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CONTRACT MANAGEMENT

CONTRACT HERMENEUTICS

by Thomas G. Reid, CPCM

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NATIONAL CONTRACT MANAGEMENT ASSOCIATION

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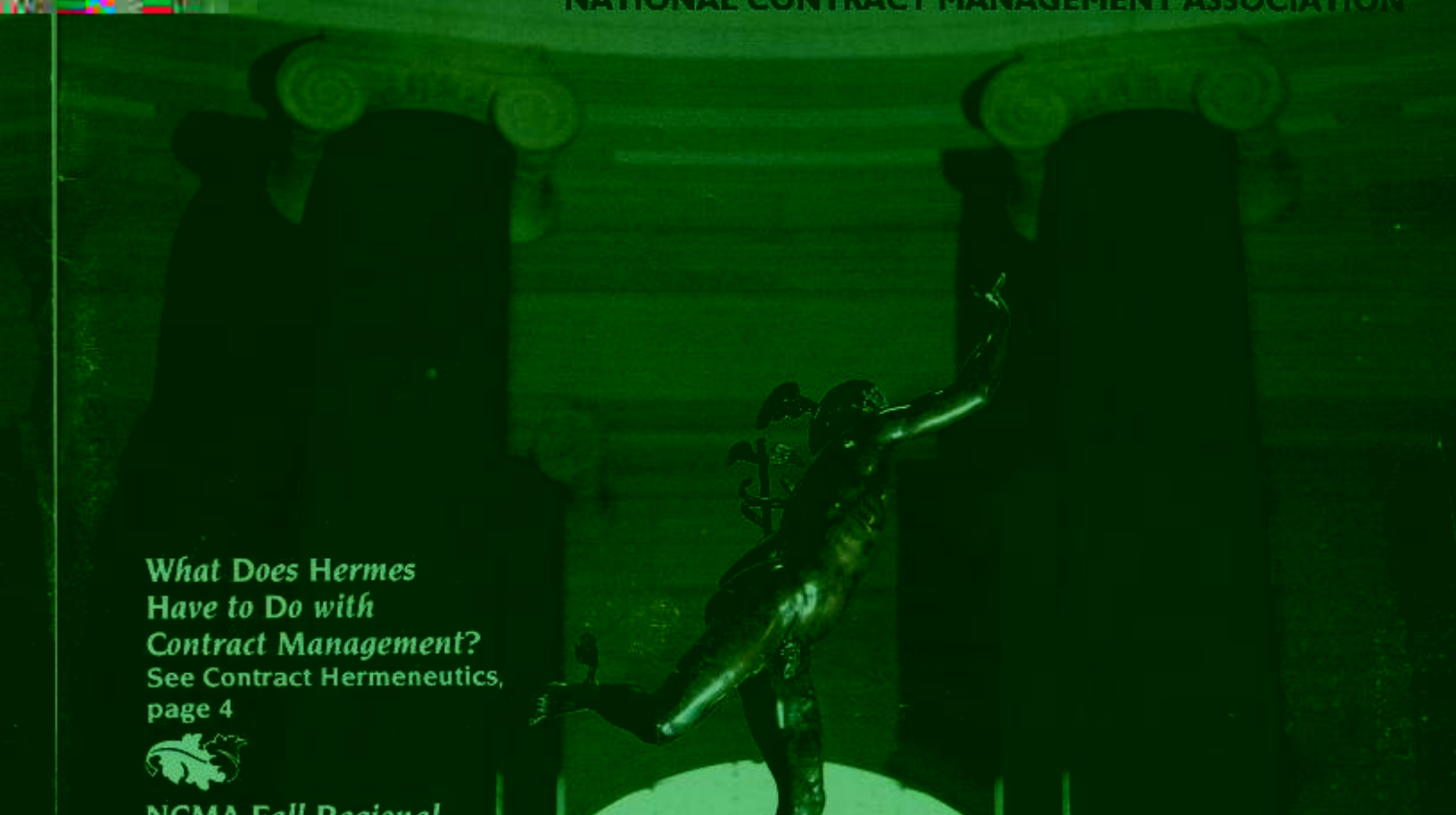

What Does Hermes Have to Do with Contract Management?
See Contract Hermeneutics, page 4

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Following is a list of 10 rules to use in the proper interpretation of contracts.

(1) A contract must be read in its entirety. All parts of the contract document must have meaning and be consistent with other parts of the contract. No word in a contract should be dismissed or treated as a redundancy or as meaningless if it has meaning that is reasonable and consistent with other parts [illegible] terms that directly contradict each other demonstrate only that there is no meeting of the minds. Where it is possible to interpret a portion of a contract to be consistent with other parts of a contract, however, that interpretation will be preferred.

At one extreme are contracts that say too little. Under the Uniform Commercial Code, many clauses can be read into certain contracts. Some international contracts can have clauses read into them due to existing treaties. Generally speaking, it is unwise to rely on the inclusion of clauses not specifically agreed to by all parties. In such cases, lawyers are usually hired to fill in the blanks after the fact.

