DECISION

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

FILE: B-219763.2 **DATE:** November 26, 1985

MATTER OF: Sunrise Maintenance Systems

DIGEST:

1. Protest alleging that work tasks and reperformance rights provisions of solicitation are ambiguous does not state a basis of protest when the protester provides no examples of the alleged ambiguities and does not demonstrate that any of the provisions are susceptible to more than one reasonable interpretation.

2. A provision in a solicitation for custodial services that permits the government to deduct from the contractor's payments for unperformed or unsatisfactory services does not conflict with any reperformance rights of the contractor. Both the standard "inspection of services" clause and the solicitation itself permit, but do not require, the government to allow the contractor to reperform.

3. Protest against a provision in a solicitation for custodial services that permits the government to deduct from the contractor's payments an amount representing the value of unsatisfactory service is denied when protester provides no explanation of its objection to the provision and does not demonstrate the unreasonableness of the provision.

4. The actual implementation of a payment deduction system for deficient performance of services is a matter of contract administration, not for GAO's review.

Sunrise Maintenance Systems protests allegedly defective specifications in invitation for bids (IFB) No. FO2604-85-B-0059, issued June 20, 1985 by the

Department of the Air Force. The IFB, a total small business set-aside, is for custodial services in 122 buildings at Luke Air Force Base and Gila Bend Gunnery Range, both in Arizona. Sunrise alleges that certain solicitation provisions, relating to the government's right to make deductions for unsatisfactory performance and to the contractor's right to reperform, are ambiguous and unreasonable. Bid opening, which was scheduled for July 22, 1985, has been indefinitely postponed.

We dismiss the protest in part and deny it in part.

The IFB incorporates by reference the standard Inspection of Services--Fixed Price clause that reserves the government's right to inspect all services, to the extent practicable, at all times during the contract term. The clause also provides that if any of the services do not meet contract requirements, the government may require the contractor to perform the service again at no increase in price. It also provides that when defects cannot be corrected by reperformance, the government may reduce the contract price to reflect the reduced value of the services. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 46.304 and 52.246-4 (1984). The IFB contains additional inspection provisions under the heading Performance Requirements Summary (PRS) that permit the government to use a variety of methods to evaluate the contractor's performance. These include random sampling of recurring services (where an inspector examines a representative number of units where a particular cleaning task, for example, vacuuming carpets, is required); periodic surveillance; and customer complaints.

Except as specifically provided by the PRS, the contractor is not entitled to correct defects by reperformance, and therefore, unsatisfactory performance may result in deductions from the contractor's payments. When the government determines services may be corrected by reperformance or late performance, the PRS states, it may require the contractor to so perform. Upon reinspection, the government may credit the contractor for satisfactory performance or hold it liable for any damages sustained by the government.

Specifically, the protester complains that (1) work tasks are not sufficiently defined in connection with reduced value deductions and (2) that ambiguities of reperformance preclude deductions under certain contract clauses. As the incumbent, the protester also alleges that in this IFB the Air Force has changed the statement of work

to allow deductions without first giving the contractor a chance to correct deficient performance. The protester contends that the current statement of work follows Air Force Regulation (AFR) 400-28 (Vol. I, Sept. 26, 1979), rather than AFR 70-9 (Aug. 17, 1984), and maintains that the latter, used in previous contracts, allows correction before deductions are taken. Finally, the protester alleges that the inspection and rejection of services provisions are improperly weighted in relation to the value of the contract.

In its report on the protest, the Air Force does not address the substance of Sunrise's protest; rather, it contends that it is vague and should be dismissed for failure to state a sufficient basis of protest. While in our opinion the protest could have been more artfully drawn, we find the allegations concerning the reasonableness of the deduction provisions and the manner in which services are weighted in relation to the value of the contract sufficient to state a basis of protest.

We dismiss the allegations that the work tasks and reperformance rights are ambiguous. The protester neither provides examples of the alleged ambiguities nor demonstrates that any of the specifications are susceptible to more than one reasonable interpretation, so that full and free competition has been impaired by bidders competing according to differing expectations of contract requirements. Therefore, the protester has not stated a basis on which to find these solicitation provisions defective.

