The Patent Ambiguity Doctrine: Clarifying the Duty to Inquire

by Randall H. Wintory

A client who has been a contractor for many years calls with an urgent problem on a public construction project. The client is adamant that the owner is responsible for the defects in the plans and specifications. The owner disagrees that there are defects in the plans and specifications, but even if there are, they should have been obvious to the contractor, but the contractor failed to inquire about them before bidding. Has the owner unfairly rejected your client’s claim? That depends on the plans and specifications and whether the client satisfied his duty to inquire.

Contract documents for construction of a project are an imperfect form of communication. An architect or engineer attempts to translate the owner’s needs into plans and specifications, which a contractor must interpret to bid on and build the project. Unfortunately, the architect/engineer does not “guarantee a perfect plan or a satisfactory result.” Inevitably, the plans and specifications contain ambiguities, conflicts, defects, discrepancies, errors, or inconsistencies, which can create doubt or uncertainty as to the true requirements of the contract. This can occur even when a contract contains clauses to help interpret the contract and avoid ambiguities.

Under familiar rules of contract interpretation, where there is doubt about its meaning a contract may be construed against the owner as the provider of the documents (a.k.a. contra proferentem). Further, a contractor may be entitled to rely on the owner’s plans and specifications and not be responsible for any errors they may contain (a.k.a. the Spearin doctrine). These rules may make it appear as though the owner bears all of the risk for ambiguities in the plans and specifications.

But, does the contractor, who is the expert at bidding on and actually building the project, have a duty to inquire about any obvious ambiguities in the plans and specifications before submitting a bid?

The Patent Ambiguity Doctrine and the Duty to Inquire before Bidding: What the Duty is …

When there is an obvious or patent ambiguity in the plans and specifications that a reasonable contractor knew or should have known about, or if the contractor has any doubt or uncertainty as to the contract’s requirements, then the contractor has a duty to inquire to clarify the contract’s requirements before submitting a bid, no matter how reasonable the interpretation may be. This duty is known as the patent ambiguity doctrine. If the contractor fails to inquire, it cannot take advantage of the ambiguity, or rely on the contra proferentem rule or the Spearin doctrine. Instead, the contract will be construed against the contractor and any claims the contractor may have will be barred.

Virginia recognized long ago that a contractor has a duty to inquire before bidding on a contract if the contractor has any doubts or uncertainties after reviewing the plans and specifications. In Trinkle v. Commonwealth, a contractor bid on a state contract to build 1.3 miles of gravel road. According to the specifications, hauling gravel from a distance greater than one half mile was considered “overhaul.” The contractor knew before bidding that the state did not pay for overhaul, but did not know the location of the gravel pits. The contractor did not include the cost of overhaul in its bid because it assumed that...
gravel could be obtained along the right of way, so there would be no overhaul. The contractor learned after award that overhaul would be necessary and requested increased compensation for the overhaul. The state rejected the request because the contract did not indicate that gravel could be obtained along the right of way. If there were any doubts about the location of gravel, "the time to have taken this matter up would have been prior to bidding on the work." The court likewise concluded it could not allow the contractor’s claim, reasoning that,

If this were done it would place a premium on ignorance, carelessness or lack of diligence on the part of contractors, and encourage those who lose on projects to assert such claims as the one asserted here, and there would be no stability in a written contract and the Commonwealth of Virginia would be in a constant state of jeopardy. The contractor should thoroughly satisfy himself in detail as to the specifications and plans … and if there be any doubt as to the interpretation or construction there should be a clarification before bids are submitted and contracts executed.

The patent ambiguity doctrine has been expressly incorporated into the VDOT Road and Bridge Specifications since 1970 or earlier, and to greater or lesser degrees into other standard form contracts. Even though the doctrine is an established common law duty, incorporating it into standard contracts has generated some criticism. The chief complaint is that obligating the contractor to review the plans and specifications and inquire about any ambiguities found unfairly shifts the risk of design defects from the owner to the contractor contrary to the Spearin doctrine. The criticisms, however, overlook the fact that a contractual duty to inquire does not impose a new duty. Moreover, requiring contractors to inquire about patent ambiguities is beneficial to both contractors and owners, and is a proper allocation of the risk involved.

