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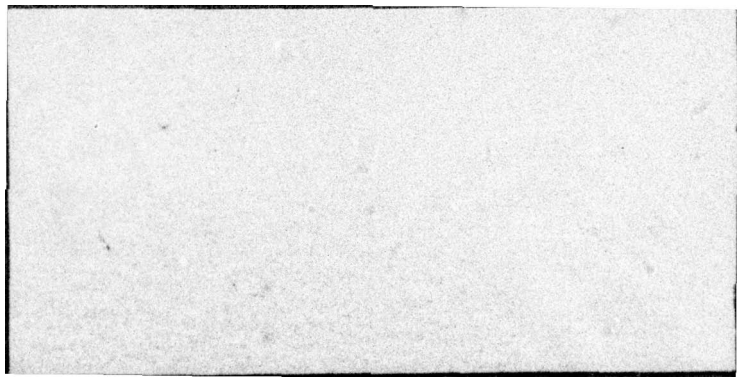

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The Rule Contra Proferentum in the Government Contract Interpretation Process

By

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INTRODUCTION

"This is a little case in which, once again, the Government's contract suffers from the endemic disease of ambiguity and imprecision. The remedy, once again, is the conventional one taken from the standard legal pharmacopeia."[1] The remedy to which Judge Davis refers is the rule contra proferentum, or as it is also known, the ambiguity rule. Literally translated contra proferentum means "against the party who proffers or puts forward a thing."[2] A more expanded and modern reading of the rule contra proferentum provides that if contractual language is susceptible to two or more reasonable interpretations, that interpretation which favors the non-drafting party will be adopted.[3]

The contra proferentum rule does not, however, find application by the courts simply because an interpretive problem is encountered in contractual language. The rule is a secondary rule of contract interpretation, and is relied on only when the meaning of the contract language-and thus the intent of the parties-is still in doubt after the court has considered "all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other," as well as "having

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admitted in evidence and duly weighed all of the relevant circumstances and communications between the parties.[6]

While referred to as a rule of contract interpretation, contra proferentum actually contributes nothing to the true purpose of contract interpretation, which is to establish "the meaning or meanings of symbolic expressions used by the parties to a contract, or of their expressions in the formative stage of arriving at the creation of one or more legally obligatory promises."[7] ". . . (I)t may be well to observe that the rule [contra proferentum] . . . is not a method by which the true intent of the parties is determined."[8] Rather, application of this rule by the courts is simply an allocation of the burden of ambiguity in contract language on the basis of responsibility for its draftsmanship.[9]

Several theories have been advanced to support use of the rule contra proferentum in the contract interpretation process, notwithstanding its failure to elicit the parties intent. The first theory underlying the rule's use is based in the belief that the draftsman of contractual language can, by exactness of expression, more easily prevent mistakes or ambiguous language, and failing to do so, should suffer from any inadequacy of the language.[10] "[The rule contra proferentum] puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves [non-drafting parties] from hidden traps not

of their own making."[11] A second and equally important theory supporting the rule's use is that the rule contra proferentum is an effective means of evening up one sided agreements-primarily contracts of adhesion-at the expense of the stronger party. When one party to an agreement is in a comparatively stronger bargaining position and uses this position of strength to impose its contract language upon the other party, it would be unconscionable to subsequently allow the stronger party's interpretation of the disputed language to prevail over that of the weaker party.[12] Ergo, contra proferentum; a rule of public policy, not contract interpretation, favoring the party without responsibility for drafting ambiguous language, and imposing a seemingly arbitrary and punitive sanction on the party to whom the language is attributable.

The field of government contracts provides an environment where the theories underlying the use of the rule contra proferentum can and have found great applicability, and have thus justified the rule's continued utilization. While the formulation of the contract language is not exclusively the government's prerogative, the general provisions of government contracts are prescribed in large part by regulation and/or statute, and the individual contractor historically has had little choice regarding their use. Additionally, in advertised procurement the bidder is generally asked to do little more than submit a bid, and any attempt by the bidder to alter the obligations specified to be undertaken by the invitation's specifications,

terms or conditions, will result in a disqualification from award consideration on the basis of nonresponsiveness.

Although application of the rule contra proferentum may appear a rather straightforward proposition once the court has failed to establish the parties' intent after having considered all of the applicable extrinsic and intrinsic evidence, the government contractor will not prevail quite so easily. Before its interpretation of disputed language is adopted by the courts, the contractor must establish that the interpretation it advances is reasonable, i.e., within the "zone of reasonableness." In determining reasonableness the court attempts to place itself in the shoes of the contractor at the time the interpretation was made, and thus ascertain if the contractor's action in arriving at a particular interpretation was reasonable in view of the circumstances. In seeking to establish the reasonableness of the interpretation it advances, the contractor faces two major problem areas which could effectively preclude such a finding by the court. The first problem area is concerned with the rule which requires a contractor to seek clarification from the government of any patent, glaring or obvious interpretive problem, or of any other interpretive problem of which it is aware. A failure by the contractor to comply with this requirement will result in a finding that the interpretation of the contractor is not reasonable, thus allowing the interpretation for which the government is contending to prevail.

Secondly, the contractor must have relied, either during bidding or performance, as applicable, on the interpretation it subsequently advances. A failure by the contractor to demonstrate reliance on its interpretation will also result in a finding that the interpretation is not within the zone of reasonableness.

In addition to the problems encountered in establishing reasonableness, the contractor also faces problems regarding the draftsmanship of the disputed language. If responsibility in whole or in part for drafting the contested language, or in some cases the entire contract, can be attributed to the contractor, then there exists the possibility that the interpretation advanced by the contractor will not be adopted by the court, notwithstanding its reasonableness.

While the purpose of this introduction is not to discuss the problems surrounding application of the rule contra proferentum in the field of government contracts, it does serve to identify the most basic issues. For purposes of this thesis the four main areas previously identified will be examined and analyzed in separate chapters, although in actual practice they are often combined into one issue of interpretation by the courts and boards. The question of reasonableness of an interpretation and the ramifications of the requirement for reasonableness will be dealt with in Chapter I. Chapter II will deal with the duty to seek clarification. Chapter III is concerned with the issue of reliance and Chapter IV will cover the issue of identification

of the draftsman and thus the types of transactions to which the rule is applicable.

CHAPTER I

THE ZONE OF REASONABLENESS

The application of the rule contra proferentum by a court or board as a means of resolving a contract interpretation problem is a means of last resort in the interpretive process. The process of interpretation preceding the use of the rule contra proferentum is intended to ascertain the parties' intent through the evaluation of extrinsic evidence as a means of determining "if it proves that the two parties arrived at the same interpretation of the terms of the contract at the outset,"[13] and through the examination in intrinsic evidence to determine if there is a clear expression of the parties' intent to be extracted from the four corners of the contract.

In evaluating the extrinsic evidence of the intent of the parties, the court will consider such things as their discussions prior to the dispute,[14] actions of the parties which express their intent,[15] and the question of whether one party knew of the interpretation the other party gave to the language in issue before the dispute arose.[16]

In evaluating intrinsic evidence, the contract must be read as a whole with meaning and effect given to all the words in the contract,[17] and the court must analyze these words to see if a clear intent is presented. Additionally, custom and trade usage is considered in giving meaning to the words,[18] as is any provision in the agreement which itself establishes the intent of the parties to have one part of the agreement take precedence over another part.[19]

During the process of attempting to ascertain the singular intent of the parties, the courts and boards are also simultaneously seeking to determine if the respective interpretations offered by the parties are reasonable. The non-drafting party need not prove the existence of an ambiguity, i.e., an interpretive problem which lends itself to more than one reasonable interpretation, but instead, is only required to prove that the interpretation upon which it relies is within the "zone of reasonableness", in order to have the rule contra proferentum work in its favor.[20]

In George Bennett v. United States,[21] the Court of Claims described the non-drafting party's burden as follows:

> To prevail on this issue, it is not essential that [contractor] demonstrate his position to be the only justifiable or reasonable one. A specification susceptible to more than one interpretation, each interpretation found to be consistent with the contract's language and the parties' objectively ascertainable intentions, becomes convincing proof of an ambiguity; the burden of that ambiguity falls solely upon the party who drew the specification.

The Blount Brothers Test

In deciding whether a particular interpretation is within the zone of reasonableness, the courts and boards have attempted to place themselves in the shoes of the potential contractor and view the situation as it was viewed by that party when required to make the interpretation.[22] "The reasonableness of [the parties'] interpretations cannot be determined by considering such interpretations in a vacuum, nor by considering the subjective intent of the parties alone."[23] Thus the courts and boards seek to identify and consider the various factors which may have had an impact on the contractor's reasoning in reaching a particular interpretation.

The basic approach to be taken in considering the contractor's action at the bidding stage is set forth in the often cited language from the Court of Claims decision in Blount Brothers Construction Co. v. United States:[24]

> . . . However, contractors are business men, and in the business of bidding on government contracts they are usually pressed for time and are consiously seeking to underbid a number of competitors. Consequently, they estimate only on those costs which they feel the contract terms will permit the Government to insist upon in the way of performance. They are obligated to bring to the Government's attention major discrepancies or errors which they detect in the specifications or drawings, or else fail to do so at their peril. But they are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents, and they are protected if they innocently construe in their own favor an ambiguity equally susceptible to another construction, for as in Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390, 418 (1947), the basic precept is that ambiguities in contracts drawn by the Government are construed against the drafter. In the case before us the ambiguity was subtle, not blatant; the contractor was genuinely misled and not deliberately seeking to

> profit from a recognized error by the Government. Under these circumstances the contractor falls within the scope of the recognized formula.

However, factors other than time and business competition are equally important in determining the reasonableness of any given interpretation, and such things as custom and trade usage and practice and prior course of dealing can impact differently on different contractors. Where, for example, one contractor becomes aware of a government interpretation of certain language through a course of dealing in similar prior procurements, and subsequently advances a different interpretation as reasonable in the next procurement, it is probable that the latter interpretation will not be found to be reasonable. However, the same interpretation of the same language reached by a contractor with no previous experience might well be found to be reasonable. The decisional law thus emphasizes that the "applicable criterion is reasonableness and not correctness."[25]

A recent decision of the NASA Board, Astro Dynamics, Inc.,[26] seems to have added a significant factor to those which will be considered in determining the reasonableness of interpretations. Prior to that decision, the courts and boards, in determining reasonableness, had historically refused to consider the acts of the drafter subsequent to the dispute which had served to clarify the language, or which constituted a redrafting of the disputed language, for use in a subsequent procurement.[27] In Pranz Mechanical Contractors, Inc.,[28] the board said:

> It has . . ., been established as precedent, both by decisions of this and other Boards and the U.S. Court of Claims, that the subsequent redrafting, for inclusion in future contracts, of language involved in a contract dispute, and/or clarification in a subsequent procurement specification of language which has theretofore given rise to disagreement cannot serve to forgive an unreasonable interpretation by the contractor of the earlier language, nor properly be regarded as an admission that it was in fact ambiguous.

Conversely, in Astro Dynamics, the NASA Board said: ". . . we believe the facts here show a nexus between the two specifications that includes time, substances and personnel to a sufficient degree to aid in determining whether the Government believed the specifications were ambiguous."[29] Whether the Court of Claims will agree that the government's action of redrafting or clarifying previously disputed language can be considered in determining reasonableness or the presence of ambiguity when there is a sufficient "nexus" between the two procurements remains to be seen, but the board decision would appear to be completely contrary to the established rule.

Interpretations Excluded From the Zone of Reasonableness

Specifically excluded from the zone of reasonableness are those interpretations which arise from situations where the interpretive problem is patent, glaring or obvious to the non-drafting party.[30] The Court of Claims, in Brezina Construction Co. v. United States,[31] found that ". . . saying that a contractual provision contains a patent discrepancy is tantamount to saying that no reasonable construction of the provision can be made unilaterally by the contractor until the discrepancy is resolved by the parties." Similarly, the Armed Services Board stated in Dancy Construction Co.,[32]

". . . it cannot be held that a contractor's interpretation is reasonable if the ambiguity is obvious." Thus, where a non-drafting party is aware of an obvious inconsistency or omission any reasonable interpretation of the contract provision is necessarily precluded and could not prevail.

When defining the parameters of the zone of reasonableness, the courts and boards, in addition to excluding interpretations based on patent or obvious ambiguities, have also consistently excluded from the zone of reasonableness those interpretations based on a twisted or strained construction of contract language, or those founded on mere disagreement of the parties.

In Bishop Engineering Co. v. United States,[33] the contractor was required to build a semi-trailer which, according to one specification would have overall dimensions that were the maximum that would still allow air transportability in a C-133 aircraft. Another specification stated that the trailer should be "approximately 39 feet in length." The contractor designed a 39 foot trailer, but the government required the contractor to increase it to 40 feet, as that was the maximum length still allowing the required air transportability. The contractor argued the specifications were ambiguous and should be interpreted against the government as drafter, thus allowing the claim of constructive change to prevail. The Court of Claims found that the contractor's interpretation of 39 feet was not within the zone of reasonableness, saying "any group of words can be twisted by strained construction into ambiguity, but this is not

permissible for it does violence to the intention of the parties as expressed in the contract language and specifications."[34] Likewise, in Southern Construction Co. v. United States,[35] the Court of Claims said:

> Contracts are not necessarily rendered ambiguous by the mere fact that the parties disagree as to their meaning. The fact that the interpretation placed by [contractor] upon the specifications may be considered conceivable, is not the proper basis for construction of the contract against the author of the language.

