

LATENT AMBIGUITY

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It is an important rule of interpretation for both solicitations and contracts that the reader must examine the plain language of the document, and resolve questions of interpretation by reading the document as a whole and in a manner that gives effect to all provisions. Where the language is unambiguous, then it can be interpreted and its meaning understood. But, where there are two possible reasonable interpretations of a document, then an ambiguity exists. There are two types of ambiguities:

- Patent ambiguities: where the ambiguity is an obvious, gross or glaring error (for example, one page includes a specification of six inches for an item, but on a later page, the same specification is referred to as 7.5 inches).
- Latent ambiguity: a more subtle ambiguity that is not obvious on the face of the document, where there are two or more reasonable interpretations possible.

A recent Government Accountability Office (“GAO”) bid protest, *Harper Const. Co, Inc.*, B-415042, Nov. 7, 2017, is an example of a latent ambiguity.

Harper involved a Navy request for proposals (“RFP”) for construction services at a Marine Corps facility in Arizona. The RFP was to be awarded on a lowest-price, technically acceptable basis, considering price and three non-price evaluation factors: (1) airfield paving experience; (2) managing construction concurrent with airfield operations and (3) past performance. Offerors were required to submit two or three relevant construction projects that demonstrated experience in airfield paving.

The RFP stated the following:

The Offeror may utilize experience of a subcontractor that will perform major or critical aspects of the requirement to demonstrate construction experience under this evaluation factor. The Offeror must provide a letter of commitment and an explanation of the meaningful involvement that the subcontractor will have in performance of this contract.

The Navy’s interpretation of the RFP: the Navy concluded that Harper’s proposal was unacceptable because Harper was to be the general contractor, but would not self-perform the airfield portion of the contract. Harper’s proposal did not include a letter of commitment and an explanation of the meaningful involvement that its subcontractor would have in the performance of the contract. The Navy did not credit Harper’s work as a prime contractor because the relevant work had been performed by Harper’s subcontractor. The Navy said it needed to evaluate the experience of the actual contractor who would perform the airfield paving.

Harper’s interpretation of the RFP: Harper could claim experience where it “performed” as a prime contractor even though the actual relevant work was performed by a subcontractor.

Nothing in the RFP contradicted this interpretation. No letter of commitment or explanation was required.

The GAO held that the disputed terms of the solicitation were latently ambiguous because they were susceptible to two reasonable interpretations, and the agency should have clarified the RFP and permitted offerors to resubmit proposals. GAO held that Harper could properly rely on its own relevant airfield paving experience to satisfy the requirements of evaluation factor 1, even where it intended to subcontract the work under the resulting contractor. The GAO also considered the more narrow interpretation of the Navy—to require actual performance of the paving work in order to be a valid performance reference—to be reasonable, but not the *only* reasonable interpretation.

GAO sustained the protest and recommended that the Navy clarify the RFP and permit offerors to submit revised proposals, and evaluate them.

The takeaway: Finding that a solicitation contains a latent ambiguity is quite rare at either the GAO or the Court of Federal Claims. Usually, using the normal rules of contract interpretation outlined above, the GAO or the court may find a patent ambiguity—which requires that the offeror bring the ambiguity to the agency’s attention *before* submitting a bid. *Harper* is a rare case where the ambiguity became apparent only *after* submission of bids. In a bid protest, the solution is to correct the ambiguity and submit revised offers. If there is a latent ambiguity in a contract that isn’t discovered until performance, the rule of “contra proferentem” applies and a contractor would likely receive an equitable adjustment. Contra proferentem is a rule that ambiguities in a contract are to be construed against the *drafter*, which is the government in the case of a government contract.

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