Silence Is Not Golden—
The Patent Ambiguity Rule’s Requirement to Speak Up and Seek Clarification

By John B. Wyatt III

The 1964 hit song, “Silence Is Golden,” bespeaks the wisdom of remaining silent and not disclosing to a friend that her partner in a romantic relationship has been untruthful. Although keeping quiet may be sound advice in maintaining a friendship, it may be imprudent when a federal government contractor chooses to remain silent when encountering contractual ambiguities.

Upon the discovery of an obvious, glaring, or readily apparent ambiguity contained within the government’s solicitation package or in its contractual documents, the contractor must speak up and seek clarification from the authorized government personnel. If the contractor chooses to remain silent, the result can be financially devastating. The severe ramification is that a contractor’s bid protest or claim for an equitable adjustment based on that ambiguity might be lost.

The Patent Ambiguity Rule’s Purpose

The government contract adage that the contractor must “speak up or be sorry” is most commonly associated with a court created canon referred to as the patent ambiguity rule. The rule requires federal government contractors to request clarification from the appropriate federal government contracting personnel upon encountering a glaring, or obvious ambiguity before submission of its bid or proposal. Failure to do so results in that ambiguity being interpreted against the contractor in a subsequent bid protest or contractual claim. The duty to seek clarification does not pertain to trivial or inconsequential ambiguities. Courts have clarified that “[a] potential contractor has responsibility to inquire about a major patent discrepancy, omission, or conflicts in the … [contractual documents] … provisions, the contractor is not normally required to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation.”

The courts and boards have not been consistent in labeling the rule. The “patent ambiguity” title has been used interchangeably with the designation of “the pre-contract clarification rule.” The “rule” portion of the title has been alternately identified as either a “doctrine” or a “principle.” Regardless of the nomenclature used, the common premise is that that the contractor must ask for clarification before submitting its bid or proposal upon discovering an obvious ambiguity or error.

A common factual situation where the patent ambiguity rule frequently applies is when the government’s solicitation or contractual documents send significant mixed signals. Obvious conflicting or incoherent information in those documents triggers the contractor’s duty to alert the government and seek guidance. The contractor’s obligation to pursue clarification is a case law imposed preventative measure, designed to promote the resolution of ambiguities early in the contracting process, and consequently avoid needless litigation.

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The patent ambiguity rule has been portrayed as amounting to a jurisdictional prerequisite imposed upon the contractor before being able to successfully pursue either (1) a bid protest or (2) a contract claim seeking an equitable adjustment based on that patent ambiguity. The rule also operates akin to a governmental affirmative defense, as it practically assures that a contractor’s failure to seek clarification will result in the loss of a later claim for an equitable adjustment.

When the patent ambiguity rule is applied, its end product is that the government is released from the consequences of its own poorly drafted contracts. As a justification for what may appear to be an extremely unfair consequence of the rule’s effect, case law has explained that it operates as:

a major device of preventive hygiene… designed to avoid post-award disputes…by encouraging contractors to seek clarification before anyone is legally bound. The rule is the counterpart…[to the]… canon…[known as contra proferentem]…in government procurement that an ambiguous contract, where the ambiguity is not open or glaring, is read against the [government (if it is the author). Conversely, the … [patent ambiguity] … principle also tends to deter a bidder, who knows (or should know) of a serious problem in interpretation, from consciously taking the award with a lower bid (based on the less costly reading) with the expectation that he will then be able to cry “change” or “extra” if the procuring officials take the other view after the contract is made.

As the above quotation illustrates, there is an inter-relationship between the two contract interpretation rules of patent ambiguity and contra proferentem. Under contra proferentem, a non-patent or latent ambiguity is interpreted against the government as the drafter of that ambiguous language, providing that the contractor’s interpretation is reasonable.

However, if an ambiguity is patent, then the exact opposite result occurs. If there is no sufficient inquiry by the contractor for clarification, the patent ambiguity is construed against the contractor. The reasonableness of the contractor’s interpretation is irrelevant.

The United States Court of Appeals for the Federal Circuit (CAFC) has explained the rationale for these differing outcomes. The patent ambiguity rule functions as an exception to the doctrine of contra proferentem.

