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But the Inspector Told Me it was All Right![1]

By Thomas R. Olson and Rielly J. Lund

An issue we run into frequently with clients ends with the exclamation that is the title of this article.

On our initial call, in which we discuss the issues that have arisen and which led to the contractor retaining our firm, the contractor explains clearly how he did not follow the contract specifications and ends the explanation with "but the inspector said it was all right!"

Unfortunately, while inspectors frequently approve work that is outside of the specifications, they generally do not have the authority to do so and contractors may be required to remove the work and/or be liable for issues caused by out of spec work.[2]

This is especially important to remember during this time of the year as projects may be winding down and temperatures are dropping. When the contractor arrives in the morning, it may be too cold to pave per the specs, but in the interests of keeping the project moving, he asks the inspector for permission to pave.

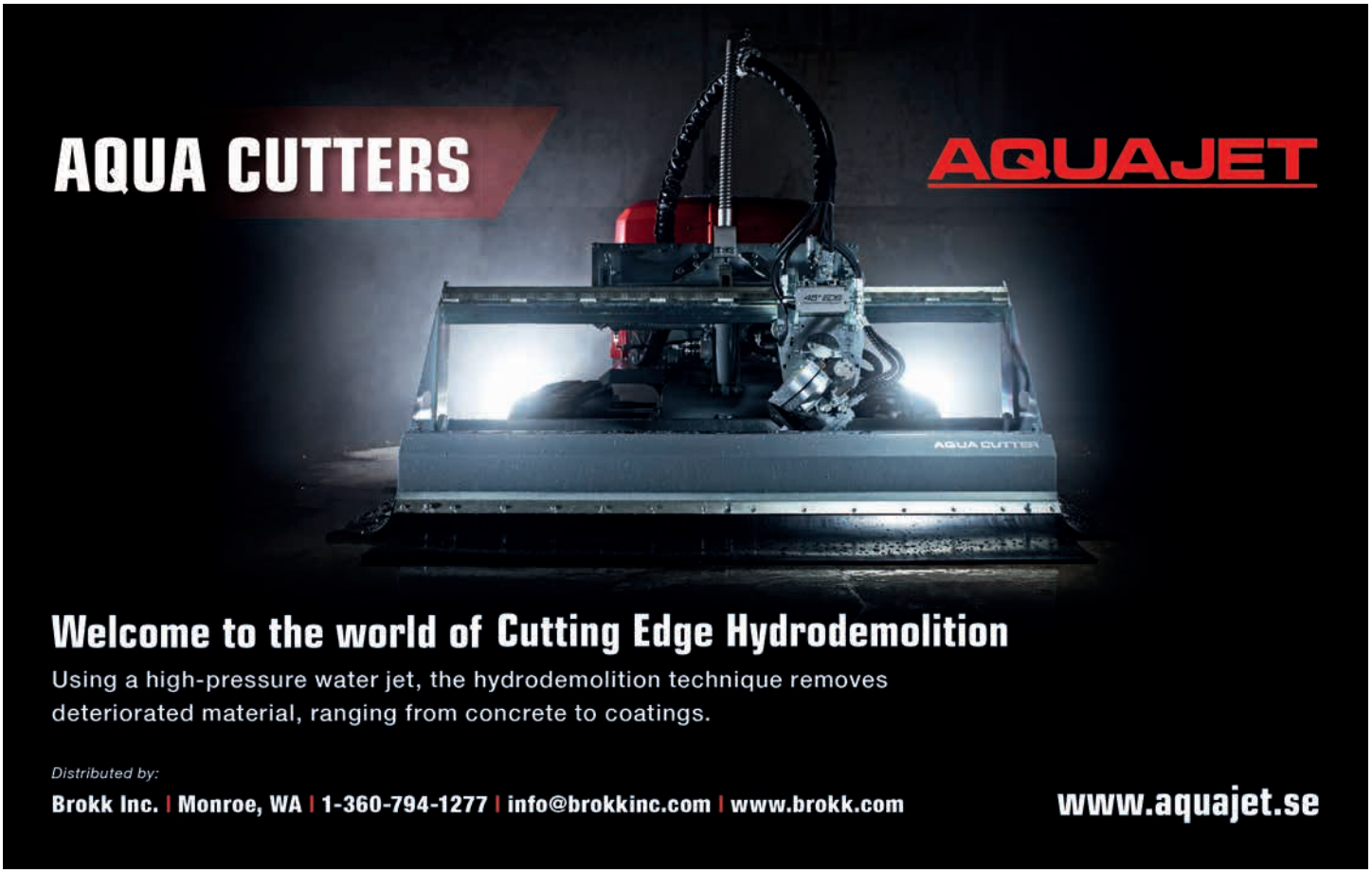
The inspector says something along the lines of "sure, go ahead." Later, when reviewing the inspector's diary, the engineer notices this and either demands the pavement be replaced or, if there are any pavement issues down the road, points to this as evidence supporting the contractor being at fault.

