



**The Comptroller General  
of the United States**

Washington, D.C. 20548

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## Decision

**Matter of:** Aquasis Services Inc.

**File:** B-235257

**Date:** July 5, 1989

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### DIGEST

Provision in a solicitation for operation of a distribution center which authorizes deduction for entire task because of unsatisfactory performance of any one element of the task is unobjectionable, where the task is not divisible by separate elements for purposes of determining an acceptable quality level because partial satisfactory performance will be of little or no value to the agency.

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### DECISION

Aquasis Services Inc., protests provisions permitting deduction from payments to the contractor for deficient performance under request for proposals (RFP) No. 52WCNA906004DM, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for services necessary to operate the National Logistics Supply Center distribution center at Kansas City, Missouri. Specifically, Aquasis alleges that the solicitation provisions under the heading "Performance Requirements Summary" (PRS) permit deductions from the contractor's payment for unsatisfactory performance of a performance category, processing standard orders for shipment, which are in excess of the value of tasks actually performed deficiently and, thus, constitute an unenforceable penalty. The closing date for receipt of proposals has been suspended indefinitely pending resolution of this protest.

We deny the protest.

The RFP divides the requirements into four performance categories, which are subdivided into tasks or elements. The processing standard orders category or task that is the subject of this protest, consists of the following elements: (1) providing documentation to the contracting officer's technical representative within 4 hours following receipt of the order, (2) removing the item from shelf and preparing it

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for shipment, (3) properly marking the packing list, (4) shipping the order in a timely manner, (5) entering the serial number on order form, (6) packing item to preserve contents, and (7) selecting shipping method. Under the RFP, the agency will monitor performance, and, if any of the tasks are not completed properly, the agency may consider the processing of the entire order unacceptable. It then would deduct an amount representing damages of the entire task, even though some elements may have properly been completed, because of deficient performance based on a formula established in the RFP. The RFP also provides for an allowable number of deviations before damages will be assessed.

The protester contends that the agency should distinguish the separate elements under the processing task in evaluating performance so that a prorata payment could be made taking into account the percentage of successfully performed elements within each order.

We will not object to a damages provision, such as the one involved here, unless the protester can show there is no possible relation between the amounts stipulated for damages and losses which are contemplated by the parties. Aquasis Services, Inc., B-229723, Feb. 16, 1988, 88-1 CPD ¶ 154. In this regard, it is the contracting agency that is most familiar with the conditions under which the services and supplies have been and will be used and therefore in the best position to determine the best method of accommodating its needs.

The agency report reasonably establishes that, if any of the elements required are not performed correctly, the order should be considered improperly processed. For example, the contractor may properly mark and pack an item, but if it ships the item late (or not at all), the value to the agency of the other services would be negated. The agency also points out that a delay in providing the order documentation to the contracting officer's technical representative (one of the required elements) can cause delays in filling the order.<sup>1/</sup> Thus, the record shows that it is essential that all the criteria for processing an order be met for the contractor to be in complete compliance with the performance requirements, and that partial performance will have little

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<sup>1/</sup> If we were to agree with the protester's proposed method of evaluating performance, the contractor would be partially paid where it correctly performs some of the elements, but ships an order late, to the wrong place, or fails to ship the item at all.

or no value to the agency. Based on the interrelationship of the elements in processing an order successfully, we conclude that NOAA has reasonably defined its needs and designated its acceptable quality level accordingly. See Aquasis Services, Inc., B-229723, supra.2/

The protest is denied.

*for* *James F. Hinchman*  
James F. Hinchman  
General Counsel

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2/ In its comments to the agency's report, Aquasis argues that the damages provision in this protest is similar to one which we found objectionable in D.J. Findley, B-215230, Feb. 14, 1985, 85-1 CPD ¶ 197. In that case, we sustained the protest against the damages provision because the agency failed to respond to or rebut the protester's allegation that there was no possible relation between the amounts stipulated for damages and the losses which are contemplated by the parties. Here, however, the agency has explained persuasively the basis for the damages provision.