

Olson Construction Law, P.C

“Authority of the Engineer”

August 19, 2025



About Olson Construction Law

At Olson Construction Law, our mission is to powerfully advocate for the construction industry by enforcing contracts, partnering with industry professionals (contractors, owners and engineers), and educating the industry about better ways to manage change. Olson Construction Law was founded by Tom Olson in 1993. Our team brings more than forty years of experience to the table.

Expertise & Qualifications

Our technical knowledge helps us effectively assist contractors with unanticipated change issues. From highway-heavy construction to airports to geotechnical issues...we've worked with it all.

We are actively involved in trade associations as well as the national construction committees that set standard specifications. In addition, we have experience in the following construction areas:

Construction Law Experience

- > Concrete Paving
- > Asphalt Paving
- > Mix Designs
- > Acceptance Testing
- > Aggregate Production
- > Aggregate Testing
- > Excavation / Dirt Work
- > Removals
- > Landfills
- > Wastewater Treatment Plants
- > Sewer Lines
- > Water Lines
- > Utilities
- > Directional Drilling
- > Open Trenches
- > Cofferdams
- > Bridges
- > Airports

Tom Olson

Tom is the founding partner of Olson Construction Law.

His vision, commitment and energy have provided important leadership both to his firm and to his clients.



OUR TEAM



Tom Olson

Partner



Rielly Lund

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Brian Jesse

Attorney



Quincy Curry

Firm Administrator



Valerie Kehrер

Paralegal



Introduction

The Focus of this webinar is **the “Authority of the Engineer”**.

What ‘rights’ and ‘obligations’ of contractors in public construction can only be addressed by the ‘Engineer’?

What are the consequences if a contractor fails to address such matters to the Engineer?

What means may be available to a contractor to overcome such a failure?

1. 'Scope' of the Engineer's Authority

As a general rule of law, if only an engineer is authorized to address a construction matter, failure to follow such procedure will normally result in the contractor being PENALIZED.

As a starting point, consequently, it is critical that concrete pavement contractors understand the 'scope' of items for which only the engineer has authority to address.

I will examine this per the **Kansas DOT Specifications**, as they are characteristic of public specifications throughout the country.

A) Technical Concrete Specifications

PRE-CONSTRUCTION

- “At the pre-construction conference, submit the [QC plan] to the Engineer for approval.”
 - “Before placing PCCP, prepare and submit to the Engineer for approval a Protection Plan to address the onset of rain during concrete placement.”
 - “Specify the location of the [rain] storage site in order that a review of the protective materials may be conducted by the Engineer.”
 - “Equip the testing facility . . . for the exclusive use of the testing facility’s quality control personnel and the Engineer.”
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- “In the QCP, identify procedures for notifying the Engineer when corrective measures must be implemented, and for halting production.”
 - “The Engineer may waive the [manufacturer’s technical representative on the project] requirement for contractors that are experience in installing the type and brand of the material being used.”
 - “If the [Hot Applied Joint Sealing Compound] application unit contains compatible material from a previous project at start-up, provide the Engineer a certification covering the material.”
 - “Before beginning construction activities, discuss with the Engineer the Contractor’s schedule.”
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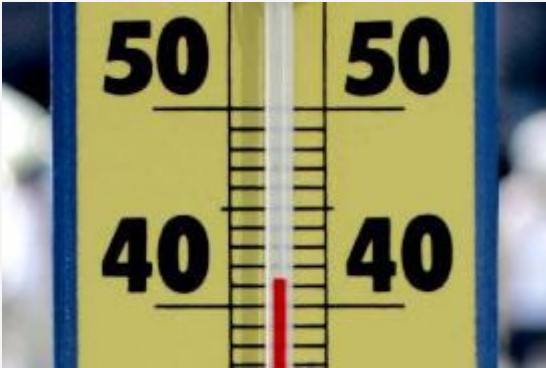
- “Do not sublet, sell, transfer, assign, or dispose of part of the contract work without the Engineer’s written consent.”
 - “The Field Engineer or designated KDOT office will review and either approve or reject the [initial or revised working] drawings.”
 - “The Engineer and utility will decide whether to adjust or relocate unidentified and incorrectly relocated utilities.”
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MIX DESIGN/BATCHING

- “Do not place any concrete on the project until the Engineer approves the mix design.”
- If “OGCA is required” for testing, “notify the Engineer in writing at least 2 weeks in advance of producing aggregate.”

- “If the Contract Documents allow the use of commercial grade concrete for designated items, then use a commercial mixture approved by the Engineer.”
- “Seek the Engineer’s approval of the concrete plant/batch before any concrete is produced for the project.”
- “Do not mix, place or finish concrete without sufficient natural light, unless an adequate artificial lighting system approved by the Engineer is provided.”

