CONTRA PROFERENTEM, LATENT AMBIGUITY AND CONTRACTOR WINS CLAIM

There is a long-standing rule in government contracting known as "contra preferentem" (against the drafter) which states that where there is an ambiguity in a contract, it will be interpreted against the party who proffers (drafts and offers) the contract. The government is construed to be the "drafter," hence ambiguities are normally to be construed against the government. However, there is another doctrine at work—the doctrine of patent ambiguity—which is an exception to the general rule of contra proferentem. If a patent ambiguity (a glaring conflict or obvious error exists in the contract or solicitation) then the contractor must inquire prior to performance in order to clarify the patent ambiguity, or the rule of contra preferentem will not apply. So there are two types of ambiguities: patent ambiguity (obvious and requiring a contractor to inquire prior to performance) and latent ambiguities (not obvious, not sufficient to trigger the patent ambiguity exception, and the rule of contra proferentem applies). *Metro Machine dba Gen'l Dynamics NASSCO-Norfolk,* ASBCA No. 61817, June 12, 2020 (hereafter, "NASSCO"), is an excellent example of the sometimes complex interplay of patent and latent ambiguity, which resulted in the application of the rule of contra proferentem.

The contractor received a contract to repair a Navy ship, which required dry-docking of the ship. The contract incorporated by reference numerous Navy rules and regulations, stating as follows:

> The contractor shall provide all labor, materials, facilities, supervision and equipment to meet the requirements outlined in Section C. All work shall be completed in accordance with applicable local, State, Federal and *Navy rules and regulations, whether they are explicitly written/references in this [contract] or not.*[Emphasis added].

The Board held that this section incorporated all "Navy rules and regulations" into the contract. Of special note, this included Mid-Atlantic Regional Maintenance Center Instruction, MARMCINST 9997.C, Technical Standards for [Continental U.S.] Docking Evolutions (Dry Docking) Where Mid-Atlantic Regional Maintenance Center is the Naval Shipbuilding Activity. (This instruction is discussed below).

During the dry-docking, certain lines holding the ship broke, and the Navy, over objection of the contractor, cancelled the dry-docking. The contractor was able to dry-dock the ship about ten days later, and filed a certified claim for $577,000—the cost of the second dry-docking. There was no question that the Navy had the right to cancel the dry-docking. The only real question in the case was who should pay for the second dry-docking—the Navy or the contractor.

The Board's analysis first considered the language in MARMCINST 9997.1C, which states:

> The DO [Navy Docking officer] protects the Navy's interest and will normally not give direction to the contractor [except] where the DO considers the ship's safety or other Navy interests would be jeopardized by the action of the contractor. In this case, the DO shall direct the contractor's Dockmaster to refrain from such action until the issue is

> resolved. Such a procedure will not relieve the contractor of responsibility but will protect the Navy's interest *even though there may be cost impact. Safety and protection of the Navy's interest in the vessel shall take precedence over concern for possible cost impact.* [Emphasis added].

The Board noted that the "cost impact" highlighted above was susceptible to two interpretations—cost to the contractor or cost to the Navy. The Board also noted that both interpretations were within the "zone of reasonableness," not that there was a preferred interpretation. Two reasonable interpretations is the definition of ambiguous language.

The Board then examined the contract and concluded that the language in this section incorporated by reference was not a "patent ambiguity" that NASSCO had a duty to inquire about. There was no "glaring conflict or obvious error" that would impose the consequences of this ambiguity on the contractor. The Board stated that Contractors are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents.

The Board concluded that there was a dilemma because there was very little language to interpret. The Board stated "we either construe 'cost impact" against the Navy under contra proferetem, or we ignore it" and "we cannot ignore it at the expense of contractors." The Board construed the interpretation against the Navy, and placed the responsibility for the cost impact of the Navy's decisions on the Navy. The Board sustained NASSCO's appeal and remanded the case for a determination of quantum.

Takeaway. Contra proferentem is a powerful ally of contractors who make claims. However, it is crucial that any patent ambiguity be questioned by the contractor before the contract begins (normally at the solicitation/proposal stage). Failure to examine the documents early, and raise the ambiguity issue at that time, may result in the ambiguity being deemed patent, and cannot form the basis of a contractor's claim. It is important to note that Boards and Courts often find an ambiguity to be patent, even though the contractor may consider it latent—so the responsibility always rests with the contractor for a careful reading of all the solicitation documents and an appropriate question concerning their ambiguity.