

DECISION

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

29466

FILE: B-214447, B-214447.2**DATE:** October 2, 1984**MATTER OF:** Linda Vista Industries, Inc.**DIGEST:**

1. In the absence of evidence clearly establishing a substantial adverse impact on competition, GAO will not object to agency's continued use of minimum manning and equipment requirements to ensure adequate service.
2. Where a mandatory provision is omitted from the solicitation, rendering it defective, award still may be made under the solicitation if there was full and free competition, the actual needs of the government will be met by the award and none of the bidders were prejudiced.
3. Where invitation anticipated combination firm, fixed-price and indefinite-quantity contract, protester which objected to the fact that the government made no representation as to the actual amount of work that would be requested under indefinite-quantity portion of contract was not prejudiced since, as incumbent contractor, it had special knowledge of the amount of work that would probably be required under indefinite-quantity portion of contract.
4. A damages provision in a solicitation for a service contract which permits the government to deduct amounts from the contractor's payments for unperformed or unsatisfactory services does not conflict with any reperformance rights of the contractor. Neither the standard "inspection of services" clause nor the damages provision requires that the government, in the case of unsatisfactory services, permit reperformance. Both provisions permit reperformance under certain circumstances and both provisions reserve the same rights to the government.

030216

5. A damages provision in a solicitation for a service contract which permits the government to deduct from the contractor's payment an amount representing the value of several tasks making up a service item, even though the nonperformance or unsatisfactory performance may have been in connection with less than all of the tasks, imposes an unreasonable penalty since the record does not indicate that these deductions are reasonable in light of the circumstances.
6. A provision in the solicitation which permits the contracting officer to withhold 10 percent of the estimated amount owed the contractor for services performed until final completion and acceptance of the work is not in conflict with the standard payments clause, since the standard payments clause states that certain deductions may be taken. The 10-percent withholding was such a deduction.

Linda Vista Industries, Inc. (Linda Vista), protests the proposed award of a contract under invitation for bids (IFB) No. N62474-84-B-2007, issued on January 30, 1984, by the officer in charge of construction at the Naval Air Station, Lemoore, California. The IFB solicited bids for grounds maintenance at the Naval Air Station. Bids were opened on April 12, 1984, and it was determined that Linda Vista was the third low bidder. By letter of February 21, 1984, Linda Vista lodged its protest with our Office, setting forth several bases for its protest.

We sustain the protest solely on the basis that one of the solicitation's damages provisions denies credit for partial or substantial performance. The remainder of the protest is denied.

First, Linda Vista objects to the manning requirement provided for by the solicitation which lists the minimum number of personnel to be provided for each job category. Linda Vista contends that this requirement unduly restricts full competition and is not in the interest of the government. Linda Vista argues that if the contractor is required to follow the staffing chart, not only is the government unreasonably controlling the contractor's performance, but the contractor is prevented from effecting certain economies due to the lack of flexibility in the use of personnel.

In this regard, our office has previously found the use of minimum manning requirements in advertised procurements to be permissible. See Dragon Services, Inc., B-213041, Mar. 19, 1984, 84-1 C.P.D. ¶ 322, and Palmetto Enterprises, Inc., et al., B-193843; B-193843.2; B-193843.3., Aug. 2, 1979, 79-2 C.P.D. ¶ 74. In the absence of evidence clearly establishing a substantial adverse impact on competition, we see no reason to question the Navy's use of minimum manning requirements which the agency believes are needed to ensure adequate service.

Second, Linda Vista objects to the table of equipment established by the government for the contractor. Linda Vista contends that the technical specifications demonstrate that the government is capable of stating its minimum needs in terms of performance specifications and that detailing the equipment to be used amounts to dictating the manner in which the needs must be fulfilled and goes beyond the minimum needs of the government. As in the case of minimum manning requirements, we see no reason to question the Navy's use of minimum equipment requirements which it believes are necessary to ensure adequate service.

