Playing Your Cards at Interpreting Federal Government Contracts

By Jerome S. Gabig, Richard J.R. Raleigh and Christopher L. Lockwood

Introduction

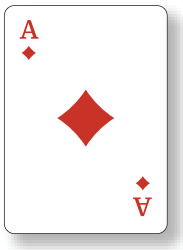
Redstone Arsenal accounts for 9.8 percent of Alabama's gross domestic product.[1] The importance of government contracts to Alabama's economy is even greater when one also considers Anniston Army Depot, Montgomery's Maxwell Air Force Base and Mobile's Austal shipbuilding complex. In the last 12 months alone, the federal government has awarded more than $11 billion in contracts to business concerns throughout the state.[2] Inevitably, with such a high volume of government contracts also comes contractual disputes, and in a world where contract amounts can often exceed seven digits, a dispute over even a relatively small percentage of those funds can be significant.

Just as in the commercial sector, one of the most common types of contract disputes arises when the vendor and the customer have conflicting interpretations of the contract.[3] Federal contracts are interpreted according to federal common law, consisting of a body of decisions issued by the U.S. Court of Appeals for the Federal Circuit, U.S. Court of Federal Claims and the several agency "boards" of contract appeals (primarily, the Armed Services Board of Contract Appeals and the Civilian Agency Board of Contract Appeals).[4]

Resolution of government contract disputes is frustrated when the respective parties do not understand the rules of interpretation by which a court or agency board will resolve the dispute. The confusion

is analogous to playing a game of cards without understanding which cards outrank others in the deck. For example, if a dispute arises from a poorly drafted government solicitation, it may be tempting for a contractor to jump straight to the well-known rule that ambiguities are construed against the drafter. However, as discussed below, this is actually among the weakest rules of contract interpretation.

By analogy to a deck of cards, this article provides a simplified approach to help demystify the often-confusing federal common law rules of contract interpretation.



Ace–Mutual Intent a.k.a. "the Cardinal Rule"

The cardinal rule of contract interpretation is to carry out the mutual intent of the parties.[5] Just as the ace is the highest card in the deck, the "cardinal rule" is the highest rule of contract interpretation. Accordingly, a court confronted with a contract dispute will first try to ascertain whether the written understanding is clearly stated and was plainly understood by the parties.[6] Occasionally, the rule is stated as giving effect to the "spirit and purpose" of the agreement.[7] Under this objective line of inquiry, the unexpressed subjective intent of either party has no bearing on how the contract should be interpreted.[8] Once satisfied as to mutual intent, a court can invoke the "principal apparent purpose" doctrine to overcome any apparent gaps or omissions in the contract language.[9]

King–Patent Ambiguity and the Duty to Inquire

Frequently, the cardinal rule cannot be readily applied because the intent of the parties is unclear (or, possibly, they never had the same intent). Before proceeding to the secondary rules discussed below, a court must first determine, as a matter of law, whether the agreement is ambiguous and, if so, whether the ambiguity is latent or patent.[10] "A patent ambiguity is one that is obvious, gross, glaring, so that the contractor had a duty to inquire about it at the start."[11] A latent ambiguity exists when the ambiguity is "neither glaring nor substantial nor patently obvious."[12]

The distinction is crucial. If the ambiguity is latent, then the court may proceed to interpret the contract using the remainder of the rules below. The court may also allow the parties to introduce extrinsic evidence to help resolve the ambiguity.[13] If, however, the ambiguity is patent, it gives rise to a duty to inquire.[14]

The duty to inquiry is a powerful rule in government contracting. Specifically, if a government solicitation contains a patent ambiguity, it triggers a duty to inquire on the part of the bidder to clarify the government's interpretation.[15] If the bidder fails to inquire about a patent ambiguity, the bidder's unilateral interpretation will fail.