Accordingly, to come within the zone of reasonableness the non-drafting party's interpretation must be based on a reasonable uncertainty of meaning, not merely disagreement, or strained and twisted construction of the language or drawings or upon an obvious interpretive problem.

Comparative Reasonableness

If a finding of reasonableness has been made by the court or board regarding a disputed interpretation of the non-drafting party, then that interpretation will be adopted under the contra proferentum rule, apparently without regard to how it compares in terms of reasonableness with the drafter's interpretation.

In WPC Enterprises, Inc. v. United States,[36] the parties dispute concerned whether generator components had to be procured from named manufacturers or whether identical components could be procured elsewhere. The text of the specifications gave general descriptions of the components without the manufacturers names. The drawings gave the manufacturer's part number and stated that the manufacturers were the approved sources, or in other instances

that the component could be purchased from the manufacturer. The contract contained no mandatory language specifically requiring purchase of the disputed components from the manufacturers, although it did for other items not in dispute. In deciding that the contract did not require purchase of the components from the named manufacturers, the Court of Claims said:

> This summary of the opposing contentions is enough to show that no sure guide to the solution of the problem can be found within the four corners of the contractual documents. As with so many other agreements, there is something for each party and no ready answer can be drawn from the texts alone. Both [contractor's] and [the government's] interpretations lie within the zone of reasonableness; neither appears to rest on an obvious error in drafting, a gross discrepancy, or an inadvertant but glaring gap; the arguments, rather, are quite closely in balance. It is precisely to this type of contract that this court has applied the rule that if some substantive provision of a government drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that is the interpretation which will be adopted-unless the parties intention is otherwise affirmatively revealed.[37]

While the language quoted above makes it clear that the non-drafting party's interpretation will prevail if the two interpretations are equally reasonable, at least one case, Global Van Lines v. United States,[38] seems to indicate that when the non-drafting party's interpretation is less reasonable than the draftsman's, it will not prevail. There the disputed interpretation involved a payment method for packing and crating contracts.[39] The Court of Claims initially found the contractor's interpretation to be without the zone of reasonableness, but then stated that the government's interpretation was "more reasonable," thus implying that

while the contractor's interpretation was reasonable, it was not sufficiently so to prevail over the government's "more reasonable" interpretation. Subsequent decisions however, have dispelled any thought that the zone of reasonableness only included those interpretations of the non-drafting party which were at least equally as reasonable as the drafter's interpretation.

In United Pacific Insurance Co. v. United States,[40] the Court of Claims made it clear that a non-drafting party's interpretation will prevail (and thus be within the zone of reasonableness) notwithstanding that it may be less reasonable than that of the draftsman. There the Court said: ". . . it is well established that if a drawing or specification is ambiguous and the contractor follows an interpretation that is reasonable, this interpretation will prevail over the one advanced by the government even though the government's interpretation may be a more reasonable one, since the government drafted the contract."[41]

The Armed Services Board, in Swinerton and Walberg Co.,[42] expanded the bounds of the zone of reasonableness even further. The contractor there had agreed to make certain alterations to an existing building. The contract drawings did not show an extention of the existing sprinkler system into the area to be added to the building. The specifications provided that the "existing fire sprinkler system shall be revised to serve new plans and revised ceilings." The government argued that the word "and" in the specification meant two separate and distinct areas,

while the contractor argued that the contract work did not include extending the system. In resolving the issue against the government, the board said:

> We should point out that [contractor's] interpretation is simply required to be in what the Court of Claims has characterized as the "zone of reasonableness". It need not be the only reasonable interpretation in order to qualify [contractor] for payment of costs incurred. In truth we believe that [the government's] interpretation is the best and preferred one but that is not the test.[43]

This decision by the Armed Services Board is in keeping with the idea that the real test is inclusion within the zone of reasonableness and not correctness.[44]

Thus for contra proferentum to work in favor of a non-drafting party, that party need only prevail upon the court or board to attach the term "reasonable" to the interpretation which it has advanced. Current case law makes it clear that the draftsman's interpretation would not prevail, notwithstanding that it was more reasonable or even the best and preferred interpretation.

CHAPTER II

THE DUTY TO SEEK CLARIFICATION

In the field of government contracts the rule contra proferentum has a companion rule which provides that a potential contractor, who when faced with an interpretive problem of which it is aware, or should be aware, fails to seek clarification from the government, is thereafter unable to rely on the rule that ambiguities in a government drafted contract are interpreted against the draftsman.[45] Notwithstanding that a contractor might otherwise be able to establish the reasonableness of its interpretation, a failure to meet the responsibility of seeking clarification of a problem will effectively preclude consideration by the court of the issue of whether the interpretation should be adopted.[46] The Court of Claims in S.O.G. of Arkansas v. United States,[47] summarized the rule as follows:

> The rule that a contractor, before bidding, should attempt to have the Government resolve a patent ambiguity in the contract's terms is a major device of preventive hygiene; it is designed to avoid just such post-award disputes as this by encouraging contractors to seek clarification before anyone is legally bound. The rule is the counterpart of the canon in government procurement that an ambiguous contract, where the ambiguity is not open or glaring, is read against the Government. . . . Both rules have their place and their function. In addition to its role in obviating unnecessary disputes, the patent ambiguity principle advances the goal of informed

> bidding and works toward putting all the bidders on an equal plane of understanding so that the bids are more likely to be truly comparable. Conversely, the 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" and "extra" if the procuring officials take the other view after the contract is made.

The primary theory underlying this duty to seek clarification is that the rule has as its purpose the preservation of the integrity of the procurement system. If, prior to bidding, a potential contractor became aware of an interpretive problem and chose to adopt its own interpretation rather than to seek clarification of the problem, it could conceivably create a competitive advantage for itself. If adoption of its own interpretation would result in less expense during contract performance, then the potential contractor could lower his bid accordingly. Should the government's interpretation prove to be different during performance, then the contractor would argue for a change order to cover its increased performance costs, on the basis that the requirement was ambiguous and the ambiguity should be interpreted against the government as draftsman. Such a method of bidding is obviously unfair not only to the government, but to the other bidders as well, whose bids included the cost of the disputed work, and thus were necessarily higher. The rule then requires a potential contractor to exercise good faith in bidding, and failing to do so, causes the contractor to suffer the consequences imposed as a result of the government's interpretation being upheld. "We think that [a contractor],

aware of an ambiguity, perhaps inadvertant, in the [government] invitation to a contract, could not accept the contract and then claim that the ambiguity should be resolved favorably to itself."[48] "A bidder should call attention to an obvious omission in a specification, and make certain that the omission was deliberate, if he wants to take advantage of it."[49] Thus, in helping to preserve the integrity of the procurement system, the rule effectively serves the purpose of deterence while contributing to the achievement of the goal of informed bidding.

A second theory underlying the duty to seek clarification is that a bidder, during examination of the bid documents and in preparation of its bid, has the "last clear chance" to avoid the inclusion of obvious interpretive problems in the resulting contract.[50] The idea, of course, is to minimize contract interpretation disputes during performance by eliminating such problems before the parties' respective obligations are undertaken. The duty imposed then is similar in theory and purpose to the duty which requires a contracting officer to seek verification of a bid from a potential contractor if the contracting officer suspects that a mistake had been made in the bid.[51] It is important to remember that although the nature of the procurement system is such that it is the contractor that is usually in the position of having to seek clarification of interpretive problems, there are also instances when the duty has been imposed on the government.[52]

Inherent Duty to Seek Clarification

The duty to seek clarification of interpretive problems of which a potential contractor is aware, or should be aware, is inherent, and although specifically required by some solicitation provisions,[53] the enforceability of this duty is not dependent on the presence of such clauses in the solicitation. In Space Corp. v. United States,[54] a drawing was omitted from the bid package, and although the contractor was aware of its omission, it chose to substitute its own analysis for what it felt was required rather than inquire as to the omission. During performance, the contractor was required to perform in a more expensive manner (that identified in the omitted drawing) and subsequently sought to rely on the contra proferentum rule, arguing that the omitted drawing created an ambiguity which should be interpreted against the government. The Court of Claims ruled against the contractor saying:

> In Beacon there was an article of the contract which made it clear that all discrepancies in the figures, drawings or specifications should be brought to the government's attention. Such a contract clause was not present here. However, an obligation to seek clarification as to an obvious omission is inherent. Thus despite the absence of the Beacon clause, the [contractor] should be held to the Beacon requirement of inquiry.[55]

Prior to the Space Corp. decision, there was some question as to whether the duty to seek clarification would actually arise in the absence of a solicitation provision requiring it. This question arose as a result of two decisions from the Court of Claims which left the issue somewhat unclear until its recent resolution. In Beacon Construction Co.

v. United States,[56] an interpretive problem was found to exist regarding the installation of weather stripping. The contract contained a provision which required the contractor to seek clarification of interpretive problems. The pertinent portion of the court's opinion follows:

> As a matter of pure contract construction, there is something to be said for both sides to this dispute, but in any event the important handicap is the express warning given to [contractor], before it bid, that plain ambiguities of this type, in the specifications and drawings, were to be taken up with the [government] . . . . A prime purpose of these contractual provisions relating to ambiguities and discrepancies is to enable potential contractors (as well as the Government) to clarify the contract's meaning before the die is cast. The bidder who is on notice of an incipient problem, but neglects to solve it as he is directed to do by this form of contractual preventative-hygiene, cannot rely on the principle that ambiguities in contracts written by the Government are held against the drafter . . . . Even more, the bidder in such a case is under an affirmative obligation. He "should call attention to an obvious omission in a specification, and make certain that the omission was deliberate, if he intends to take advantage of it." . . . If the bidder fails to resort to the remedy proffered by the Government, a patent and glaring discrepancy (like that which existed here) should be taken against him in interpreting the contract. We do not mean to rule that under such contract provisions, the contractor must at his peril remove any possible ambiguity prior to bidding; what we do hold is that, when he is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representatives if he intends to bridge the crevasse in his own favor. Having failed to take that route, [contractor] is now barred from recovering on this demand.[57]

This decision was followed closely by the Court of Claims decision in W.P.C. Enterprises, Inc. v. United States,[58] where the contract containing the disputed interpretive problem did not contain a Beacon type clause requiring the potential contractor to seek clarification. In its decision, the Court of Claims seemed to indicate that the duty to seek

clarification might be dependent on the presence in the bid documents of a clause setting forth such a requirement:

> Although the potential contractor may have some duty to inquire about a major patent discrepancy or obvious omission, or a drastic conflict in provisions, . . . he is not normally required (absent a clear warning in the contract) to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. The Government, as the author, has to shoulder the major risk of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions-as well as the main risk of a failure to carry that responsibility. If the [government] chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications. Or it can shift the burden of ambiguity (to some extent) by inserting provisions in the contract clearly calling upon possible contractors aware of a problem-in-interpretation to seek an explanation before bidding.[59]

Subsequent to the Beacon and WPC decisions, the Court of Claims attempted to put the issue of when the duty would arise to rest. In Blount Brothers Construction Co. v. United States,[60] the court, while expressly finding that the duty to inquire did not exist in that case, spoke to the issue in dicta, saying: "Even if the invitation for bids should fail to state that requests for interpretation of the specifications and drawings are to be made to the Government agency (. . .), it would seem that the obligation to seek clarification is inherent." Decisional law now makes it clear that the duty of a potential contractor to seek clarification of interpretive problems it either recognizes or should recognize is not predicated upon the presence in the solicitation of a clause stating such a requirement.

Interpretive Problems Which Raise the Duty to Seek Clarification

The rule imposing the duty to seek clarification does not require the bidder to bring to the government's attention every possible interpretive problem which may exist in the bid documents. Even ". . . the presence of a contract clause requiring clarification will not create a duty in a situation where the [interpretive problem] in the contract language was not patent or obvious."[61] While obligated to seek clarification of obvious or major interpretive problems, bidders ". . . are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents,. . . ."[62] The Court of Claims, in Max Drill, Inc. v. United States,[63] summarized the applicable case law as follows:

> . . . . The contractor cannot bridge the gap in his own favor when presented with an obvious omission, inconsistency, or discrepancy of significance. Beacon Construction Co. v. United States, 161 Ct. Cl. 1, 6-7, 314 F.2d 501, 504 (1963).
>
> The words "obvious omission, inconsistency, or discrepancy of significance" in Beacon must be emphasized; however, it is not every possible ambiguity or doubt which imposes a duty on the contractor to make formal inquiry. W.G. Cornell v. United States, 179 Ct. Cl. 651, 668, 376 F.2d 299, 310 (1967). A potential contractor is not required to seek clarification of all possible differences in interpretation. Cf. WPC Enterprises, Inc. v. United States, 163 Ct. Cl. 1, 6, 323 F.2d 874, 877 (1963). What constitutes the type of omission sufficient to put [contractor] under obligation to make inquiries cannot be defined generally, but on an ad hoc basis of looking to what a reasonable man would find to be patent and glaring. L. Rosenman Corp. v. United States, 182 Ct. Cl. 586, 590, 390 F.2d 711, 713 (1968).