When a dispute arises as to the interpretation of a contract and the contractor’s interpretation of the contract is reasonable, we apply the rule of contra proferentem, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document … [the government]. However, the court will consider whether the ambiguity or lack of clarity was sufficiently apparent … [patent] … that there arose an obligation on the contractor to inquire as to that provision before entering into the contract. [citations omitted]

**Application of the Patent Ambiguity Rule**

Professor Nash has determined that the majority of judges of the CAFC have generally used a three-step methodical procedure for both identifying ambiguities and applying the risk allocation rules (such as contra proferentem and patent ambiguity). These three steps are:

- **Step 1**: Read the words of a contract (“intrinsic evidence”) to determine whether they have a single “plain meaning.” If so, hold for the party arguing for that meaning. If not, there is an ambiguity.

- **Step 2**: If the words are ambiguous, look at the conduct of the parties (“extrinsic evidence”) to determine whether it resolves the ambiguity. If so, hold for the party arguing for that meaning. If not, apply the risk allocation rules to determine which party should bear the risk of the ambiguity.

- **Step 3**: Under the risk allocation rules, the interpretation of the non-drafter of the ambiguous language will prevail unless the non-drafter is the contractor. In that case, the contractor will prevail only if it has asked for clarification of obviously ambiguous language (“patent ambiguities”) and has relied on its interpretation.

Inherent in the CAFC’s analytical process described above are the two fundamental elements of the patent ambiguity rule. The first requirement is that an ambiguity must exist. An ambiguity is defined as “[c]ontract language that is capable of being understood to have more than one meaning … [and] … [t]he test for determining whether the language is ambiguous is whether reasonable persons would find the contract subject to more than one interpretation.” The determination of the presence of an ambiguity is not limited to the contractual parties’ assertions. A reviewing court can determine that an ambiguity exists even though neither party to the contractual dispute has alleged one.

The second prerequisite for the application of the patent ambiguity rule is that the ambiguity must be patent. Patent
refers to something that is obvious or readily visible. A patent ambiguity is obvious since it arises from defective, obscure, or senseless language… [which is]… [readily discoverable by observation or inspection]… potentially found in solicitations or contracts.” Therefore, a patent ambiguity should be obvious, glaring or readily apparent to a reasonable contractor.20

In assessing whether an ambiguity is obvious, glaring, or readily apparent, Professor Nash has identified five common factors, which have been utilized by the courts and boards. “These factors include: (a) viewing the total bid package as would a reasonable bidder, (b) the amount of the (? dollars involved, (c) the importance of the … [ambiguous] … term, (d) the conduct of other bidders, and (e) the failure of government personnel to discover the ambiguity.”21

A classic CAFC decision illustrating the successful proof of the existence of a patent ambiguity, and the contractor’s failure to seek clarification, is Triax Pacific, Inc. v. Secretary of the Army.22 The contractual work in the case involved the renovation of military housing units including the construction and painting of lanais. The disputed issue was whether the contractor was required to paint the recently poured concrete surfaces and the rough structural grade wood beams of the lanais. Triax argued that the painting of those surfaces was outside the scope of the contract due to a conflict between two different provisions in the specifications.

The contractor pointed out that painting the lanais’ concrete surfaces expressly conflicted with another specification in the contract. That provision required that the newly poured concrete surfaces must be allowed “to cure for at least 30 days before painting.” Waiting 30 days would render impossible the contractor’s adherence to the contract’s time requirements in the performance schedule.

The contractor argued that its reading of the contract’s painting requirements was the only possible reasonable interpretation when the contract was read as a whole. Triax also emphasized that the painting of the rough structural grade wood beams was at odds with customary commercial practice. The contractor argued that if the Army wanted the lanai beams to be painted, it should have specified a better grade of wood to be used (the normal commercial standard) which would have required much less surface preparation before painting (such as sanding). Also, the drawings did not indicate that the disputed concrete areas and beams were to be painted.

The government overruled Triax’s arguments and insisted that the contract’s specifications did require that the “exterior concrete surfaces” and “exterior and interior wood surfaces” of the lanais to be painted. Triax argued that the government’s literal reading of that specification was erroneous and unreasonable. The government ordered the disputed surfaces to be painted and threatened the contractor with a termination for default if it failed to comply. The contractor painted the surfaces under protest and filed a claim for an equitable adjustment. The Armed Services Board of Contract Appeals (ASBCA) agreed with the government. Triax appealed.