The Duty to Inquire Is a Form of Preventive Hygiene
The duty to inquire has been called “a major device of preventive hygiene,” because requiring contractors to seek clarification of the contract before bidding helps avoid post-award claims and costly litigation. The duty falls upon the contractors because public construction contracts are awarded by competitive sealed bidding where the contract is awarded to the lowest bidder. Unlike a negotiated contract, there is no opportunity for the owner and the contractor to engage in discussions about the contract and reach a mutual understanding about its requirements before being contractually bound. The owner also has no opportunity or obligation to verify before accepting the low bid that the contractor read and understands the plans and specifications. An ambiguity may cause the contractor to exclude costs it should have included. This may well result in the contractor being the low bidder, but it will likely lead to claims and litigation. The only opportunity to avoid these problems is for contractors to inquire before submitting a bid.

The patent ambiguity doctrine also makes the bidding process fair to all bidders. Fair and open competition for public contracts is the goal of a competitive procurement system. A duty to inquire helps provide a level playing field, ensuring to the greatest extent possible that all bidders bid upon the basis of the same plans and specifications. As one court explained,

An essential element of the bidding process is a common standard of competition. To that end, the conditions and specifications must apply equally to all prospective bidders, thus permitting the contractors to prepare their bids on the same basis. … It is to assure a level playing field that contractors are urged in bid documents to examine the documents thoroughly, make site visits, attend pre-bid conferences, and raise questions about the drawings, specifications and conditions of bidding and performing the work. To every possible extent, such questions should be addressed before bid opening.

---

**Fair and open competition for public contracts is the goal of a competitive procurement system.**

*Conner Bros v. United States* is an example of why the duty to inquire is necessary to avoid needless claims and litigation. *Conner* involved a federal construction contract to renovate an HVAC duct system. The existing ductwork was located in the narrow space above the existing
ceilings, which was filled with wires and pipes such that Conner and its subcontractor were unable to see the ductwork. Conner bid on the contract without inquiring about the above-ceiling conditions. After award, Conner found that connecting to the duct system would require far more cost than Conner had included in its bid, leading to claims and litigation.

Knowing the above-ceiling conditions was critical to properly preparing a bid. Conner’s inability to see those conditions was a glaring inconsistency that it had a duty to inquire about before submitting its bid. The court concluded

If the contractor fails to inquire before bidding, it will be barred from claiming that the omitted work is a change or extra.

that it would be contrary to the letter and intent of the law to hold the government responsible for the alleged extra work where Conner waited until after the contract was awarded to raise the issue of the above-ceiling conditions.

A contractor that knows or should know about a patent ambiguity, but fails to inquire about it, deprives the owner of an opportunity to correct the ambiguity and avoid the resulting claims and costs. In Modern Cont’l S. v. Fairfax County Water Authority, a dispute arose over whether the contract required extension stems or torque tubes as the operating mechanism for butterfly valves. MCS claimed that replacing extension stems already installed with torque tubes was extra work and demanded payment of the costs incurred.

Although MCS was aware of conflicts in the drawings, it never verified the details and never notified the Authority about the conflict before it began installing extension stems. MCS argued it had no duty to inquire because there was no conflict — torque tubes were not in the specifications. The contractor’s interpretation, however, was inconsistent with the contract. The drawings called for torque tubes and showed details consistent with torque tubes but inconsistent with extension stems. The requirements in the drawings were deemed to be included in the specifications.

MCS also argued it was not responsible for errors in the Authority’s plans under the Spearin doctrine, which prohibited shifting the risk of design errors to MCS. That argument failed though, because the contract required MCS to review the plans and specifications for errors or ambiguities and to clarify any found before beginning work. Had MCS inquired about the obvious conflict between the drawings and the specifications, the Authority would have had the opportunity to clarify the contract, thereby avoiding the resulting claims and litigation.