The determination of the existence in contractual documents of a patent, glaring or obvious interpretive problem is made by the courts and boards in the same manner as are determinations of whether or not an interpretation is

within the zone of reasonableness. In finding that a contractor failed to seek clarification of an obvious interpretive problem, the Veterans Administration Board in Produce Terminal Cold Storage Co.,[64] outlined the position from which it viewed the contractor's actions:

> In determining the validity of the contractor's interpretation however, the Board will consider the meaning attached to the disputed provision of the contract by a reasonable bidder who is assumed to have the ability to perform the work specified therein and the knowledge to read and interpret the contract words and phrases pertaining thereto.

While the foregoing discussion identifies the types of interpretive problems which contractors or potential contractors should recognize, it must be emphasized that recognition is not a prerequisite for finding that the contractor should have sought clarification. The requirement to seek clarification goes hand in hand with the existence of a patent interpretive problem, not the recognition of it. "It is the existence and type of the discrepancy, not necessarily the contractor's actual knowledge of it, that imposes a burden of inquiry on the contractor. . . ."[65] Additionally, the contractor must also seek clarification of any other interpretive problem of which it is aware, notwithstanding that it might not be considered "patent" by a court.[66]

As a result of the Court of Claims decision in J.W. Bateson v. United States,[67] some question has arisen as to whether it is necessary for a contractor to seek clarification of an obvious or patent interpretive problem when the contractor is negotiating a modification to an

existing contract, or negotiating on a sole source basis with the government. In that case a major amendment negotiated between the parties contained an interpretive problem which the contractor did not recognize until performance had begun. The government argued that the contractor had failed to comply with its duty to inquire, but the court found that the interpretive problem was not patent. The court also indicated that the duty to inquire really served no useful purpose after the bidding stage of a procurement. While it is true that no competitive advantage would be gained by the contractor in such a situation, it must be recognized that the requirement to seek clarification also serves another purpose, that of eliminating interpretive problems from an agreement before the respective obligations are undertaken. In view of the Court of Claims recent emphasis on this purpose in S.O.G. of Arkansas v. United States, supra, it is doubtful that future decisions will carve out exceptions to this duty in the two instances mentioned above.

The Developing Criteria for Ascertaining the Existence of Patent Interpretive Problems

Although the determination of whether a particular interpretive problem is the type which raises the duty to inquire is made on a case by case basis, decisional law has begun to develop a set of criteria to assist the courts and boards in making this determination. This criteria is directly connected to the question of how closely the potential contractor should be required to scrutinize solicitation

provisions in order to identify interpretive problems. In Gorn Corp. v. United States,[69] while not finding the existence of a patent interpretive problem, the Court of Claims demonstrated that there are limits to the amount of study a bidder is required to undertake in ascertaining the government's requirements prior to bidding. The court found a government drafted description of a switch ambiguous because the contractor would have been required to ascertain the government's requirements by cross checking a long list of tables and catalog references. The critical question then is the extent of prebid examination required of the contractor, and the criteria, when taken separately or in various combinations, has been used as an effective aid in answering this question.

The first and most commonly relied upon criterion involves a comparison of the amount of recovery sought by the contractor for work which according to its interpretation was not required, with the total contract price. When the former amount is relatively insignificant compared to the latter, it has been deemed to be the result of the type of interpretive problem ". . . that could escape notice during the estimating period."[70] In Gelco Builders v. United States,[71] a dispute arose as to whether the contractor was to install insulation on certain supply ducts in an air conditioning system. The original specification provided: "All air conditioning air handling units, fresh air intakes, all air conditioning new and existing supply ducts, and all return ducts located in non-conditioned spaces, shall

be covered." An addendum was subsequently issued which amended the specification to read: "All air conditioning air handling units, fresh air intakes, and all air conditioning new and existing shall be covered and all return air ducts located in non-conditioned spaces shall be covered." The contractor interpreted the addendum as deleting the requirement to insulate the supply ducts and reduced its bid by $385,000, notwithstanding that other paragraphs in the specifications specifically required the contractor to cover the supply ducts. The total contract price was approximately $2,200,000. The Court of Claims found that the facts in the case, including a comparison of the amount claimed ($385,000) with the total contract price, clearly indicated a duty on the contractor's part to inquire regarding the insulation requirement, rather than unilaterally deciding to delete such a significant requirement from the specifications. The Court of Claims, in Boyajian v. United States,[72] while not convinced that the interpretation advanced by the contractor was even conceivable, assumed for purposes of discussion that it was. However, the court then pointed out the obvious inconsistency of the contractor's interpretation with other contract requirements saying "that [contractor] could not have regarded the preproduction test as an inconsequential contract item as demonstrated by the fact that, although the entire contract amounted to approximately $17,500, [contractor] testing cost claim here asserted is in the amount of $9,000."[73]

However, while serving to point up the obviousness or significance of an interpretive problem in some cases, this

criterion has likewise aided contractors who sought to avoid a finding that they had failed to fulfill a duty to inquire. In Mountain Home Contractors v. United States,[74] the contractor concluded during bid preparation that kitchen exhaust fans were not required in 298 of 300 housing units. This conclusion was based on the fact that although one drawing indicated that 298 fans would be an alternate bid item, fans were not included among the 19 alternate bid items and the contractor unilaterally decided they were not required. During contract performance, the government required installation of fans in all 300 units, and the contractor claimed the increased costs. The Court of Claims found that an interpretive problem existed in the contract, but further found that it was not glaring, substantial or patently obvious. "[The interpretive problem's] insignificance is noted by comparing the total contract price of $4,918,600 to the amount [contractor] alleges is due him, $19,764."[75] Although the court says that the comparison of prices is not the sole determinative factor, it is clearly the only objective standard used. In another more recent case, Robert L. Guyler,[76] the board used the price comparison test as one of three criteria in determining that an interpretive problem should not have given rise to a prebid inquiry by the contractor. The finish schedule of a housing rehabilitation contract called for painting some bathroom walls, while one of the drawings indicated that the same walls were to be covered with vinyl fabric. The contractor did not perceive the conflict and bid the job based on

painting the walls. He was subsequently required to install vinyl covering at an added cost of $20,197. When compared to the contract price of $2,995,675, this amount was not considered to be substantially significant enough to impose a duty to inquire. The price comparison criterion has similarly been used in other cases to support a decision that the interpretive problem in dispute was not sufficiently patent or obvious as to impose the duty to seek clarification.[77]

Notwithstanding that this criterion of price comparison is widely used, it lends itself to a certain amount of criticism because of the unrealistic manner in which it is actually applied. Many disputes over interpretive problems actually involve the subcontractor's interpretation and not the prime's, although the prime pursues the claim for the subcontractor.[78] Take for example a hypothetical case involving a painting subcontractor who in the preparation of his bid fails to recognize an interpretive problem present in the painting specifications. The subcontractor had only to review those parts of the solicitation dealing with the painting requirements, and not the entire solicitation. On the other hand, it is doubtful if the prime gave much, if any, consideration to the painting specifications, leaving this responsibility to the subcontractors. Why then should not the criterion compare the disputed amount with the painting portion of the total contract price, rather than with the total? Surely the courts and boards recognize that this procedure occurs in the bidding system, yet they choose to ignore it when determining the obviousness of an interpretive

problem. Thus, in those cases when the subcontractor is actually the party that will benefit from a finding of nonobviousness, perhaps the better test or criterion would be to compare the two numbers that are realistically connected, i.e., the claimed amount and the subcontract amount, rather than two which are not.

A second criterion which was relied upon by the Armed Services Board in two recent cases, L.B. Samford, Inc.,[79] and Robert L. Guyler, supra, is concerned with the conduct of all bidders during the preaward period. The lack of preaward reaction, be it inquiry or protest, by the bidders to a particular interpretive problem which has subsequently come to light is considered to be some indication that the problem was not patent, glaring or obvious. In the Samford case, seven firms bid on the procurement with no protest or inquiry concerning the interpretive problem in dispute, and in the Guyler case, all five bidders failed to discover a conflict which existed in the solicitation. This criterion serves not to show obviousness, but rather the lack of it, and has no "other side of the coin" whereby obviousness can be indicated, because preaward inquiries or protests normally result in resolution of the interpretive problem before the parties undertake their constructual obligations.

In connection with the preaward conduct of the bidders, the Samford case also relied upon the bidding pattern of the bidders as a test of obviousness. Five of the seven bidders submitted bids below the government estimate and the board viewed this fact as suggesting that those bidders were

equally misled as to the government's intended interpretation and requirements. Had the contractor been the only one below the government estimate, then presumably this fact would have been some indication that perhaps the interpretation he placed on a problem was strained or so inconsistent with the rest of the invitation that it imposed the duty to inquire. However, the obvious problem of using this criterion is that it fails to consider the fact that the bids could be patterned in the way they were-as related to the government estimate-for any number of reasons, such as attempts to buy in or on an inaccurate government estimate.

Other, less frequently applied, criteria can be drawn from various decisions of the courts and boards. The first, similar in theory to the price comparison test, involves measuring the importance of the work item wherein the interpretive problem has arisen, as compared to the entire contractual requirement. Thus where the problem arose in work included in an elective additive, the board found that this contributed to its diminished importance.[80] In another instance, government engineers, during their several reviews of the specifications as drawn by an independent architect-engineer firm, had failed to recognize the interpretive problem in issue. This fact was considered by the board as an indication that the problem was of the type which did not have the requisite obviousness to impose a duty to inquire.[81] In Gus Kraus v. United States,[82] the Court of Claims, as part of its total approach to resolution of the issue of whether an error was glaringly obvious or patent, relied on

one of the underlying theories of the duty to inquire. The court found an absence of evidence that the contractor stood to gain anything of consequence from its interpretation, thus substantiating the argument that the contractor was rightfully unaware of its existence. Similarly, in Brezina Construction Co. v. United States,[83] the Court of Claims placed emphasis on the absence of government allegation that the contractor acted in other than good faith when interpreting the bid documents.

Although these various criteria provide some degree of objectivity to the process of determining if a particular interpretive problem is patent, glaring or obvious, they are by no means the exclusive tests, as the final determination still remains largely subjective. This fact is illustrated by a recent decision from the Interior Board, where it is indicated that perhaps a less stringent requirement to seek clarification of obvious interpretive problems will be placed on the contractor if it is a small business.[84] In finding that the interpretive problem in issue was not sufficiently obvious to invoke the duty to inquire, the board said: "We think the Government's contention requires more sophistication than can reasonably be required of small business concerns for which this project was set aside."[85] However, this case has not subsequently been cited for the proposition that a less stringent requirement is placed on small businesses, and no other decisions have exhibited a similar line of reasoning regarding the duty of small businesses to seek clarification.

From Whom Should Clarification Be Sought

Certain provisions in solicitation packages provide the potential contractor with important guidance regarding its duty to seek clarification of what it perceives to be interpretive problems in the solicitation documents.[86] These provisions not only state the duty to inquire or seek clarification, they also provide a source for either information or clarification. However, in those situations where the source identified is someone other than the contracting officer, or in those situations where a bidder seeks clarification from someone other than the contracting officer, the question necessarily arises as to the authority of that person to provide a binding interpretation or explanation of an interpretive problem raised by a bidder. Decisional law in this area seems to indicate that the contractor's action in reliance on clarification provided by one of questionable authority will be upheld by the courts and boards, presumably on the basis of an implied delegation of authority theory, so long as the contractor's actions were reasonable and in general compliance with the instructions in the solicitation.

In Blake Construction Co.,[87] the type of authority, as well as its actual limits were unclear, although it was clear that the employee possessed some authority to provide clarification of interpretive problems. The solicitation provided only a phone number and extension for bidders seeking information concerning the procurement. The contractor called regarding a discrepancy and was given incomplete

clarification by the employee, who was not the contracting officer. The authority of this employee, as adduced through testimony before the board, was to receive requests for clarification or information and to pass on questions to a Design Division. He also had authority to screen these requests, but the decision does not establish that he had complete authority to answer any and all inquiries. The contractor relied on the clarification given in formulating its interpretation of the government requirements. The board found that the contractor had acted reasonably in seeking clarification and in relying on the information received in arriving at its interpretation.

In Leran, Inc.,[88] the solicitation did not specify the contracting officer as the sole source of clarification, although the government argued that he should have been. The contractor perceived a problem in an electrical drawing and queried a government employee about it. The board approved the contractor's actions, even though he did not seek clarification from the contracting officer, saying:

> . . . clarification of the meaning of the note on Drawing No. 10 was sought, true not from the contracting officer, but from the person in the Government who had either prepared or supervised the preparation of Drawing No. 10. It would seem that no more reliable source of information could be found. Further, the circumstances in the appeal before the Board are peculiar in that the person called was the electrical engineer for the arsenal. He was personally known by the caller, who had dealt with him on previous occasions with respect to electrical work to be done at the arsenal. Under such circumstances, if called on to do so, the Board would be constrained to find that this manner of clarification and reliance on the information obtained would be reasonable.[89]

There is no indication in this case that the engineer had any express authority to interpret or clarify solicitations, so presumably the board found that his past associations and conduct with the contractor provided sufficient implied authority to justify reliance on his statements. Additionally, the contractor's interpretation of the drawings, as formulated after receiving this clarification, was found to be reasonable.

Jefferson Construction Co. v. United States[90] was a case in which an escort for a site visit related that a requirement questioned by the contractor was not within the intended scope of the contract. The escort's normal duties were those of the station's chief concrete inspector, but at the time of the site visit, he had no duties related to the particular procurement other than escort duties. The contractor relied on the escort's interpretation of the contract requirements and made no attempt to ascertain his actual authority. The Court of Claims found the escort to have been without authority to make a binding interpretation, notwithstanding his normal position of chief concrete inspector.[91] It is important to note however, that prior to finding that the inspector was without authority, the court found that the contractor's interpretation was unreasonable in view of the entire requirement of the specification.