The CAFC determined that the conflict between the contract’s specifications and the drawings created a patent ambiguity. Triax should have discovered the patent ambiguity and sought clarification from the Army before bidding. By not seeking clarification, Triax was doomed in its attempt to successfully prevail based upon its contractual interpretation. In reaching that conclusion, the CAFC recognized that:

[ambiguities in a government contract are normally resolved against the drafter. An exception to that general rule applies, however, if the ambiguity is patent. The existence of a patent ambiguity in a government contract raises the duty of inquiry, regardless of the reasonableness of the contractor’s interpretation … [and] … [a]bsent such inquiry, a patent ambiguity in the contract will be resolved against the contractor.23 [Citations omitted].

A Latent Ambiguity Is Outside the Scope of the Patent Ambiguity Rule

If an ambiguity is not patent, it is deemed to be latent.24 A latent ambiguity is one that “arises from language that appears clear and intelligible, but … because of some extrinsic fact or extraneous evidence, … requires interpretation or choice between two or more possible meanings.”25 A latent ambiguity is unknown and not readily ascertainable by a reasonable contractor. Unless it is actually known by the contractor, a latent ambiguity does not require a contractor to ask for clarification.

A CAFC case demonstrating a latent ambiguity’s immunity from the patent ambiguity rule’s requirements is the United States v. Turner Constr. Co.26 In Turner, the government issued an invitation for bids (IFB) for the purchase and installation of quantitative air control systems (QACs). After the IFB was issued, the government became aware that various bidders had interpreted the contract’s specifications as requiring a specific sole source proprietary transmitter, which had to be
installed in the central Air Volume Control Center’s metal cabinet. In the trade, other transmitters were frequently installed outside the control center’s cabinet and functioned just as effectively.

Wishing to avoid the adverse ramifications of a sole source procurement and in an apparent attempt to comply with the newly enacted requirements of the Competition in Contracting Act (CICA), the government, by letter, clarified that the “certain proprietary transmitter was not required.” Upon learning about this new clarification, Turner resubmitted its bid and was awarded the prime contract.

During contract performance, the government, apparently disregarding its previous clarification, required that the transmitters be placed in the control center’s cabinet. Turner argued that the placing of the transmitters was a discretionary decision by the contractor and, that the government’s insistence that the transmitters be placed in the control center’s cabinet required “out-of-scope” work. Turner complied but filed a claim for an equitable adjustment. The disputed issue, in the resulting litigation, was whether the contract’s specifications for the QAC required the location of transmitters (which were the most expensive and prominent component of the QAC) to be located within the central unit’s metal cabinets. The relevant contract specification read as follows:

6A. Air Volume Control Centers (QAC) shall be factory assembled and calibrated. It shall consist of metal cabinet constructed of 14 gage steel with hinged front, key locked doors, necessary gauges, meters, controllers, etc., as specified herein and as shown on drawings, to achieve the function intended. [Emphasis added in bold and italics].

The government argued that a word-by-word analysis of the above specification mandated that the transmitters be installed within the central metal cabinet. It claimed that the transmitters were intended to be included under the “etc” language of the specification.

The CAFC rejected the government’s argument that the “etc” wording was intended to include the transmitters. The court concluded that it was “improbable that the most expensive, and by implication, the most prominent, component of the QAC would be designated by … [the] … indirect and secondary … [term of ‘etc’].” The CAFC found that an ambiguity existed because “the government’s agent apparently failed to recognize that in revising the contract to avoid sole source or proprietary procurement of the transmitters, it produced an ambiguity as to where the transmitters might be placed, an ambiguity a bidder might reasonably interpret as this bidder did.”

The CAFC further characterized this ambiguity as latent. As it was not glaring or overtly obvious, it was not a patent ambiguity. The absence of the word “transmitter” in the crucial paragraph, 6A, supported the contractor’s reasonable interpretation that the location of the transmitters was a contractor’s discretionary decision. Since the ambiguity was latent, the contractor was under no duty to inquire (seek clarification). The CAFC ordered that the contractor receive an equitable adjustment for the additional work performed in relocating the transmitters. However, the exact opposite outcome would have occurred had the ambiguity been determined to be patent.

