

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-183591

DATE: July 10, 1975

50889

95424

MATTER OF: Kleen-Rite Corporation

DIGEST:

1. Liquidated damages clause for nonperformance or inadequate performance of custodial services does not constitute penalty since damage assessment is reasonable in relation to losses contemplated.
2. There is adequate justification to provide for application of liquidated damages clause to instances of nonperformance and inadequate performance even though under prior contracts clause applied only to nonperformance, because both situations are undesirable and cost of correction may be just as expensive.

Invitation for bids No. DAHC30-75-B-0059 was issued on March 17, 1975, by the United States Army, Military District of Washington Procurement Division for custodial services at Cameron Station, Alexandria, Virginia. Bid opening has been postponed because of a protest.

On April 8, 1975, Kleen-Rite Corporation (Kleen-Rite) protested to our Office the "MONETARY ADJUSTMENT FOR INADEQUATE PERFORMANCE" clause as being punitive and unconscionable. The clause, with a portion of the table of adjustments, reads as follows:

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"It is agreed that failure to accomplish any work required under this contract or to satisfactorily accomplish such work, where due to the carelessness, neglect or fault of the Contractor, shall constitute a deficiency for which a reduction of payment will be made according to the schedule set forth below. The Contractor's representative shall be advised in writing by the COR at the time and place of inspection of the deficiency and that such monetary adjustment shall be made from payments to the contractor.

| <u>ITEM & CLEANING</u> <u>OPERATION</u> | <u>UNIT</u> | <u>RATE</u> | <u>PRIOR YEAR</u> <u>RATE</u> |
|--|-----------------|-------------|----------------------------------|
| <u>Floors (1,000 Sq Ft):</u> | | | |
| Sweeping | Per 1,000 sq ft | \$3.00 | (\$0.36) |
| Vacuum floors | Per 1,000 sq ft | 2.00 | (0.96) |
| Vacuum rugs & carpeting | Per 1,000 sq ft | 2.50 | (1.48) |
| Mopping & rinsing | Per 1,000 sq ft | 4.00 | (1.48) |
| Waxing | Per 1,000 sq ft | 4.00 | (0.40) |
| Buffing | Per 1,000 sq ft | 2.50 | (1.08) |
| Mop, Wax & Buff | Per 1,000 sq ft | 7.00 | (2.97) |
| Strip & re wax | Per 1,000 sq ft | 8.00 | (3.20) |
| <u>Cleaning Toilet</u> <u>& Fixtures:</u> | | | |
| Floors (toilet rooms & shower rooms) | Per room | 5.00 | (0.96) |
| Wash bowls | Each | .25 | (0.08) |
| Sinks | Each | .50 | (0.08) |
| Urinals | Each | .25 | (0.08) " |

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The figures in parentheses are the amount of adjustments included in IFB No. DAHC30-74-B-0070, the solicitation for the same services during the prior year. It is the increase over the prior year to which Kleen-Rite objects, contending that the amounts are unreasonable and could result in penalties greater than the contract price.

Also, Kleen-Rite protests the changing of the clause to include "inadequate" performance whereas under prior solicitations the adjustments were made only for "nonperformance." In IFB -0070, the following clause was included:

"Any deduction made under the above provisions shall be limited to the amount specified for the particular items or area that is deficient or the number of square feet actually deficient, and said deductions shall not be made for items or areas, or portions thereof, for which the required tasks have been duly performed."

This has been deleted in the instant IFB so that the above adjustments will be assessed for inadequate performance as well as nonperformance. Kleen-Rite alleges that a compromised price must be available for inadequate or nonsatisfactory work, because it is possible for a portion of an area to be satisfactory and yet the contractor will be assessed the total adjustment required in the above table.

In essence, the table of monetary adjustments is a liquidated damages clause. In determining whether a contract stipulation for liquidated damages is valid or whether it constitutes a penalty, the only matter to be considered is the relation between the amount stipulated as liquidated damages and the losses which are in contemplation between the parties when the agreement is made. In order for a liquidated damage provision to be adjudged as a penalty and therefore invalid, it must be conclusively shown that there is no possible relation between the amount stipulated for liquidated damages and the contemplated losses. Where it is difficult or impracticable, at the time a contract is executed, to calculate the damage which might result, reasonable agreements for liquidated damages are uniformly upheld, and it is not material that the actual

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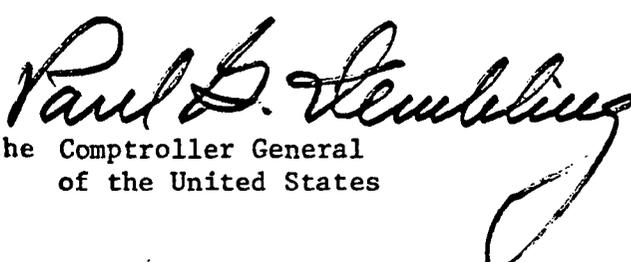
loss caused by the delay is small as compared with the amount of liquidated damages agreed upon, or that such damages may even exceed the contract price, since the validity of the liquidated damage provision is for determination as of the time the agreement is entered into. 46 Comp. Gen. 252, 258 (1966).

The changes in the monetary adjustment clause were made as a result of an audit by the United States Army Audit Agency on custodial service contracts. The Audit Agency recommended that a new higher monetary adjustment table be established as the previous tables were too low to encourage adequate performance. Therefore, the rates were increased as reflected by the table included in the present IFB. According to the Army, the rates are reasonable when compared to the costs the Government would incur to correct the deficiencies caused by inadequate performance by the contractor.

The Army cites, as an example, the costs which would be incurred if the contractor failed to properly clean the floors in a toilet or shower room. In that event, there would be a \$5.00 reduction in the contract price. However, the Army has estimated that it would take 1 hour for Government personnel to arrive at the location of the work to be performed, to perform the work, to return to their normal duty station and to dispatch and return inspecting personnel. The cost to the Government for that procedure would be in excess of \$9.00.

Further, Kleen-Rite objects to the failure to include a provision such as the clause quoted above relative to compromising or prorating the amount of the adjustment based on the actual amount of area affected by the inadequate or nonperformance. However, the Army has indicated that inadequate performance is just as undesirable as nonperformance. Further, the cost of correcting inadequate cleaning area may be just as expensive as initially cleaning. Therefore, we believe there is adequate justification for the changes in the clause.

Accordingly, the protest is denied.


For the Comptroller General
of the United States