Under proper circumstances, the patent ambiguity rule can overcome any of the other interpretation rules discussed below. Only if the court decides that the ambiguity was not patent will it reach the question of whether a contractor's interpretation is reasonable.[16]

Unlike many of the other rules of contract interpretation, the patent ambiguity rule does not attempt to ascertain the most probable intent of the parties. Instead, this rule prevents contractors from taking advantage of the government, ensures that all bidders bid on the same specifications and attempts to resolve ambiguities before a contract is awarded, thereby avoiding costly after-the-fact litigation.[17]

Queen–The Whole Instrument Rule

Assuming that a contractor's interpretation is not foreclosed by a failure to inquire, the next highest rule of interpretation is the whole instrument rule.[18] Under the whole instrument rule, an interpretation that gives a reasonable meaning to all parts of an instrument will be preferred to one that leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous.[19] Additionally, a court will avoid construing any contractual provision as being in conflict with another, unless no other reasonable interpretation is possible.[20] Thus, if a provision can be interpreted in two ways–one that is consistent with other contractual clauses and one that conflicts–the whole instrument rule dictates that the consistent reading is preferred. A harmonious reading of the whole instrument prohibits a twisted or strained analysis that would take terms out of their context.

As we descend into the remainder of the deck, it is worth noting that each of the following rules is

progressively less concerned with ascertaining the actual intent of the parties and is more reliant on providing a mechanical substitute to determine the most probable intent. The more mechanical the rule, the less it is preferred, as it is less likely to reflect the true intent of the parties and therefore less likely to give effect to the cardinal rule.

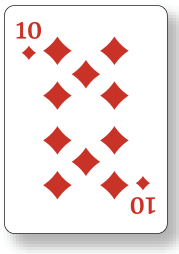
Jack–The Express Language Rule

After avoiding a twisted interpretation under the whole instrument rule, the express language rule dictates that if the language of a contract is subject to only one reasonable interpretation, then that interpretation should prevail.[21] Like the whole instrument rule, and often used in conjunction with it, the express language rule is a central tool of contract interpretation. If, after examining the intrinsic features of the instrument, the court finds that its terms are clear and unambiguous, the court will give those terms their plain and ordinary meaning and will not resort to extrinsic evidence as an aid to interpretation.[22]

The express language rule behooves parties to read their agreements before signing them. The rule recognizes that, absent highly unusual circumstances, the parties should be able to rely on the chosen language of their contract. For example, the parties are fully entitled to use express language to deviate from a prior course of dealings or custom in trade.[23] Thus, a prior course of dealings will not override definitions that are provided in the express language of a contract.[24]

Professor Ralph Nash, the preeminent scholar on federal government contracts, attributes to a pundit, EK Gubin, the adage, "When all else fails, read the contract."[25] Professor Nash went on to explain: "In 1960, that was good advice. In 2011, that's bad advice. You better read the contract before you sign it."[26] Courts do not permit a party to avoid contractual obligations by claiming ignorance of the express terms to which they agreed.[27] Failing to read a document before signing it does not enable one to ignore the obligations imposed by that document.[28] Consequently, a contractor who submits a bid without reading all the specifications does so at its own peril.[29]

Fortunately, the government is also precluded from pleading ignorance as a basis for avoiding its contractual obligations. In *Alkai Consultants, LLC*, ASBCA No. 56792, 10-2 B.C.A. (CCH) ¶ 34493 (June 24, 2010), the Armed Services Board of Contract Appeals overturned a termination for default where the contracting officer misunderstood the delivery date and "thought the completion date had passed."[30]



Ten–Conduct of The Parties

If the express language fails to resolve a disagreement, the next step is to consider the parties' conduct under the contract prior to the dispute. How the parties acted under an agreement before the advent of controversy is often more revealing than the dry language of the written agreement by itself.[31] The rationale behind this rule is that the interpretation the parties place upon a contract during their performance demonstrates their intent.[32] Once the interpretation of the contract becomes controversial, however, a party is apt to manipulate its behavior to buttress its own litigating position. As such, behavior after a controversy arises is not a trustworthy indicator of intent.[33]

Nine–Knowledge of The Other Party's Interpretation

A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation is bound by such interpretation."[34] In the context of government contracts, this rule dates back to a 1970 Court of Claims decision in *Perry & Wallis v. United States*.[35] In that case, the court found that the contractor was aware of the agency's interpretation of a disputed contractual provision due to its involvement as a subcontractor in a similar claim against the same agency involving the same contractual language. Having agreed to the language with knowledge of the agency's interpretation, and without making any inquiry to the contrary, the court held that the contractor was bound by the agency's prior interpretation.