**The Patent Ambiguity Rule’s Role in Bid Protests**

The application of the patent ambiguity rule was historically confined to contractual disputes wherein a contractor sought an equitable adjustment to the contract based upon the alleged ambiguity. But, the rule has also significantly been utilized in the bid protest realm. As Professor Nash has noted, “[t]he patent ambiguity rule had its genesis in claims litigation but has taken on a life of its own in contract award controversies … [bid protests].”

In the past, the time period for filing a protest, based on an ambiguity in the solicitation or its accompanying documents, was different between the two bid protest forums: the Government Accountability Office (GAO) and the United States Court of Federal Claims (CFC). The GAO, for many years, in its bid protest regulations, has required bidders to seek clarification of patent ambiguities in the solicitation prior to bid opening or upon the receipt of proposals.

“Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals…[and]…alleged improprieties which do not exist in the original solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.”

In the landmark case of Blue & Gold Fleet, L.P. v. U.S., the CAFC issued a court created rule called the “waiver rule.” The waiver rule, which now applies to bid protests before the CFC, is similar to and generally parallels the time
requirements for seeking clarification of the GAO’s bid protest regulations. The end result of the waiver rule is that:

a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a … [Tucker Act35] … action in the Court of Federal Claims.34

The above quotation exemplifies the significant interplay between the Blue & Gold’s waiver rule and the patent ambiguity rule. Specifically, the CAFC has recognized that these two rules share the common goal of requiring bidders and offerors to forthrightly bring to the government’s attention the existence of patent errors in a solicitation before the submittal of bids or proposals. Both rules strive to help maintain a level playing field among the various contractual offerors by precluding a contractor from benefiting from engaging in a “wait and see” approach.

In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent . . . . If its proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation. [A]ssuming that there is adequate time in which to do so, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the contract.35 [Emphasis added]

Likewise, the two rules impose the same adverse result upon a contractor who fails to seek clarification from the government, which is the inability to successfully proffer its interpretation of the patent error in a subsequent action against the government.36 Latent errors or ambiguities are outside the scope of application of both the patent ambiguity and the waiver rules.37

The Patent Ambiguity Rule’s Requirement to Seek Clarification

If a patent ambiguity in the government’s solicitation is discovered by the contractor, then the contractor must seek clarification of that ambiguity prior to the submittal of its bid or proposal. This obligation is activated by the presence of either actual or constructive knowledge of the ambiguity by the contractor.

Black’s Law Dictionary defines “actual knowledge … [as] … [d]irect and clear knowledge … [versus] … [c]onstructive knowledge … [which is] … knowledge that … [the contractor] … using reasonable care or diligence should have, and … is attributed by law to … [the contractor].”38 Whether the requisite knowledge requirement has been satisfied will be dependent upon the facts of each individual case. The actual knowledge requirement is satisfied if the government proves that the contractor knew of the ambiguity either before bid opening or the submission of its proposal. If the contractor possesses actual knowledge of a patent or latent ambiguity, clarification must always be sought.

Conversely, the constructive knowledge standard applies only to a patent ambiguity because of its obvious or glaring nature. If the government’s contractual documents contain an ambiguity that is so patent or apparent that the contractor, in the exercise of reasonable care, should have known about it, then the contractor must inquire.

The words “reasonable care” from the aforementioned definition are very significant. Negligence law measures the required duty of care “by the reasonable person standard … how an ordinarily prudent person should act … [in the same circumstances].”39 The reasonable care standard is the benchmark “against which negligence is measured and what … [conduct] … must be observed to avoid liability.”40 If a reasonable contractor, under the same or similar circumstances, would have known of the patent ambiguity, then the contractor has constructive knowledge of it. Failure to inquire about a patent ambiguity equates to an act of contractor negligence.

As previously stated, when the contractor has constructive knowledge of the ambiguity, then clarification must be sought. Case law has established that a valid defense does not exist if the contractor claims that its failure to inquire was due to lack of actual knowledge of the obvious ambiguity or that the contractor’s interpretation of that ambiguity was reasonable.41

When Must the Contractor Seek Clarification?

Professor Nash warns contractors that “[t]he time to seek clarification for any aberrations [ambiguity or discrepancy] is BEFORE the submission of a bid or proposal … [because the] … [f]ailure to do so could result in losing a … [subsequent] … claim.”42 [Emphasis in original].

How soon before submission of its bid or proposal must the contractor seek clarification of a known or patent ambiguity? The best course of action for the contractor is to always seek
immediate clarification from the government when becoming aware of the ambiguity, error or discrepancy.

