

THE PATENT AMBIGUITY DOCTRINE AND THE CONTRACTOR'S DUTY TO INQUIRE

INTRODUCTION

Contract documents for a construction project are an imperfect form of communication. The Architect or Engineer does its best to translate the owner's needs into plans and specifications, which the A/E does not guarantee to be perfect. Inevitably, the plans and specifications contain **defects, ambiguities, errors** or **inconsistencies**.

Under the rules of contract interpretation, ambiguities in the owner-provided plans and specifications are construed against the owner (a.k.a., the rule of *contra preferentem*), and a contractor may rely on the owner's plans and specifications and not be responsible for errors contained therein (a.k.a, the [Spearin Doctrine](#)).

These two rules appear to place all of the risk of defective plans and specifications on the owner, or government. However, a contractor does have a duty to ask for clarification of obvious ambiguities or errors under the pre-contract clarification rule, also known as the **Patent Ambiguity Doctrine**.

PATENT AMBIGUITY DOCTRINE

When dealing with an obvious – or patent – ambiguity in government-provided plans and specifications, the contractor has a duty to seek clarification from the government **before** submitting its bid. Failure to do so may prevent the contractor from raising an ambiguity argument after contract award.

A patent ambiguity in a government solicitation is loosely defined as an ambiguity that is obvious, gross, or glaring or involves glaringly inconsistent provisions of which a **reasonable contractor** *was* or *should have been* aware. After all, it is “not the actual knowledge of the contractor, but the **obviousness** of the discrepancy which imposes the duty of inquiry.”¹

The question of whether an ambiguity is patent is determined on a case-by-case basis, based on an analysis of the specific facts of each contractual situation.² Because the determination of patent ambiguities and a contractor's duty to inquire is dependent upon the facts of each case, the analysis is often nuanced.

Some of the objective factors that courts and boards consider in their analysis of the obviousness of a contractual ambiguity include, (1) the ratio of recovery sought to the overall contract price, (2) the conduct of all of the bidders on the contract during the bidding period, (3) the failure of government personnel to discover the ambiguity, and (4) the importance of the disputed work to the entire contract. These factors are in no particular order of precedence. The courts and boards may consider any objective factors they deem necessary to come to their conclusion of what a reasonable contractor should have discovered.

¹ *Chris Berg, Inc. v. United States*, 197 Ct. Cl. 503, 455 F.2d 1037 (1972).

² See *Interstate Gen. Gov't Contractors v. Stone*, 980 F.2d 1433 (Fed. Cir. 1992).

DUTY TO SEEK CLARIFICATION BEFORE BIDDING

The requirement to seek clarification of ambiguous or defective plans and specifications *before bidding* is preventative in nature. The rule is designed to avoid post-award disputes by encouraging contractors to seek clarification before any of the parties are legally bound.

The rule also serves to deter bidders who know of a serious discrepancy in the plans and specifications from consciously taking the award with a lower bid (based on the less costly interpretation) with the expectation that the contractor may then be able to claim that a Change has occurred if the Contracting Officer follows a different interpretation after the contract is made, and thus be entitled to an equitable adjustment.³

CONCLUSION

Contractors can easily satisfy their duty to inquire by thoroughly reviewing the contract documents to satisfy themselves as to the plans and specifications, and if there is any doubt as to their interpretation or requirements, they should ask the government for clarification before bids are submitted.

Contractors should not assume that their interpretations are correct, because it is the contractor who will bear the risk if they are wrong in their unilateral interpretation. This is particularly true when the potential costs are significant.

Especially in this area, it is wise to enlist the assistance of a consultant familiar with the Patent Ambiguity Doctrine, who can help **to determine whether the contractor has – or had – a duty to inquire as to the ambiguous plans and specifications**, and whether the contractor's increased costs due to the ambiguity and resultant Changes may be recoverable from the government.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

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³ See *Sturm v. United States*, 190 Ct. Cl. 691, 421 F.2d 723 (1970).