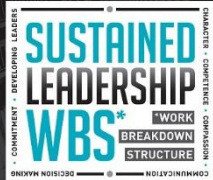




Deciphering Government Contracts

A Simplified Guide for
Practitioners and Lawyers

Session 5



*A Disciplined Project Approach
to Building You and Your Team
into Better Leaders*

THOMAS G. REID
JD, CScM, CPCM

Schedule

TUESDAYS FROM MAY 23, 2023 TO JUNE 27, 2023

10:00 AM - 11:30 AM (EST)

Session 1 - 10 Basic Rules

Session 2 – Say what you mean; mean what you say

**Session 3 – What is the contract? Putting the right things in
and leaving the wrong things out.**

Session 4 – Punctuate this!

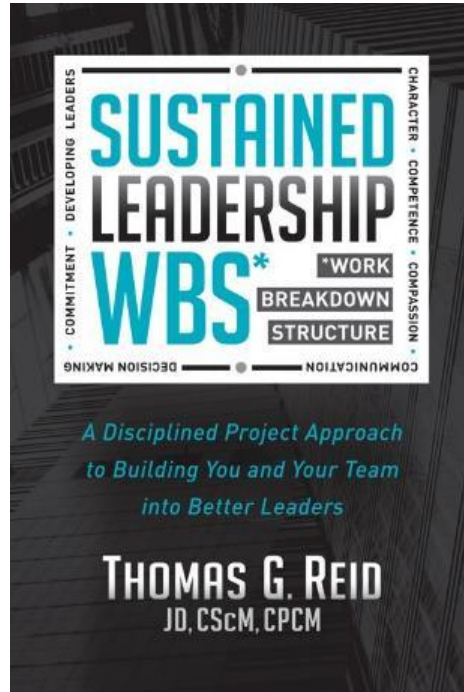
**Session 5 – Word Usage; misused words, grammar,
references**

Session 6 – How do you know when it is done?

Who am I?

- Thomas Reid, JD, MPA, CPCM,
- Chief Problem Solver, CCS
- Over 40 years in government contracting
- Have served in government, large businesses, small businesses, 8(a), non-profit, and start-up
- Speaker, author, trainer, attorney, expert witness, and contract manager

Latest Publication



- Reveals 229 elements of leadership
- Provides a lexicon of leadership by defining each element
- Uses project management tools to help you build yourself into a sustained leader
- Covers the Professional Competencies defined by OPM

New learning platform at www.TalkingHeadAcademy.Thinkific.com provides CPEs for NCMA certification for all classes on the platform.

Summary

- In a series of 6 weekly 90-minute sessions, you will gain deep insight on how contracts, both government and commercial, are interpreted by boards and courts. The rules are not always the same for them! We will also spend some time discussing good contract drafting that will avoid interpretation disputes. Filled with both legal theory for the legally inclined and practical application, you will develop a deeper appreciation for contract formatting, drafting quality contracts, and avoiding disputes, ambiguities, and misunderstandings.

All Sessions, 2:00pm-3:30pm (ET)

Review of Session #1 – Ten Rules

1. A contract is read in its entirety
2. Order of Precedence
3. Patent ambiguities must be clarified
4. Trade and custom usage
5. Course of dealing and performance
6. Parol evidence
7. Plain meaning
8. Rule of sameness
9. Ejusdem generis
10. Contra preferentem

Review of Session #2 – Say What you Mean

- A reasonable person is defined by the context of the situation; it is not an absolute and a person is required only to act “within the zone of reasonableness” under the circumstances
- Ordinary/Plain meaning, while falling into disfavor apart from context, it is still the majority view, especially in government contracting
- Parol evidence rule excludes extrinsic evidence in a complete integrated agreement; draft the contract to carry your intent
- Ejusdem generis tells us that lists contain only similar things

Summary Session #3 – What is the contract?

- A contract should represent a “meeting of the minds” among the contracting parties
- To properly interpret a contract, you must first know what the contract is
- Good faith and fair dealing are part of every contract
- The legal context of a contract is automatically incorporated
- Careful drafting, great attention to detail, and improving your knowledge of contracting matters will enhance the quality of your contract.

Review of Session #4 – Punctuate This!