MCS’s claim was based on the very type of error or ambiguity that the contract’s duty to inquire was intended to avoid. Even though MCS knew about the obvious errors or ambiguities, it failed to inquire about them, resulting in needless claims and litigation, and defeating the whole purpose of the duty to inquire. Another important purpose of the duty to inquire is that it prevents contractors from taking advantage of a known or obvious ambiguity. This can occur when a contractor interprets the contract as omitting work that the contractor knows is necessary for completion of the project. This allows the contractor to submit a lower bid by leaving out the cost of the omitted work with the expectation that, if awarded the contract, the contractor can claim that the omitted work is a “change” or “extra” for which it should be paid additional compensation. Trinkle is an example of how this can occur. The duty to inquire is the simplest way to prevent this type of advantage. If the contractor fails to inquire before bidding, it will be barred from claiming that the omitted work is a change or extra.

Another way contractors may take advantage of a patent ambiguity is by manipulating their bid prices. In Dugan Construction Co., Inc. v. New Jersey Turnpike Authority, the contractor claimed $9.5 million for work that was actually worth approximately $50,000, based on an obvious error regarding the quantity of wastewater to be removed. The contract estimate was 55 gallons, but the actual quantity turned out to be more than 200,000 gallons. The contractor did not inquire about the obvious error, and bid $50/gallon to remove less costly non-hazardous wastewater, while only bidding $4/gallon to remove more costly hazardous wastewater. While the duty to inquire would bar the claim, the court opted to reform the contract to pay the contractor the actual cost of the work, which prevented the contractor from taking advantage of the patent error. The same result could be
achieved using contractual provisions that allow for adjustment of unit prices.

**… and What the Duty Is Not**

A contractual duty to inquire is not an attempt by owners to eliminate the Spearin doctrine. First, the duty to inquire has been the law in Virginia since at least 1938. Incorporating that existing law into standard form contracts does not impose a new or expanded duty on contractors.

Second, assuming the Spearin doctrine applies to the commonwealth’s contracts (although the Supreme Court of Virginia has not yet ruled that it does), as adopted in Virginia it stands for the proposition that a contractor who is required to follow the owner’s plans and specifications, which are defective or insufficient, will not be responsible to the owner for loss or damage caused solely by the plans and specifications. Provided there is no “negligence on the contractor’s part, or any express guarantee or warranty by him as to their being sufficient or free from defects.” Thus, the Spearin doctrine does not relieve a contractor from its negligence in interpreting the plans and specifications. While the contractor is not expected to have the knowledge and training of an architect or engineer, the contractor is still an expert in its own right. The contractor is responsible for understanding the complexity, difficulties and requirements of the contract it is bidding on. Consequently, the contractor has a duty to review the plans and specifications with the care and skill of a reasonably prudent contractor, and to inquire about any obvious, patent ambiguities prior to bidding.

The patent ambiguity doctrine is not in conflict with Spearin doctrine in another respect. The duty to inquire only shifts the risk of patent ambiguities to the contractor. Contractors are not required to “ferret out” latent errors or ambiguities, or to eliminate every possible ambiguity prior to bidding.

**How Does A Contractor Satisfy Its Duty To Inquire?**

Contractors can easily satisfy their duty to inquire by following the Supreme Court of Virginia’s advice in Trinkle: contractors should thoroughly satisfy themselves as to the plans and specifications and, if there is any doubt as to their interpretation or requirements, there should be a clarification before bids are submitted. Contractors should not assume their interpretation is correct, particularly when the potential cost is significant. Certainly, contractors must not seek to take advantage of a perceived error. A project is unlikely to end well when a contractor is the low bidder because it underbid the job based on a misinterpretation of the plans and specifications, or planned on claiming that work required under the contract is a change or extra.

Contractors have ample opportunities to submit questions to the owner before submitting a bid. Questions can be submitted at pre-bid meetings that owners typically hold, via fax as instructed in the invitation for bids, or online for VDOT contracts.