Third, Linda Vista objects to the omission of the value engineering clause from the solicitation. Defense Acquisition Regulation (DAR), § 1-1704.1, reprinted in 32 C.F.R. pts. 1-39, vol. 1 (1983), requires the inclusion of the value engineering clause contained in DAR, § 7-104.44, reprinted in 32 C.F.R. pts. 1-39, vol. 2 (1983), to be included in every supply or service contract of \$100,000 or more. According to the record, the solicitation was amended to incorporate the value engineering clause set forth in DAR, § 7-104.44; however, an additional value engineering clause required by DAR, § 7-1903.51(b), reprinted in 32 C.F.R. pts. 1-39, vol. 2 (1983), relating to contract saving sharing, was omitted. The Navy contends that the omission was inadvertent and is not prejudicial to bidders since the clause has no bearing on the evaluation of bids. The Navy argues that the eventual contract awardee will not lose any rights, as the clause will be added by modification but, in any event, the DAR-prescribed clause would be read into the contract under the doctrine established in G.L. Christian & Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418, motion for rehearing denied, 160 Ct. Cl. 58, 320 F.2d 345, cert. denied, 375 U.S. 954 (1983). Since the record indicates that Navy knew of the omission prior to award, the issue presented by the omission of the clause is whether the omission rendered the IFB so defective as to require that it be canceled and resolicited with the proper clause included.

We have held that the so-called "Christian doctrine" is limited to the incorporation of mandatory contract provisions into otherwise properly awarded contracts and cannot be used to incorporate mandatory provisions into an IFB when they have been inadvertently omitted. 47 Comp. Gen. 682, 685 (1968). There is no doubt that the solicitation was defective since it did omit a mandatory clause; however, our Office has held that the utilization of inadequate, ambiguous or otherwise deficient specifications is not always a compelling reason to cancel a solicitation and readvertise. Where an award under the solicitation, as issued, would serve the actual needs of the government and would not prejudice other bidders, we have not recommended cancellation and resolicitation. See Kleen-Rite Corporation, B-189458, Sept. 28, 1977, 77-2 C.P.D. ¶ 237, and cases cited therein. In the present case, there is no evidence that full and free competition was not achieved, that any of the bidders were prejudiced by omission of the clause or that the actual needs of the government will not be served. Therefore, we do not believe that the omission of the clause rendered the solicitation so defective as to require that it be canceled and resolicited.

Fourth, Linda Vista objects to the language contained in the provision at page 0001-13, paragraph 18(b), entitled "Indefinite Quantity Portion." By way of explanation, the solicitation defines the contract to be awarded as a "combination firm, fixed-price [item 1] and 'indefinite quantity' [item 2] contract." The solicitation provides estimates for both portions of the number of units of work for the services. However, the language complained of provides that the actual amount of work to be performed under the indefinite-quantity portion and the time of such performance are to be determined by the officer in charge who is to issue work orders to the contractor for work to be done. There is no minimum ordering requirement for this portion of the solicitation.

Linda Vista argues that this provision places ordering in the sole discretion of a specific government official and, thus, avoids the necessity of placing orders in good faith against actual requirements that materialize. We disagree. The indefinite-quantity portion of the solicitation did not specify a minimum quantity to be ordered. However, the IFB anticipates that a contract shall be awarded for the furnishing of all management, labor, materials, transportation and equipment required for grounds maintenance at the Naval Air Station. Due to the indefinite nature of the services covered by the indefinite-quantity portion, we do not know whether it was practical for the

Navy to include a minimum order requirement in the IFB. While Linda Vista complains that the government made no representation as to the actual amount of work that would be requested under the indefinite-quantity portion of the contract, we do not believe that Linda Vista has been prejudiced since, as an incumbent contractor, it would have a special knowledge of approximately what quantity of work would be required under that portion of the contract.

Fifth, Linda Vista contends that the standard inspection of services clause (general provision 4) required by DAR, § 7-1902.4, reprinted in 32 C.F.R. pts. 1-39, vol. 2 (1983), is in conflict with another provision of the solicitation. Linda Vista contends that the "consequences of contractor's failure to perform required services" clause (hereafter referred to as the consequences clause), on pages 0004-2 and 0004-3 of the solicitation, is in conflict with the inspection of services clause, which reserves the government's right to inspect all services, to the extent practicable, at all times during the contract terms, and also provides, in pertinent part, as follows:

"If any services performed hereunder are not in conformity with the requirements of this contract, the Government shall have the right to require the contractor to perform the services again in conformity with the requirements of the contract, at no additional increase in total contract amount. When the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services, the Government shall have the right to (i) require the contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; and (ii) reduce the contract price to reflect the reduced value of the services performed. . . ."