Anytime changes are being made, you need to ask yourself the following question: who has the authority to bind the owner to any changes in the contract? You entered into the contract with the project owner, and that contract includes plans and specifications which you are required to follow without a change. In order for you to perform work contrary to these plans and specifications, it must be approved, so who is allowed to approve a change?

In the past, complex legal arguments of agency, apparent authority, actual authority, and more were all made and considered in determining this question. These days, almost all public bodies contractually designate authority through the project specifications (which of course are contract documents).

An example of the inspector's authority can be found in the Iowa DOT Standard Specifications, Section 1105.06, Authority and Duties of the inspector:

> The Contracting Authority may appoint inspectors to represent the engineer in the inspection of materials used in and work done under the contract. Such inspection may extend to any part of the work and to preparation or manufacture of materials to be used. The inspector will not be permitted to modify in any way the provisions of the contract documents or to delay the work by failing to inspect materials and work with reasonable promptness. An inspector is placed on the work to keep the engineer informed as to its progress and the manner in which it is being performed. Results of inspection tests and examinations will be available to the contractor on an



informational basis. Absence or presence of representative test data does not alter the contractor's responsibility for compliance with the contract documents in accordance with Article 1104.01. The inspector will not act as supervisor or perform other duties for the contractor, nor improperly interfere with management of the work. The inspector will not be authorized to approve or accept any portion of the work. In case of dispute between the contractor and inspector as to quality of materials or manner of performing the work, the inspector has authority to reject materials or suspend the work until the question at issue can be decided by the engineer. Written notice of suspension of work will be given to the engineer and contractor by the inspector.

As you can see from the information above, the inspector does not have the authority to make changes to the contract. The inspector is there for one purpose: to keep the engineer informed of the progress. Only the engineer is authorized to make changes to the contract requirements.

Unfortunately, most contractors and inspectors either ignore this clause, or don't know about it. Even more troubling is if the inspector does *know this,* but in the interest of keeping things moving, *doesn't care.*

Either the project will work out, and no one will care what was done, or the contractor will be on the hook since no official change was made. Either way, it's no skin off of the inspector's back.

We have seen the situation where an inspector acknowledged he knew the contractor was requesting something outside of the specs, knew the he was not allowed to approve a change, and yet, told the contractor to go ahead anyway. When asked why, the reasoning was the inspector assumed the contractor knew and didn't care, so he didn't either.

So, as you are wrapping up your projects this year and are pressured to pave during cold weather, review the specifications to determine who actually has the authority to approve this. Ask that person to acknowledge the change in writing. If they refuse, ask yourself why, and proceed following the contract requirements unless a change is made in writing.

References:

1. The legal principles discussed in this article are in no way guaranteed to apply in the jurisdiction where your project takes place. For each specific fact scenario, an attorney should be consulted.
2. Note, that there are numerous legal arguments that can be made to either get around this, or at the very least minimize damages. However, these types of legal arguments are nearly never resolved at the front end, and you will be paying a lot of money in attorney fees to prevail. Our firm advocates for "best practices" by our clients, and this article reflects that philosophy.

ABOUT THE AUTHORS

Thomas Olson is the founding partner of Olson Construction Law. Tom's commitment is to provide guidance on how to resolve issues on the jobsite, not in the courtroom. Tom has worked on highway heavy projects throughout much of the United States for more than thirty years. A prolific speaker and writer as well as attorney, his expertise is in concrete and asphalt paving, utility, earthwork and bridge construction, schedule analysis, material testing, and the technical and legal obligations of both engineers and contractors.

Rielly Lund is a committed advocate for contractors, with the ability to quickly and accurately analyze a client's issue within the parameters of each specific contract. Rielly works with contractors through all stages of construction, from bidding to acceptance, with the goal of minimizing risk and maximizing profits for contractors. With this in mind, Rielly enjoys discussing various contractual requirements with contractors before issues arise, so they are best able to meet any challenges head on.