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# Patent Versus Latent: Unraveling the Ambiguity Puzzle

The patent ambiguity doctrine is a key principle that impacts government contract disputes in both the pre-award and post-award phases.



BY STEPHEN L. BACON

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**A**mbiguity is often at the core of many disputes that arise throughout the government contracts lifecycle. In bid protests and claims, disputes frequently center on how language included in a solicitation or contract should be interpreted.

A patent ambiguity is one that is obvious or glaring, while a latent ambiguity is more subtle and difficult to detect. Government contract disputes are routinely determined by whether the ambiguity at issue is patent or latent.

For example, the distinction between patent and latent ambiguities can dictate whether a protest is timely or not. In the context of a post-award claim, the type of ambiguity at the crux of the dispute can determine whether the contract is construed against the government or the contractor.

It is therefore imperative to understand the rules of interpretation relating to patent and latent ambiguities. A familiarity with these rules will help avoid disputes or, at a minimum, put you in a position to prevail in the event a dispute arises at some point during the contracting lifecycle.

### Patent Versus Latent Ambiguities

The forums authorized to resolve government contracts disputes are regularly called upon to decide whether a particular provision is ambiguous and, if it is ambiguous, whether that ambiguity is patent or latent. In general, “[a]n ambiguity exists where two or more reasonable interpretations of

the terms or specifications are possible” in a solicitation or contract.<sup>1</sup>

Not every interpretation advanced by one of the contracting parties is reasonable. To establish the existence of an ambiguity, a party must “show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it

scenarios is informed by the rules of interpretation governing ambiguous provisions.

### Pre-Award Protests

It is well-established that solicitations “must be sufficiently free from ambiguity so that offerors may compete on a common basis.”<sup>4</sup> Potential offerors

## Ambiguities can be litigated in the context of a pre-award protest, post-award protest, or claim raised during contract administration.

reached.”<sup>2</sup>

A patent ambiguity is usually described as “an obvious, gross, or glaring error” in a solicitation or contract. In contrast, a latent defect is a subtle defect that “exists when, for example, the solicitation is susceptible to two reasonable interpretations that do not rely on conflicting solicitation terms.”<sup>3</sup>

Ambiguities can be litigated in the context of a pre-award protest, post-award protest, or claim raised during contract administration. The resolution of disputes in these

must challenge any solicitation defects, including patently ambiguous requirements, prior to the deadline set for receipt of proposals.<sup>5</sup>

A potential offeror may challenge an ambiguous solicitation to force the agency to clarify its requirements before proposals are due. The protest will be sustained if the potential offeror can show that conflicting information in the solicitation creates an ambiguity.

A potential offeror may challenge an ambiguous solicitation to ensure that it will have an opportunity to

compete based on requirements that are commonly understood by all offerors.

In Selex ES Inc., for example, the solicitation contained conflicting information as to whether certain requirements were due at the time of proposal submission or after award.<sup>6</sup>

In this case, the U.S. Government Accountability Office (GAO) found that although the protester and the agency had different interpretations of the solicitation, both interpretations were reasonable. But GAO sustained the protest because the protester's interpretation was reasonable and, thus, it was impossible to know if offerors would be eliminated from the competition if they did not comply with the requirements at the time of proposal submission.

### Post-Award Protests

In a post-award protest, the distinction between patent and latent ambiguities becomes paramount to determining whether the protest was timely filed. If a patent ambiguity in a solicitation is not challenged prior to the proposal deadline, any subsequent challenge to the meaning of ambiguous term is considered untimely.

This timeliness rule encourages offerors to come forward with any objections they may have to the terms of a solicitation prior to the submission of proposals. The early resolution of patent ambiguities is intended to avoid costly post-award disputes.

It also prevents contractors from engaging in gamesmanship. Contractors cannot compete under a solicitation that contains an obvious

# The early resolution of patent ambiguities is intended to avoid costly post-award disputes.

defect and then object to that defect after award as a way to restart the bidding process when it has greater knowledge about the competition.

The protest of Sterling Medical Associates, Inc. illustrates the danger of submitting a proposal without clarifying a patent ambiguity.<sup>7</sup> That case involved a Department of Veterans Affairs (VA) solicitation for community-based outpatient client services.

The VA rejected the protester's proposal as technically unacceptable because it did not provide evidence that it was accredited by The Joint Commission (TJC), an independent, non-profit accrediting body. The VA's determination was based upon a requirement in the solicitation that required offerors to provide TJC accreditation letters prior to award.

TJC grants contract-based accreditations and facility-based accreditations. The protester argued that a TJC facility accreditation was sufficient to meet the solicitation's requirements, whereas the VA maintained that the

contract itself had to be accredited.