As for the hypothetical client, the contractor is the architect of its own fate (forgive the cliche). If the ambiguity was obvious, but the contractor failed to inquire about it before bidding, then the contract should be construed against the contractor.

**Endnotes:**

The views expressed in this article are the author’s and should not be taken as the views of the Office of the Attorney General.

2. For the sake of brevity, these terms will all be referred to collectively as ambiguities. But note: the patent ambiguity doctrine is applied where there is an ambiguity, as well as where there are conflicts, discrepancies, inconsistencies, errors, omissions, or other differing interpretations of the contract. Phillip L. Bruner and Patrick J. O’Connor Jr., “Bruner and O’Connor on Construction Law” §§ 3:23, 6:29 (2002).
3. For example, order of precedence clauses dictate which parts of the contract take precedence over other parts; or complimentary clauses provide that requirements in one part of the contract are deemed to be required in all parts.
6. Triax Pac. v. West, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997).
7. Triax, 130 F.3d at 1474-75. For a thorough review of the patent ambiguity doctrine in federal construction cases, see “Government Contracts: Law, Administration & Procedures” § 2.170 (Walter Wilson, gen. ed., Matthew Bender 2012); and
THE PATENT AMBIGUITY DOCTRINE


8 Triax, 130 F.3d at 1474-75; Beacon Constr. Co. v. United States, 161 Ct. Cl. 1, 6-7, 314 F.2d 501, 504 (Ct. Cl. 1963); PCL Constr. Servs., Inc. v. United States, 47 Fed. Cl. 745, 785-86 (Fed. Cl. 2000).

9 Id.

10 170 Va. 429,196 S.E. 652 (1938).

11 Id. at 433, 196 S.E. at 654.

12 Id.

13 Id. at 438-39, 196 S.E. at 656.

14 "VDOT Road and Bridge Specifications" (1938) § 105.04 ("The Contractor shall take no advantage of any apparent error or omission in the plans and specifications but the Engineer shall be permitted to make such corrections and interpretations as may be deemed necessary …"); "VDOT Road and Bridge Specifications" (1970) §§ 102.04 ¶ 3 ("If any person … contemplating the submission of a proposal for this contract is in doubt as to the true meaning of any part of the plans, specifications, or other contract documents, he may submit to the Contract Engineer a written request for an interpretation thereof."); 105.04, ¶ 2 ("The Contractor shall take no advantage of any apparent error or omission in the plans or specifications, he shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the plans and specifications."); and "VDOT Road and Bridge Specifications" (2007) §§ 102.04(c), 105.12.

15 AIA A201 (1997 and 2007) § 3.2; ConsensusDocs 200 (2007) §§ 3.1.2, 3.3 and 14.2.2; EJCDC C-410 (2002) § 3.01(A), (F)-(J); Commonwealth’s Form CO-7A § 2 (Instructions to Bidders) and Form CO-7 § 23(b) (General Conditions).


17 Beacon, 161 Ct. Cl. at 6-7, 314 F.2d at 504; PCL, 47 Fed.Cl. at 786; S.O.G. of Arkansas v. United States, 212 Ct. Cl. 125, 131, 546 F.2d 367, 370-71 (Ct. Cl. 1976).


20 Va. Code § 2.2-4300; Triax, 130 F.3d at 1475; and see Trinkle, 170 Va. at 438-39, 196 S.E. at 656.

21 PCL, 47 Fed. Cl. at 786.

22 D’annunzio Brothers, Inc., v. New Jersey Transit Corp.,245 N.J. Super. 527, 532-33, 586 A.2d 301, 304 (N.J. Super. Ct. App. Div. 1991) (citations omitted) (contractor’s claim barred where before bidding contractor discovered a discrepancy in bid documents, but did not clarify the meaning of the contract, and interpreted the contract to require a unit price for excavation and backfill in connection with installing concrete structures, which was wildly inconsistent with the estimated quantity of such work, when the true intent was that excavation and backfill were to be included in the unit price of installing concrete structures).

23 65 Fed.Cl. 657 (Fed.Cl. 2005).

