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HOW COURTS DETERMINE THE MEANING OF EVERY DAY WORDS IN RESOLVING CONSTRUCTION DISPUTES

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I. INTRODUCTION.

Sometimes the resolution of a legal dispute will hinge on the meaning of a specific word or phrase in a bid document or contract.

Massachusetts has a statute defining how words in a statute are to be interpreted. This is contained within M.G.L.A. 4 § 6. Rules for construction of statutes:

". . . . Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."

Most legal interpretations of every day words occur in court decisions. From our files, a certain covenant not to compete case related to a signed employment contract hinged on the meaning of the words 'solely coded'. From a Veterans Administration Board of Contract Appeals case we handled some years back, the resolution of a significant equitable adjustment hinged on the meaning of the words 'completely fill'. More on that one later.

This *Squib* reviews a decision by a United States Civilian Board of Contract Appeals evaluating a seven figure claim by an electrical subcontractor which depended on what is the meaning of the word 'new'.

II. WHAT IS A 'NEW' GENERATOR?

This is the United States Civilian Board of Contract Appeals decision in the case of Reliable Contracting Group, LLC v. Department of Veterans Affairs, an administrative proceeding, which was subsequently appealed to the Court of Appeals within the Federal court system.

A certain project for a VA facility in Miami, Florida required the replacement of a variety of generators. Generators were supplied and installed but a question arose as to whether or not the generators were 'new'.

A provision in the General Conditions in paragraph 1.47(a) required that: "All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended."

There was a provision in the 'ENGINE GENERATORS' contract section providing in 1.3 QUALITY ASSURANCE that: "E. Factory Test: The Government shall have the option of witnessing the following tests at the factory . . . 1. Load Test . . .2. Quick Start Test . . ."

This being a federal project, there are provisions in the Federal Acquisition Regulations (FAR) in 48 C.F.R. s. 52.211-5 MATERIAL REQUIREMENTS defining the words 'new' and 'reconditioned':

"*New* means composed of previously unused components, whether manufactured from virgin material, recovered material in the form of raw material, or materials and by products generated from, and reused within, an original manufacturing process; provided that the supplies meet contract requirements, including but not limited to, performance, reliability and life expectancy . . .

"*Reconditioned* means restored to the original normal operating condition by readjustments and material replacement."

Evidence concerning the condition of the generators as supplied and how they were tested and who watched the tests was, as is usually is the case, conflicting.

The electrical subcontractor (Fisk) had purchased the generators from a supplier (DTE) which had purchased these generators from DSA. DSA stated that these generators had been sold to another company who took delivery of them but never installed or started the units, They sat in place for four years uninstalled/unused until they were picked up for this project. So, the generators came from a third tier material supplier. But, since these generators were obtained from another company, essentially, they were supplied by a fourth tier material supplier. The current supplier stated that the generators only had a few test hours on them and they would come with a full warranty.

The VA contended that the two generators which were delivered were "not only used but also abused." Inspecting them when they were delivered to the site, they stated that they showed "a lot of wear and tear including field burns to enlarge mounting holes." The VA also contended that because these generators had previous ownership, that made them 'used'.

Fisk got a factory representative to view the generators and examine their history from the control panels, the units being reported to be in "good condition", the two generators control panels showing respectively: start hours (7 and 12); engine hours (3 and 2); control hours (9 and 4) and kilowatt hours (2071 and 2251). Based on this information, Fisk concluded that "(t)he readings indicate that the generators appear to only have been in test and start up condition." Yet, in other correspondence, Fisk stated that "the generators appear to have been inadequately stored."

Ultimately, as the VA would not accept the generators tendered and installed, Fisk obtained new generators and then submitted a claim through the general contractor (Reliable) for $1,100,623 for the additional costs incurred by Fisk due to VA direction that the generators be replaced.

The VA denied the claim. Reliable appealed to the United States Civilian Board of Contract Appeals.

The Board denied the appeal. In its discussion, it said that for the generators to be 'new', they had to be capable of being tested at the factory. These generators, being in storage for four years off site, could not be factory tested and did not meet, therefore, the requirement of being "new".