At the other extreme are contracts that say too much. Government contracts often fall into this category due to their many required clauses. Such

ermeneutics is a discipline all contract specialists practice, but you probably don't know it by that name. Hermes e messenger of the gods in Greek logy. Part of Hermes' responsi- was to interpret the will of the thus, *hermeneutics* deals with of conveying a message that has ng.

mally defined, hermeneutics is udy of the methodological prin- of interpretation. It can also be d as the art or science of con- ion and interpretation. This arti- actually about contract interpre- If that were the title, however, you have read on?

vritings are subject to hermeneu- nce any written document can be misinterpreted. Every discipline has its own set of interpretation principles to safeguard against misinterpretation. For example, the rules that govern the interpretation of the Bible, Shakespeare's plays, or medieval poetry all have their own unique principles. Hermeneutics establishes rules and guidelines for interpretation. It is a technical, complex, and well-developed science.

Certain literary techniques are inappropriate for contracts: creativity is not encouraged; hyperbole and metaphor are strongly discouraged; allegory is strictly prohibited. Since these literary devices are not used in our profession, what is a conscientious contract specialist to do?

Certain rules of construction and interpretation apply to contracts, just like any other group of writings. Some of these rules are unique to contracts.

inclusion is often considered harmless because the offending clause will be "self-deleting," but such an argument violates this first rule of contract hermeneutics.

(2) There is always an order of precedence. Many contracts have a specific Order of Precedence clause that is generally enforced. Some have a boilerplate Order of Precedence clause that lists parts of the contract that do not exist or refers to them by names other than those assigned under the contract. (See rule three.)

Absent a specific clause, two general principles will apply. First, precedence will be given to the specific over the general. The reasoning for this was accurately stated by Professor Arthur L. Corbin in his multivolume treatise, *Corbin on Contracts*: "The concrete is more readily understandable than the abstract and more likely to be accurately expressed." For example, if a contract states that its purpose is to paint the widget to resist the weather, and the specification requires that the surface be sanded with light paper and receive one coat of primer and three coats of gloss finish, the detailed specific requirement will control over the general.

Note also that using rule one, the two provisions will be read to be consistent with each other; i.e., applying the paint as specified will result in an article that resists the weather. If the contractor has reason to know that the painting process described will not result in a weather-resistant finish, rule three will apply concerning ambiguities. If the contractor does not have reason to know that such painting is inadequate, and it turns out that it is inadequate, rule 10 will apply. As can be seen, even among these rules there is an order of precedence.

The second principle in rule two is that parts of a contract drafted subsequently take precedence over those drafted previously. This applies, for example, to situations where unique clauses are added to preexisting boilerplate. In general, pen and ink changes will take precedence over typed provisions, which take precedence over preprinted clauses. It also applies to later contract amendments. There is a presumption that the parties know what is already in the contract and that later drafted portions, which reflect a refinement of the thought process that led to the earlier language, should therefore take precedence.

(3) Where an ambiguity is obvious to the reader, certain duties arise. Where patent ambiguities exist, the reader is obligated to inquire. Neither party to a contract can capitalize on a deal that is just too good to be true. In the competitive contracting arena, ambiguities can also result in all bidders not playing on a level field. Consequently, inquiries are mandatory when terms directly contradict each other and thus give rise to a patent ambiguity or when a clear omission results in a patent ambiguity.

(4) Words that have an accepted meaning in customary trade usage will be given that meaning. When parties contract for a Beta software product, for example, the automatic data processing (ADP) industry knows that the product is not commercial off-the-shelf, but is a software product that has reached a point of field testing. It is critical to understand the industry's jargon. You must be able to communicate effectively not only with your technical people, but with the other party to your contract as well. Each discipline has a unique language. Construction, ADP, and architect and engineering are three common examples that, because they are unique, require separate purchasing activities to handle them.

This rule can also be applied to show that contract language that appears clear can actually have a completely different meaning. For example, a two-by-four piece of lumber is not two inches by four inches; it actually measures one and one-half inches by three and one-half inches. The difference can be critical. Care must also be exercised when contracting in various locations since trade usage can vary greatly from place to place. This is particularly true in international contracting.

(5) If the parties to a contract have a course of dealing where words used are given a specific meaning, that course of dealing will control the meaning given to those words. This is sometimes referred to as a process of practical interpretation and application. The given definition may not violate the

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rule of plain meaning (see rule seven) to the degree that the parties have agreed through their actions to acceptable standards of performance, but one of the parties will not be given the right to substantially alter that standard. The course of dealing rule will control.

One party will not be permitted to unilaterally establish a course of dealing. The other party's concurrence must be established by express assent, by acting in accordance with it, by accepting performance without objection, or by saying nothing when it is obvious that the first party is acting in reliance on the course of dealing. Many poorly informed contracting officers have been "deemed" to be aware of a contractor's performance and thus bound by an established course of dealing.

(6) As applied to contract interpretation, the agreement shall be fully set forth within the four corners of the document. This is known as the parol evidence rule. It is not, as its name implies, a rule of evidence — it is a substantive rule of law. To the degree that there might be an ambiguity or gap in the contract, external oral testimony (or evidence) will be considered in determining the parties' intent. Conversely, if there is no ambiguity, oral testimony of what one (or more) party intended will not be considered in determining (or contradicting) the meaning of the contract as written. This has great practical use to contract specialists who in any dispute settlement need to know what the court or board will consider in interpreting a contract. This rule will generally preclude either party from arguing that some side agreement alters the written contract terms.

