

## **BIDDING: ASSUME AT YOUR PERIL**

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We are often confronted with questions from contractors regarding ambiguities discovered in plans and specifications during construction. Most project management personnel are well versed in the general adage that an ambiguous contract will be resolved against the party who drafted it. However, disappointment quickly sets in when they learn that the rule is one of last resort and courts apply it only after several other rules aimed at resolving ambiguities prove unsuccessful. Furthermore, as a recent case in New York demonstrates, even when the rule applies, there is a significant caveat - the ambiguity must be a latent one and not one the contractor knew or should have known about when it bid the project.

*L&L Painting Co., Inc. v. Contract Resolution Board of the City of New York, 68 A.D.3d 594 (N.Y. App. Div. 2009)* involved a contract between the New York City Department of Transportation (“DOT”) and a bridge painting contractor for removal of lead-based paint from the Queensboro (59<sup>th</sup> Street) Bridge in New York City, which carries ten lanes over the East River - four on the upper deck and six on the lower.

The dispute arose from conflicting interpretations of a drawing that depicted a temporary protective scaffolding platform the contractor was required to build over the roadways to protect the travelling public from the contractor’s operations. The drawing, which was identified as “Sheet 26R,” consisted of a cross section of the bridge and several numbered plan notes. Note 5, which addressed the temporary platform, stated as follows: “Minimum vertical clearance of 14 feet shall be maintained above all roadways.” The only references in the cross section drawing to Note 5, however, were two lines that pointed solely to the two upper lanes and the four inner lanes on the lower deck, which were separated from the two outer lanes by structural steel columns. In addition, even though the two outer lanes on the lower deck were shown in the cross section as being 18 inches higher than the four inner lanes, the drawing depicted the temporary platform as a straight horizontal plane extending over all six lanes.

When the contractor submitted its shop drawings for the lower deck platform, the DOT rejected them because although clearance was adequate over the middle four lanes, it was less than 14 feet over the outer lanes. The contractor gave notice of its intent to file a claim and made the necessary revisions to yield 14 feet of clearance on the outer lanes. This work was significantly more costly because,

among other things, it involved relocating existing power cables on the bridge.

In its claim and presentation to the Contract Dispute Resolution Board of the City of New York (“CDRB”), the contractor argued the following:

*The elevation of the inner roadway and the outer roadway are significantly different. If the elevation of the platform is maintained and the elevation of the roadway is different, it is impossible to maintain the same clearance. This is an ambiguity in the contract documents.*

This ambiguity, the contractor argued, should be construed against the DOT as the party who drafted the language. When the DOT and the CDRB rejected the claim, the contractor appealed.

The Supreme Court of New York, Appellate Division agreed that an ambiguity existed, but it ruled against the contractor. First, the court noted that the real ambiguity was between the language of Note 5, which required the 14-foot clearance on **all** roadways, and the cross section drawing, which, by virtue of the two arrows, indicated that Note 5 applied solely to the upper lanes and insider lower lanes. Second, however, it determined that the ambiguity was a patent one and thus should have been obvious to all bidders. Because the contractor failed to seek a pre-bid clarification, the court ruled that the contractor assumed the risk that its own interpretation was the correct one.

A patent ambiguity is one that appears on the face of a document and arises from the language (or depiction) itself. A latent ambiguity, on the other hand, does not readily appear in the language (or depiction), but instead arises from a collateral matter or scenario against which the language is applied. Although admittedly, owners’ responses to pre-bid clarification requests are often unhelpful, contractors are best served by seeking clarification to obvious ambiguities in writing. Otherwise, they assume at their peril.

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