

# Properly defined

Words with multiple meanings can cross communication



BY LARRY CAUDLE

Oftentimes, construction contract disputes arise because two parties to a contract disagree over the interpretation of a provision that is supposed to govern a specific event or circumstance.

## Dodging the drafter

Language in a contract is considered ambiguous if it is subject to two or more reasonable interpretations. It is not enough that two parties differ on the meaning of the language—both meanings offered by the

parties must be reasonable ones. When confronted with ambiguous language, the court must determine what the parties supposedly intended when they entered into the contract.

As a preliminary matter, a contractor can only challenge a “latent” ambiguity—one that is initially unambiguous on its face, but which becomes unclear only upon closer examination or after the occurrence of an event or circumstances. If the ambiguity is “patent” or obvious, the contractor has a duty to bring the ambiguity to the owner’s attention before submitting its bid, and failure to do so means it has assumed the risk that its interpretation is the correct one. Most contractors are aware of the rule that ambiguities are resolved against the drafter, which is often the owner. Most contractors are surprised to learn, however, that this is a rule of last resort and will be applied only after the exhaustion of other efforts to ascertain the parties’ intention. The court will avoid reading one provision in isolation and will typically consider any other provisions in the contract that might bear on the same subject matter so as to give meaning to the contract as a whole. This occurs most often when multiple technical specification sections govern a particular part of the work and one section might modify, illuminate or even limit other sections. Courts also will look at documents that evidence or memorialize pre-contract discussions or negotiations such as an original offer, a quotation or meeting notes. In the public contracting sector, these documents rarely come into play because contracts are competitively bid and no nego-

tiations take place. However, pre-bid meeting minutes have been used for this purpose. In addition, negotiations do occur in connection with change orders, and the meaning of change-order language sometimes becomes the subject of disputes. A party might prevail if it can produce notes or worksheets created during change-order negotiations that corroborate its version of what the parties intended. Courts will similarly look to any inconsistencies between a party’s interpretation of

the contract and their own conduct on the same project. In some instances, a court might even look to what is customary in the industry to aid it in resolving a contract ambiguity. This occurs when contract language uses terms specific to the industry. To illustrate, a court re-

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cently permitted a contractor to introduce evidence at trial on the industry meaning of “working day” when the contract used the term, but did not provide a definition. Only if the court is unable to resolve the ambiguity after considering all of the above will it apply the last resort rule and construe the language against the drafter.

One line of caution: In a few states such as Oklahoma and North Dakota, the last rule cannot be applied against a public owner because it has been determined to conflict with public policy. In real practice, contractors should be aware that the most cited rule of construing ambiguous contract language against the party who drafted it is rarely applied. In most instances, courts are able to resolve such disputes by considering the factors cited above and determining the parties’ original intention.



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