A similar situation developed in Max Drill, Inc. v. United States,[92] when a bidder sought clarification by discussing its interpretation of a painting specification with the site visit escort, and asking for the escort's information. The exact authority of the escort was not

specified, although it appears from the decision that he was without authority to interpret the specifications. The escort confirmed the contractor's interpretation, but during performance, the contracting officer repudiated that interpretation. The Court of Claims recognized the contractor's interpretation as reasonable and regarding the contractor's reliance on the escort's confirmation said: "The [Explanation to Bidders] provision does not mean that the bidder cannot take into account, in determining what the specifications reasonably call for, the statements made by a knowledgeable government official, who is representing the contracting officer, which appear to be in conformity with the plans, specifications and contract."[93] The distinction to be drawn between the Jefferson and Max Drill decisions is based on the reasonableness of the interpretations advanced by the contractor. If the government employee whose authority is in question is relied upon in reaching a reasonable interpretation of the problem, i.e., one "in conformity with the plans, specifications and drawings," then there is good authority for accepting that interpretation, notwithstanding the employees lack of authority.

How and When Should Clarification Be Sought

The issues of how and when clarification should be sought are in actual practice often closely intertwined because the element of time has a significant impact on the manner in which a bidder can practically seek clarification. Thus there is a certain amount of overlap in the treatment of the two issues, and for this reason they are considered

together in the same section.

Standard Form 33-A and Standard Form 22 provide that any explanation desired by a bidder or offeror regarding the meaning of the solicitation, drawings or specifications must be requested in writing. No other solicitation provision of general applicability elaborates on the method in which clarification should be sought. Although some decisions have required strict compliance with these solicitation provisions, other more recent decisions have found oral inquiries satisfactory. The latter decisions seem to be the better reasoned and are in keeping with the idea that the real purpose of these inquiries is to put the government on notice of possible interpretive problems, so they may be resolved at an early stage in the procurement process. When time permits, a written inquiry should unquestionably be made, but often time restraints prohibit this type of inquiry. While a few decisions demand complete compliance with the solicitation provisions, the better reasoned ones recognize the contractor's predicament and shift the burden to the government to provide clarification, or suffer the consequences of not providing clarification, notwithstanding that oral inquiry is made very close to bid opening.

In Benjamin Zelonka Construction Co.,[94] the invitation for bids contained a clause requiring written requests for clarification. The contractor made an oral preaward inquiry concerning the type of wood required in the invitation, but was told his inquiry was premature. A second similar inquiry was made after award. Clarification was slow in coming and

the contractor argued that he was thus entitled to an excusable delay. The General Services Board found the oral requests for clarification to have been imporper and stated that the contractor was obliged to strictly follow the requirement for written requests for clarification as set forth in the invitation.

A recent Court of Claims decision, William F. Klingensmith, Inc. v. United States,[95] also emphasized the importance of following the prebid inquiry instructions contained in a solicitation, although the primary issue was one of timeliness and not one which was concerned with the manner in which clarification was sought. The solicitation required submission of inquiries in writing at least 10 days before bid opening. The contractor made an oral inquiry concerning a requirement for paving material only three hours before bid opening. The government employee was unable to respond to the inquiry because there was insufficient time to amend the solicitation. The contractor followed its own interpretation which led to the dispute before the court. The court ruled in the government's favor finding the contractor's inquiry not only "untimely" but also "wholly deficient."

While the Zelonky and Klingensmith cases illustrate the need for strict compliance with the solicitation provisions regarding requests for clarification, other decisions have taken a less strict approach in their requirements. In two recent cases, oral inquiries were found to be sufficient by the Armed Services Board.[96] The first case, CML-Macarr, Inc., involved a supply solicitation which presumably contained a

standard Form 33-A calling for written inquiries. The contractor made three separate oral preproposal inquiries concerning a specification revision, none of which were completely successful. The government argued that the duty to inquire had not been satisfied because clarification was never fully received. The board found that the contractor's oral inquiries had satisfied the duty to inquire, which "encompasses a burden to make the Government aware of the discrepancies."[97] In the second case, DeRalco, Inc., a contractor bidding on a construction project made an oral request for clarification of painting specifications to the source specified in the solicitation. In response, the contractor was told to bid the specifications the way it understood them. After so doing, a dispute concerning the specifications arose and the board found that the oral inquiry satisfied any duty the contractor had to seek clarification. The decision does not state whether a Standard Form 22, requiring written inquiries, was included in the solicitation package but there is no indication that it was not. Other board decisions have been equally hesitant to criticize the use by potential contractors of the oral request for clarification.[98]

In considering the manner in which clarification should be sought, it is appropriate to recognize that one procedure in government procurement, by its very nature lends itself to the submission of oral requests for explanation or clarification.[99] The prebid conference is generally used only in complex procurements, and provides a "means of

briefing prospective bidders . . . and explaining complicated specifications and requirements to them as early as possible after the invitation has been issued and before the bids are opened."[100] The Court of Claims, in Manloading & Management Associates v. United States,[101] specifically recognized that "oral questions and answers are expected and encouraged" at the prebid conference because "typically all of the prospective bidders are present." Answers to questions can breed more questions from bidders until the entire process of seeking and providing clarification is largely oral.

Another recent case, Universal Ecsco Corp.,[102] held that the submission of drawings constituted an inquiry and satisfied the contractor's duty to seek clarification. The pertinent part of the board decision is as follows:

> [Government] alleges that [contractor], in regard to the area under consideration, did not comply with the contractual requirement to seek clarification or interpretation of the drawings. Without quoting the Chinese proverb, it is difficult to conceive of a more direct inquiry than one which is made in the form of a drawing with the implied statement--"unless instructions to the contrary are received, the system will be built as indicated by these drawings."[103]

The best procedure unquestionably is to submit a written request for clarification should an interpretive problem be perceived anywhere in the contractual documents. This request, while clearly identifying the interpretive problem would also clearly reflect the interpretation given it by the contractor.[104] Additionally, clarification should be sought in such a manner as to elicit a written response from the government.[105] Although this procedure would be

ideal in situations where a potential contractor had 60 days to bid and identified the problem early, or even where the problem is identified after award, it offers little to the bidder that recognizes an interpretive problem quite close in time to bid opening. Standard solicitation provisions provide that the bidder should submit requests for clarification ". . . with sufficient time allowed for a reply to reach bidders before the submission of bids."[106] If the bidder cannot realistically comply with the time and manner of submission requirements of the solicitation, he is forced into the unenviable position of having to decide whether he will 1) simply not bid, 2) bid without making inquiry and gamble on the government's interpretation or 3) make an oral inquiry at the last moment notwithstanding the solicitation requirements. If the bidder chooses not to bid because of his inability to comply with the solicitation requirements, the procurement system suffers from the loss of competition. Alternatively, it is wholly inappropriate and unfair for a contractor to have to gamble on what the government's interpretation is, simply because he cannot make inquiry regarding the problem in the manner specified in the solicitation. Unless the third course of action elicits clarification from the government, and it probably will not unless the government will avail itself of the means of providing clarification to all bidders, then the bidder really has no choice at all.

In Delta Electric Construction Co.,[107] the bidder found himself faced with a similar choice during examination of the construction solicitation documents. In this case however,

the bidder orally sought clarification of several interpretive problems it had recognized. The government responded that insufficient time remained before bid opening to issue an amendment, and thus the bidder would have to bid the job as he interpreted it. After doing so, the contractor found his interpretation to be different from that of the government. The board, finding in favor of the contractor, said:

> In Blare Construction Company, Inc., ASBCA No. 9828, 65-2 BCA ¶5121, this Board held that where a patent inconsistency was brought to the attention of the contracting agency, the Government must shoulder the responsibility for clarification.
>
> Here, it refused to shoulder the responsibility. There is no argument from the Government that [contractor] was wrong in bringing the problem to the attention of the people designated in the IFB as the source of clarification.[108]

This decision, however, seems to be in direct conflict with the Court of Claims decision in Klingensmith, supra, where the court said: "Even in ambiguity situations, the rule that the ambiguity is to be resolved against the drafter would not be applied where there is a failure to comply with contract provisions obligating the contractor to seek clarifications if there are conflicts and discrepancies in the drawings and specifications."[109] The only apparent difference is that in Klingensmith the solicitation required submittal of written requests for clarification 10 days before bid opening, and in Delta no such time limit was imposed.

The Delta decision clearly takes the better approach to the problem because it recognizes that the contractor's actions in orally seeking clarification have put the government on notice of the possibility that an interpretive problem

exists in the solicitation. Having been placed on notice of the existence of a problem, the government should take corrective action before the procurement process progresses further. Admittedly there are instances where the procurement cannot be delayed[110] or cancelled[111] due to fiscal problems or because that which is being procured is urgently needed. However, in those cases where the government has been placed on notice of an interpretive problem and chooses not to resolve it, regardless of the reason, it would seem appropriate for the government to assume responsibility for interpretations that are not in consonance with its own. There is no logic in allocating the responsibility to the contractor simply because he did not meet a solicitation requirement calling for written inquiries within a certain time frame.

Ideally, the initial inquiry, made upon recognition of an interpretive problem, will elicit from the government the necessary clarification to allow the potential contractor to make an informed and knowledgeable bid or offer. However, it is possible that the inquiry will not produce the desired clarification. In CML-Macarr, Inc., supra, the contractor made three unproductive inquiries, but the government argued that as complete clarification had not been provided, the contractor had not fulfilled his duty of inquiry. The government relied on the board decision in Southside Plumbing Co.,[112] wherein the board found that the bidder was obligated to pursue its inquiry to the point of clarification. The board in CML-Macarr then was faced with the question of when must a potential contractor continue to seek clarification

after initial inquiries have been unproductive. The question was answered as follows:

> The duty to inquire encompasses a burden to make the Government aware of the discrepancies and if the Government's response does not clarify the matter, further inquiry may be called for. In this case, however, we conclude that the contractor did make further inquiry after having been referred to the Philadelphia publication repository as a result of its first inquiry. At some point the burden shifts from the contractor to seek clarification to the Government to provide clarification. We are content that here the [contractor's] prebid inquiry was sufficient to shift the burden to the Government to provide clarification . . . .[113]

Thus this decision stands for the propositions that 1)further inquiry is necessary if the initial request for clarification is unproductive; 2) the determination of the extent to which further inquiry must be pursued is purely subjective; and, 3) the duty to seek clarification can be satisfied without actually receiving clarification.

The potential contractor's duty to seek clarification is not limited in point of time to that period preceeding bid submission. In Larry T. Smith,[114] a patent interpretive problem existed regarding the method of designating steel requirements in the specifications. The board found that ". . . the Government's request for verification of [contractor's] bid in the light of the substantially higher bid of the other bidder should have caused [contractor] additional doubts as to whether it was correct in presuming that the lighter and cheaper steel was required."[115] Not only should a potential contractor seek clarification prior to bidding or at the time of bid verification, it should also be sought at the time of contract award, if the facts are such as to indicate the

presence of an interpretive problem. Although in Royal Painting Co.,[116] the board found the contractor's interpretation unreasonable in the first instance, it found the contractor's case further weakened by the absence of inquiry at the time of award. The contract involved was for the painting of buildings. The contractor interpreted the solicitation as calling for the painting of 120 buildings, while the government argued that it covered 228 buildings. The contractor's bid for 120 buildings was not so low as to alert the contracting officer to the possible presence of a problem. The document of award furnished to the contractor stated that the contractor was "being awarded a contract in the amount of . . . for painting 228 buildings." At this point, notwithstanding what had previously occurred, the contractor should have clearly and without question recognized the presence of an interpretive problem and sought its clarification.

Clarification must also be sought subsequent to award should a theretofore unrecognized interpretive problem appear. The Court of Claims decision in Kings Electronics Co. v. United States,[117] is illustrative of the need to seek clarification after award. The contractor became aware of a conflict in the specifications which required resolution before the contractor could proceed. The contractor spent four months trying to resolve the problem before clarification was sought. The court found that the four month period did not constitute an excusable delay, as the contractor should have notified the government of the problem's existence upon its recognition. Although the Court of Claims has also said that a duty to

inquire, imposed later than the bidding stage of a procurement "can serve no useful purpose,"[118] the contrary is true. Any contractor that recognizes a problem during performance and applies its own interpretation rather than seeking clarification from the government, shall do so "at his own risk and expense."[119]

The Last Clear Chance Concept

In a few rare cases a "last clear chance" concept has been employed by the courts and boards to excuse a contractor from its duty to seek clarification of a patent or obvious interpretive problem. In so doing, the contractor has been allowed to benefit from the rule contra proferentum notwithstanding its failure to inquire.

In Larco-Industrial Painting Corp.,[120] the interpretive problem concerned the precise meaning of the term "90 duplex units" in a contract for house painting. The government intended the term to mean 90 buildings with two residential units each. The contractor interpreted the term to mean 45 buildings with two units each, based on its experience with a similar prior procurement. No requests for clarification were submitted by the bidders, and the contractor submitted the low bid at almost one half the government estimate. The contractor was asked to verify its bid but was not put on notice that its bid was so low as to indicate the possibility of error. The government argued that the contractor had a duty to seek clarification of the meaning of the words "duplex unit" and having failed in that duty, should not subsequently

prevail before the board. The board however, found that even accepting the government's argument, the contractor would still prevail because the government failed to put the contractor on notice that its interpretation of the specification was possibly different from the government's.