Nash counsels that the government’s “bidding documents may require that requests for clarification be submitted not less than a specified number of days … [such as 10 days] … before bid opening … [and] … the failure to make inquiry within such period may defeat the contractor’s claim.” Nash also notes that the government’s policy of setting time limits for receiving contractor clarification queries in its solicitation has been criticized as not recognizing the realities of the inherent perplexities of federal government contracting. (citation) In one case, reflecting such criticism, these time constraints actually excused a contractor from seeking clarification of a discrepancy of which it had actual knowledge.

[I]t is immaterial that contractors were allowed 30 days in which to prepare bids or that the IFB provided that inquiries must be received no later than 10 days prior to bid opening. The realities of bidding are that contractors may become aware of discrepancies in plans and specifications shortly before bid opening. If the Government is not prepared to provide meaningful responses to last minute requests for clarification, or to extend the bid opening date, it must accept the consequences...[and]…the contractor’s lack of inquiry … [is] … excused.

Who Must Receive the Request for Clarification?

This request for clarification must be made by the contractor to the authorized contracting official. The duty to seek clarification applies regardless if a sealed bid or competitive proposal (negotiated) procurement is involved. Once the request for clarification is received, the burden of action then shifts to the government. The government must now make reasonable efforts to provide the necessary clarification or potentially lose the advantage of having that ambiguity interpreted in its favor in subsequent litigation.

What if the Government Response Fails to Sufficiently Clarify

If the government’s response fails to provide the needed clarification, then the contractor should request again. Professor Nash admonishes that if a contractor seeks clarification only once and doubt remains, the contractor’s obligation may not have been satisfied. In support of his warning, Professor Nash quotes the CAFC’s “Community Heating” test, which states that:

it is not enough under the duty to inquire that a contractor merely make an initial inquiry...where a contractor requested clarification of a contract but received an addendum which did not alleviate the confusion … [then] … the duty to inquire had not been met. If after receiving the addendum, the intended meaning was still not clear to … [the contractor] … it should have requested a further clarification. [citation omitted]

A contractor is best served by adhering to the maxim of “better to be safe than sorry” when requesting clarification of an ambiguity. A prudent contractor will continually request clarification from the appropriate governmental personnel until the disputed issue is resolved.

Case law suggests that the contractor’s duty to obtain clarification is not never-ending especially if further requests would be pointless. A pinnacle may be reached where the government has failed to satisfy its legal burden of providing clarification despite repeated numerous contractor good faith requests. The contractor may be excused from being required to make additional inquiries if the facts demonstrate that contractor efforts beyond that point are futile.

A case illustrating the attainment of such a “point of futility” is Allied Technology Group, Inc. v. United States. The bid protestor and another bidder both had sought clarification from the Navy of a patent ambiguity in its bidding documents regarding overtime. The court held that the Navy’s solicitation sent significant mixed signals, which created patent ambiguities.

The court recognized that the patent ambiguity rule imposed upon the bidders the duty to seek clarification, which the bidders had done. The Navy’s repeated brief response to the offerors’ clarification requests was that “the solicitation was clear on its face.” The Navy said nothing more. Regarding the Navy’s perfunctory response to those bidders, the court highly criticized the Navy’s actions by stating that:

[b]oth inquiries addressed to the Navy... clearly drew the Navy’s attention to the specific, problematic language. Both times, the Navy deliberately refused to substantively address the questions raised. The Navy’s handling of these two clarification requests clearly established … that further inquiries by prospective offerors would have been to no effect … [and these] … genuine attempts to seek clarification … were completely rebuffed by the agency officials. The court believes that … there is a point at which a contractor is entitled to defer from further inquiry, knowing
that further attempts would be futile. Once ambiguities have been identified ... and clarification has been genuinely sought, the inconsistencies must be interpreted against the Navy as the drafter.49 [Emphasis in original]

Unfortunately, there exists no clear-cut formula of determining when this “point of futility” has been reached. It is dependent upon the unique factual situation of each individual case. Although arguably burdensome to the contractor, multiple inquiries may well be worth the effort considering the serious risk involved. Contractor noncompliance with the clarification requirement means that the contractor forfeits its ability to successfully proffer its interpretation of the ambiguity. That forfeiture seriously jeopardizes the contractor’s chance of winning a subsequent dispute involving the contractual interpretation of that ambiguity.