At this point, the claim was appealed to the Federal Court of Appeals.

The Court referenced a Fisk letter to DTE stating that "(m)y foreman noted that the units were in 'BAD CONDITION' and proceeded to install the units." Reliable had written to Fisk stating "(a)s we discussed with you, the equipment on site is clearly unacceptable by anyone's standards."

The Court referenced that the Board had found that with the generators having left the factory in 2000, they were incapable of being factory tested in 2004 and were not, therefore, 'new'.

The Court did not find this VA argument persuasive because of the fact that the VA had never contemporaneously made that argument that they were non-conforming because they were incapable of being factory tested. Secondly, the Court stated that while the contract required that the generators be capable of being tested, the contract did not expressly require testing to be done at the factory or at the time the generators were manufactured.

Against Reliable's arguments, the Court stated that the mere fact that the generators were not 'used' does not make them 'new'. The Court said that "dictionaries do not define "new" as simply being the opposite of "used" ". The Court said further:

> "Because "new," as used in s. 1.47, is not defined by the contract and there is no single plain meaning of the word "new" it is ambiguous. It is therefore appropriate to look both to the definitions of "new" and to industry definitions, standards and practices."

The Court gave some definitions:

> "New could require that the generators be recently manufactured. This has some support in the dictionaries. See Black's Law Dictionary1204 (10th ed.2014) ("recently come into being"); Webster's Third New International Dictionary 1522 (2002) ("having existed or having been made but a short time; having originated or occurred lately."). . . .

> "New" could require a fresh condition. Dictionary definitions support this interpretation. See Webster's Third New International Dictionary 1522 (2002) (defining "new" to mean: "usu(ally) of superior quality;" "(f)reshness);" "(f) resh in in this connection applied to what is new and still retaining a first liveliness, energy, virginal quality, and so on").

The Court said that there was conflicting evidence as to the extent of the damage to the generators by their not being used and in storage for four years. The Court further said: "In light of the conflicting evidence and lack of fact-finding by the Board on this issue, we remand for the Board to determine whether the damage to the generators during the four-year period between the original manufacture and the date of delivery to the VA site was significant enough to render the generators not "new." " (**ED**: 'remand' means that the case was sent back to the Board to make further determinations and rulings along the lines required by the Court decision.)

III. WHAT DO THE WORDS "COMPLETELY FILL" MEAN?

This was the question before the Veterans Administration's Board of Contract Appeals with regard to a case we handled some years ago. (For those not familiar with 'boards of contract appeals', many federal agencies offer an administrative forum for the resolution of disputes, which is somewhat simpler and usually cheaper than suing the United States in a federal district court.)

The VA built a new laundry to service one of their hospitals. This laundry had several large boilers and four underground oil tanks to service them. I represented the plumber. Towards commissioning, the VA instructed the plumber to fill the four thirty thousand gallon underground oil tanks. This was during a time period when petroleum prices were seriously increasing, if not sky-rocketing. The bid document contained language to the effect that the plumber was to "completely fill" all underground oil tanks.

My guy told the VA to back its trucks up to the tanks and then he would attach the hoses to the tanks and 'completely fill' these various tanks. The VA, shall we say, took a dim view of this bid document interpretation! Making a longer story short, the plumber ultimately did supply the oil for the tanks and then promptly submitted a claim for the value of the oil, which was about eighty thousand dollars, plus or minus, a much bigger sum then than it is today. The VA denied the claim and we appealed the matter to the VA Board of Contract Appeals.

We had a two-fold approach to the claim.

First, the plumbing portion of the bid documents in more than one hundred instances used the words 'furnish' or 'provide' when it was clear that the government expected the plumber to supply actual materials and products. Therefore, given that context, what did 'completely fill' mean? There was nothing in the bid document specifically indicating that the plumber had to either 'furnish' the oil or 'provide' the oil. Since the specification was clear in more than one hundred other instances when it expected the plumber to *buy* or *pay for* some material or product, if that were the intention here, then why didn't the bid document specifically say so?