(7) The intent of any contract clause will be determined in accordance with the normal rules of grammar, speech, syntax, and context. This is the plain meaning rule, also known as the *sensus literalis rule*. A horse is a horse unless it was developed by a committee, in which case it is a camel. In a contract, one party cannot act like Humpty Dumpty in Lewis Carroll's *Through the Looking Glass* and claim that a word that has a plain meaning in everyday usage in fact means something completely different when used by the contracting parties. This rule is a cousin to the trade usage rule (rule four), differing in that no particular expertise is required except a reasonable command of English. It does not generally apply to technical jargon.

(8) When you use the same words to describe something or to state a point, you mean precisely the same thing. Conversely, if you use different words, you intended to convey a different thought. This rule of sameness has wreaked havoc on many unsuspecting contract drafters. In contracts, creativity does not count. Many people fault lawyers for being "picky" about language. Very often it is the unfortunate consequences of this rule for which precision of language is sought.

Suppose you are leasing a hangar, an office area, and an outside apron area that includes some tie-down points. You begin by saying that you are leasing the described "facility," the main piece of which is the hangar. In a later clause you state, "Lessee shall be responsible for maintaining the hangar." Is the lessee responsible for maintaining the office area? Probably not. While the drafter may have intended the word "hangar" to mean the entire facility and in normal conversation would have referred to the facility as "the hangar," using different words in the contract indicates that different meanings are intended. If you mean the same thing, say the same thing. It makes for dry reading, but the intent cannot later be challenged.

(9) Any list of examples shall accurately represent the full spectrum of items to be included (ejusdem generis). A presumption arises that any list of examples will include all the common salient characteristics on the list. One way to remember this is to call it the "birds of a feather" rule. Take, for example, a rule that "cars and trucks are prohibited on the beach." Can you take your motorcycle on the beach? Probably not since, like the other items on the list, it is a motorized wheeled vehicle. Can you take your horse on the beach? Probably yes. A horse is a means of transportation, but it is not a motorized

(continued on page 51)

Ten Rules of Contract Hermeneutics

(1) **A contract is read in its entirety.** All parts of a contract have meaning.

(2) **Order of precedence.** Absent a specific Order of Precedence clause, specific and later drafted clauses have priority.

(3) **Patent ambiguities must be clarified.** Clear errors give rise to a duty to inquire.

(4) **Trade and custom usage.** Technical jargon will be given its accepted technical meaning.

(5) **Course of dealing.** Past dealings of the parties will determine interpretive intent.

(6) **Parol evidence.** Absent an ambiguity or an obvious gap, external oral testimony cannot alter the agreement.

(7) **Plain meaning.** Basic English and rules of grammar and construction will have plain, clear, accepted meaning.

(8) **Sameness.** If you mean the same thing, say the same thing.

(9) **Ejusdem generis.** Lists will be interpreted to include only like items.

(10) **Contra preferentem.** Ambiguous provisions will be construed against the drafter.

(continued from page 6)

wheeled vehicle.

A corollary to this rule in Latin is *expressio unius est exclusio alterius*, which loosely translated means "to express one is to exclude all others." If, for example, your contract calls for the furnishing of hardware, software, and maintenance, but the invoice provision says, "Invoices for maintenance must be submitted in triplicate," must invoices for hardware or software also be submitted in triplicate? This rule would say no. The clause could have been drafted to include all three, but it was not. The presumption is, therefore, that by expressing only one you have implicitly excluded the other two.

(10) If a contract provision is deemed ambiguous, the ambiguity will be construed against the party that drafted the offending provision (contra preferentem). The rule is not always simple to apply. Although the government is generally presumed to have drafted its contracts, in practice the contractor often proposes much of the language.

Sometimes language is adopted by consensus during negotiation simply because it worked before. Unfortunately, the language might later be discovered to be ambiguous as presently applied, and it will not always be clear who the drafter was. The courts and boards will not go out of their way to find an ambiguity, but if there are at least two reasonable interpretations after application of the other nine rules, and if the nondrafting party has given reasonable meaning to an ambiguous provision, the nondrafting party's interpretation will prevail.

Conclusion

In Shakespeare's *Hamlet*, Polonius discovers Hamlet reading a book. "What do you read, my lord?" he asks. Hamlet's simple reply — "Words, words, words." In contracting, words are how we specify our needs and create the necessary "meeting of the minds" between or among the parties. You can see how important it is to select your words carefully and to interpret the words of others. The above is not an exhaustive list, but using these 10 rules will increase the quality of your work and the professionalism of our field. ■

ABOUT THE AUTHOR

Thomas G. Reid, CPCM, is associate general counsel, Martin Marietta Data Systems. He is NCMA's functional director for Liaison with the Federal Bar Association, serves on the Education/Certification Policy Review Board, and is a member and past president of the Mardi Gras (LA) Chapter.