

THE BURDEN OF AMBIGUITY IN GOVERNMENT CONTRACTS

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There is much judicial comment indicating that when the federal government enters into contracts with private parties it steps out of its role as sovereign and becomes subject to the same rules of contractual liability as those which govern dealings between private parties.¹ However, when one disregards the clichés and examines the realities, he discovers some fundamental differences inherent in the relationship between the government and its contractors which the latter can ill afford to overlook or ignore.

For example, the terms of a government contract are seldom the product of negotiation between the parties. The basic document constituting *the* contract (in which all else is incorporated by reference) consists of a prescribed form² which no representative of the government has the power to vary.³ Even an actual, albeit inadvertent, omission or variance from the prescribed form has been held to be ineffective and the provisions of the prescribed form have been read into the contract.⁴ The rationale of such a result is that no representative of the government has any authority to enter into a contract in its behalf except in the form prescribed by statute or regulation. One who would enter into a government contract must, therefore, "accept or reject the contract as proffered, without haggling."⁵

Under such circumstances, one would expect those courts having jurisdiction over controversies under government contracts⁶ to apply the familiar rule that any ambiguity in a written instrument will be construed most strongly against the party responsible for the choice of language.⁷ In general, this has been the case, both in the courts⁸ and in the contracting agencies' own review boards⁹ which exercise the

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¹ *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946); *Century Indem. Co. v. United States*, 236 F.2d 752 (D.C. Cir. 1956).

² 41 C.F.R. § 1-16.901 (1964).

³ *Chalker & Lund Co. v. United States*, 123 Ct. Cl. 381, 107 F. Supp. 734 (1952).

⁴ *Southwestern Stamp Works*, 60-1 BCA, ¶ 2653 (1960).

⁵ *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 877 (Ct. Cl. 1963).

⁶ The Court of Claims has exclusive jurisdiction where the amount in controversy is in excess of \$10,000. Cases involving a lesser amount may be brought either in the Court of Claims or in a federal district court. 28 U.S.C. § 1346(a)(2) (1958).

⁷ *Garrison v. United States*, 74 U.S. (7 Wall.) 688 (1868).

⁸ *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390 (1947).

⁹ *Northern Elec. Corp.*, 62 BCA ¶ 3494 (1962); *Ingalls Shipbuilding Corp.*, 56-2 BCA ¶ 1086 (1956).

functions of the department head under the standard disputes clause.¹⁰

However, a recent line of cases first developed in the Court of Claims¹¹ and apparently adopted by the review boards,¹² indicates that this time-honored rule of contract construction is subject to modification when applied to the field of government contracts. In these cases, an escape hatch appears to have been found whereby the government may contractually relieve itself of the burden of ambiguity in certain instances. The escape hatch is found in article 2 of the standard form which provides:

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. *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, who shall promptly make a determination in writing. Any adjustment*

¹⁰ In its current form, this clause provides:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded opportunity to be heard and to offer evidence in support of his appeal. Pending final decision on a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude considerations of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

41 C.F.R. § 1-16.901-23A (1964).

¹¹ *Beacon Constr. Co. v. United States*, 314 F.2d 501 (Ct. Cl. 1963); *Jefferson Constr. Co. v. United States*, 151 Ct. Cl. 75 (1960); *Ring Constr. Corp. v. United States*, 142 Ct. Cl. 731, 162 F. Supp. 190 (1958).

¹² *Daniel Constr. Co.*, 65-1 BCA ¶ 4540 (1965).

by the Contractor without such a determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.¹³ (Emphasis supplied.)

While the above form is the product of several revisions in wording beginning as far back as former Form 23¹⁴ in 1942, the italicized words have remained substantially the same. It is this language upon which the Court of Claims based its decision in *Beacon Constr. Co. v. United States*¹⁵ to deny relief to the contractor.

The *Beacon* case illustrates the risk to which a contractor exposes himself in attempting to depend upon his own interpretation of an ambiguous contract provision rather than bringing the ambiguity to the attention of the contracting officer prior to bidding. Relying on its own understanding of the housing contract under which it was working as not requiring it to install weatherstrips on the windows of the buildings, the contractor completed the project and saw it accepted by the government without weatherstripping of the windows. For all that appeared, the contractor's understanding was consistent with that of the supervisory personnel of the contracting agency which administered the contract for the government and accepted the project. Several months later, after the buildings and their occupants had been exposed to the rigors of a Maine winter, it was "discovered" that the weatherstrips had been omitted. The cost of having them installed by another contractor was withheld from the original contractor. The contracting officer's decision to withhold the funds was upheld by the head of the department and suit was brought to recover the withheld funds. The Court of Claims, while recognizing that neither it nor the contractor was bound by the agency's construction of the contract,¹⁶ nevertheless held that the contractor was precluded from recovery by virtue of the provision in article 2 of the contract quoted above, because of its failure, *prior to bidding*, to seek a clarification from the contracting officer of a discrepancy in the specifications. The court described this discrepancy as "patent and glaring."¹⁷

On the same day, the Court of Claims decided *Guyler v. United States*,¹⁸ in which it allowed recovery for additional painting where the contract specified "Interior exposed masonry surfaces [indicated

¹³ 41 C.F.R. § 1-16.901-23A (1964).

