



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Aquasis Services Inc.

File: B-229686

Date: January 29, 1988

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### DIGEST

Provision in a solicitation which authorizes deduction for value of unsatisfactorily performed tasks, monitored by random sampling and customer complaint, in proportion to the defective performance imposes a reasonable measure of damages.

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### DECISION

Aquasis Services Inc. protests allegedly defective specifications in invitation for bids (IFB) No. F01600-87-B-0031, issued by the United States Air Force for services necessary to operate the administrative telephone switchboard operation at Maxwell Air Force Base, Alabama. Specifically, Aquasis protests that the solicitation provisions under the heading "Performance Requirements Summary" (PRS) permit deductions in the contractor's payment which are in excess of the value of the tasks actually performed deficiently and, thus, constitute a unenforceable penalty.

We deny the protest.

The IFB incorporated by reference the standard "Inspection of Services" clause contained in the Federal Acquisition Regulation (FAR) § 52.246-4. The clause generally must be included in all fixed-price service contracts. FAR § 46.304 (FAC 84-25). It reserves the government's right to inspect all services, to the extent practicable, at all times during the term of the contract. The clause 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 performed.

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The IFB also contains a "Contractor Payment" section 4.1 which states:

"For performance of a service that does not exceed the AQL [acceptable quality level] the contractor shall be paid the percentage of the monthly contract line item price indicated in Column 5 of the attached PRS charts for that service."

The PRS provisions permit the Air Force to sample the contractor's performance of some services by random sampling and customer complaints and to deduct payments for unsatisfactory services in an amount calculated to represent the value the unsatisfactory service bears to all the contract's requirements. To determine that value, the PRS breaks the total contract effort down to its basic component services. The value of unsatisfactory performance under a component service is determined by calculating the percentage any sampled unsatisfactory service bears to the size of the entire sample, and then multiplying it times a fixed percentage listed in the IFB which represents the value of the component service in comparison with the total contract effort. The IFB also provides an allowable deviation for which the government will not take any deductions.

In the protest filed on November 25, 1987, Aquasis alleged that the solicitation assigned unreasonable values to the tasks to be performed under the contract and that payment deductions for unsatisfactory service were disproportionate to the amount of service not performed. Aquasis specifically protests the deduction system for RS-1, RS-2, RS-3, and RS-4 (Required Service) which allegedly groups several tasks into a single deduction category which allows the Air Force the right to deduct for the entire component item should the contractor fail to perform one of the tasks since no provision is made for partial performance or pro rata deductions. All of these particular required services include answering a call within a specified period of time and either (1) completing the call or providing further customer service or (2) responding to customer request with a correct phone number, accurate information or a referral. In RS-1 if the contractor answered the call on the fifth ring instead of the fourth ring, a maximum deduction (60 percent) for nonperformance would be allowed even though the contractor might have then completed the call and/or provided further dialing procedures, tasks also required under RS-1.

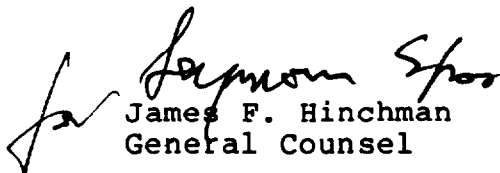
On December 4 the Air Force issued amendment No. 0003 to correct the alleged deficiency in the solicitation. Amendment No. 0003 broke down the various tasks within each component of required service and provided a maximum payment

percentage for each task. Therefore, in the example above a contractor would receive a deduction in payment (25 percent) for not answering on the fourth ring but would receive maximum payment for the other tasks completed. The protester, however, maintains that the solicitation deficiency remains and imposes an unenforceable penalty. We do not agree.

Before we will rule that a liquidated damages provision imposes a penalty, the protester must show there is no possible relation between the amounts stipulated for liquidated damages and losses which are contemplated by the parties. See Wheeler Brothers, Inc., B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575. A protester who objects to a solicitation's deduction provision has a heavy burden. Sunrise Maintenance Systems, B-219763.2, Nov. 26, 1985, 85-2 CPD ¶ 603. 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 arbitrary or otherwise unreasonable. Id.

Aquasis has not met this burden but merely alleges that the solicitation provisions permit deductions for unsatisfactory performance of a task which do not reflect the value of that portion of the task satisfactorily performed. The Air Force, by amendment to the solicitation, has provided a deduction formula which it submits is proportionate to their estimated value of each task. The deduction will vary with the percentage of the sample which is unsatisfactory, and we, therefore, conclude that this deduction formula provides a reasonable measure of damages. Aquasis indicates in its comments to the agency report that more value should be assigned to the "customer service" aspect of the required service. However, it is the agency's discretion to determine where emphasis should be placed in meeting the requirements of the solicitation, and we will not question such a determination unless evidence of unreasonableness is presented. See Environmental Aseptic Services Administration--Request for Reconsideration, B-217487.3, Jan. 2, 1986, 86-1 CPD ¶ 1.

The protest is denied.

  
James F. Hinchman  
General Counsel