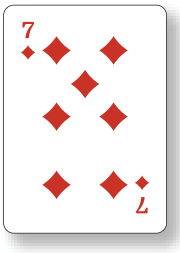
Likewise, the government can be bound by failing to object to the known interpretation of a contractor.[36] In a 2006 case involving a tax settlement agreement, the Court of Federal Claims found that the plaintiff had clearly communicated its interpretation to the IRS during the negotiation of the agreement. Applying *Perry*

& Wallis, the court held that this rule of contract interpretation "may apply equally to the government."[37]

Eight–Prior Course of Dealings

A course of dealing is defined as "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a basis of understanding for interpreting their express and other conduct."[38] A course of dealing involves more than just a single transaction or event.[39] One or two prior deviations from a contract are not enough.[40] A court will look to whether the prior conduct is of sufficient similarity and repetitiveness to constitute an understanding.[41] If a sufficient course of dealing is found, the rule precludes the government from suddenly changing a long-standing interpretation of contract language to the detriment or prejudice of a contractor who has acted in reliance on that historic definition or contractual practice.[42]

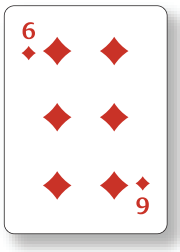
This rule does not focus on the parties' conduct during the contract at issue. Rather, the focus is on the parties' interpretation of past similar contracts. Under this rule, the parties' actions under past contracts are taken as strong evidence of their intent when entering into subsequent transactions with each other. Unless the parties agreed to deviate from their prior course of dealings, it may be presumed that they intended to continue dealing in the same manner.



Seven–Trade Usage

The Federal Circuit's decision in *Metric Constructors, Inc. v. NASA* contains a detailed discussion of trade usage as a tool of contract interpretation.[43] Before arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties.[44] According to the Federal Circuit, evidence of trade practice and custom is part of the initial assessment of contract meaning.[45] It illuminates the contemporaneous circumstances of the time of contracting, giving life to the intentions of the parties.[46] It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretations of that bargain.[47] Thus, where trade usage or custom attaches a special meaning to certain words or terms, a party may be permitted to introduce evidence of that special meaning to enable the court to interpret the contract language in accordance with the intention of the parties.[48]

However, evidence of trade usage does not override an otherwise unambiguous contract provision.[49] A contracting party cannot invoke trade practice and custom to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting.[50] Trade practice evidence is not an avenue for a party to avoid its contractual obligations by later invoking a conflicting trade practice.[51] Instead, a court will accept evidence of trade practice only when a party shows that it relied reasonably on a competing interpretation of the words when it entered into the contract.[52]



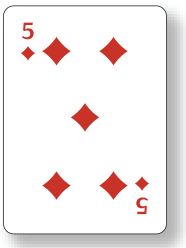
Six–Specific Over General

After trade usage, we begin to reach the bottom of the deck, where the rules are significantly more mechanical in their operation. These rules often carry Latin names such as *generalia specialibus non derogant* ("the general does not detract from the specific"). However, if your best argument is in Latin, realize that you may be holding weak cards.

Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language.[53] This rule is based on the rationale that people commonly use general language without a clear consciousness of its full scope and without awareness than exception should be made.[54] When two provisions clearly contradict so that both cannot be given full effect, it is presumed that the more specific provision is likely to reflect the parties' intent.[55] Treating the specific language as an exception to the general terms, so that both are given some effect, is viewed as being in accordance with the whole instrument rule.[56]

In *Goldwasser v. United States*, the plaintiff received a Navy contract to print and deliver a weekly newspaper called *The Shipworker*.[57] The contract contained two conflicting provisions regarding the minimum number of copies the Navy was required to order. One provision generally stated that the Navy would order indefinite quantities of not less than $100 per period. Another more specific provision stated that the Navy would order a minimum of 10,000

copies per issue and contained requirements regarding additional copies and print/color specifications. The court found that the indefinite quantities provision was boilerplate language resulting from the Navy's selection of an incorrect contract form. The court rejected that general language and instead applied the specific minimum quantities set forth in the second, more specific, provision.



