

THE RESULT OF MISINTERPRETATION

Ambiguity created by Miscommunication

INTRODUCTION

Most individuals who have tried to communicate information to another person understand that the communication may not come across as intended. The same holds true with contractors, suppliers and even the Government. Information given and received may not be as clear to one party as it is intended to another party. Contractors need to be effective communicators, especially in written communications and should understand that miscommunication can create ambiguity. That ambiguity, in turn, can determine the meaning and effect of the communication.

HOW AN AMBIGUITY CAN IMPACT THE CONTRACTOR

An ambiguity can cause a great deal of confusion for a contractor. A contractor's **interpretation** of the written content of its **contract** can differ from the interpretation of the Government. A contractor may begin execution of its work under one understanding of the contract language, only to find out at a later time that the Government intended something entirely different. In numerous instances, the Government has decided to require a contractor to conform the work to the Government's "newly minted meaning" of the wording in the contract.

In fact, if a contractor is unable to recognize ambiguities in contract documents and chooses to perform work as newly directed by the Government, it may be at risk for a substantial loss due to extra work efforts and the costs associated with such extra work. However, if a contractor realizes there is a difference in interpretation between it and the Government, a contractor may be able to justify its position and has a legal right to do so.

The saving grace for a contractor in situations where a true ambiguity exists in a Government contract is that the ambiguity **legally is construed against the party responsible for drafting the contract document**. See *Sofarelli Associates, Inc. v. United States*, 1 Cl. Ct. 241 (1982) and *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390 (1947) at 418:

"Where the Government draws specifications which are fairly susceptible of a certain construction and the contractor actually and reasonably so construes them, justice and equity require that that construction be adopted. Where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is especially applicable to Government contracts where the contractor has nothing to say as to its provisions." (i.e. "zero input" emphasis added)

Contractors should keep in mind, however, that the perception of the meaning must be within what is considered a "zone of reasonableness." (See *Cibinic Nash*) This basically means that if there is a possibility that the interpretation could be misconstrued, and a contractor understood its contract to instruct the work to be performed in a certain manner, that manner will be considered correct unless the opposite intention is clearly defined and both parties agree on the intended meaning. In most cases the "Changes" clause effectively allows for such a revision in the contract and the costs associated with it.

In *Gorn Corp. v. United States*, 191 Ct. Cl. 560, 424 F2d 588 (1970), the Court stated that:

“A contractor should not be required to wade through a maze of numbers, catalogues, cross-reference tables and other data resembling cross-word puzzles in order to find out what the Government requires in an invitation for bids. This is especially true where, as in this case, the requirements of the Government could have been clearly specified by the use of a half dozen ordinary words and figures...” Id. at 566.

Furthermore, Excell Consulting was recently involved in an instance in which the Government attempted to take a simple statement in which the specifications had a section that stated:

“All building utility systems shall be designed for 24-hour-a-day operation.”

The Government did not read the contract specifications as a whole, and as such, tried to impose upon a contractor that it had to perform design efforts for 24-hour-a-day occupancy as opposed to 24-hour-a-day operation, which was what the contractor bid upon. This situation would have caused the contractor to incur a \$3 million negative position.

However, because the contractor was able to show convincingly that the Government used a simple statement and construed it ambiguously, the situation ultimately resulted in the contractor’s favor via a negotiated “change order” process that recognized the “change”.

CONCLUSION

Government contractors should be aware of and know what to do when the [contract, specifications, drawings](#), or other contractual documents are unclear. Excell Consulting International has experienced professionals who understand the procedures necessary to guide your company through contractual situations that involve items that may be unclear.

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor’s interests properly and thoroughly. The experts at Excell Consulting International, Inc. stand ready to assist and evaluate your company’s position and provide valuable and cost-effective guidance for your business.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

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