- Punctuation counts
- ALL writing requires clarity; proper use of punctuation helps
- When judges get involved, outcomes can become crap-shoots
- Lack of clarity creates lack of certainty on the outcome
- Refresh yourself periodically on the basic rules of grammar and punctuation
- Pay attention to detail and particularly to punctuation

Communication

- ***Many contract disputes arise because different people attach different meanings to the same words and conduct.***

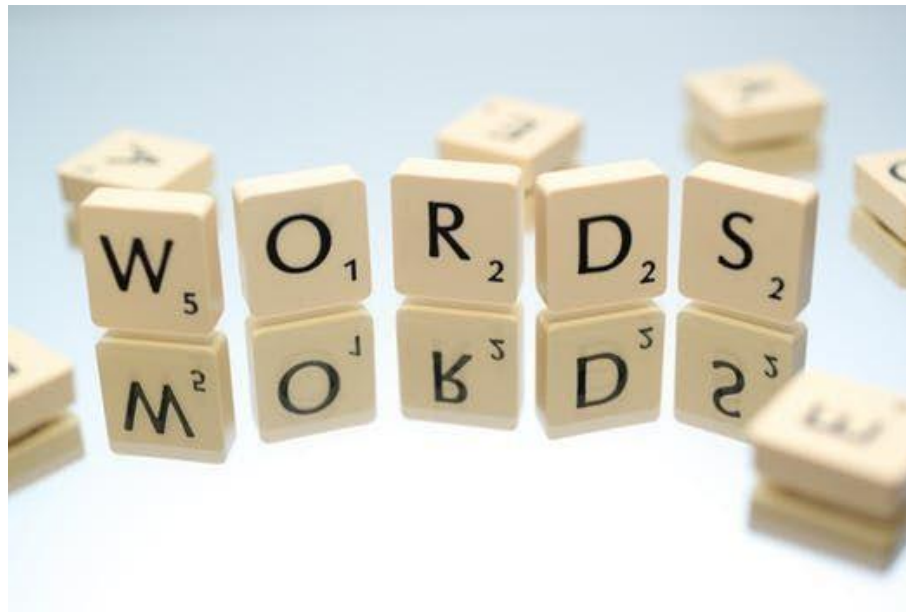
**Restatement (Second) of Contracts, §2 (1981), comment b,
Manifestation of Intention**

Session 5 – June 20- Word usage – misused words; grammar; references

- Just as in school, spelling and grammar count when reading a contract and understanding its intent. There are many frequently misused words and phrases that tend to contribute more confusion than clarity. Have you ever heard someone refer to the “physical year” when they meant the “fiscal year”? Interpretation rules here include the rule of sameness and contra preferentem. Proper and consistent references are also discussed. Creative writing is typically NOT a preferred approach in contract drafting.

Words may have Meaning, or they May Not

- Polonius: What do you read, my lord?
Hamlet: Words, words, words (Shakespeare, 1603)
- By repeating the word three times, Hamlet suggests that what he is reading is meaningless.
- Contract drafting is a form of “technical writing’



Technical Writing

- Technical writing encompasses all documentation of complex technical processes. It includes reports, executive summary statements, briefs. Any time technical information is conveyed in writing at work, it is, by definition, technical writing.
- This can include high-tech manufacturing, engineering, biotech, energy, aerospace, finance, IT, and global supply chain.
- The format is no longer bound to lengthy user manuals. Technical information must be distilled and presented unambiguously. This can come in the form of technical reports, emails, policy, briefs, and press releases.
- The bottom line is if you work in a technical field you are most likely performing technical writing.

Business Writing

How is Technical Writing Different Than Business Writing?

- Be warned, technical writing is not exactly the same as business writing.
- Business writing is a broader category. It can be argued that technical writing falls under business writing. It deals with many of the same topics and documents.
- The process and outcomes of technical writing are unique.

<https://www.instructionalsolutions.com/blog/what-is-technical-writing>

RULE #3 - Patent Ambiguities Must be Clarified

- Clear or obvious errors give rise to a duty to enquire
- If the ambiguity is latent (not obvious), the non-drafting party must show that it relied on its reasonable understanding

Remember this?