Five–Other Miscellaneous Maxims

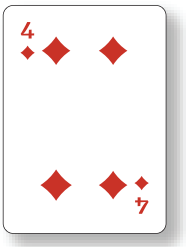
Miscellaneous maxims are a hodgepodge of mechanical rules that jurists sometimes use to infer the most probable intent of the parties. The rule of specific over general, discussed above, is one such maxim. Other examples include:

Noscitur a sociis ("it is known by its associates")–a word used by the parties in one sense is to be interpreted as employed in the same sense throughout the writing, in absence of countervailing reasons.[58]

Ejusdem generis ("of the same kind or class")–when a list of specific matters is follow by more general words relating to the same subject matter, the general words are interpreted as meaning things of the same kind as the list of specific matters to which the parties refer.[59]

Expressio Unius est Excusion Alterius ("the expression of one thing is the exclusion of another"). According to the ASBCA, "It is rightly applied as an aid in contract interpretation, where one or more objects in a class are specifically named and another object of that class is not named."[60]

At their core, these various maxims are little more than extensions of the whole instrument rule. When other aspects of an instrument may help inform the meaning of a specific term, these maxims may serve as helpful references for accomplishing that task.



Four–Order of Precedence Clauses

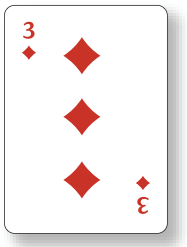
An order of precedence clause is an agreement between the parties on how inconsistencies in the contract should be resolved. FAR § 52.215-8 provides an order of precedence clause:

> Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:
>
> (a) The Schedule (excluding the specifications)
>
> (b) Representations and other instructions
>
> (c) Contract clauses
>
> (d) Other documents, exhibits, and attachments
>
> (e) The specifications.

For construction contracts, it is not uncommon for an order of precedence clause to state: "In case of differences between drawings and specifications, the specifications shall govern." Thus, if a specification requires the construction of only six dog kennels but the drawings show eight kennels, the contractor is only required to construct the six kennels set forth in the specifications.[61]

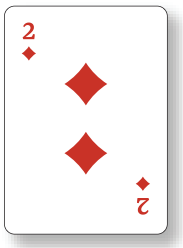
Since an order of precedence clause is the result of an express agreement of the parties, one might be tempted to consider it a very strong card in the deck. In practice, however, one must first apply the foregoing rules. Clearly, an order of precedence clause will not overcome the cardinal rule of contract construction.[62] Nor will it circumvent the whole instrument rule.[63] Moreover, if an erroneous specification creates a patent ambiguity, it may give rise to a duty to inquire.[64]

Finally, by its very nature, an order of precedence clause presupposes that there has been an error (almost always by the government) resulting a conflict between, for example, the drawings and the specifications. Because these clauses merely seek to protect the government from its own mistakes, they are strictly construed, even if the result works against the government's needs. Therefore, order of precedence clauses are relegated to a lowly status among contract interpretation rules.



Three–Punctuation

Reliance on punctuation has long been recognized as a poor method of contract interpretation. In 1965, the United States Court of Claims aptly stated: "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it."[65]



Two–Interpretation Against the Drafter

As mentioned in the introduction, many are familiar with the rule that ambiguities in a contract may be interpreted against the drafting party. However, this rule is widely recognized as a "rule of last resort," which is only used after all other cards have been played.[66] Frequently, the rule is called by its Latin name–*contra proferentem* ("against the one bringing forth"). This mechanical rule places the consequences for lack of clarity upon the party responsible for the poor draftsmanship. The rule is premised upon favoring the party that is least culpable for the existence of the dispute. The rule does not apply to clauses that have their basis in statutes or regulations which have the force and effect of law.[67]

There seems to be a common misperception that *contra proferentem* is a powerful rule of contract interpretation. This misconception is likely due to the fact that the rule is very mechanical and easy to understand and apply. However, since the rule is essentially punitive (usually against the government), and therefore least likely to ascertain the most probable intent of the parties, it is viewed as the lowest of all the rules and is only applied only after all other modes of interpretation have failed.

Conclusion

Many contract disputes remain unresolved because the parties do not understand the applicable rules of interpretation. As discussed above, the overarching goal is to ascertain the mutual intent of the parties. Since attempting to divine intent can be a nebulous task, courts have developed a system of increasing mechanical rules to aide in determining the most probable intent of the parties. As discussed in this article, one way to conceptualize these rules is by analogy to the hierarchy within a deck of cards.