> Insofar as [contractor] was under any duty to seek a clarification prior to bidding, this is more than offset by the Government's failure to discharge its "last clear chance" duty to clarify the situation prior to making any award after having been put on notice that something was askew.[121]

The contractor's duty is in effect superceded by the government's duty under the bid verification rule, which requires the government to call attention to a suspected mistake in the bid, and seek verification of the bid from the potential contractor,[122] thus giving the government the last opportunity to resolve any problem.

If however, the government does comply with the requirements of the bid verification rule, and the contractor is given the last opportunity to correct a problem but fails to avail itself of the opportunity, then the duty to request clarification will not be extinguished. Thus in Wickham Contracting Co. v. United States,[123] the Court of Claims found that a drawing scale error was so obvious that the contractor should have been aware of it prior to bidding and sought clarification. However, the court also found that the government had notice of the error before award and thus should have clarified it for the contractor. The court managed to avoid deciding which party had the "higher" duty because the contractor became aware of the error when bid

verification was sought by the government. The contractor, however, chose to verify its bid, notwithstanding its actual knowledge of the error, rather than to seek clarification and perhaps to seek relief for a mistake in bid. "At the time it was requested to verify its bid, [contractor] was aware of the drawing scale error, and whatever duty the government may have had before to advise [contractor] of the error faded."[124]

The contractor's duty to seek clarification has also been extinguished by the government's failure to comply with its duty to provide the contractor with special knowledge in its possession which would aid the contractor in bidding or performance. In Power City Electric, Inc.,[125] the Interior Board found that the government's nondisclosure of information regarding actual contract requirements, as compared to solicitation estimates for access road improvement was sufficient to overcome the contractor's duty to inquire saying:

> It appears to be settled law that, in the absence of language requiring a bidder to make its own determination of quantities, a contractor is generally entitled to rely on the reasonable accuracy of Government estimates. This being true no reason is apparent why a prospective bidder on notice of a substantial overrun should not be expected to seek clarification or risk having the interpretation of the contract resolved against him. Application of this rule here would require denial of the claim for, although we have found appellant's interpretation of the invitation reasonable, a site investigation in conjunction with the estimated amount of road improvement makes it equally reasonable to conclude that appellant was on notice of a possible error in specifications and it is evident that appellant's assumption that access roads shown on the drawings either were or would be brought to the standards of the specifications was favorable to the contractor. Nevertheless, under the circumstances present here, we decline to apply the rule for the reason that at the time the invitation was issued the Government had in

its possession material information, i.e., the list of access road improvement for pay, which it failed to disclose. When the Government enters into a contract, as part of its implied duty to help rather than hinder performance, it is obligated to provide the contractor with special knowledge in its possession which might aid the contractor in performing. The courts and the boards have taken an increasingly stringent attitude toward the withholding of information the disclosure of which would be likely to have a material effect on a contractor's estimate of costs. We, therefore, hold that any possible duty of appellant to make inquiry has been nullified by Bonneville's failure to disclose the access road improvement list which according to the Government's own admission contained the only improvements necessary for its needs and was based on standards not specified in the contract. On balance, the appellant's fault was less serious than the Government's fault.

No duty or inquiry being present, there is for application the rule that ambiguities will be construed against the drafter.

While the "last clear chance" concept is rarely used to relieve a contractor of its duty to seek clarification, it must be appreciated as a potential source of relief if a contractor does fail to comply with its duty of inquiry, and the government likewise fails to avail itself of an opportunity to reconcile a potential interpretive problem.

The Government Duty to Seek Clarification

Although the preceding discussion of the duty to seek clarification has concentrated, out of necessity, on the contractor's duty, there are instances in which the "tables are turned" and the duty must be borne by the government. A recent Armed Services Board decision, Barry L. Miller Engineering, Inc.,[126] is illustrative of the situation where the duty to seek clarification is on the government. There a negotiated contract incorporated the contractor's letter specifying an increase in contract price for goods provided

under the contract if the contractor experienced an increase in raw material costs. The increase in the price of goods was to be equal to the increase in raw material costs. Additionally, the contractor's letter specified the raw material cost at that time and then stated that the "above is negotiable if it does not meet with your approval," referring to the entire letter. The letter was incorporated without further negotiations and the government subsequently refused to allow any escalation in the price beyond the 3% provided for in the contract's price adjustment clause. During the board hearing, the government argued that the letter was ambiguous, its interpretation was reasonable, and thus the language should be interpreted against the contractor as drafter. The board found that the contracting officer was on notice that the contractor's offer was not based on the 3% escalation ceiling, and having failed to seek clarification or to advise the contractor of its interpretation, the government could not rely on the rule contra proferentum.

CHAPTER III

RELIANCE

The Necessity for Demonstrating Reliance

The contractor seeking to have its interpretation prevail over that of the government through application of the rule contra proferentum, must be able to demonstrate that it relied on the interpretation it advances. The Court of Claims, in Randolph Engineering Co. v. United States,[127] said: "[WPC Enterprises v. United States] says that the contractor's interpretation of a government drawn agreement will be adopted if the contractor actually and reasonably relied upon that interpretation when it entered into the contract." The Armed Services Board, in Bern Kane Products, Inc.,[128] stated the requirement as follows:

> In each case where an equitable adjustment is demanded for extra work or material based upon contested specification interpretations, an essential issue is whether the claimant actually made his bid on the basis of the alleged interpretation. This issue bears not only upon entitlement to an equitable adjustment but also upon the amount thereof.

The necessity for demonstrating reliance has its foundation in the idea that absent proof to the contrary, the parties were of a singular interpretation, and thus a singular intent, at the predispute state. As the rule contra proferentum is not for application if the parties' intent is ascertainable

through an examination of the applicable extrinsic and intrinsic evidence, proof of reliance is necessary to move the interpretive problem to that point where the parties' interpretation and intent are clearly different and thus subject to resolution by contra proferentum. The Armed Services Board decision in Solano Aircraft Service, Inc.,[129] is indicative of this line of reasoning as applied to the issue of reliance. There the issue between the parties was whether or not the flaps of an aircraft were included in a "half-aircraft" wash. The board's decision is as follows:

> We find as a fact that the contract specification is ambiguous with regard to whether or not "the entire underside of both wings" includes the underside of the flaps. The weakness of the specification is not cured by the various Technical Orders from which plausible support may be gleaned for both parties' positions. Nor is any satisfactory solution to be found elsewhere in the record which the parties have presented to the Board. [Contractor] submits that under these circumstances the ambiguity of the specification should be resolved in its favor. However, in order for [contractor] to recover it must be proved that [contractor's] bid price for half-aircraft wash did not include the underside of the flaps. This has not been done. Nor has [contractor] adduced any other evidence as to its interpretation of the specification at the time the subject contract was entered into. Absent such proof [contractor] has not shown that its interpretation of the specification at the time it made its bid was any different from that contended by the Government nor that any increased costs were sustained by [contractor] due to the ambiguity.[130]

The requirement that a contractor be able to demonstrate reliance on an interpretation it advances is an effective means of preventing contractors from obtaining windfalls as a result of the existence of an interpretive problem in the contract. If the government's interpretation would be more costly during performance than that for which the contractor contends, then the contractor must be able to show that it had not expected

to perform in the more costly manner and had thus not provided for such costs in its bid. In James A. Mann, Inc. v. United States,[131] the contractor sought to recover for the cost of furnishing and installing a generator, on the basis that the contract was ambiguous regarding the requirement for the generator. Recovery was not allowed by the Court of Claims because the evidence conclusively established that the contractor had been aware of the interpretive problem prior to bidding and had included the costs for the generator in its lump sum bid. The court said: "Under these circumstances, a judgment against the Government in this case would amount to a windfall for the [contractor]. This would be unjust to the Government, as well as unfair to the other bidders."[132]

In those instances when it is the interpretation given contract language by a subcontractor that is actually in issue, not only must it be established that the subcontractor relied on its interpretation, it must also be established that the prime contractor relied on the same interpretation. In Hart Engineering Co.,[133] the dispute concerned whether a certain annunciator panel was to be government furnished or contractor furnished. It was clearly established that the electrical subcontractor had interpreted the contract as requiring the government to furnish the panel, and had subsequently relied on that interpretation when making its bid to the prime contractor. The government, however, argued that the prime had failed to show that it had relied strictly on the subcontractor's bid and had not itself included the cost of the panel in its overall bid. The board, while finding that

it was "[contractor's] burden to prove this matter," also found that the record contained sufficient evidence of reliance by the prime contractor on the subcontractor's bid.

Likewise, the government must be prepared to demonstrate reliance on the interpretation it advances. In General Warehouse Two, Inc. v. United States,[134] the Court of Claims recognized that the language in a contract for building rental was susceptible to more than one reasonable interpretation. The government argued that it leased the entire building for a fixed sum whereas the contractor argued that the government was obligated to pay for the space used in excess of the 100,000 square feet specified as a minimum in the contract. The court found that the government, in past actions, had not relied on the interpretation it argued for, but had in fact acted consistently with the contractor's interpretation by paying for other additional areas used in the building in excess of the 100,000 square feet. It is interesting to note that the court actually resolved the problem through application of the rule contra proferentum, and then stated that the government's inability to demonstrate reliance supported that decision. It would seem that the government's inability to demonstrate reliance would have been dispositive of the problem, because it shows that the parties were of a singular interpretation, and thus intent, before the dispute arose.

If the interpretive problem in issue is one which is patent or glaring, the contractor's reliance on its interpretation will not excuse its prior failure to seek clarification of the problem. The Armed Services Board,

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in American Electric Contracting Corp.,[135] said:

> The law is well-settled that when a contract contains an obvious conflict or ambiguity a contractor must seek clarification before he may rely on his own interpretation of the conflicting language . . . . [Contractor] did not seek clarification from the contracting officer as it was its duty to do. In the absence of compliance with its duty, it may not recover additional funds caused by its reliance on its own, erroneous, interpretation.

How is Reliance Established

The foregoing discussion of the necessity for demonstrating reliance has given some indication of the manner in which reliance may be shown. When the government and a contractor differ on an issue of contract interpretation, the contractor's interpretation is normally characterized as being the one which requires the less expensive manner of performance, while the government's interpretation requires a more expensive manner of performance. Accordingly, the easiest way for a contractor to establish that it relied on its less expensive interpretation is by establishing that it did not include in its bid the cost of performing in the more expensive manner.

In Gentz Construction Co.,[136] a dispute arose as to whether certain pipe and valves were to be furnished by the contractor as part of its lump sum performance price under one bid item, or under a separate item in the bid schedule. The contractor argued that these items were not to be furnished as part of its performance of the work for which the lump sum bid had been submitted. Additionally, the contractor argued that the contract requirements were ambiguous and should be interpreted against the government on the basis of contra proferentum. The board emphasized the fact that the contracting

officer had acknowledged in his final decision that the costs concerned had been excluded from the lump sum price thereby establishing that the contractor had in fact relied on the interpretation it advanced as reasonable.

Similarly, in Delta Electric Construction Co.,[137] the contract interpretation dispute revolved around whether or not the contractor was required to furnish a certain regulator during performance of a construction contract for airfield lighting. As in the previous case, the board specifically found that the contractor did not include the cost of the regulator in its bid, thereby demonstrating reliance on its interpretation that the regulator was to be provided by the government. Having found reliance, the board also found that the contractor's interpretation was reasonable, and resolved the dispute through application of the rule contra proferentum.

Conversely, in James A. Mann, Inc. v. United States, supra, the contractor had clearly included the costs of the alleged extra work in its bid, and thus was unable to prove reliance on an interpretation which did not provide for the same work.

In those instances when an interpretation cannot be substantiated by a showing of impact during bid formulation, the contractor must be prepared to offer proof by other means. In Young Associates, Inc. v. United States,[138] a question arose regarding whether or not a provision of the contract authorized collection of liquidated damages. The contractor argued that the provision was ambiguous and should be resolved on the basis of contra proferentum, the interpretation it

advanced being reasonable. The Court of Claims found that:

> If the contractor had shown that from the beginning it understood the agreement otherwise-not to provide at all for liquidated damages-we might well have upheld its position on the ground that such a reading, opposite to the risk of the ambiguity should lie with the drafter. But the record is quite to the contrary. During performance and before this controversy arose, plantiff clearly and affirmatively indicated that it considered the contract to authorize the imposition of liquidated damages.[139]

The establishment of reliance, then is a necessary part of establishing the overall reasonableness of any particular interpretation. If the contractor cannot establish reliance in bidding or otherwise demonstrate that the interpretation it contends for was in fact the predispute interpretation upon which it relied, then it is unlikely that the contractor will subsequently prevail through application of the rule contra proferentum.

CHAPTER IV

IDENTIFYING THE DRAFTSMAN OF CONTRACTUAL LANGUAGE

As a prerequisite to the application of the rule contra proferentum by a court or board, the party seeking to avail itself of the rule's benefits must be able to establish that the draftsmanship of the interpretive problem is attributable solely to the other party.[140] Or, as Professor Corbin puts it, "In any case, before interpreting a contract contra proferentum, it must be clear to the court that the form of expression in words was actually chosen by one rather than by the other."[141] In allocating the burden of ambiguity in contract language, the various decisions have traditionally spoken in terms of identifying the "draftsman", and having once done so, adopting the interpretation of the other party.[142] The question necessarily arises then as to how the Court of Claims, the various boards of contract appeals and other authorities such as the Comptroller General go about the process of identifying the draftsman of the contract language.

