



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R Squared Scan Systems, Inc.

File: B-249917; B-250089.2; B-250098; B-250099;
B-250100; B-250101; B-250170; B-250782

Date: December 23, 1992

Paul T. Hunt for the protester.

William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.

Paula A. Williams, Esq., Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Rates established for recovery of liquidated damages which are reasonably related to actual costs agency will incur do not constitute a penalty and are permissible.

2. Solicitation may properly establish contractor's liability for both liquidated damages and excess procurement costs.

DECISION

R Squared Scan Systems, Inc. protests the terms of eight request for proposals (RFPs) issued by the Department of Veterans Affairs for maintenance services of computerized tomography (CT) scanners at various Veterans Affairs Medical Centers (VAMCs).¹ The CT scanners will be used to perform

¹The solicitation numbers and our respective file numbers are listed below.

<u>Solicitation No.</u>	<u>File No.</u>
565-3-93	B-249917
689-42-92	B-250089.2
594-5-93	B-250098
673-14-93	B-250099
589-07-92	B-250100
595-4-93	B-250101
659-1-93	B-250170
405-43-92	B-250782

diagnostic examinations as part of patient care services at the VAMCs. R Squared alleges that the solicitations are overly restrictive because the liquidated damages clause in each solicitation imposes cost-prohibitive penalties for equipment downtime.

We deny the protests.

The solicitations were issued during a period from May through August 1992. Each solicitation contains a liquidated damages clause with the following provisions.²

"A. Contractor shall be liable to the Government for [the agency's] losses of production due to significant equipment downtime. Significant equipment downtime is that which exceeds 10 - 11 hours/month. Records regarding downtime will be kept by the COTR and the maintenance contractor.

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"C. If downtime exceeds 16 consecutive hours, the [contracting officer] may exercise the option to hire an alternative source to resolve the problem. The decision to exercise this alternative will reside exclusively with the [contracting officer]. All fees generated by the alternate contractor(s) will be handled in accordance with the Default clause

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"E. Monies will be subtracted from the contract if the contractor fails to meet the up-time requirements using the following formula:

<u>"MONTHLY DOWNTIME</u>	<u>MONIES</u>
10 - 11 hours/month	0%
12 - 13 hours/month	20%
14 - 15 hours/month	40%
16 - 17 hours/month	60%
18 - 19 hours/month	80%
Over 20 hours/month	100%"

R-Squared protests that the above provisions are "unduly restrictive and cost-prohibitive," and asserts that the solicitations "penalize the contractor three times for any extended downtime." Specifically, R Squared maintains that

²Some of the solicitations contain minor variations that have no impact on the issues raised in this protest.

the above provisions make the contractor liable for (1) production losses (under paragraph A); (2) the expenses of another service contractor (under paragraph C); and (3) reduction of contract revenues (under paragraph E).

R Squared fails to ascertain the obvious relationship between paragraphs A and E and the fact that, together, they establish a single liability. Paragraph A establishes the contractor's liability for costs associated with the agency's production losses caused by significant equipment downtime; paragraph E creates the specific formula for calculating those damages to be assessed for significant downtime. Paragraph C establishes the contractor's liability for procurement costs in the event of a partial termination under the default clause.

R Squared asserts that the contractor's potential liability for production losses, under paragraphs A and E above, is excessive. Specifically, R Squared complains that the rate of liquidated damages specified creates too much performance risk for the contractor.

The agency states that, in these contracts for CT scanners, equipment downtime causes production losses and severely compromises patient care. Specifically, the agency explains that, during periods of equipment downtime, CT examinations are either postponed or contracted out; in either event, actual costs are incurred. When CT examinations are contracted out, the associated costs range from \$500 to \$800. When CT examinations are postponed, the lengths of patient stays are increased, surgeries are delayed, other more expensive diagnostic tests may be performed, and patients may be forced to make repeated visits to the VAMC. In addition, contrast dye which has a short lifetime may have been ingested by the patient prior to scanner failure, and hard copy filming may become backlogged due to film camera failure and have to be performed by a technician later on overtime pay basis. While all of these costs are real, the agency points out that they are difficult to quantify.

The Federal Acquisition Regulation (FAR) specifically authorizes a procuring agency's use of liquidated damages clauses in instances where timely performance is such an important factor that the government may reasonably expect to suffer damages if performance is delinquent, and the extent or amount of such damages will be difficult or impossible to ascertain or prove. FAR § 12.202(a). The rate of liquidated damages imposed must be reasonable and bear some relationship to the losses contemplated. FAR § 12.202(b). Before this Office will rule that a liquidated damages provision imposes an impermissible penalty, the protester must show that there is no possible relationship

between the solicitation's specified liquidated damages rate and reasonable contemplated losses. Ameriko Maintenance Co., B-224087, Dec. 19, 1986, 86-2 CPD ¶ 686; Wheeler Bros., Inc., B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575; International Business Inv., Inc., B-213723, June 26, 1984, 84-1 CPD ¶ 668.

The liquidated damages provisions at issue here specify certain percentages of deductions from the invoice dollar totals, to be calculated on a monthly basis. Under the terms of the solicitations, no liability is incurred for equipment downtime which constitutes less than 5 percent of the total time the equipment is to be available during a given month. Deductions from contract revenues increase as the level of downtime increases, and liability is limited since downtime is calculated and revenue deductions are assessed on a monthly basis.

On this record, we cannot conclude that the liquidated damages provisions at issue here create unreasonable liability for the contractor or that they bear no relationship to the actual costs the agency will incur. Accordingly, the deduction provisions do not constitute a penalty and are not otherwise an unreasonable exercise of agency discretion. See Environmental Aseptic Servs. Admin., B-221316, Mar. 18, 1986, 86-1 CPD ¶ 268.

R Squared next protests that the agency's inclusion of provisions for both liquidated damages and excess procurement costs (under paragraph C above) is improper. We find this contention without merit.

It is well settled that procuring agencies are authorized to contractually provide for the recovery of both liquidated damages and excess procurement costs. See FAR §§ 49.402-2, 49.402-7. Such recovery is proper where the agency actually incurs both types of costs due to a contractor's defective contract performance. Here, the record indicates that the costs covered by the provision for liquidated damages are separate from those covered by the procurement clause. Accordingly, the agency's inclusion of solicitation provisions that create liability for both liquidated damages and excess procurement costs is not improper.

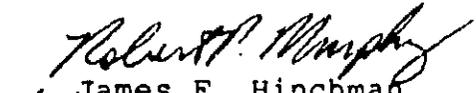
Finally, in its comments on the agency report, R Squared for the first time complains that the solicitation is ambiguous regarding the definition of "equipment downtime." This portion of R Squared's protest is without merit.

The RFP clearly defines "equipment downtime" as periods during the "normal hours of coverage³ . . . that the scheduled equipment is not fully operational." The RFP further states:

"Downtime will begin when the contractor is required to be on site (see Unscheduled Maintenance Section response time definition), after notification by the CO, COTR, or designated alternate. Downtime will accumulate until the scheduled equipment is returned to full and usual operation and accepted as such by the CO, COTR or designated alternate. [Downtime] does not include scheduled maintenance for PM purposes or when waiting for VA furnished tubes. Refusal of access to the equipment indicates that the unit is up and running and this time will not be considered when determining downtime."

In our view, the above provisions of the RFP clearly and unambiguously define "equipment downtime."

The protests are denied.


for James F. Hinchman
General Counsel

³The solicitations specifically identify the normal hours of coverage.