Keep in mind, while rules are often helpful, contract interpretation tends to be more art than science. If mutual intent is clear, no mechanical rule will overcome it. And, only if a court is unable to ascertain the most probable intent will it resort to a punitive result, such as *contra preferentem*.

We hope that this article will be a helpful reference in your next federal contract interpretation dispute. ▲

Endnotes

1. *https://www.al.com/business/2018/11/redstone-arsenal-leader-sees-50000-working-on-base-in-2025.html*.
2. *https://www.usaspending.gov/#/state/01.*
3. "The most frequently litigated issue in government contracting is probably the correct interpretation of contract language." *Interpretation Disputes: Finding An Ambiguity,* 4 *Nash & Cibinic Report* ¶ 25 (April 1990).
4. *See United States v. Greer*, ___ F. Supp. 3d ____, 2019 WL 282035 (2019), Jan. 22, 2019 ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). "Courts must therefore apply the federal common law of contracts to the interpretation of contracts with the federal government." *Red Lake Band of Chippewa Indians v. U.S. DOI*, 624 F. Supp. 2d 1, 12 (D.D.C. 2009).").
5. *Hegeman-Harris & Co. v. United States*, 440 F.2d 1009, 1014 (1971). *See also* 11 *Williston on Contracts* § 32:2 (4th ed.); *Nicholson v. United States*, 29 Fed. Cl. 180, 194 (1993); *Tri-Star Elecs. Int'l, Inc. v. Preci-Dip Durtal SA*, 619 F.3d 1364, 1367 (Fed. Cir. 2010); and *M.A. Mortenson Co.*, ASBCA No. 53062, 01-2 BCA (CCH) ¶ 31573 (Aug. 17, 2001).
6. *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).
7. *Navcom Def. Elecs., Inc.,* ASBCA No. 50767, 01-2 B.C.A. (CCH) ¶ 31546 (July 25, 2001) ("Provisions of a contract must be so construed as to effectuate its spirit and purpose.").
8. *Cooper Realty Co. v. United States*, 36 Fed. Cl. 284, 289 (1996) ("When construing a contract, the court seeks to ascertain the objective intent of the parties, thus "mental reservations are legally irrelevant."); *Singer-Gen. Precision, Inc. v. United States*, 427 F.2d 1187, 1193 (Ct. Cl. 1970) ("the unexpressed, subjective, unilateral intent of one party is insufficient to bind the other.").
9. 11 Williston on Contracts § 32:9 (4th ed.). *.E.g.*, *Sea-Land Serv. v. United States*, 553 F.2d 651, 656 (1977).
10. *K-Con, Inc. v. Sec'y of Army*, 908 F.3d 719, 722 (Fed. Cir. 2018).
11. *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009).
12. *K-Con, Inc.*, 908 F.3d at 722.
13. *E.g. BPLW Architects & Engineers, Inc. v. United States*, 106 Fed. Cl. 521 (2012).
14. *Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993).
15. *K-Con, Inc.*, 908 F.3d at 722.
16. *Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982).
17. *Newsom*, 676 F.2d at 649.
18. *See Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). The whole instrument rule is often discussed in relation to cardinal rule. *M&G Polymers USA, L.L.C. v. Tackett*, 135 S. Ct. 926, 937 (2015) ("Under the 'cardinal principle' of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.") (Ginsburg, J., concurring); and *AMP, Inc. v. United States*, 389 F.2d 448, 454 (1968) ("But it is also a cardinal rule that the parties' intent must be gathered from the instrument as a whole.").
19. *Hol-Gar Mfg. Corp*, 351 F.2d at 979. *See also City of New York v. United States,* 113 F. Supp. 645, 647 (Ct. Cl. 1953) ("To resolve this apparent ambiguity we look to the intention of the parties which is to be gathered not from a reading of paragraph 5(a) alone, but from the whole instrument in the light of the circumstances existing at the time of its negotiation.").
20. *Id. See also Appeal of M.A. Mortenson Co.,* VABCA No. 2435, 88-3 B.C.A. (CCH) ¶ 20895 (June 14, 1988).
21. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993) ("A contract is read in accordance with its express terms and the plain meaning thereof."); *Blackstone Consulting Inc. v. United States*, 65 Fed. Cl. 463, 469 (2005) ("[T]he court must endeavor to effectuate the parties' intention using the plain language of the agreement itself.") aff'd, 170 F. App'x 128 (Fed. Cir. 2006); *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992) ("Wherever possible, words of a contract should be given their ordinary and common meaning.").
22. *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003).
23. *MPE Bus. Forms, Inc.*, GPOBCA No. 10-95 (Aug. 16, 1996); *Sixth & E Assocs., L.L.C.*, 09-2 B.C.A. (CCH) ¶ 34179 (June 22, 2009); *Houck Ltd.*, 09-1 B.C.A. (CCH) ¶ 34134 (May 5, 2009).
24. *MPE Bus. Forms, Inc.*, GPOBCA No. 10-95 (Aug. 16, 1996) ("In this case, however, the Appellant's 'trade usage' argument must fail because the contract itself defines the critical term.").
25. 213 *Military Law Review* (Fall 2012) at 197.
26. *Id.* at 198.