PLACEMENT



- “Provide advanced notice of Project work to be performed so the Engineer may coordinate the Inspectors’ activities with the Contractor’s work.”
- “Do not deposit any material until the subgrade or base has been checked and approved by the Engineer.”
- “Unless authorized by the Engineer, discontinue mixing and concreting operations when the descending ambient temperature reaches 40 degrees.”

- “If the Engineer permits placing concrete during cold weather, aggregate may be heated by either steam or dry heat system before placing them in mixer.”
 - “Joint tie bars may be installed mechanically if approved by the Engineer.”
 - “The Engineer may require the tie bars to be installed ahead of placing the concrete.”
 - “Do not apply moisture to the surface of the concrete pavement unless the Engineer approved the use of additional water on the fresh concrete surface to lubricate the floor of the longitudinal finisher.”
 - “Do not operate hand vibrators more than 15 seconds, or less than 5 seconds in any only location unless approved by the Engineer.”
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- “Flexible or curved forms must be approved by the Engineer.”
 - “On projects of less than 5,000 square yards, or projects with longitudinal tining, the tining and curing devices may be mounted on the same carriage when approved by the Engineer.”
 - “The Engineer may approve [Pressure Relief Joints] pre-positioning if the 2-inch material of adequate means are taken.”
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- “If approved by the Engineer, the contractor may pave beyond the point location a distance to maintain the line and grade.”
- Contractor may “weight the curing material down” by “other methods.....with approval of the Engineer.”

REPAIR

- “Remove, dispose of and replace concrete damaged by cold weather as determined by the Engineer.”
 - “Repair all bore holes in a manner approved by the Engineer.”
 - Contractor must remove deficient pavement “when the Engineer determines that deficient pavement must be removed.”
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- “Correct all irregularities exceeding the specified tolerance using equipment and methods approved by the Engineer.”
- “After the irregularities are corrected the Engineer will retest the area to verify compliance with the specified tolerance.”
- For “corrections,” use “Diamond grinding or other profiling devices approved by the Engineer.”

“The Engineer, not the Contractor, decides whether the Contractor shall repair the unacceptable work or remove and replace the unacceptable work.”

MEASUREMENT/TESTING

- “The width for measurement [of PCCP] will be the width of the pavement shown on the typical cross-section of the Contract Documents . . . or as directed by the Engineer.”
- “The Engineer will measure each concrete core when the results from the core information [required for disputed tests] increases payment for the Contractor.”
- “The Engineer will observe and document . . . the appropriate thickness of the plastic concrete.”



- “The Engineer will verify that only approved mixes are used.”
- “Prior to taking any core samples, notify the Engineer of the decisions to divide a day’s production into 2 equal lots.”
- “The Engineer reserves the right to generate the random [coring] locations.”
- “The Engineer will witness all comprehensive strength tests for each subplot and initial the Contractor’s documentation.”

- “These cores shall be obtained in time to determine the 35-day comprehensive strengths unless approved by the Engineer.”
 - “The Engineer and the Contractor will use the results of the initial [Profilograph] testing to evaluate the paving methods and equipment.”
 - “The Engineer will reject concrete that does not comply with the specified requirements.”
 - “The Engineer will permit occasional deviations below the specified cementitious content, if it is due to the air content of the concrete exceeding the designated air content, but only up to the maximum tolerance in the air content.”
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- “As the work progresses, the Engineer reserves the right to require the Contractor to change the proportions if conditions warrant such changes to produce a satisfactory mix.”

DISPUTES

- “Notify the Field Engineer of disputes with Inspectors verbally without delay, so the Field Engineer has the opportunity to resolve the situation Disputes include an Inspector exceeding the scope of the Inspector’s authority, failing to perform adequately the Inspector’s duties, treating the Contractor unfairly, or otherwise acting contrary to the contract.”
- “At the Engineer’s request, remove disorderly, intemperate, or unqualified personnel, whether employed by the Contractor, subcontractors’, or suppliers.”
- “Notify the Field Engineer if another contractor fails to cooperate or coordinate work sequencing.”

B) 'Change' Specifications

- “If the contract specifies the method of operations or equipment, obtain the Engineer’s approval to alter the method of operations, equipment, or both.”
 - “If the Contractor wishes to modify the Contract Documents to reduce Project construction costs, the Contractor may submit to the Field Engineer a written value engineering proposal.”
 - “The Engineer will make a contract adjustment for a significant change in contract quantities.”
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- “The Engineer may eliminate items from the contract regardless of whether the eliminated item(s) represents the entire subcontract.”
- “The Engineer will make a contract adjustment for a differing site condition.”
- “The Engineer will make a contract adjustment for extra work.”
- “A temporary suspension of work occurs when . . . the Engineer orders the Contractor to suspend all or part of the work.”