The consequences clause is an additional clause in the solicitation. Section "a" of this clause permits the government, in the case of nonperformance or unsatisfactory work, to (1) deduct from the contractor's invoice all billings associated with the nonperformed or unsatisfactory work at rates set out in a schedule of deductions contained in the solicitation, unless the contractor is given an opportunity to satisfactorily perform the work in question at no additional cost to the government; or (2) have the work performed by its personnel, or by other means.

Additionally, section "b" of the clause permits the government, in the case of the options mentioned in (1) above, to also deduct, as liquidated damages, an additional 10 percent of the rate set forth in the schedule of deductions and, in the case of the option set forth in (2) above, the government is permitted to deduct 20 percent of the schedule of deductions rate for liquidated damages.

Linda Vista has two basic complaints in regard to the above two clauses. First, Linda Vista contends that the inspections of services clause does not permit deductions in the case of reperformable tasks without the contractor being given an opportunity to reperform, whereas, under the consequences clause, the government, both in the case of unperformed work as well as unsatisfactory performance, has the option of either affording the contractor an opportunity to perform the work satisfactorily or not exercising the option and taking the deductions. Second, Linda Vista contends that the consequences clause, when viewed in light of the deduction schedule, appears in many instances to expressly establish a systematic method of denial of credit for partial or substantial performance.

The Navy, in response to Linda Vista's allegations, states that the consequences clause does not allow for unreasonably large deductions in instances of slight defects in the performed work, but merely permits deductions from billings associated with unperformed or unsatisfactorily performed work. The Navy contends that deductions from billings associated with satisfactorily performed work may not be made. The Navy further contends that the consequences clause should be construed to do no more than effect the government's most basic remedy, to not pay for work which has not been acceptably performed. With regard to Linda Vista's complaint that the consequences clause permits the government to deduct for reperformable work rather than giving the contractor an opportunity to reperform the work, the Navy states it is entitled to decide when it is in the government's interest to not seek reperformance of work which, while correctable, is of little value to the government when performed late.

In regard to Linda Vista's complaint that under the consequences clause, as opposed to the inspection of services clause, the government has the option in case of both unperformed work as well as unsatisfactorily performed work to either give the contractor an opportunity to reperform or not giving the contractor this opportunity and taking the deductions, we do not believe this complaint has merit. We agree with the Navy that it should be entitled to decide in

its best interest not to have the work performed if it is of no use to the Navy after being performed late.

The inspection of services clause gives the government the right, where performance is unsatisfactory, to require reperformance at no additional increase in the contract amount and to reduce the contract price to reflect the reduced value of the services performed when the services "are of such a nature that the defect cannot be corrected by reperformance of the services." The clause does not expressly bestow any rights on the contractor and explicitly recognizes that circumstances may exist where reperformance would not correct a deficiency, for example, where the service would be of no use to the Navy if it is performed late. The clause thus reserves, for that situation, the government's right "to (i) require the contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; and, (ii) reduce the contract price to reflect the reduced value of the services performed." (Emphasis added.) The inspection of services clause does not require that the government permit reperformance without regard to the circumstances; rather, it simply allows the government to permit reperformance. See Environmental Aseptic Services Administration and Larson Building Care Inc., B-207771, et al., Feb. 28, 1983, 83-1 C.P.D. ¶ 194. The same rights are reserved to the government under the consequences clause.

Regarding Linda Vista's contention that the consequences clause appears to establish a systematic method of denial of credit for partial or substantial performance, we believe this contention has merit. While undoubtedly under most circumstances the Navy would not take unreasonable deductions where there has been substantial or even partial performance, we disagree with the Navy's contention that the consequences clause does not allow for unreasonable deductions where there has been substantial or partial performance. As mentioned above, the consequences clause provides that deductions are to be at the rate set out in the schedule of deductions. Some of these items on the schedule are lump-sum items for the performance of many pieces of work. For example, item No. A.I. 16 for fall cleaning would appear to consist of many tasks and, should the contractor fail to perform one task, the government would have, under the consequences clause, the right to deduct for the whole item since no provision is made in the consequences clause for partial performance or pro rata deductions.