27. *Upton v. Tribilcock*, 91 U.S. 45 (1875); *Nichols v. United States,* 29 Fed. Cl. 180 (1993).
28. *Alaska Am. Lumber Co. v. United States*, 25 Cl. Ct. 518, 529 (1992).
29. *Dale Ingram, Inc. v. United States*, 475 F.2d 1177, 1184 (Ct. Cl. 1973); *Sauer Mech., Inc.*, NASA BCA No. 884-9, 86-2 B.C.A. (CCH) ¶ 18884 (Mar. 6, 1986); *Z.A.N. Co.*, ASBCA No. 25488, 86-1 B.C.A. (CCH) ¶ 18612 (Nov. 29, 1985) *Turnkey Enters., Inc. v. United States*, No. 304-76, 1979 WL 16470, at *6 (Ct. Cl. Jan. 31, 1979), *aff'd*, 597 F.2d 750 (Ct. Cl. 1979); *P & K Contracting, Inc. v. United States*, 108 Fed. Cl. 380, 396 (2012), aff'd, 534 F. App'x 1000 (Fed. Cir. 2013).
30. *ALKAI Consultants, LLC*, 09-1 BCA ¶ 24058, ASBCA No. 55581.
31. *Omni Corp. v. United States*, 41 Fed. Cl. 585, 591 (1998); *Macke Co. v. United States*, 467 F.2d 1323, 1325 (1972).
32. *Boye v. United States*, No. 07-195 C, 2008 WL 11408605, at *1 (Fed. Cl. Nov. 18, 2008); *Floyd v. Ring Const. Corp.*, 165 F.2d 125, 129 (8th Cir. 1948) ("[W]here ambiguity exists in a contract the construction the parties in their dealings and by their conduct have placed upon the terms will furnish the court with persuasive evidence of their meaning."); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) ("It is the general law of contracts that in construing ambiguous and indefinite contracts, the courts will look to the construction the parties have given to the instrument by their conduct before a controversy arises.").
33. *Fincke v. United States*, 675 F.2d 289, 295 (1982) ("Their actions and conduct before the inception of a controversy is of much greater weight than what they said or did after a dispute arose."); *Liles Constr. Co. v. United States*, 455 F.2d 527, 538–39 (1972) ("It is only actions and interpretations before the controversy arises, conduct during performance, that are highly relevant in determining what the parties intended."); and *Dynamics Corp. of Am. v. United States*, 389 F.2d 424, 430 (1968).
34. *Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 725 (1970); *Blue Cross & Blue Shield United of WI & Subsidiaries v. United States*, 71 Fed. Cl. 641, 649 (2006); *HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327 (Fed. Cir. 2004); *Appeal of PCA Health Plans of Texas, Inc.*, ASBCA No. 48711, 98-2 B.C.A. (CCH) ¶ 29900 (June 24, 1998).
35. *Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct. Cl. 1970).
36. *Blue Cross & Blue Shield United of WI & Subsidiaries v. United States*, 71 Fed. Cl. 641, 646 (2006) ("This rule may apply equally to the government; i.e., that the meaning BCW assigns to paragraph (3)(e) could prevail if, at the time the agreement was made, the government knew or should have known how BCW understood the provision and did nothing further.").
37. *Id.*
38. *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 688 (1994) (citing Restatement (Second) of Contracts § 223 (1981)) at 157-58 (1981).
