What Is a Contractor Supposed to Do with Information That Is Not Part of the Contract?

By Michael C. Loulakis and Lauren P. McLaughlin

We are frequently asked by our clients to provide views on how to handle as-built drawings, old geotechnical reports and project studies, and other documents that have some relationship to a project. Most public procurement owners characterize these documents as reference or informational documents and do not consider them contract documents.

But why don't owners make the reference documents part of the contract documents? The most typical reason is that they are not reliable, and if they are included as contract documents, they will expose the owner to claims under the differing site conditions clause and/or the *Spearin* doctrine (i.e., the owner's implied warranty that the contract documents are accurate). Given this, why do owners provide these documents during the bidding process? Because if an owner does not, it might be exposed to a contractor's claim that it breached its obligation to disclose relevant information to bidders.

Reference documents that consist only of background information are generally not problematic. What is highly problematic are those reference documents that the owner expects the contractor to review and that contain information material to the contractor's work. Contractors may or may not have looked at these documents — after all, they did not rise to the level of being contract documents. If the contractor did look at them, is it required to consider in its bid what was in those documents? If it did not look at them, is it nevertheless bound by what was in those documents? And can the owner have it both ways, using reference documents as a shield to avoid contractor claims but also as a sword in requiring the contractor to be bound by requirements in them as if they were contract documents?

There are a handful of cases that discuss this issue and provide guidance on how situations like this are resolved. While this month's case, *Primrose Retirement Communities LLC v. Ghidorzi Construction Co. LLC*, does not give a dispositive answer to the issue, it provides a great example of how challenging this situation can be in administering a contract.

THE CASE

The project involved an assisted living facility in Wyoming. The owner, Primrose Retirement Communities, retained a geotechnical consulting firm to prepare a soils report and make structural recommendations for construction. The report identified the existence of expansive clays and provided recommendations to mitigate them. One of the recommendations was to support the structure with spread footings bearing on "new, non-expansive, low-permeability, engineered fill." The report included specific design and construction recommendations for the use of spread footings.

Primrose contracted with Ghidorzi Construction as the general contractor under what appears to be a standard American Institute of Architects contract for construction. The contract specifically excluded the soils report as part of the contract documents. However, within the contract documents was a drawing by Ghidorzi's structural engineer that included a note: "All footings shall bear on new engineered fill as per soils report ... . The soils report must be strictly adhered to."

About a year after the project was completed, Primrose noticed some movement of the slabs and walls in the water service room (i.e., the location where the water main entered the building). Ghidorzi inspected the situation and, after testing the soils, concluded that there was an increase in water saturation. Problems continued to escalate thereafter and the facility experienced cracks and separation in its floors and walls. While it was eventually discovered there were leaks in the connection between the service line and water main, even after the connection was repaired, differential movement did not cease. It was also discovered that Ghidorzi did not follow the recommendations in the soils report relative to the spread footings. Primrose believed that Ghidorzi's failure to do so was one of the reasons for the problems being experienced.

Primrose sued Ghidorzi and other parties, including Primrose's architect. Primrose's architect brought a claim against Ghidorzi's engineering subcontractor. Eventually, all claims against the entities named in the action were dismissed by agreement of the parties, with the only parties left being Primrose and Ghidorzi. Ghidorzi moved to dismiss all of Primrose's claims because, among other things, the soils report was excluded from the contract documents and Ghidorzi claimed that it was not obligated to follow the recommendations included therein. The trial court granted Ghidorzi's motion for summary judgment, prompting Primrose to appeal to the Wyoming Supreme Court.

THE RULING

The Wyoming Supreme Court determined that the trial court erred in granting summary judgment, as it found material questions of fact on the interpretation of the contract and whether Ghidorzi's actions contributed to Primrose's damages. As a result, it sent the case back to the trial court to have these issues determined by a jury.

The supreme court's decision on the contract was based on its conclusion that the contract was ambiguous. On one hand, the soils report was clearly excluded as being a contract document. On the other hand, the court found that there was an intent to make the report's spread footing specifications part of the contract through the language of the drawing's annotation.

The supreme court rejected Ghidorzi's argument that it was not obligated to consider non-contractual documents. The court cited contract language that Ghidorzi was "obligated to ... report any errors, inconsistencies, or omissions" it discovered and to "make no deviation from the Contract Documents without specific and written approval from the Architect." The supreme court also stated that: "At this stage of the proceedings, there is nothing in the record to establish Ghidorzi did not discover the inconsistency or the basis for Ghidorzi's decision to proceed without incorporating the engineer's drawing note."

THE ANALYSIS

It seems self-evident that someone who signs a contract should understand what the contract says. But it certainly appears that this did not happen in the *Primrose* case. Primrose, the owner, intentionally excluded the soils report, likely in an effort to avoid the risk of claims mentioned in this column's introduction. However, it apparently never thought through how this might impact the design and construction standards for the spread footings, which were directly addressed in that report. Ghidorzi, as the general contractor, also apparently never thought through the implications of including the drawing from its own engineer as a contract document.

All this is undoubtedly why the Wyoming Supreme Court sent the case back for a jury trial for a factual determination of what the parties were intending as they agreed to these conflicting provisions. Who will win is anyone's guess at this point. This is particularly true, given that the soils report was couched in terms of recommendations and that there may be challenges as to what was a recommendation and what was a requirement.

One other item that is interesting about this case: the role of Ghidorzi's structural engineer. While the decision does not explain this, it almost seems as if the drawing was part of a proposal made on a design-build contract. Yet there is nothing to suggest that this was a design-build project or that the design of the footings was delegated to Ghidorzi under the contract. This fact certainly made the case confusing for us to read.

It also raises a question of what Ghidorzi was thinking if its own engineer identified the standards for installing the footings. This was clearly a concern by the supreme court, which seemed at a loss as to what prompted Ghidorzi to ignore this drawing. Ghidorzi will have to have a good explanation for this if it hopes to prevail at trial. **CE**

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