We find the protest on the change in the statement of work with regard to the reperformance rights without legal merit. AFR 400-28 prescribes the method for developing a statement of work and a quality assurance plan for service contracts; it implements Air Force policy concerning these matters. AFR 70-9, on the other hand, deals with procedures; it describes the quality assurance evaluation program and assigns responsibilities for personnel involved. Moreover, AFR 70-9 specifically instructs that performance work statements are to be written using AFR 400-28 as guidance. AFR 400-28 provides guidance for deductions for deficient services, but it does not specifically address the issue of reperformance before deduction. Rather, this is left to the agency's discretion under the inspection of services clause, which indicates that circumstances may exist where reperformance would not correct a deficiency. FAR, 48 C.F.R. § 52.246-4.

We have previously recognized (under a similar clause in the Defense Acquisition Regulation) that the government may, but is not required to, permit reperformance. See Environmental Aseptic Services Administration et al., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194; Linda Vista Industries Inc., B-214447 et al., Oct. 2, 1984, 84-2 CPD ¶ 380. In the Environmental case, we recognized that even when deficient services are satisfactorily reperformed, the government receives reduced value. Therefore, we found the contention that deduction provisions are inconsistent with reperformance rights without merit. To the extent that the protester here complains that the solicitation permits the government to deduct payments before giving the contractor an opportunity to reperform, we deny the protest.

The remaining issue involves the reasonableness of the challenged deduction provisions. Sunrise concludes, without explanation, that the deduction provisions are not reasonable. The deduction provisions establish a system of liquidated damages--that is, fixed amounts the government can recover from the contractor upon proof of violation of the contract, without proof of the damages actually sustained. See Environmental Aseptic Services Administration, 64 Comp. Gen. 54 (1984), 84-2 CPD ¶ 510. The FAR and our decisions require that a rate of liquidated damages be reasonable in light of the solicitation's requirements, since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR, 48 C.F.R. § 12.202(b); Environmental Aseptic Services Administration et al., 62 Comp. Gen. 219, supra; D. J. Findley, B-215230, Feb. 14, 1985, 85-1 CPD ¶ 197.

We will review a protest alleging that a solicitation's liquidated damages provision imposes a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, can adversely affect competition and unnecessarily raise the government's costs. Environmental Aseptic Services Administration et al., 62 Comp. Gen. 219, supra.

However, a protester who objects to the deduction provisions has a heavy burden. Eldorado College, B-213109, Feb. 27, 1984, 84-1 CPD ¶ 238. It is the contracting agency that is most familiar with the conditions under which the services and supplies have been and will be used. Therefore, our Office will not question agency decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbituary or otherwise unreasonable. Id.

The protester here has not given us a single example of a service that will be inspected, the value of which is allegedly improperly weighted in relation to the total contract value. Nor has the protester shown that the units that the Air Force will randomly sample will not provide a reasonable basis for finding that the service in question has been satisfactorily performed, resulting in full payment, or unsatisfactorily performed, resulting in a deduction.

Therefore, we conclude that the protester has not carried its burden of proof, since it has not demonstrated that the deduction provisions are arbitrary or otherwise unreasonable. Further, to the extent the protester is contending that the deduction provisions place an unfair risk on the contractor, we note that the mere presence of risk in a solicitation does not make a solicitation improper, since bidders are expected to exercise business judgment and to take risk into account when developing their bids. Tally Support Services, B-209232, June 27, 1983, 83-2 CPD ¶ 22. In any event, the implementation of a valid payment deduction system for deficient performance is a matter of contract administration, not for review by this Office. Starlite Services, Inc., B-219418, Oct. 15, 1985, 85-2 CPD ¶ ____.

We dismiss the indicated portions of the protest and deny the remainder.

for Seymour Efros
Harry R. Van Cleve
General Counsel