Advertised Procurement

In the area of formally advertised procurement, this issue has not warranted a great deal of attention from the various courts, boards and other authorities. The strict

formalities surrounding formally advertised procurement necessarily circumscribe the instances in which a prospective contractor can actually participate in the formulation of contract language.[143] Decisions where the rule contra proferentum has been applied to resolve interpretive problems in an advertised procurement are characterized by a complete lack of discussion regarding the manner in which the draftsman was ascertained.[144] Examples are legion where the decision has simply stated that the government, as draftsman of the ambiguous language, should bear the burden of any subsequent uncertainty.[145] In Frank Briscoe Co.,[146] the board stated that it was assumed until proven differently that contract documents in advertised procurement were prepared by the government or prepared under government control. Although never subsequently cited for that particular proposition, the decision exhibits a line of reasoning which is in keeping with the approach generally taken by other boards and courts, i.e., absent some evidence that the documents were drafted by a party other than the government, the courts and boards will proceed on the assumption that they are government drafted. ASPR and FPR guidance regarding responsiveness of bids[147] and rejection of bids[148] lends support to this presumption, as a failure to agree to the terms and conditions of the invitation, or an attempt to alter them in any way will be grounds for a bidders elimination from consideration. Thus the advertised procurement system is structured in such a way as to effectively preclude anyone but the government from being involved in the "drafting" of the contract. What results

then is the classic contract of adhesion, wherein the terms and conditions are offered to the prospective contractor on a take-it-or-leave-it basis. Against this background the presumption of government draftsmanship is justified and in keeping with the theoretical basis of the contra proferentum rule.

At least two types of situations can occur where the presumption of government draftsmanship in an advertised procurement is overcome, and the contractor is recognized as the "draftsman". The first involves incorporation of a contractor's bid into a contract, while the second is concerned with two-step advertised procurement, where the contractor submits a technical proposal which is subsequently incorporated into the contract.

Bids

In Fisk Electric Co.,[149] the board was faced with a case in which the creation of ambiguous contract language was attributable to both the government and the contractor. However, the contractor, while being held responsible for a portion of the draftsmanship of the ambiguous language because of the terms he chose to use in his bid,[150] avoided the burden of ambiguity because the preponderance of fault for the entire ambiguous condition was laid on the procuring activity. Had not the board been able to allocate the preponderance of the responsibility to the government, then presumably the contractor, as draftsman of the ambiguous symbols in the bid, would have had to suffer the burden of ambiguity. Such disposition has

been made in preaward situations when a bid has been found to be ambiguous as a result of the contractor's draftsmanship thereof. Thus when a bidder indicated a 1/2% 10 day prompt payment discount on the original bid, and a 1/2% 10 day discount as well as a 5% 20 day discount on the copies, the Comptroller General found that the contracting officer could properly accept the bid on the basis of the 5% discount because the bid was the result of ambiguous draftsmanship by the bidder, and thus should be interpreted most favorably to the government.[151] Similarly, when a prospective contractor submitted a bid for furnishing surety bonds but failed to specify which of the three types of bonds solicited the bid was based upon, the Comptroller General again found the bid to be ambiguous and determined that it should be interpreted against the bidder as creator of the interpretive problem.

Accordingly, it is clear that in proper circumstances a contractor can be found to be the "draftsman" of language in an advertised procurement, notwithstanding the presumption to the contrary.[152]

Two-Step Formal Advertising

Two-step formal advertising[153] provides the second exception to the general presumption of government draftsmanship in advertised procurement. By its very nature, two-step advertised procurement presents situations entirely opposite to those found in normal advertised procurement. Under step one of this procedure, prospective contractors receive a request for submission of unpriced technical proposals.

This request outlines among other things the government's general requirements in the procurement.[154] Proposals submitted are evaluated by the government and those prospective contractors who have submitted acceptable proposals are then given an opportunity to submit bids for the particular work under step two. The successful bidder's technical proposal is incorporated into the resulting contract.[155] Thus, at this point, unlike formal advertised procurement, the contractor has had a role in formulating the contract language to the extent that he was the draftsman of the technical proposal.

Although apparently no cases have arisen dealing with the specific question of whether, for purposes of application of the rule contra proferentum, the contractor would be considered the draftsman of any language in a technical proposal, it seems logical to assume that he would be. Such a result would be in keeping with a related decision reached by the Department of Transportation Board in Burroughs Corp.[156]. In that case, the contractor had been awarded a contract under the two step procurement method for delivery and installation of radio equipment at numerous diverse sites. At no point in the contract were the floor levels where installation was to take place mentioned, and the parties agreed that the question was never discussed prior to award. The Board found that "since the contract incorporated by reference [contractor's] technical proposal, [the contractor] as well as the Government played a hand in the drafting of the contract provisions."[157] The important point of course is that the contractor was specifically recognized as sharing some of the responsibility

for "drafting" the contract. Had the problem in this case been the existence of ambiguous language in the technical proposal as incorporated into the contract, rather than the absence of terms from the contract altogether, it would seem to follow that contra proferentum would work against the contractor as draftsman of the technical proposal.

ASPR provides that discussions may take place during evaluation of proposals in step one between the government and a party submitting a technical proposal, for purposes of making an otherwise unacceptable proposal acceptable through the submittal of additional information by the party, clarifying or supplementing the proposal, but not basically changing it.[158] Suppose that during the course of these discussions the government requires, with some degree of specificity, the proposer to supplement his technical proposal with certain specifications, for example, to bring it within the range of acceptability. The proposer does so, but in the process an interpretive problem is created in the proposal which does not appear until performance is underway. In this set of circumstances, will the contractor be considered so much the draftsman of the language as to have contra proferentum work against him? No case involving two-step advertised procurement has dealt with this specific question, but there is some authority to be drawn from decisions involving negotiated procurement for answering in the negative.[159] These cases indicate that when an ambiguous provision is not solely the responsibility of one party in terms of its conception and actual reduction to a written document, then a case of mutual draftsmanship may

well be found, thus precluding application of the contra proferentum rule.

Negotiated Procurement

In analyzing the approaches taken by the courts and boards to identify the draftsman of negotiated contracts, it is appropriate to separate the instances of negotiated procurement into two categories. The first category includes those contracts where no negotiations took place between the parties as to the substantive terms and conditions of the contract, while the second category includes instances where there were significant negotiations concerning the contract's contents.

The first category of contracts includes those wherein negotiated procurement is conducted in virtually the same manner as formally advertised procurement, i.e., the government issues a request for proposals which requires the offeror to do little more than submit a price for the proposal, while the other terms and conditions are fixed. Award is then made after the proposals have been evaluated, but without benefit of discussions between the offeror and the government concerning the substantive terms and conditions.[160] When problems of contract interpretation arise in these cases, the courts and boards have followed the same line of reasoning as in formally advertised procurement, when it is presumed that the government drafted the contract documents, absent proof to the contrary.[161] In Peter Kiewit Sons Co. v. United States,[162] a landmark case in this area, advertised procurement had failed to produce a contractor for a construction project, so the

procuring activity "negotiated" a contract with the plantiff. It appears from the facts, however, that the only aspect of the contract that was truly negotiated was the price. A problem of specification interpretation arose between the parties, and eventually found its way to the Court of Claims. In reaching its decision favorable to the contractor, the court made the following oft-cited statements:

> When 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 provision.[163]

As with most decisions in advertised procurement cases, this decision is characterized by a lack of discussion regarding the manner in which the draftsman was identified. This, of course, can be attributed to the fact that in this type of procurement there really is no issue as to which party drafted the contract language, because the particular method of procurement used precludes the contractor from contributing to the creation of the contract language.[164]

It is in the second category of negotiated procurements, those where there had been a significant amount of negotiation and discussion between the parties regarding the substantive contents of the contract, that the problem of identifying a draftsman becomes more difficult.

"Fully Negotiated" Contracts

A line of cases has developed in recent years establishing the concept of a "fully negotiated" contract, which precludes application of the rule contra proferentum because no party can be identified as the sole draftsman of the contract. This line of cases has its beginning in the Deloro Smelting and Refining Co. v. United States[165] decision, handed down by the Court of Claims in 1963. In that case, the contractor had agreed to supply cobalt in accordance with the contract delivery schedule. The contract contained an escalation clause which provided for a price adjustment based on the market value of cobalt as of the date of delivery. When the contractor failed to meet the established delivery schedule, a dispute arose concerning whether the "date of delivery" in the escalation clause referred to the date of actual delivery or the date of delivery established in the contract. The court, while finding the language ambiguous, refused to attribute its authorship to either party, reasoning as follows:

> In its pertinent articles, this was not a standard form agreement but an ad hoc arrangement negotiated by the parties for a special situation. The record contains no enlightening information on comparable escalation or adjustment provisions. We cannot charge the [government] with any ambiguities since [contractor] appears to have initially proposed the terms which are now disputed; but there was also considerable negotiation and the [contractor] does not seem to be so much the author that it should bear on that account, the brunt of uncertainties.[166]

The Deloro decision was followed closely by the Court of Claims decision in Tulelake Irrigation District v. United States,[167] where the court, although reaching a similar

decision, did so on facts quite dissimilar. The contractor and the government entered into a negotiated contract which incorporated by reference another interagency contract completely drafted by the government. The interpretation of a provision of the interagency contract subsequently became the subject of a dispute between the parties. In resolving the disputed interpretation, the court said:

> . . ., we are not dealing with a contract authored exclusively by the Government. Far from being a contract of adhesion, the 1956 agreement was virtually coauthored during a period of lengthy negotiations. Although the disputed provision, incorporated by reference from the 1946 interagency pact, was of course drawn by the [government], it was subject to [the contractor's] scrutiny in 1956 and could have been modified at that time. Where a contract with the United States is as fully negotiated and bargained for as this one, the principle that ambiguities must be construed against the Government is inopposite.[168]

The Court of Claims appears to be taking the position that absent unilateral preparation of the contract terms and conditions, draftsmanship, for purposes of the contra proferentum rule, will not be attributed to one party or the other. This may well be because in contracts where there is no obvious overreaching by one party, no one sideness of terms and conditions and no imposition of one party's terms and conditions upon the other party, the theoretical basis for application of the rule contra proferentum is extinguished.[169] Certainly subsequent decisions from the contract appeals board lend support to this idea. In Compudyne Corp.,[170] the Armed Services Board cited Tulelake for the proposition that ". . . where the terms of a contract or supplemental agreement . . . are arrived at by negotiation of the parties, there is

no basis for presuming it was written more favorably to the Government than the contractor or should be construed against the Government."[171] The Armed Services Board, in Metropolitan Washington Board of Trade,[172] exhibited the same reasoning:

> [The contractor] contends that the contra proferentum rule should apply in the interpretation of this contract and especially with respect to the Payments clause which was "drafted by the Government and imposed on the contractor".
>
> The contra proferentum rule does not apply here. We are aware that the contract contains a Standard Form 32. We are also aware that the Government "drafted" the contract in the sense that Labor prepared, assembled and typed the contract document. But the term "drafter" as used in the context of the contra proferentum rule refers to the party that unilaterally prepares the contract. Here the parties . . . actually engaged in negotiating the terms of the contract . . . . Under the circumstances we are unable to conclude that the contract was so "one-sided" as to properly apply the contra proferentum rule.

Thus the trend in these cases, if it can be called that, is away from the seemingly automatic application of the rule contra proferentum against the government as "draftsman" of the contract language in those contracts where there was significant negotiations concerning the terms and conditions, even though the government may have drafted the particular language in dispute.

In those cases where the specific language in dispute had previously been the subject of negotiations between the parties, the decisions have consistently attributed the draftsmanship to both parties, and have thus not required either the government or the contractor to bear the burden of the interpretive problem.[173]

Cases of negotiated procurement where the authorship of interpretive problems has been attributed solely to the

contractor, while indeed rare, are by no means nonexistent. Thus where a contractor's proposal for a modification took the form of a personal letter, and was accepted by the government in that form, the interpretive problem in its wording was attributed solely to the contractor as draftsman, and contra proferentum worked in favor of the government.[174] More recently in Canadian Commercial Corp. v. United States,[175] the Court of Claims found the contractor responsible for creation of an interpretive problem through the wording used in a preaward telegram from the contractor to the government. Similarly, in Southeastern, Inc.,[176] the contractor prepared a release provision, the language of which was subsequently the basis of dispute between the parties. The board found that any interpretive problem in the language was to be interpreted against the contractor as draftsman.

