

## ***Must We Use “Shall” In Our Specifications?!***

It’s interesting how people can get so wrapped up on such trivial matters; especially when it comes to the English language and the use of certain words in a legal setting, even when it’s construction related. I’m writing this article as a result of a particular topic that appeared in the 4Specs.com discussion forum in September. The topic initiator indicated that he had a “California public-agency client” which was advised by its attorney not to accept contracts or specifications that use the word “shall,” and to use either “will” or “must” in its place.

Surprisingly, the topic generated the most responses in the shortest period of time (51 responses in 25 days), and third in total number of responses behind “Battle Plans for MasterFormat ‘04” (89 responses) and “Favorite Typos?” (63 responses). Some poked fun at California lawyers (who wouldn’t?), some took a philosophical view, while others quoted the *Manual of Practice* (or *MOP*) and a variety of legal sources.

With my interest now piqued, I decided to do a little research of my own.

Unexpectedly, I discovered that the Oregon Attorney General’s office was even advocating the use of *must* in lieu of *shall* at a public law conference. This led to my discovery of the “Guidelines for Drafting and Editing Court Rules” by Bryan Gamer. The “Guidelines,” as I’ll refer to it in this article, are published by the Administrative Office of the United States Courts (<http://www.uscourts.gov/rules/guide.pdf>).

The “Guidelines” recommend that *shall* should be replaced by either *must* or *may*, “or some other, more appropriate term.” According to the “Guidelines,” *must* is equal to the statement “is required to” (as opposed to *must not* meaning “is required *not* to”). Traditionally, *shall* has come to mean “has a duty to,” which is supported by the “Guidelines,” provided that it imposes a duty, or legal obligation, on the subject of the clause. Its common application in specifications can be directly translated using this interpretation. For example:

The Contractor *shall* examine substrates before applying finish.

...can easily be translated into:

The Contractor *has a duty to* examine substrates before applying finish.

In this case, the contractor has a legal obligation to examine the substrates, and failure to do so could be considered a breach of contract.

However, I’ve seen applications of *shall* that do not conform to the traditional legal meaning. To make my point, read the following example paragraph from an actual specification:

Fans shall be of the inline type with FRP housing and mixed flow impeller.

Now, if the fans were not of the “inline type with FRP housing and mixed flow impeller,” can they be sued for breach of contract? The answer is obviously “no” (but I’m sure somebody out there would’ve tried). The correct language, according to the “Guidelines,” would be:

Fans *must* be of the of the inline type with FRP housing and mixed flow impeller.

The use of *must* informs the contractor that the fans are “required to” have those features.

That’s enough of the “legalese” side of the controversy. Now I’ll get on my soapbox and discuss the way it really should be done...

If specifications are to be clear, concise, correct, and complete, then they must (notice I didn’t use *shall*) be written using a style that “is characterized by accuracy, brevity, and clarity.” (Ref. 5.8.1 *PRM-MOP* or FF/170.1 *MOP, 1996 ed.*). In my opinion, you can avoid the semantic confusion completely by following a few simple recommendations which are easily found in the *CSI Manual of Practice*.

The use of *shall* is characterized as the **indicative mood**, and its use is wordy and clumsy. If I could remove all the *Contractor shall’s* and *Product X shall’s* from the specifications I receive from consultants, I could reduce a project manual by several pages. Rather than saying the “Contractor shall...” do something, just say what needs to be done. This is called the **imperative mood**. Remember, the specifications are written for the contractor, the entity that is a

party to the owner-contractor agreement, not the painter, electrician, carpenter, etc. So why repeat who *shall* be doing something when we all know it's the contractor. Leave it up to him to decide who he wants to actually perform the work; that's his job. Let's take a look at my first example:

The Contractor shall examine substrates before applying finish.

This sentence can easily be written without having to identify the subject of the requirement:

Examine substrates before applying finish.

See how simple that is? Plus, we eliminated three words!

Now let's tackle *must*.

In specifying requirements for specific items, products, materials, etc., a shortened, or "streamlined," form can easily be incorporated. This can be achieved by placing the subject first, followed by a colon (:), and then the requirement. The purpose of the colon is to replace the words "must be" (My wife, the physician, says the colon has another purpose, but I won't go there). At this point I depart from the *MOP* (ever so slightly), which is understandable, due to the *shall* versus *must* debate. The *MOP* states in its sample specification text that the colon replaces "shall be" (Ref. 5.8.11 *PRM-MOP* or FF/170.5 *MOP*, 1996 ed.). In either case, the words can be eliminated, thereby avoiding the whole mess. To illustrate the concept, we'll return to my second example sentence:

Fans must be of the inline type with FRP housing and mixed flow impeller.

...can be streamlined as follows:

Fans: Inline type with FRP housing and mixed flow impeller.

It's direct, clear, and readily understandable, and, we've eliminated four words!

Architects and engineers complain that contractors don't read the specifications. Why would they when the language used is passive and not active. Nobody wants to read paragraph after paragraph of *Contractor shall's* to get to the meat of the requirements.

So, if you follow the advice above and the *MOP*, then in the future, when a "public-entity client" asks you to replace all the *shall's* with *must's*, all you have to say is "okay, no problem."

And, for the finale, I'll answer my interrogatory article title: **NO!**

To comment on this article, contact the author at [ron@specsandcodes.com](mailto:ron@specsandcodes.com).

*About the Author: Ronald L. Geren, RA, CSI, CCS, CCCA is the principal of RLGA Technical Services located in Phoenix, Arizona, which provides specification and code consulting services to architects, engineers, owners, and product manufacturers He is a 1984 graduate of the University of Arizona, and has held various technical and managerial positions for military, state, and private agencies.*