



Legal Brief

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The Complex Task of Resolving Disagreements on the Meaning of Contract Terms

Construction projects are complex undertakings. The basic agreement is usually only one of many documents that make up the Contract Documents. The plans, specifications, addenda and general and supplementary conditions are often part of the Contract Documents. Contracts often incorporate industry standards. Because so many different documents are part of the contract, it is almost unavoidable that there will be conflicts or ambiguities between and among the different documents, including the plans and specifications. Construction lawyers are often called upon to assist contractors in sorting out these issues. The outcome often has significant financial consequences.

Many disputes arise because the parties' interpretations regarding an aspect of the Contract Documents are different. For example, an owner and its architect might interpret a note on the drawings one way, while the contractor interprets the same note another way. Another common problem occurs where there are inconsistencies within the Contract Documents themselves. The plans might not agree with the specifications in some respect. Or, inconsistencies and conflicts may exist within a single document as where, for example, the floor plan on one page of the plans is not consistent with a cross section on another page.

In an attempt to address these issues, some contracts contain an order of precedence

clause, which identifies which documents will take precedence over others. Such a clause often states, for example, that in the case of an inconsistency between the plans and specifications, the plans govern or vice versa. Such a clause would not be of assistance, however, if the inconsistency is within the specifications or plans themselves. Some contracts attempt to resolve this by stating that the provision requiring the greater amount of work controls.

In the absence of an order of precedence clause, or where the precedence clause does not resolve the discrepancy, there are certain rules of contract interpretation that courts employ to resolve discrepancies. Each tool is designed to determine what the parties intended. In their attempt to determine what the parties intended, courts will often look at "extrinsic evidence" – the surrounding facts and circumstances of the transaction. This often includes oral statements made by the parties before the contract was signed. It may also include e-mail or other written communications between the parties. For example, in one recent case, the contract stated that the contractor would provide a "restoration cleaning" of a 100-year-old building.

The contract contained no further description of what constituted restoration cleaning. To determine what was intended, the court received evidence of prior oral conversations between the parties

concerning the level of cleaning that was expected and what the "restored" building would look like. It also received industry custom evidence of what restoration cleaning usually means within the masonry and limestone industries.

It is always advisable to carefully review the contract up front to make sure it describes all work and all obligations. Failing to do so can lead to expensive, protracted disputes.

In some situations, there are very few, if any, pre-contract communications between the contractor and owner and, thus, the surrounding circumstances are of no assistance in determining what the parties intended. This is often the case on public projects where there is little or no communication between the contractors and the owner or its architect. In such cases, courts usually resort to judicially established canons of interpretation. One such canon is that a contract should be construed against the party that drafted it. In other words, if one party prepared the contract – which is usually the case on public projects – that party has an

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obligation to make sure it is clear. If it fails to do so, the contractor's interpretation, if reasonable, will be given effect. This canon is frequently used where the contract is presented on a take-it-or-leave-it basis as is usually the case on public projects.

Before resorting to extrinsic evidence or applying the canons of interpretation, courts will often seek to harmonize apparent inconsistencies or ambiguities. For example, where one note or specification deals only generally with an issue while another addresses the same issue or element more specifically, the court will often find that the more specific provision, plan or section controls.

In competitive bidding, a special rule has developed called the "patent ambiguity

doctrine." This doctrine is an exception to the rule which construes the contract against the drafter. Under this rule, if the contract contains an obvious or glaring inconsistency, omission or ambiguity, the contractor has a duty to inquire with the other party concerning it. The avowed purpose of this rule is to prevent the contractor from taking advantage of a public owner and hence, the taxpayer. If the contractor fails to raise a question about the ambiguity before bidding, it will usually be bound by the owner's interpretation. If the ambiguity is not glaring or obvious, it is said to be latent. A latent ambiguity is one which could not ordinarily have been discovered by the reasonable bidder before the bid. In these cases, the contractor is not bound by the owner's interpretation and the contract is often construed against the owner.

In closing, interpreting contracts can be complicated. It is always advisable to carefully review the contract up front to make sure it describes all work and all obligations. Failing to do so can lead to expensive, protracted disputes, and it can result in having to perform more work than intended without additional compensation.



Regional News ...



Navarro and Wright Expands to Delaware

Navarro & Wright Consulting Engineers, Inc. has recently secured a new office location in Delaware as part of their expansion efforts in the Mid-Atlantic region. The firm currently operates two offices in Pennsylvania and an office in New York and Maryland.

Navarro & Wright provides civil engineering and related services for Municipal, Transportation, Site/Civil Infrastructure and Natural Gas Industry clients in the Mid-Atlantic region. Established in 1996, the company is a multi-disciplinary firm operating five offices and employing over 80 people.

Recently, the firm was approved by The State of Delaware, Office of Minority and Women Business, adding to its Enterprise (OMWBE) as a minority owned business enabling them to provide consulting engineering services to State departments, agencies, authorities, school districts, higher education institutions and all businesses within the state.