- **Inquiry/Enquiry** *Inquiry* and *enquiry* both mean “a request for information.” *Inquiry* is the standard American English spelling. *Enquiry* is the British/Canadian spelling.
- Colour
- Behaviour
- Judgement

Commonly Confused Words

- **Accept/Except**
- **Advice/Advise**
- **Affect/Effect**
- **Among/Amongst**
- **Breath/Breathe**
- **Capital/Capitol**
- **Complement/Compliment**

Commonly Confused Words

- **Between/ Among**
- **Then/Than**
- **Disinterested/Uninterested**
- **Defence/Defense**
- **Emigrate/Immigrate**
- **E.g./I.e.**
- **Empathy/Sympathy**
- **Farther/Further**
- **Fewer/Less**

Commonly Confused Words

- **Flaunt/Flout**
- **Gaff/Gaffe**
- **Gray/Grey**
- **Historic/Historical**
- **Imply/Infer**
- **Insure/ ensure/ assure**
- **It's/Its**
- **Lay/Lie**

Commonly Confused Words

- **Lead/Led**
- **Learned/Learnt**
- **Loose/Lose**
- **Principal/Principle**
- **Inquiry/Enquiry**
- **Stationary/Stationery**

Commonly Confused Words

- **Than/Then**
- **Their/There/They're**
- **To/Too/Two**
- **Toward/Towards**
- **Who's/Whose**

Portions of the above were derived from:

<https://www.grammarly.com/blog/commonly-confused-words/>

Commonly Confused Words

- **Anxious/Eager**
- **Bimonthly/Semimonthly**
- **Cite/Site**
- **Comprise/Compose**
- **Connote/Denote**
- **Continual/Continuous**
- **Discreet/Discrete**

Commonly Confused Words

- **Precede/Proceed**
- **Who/That**
- **Fiscal/ Physical**
- **Seen /Saw**
- **Hearty /Hardy**
- **Principal /Principle**
- **Site / Sight / cite**
- **To / Too / Two**
- **Dessert / desert**

Portions of the above were drawn from: <https://www.carew.com/choose-words-carefully-20-commonly-confused-misused-words-can-hinder-sales-effectiveness/>

Words to Omit

- Delete these words to make your writing more potent:
 - Really - Just - So - Often - That - Sometimes
 - Better - It - Well - Probably - Usually
 - And, and, and - Much - Like – This
- Classes of words: adverbs
- Very (Twain)

Parallel Structure

Parallel structure means using the same pattern of words to show that two or more ideas have the same level of importance. This can happen at the word, phrase, or clause level. The usual way to join parallel structures is with the use of coordinating conjunctions such as "and" or "or."

WORDS AND PHRASES

With the -ing form (gerund) of words:

Parallel: Mary likes **hiking**, **swimming**, and **bicycling**.

With infinitive phrases:

Parallel:

Mary likes **to hike**, **to swim**, and **to ride** a bicycle.

OR

Mary likes to **hike**, **swim**, and **ride** a bicycle.

(Note: You can use "to" before all the verbs in a sentence or only before the first one.)

DO NOT MIX FORMS.

https://owl.purdue.edu/owl/general_writing/mechanics/parallel_structure.html

Parallel Structure

SCOTUS Heller decision fn 14:

14 Faced with this clear historical usage, Justice Stevens resorts to the bizarre argument that because the word “to” is not included before “bear” (whereas it is included before “petition” in the [First Amendment](#)), the unitary meaning of “to keep and bear” is established. Post, at 16, n. 13. We have never heard of the proposition that omitting repetition of the “to” causes two verbs with different meanings to become one. A promise “to support and to defend the Constitution of the United States” is not a whit different from a promise “to support and defend the Constitution of the United States.”

Passive Voice

- Passive voice tires the reader because they have to think about who received the action of the verb in the sentence. The subject is acted on rather than doing the action.
- Active voice places the actor in a direct relationship with the action. The subject of the sentence performs the action.

EXAMPLE:

1. The contract may be terminated by either party with thirty days written notice to the other party.
2. Either party may terminate this contract by giving thirty days written notice to the other party.

Passive Voice

- Chronology is easier to follow in active voice
- Active voice tends to express the thought in fewer words
- Watch for:

“be” words (is, are, was, were)

Followed by a verb ending in “ed”

The motion was denied

The word “by”

Followed by a noun or proper name

The squirrel was chased by the dog.

Defined Terms

- Define the terms you are going to use.
- Use the defined words with a capital letter only
- DO NOT define terms you do not intend to use.
- DO NOT use defined terms in a different way

Proper Party Designation

- Don't use “party of the first part” and “party of the second part.”
- Designate the parties as defined terms and then USE THEM
- “Buyer” and “Seller” are usually adequate.
- FAR is consistent in the use of “government” and “contractor.”
- BE CAREFUL WITH FLOW DOWN CLAUSES!!