Secondly, we contacted other plumbers – the plumber's competitors - who had bid this job and asked them if they had carried oil as part of their bid. Two of them said that they hadn't. One of them seemed almost eager to testify, saying something to the effect that 'we shouldn't let them get away with this'. For, that plumber could see that this could have just as easily been him forced to dig deep into his pocket to pay for something he hadn't figured into its bid. Both of these subcontractors testified as our first two witnesses.

The combination of these two approaches was successful and we recovered 100% of the claim. We were told some years later after the Government lawyer was appointed judge that this had been the only case this lawyer had ever lost, at least up to that point in time.

This story supports a contention from one of my large, union plumbers when he said to me almost excitedly during a meeting reviewing a matter: 'when you go to court, you can never tell what is going to happen'! My being several years into the law business, this statement has been proved in case after case I have tried or handled. I've won cases I expected I'd probably lose – such as the 'completely fill' case – and lose cases I expected to win. I've found this to be particularly true with Massachusetts public bid protests.

(Incidentally, Black's Law Dictionary's definition of 'fill' wouldn't have helped either side to this dispute, defining the word to mean: "dirt, sand, rock, or similar material dumped into wetlands, a ravine, or some other depression in the earth.")

IV. CONCLUSION.

Our sometimes friend Earl discovered his local library quite by accident and only because it was next door to a bar he often frequented. Having discovered there dictionaries, he has half worn out his right index finger thumbing through dictionaries looking up the meaning of certain words found in contracts and in bid documents.

In some potential claim situations your company may be involved with, a factor in the resolution of that situation might depend on what the meaning is of a certain word or phrase. Note, we are not talking about most legal words or phrases. We're simply discussing the meaning of an everyday word like 'new' or an everyday phrase such as 'completely fill'.

Sometimes, statutes and court cases from your jurisdiction may define what a specific word means. One well-used legal research system uses/used to have a book with the title of 'words and phrases' designed precisely to deal with such issues.

For the meaning of both legal terms and common words used in a legal context, lawyers and judges frequently refer to Black's Law Dictionary. This book is on sale at Amazon.com as this is written for the price of $73.95, which might be some of the best value you have ever gotten from such a small amount of money.

The learning, then, from this case. There are any number of factors one evaluates in determining how far to push a dispute. Should one settle for short or no money? Start a case with the idea of dropping it if it does not lead to a settlement within a certain period of time? Or, get in the litigation car and fasten your seatbelt, as this may be a rather *long* ride!

Those familiar with our website and with some of our writings in the 'Construction Article' section or with our *Squibs* know that we try to assist people in developing business systems (i.e. good daily reports) that will assist them should any particular job result in a dispute that is not going to go away quickly. Therein we also discuss some of the substantive law dealing with the subject matter of many disputes, which will hopefully help people and companies in evaluating the strength of their chances in either pursuing a claim or in defending against a claim.

It may be that the claim situation you are involved with depends heavily on the meaning of a specific word. You can ask your attorney whether there are any statutory or court case definitions for that word in your state. Such definitions would be first looked at by any court considering the meaning of a word. But, where there are no statutory or court case definitions for a key word, this may be the time to pull out good dictionaries to see how they define that word, understanding that most courts will consult with Black's Law Dictionary ahead of every day non-legal dictionaries Your being able to look up meanings from that very same dictionary that the judge will use before you get too heavily-invested in a legal matter in which word definitions will play a significant part could very well have its advantages!

In case you were wondering, these are some of the definitions of 'new' from Black's Law Dictionary: "recently come into being; recently discovered; changed from the former state; unfamiliar; unaccustomed; beginning afresh". Several of these definitions have sentences demonstrating their meaning. As to the first definition above, the example given is: 'the new car was shipped from the factory this morning.'

Speaking of 'afresh', my sometimes buddy Earl just asked me if I'd like my drink freshened up, my meeting him at one of his local places of business, most of which contain any number of stools and models of stage coaches being pulled by large and vigorous horses. Places where some of the drinks are produced having fruit or vegetables floating in them. My being a teetotaler for quite some time now, I said that I'd have a Sprite with a twist of lemon. After all, lemons are in the 'fruit' family and nutritionists say we should increase our intake of fruits and vegetables. Also, lemon peels are sour. And, even though spelled differently, so am I!

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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