24 Id., at 676-78, 683-86.

25 Id., 65 Fed.Cl. at 676.

26 Modern Cont’l South v. Fairfax Cnty. Water Auth., 70 Va. Cir. 172 (Fairfax Cir.Ct., Feb. 9, 2006) ("MCS I") (resolving conflict in contract against contractor where contractor failed to verify details or notify owner of conflict); and Modern Cont’l S. v. Fairfax Cnty. Water Auth., 72 Va. Cir. 268 (Fairfax Cir.Ct., Nov. 21, 2006) ("MCS II") (motion for reconsideration addressing Spearin argument). Note: These cases address MCS’s contractual duty to inquire before beginning work rather than before bidding. However, much of the court’s analysis is equally applicable to the duty to inquire pre-bid.

27 MCS I, 70 Va. Cir. at 182.

28 MCS II, 72 Va. Cir. at 269.

29 Id.

30 Id. at 271-72 ("MCS at least implicitly warranted to the Authority that the drawings that MCS was contractually obligated to review for defects or ambiguities, were, in fact free from any such infirmities").

31 MCS I, 70 Va. Cir. at 184-85; MCS II, 72 Va. Cir. at 272.

32 MCS II, 72 Va. Cir. at 272.

33 S.O.G., 212 Ct. Cl. at 131,546 F.2d at 370-71.

34 Supra note 10. See also J.H. Berra Construction Co., Inc. v Missouri Highway & Trans. Comm’n, 14 S.W.3d 276, 281-82 (Mo. App. 2000) ($1 million claim for the cost of overhaul barred where contractor did not include the cost in its bid based on its assumption that the owner would pay for overhaul via a change order at additional cost, despite knowing before bidding that the owner did not pay for overhaul as a separate item — the cost had to be included in the bid); and Seal and Co., Inc. v. WMATA, 768 F. Supp. 1150, 1160-61 (E.D. Va. 1991) (low bidder’s bid rejected as non-responsive based on its failure to include a signed Buy America certificate with its bid, which would have allowed the bidder to manipulate the amount of its bid).

35 This is known as unbalanced bidding. Victory Const. Co., Inc. v. United States, 206 Ct. Cl. 274, 287, 510 F.2d 1379, 1387 (Ct. Cl. 1975) (defining
an unbalanced bid as “one in which the contractor allocates a disproportionate share of indirect costs and anticipated profit to the unit prices bid for those items on which he anticipates an overrun; the object being to reap overgenerous profits should the anticipated overruns materialize.”).


37 Id. at 239-242, 941 A.2d at 627-30.

38 Id.


40 MCS II, 72 Va. Cir. at 270-71, quoting Greater Richmond, 200 Va. at 595, 106 S.E.2d at 597 (emphasis omitted).

41 See MCS II, 72 Va. Cir. at 272 (rejecting contractor’s Spearin argument where contractor misinterpreted plans and specifications).


43 PCL, 47 Fed.Ci. at 799-800.

44 Conner, 65 Fed.Ci. at 683-86; see also MCS II, 72 Va. Cir. at 269-72 (Spearin doctrine did not relieve contractor of duty to verify the plans and clarify the apparent error); Kiska Constr. Corp., U.S.A. v. Washington Metro. Area Transit Auth., 321 F.3d 1151, 1162-64 (D.C. Cir., 2003) (relying on Spearin, contractor argued that WMATA impliedly warranted that the specified dewatering system would lower the groundwater table to the required level, which the court rejected because an ambiguity in dewatering requirements was sufficiently obvious that contractor should have inquired as to the true meaning of the contract and by failing to do so assumed the risk of an adverse interpretation).

45 Bruner and O’Connor on Construction Law § 3:23.


47 Beacon, 161 Ct. Cl. at 7.

48 See, e.g., D.C. McClain, Inc. v. Arlington, 249 Va. 131, 452 S.E.2d 659 (1995) (contractor terminated after failing to complete a bridge where prior to bidding the contractor failed to obtain an easement it knew it needed, failed to include the cost of the easement in its bid, and failed to inform the owner of either issue).