Regardless of the type, all government contracts contain certain clauses and provisions which are required by statute or regulation, and thus are not the subject of negotiations between the parties.[177] At first glance it is natural to assume that all of these clauses are drafted entirely by the government, and thus contra proferentum should work against the government in any dispute involving their interpretation. However, some writers have suggested that responsibility for draftsmanship of these "required" clauses should not properly be borne by the government, because the clauses are really the "product of numerous revisions of government committees and study groups, with the benefit of industry comments and recommendations," and because "they usually reflect a compromise

of conflicting viewpoints"[178] and thus do not reflect an "exclusively predominant single will."[179] This theory of draftsmanship has not, however, found its way into the case law, unless the Deloro-Tulelake line of decisions reflects some degree of similar reasoning.[180]

CONCLUSION

The rule contra proferentum is a very important part of the overall contract interpretation process in the field of government contracts. It benefits that party without responsibility for drafting disputed contract language, but only if the parties' intent is otherwise unascertainable from an examination of all the applicable extrinsic and intrinsic evidence. The primary requirement preceding the rule's application is that the non-drafting party's interpretation be reasonable. Although the entire interpretation process inquires into the question of reasonableness, two of the greatest areas of concern are those involving the duty to seek clarification of patent or obvious interpretive problems and the reliance by a party on its predispute interpretation. If one party failed to seek clarification of an obvious interpretive problem or was unable to establish predispute reliance on the interpretation it subsequently advanced as reasonable, then the likelihood of that interpretation prevailing under contra proferentum is minimal.

Presuming that reasonableness can be established, the rule contra proferentum will only aid the non-drafting party. Thus where the party seeking to benefit from the application of the rule was responsible in whole or in part for the drafting of

the disputed language, it will not prevail under the rule.

Government contracts, because they are so often wholly government drafted, necessarily lend themselves to frequent application of the rule contra proferentum. Accordingly, the rule must be appreciated as a continually relied upon source of resolution for contract interpretation issues in the area of government contracts.

FOOTNOTES

1. Strum v. United States, 190 Ct. Cl. 691, 693, 421 F.2d 723, 724 (1970).

2. Black's Law Dictionary 393 (rev. 4th ed. 1968).

3. C. Dees and G. Ginsburg, Contract Interpretation and Defective Specifications (Government Contract Monograph No. 4) 27 (1975 ed.).

4. Harold Purtell Construction Co., ASBCA 3647, 57-1 BCA ¶1342 (1957); 4 Williston, Contracts §621 (1969 ed.).

5. 3 Corbin, Contracts §559 (1960 ed.).

6. Id.

7. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833 (1964).

8. Stanford Applied Engineering, NASA BCA 101, 67-1 BCA ¶6150 (1967).

9. Islands-Anderson-Montin-Benson, ASBCA 5347, 59-2 BCA ¶2442 (1959).

10. 17A C.J.S. Contracts §324 (1963).

11. Strum v. United States, supra n. 1 at 697, 421 F.2d at 727.

12. 3 Corbin, supra n. 5 at §559.

13. R. Nash, Government Contract Changes 223 (1975).

14. In factual situations where one party has, through discussions, received the other party's interpretation of particular contract language at the predispute stage, these discussions have been found to be determinative of the parties' intent at that time. In Sylvannia Electric Products, Inc. v. United States, 198 Ct. Cl. 106, 458 F.2d 994 (1972), information provided by a government representative at a prebid conference in response to questions regarding the contractor's obligation was found to be binding as an expression of government intent. See also, Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970).

15. Evidence that the parties had given the contract a certain interpretation prior to the dispute arising is given great weight in determining the parties' intent. Max Drill, Inc. v. United States, supra n. 14. The parties' interpretation can be implied from conduct as well as from words. Poole & Kent Corp., VACAB 1086, 75-1 BCA ¶11,186 (1975). Additionally, a contractor's reliance on a prior course of dealing in reaching an interpretation of ambiguous language has been recognized by the Court of Claims. Abe L. Greenberg Co. v. United States, 156 Ct. Cl. 434 (1962).

16. In Perry & Wallis, Inc. v. United States, 192 Ct. Cl. 310, 427 F.2d 722 (1970) the Court of Claims found that the contractor was bound by interpretations rendered in three prior board decisions saying ". . . when he signed the instant contract, [the contractor] did so with knowledge of the [government's] past interpretation of this phase of the contract. A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." Similarly, in Cresswell v. United States, 146 Ct. Cl. 119, 123 (1959), the court said: "If one party to a contract knows the meaning that the other intended to convey by his words, then he is bound by that meaning. The same is true if he had reason to know what the other party intended."

17. See, e.g., Hunkin Conkey Construction Co. v. United States, 198 Ct. Cl. 638, 642, 461 F.2d 1270, 1272 (1972), where the Court of Claims said: "If at all possible, a contract should be read as a whole and effect given to all of the contract terms." See also, Hol-Gar Manufacturing Corp. v. United States, 169 Ct. Cl. 384, 395, 351 F.2d 972, 979 (1965), where the court made the following statement regarding the interpretive process:

> Also, an interpretation which gives a reasonable meaning to all parts of the instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; not should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.

18. See, Gholson, Byars & Holmes Construction Co. v. United States, 173 Ct. Cl. 374, 395, 351 F.2d 987, 999 (1965), where the Court of Claims stated:

> The principle is now established in this court (and almost every other court) that in order that the intention of the parties may prevail, the language of a contract is to be given effect according to its trade meaning notwithstanding that in its ordinary meaning it is ambiguous. That is to say that trade usage or custom may show that language which appears

on its face to be perfectly clear and unambiguous has, if fact, a meaning different from its ordinary meaning.

See also, W.G. Cornell v. United States, 179 Ct. Cl. 651, 376 F.2d 299 (1967).

19. Standard Form 33A, applicable to supply and service contracts, contains the following Order of Precedence clause:

> In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Solicitation Instructions and Conditions; (c) General Provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; and (e) the specifications.

In the procurement of construction services, a more limited counterpart of the Order of Precedence clause is found in Standard Form 23-A. Clause 2, Specifications and Drawings, provides that "In case of difference between drawings and specifications, the specifications shall govern." Additionally, ASPR 7-602.45, Contract Drawings, Maps and Specifications, provides that large scale drawings shall in general govern small scale drawings. The impact of these clauses on the interpretation process is illustrated by the following excerpt from John A. Volpe Construction Co., VACAB 638, 68-1 BCA ¶6857 (1968):

> [The Specifications and Drawings clause] . . . takes over to express the contractual intent by specifically providing which of the two conflicting requirements shall take precedence and be effective as stating the contract obligations assumed by the parties. The parties have in their contract agreed, by a clause binding on both of them, that in such a situation the specification shall govern. Operation of the clause may appear to be arbitrary, for it resolves the conflict and fixes the contract requirement without regard to which of the conflicting provisions are correct, but it does not discriminate in favor of either party and it is not unreasonable as a practical solution to the problem of conflicting requirements that could otherwise exist in the written contract.

20. WPC Enterprises, Inc. v. United States, 163 Ct. Cl. 1, 323 F.2d 874 (1963); Dancy Construction Co., ASBCA 21290, 77-1 BCA ¶12,273 (1976); Blackhawk Heating & Plumbing Co., GSBCA 3834, 75-2 BCA ¶11,367 (1975).

21. 178 Ct. Cl. 61, 64, 371 F.2d 859, 86] (1967); see also, Nash, supra n. 13 at 232.

22. H & M Moving, Inc. v. United States, 204 Ct. Cl. 696, 499 F.2d 660 (1974); John McShain, Inc. v. United States, 199 Ct. Cl. 364, 462 F.2d 489 (1972); Liles Construction Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Norcoast Constructors, Inc. v. United States, 196 Ct. Cl.

1, 448 F.2d 1400 (1971); Perry and Wallis, Inc. v. United States, supra n. 16; D & L Construction Co. v. United States, 185 Ct. Cl. 738, 402 F.2d 990 (1968); George Bennett v. United States, supra n. 10; Gholson, Byars & Holmes Construction Co. v. United States, supra n. 18; Astro Dynamics, Inc., NASA BCA 1067-38, 75-2 BCA ¶11,479 (1975); T.G.C. Contracting Corp., ASBCA 19116, 75-1 BCA ¶11,346 (1975); Mosites Construction Co., GSBCA 1103, 1964 BCA ¶4048 (1964).

23. Perry and Wallis, Inc. v. United States, supra n. 16 at 316, 427 F.2d at 726.

24. 171 Ct. Cl. 478, 496-7, 346 F.2d 962, 972-3 (1965).

25. T.G.C. Contracting Corp., supra n. 22.

26. Supra n. 22.

27. Martin Lane Co. v. United States, 193 Ct. Cl. 203, 432 F.2d 1013 (1970).

28. VACAB 1105, 74-2 BCA ¶10,854 at 51,630 (1974).

29. Astro Dynamics, Inc., supra n. 22 at 54,734. The board states that its decision does not run afoul of the principle prohibiting consideration of post-performance conduct, because the Court of Claims has found "supportive value" in evidence of this nature. In the case cited for this proposition, Centre Manufacturing Co. v. United States, 183 Ct. Cl. 115, 392 F.2d 229 (1968), the court made such a statement, but only after having reached its decision, and specifically without reliance on the fact that post-performance redrafting or clarification had occurred. The board also cites two Armed Services Board cases where the government's deviation from a contested specification during reprocurement was relied upon as evidence of impossibility. Ryan Aeronautical Co., ASBCA 13366, 70-1 BCA ¶8287 (1970), and Kinn Electronics Corp., ASBCA 13526, 69-2 BCA ¶8061 (1969).

30. See notes 45 through 126, infra, and accompanying text.

31. 196 Ct. Cl. 29, 34-5, 449 F.2d 372, 375 (1971).

32. Supra n. 20 at 59,088. See also, Jamsar, Inc. v. United States, 194 Ct. Cl. 819, 442 F.2d 930 (1971); Southern Construction Co. v. United States, 176 Ct. Cl. 1339, 364 F.2d 439 (1966).

33. 180 Ct. Cl. 411 (1967).

34. Id. at 416.

35. Supra n. 32 at 1361, 364 F.2d at 453. See also, Astro-Space Laboratories, Inc. v. United States, 200 Ct. Cl. 282, 470 F.2d 1003 (1972); Tri-Cor, Inc. v. United States, 198 Ct. Cl. 187, 458 F.2d 112 (1972); S. Kane & Sons, Inc., GSBCA 3919, 74-2 BCA ¶10,774 (1974).

36. Supra n.'20.

37. Id. at 5-6, 323 F.2d at 876. See also, Thompson Ramo Wooldridge, Inc. v. United States, 175 Ct. Cl. 527, 361 F.2d 222 (1966).

38. 177 Ct. Cl. 829 (1966).

39. The opinion was actually written by a Trial Commissioner and adopted with minor modifications by the court in a per curiam opinion.

40. 204 Ct. Cl. 686, 497 F.2d 1402 (1974).

41. Id. at 695, 497 F.2d at 1407.

42. ASBCA 18925, 75-1 BCA ¶11,052 (1975).

43. Id. at 52,592. This language was cited with approval in Astro Dynamics, Inc., supra n. 32.

44. T.G.C. Contracting Corp., supra n.22; Bry-Air, Inc., ASBCA 19452, 75-1 BCA ¶11,022 (1975); Crescent Communications Corp. DOT CAB 73-12, 74-1 BCA ¶10,531 (1974).

45. Ring Construction Corp. v. United States, 142 Ct. Cl. 731, 162 F. Supp. 190 (1958).

46. S.O.G. of Arkansas v. United States, ___ Ct. Cl. ___, 546 F.2d 367(1976); American Optical Corp., ASBCA 20488, 77-1 BCA ¶12,346 (1977).

47. Id. at ___, 546 F.2d at 370-1.

48. Consolidated Engineering Co. v. United States, 98 Ct. Cl. 256, 280 (1943); Jensen Ready Mix Co., IBCA 157, 61-1 BCA ¶3059 at 15,840 (1961).

49. Ring Construction Corp. v. United States, supra n. 45 at 734, 162 F. Supp. at 192.

50. Jensen Ready Mix Co., supra n. 48.

51. ASPR 2-406.1 (1976 ed.).

52. See note 126, infra and accompanying text.

53. Standard Form 33-A, applicable to supply and service contracts, provides that an offeror must request an explanation of any question it may have regarding the meaning or interpretation of the "solicitation, drawings, specifications, etc." It does not, however, provide a specific source from which this explanation is to be sought. Block 9 of Standard Form 33, also applicable to supply and service contracts, provides a name and telephone number that a bidder can call for information concerning the procurement. Additionally, DD 1707, used as a cover sheet for solicitations, lists a name, address and telephone number that a bidder may contact to obtain "information on this procurement." Thus, unless the person identified as the contact point for information is the contracting officer, there is no specific requirement in supply or service solicitations that the contracting officer's clarification of interpretive problems be sought. The opposite is true for construction procurements.

Standard Form 22, applicable to construction contracts, contains the same requirement to seek clarification as does Standard Form 33-A. While a DD 1707 accompanies a construction solicitation as well as supply and service solicitations, construction solicitations have no counterpart of Block 9 in Standard Form 33. However, Standard Form 23-A contains the following caveat in the second general provision: "In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer . . . ." ASPR 7-602.45, Contract Drawings, Maps and Specifications, a required clause for all construction contracts, contains a similar requirement of notification to the contracting officer of any discrepancies. The term "contracting officer" is defined in Standard Form 23-A as ". . . the person executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative."

54. 200 Ct. Cl. 1, 470 F.2d 536 (1972).

55. Id. at 6, 470 F.2d 539.

56. 161 Ct. Cl. 1,314 F.2d 501 (1963).

57. Id. at 6-7, 314 F.2d at 503-4.

58. 163 Ct. Cl. 1, 323 F.2d 874 (1963).

59. Id. at 6-7, 323 F.2d at 877.

60. 171 Ct. Cl. 478, 496, 346 F.2d 462, 972 (1965).