- “The Engineer will not grant monetary compensation but will suspend working day charges or grant a time extension.”
- If the Contractor fails to provide timely claim notice, “the Engineer may:
 - Reduce the Contractor’s request for contract adjustment by the amount of time, money, or both time and money the Secretary may have been able to save if the Contractor would have given more timely notice or a more timely contract adjustment request; and
 - Reduce the contractor’s request by amounts the Engineer was unable to substantiate with KDOT records; or
 - Deny the claim and consider the lack of timely notice as the Contractor’s waiver of the claim.”

- “Notwithstanding subsection 104.8c, the Engineer will deny the claim and consider the lack of timely notice as the Contractor’s waiver of the claim if the Contractor fails to provide notice of the Contract Change before the Engineer issues Notice of Acceptance of Contract.”
- For “Proof of Delay,” “the Engineer will consider additional days and extensions.”

NOTE: WHILE THE ENGINEER MAY “ALTER OR WAIVE CONTRACT PROVISIONS, ISSUE INSTRUCTIONS CONTRARY TO THE CONTRACT,” THE INSPECTOR MAY DO NEITHER OF THESE THINGS, OR “ACCEPT FROM CONTRACTOR ANY NOTICES REQUIRED BY THE CONTRACT DOCUMENTS TO BE GIVEN BY THE CONTRACTOR TO THE ENGINEER.”

**“UNAUTHORIZED WORK IS WORK PERFORMED WITHOUT THE FIELD ENGINEER’S
APPROVAL” AS WELL AS “WORK PERFORMED CONTRARY TO THE FIELD ENGINEER’S
INSTRUCTIONS.”**

“FOR EITHER UNACCEPTABLE WORK OR UNAUTHORIZED WORK, THE FIELD ENGINEER WILL GIVE THE CONTRACTOR WRITTEN NOTICE OF THE REMEDY KDOT HAS SELECTED.”

2. Consequences if Contractor Fails to Obtain Required Authorization of Engineer

a) General Rule

- “Contractors are obliged to carefully check the authority of parties upon whose direction they intend to rely.”
- The United States Supreme Court has held that:
“If the Government is to be held strictly to its contractual obligations as though it were a private obligor, then of course it is entitled to insist that those who contract with it shall be held to the same accountability.”

- For example, in the case of *J. A. Tobin Constr. Co. v. Kemp*, the Kansas Supreme Court held that a contractor was required to **correct all defective work at its own expense notwithstanding that “the defective work may have been done or the defective materials used with the full knowledge of the inspector.”**

“The inspections required by the contract were for the benefit of KDOT, not the contractor. The Inspectors were without authority to waive the specified placement of the rebar. Their failure to notice the error and call it to the attention of the contractor was not something upon which the contractor could have ‘rightfully relied’ so as to give rise to the doctrine of equitable estoppel. Approval by the inspectors is not the equivalent of final acceptance by the engineer.”

- “Contractor waived right to additional compensation when it relied upon what inspector instructed.”
- “Directions of inspector were unauthorized statements upon which contractor could not rely.”
- Contractor waived its claim because it failed to provide notice to party authorized to receive notice.

“Parties are presumed to know the law and are required at their peril to ascertain the authority of a public officer with whom they are dealing.”

b) Limited Exceptions that may apply for Failure to Deal with Authorized Party

i. IMPLIED AUTHORITY

“The parties themselves have interpreted the contract to allow an increase and a decrease in the contract sum with only the written signature of the architect. Even if the contract does not grant this authority to the architect, the parties themselves through their **course of conduct** have interpreted and modified so as to place in the hands of the architect final authority.”

ii. RATIFICATION

- Engineer approves what the inspector agreed to per subsequent communication with contractor.
 - Inspector provides direction in presence of Engineer who does not object.
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iii. AUTHORITY BY ESTOPPEL

- “Estoppel is a concept that prohibits a party from escaping liability for statements, actions or inactions if they have been reasonably relied upon by the other party.”
- Upholding a finding that extra work was authorized where the Engineer knew the extra work was being done and remained silent.”

3. Conclusion

- For public concrete pavement construction, contractors need to understand the full 'scope' of work and changes in the work for which the Engineer only has the authority to address.
- While there are some limited exceptions that may apply if the contractor fails to properly address the issue as required to the Engineer, the general rule is such failure will be penalized.
- Such penalties may be far-reaching and expensive.
- Penalties may include, for example, having to correct defective work improperly authorized by the inspector and waiver of claims for additional compensation and/or time extensions.



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THANK
YOU!