GAO concluded that any language that seemed to permit a facility-based accreditation created a patent ambiguity that the protester was obligated to challenge in a protest prior to the submission of its proposal. Because the protester failed to timely clarify whether a facility-based accreditation would meet the VA's requirement, its protest was dismissed as untimely.

### Claims Under the Contract Disputes Act

The contractor's duty to clarify patent ambiguities can also be highly consequential when a claim is litigated under the Contract Disputes Act. In a "constructive change" change claim, the contractor seeks additional compensation for work it performed beyond the contract requirements pursuant to the government's direction.<sup>8</sup>

These disputes often focus on whether the terms of the original contract required the contractor to

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perform the alleged “extra” work or not. If the contract terms at issue are ambiguous, the Court of Federal Claims or the Board of Contract Appeals will proceed to determine whether the ambiguity was patent or latent.<sup>9</sup>

The contractor’s preferred interpretation will fail if the terms are deemed patently ambiguous such that the contractor had a duty to clarify during the pre-award phase. This rule of contract interpretation serves the same purpose as the timeliness rule applied in the context of a bid protest: it “is designed to ensure, to the greatest extent possible, that all parties bidding on a contract share a common understanding of the scope of the project.”<sup>10</sup>

While contractors are punished for failing to timely clarify patent ambiguities, they are not charged with discovering subtle ambiguities that may exist in solicitation documents prior to contract award.

If the contractor’s interpretation of a latently ambiguous provision is reasonable, and the contractor can show that it relied on that interpretation in preparing its proposal, the contract will be construed against the government as the drafter under the doctrine of *contra proferentem*.

The Court of Federal Claims’ decision in *Baldi Bros, Inc. v. United States* illustrates the consequences contractors face when they fail to clarify patent ambiguities prior to submitting their proposals.<sup>11</sup> That case involved a dispute about whether the government was responsible for providing a Clean Soil Handling Area (CSHA) to the contractor for disposal

of excess soil excavated during replacement of an aircraft ramp.

The specifications referenced a CSHA located at Travis Air Force Base where the work was performed that could be used for soil disposal. But, in response to a bidder’s question, the government stated that all excess soil was “to be disposed of off-site.”<sup>12</sup> In an amendment to the solicitation, the government also provided an updated map that did not show a CSHA on the base.

The contractor eventually submitted a claim for additional costs when it was required to transport the soil to an off-base site for disposal. The contractor interpreted the government’s answer, that disposal was to be “off-site,” to mean “off the project site,” not entirely off the base.<sup>13</sup>

The Court denied the claim and found that the unambiguous language of the contract did not require the government to provide a CSHA to the contractor. Further, even if the specification’s reference to a CSHA created an ambiguity, the Court ruled that “the ambiguity would be a patent ambiguity that would be resolved against Baldi because Baldi failed to inquire about inconsistencies in the Contract.”<sup>14</sup>

## Conclusion

The patent ambiguity doctrine is one the most influential rules in government contracting. It exists to ensure that solicitation defects are promptly identified and resolved so that offerors can compete based on a common understanding of the government’s requirements.

The doctrine stresses the need

for contractors to be diligent in reviewing solicitations. Glaring errors should be spotted and brought to the government’s attention through the question-and-answer process or, if necessary, a bid protest filed prior to the proposal deadline. A contractor’s failure to follow these rules could result in dismissal of an untimely protest or denial of post-award claim for monetary relief. **CM**

*The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O’Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.*

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## ENDNOTES

- 1 IBM Corp., B-421471 et. al, Jun. 1, 2023, 2023 CPD P135 at 11.
- 2 RELI Group, Inc., B-412380, Jan. 28, 2016, 2016 CPD P51 at 6.
- 3 IBM Corp. at 11.
- 4 Global Technical Systems, B-411230.2, Sept. 9, 2015, 2015 CPD P335 at 19.
- 5 4 C.F.R. § 21.2(a)(1).
- 6 Selex ES Inc., B-402799, Sept. 6, 2022, 2022 CPD P234.
- 7 Sterling Medical Associates, Inc., B-419794, June 25, 2021, 2021 CPD P248.
- 8 Bell/Heery v. United States, 739 F.3d 1324, 1335 (Fed. Cir. 2014)
- 9 NVT Technologies, Inc. v. United States, 370 F.3d 1153, 1162 (Fed. Cir. 2004).
- 10 Triax Pacific, Inc. v. West, 130 F.3d 1469, 1475 (Fed. Cir. 1998)
- 11 Baldi Bros, Inc. v. United States, 156 Fed. Cl. 372 (2021)
- 12 Id. at 383.
- 13 Id. at 376.

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