61. Nash, supra n. 13 at 235 (1975).

62. Blount Brothers Construction Co. v. United States, supra n. 56 at 496, 346 F.2d at 973.

63. 192 Ct. Cl. 608, 625-6, 427 F.2d 1233, 1244 (1970).

64. VACAB 1124, 75-1 BCA ¶11,225 at 53,432 (1975), see also, American Optical Corp., supra n. 46.

65. J.A. Jones Construction Co. v. United States, 184 Ct. Cl. 1, 13, 395 F.2d 783, 790 (1968). See also, Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 515, 455 F.2d 1037, 1045 (1972), where the Court of Claims said: "We need not go on to establish if [contractor] actually knew of the obvious conflict, since it is not the actual knowledge of the contractor, but the obviousness of the discrepancy which imposes the duty of inquiry."

66. James A. Mann v. United States, 210 Ct. Cl. 104, 535 F.2d 51 (1976).

67. 196 Ct. Cl. 531, 450 F.2d 896 (1971).

68. See 13 Government Contractor ¶510, Nash, supra n. 13.

69. 191 Ct. Cl. 560, 424 F.2d 588 (1970).

70. L.B. Samford, Inc., ASBCA 19138, 76-1 BCA ¶11,684 (1975).

71. 177 Ct. Cl. 1025, 369 F.2d 992 (1966).

72. 191 Ct. Cl. 233, 423 F.2d 1231 (1970).

73. Id. at 260, 423 F.2d at 1247.

74. 192 Ct. Cl. 16, 425 F.2d 1260 (1970).

75. Id. at 22, 425 F.2d at 1264.

76. ASBCA 20371, 76-1 BCA ¶11,690 (1976).

77. See, eg., L.B. Samford, Inc., supra n. 70; Blackhawk Heating and Plumbing Co., GSBCA 3834, 75-2 BCA ¶11,367 (1975); Dawson Construction Co., GSBCA 3820, 75-1 BCA ¶11,339 (1975).

78. See e.g., Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972); Blake Construction Co., ASBCA 9828, 65-2 BCA ¶5,121 (1965).

79. Supra n. 70.

80. L.B. Samford, Inc., supra n. 70.

81. Robert L. Guyler, supra n. 76. It is important to note that the board relied on three criteria or tests to reach a decision and no one single fact was determinative of the outcome of the case. See also, Kraus v. United States, 177 Ct. Cl. 108, 366 F.2d 975 (1966), where the Court of

Claims that an experienced and competent field inspector agreed during performance with the preaward interpretation of the contractor. The court said: "If [contractor's] error was so glaringly obvious or patent that he should have discovered it or made inquiry to the Contracting Officer, we find it difficult to understand why a well qualified representative of the [government] made the same mistake."

82. Id.

83. 196 Ct. Cl. 29, 449 F.2d 372 (1971).

84. Whalen & Co., IBCA 1034-5-74, 75-2 BCA ¶11,377 (1975).

85. Id. at 54,152.

86. Supra n. 53.

87. ASBCA 4828, 65-2 BCA ¶5121 (1965).

88. ASBCA 71-5, 61-2 BCA ¶3227 (1961).

89. Id. at 16,735.

90. 151 Ct. Cl. 75 (1960).

91. The solicitation apparently did not specify a source for clarification, but it did provide that "oral explanation or instructions given before the award of the contract will not be binding." See also, Bromley Contracting Co., ASBCA 15483, 72-1 BCA ¶9252 (1972).

92. Supra n. 63.

93. Id. at 625, 427 F.2d at 1243.

94. GSBCA 2930, 70-2 BCA ¶8476 (1970).

95. 205 Ct. Cl. 651, 664, 505 F.2d 1257, 1265 (1974).

96. ASBCA 19950, 76-2 BCA ¶12,047 (1976).

97. ASBCA 20630, 76-2 BCA ¶11,971 (1976).

98. See e.g., Delta Electric Construction Co., ASBCA 14324, 71-1 BCA ¶8830 (1971); Blake Construction Co., supra n. 87.

99. ASPR 2-207, 3-504 (1976 ed.).

100. ASPR 2-207 (1976 ed.).

101. 198 Ct. Cl. 106, 458 F.2d 994 (1972).

102. POD BCA 190, 70-1 BCA ¶8224 (1970).

103. Id. at 38,242.

104. Southside Plumbing Co., ASBCA 8120, 1963 BCA ¶3982 (1963), mot. recon. den., 1964 BCA ¶4314 (1964).

105. P. Shnitzer, Government Contract Bidding at 85 (1976).

106. See Standard Forms 33A and 22.

107. Supra n. 98.

108. Id. at 41,066. The decision does not indicate whether the solicitation contained a requirement for written requests for clarification, but as a Standard Form 22 is a normal part of a construction solicitation, it probably did.

109. William F. Klingensmith, Inc. v. United States, supra n. 95 at 664, 505 F.2d at 1265.

110. ASPR 2-208 (1976 ed.).

111. ASPR 2-209 (1976 ed.).

112. Supra n. 104.

113. CML-Macarr, Inc., supra n. 96.

114. ASBCA 16669, 72-1 BCA ¶9468 (1972).

115. Id. at 44,102. The board found that the contractor should originally have made a prebid inquiry to the government, not a supplier, but failing to do so, should have inquired when verification was sought.

116. ASBCA 19839, 75-2 BCA ¶11,413 (1975).

117. 169 Ct. Cl. 433 (1965).

118. J.W. Bateson Co. v. United States, supra n. 67 at 546, 450 F.2d at 904.

119. Standard Form 23-A.

120. ASBCA 12872, 68-2 BCA ¶7303 (1968); see also, Fairchild Industries, Inc., ASBCA 16302, 74-1 BCA ¶10,567 (1974), where the board relied on the reasoning in Larco to reach a similar result. The board found that the contractor's submission of pricing data on DD 633 put the government on notice of the contractor's interpretation regarding the pricing method for certain materials, although the contracting officer did not review the data. The contractor was never told, and referred to the data during later discussions with the contracting officer. Thus, once again, the government had notice that something was

wrong before the contract was signed, but failed to take action to correct the problem. This was found by the board to offset any duty the contractor had to seek further clarification of the pricing mehtod.

121. Id. at 33,951.

122. ASPR 2-406.3(e)(1) (1976 ed.). For a recent treatment of the bid verification rule, see. Shnitzer, supra n. 105 at 449-452.

123. ___ Ct. Cl. ___, 546 F.2d 395 (1976).

124. Id. at ___, 546 F.2d at 400.

125. IBCA 950-1-72, 74-1 BCA ¶10,376 at 49,005 (1973). See also, Sklute, Government Misrepresentation and Non-disclosure of Superior Knowledge in Federal Procurement, 6 Pub. Cont. L. J. 39 (1973).

126. ASBCA 20554, 75-2 BCA ¶11,567 (1975).

127. 176 Ct. Cl. 872, 800, 367 F.2d 425, 430 (1966). See also, Gentz Construction Co., IBCA 1015-1-75, 75-1 BCA ¶11,010 (1974), where the board said at page 52,418: "An essential to contractor success on a contract interpretation question is proof of his reliance on his interpretation at the time he entered into the contract."

128. ASBCA 8547, 1963 BCA ¶3823 at 19,071 (1963).

129. ASBCA 18053, 74-2 BCA ¶10,784 (1974).

130. Id. at 51,284.

131. Supra n. 66.

132. Id. at ___, 535 F.2d at 62.

133. ASBCA 17484, 73-2 BCA ¶10,153 (1973).

134. 181 Ct. Cl. 180, 389 F.2d 1016 (1967).

135. ASBCA 19566, 76-1 BCA ¶11,802 at 56,360 (1976).

136. Supra n. 128.

137. ASBCA 14324, 71-1 BCA ¶8830 (1971).

138. 200 Ct. Cl. 438, 471 F.2d 618 (1973).

139. Id. at 442-3, 471 F.2d at 620.

140. Bowen-McLaughlin-York, Inc., ASBCA 13068, 69-2 BCA 7964 (1969).

141. 3 Corbin, supra n. 5 §559.

142. See e.g., Peter Kiewit Son's Co. v. United States, 109 Ct. Cl. 390 (1947); WPC Enterprises, Inc. v. United States, supra n. 20.

143. See, ASPR Section 2 (1976 ed.).

144. H & M Moving, Inc. v. United States, supra n. 22; Thompson Ramo Wooldridge, Inc. v. United States, supra n. 37; Western Contracting Corp. v. United States, 144 Ct. Cl. 318 (1958).

145. Id.

146. AEC BCA 23-2-66, 66-1 BCA ¶5601 (1966).

147. ASPR 2-301 (1976 ed.).

148. ASPR 2-404.2 (1976 ed.).

149. DOT CAB 75-34, 76-2 BCA ¶12,090 (1976).

150. The bid form provided that the bidders could enter a figure which represented the amount of credit the government would receive if the bidder took title to the old generator it had bid to replace. The contractor entered "N/A" and although both parties agreed that it meant "non-applicable", they disagreed on whether it was the credit or the bid quotation to give the credit that was not applicable. Bidders had been given the option of bidding or not bidding on the credit item.

151. Comptroller General decision, B-161336, 23 June 1967, unpublished.

152. Comptroller General decision, B-141786, 39 C.G. 546 (1960). The procuring activity's bid forms did not provide for each type of bond as a separate bid item, and thus could arguably have contributed to the creation of the ambiguity, although the Comptroller General did not consider this argument.

153. See, ASPR Section 2, Part 5 (1976 ed.).

154. ASPR 2-503.1 sets out the minimum requirements of the request for technical proposals.

155. ASPR 2-503.1(a)(viii) (1976 ed.). Consolidated Diesel Electric Co. v. United States, 209 Ct. Cl. 521, 533 F.2d 556 (1976). See also, Conrad, Inc., ASBCA 14239, 71-2 BCA ¶9163 (1971), where the board recognized that the contractor had some design responsibility (draftsmanship of specifications) in two step procurement. While recognizing that an interpretive problem was present in the contract, the board

chose to resolve the problem on the basis of defective specifications rather than contract interpretation.

156. DOT CAB 69-11, 70-1 BCA ¶8138 (1970).

157. Id. at 37,805.

158. ASPR 2-503.1(a)(viii) (1976 ed.).

159. Ball State University v. United States, 203 Ct. Cl. 291, 488 F.2d 1014 (1973); National By-Products, Inc. v. United States, 186 Ct. Cl. 546, 405 F.2d 1256 (1969).

160. Standard Form 33-A, paragraph 10(g), provides that the government may award a contract based on initial offers received, without discussion of those offers.

161. See, notes 143 through 156, supra, and accompanying text.

162. 109 Ct. Cl. 390 (1947).

163. Id. at 418.

164. See e.g., J.W. Bateson Co. v. United States, supra n. 67; Gorn Corp. v. [illegible]ted States, supra n. 69; B.F. Goodrich Co. v. United [illegible] 185 Ct. Cl. 14, 398 F.2d 843 (1968).

165. 161 Ct. Cl. 489 [illegible]3).

166. Id. at 495.

167. 169 Ct. Cl. 782, 342 F.2d 447 (1965).

168. Id. at 792-3, 342 F.2d 453. The only authority cited by the court for this statement is the Deloro case.

169. National By-Products, Inc. v. United States, supra n. 156; Lone Star Energy Co., VACAB 1163, 76-1 BCA ¶11,650 (1975).

170. ASBCA 15913, 73-1 BCA ¶9835 (1972).

171. Id. at 45,969.

172. GSBCA LD-10, 74-2 BCA ¶10,681 (1974).

173. Consumers Ice Co. v. United States, 201 Ct. Cl. 116, 475 F.2d 1161 (1973); REDM Corp., ASBCA 17378, 73-2 BCA ¶10,167 (1973); Olin Mathieson Chemical Corp., ASBCA 7401, 1961 BCA ¶3596 (1962); Daystrom Instrument Division of Daystrom, Inc., ASBCA 3438, 58-2 BCA ¶2050 (1958).

174. S.S. Mullen, Inc., ASBCA 8808, 1964 BCA ¶4449 (1964).

175. 202 Ct. Cl. 65 (1973).

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165. 161 Ct. Cl. 489 (1963).

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174. S.S. Mullen, Inc., ASBCA 8808, 1964 BCA ¶4449 (1964).

175. 202 Ct. Cl. 65 (1973).

176. ASBCA 7677, 1963 BCA ¶3904 (1963).

177. The parties may, however, seek a deviation from appropriate authorities to avoid the inclusion of specific provisions or clauses in the contract. See, ASPR 1-109 (1976 ed.).

178. Shedd, Resolving Ambiguities in Interpretation of Government Contracts, 36 Geo. Wash. L. Rev. 1, 15 (1967).

179. Pasley, The Interpretation of Government Contracts, 25 Fordham L. Rev. 211, 214 (1956). But see, Cuneo and Crowell, Impossibility of Performance, Assumption of Risk or Act of Submission, 29 Law & Contemp. Prob. 531, 549 (1964), where the authors argue that "the fact that many of the standard clauses are drafted with the advice (and sometimes consent) of the business community does not inject any real element of consent into the contract."

180. In Metropolitan Washington Board of Trade, supra n. 169, the board specifically refused to apply contra proferentum to an interpretive problem in a "required" clause, but on the theory that the entire contract was fully negotiated.

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THE RULE CONTRA PROFERENTUM IN THE GOVERNMENT CONTRACT INTERPRE--ETC(U)
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