Personal Pronouns

- Commonly used in commercial contracts; especially when there is minimal ability to bargain.
 - “We” will do this, and “You” will do that, then you will sit down, shut up, and accept what we give you.
- Not typically used in government contracts
 - “Government” and “Contractor” are the most common terms used

Superfluous Words (Lawyers get Paid by the Word)

Avoid

In the event that

In spite of the fact that

Owing to the fact that

At this moment in time

In the absence of

Made good their escape

Leaves much to be desired

Was of the opinion that

Put in an appearance

Use

If

Although

Because

Now

Without

Escaped

Poor/weak/insufficient

Thought

Appeared

Avoid Redundancies (An Artifact of the Norman Conquest)

- The number of Normans who settled in England was sufficiently predominant to continue to use their own language. It was natural at first, because they knew no English. For 200 years after the Norman conquest, French remained the language of ordinary exchanges among the upper classes in England.
- Plus – Latin for the clergy and other aristocracy

Redundancies

- Rest, residue, and remainder
- Null and void
- Remise, release, sell, and quit claim
- Due and payable
- Indemnify and hold harmless
- Sell, convey, assign, transfer, and deliver

Legalese

- **Aforementioned**
- **Hereinafter**
- **Whatsoever**
- **Therein**
- **Herein**
- **Now Witnesseth**

Foreign Words

- **Inter alia**
- **Assuming arguendo**
- **A fortiori**
- **A priori**
- **Ab initio**
- **De facto**
- **Res ipsa loquitor**
- **Etc.**

Readability

The more readable your contract, the less likely it will need interpreting

- Sentence length (20-25 words)
- Paragraph length (5-6 sentences)
- Passive voice below 5-10%
- Flesch-Kincaid score –
 - 90- 100 – 11 year old
 - 60-70 – 15 year old
 - 0-30 – College Graduates

Readability

REMEMBER!

You don't write the standard clauses

You don't (usually) write the specifications

You don't usually write the Exhibits/Attachments

**You ARE responsible for
administering the contract, reducing risk, and
creating business certainty.**

The Power of MS Word

MS Word can provide a wealth of data on readability:

- Number of words
- Number of characters
- Number of paragraphs
- Number of sentences
- Average number of sentences per paragraph
- Average words per sentence
- Average number of characters per word
- Percentage of sentences in passive voice
- Flesch Reading Ease Scale
- The Flesch-Kincaid Grade Level Scale

Nominalization

Converting a verb to a noun

- You may make an application – You may apply
- When the court makes its determination – When a court determines
- You will provide information – You will inform

Other Writing Traps

- **Double (or Multiple) Negatives**
- **Compound negatives**
- **Split infinitives**
- **Using numerals and words for numbers**
- **Creating unnecessary objects**
- **Confusing that and which**
- **Confusing that and who**

Benefits of Plain English

- More efficient negotiations
- Lower costs
- Improves productivity
- Gets team up to speed more quickly
- Less likelihood a party will plead ignorance
- Court more likely to enforce the terms
- Increases trust/ credibility
- Reduces disputes and misunderstanding
- Shorter documents
- Less intimidating to clients/ customers

Resources - <https://www.plainlanguage.gov/>

The screenshot shows a web browser window with the URL <https://www.plainlanguage.gov/>. The main heading reads: "Plain language makes it easier for the public to read, understand, and use government communications." Below this is a blue button labeled "Learn more".

Four resource categories are listed in a grid:

- Law and requirements »**: Learn about the Plain Writing Act, policy memos, and executive orders that require agencies to use plain language.
- Plain language guidelines »**: Official writing guidelines for understanding your audience, being clear and concise, and testing your content.
- Training »**: Request in-person training for your federal agency, or use our videos and materials to create your own class.
- Examples »**: See plain language in action in a variety of regulations, legal documents, handbooks, and publications.

The browser's address bar shows the URL <https://www.plainlanguage.gov/guidelines/>. The Windows taskbar at the bottom shows the time as 1:43 PM on 4/26/2021.