For reasons stated below, we believe that section "a" of the consequences clause imposes liquidated damages in violation of applicable provisions of DAR, § 1-310, reprinted in 32 C.F.R. pts. 1-39, vol. 1 (1983), concerning liquidated damages, although, as previously pointed out, section "b" of the consequences clause specifically provides for the deduction of liquidated damages to compensate the government for administrative or other expenses resulting from nonperformance or unsatisfactory performance.

Liquidated damages are fixed amounts which one party to a contract can recover from the other party 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). In the present case, the amount to be deducted is fixed by schedule of deductions. While a liquidated damages provision benefits the government in that it permits such deductions, the use of such a provision is not without limitation.

DAR, § 1-310 limits the use of such damages to instances where the time of performance is such an important factor that the government may reasonably expect to suffer damages if the performance is delinquent and the extent or amount of such damages would be difficult or impossible to ascertain. The regulation recognizes that liquidated damages fixed without reference to probable actual damages may be held to impose a penalty and, therefore, be unenforceable. In this regard, see Pribe & Sons v. United States, 332 U.S. 407 (1947), wherein it was held that while such damages might add an effective spur to satisfactory performance, it is well settled that such a penalty to deter default is improper and unenforceable.

We will object to a liquidated damages provision as imposing a penalty if a protester shows that there is no possible relation between the amounts stipulated for liquidated damages and the losses which are contemplated by the parties. See 46 Comp. Gen. 252 (1966); Massman Construction Co., B-204196, June 25, 1982, 82-1 C.P.D. ¶ 624. We believe that the protester initially met this burden by showing that the consequences clause does permit deduction for the total item, even though the nonperformance or unsatisfactory performance might relate to less than all of the tasks covered by the item.

It was incumbent on the Navy, in its response to the protester, to show that there is a reasonable basis for its measure of damages, which the Navy failed to do. The Navy's

failure to respond to the protester's allegation with a reason as to why nonperformance or unsatisfactory performance of a task or tasks less than covered by the item, without regard to the nature or seriousness of the task, warrants deduction for the entire item compels us to conclude that section "b" of the consequences clause imposes a penalty as to nonvital tasks and would unnecessarily raise the government's cost and have an adverse impact on competition. We therefore sustain the protest to that extent. See Environmental Aseptic Services Administration and Larson Building Care Inc., B-207771, et al., supra.

Finally, Linda Vista objects to the payments clause (general provision 5) as being an unauthorized deviation from the payments clause required by DAR, § 7-103.7, reprinted in 32 C.F.R. pts. 1-39, vol. 2 (1983). Paragraph (a) of the solicitation's payment clause, which is in substantial compliance with DAR, § 7-103.7, provides as follows:

"The contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be on performance accepted by the government when the amount due on such performance so warrants; but not more often than once a month."

The deviation complained of is a provision in paragraph (b) of the solicitation's payments clause which allows the contracting officer to withhold 10 percent of the estimated amount (due the contractor for services rendered) until final completion and acceptance of the work. Paragraph (a) of the payments clause states that the contractor will be paid for services rendered and accepted, less deductions as herein provided. One of these deductions is a withholding of 10 percent of the amount due the contractor until final completion and acceptance of the work. We do not find that the solicitation's payments provision in any way deviates from the requirements of DAR, § 7-103.7.

The protest is sustained as to the provisions that permit excessive deductions. Since the bids have been opened, Navy is precluded from amending the solicitation so as to eliminate any possibility of excess deductions. However, we do not believe that cancellation and resolicitation are warranted since there was adequate competition and it does not appear that the protester has been prejudiced.

B-214447, B-214447.2

Instead, we are recommending to the Navy that in administering the contract to be awarded, it avoid taking deductions under the contract in a manner that imposes a penalty.

The protest is denied in part and sustained in part.

Milton J. Aroslan
for Comptroller General
of the United States