Examples of Contractor Fulfillment of Its Requirement to Seek Clarification

Besides Allied Technology, additional case law has provided guidance as to how a contractor can satisfy its obligation to obtain the requisite clarification. In SIPCO Services & Marine, Inc. v. U.S.,50 the government desired the blasting and coating of a steel structure and specifically stated the type of painting system to be used. The specifications failed to address the type of unique coating treatment needed for the inaccessible areas of the structure. The court found that “[t]he absence of specific language for special treatment of … [the inaccessible areas] … created a patent ambiguity because it would have been obvious to a reasonably prudent contractor that the … [painting] … system specified would not successfully deal with the inaccessible areas.”51

The contractor’s duty to seek clarification of that patent ambiguity was determined by the court to have been satisfied. A SIPCO employee, at a pre-bid conference, had specifically inquired what coating treatment was needed for the inaccessible areas. The government’s response to SIPCO, in the presence of the other bidders, was to “bid the specification as stated and the issue of the inaccessible areas would be handled later.”52 The court ruled that the government, “whether through negligence or oversight,”53 had failed to remedy the patent ambiguity by taking the necessary action to correct its bid documents. SIPCO prevailed on its claim for an equitable adjustment.

In Engineered Demolition, Inc. v. U.S.,54 the court found that a patent ambiguity existed when the government’s solicitation contained conflicting amounts regarding the government’s estimate of the amount of contaminated material to be removed. Applying the patent ambiguity rule, the court decided that the contractor had fully complied with its clarification obligation. The contractor had alerted the government before submission of its bid that the bidding schedule and the contract drawings showed different amounts of material to be excavated and hauled by rail car to a disposal site. The court determined that the government was negligent or failed to act in good faith when it responded to the contractor’s inquiry about the quantity that was to be used as the basis for the contractor’s offer.

Conclusion

In 1995, Professor Dakin wrote that “[t]he significance of the patent ambiguity rule probably is not fully appreciated [because] … [i]t operates to the exclusion of any other contract interpretation rule, and it does not consider the reasonableness of a contractor’s interpretation.”55 Despite the passing of twenty years, landmark cases have established that those words ring equally true today.56

Contractor ignorance of the patent ambiguity rule and its adverse ramifications can constitute a trap for the unwary. The rule’s principal unfavorable outcome to a contractor is that it functions as an exception to the contra proferentem doctrine. It absolves the government from the adverse results of its poorly drafted contracts. If the contractor fails to seek clarification, then the loss of a subsequent claim for an equitable adjustment based on a patent or known ambiguity is practically assured. The patent ambiguity rule continually reaffirms that a contractor’s failure to ask for clarification is “silence that is not golden.” The best advice for a federal government contractor when encountering an obvious contractual ambiguity, defect, discrepancy or error is to speak up and be heard. JCM
ENDNOTES

1 See www.songfacts.com/detail.php?id=2114 , stating that “Silence Is Golden” was originally recorded in 1964 by the Four Seasons as the B-side of their #1 hit “Rag Doll.”


3 See Blue & Gold Fleet L.P. v. U.S., 492 F. 3d 1308 (Fed. Cir. 2007).


6 Allied Tech., 39 Fed. Cl., at 138, (citing WPC Enterprises, Inc. v. U.S., 163 Ct. Cl. 1, 6, 323 F.2d 874, 877 (Ct. Cl. 1963)).


8 See Triax Pacific, Inc. v. Sec. of the Army, 130 F.3d 1469, 1475 (Fed. Cir. 1997).

9 See http://us.practicallaw.com/4-383-2653. where the contra proferentem rule is depicted as applying when “there is doubt about the meaning of the contract, the words will be construed against the person who put them forward”...[the drafter].


11 See Blinderman Constr. Co. v. U.S., 39 Fed. Cl. 529, 1997 U.S. Claims LEXIS 262 (Fed. Cl. 1997), where the court explained that “[contra proferentem] comes into play only if the non-drafting party’s interpretation of the contract is reasonable...falls within the zone of reasonableness,” at 538, 539 [citations omitted].

12 See SIPCO Services & Marine, Inc. v. U.S, 41 Fed. Cl. 196, 216, (“reasonableness of contractor interpretation is irrelevant if the ambiguity is deemed patent”).