¹⁴ 41 U.S.C. (App.) § 54.13 (1958).

¹⁵ Supra note 11.

¹⁶ Id. at 502.

¹⁷ Id. at 504.

¹⁸ 314 F.2d 506 (Ct. Cl. 1963).

on the drawings to be painted] shall be painted in accordance with the attached Figure 1." The words in brackets were deleted by a modification to which the parties had agreed. "Attached Figure 1" did not specify what surfaces were to be painted. The drawings showed the walls in one room as painted black. The contractor contended that he was only required to paint the masonry in that one room. A majority of the Court of Claims (Judge Whitaker dissented) agreed with the contractor.

Judge Davis, who wrote the opinion in *Beacon*, wrote a concurring opinion in *Guyler*, in which he distinguished *Beacon* on the following basis:

(a) The discrepancy here, if one existed at all, was not of the gross and patent character with which the Court is dealing in *Beacon* . . . but could, rather easily, be resolved by reading the contract as a whole; (b) the possible ambiguity came to light only after the contract was signed, not before it was consummated; and (c) that ambiguity was obviously apparent to the contracting officer prior to the time plaintiff discovered it. In this case, accordingly, there was no breach by the contractor of the requirements of Article 2.¹⁹

A few months later, the court decided *WPC Enterprises, Inc. v. United States*, "a study in the toils of ambiguity."²⁰ The issue in this case was whether five components of generator sets were required by the contract to be manufactured by (or with the authority of) certain named companies (as the government contended) or whether the plaintiff could furnish identical components of other manufacturers at a lower price. The specifications gave general descriptions without naming any manufacturer; the drawings, on the other hand, showed the parts by the number given to each item by a named manufacturer and declared that manufacturer to be the approved source.

The court summed up the position of the parties in the following language:

As with so many other agreements, there is something for each party and no ready answer can be drawn from the texts alone. Both plaintiff's and defendant's interpretations lie within the zone of reasonableness; neither appears to rest on an obvious error in drafting, a gross discrepancy, or an inadvertent but glaring gap; the arguments, rather, are quite closely in balance. It is precisely to this type of contract that

¹⁹ Id. at 510-11.

²⁰ 323 F.2d 874, 875 (Ct. Cl. 1963).

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.²¹

Beacon and *Guyler* were distinguished with the following explanation:

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. . . . If the defendant chafes under the continued application of this check . . . 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.²² (Emphasis supplied.)

The clause in the contract which, in *Beacon*, was held to shift the burden of ambiguity is a mandatory provision in a standard form.²³ If, by the insertion of such a clause, the government has shifted the burden of ambiguity in *Beacon* and those cases which purport to follow it, it must be deemed to have done so in all contracts.

This, however, does not appear to be the case. From what was said in *Beacon*, as well as in such earlier cases as *Consolidated Eng'r Co.*,²⁴ *Ring Constr. Co.*,²⁵ and *Jefferson Constr. Co.*,²⁶ and in such later cases as *WPC*,²⁷ it seems that this rule may be invoked only when the Court of Claims determines, on an *ad hoc* basis, that a discrepancy or ambiguity was "patent," "glaring," or "obvious," or whatever other epithet may be appropriately applied.

The disturbing feature about this rule is not that it requires the contractor to make a careful examination of the contract documents and call any discrepancies to the government's attention, but rather that the consequence of his failure to make an inquiry or to discover

²¹ Id. at 876.

²² Id. at 877.

²³ 41 C.F.R. § 1-16.901-23A (1964).

²⁴ *Consolidated Eng'r Co. v. United States*, 98 Ct. Cl. 256 (1943).

²⁵ *Supra* note 11.

²⁶ *Supra* note 11.

²⁷ *Supra* note 20.

a discrepancy at the bidding stage appears to be a forfeiture of any right subsequently to challenge in the courts an adverse determination by the contracting officer in interpreting the disputed specification. The Wunderlich Act²⁸ outlaws any clause in a government contract making the decision of a contracting officer final on a question of law. The intent of Congress appears clear that, as to questions of law arising under a government contract, the parties are entitled to a judicial, rather than merely an administrative determination. The lesson of *Beacon* and of those cases which follow it, however, appears to be that, where a bidder (who subsequently becomes the contractor) fails to make a pre-bid inquiry as to the interpretation of a "patent and glaring discrepancy," the court will refuse to consider the merits as to the correct interpretation of the contract even where "as a matter of pure contract-construction, there is something to be said for both sides. . . ."²⁹

As applied by the departmental review boards, the rule makes the contracting officer's decision on a dispute of law unreviewable even within the department under the framework of the "disputes" clause.³⁰

The moral is clear, as stated in *Ring*, that "a bidder should call attention to an obvious omission in a specification and make certain the omission was deliberate, if he intends to take advantage of it."³¹ What is less clear is the point at which the Court of Claims will decide that an omission was so obvious that it should abrogate its judicial functions and defer to the determination of the contracting officer.

²⁸ 68 Stat. 81 (1954), 41 U.S.C. § 322 (1958).

²⁹ *Beacon Constr. Co. v. United States*, supra note 11, at 503.

³⁰ *Daniel Constr. Co.*, supra note 12.

³¹ *Ring Constr. Corp. v. United States*, supra note 11, at 734, 162 F. Supp. at 192.