

Doctrine of Contra- Proferentem in Contracts Management

(Nirmal Goel, Technical Examiner, CVC)

Occurrence of disputes is common feature in civil construction contracts. Often the disputes arise because of contract clauses which can be interpreted in more than one way. The job of arbitrator / court becomes more difficult when various interpretations argued by the parties to the dispute are equally good, reasonable and plausible. In such circumstances, the Doctrine of Contra- Proferentem becomes a handy tool to the arbitrator or the judge to decide the matter in accordance with principles of equity, good conscience and justice. This doctrine, which originated from insurance contracts, states that when a contract provision can be interpreted in more than one way, the Court will prefer that interpretation which is more favourable to the party who has not drafted the agreement (or simply that interpretation which goes against the party who has inserted / insisted on inclusion of the alleged ambiguous clause in the agreement).

The rationale behind this doctrine emanate from the fact that parties to the agreement are often not in equal position. One party dominates the execution of the agreement while the other party merely signs on the dotted line. Such contracts are mainly “standard form take it or leave it” contracts e.g. in insurance contracts, an individual usually has to accept all terms and conditions of insurance policy document framed by the insurer company with no liberty on part of the individual to negotiate or alter the conditions of the contract. Similar is the situation in Government contracts, wherein the tender notices floated by Government agencies prescribes that the bidder will not put any condition in the tender. The bidder is simply made to sign on the dotted lines and no deviation from the tender conditions is permitted. Therefore, this doctrine is very much applicable in the contracts entered into by the State with various private parties / contractors.

Another underlying philosophy behind this doctrine is that one should not be rewarded for his own fault. **Contra- Proferentem places the cost of losses on the party who was in the best position to avoid the harm.** The Courts / Arbitrators

expect that the party who drafts the agreement shall take due care and caution and shall not insert ambiguous provisions in the agreement. The doctrine seeks to encourage clear, explicit and unambiguous drafting of the agreement and to avoid latent and hidden meanings of its clauses.

However, this doctrine is not to be construed to encourage unreasonable or inequitable interpretation against the drafter of agreement. It is applicable only when the various interpretations are equally sound, reasonable and plausible and no clear intention contrary to the interpretation being adopted on this principle is prima-facie evident in the contract document.

Unconditional tenders are unavoidable necessity in Government contracts. In such scenario, it becomes an added responsibility on the part of NIT framers, checkers and approvers to **read, re-read and re-re-read** the various provisions of the tender document and ensure that its various provisions are clear, explicit and unambiguous. For carrying out this responsibility, a) the latent, hidden or implied meanings to contract clauses are to be avoided; b) the contract conditions need to be realistic; c) all information required for working out rates by prospective bidders needs to be given in the tender document; d) technical specifications and mode of measurements should be clear; and e) the tender document should take care of various contingent event. Since many of the construction disputes are repetitive in nature, one should take lessons from them and prescribe proper provision in the tender documents to deal with them.

Besides above discussion, this doctrine has got vigilance connotation also. Many a times, ambiguous provisions are interpreted in favour of contractors. In such case, the Vigilance Organization first dispute the ambiguity itself and try to assert that there has been an attempt to create ambiguity when there was none and then tries to search malafide angle in such interpretation especially when such an interpretation has resulted into passing of undue benefits to the contractor or has caused loss of public money. So by carefully preparing tender documents, NIT

framers, its checkers and approvers can protect their officials from unnecessary vigilance scrutiny also.

In essence, the doctrine of Contra-Proferentem puts an added responsibility on framer, checkers and approvers of tender documents and emphasizes additional efforts on their part to avoid ambiguities and to make contract documents clear, explicit and unambiguous in nature. Further, it requires tender documents to be complete ones so as to take care of not only foreseeable but unforeseen circumstances also.

Note: This Article has been published in the Magazines: -

1. **Crystal Clear**, Airports Authority of India Vigilance Magazine (Oct. 2010 issue)
2. **Civil Engineering & Construction Review** (Dec. 2010 issue).
3. Indian Institute of Arbitration and Mediation (IIAM) Magazine "**The Indian Arbitrator**" – (January 2011 issue)