14 Ralph C. Nash and John Cibinic, Jr., “Postscript VIII: The Plain Meaning Rule,” Nash and Cibinic Report (December 2012), at 1, however Nash attributes these steps to being utilized by three judges of the court: but see “Postscript IX: The Plain Meaning Rule,” Nash and Cibinic Report (June 2014) where Professor Nash criticizes the CAFC’s recent decision in Shell Oil Co. v. U.S., No. 2013-5051, 2014 WL 1661493 (Fed. Cir. 2014). Nash argues that the majority panel ignored that the word “charge” which was obviously ambiguous and instead struggled to determine a plain meaning of the word by utilizing Step One. The result was that three of the five judges ascertained one “plain meaning” while the other two found the opposite “plain meaning.” Nash believes that the more logical course of analysis would have been for the court to have first considered extrinsic evidence to determine if there existed a single reasonable interpretation of the ambiguous word “charge.”


18 Nash and Schooner, note 16, at 20

19 Ibid., at 290.


23 Triax Pacific, 130 F.3d, at 1474, 1475.

24 See Interstate Gen. Gov’t Contractors, Inc. v. Stone, 980 F.2d 1433,1434 (Fed. Cir. 1992), (“more subtle ambiguities are deemed latent and are accorded an interpretation favorable to the contractor under the doctrine of contra proferentem”).


28 Turner Constr., 819 F.2d, at 285.

29 Ibid., at 286.

30 Nash and Cibinic, note 22, at 1.

31 4 CFR 21.2 (a) (1).

32 492 F.3d 1308, 1315 (Fed. Cir. 2007).

33 28 U.S.C. 1491(b).

34 Blue & Gold, 492 F.3d, at 1315.

35 Comint Sys. Corp. et al v. U.S. et al, 700 F.3d 1377, 1382, 2012 U.S. App. LEXIS 25109 (Fed. Cir. 2012); see also DGR Assocs., Inc. v. U.S., 690 F.3d 1335, 1343 (Fed. Cir. 2012) (“[I]f there is a patent, i.e., clear, error in a solicitation known to a bidder, the bidder cannot lie in the weeds hoping to get the contract, and then if it does not, blindside the agency about the error in a court suit.”)

36 Blue & Gold, 491 F.3d, at 1313.
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37 See Comint Sys. Corp., 700 F.3d, at 1383 (footnote 5); see also Blue & Gold, 492 F.3d, at 1313.

38 Black’s Law Dictionary (9th ed. 2009), available on WESTLAW.

39 Kenneth W. Clarkson, Roger LeRoy Miller, Frank B. Cross, Business Law Text and Cases, twelfth ed. (South-Western, Cengage Learning): 137.

40 Ibid., at G-28.

41 See Triax Pacific, 130 F.3d, at 1475.

42 Nash and Cibinic, note 22, at 5.

43 See Cibinic, et.al. note 3, at 242-3.

44 Appeal of Wright Assocs., Inc., ASBCA 22492, 79-2 BCA P14,102, at 69, 379, recons. denied, 80-1 BCA, (CCH) P14,253; see also Appeal of Dickman Bldrs., Inc., 91-2 BCA (CCH) P23,989; 1991 ASBCA LEXIS 137 (1991), but see Appeal of New England Constr. Co, ASBCA No. 4429, 94-1 BCA (CCH) P 26,535 (1993) where the board declared that the excusal of the contractor from seeking clarification in the Wright decision is limited to its unique set of “proven facts.”

45 See Cibinic, et.al. note 3, at 243.


47 Ibid., at 1580.


49 Ibid., at 141.

50 41 Fed. Cl. 196 (Fed. Cl. 1998)

51 Ibid., at 216

52 Ibid.

53 Ibid.

54 70 Fed. Cl. 580 (Fed. Cl. 580 2006)

55 Dakin and Wyatt III, note 29, at 17. [Citations omitted]

56 See Triax Pacific, 130 F.3d, at 1474, 1475, (“the existence of a patent ambiguity in a government contract raises the duty of inquiry, regardless of the reasonableness of the contractor’s interpretation”); SIPCO, 41 Fed. Cl., at 216. (“reasonableness of the contractor interpretation is irrelevant if the ambiguity is deemed patent”).