Resources

Grammar sites

- [Guide to Grammar and Style](#), Jack Lynch
- [Purdue Online Writing Lab: Grammar](#)
- [Common Errors in English Usage](#), Washington State University
- <https://www.sec.gov/pdf/handbook.pdf>
 - A Plain English Handbook How to create clear SEC disclosure documents

Checklists

- [Checklist for Plain Language](#), PLAIN
- [Checklist for Plain Language on the Web](#), PLAIN
- [10 Steps to Plain Writing](#) (PDF), Census
- [Quick Checklist for Plain Language](#), Center for Health Literacy
- [Five Steps to Plain Language](#), Center for Plain Language
- [Plain Language Checklist for Documents](#), National Adult Literacy Agency
- [Plain English Checklists](#), Simply Put

Contra Proferentem - Its Basic Function

“ ... a tie breaker when there is no other sound basis for choosing one contract interpretation over another.” Margaret N. Kniffin, Corbin on Contracts, §24.27 (1993)

Contra Proferentem

Contra Proferentem is a Rule of Last Resort

***"The rule of contra preferentem is the last to be resorted to."* Sir Francis Bacon, A Collection of Some Principal Rules and Maximes of the Common Law (1597)**

***"... often denigrated as a rule of last resort."* E. A. Farnsworth, Farnsworth on Contracts, §7:11 (3rd ed. 2004)**

Contra Proferentem

Contra preferentem is a schoolmaster of wisdom and diligence in making men watchful in their own business.— Sir Francis Bacon, A Collection of Principal Rules and Maximes of the Common Law (1597)

As between two reasonable and practical constructions of an ambiguous provision ... the provision should be construed less favorably to that party which selected the contractual language. U.S. v. Seckinger, U.S. Supreme Ct, (1970)

Ambiguous Contracts

It does not matter if one party's interpretation is more reasonable than the other's.

"To determine if a contract is ambiguous, a tribunal 'need not determine which" of the parties' interpretations "is the more likely interpretation," but 'need merely decide whether each . . . is sufficiently reasonable to render the clause ambiguous.'" A-Sons' Construction, Civilian Board of Contract Appeals (2015)

The Duty of Inquiry

“Ambiguities fall under two categories - patent or latent. The general rule of contra proferentem is to construe the ambiguous contract language against the drafter. However, a patent ambiguity is an exception, which is “sufficiently glaring to trigger” a contractor to inquire before a bid is submitted. The patent ambiguity is construed against the contractor. If an ambiguity is latent, the general rule may be applied, but the contractor's interpretation must be determined to be reasonable.” Certified Construction Company of Kentucky, ASBCA (2016)

Contra Proferentem's Duty of Inquiry

“A patent or obvious conflict or inconsistency in specifications which exists in the solicitation phase of a procurement gives rise to a bidder’s legal duty to clarify before it chooses to rely upon its own interpretation. Failure to fulfill that legal duty results in the bidder bearing the burden of the alleged conflict or inconsistency.” P.J. Dick v. Department of Veterans Affairs, Civilian Board of Contract Appeals (2016)

Rationales for the Duty of Inquiry

In addition to obviating unnecessary disputes, the patent ambiguity principle advances the goal of informed bidding, and works towards putting all bidders on an equal plane of understanding, so that bids are truly comparable. ... Conversely, it also tends to deter a bidder who knows, or should know, of a serious problem, from taking the award based on its less costly reading, with the expectation he will then be able to cry "change." – Court of Claims (1976)

Contra Proferentem

The Government Contract Elements of Contra Proferentem:

An Ambiguous Contract

Drafted by Just One Party

Ambiguity/Problem Not Patently Obvious

The Non-Drafter Contractor Can Prove that It Relied on its Reasonable Interpretation When Preparing Its Proposal

5 A failure to do so, precludes recovery!

The District of Columbia has a “no cost” contract with Soprano’s Towing to tow cars designated by the District to the city’s impound lot, where they would be offered for sale at auction. The contract provides that Soprano has the option of purchasing any such vehicle for \$50 “if it does not sell at public auction.”



The District attempts to sell the vehicles at successive auctions, claiming that it decides how many attempts it can make to sell the cars before they are offered to Soprano.

Soprano says the cars are theirs for \$50 each after the first auction.

Summary

- The words you choose to use are important
- The words you choose to NOT use are important
- Words have accepted meanings – do not misuse them
- Everything you write should be readable
 - Sentence length
 - Paragraph length
 - Word usage
 - Appropriate readability level
- Ambiguities, even if inadvertent, will work against the drafter
- Contract interpretation issues can be crap shoots
- Disputes will have a negative impact on the project

YOUR JOB IS TO REDUCE RISK, UNCERTIANTY, AND CONFUSION

PCI Instructor, Tom Reid

www.CertifiedContractSolutions.com

www.Ask-Tom-Reid.com

www.SustainedLeadershipWBS.com

<https://TalkingHeadAcademy.Thinkific.com>

www.ContractOverlord.com

“The first responsibility of a leader is to define reality. The last is to say thank you.”

Max DePree

Author & Business Executive

