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**DECISION**



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

**FILE:** B-213109

**DATE:** February 27, 1984

**MATTER OF:** Eldorado College

**DIGEST:**

1. A performance requirements summary in a request for proposals (RFP) for services which permits the government to deduct amounts for unsatisfactory services does not impose a penalty and is capable of being objectively enforced where: (1) the protester has failed to show standardized testing is invalid to measure contractor performance, (2) the RFP is not ambiguous as to when the government may deduct if students do not achieve a particular grade level upon completion of a course, and (3) the government drafted specific performance standards to measure contractor performance for this procurement.
2. Protest allegation that the contractor should not have to guarantee its employees payment regardless of the quality of the employee's performance while the contractor may be denied payment for inadequate performance is without merit where minimum wage law provisions were included in the RFP.
3. Protest allegation that the RFP allows the agency to retain complete control over the curriculum and materials in a procurement for professional educational services is without merit where the terms of the RFP do not prevent the contractor from augmenting the government-furnished materials or establishing the method in which the materials must be utilized and do not require the agency to approve the contractor's curriculum.

Eldorado College (Eldorado) protests the award of a contract to Central Texas College under request for proposals (RFP) No. DABT23-83-R-0041, issued by the Department of the Army for professional educational services.

We deny the protest.

The RFP contains provisions under the heading Performance Requirements Summary (PRS) that permit the government--after surveillance by random sampling of the contractor's performance, 100-percent inspection of end of course testing or student complaints--to deduct payments for services exceeding the "maximum allowable degree of deviation from perfect performance (AQL)" in an amount calculated to represent the value the unsatisfactory services bear to all the contract requirements.

First, Eldorado protests that the RFP is improper because the above format for deductions subjects the contractor to punitive measures for noncompliance, is not capable of objective enforcement, and presumes breach of contract, contributory negligence or other consequences. Specifically, Eldorado argues that the standardized testing required in the RFP to be used to measure student progress, and thus contractor performance, cannot be proven to be a valid and absolute measurement of achievement concerning the performance requirements. Eldorado also contends that the RFP requirement that students achieve the fifth or ninth grade level (depending on the course) as measured by standardized testing after taking a course or there will be a deduction is ambiguous. This is because the Army has informed Eldorado that a gain of 1.5 grade levels will result in no deduction even though the student did not reach the fifth or ninth grade levels. Finally, Eldorado alleges that the performance standards set forth in the RFP are invalid because the "standards of care" for the educational services industry have not been sufficiently established to distinguish objectively adequate from inadequate performance.

The Army responds that while standardized testing may not be universally regarded as an accurate measurement of learning, it is nonetheless the most widely accepted means of measuring learning and is an objective means to measure the quality of the services rendered. The Army also contends that the performance standards were derived from directives regulating the programs included in the procurement, not from the educational services industry's "standards of care."

The deductions for noncompliance with the performance requirements relate to liquidated damages. Liquidated damages are fixed amounts which one party to a contract can recover from the other upon proof of violation of the contract and without proof of the damages actually sustained. See Kothe v. R.C. Taylor Trust, 280 U.S. 224 (1930).

Recently, we did object to a similar liquidated damages provision as imposing a penalty because the protester showed that there was no possible relation between the amounts stipulated for liquidated damages and the losses which were contemplated by the parties. Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD 194. However, a protester who objects to the requirements has a heavy burden. Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD 56. The contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements which reflect those needs. Torrington Company, a division of Ingersoll-Rand Company, B-210877, B-210877.2, September 2, 1983, 83-2 CPD 298. It is the contracting agency which is most familiar with the conditions under which the services and supplies have been and will be used, and our standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, our Office will not question agency decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2 CPD 339.

We conclude that the Army has adequately established the reasonableness of the requirements challenged here and has shown accordingly that the deductions for noncompliance do not impose a penalty and are capable of being objectively enforced.

Initially, we note that Eldorado has merely alleged, but not shown, that the validity of standardized testing to measure contractor performance cannot be proven.

As to the alleged ambiguity concerning a student's failure to reach a particular grade level after completion of a course, the RFP clearly provides for a deduction if the

student has not gained more than 1.5 grade levels even if the student does not reach the fifth or ninth grade levels. Eldorado's argument as to this requirement is without merit.

Regarding the RFP's performance standards, we note that the Army does not allege that these standards either derived from or should be the "standards of care" for the educational services industry. Rather, the Army claims that it needed to specify performance standards for the purpose of measuring contractor performance in this particular case. Therefore, although the educational services industry may not yet have standards of care so as to distinguish objectively adequate from inadequate levels of performance, we cannot conclude that the Army acted unreasonably in drafting performance standards for the purposes of this procurement. Thus, the argument concerning the existing "standards of care" in the industry is of no consequence.

Second, Eldorado argues that the contractor should not have to guarantee its staff payment under applicable minimum wage statutes regardless of the quality of the staff performance while the contractor is denied the same assurance under the above format for deductions. However, the Service Contract of 1965, 41 U.S.C. §§ 351, et seq. (1976), and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq. (1976), applied to this solicitation. These statutes mandate a minimum wage, regardless of the quality of the employee's performance. Therefore, we find this issue without merit.

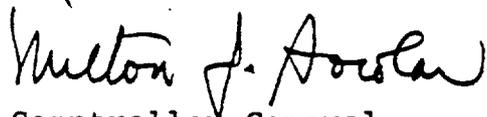
Third, Eldorado alleges that the government unreasonably retained complete control over the curriculum and materials because the RFP states that the government shall specify the materials, texts, and forms for instruction, receive and approve the course curriculum, and specify what texts and courses will be the basis for certain courses.

The Army asserts that while the RFP requires the use of government-furnished materials, nothing in the RFP prevents the contractor from augmenting these materials or establishing the method in which the materials must be utilized. The Army also claims that the RFP only requires the contractor to provide two copies of the curriculum to the

government, not that the government must approve the curriculum.

As stated above, our Office will not question agency decisions concerning the best methods of accommodating its needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Romar Consultants, Inc., supra. In this case, we agree with the Army that the terms of the RFP do not prevent the contractor from augmenting the government-furnished materials or establishing the method in which the materials must be utilized. We also agree with the Army that the terms of the RFP do not require the government to approve the contractor's curriculum. We thus cannot conclude that the government has unreasonably retained complete control over the curriculum and materials.

We deny the protest.

for   
Comptroller General  
of the United States