;
  - (8) other documents, exhibits, and attachments; and
  - (9) the specification.



# A sample agency clause

- EDAR 3452.215-33, governing the Dept. of Education, contains the following “Order of Precedence” clause

Any inconsistency in this contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the work statement or specification).
- (b) The contract clauses (Section I).
- (c) Any incorporated documents, exhibits, or attachments, excluding the work statement or specifications and the Contractor’s proposal, representations, and certifications,
- (d) The work statement or specifications, and
- (e) The Contractor’s proposal, as amended, including representations and certifications.

# Elements of an effective “Order of Precedence” clause

- There must be:
  - A legally effective (*i.e.*, mandatory) “Order of Precedence” clause
  - A true conflict must exist and
  - The conflict must be covered by the clause

# What's a legally effective "Order of Precedence" clause?

- It must *clearly* establish a mandatory order of precedence
- For example, in one case, where the "Order of Precedence" clause stated that, "in general," figures on large-scale drawings shall be followed in preference to figures on small drawings, the ASBCA said that the use of the words "in general" negated the mandatory nature of the "Order of Precedence" clause
- In contrast, in a case where a clause specifically made large-scale drawings supersede small-scale drawings, the VABCA held the clause was effective

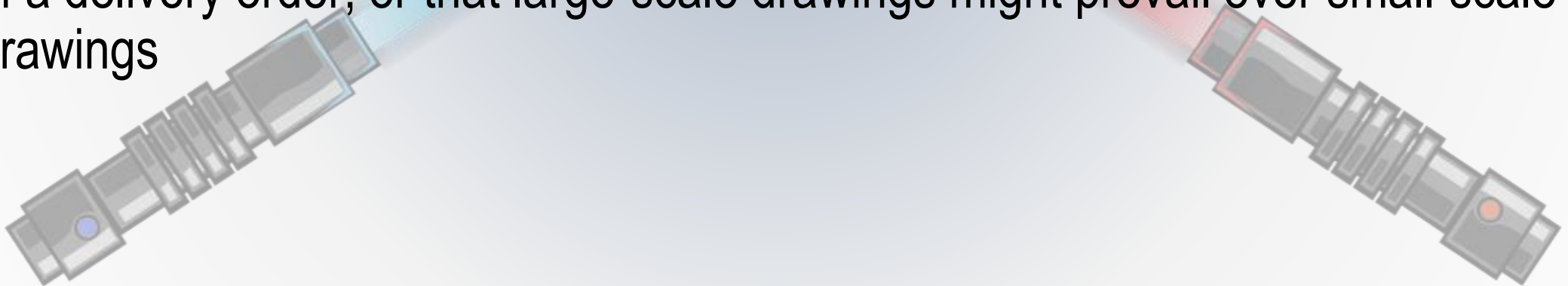


# What's a true conflict?

- There must be a true conflict within the contract in order for the clause to be effective
- Mere silence does not create a conflict

# The true conflict must be covered by the “Order of Precedence” clause

- The conflict must be between parts of the contract covered by the clause
- Many “Order of Precedence” clauses address differences between specifications and drawings, but other contract provisions can be addressed by such a clause
- For example, a clause might state that the Schedule will prevail over language in the General Provisions; or that the basic contract will prevail over the terms of a delivery order; or that large-scale drawings might prevail over small-scale drawings



## The clause must resolve the conflict

- If the “Order of Precedence” clause, for example, says that the specifications will prevail over the drawings, it will not resolve a conflict that is contained *only in the specifications*—that would require resorting to the rules of contract interpretation
- But if the specifications call for rebarring and the drawings call for splicing, the specifications will prevail under such a clause



# An “Order of Precedence” clause can resolve questions about levels of detail and quality

- Example: “It shall be understood that the specifications and drawings are complementary and are to be taken together for a complete interpretation of the security systems work. Where there are conflicts between the drawings and specifications, or within the specifications or drawing themselves, the items of higher standard shall govern.”



# Patent ambiguity

- A “patent” ambiguity is defined by the courts as one that exists when there is a facial inconsistency between provisions or terms within the contract; in other words, the patent ambiguity is apparent on the face of the document
- It can encompass obvious omissions, inconsistencies, and discrepancies
- It raises a duty to inquire

# An offeror's dilemma

- What happens when there is a patent ambiguity in an RFP?
  - The courts and the GAO say that an offeror has a duty to inquire about patent ambiguities prior to submitting its proposal
  - If an offeror fails to do so, it may end up bearing the costs of its mistaken interpretation
  - But if the “Order of Precedence” clause in the solicitation resolves the conflict, then there is no conflict and the offeror (at least in theory) is not obligated to inquire about it



## Best practice

Unless you are absolutely certain that the issue has been resolved, *ask the Government about it*

# Summary

- Smart contractors use the “Order of Precedence” clause to resolve discrepancies within a solicitation
- Never assume that a solicitation or a contract contains a standard “Order of Precedence” clause
- Depending on the financial implications of the issue, even if you have resolved a conflict using the “Order of Precedence” clause in a solicitation, you might want to ask the C.O. about it

# Thank you!



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