

WHO CAN HELP INTERPRET A CONSTRUCTION CONTRACT: NO ONE? THE CONTRACT? THE INDUSTRY?

By Matthew DeVries

The Supreme Court of Tennessee recently heard oral arguments on a contract interpretation issue in a construction dispute between Ray Bell Construction and Tennessee Department of Transportation (TDOT). One lesson learned involves how to interpret contracts, whether you are talking about the scope of work, changes, compensation, or delays.

THE TDOT DISPUTE

The disagreement in the TDOT case involved a question on whether the contractor was entitled to an early incentive payment given the delays on the project beyond the contractor's control. There was a disagreement as to whether the completion date could be moved, altered, or amended. The trial court held that there was an "egregious ambiguity" in the parties' contract and allowed extrinsic evidence, including evidence of other contracts, to clarify the issue. The final decision from the Tennessee "Supremes" is expected.



90% OF CONSTRUCTION DISPUTES ARE FACT-DRIVEN

According to Matthew DeVries, 90 percent of disputes are fact-driven ... which means that you need to get the facts right, reduce them to writing, and keep them organized. Facts are important. So, what can you do to develop and preserve the facts necessary to help you win your case? Here are some of DeVries' tips:

- 1. Keep written records.** Although conditions in the field may constantly change, make sure you have a process in place to reduce to writing all pertinent facts that affect construction. This may be a changed condition, interference by another party, unusually severe weather conditions, a change in material price, etc. If you have a pertinent conversation by phone or in person, make sure you follow-up the conversation in writing. I cannot tell you how many times I have heard, "Well, they agreed to the change order on the phone."
- 2. Record just the facts.** If you take the time to record the facts in writing, make sure you leave out all the informal language and other information that will make a good exhibit in litigation. There is no need to tell the owner's representative that he is an idiot (...even if he is...) in a request for information. There is no need to tell the contractor's project manager that he is incompetent (...even if he is...) in an email responding to the RFI. Stick to the facts.
- 3. Organize your information.** Whether you keep hard-copy documents or you have incorporated the paperless project, make sure you take the time to use a folder structure system that organizes the information in a chronological manner. This will help you (and your attorney) in the event a dispute arises.

ABOUT THE AUTHOR

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ANOTHER EXAMPLE

In construing a written contract, the controlling consideration is the intention of the parties as derived from all the terms of the contract. Legally, a written contract, to which both parties have assented as a complete and accurate expression of their agreement, may not be varied or contradicted by understandings and negotiations, which occurred prior to signing the contract. Thus, as a general rule, a proposal by a contractor cannot be used to vary or contradict the signed contract.

If the contract is so ambiguous that its meaning is unclear, the court can allow parol or extrinsic evidence to be admitted. A contract is considered ambiguous "when it is reasonably susceptible to more than one meaning." As a result, if the contractor can show that the scope of work specified in the contract is ambiguous, then the contractor's proposal may be used as extrinsic evidence to explain the meaning of the contract.

Owners (such as TDOT in the case currently on appeal) often argue the language in the scope of work specified in the contract is readily apparent and, therefore, the contractor should not be permitted to introduce its proposal as evidence on the issue of ambiguity. However, a court may conditionally consider extrinsic evidence, including the proposal, for the purpose of determining whether a contract is ambiguous. If the signed contract is reasonably susceptible of two or more meanings, the courts would likely consider the public owner's interpretation of the scope of work and the contractor's proposal.

WHO CAN HELP INTERPRET A CONSTRUCTION CONTRACT?

Using the above two references, the rules are pretty clear that the court must look only to the four corners of the contract to interpret its provisions. Only where there is an ambiguity can the court look to extrinsic or parol evidence, including other writings, conduct of the parties, and industry practice. ■



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