39. *IAP World Servs., Inc.*, 12-2 B.C.A. (CCH) ¶ 35119 (Aug. 13, 2012); and *Cape Romain Contractors, Inc.*, ASBCA No. 50557, 00-1 B.C.A. (CCH) ¶ 30697 (Dec. 15, 1999) citing *Doyle Shirt Mfg. Corp. v. United States*, 462 F.2d 1150, 1153 (Ct. Cl. 1972). *See also Appeal of Tech. Sys., Inc.*, ASBCA No. 59577, 17-1 B.C.A. (CCH) ¶ 36631 (Jan. 12, 2017) (auditor's failure to challenge a cost in one audit did not constitute a course of conduct precluding the government from disallowing the costs in subsequent audits.).
40. *Custom Printing Co.*, GPOBCA No. 28-94 (Mar. 12, 1997).
41. *Romala Corp. v. United States*, 20 Cl. Ct. 435, 446 (1990), aff'd, 927 F.2d 1219 (Fed. Cir. 1991).
42. *Custom Printing Co*., GPOBCA No. 28-94 (Mar. 12, 1997).
43. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Western States Const. Co. v. United States*, 26 Cl. Ct. 818, 823 (1992) (citing 17A Am Jur. 2d *Effect of usage, custom, or course of dealing* § 364 (1991)).
49. *Id.*
50. *Metric Constructors, Inc.*, 169 F.3d at 752.
51. *Id.*
52. *Id.*
53. *Hills Materials Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) citing *Hol–Gar Mfg.,* 351 F.2d at 980.
54. Restatement (Second) of Contracts § 203, comment e. (1981).
55. *Abraham v. Rockwell Int'l Corp*., 326 F.3d 1242, 1254 (Fed. Cir. 2003) quoting *Farnsworth on Contracts* § 7.11 (2d ed. 2000).
56. Restatement (Second) of Contracts § 203, comment e. (1981).
57. *Goldwasser v. United States*, 325 F.2d 722 (Ct. Cl. 1963).
58. 11 Williston on Contracts § 32:6 (4th ed.). *See also Shell Oil Co. v. United States*, 751 F.3d 1282, 1305 (Fed. Cir. 2014) (Reyna, J., dissenting).
59. 11 Williston on Contracts § 32:10 (4th ed.); *Bighorn Lumber Co. v. United States*, 49 Fed. Cl. 768, 771 (2001).
60. *ITT Defense Communications Div.*, ASBCA No. 44791, 98-1 BCA ¶ 29,590 citing 3 *Corbin on Contracts* § 552 (1960); See also, *Smelser v. United States*, 53 Fed. Cl. 530 (2002) and *Beard v. United States*, 125 Fed. Cl. 148 (2016).
61. *Appeal of Sommers Bldg. Co., Inc*., ASBCA No. 32232, 86-3 B.C.A. (CCH) ¶ 19223 (July 28, 1986). *See also Hensel Phelps Const. Co. v. United States*, 886 F.2d 1296, 1298 (Fed. Cir. 1989); *Franchi Const. Co. v. United States*, 609 F.2d 984, 990 (Ct. Cl. 1979).
62. *Apollo Sheet Metal, Inc. v. United States*, 44 Fed. Cl. 210, 214 (1999); and *Appeal of John C. Grimberg Co., Inc.*, PSBCA No. 1085, 83-2 B.C.A. (CCH) ¶ 16836 (June 21, 1983).
63. *Sperry Corp. v. United States*, 845 F.2d 965 (Fed. Cir. 1988).
64. *W. Bay Builders, Inc. v. United States*, 85 Fed. Cl. 1, 29 (2008).
65. *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965). *See also Marathon Oil Co. v. Kleppe*, 556 F.2d 982, 985 (10th Cir. 1977) (internal quotations omitted).
66. *Gardiner, Kamya & Assocs., P.C. v. Jackson*, 467 F.3d 1348 (Fed. Cir. 2006); *Dick Pacific/GHEMM, JV ex rel. W.A. Bottling Co. v. United States*, 87 Fed. Cl. 113, 126 (2009).
67. *Honeywell Inc. v. United States*, 661 F.2d 182, 186 (Ct. Cl. 1981).

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