



Comptroller General  
of the United States  
Washington, D.C. 20548

1016216

# Decision

**Matter of:** EDP Enterprises, Inc.

**File:** B-256368

**Date:** June 14, 1994

Major W. Park, Jr., Esq., Gage & Tucker, for the protester, Riggs L. Wilks, Jr., Esq., Elizabeth D. Berrigan, Esq., and Jeffrey S. Dubois, Esq., Department of the Army, for the agency. Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest against solicitation provisions relating to the deduction of contractor payments for inadequate performance is denied where record shows that deductions bear a reasonable relationship to the approximate losses the government could suffer as a result of inadequate performance.

## DECISION

EDP Enterprises, Inc. protests the terms of request for proposals (RFP) No. DABT31-94-R-0001, issued by the Department of the Army for dining facility attendant, management, and food production services at Fort Leonard Wood. EDP argues that the RFP's provisions relating to deductions from contract payments for unsatisfactory performance are unreasonable.

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

The RFP calls for offers to perform comprehensive dining facility attendant, management, and food production services for a base year and four 1-year options. The contractor will be responsible for furnishing all labor and janitorial/expendable supplies required for performance of the contract. The required services are to be furnished at numerous dining facilities located at Fort Leonard Wood and for troops in the field ("field feedings"). The RFP provides that the contractor will receive a lump-sum monthly payment for all services and supplies provided during the preceding month, 75 percent of which is for food production services, and 25 percent of which is for other services and janitorial/expendable supplies.

The 75-percent portion of the monthly payment which is for food production services is subject to deductions for unsatisfactory performance.<sup>1</sup> Specifically, the solicitation divides the food production services payment between eight separate categories of tasks, and each category is assigned an acceptable quality level (AQL). The AQL is the percentage of a contractor's performance which may be found unacceptable before the monthly payment is to be reduced. The categories, percentages, and AQLs, as set forth in the solicitation, are as follows:

<u>Work Category</u>	<u>Percentage of Monthly Payment</u>	<u>AQL Percentage</u>
Menu Planning	1	10
Main Line Food Preparation	20	10
Self Service Food Preparation	6	6.5
Food Serving	10	6.5
Headcount/Cashier Services	8	4
Administrative Requirements	10	10
Equipment Cleaning	8	10
Field Feeding	12	4

Where the contractor performs unsatisfactorily in a given category, its monthly payment may be reduced, in whole or in part, by as much as the applicable percentage depending on the extent of the unsatisfactory performance.

In order to determine whether a contractor is performing satisfactorily, the RFP provides for inspection of a representative sample of the contract work. Each of the eight work categories is divided into a number of tasks, and failure to meet the performance requirements for a stated number of tasks within a work category will result in the contractor receiving a defective performance rating for that inspection. Where a contractor is found to have more than the allowable number of defects per month in a work

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<sup>1</sup>For one of the dining facilities, the Army provides food production services and the contractor provides only dining facility attendant services. Under this portion of the contract, 85 percent of the contractor's payment is for services and the remaining 15 percent is for supplies; the 85 percent service payment is subject to potential deductions for unsatisfactory performance. EDP's protest concerns only the potential 75-percent deduction that may be made for the food production portion of the RFP.

category, its payment in that category is reduced for the month.<sup>2</sup>

EDP argues first that the maximum 75 percent potential deduction in the monthly payment bears no reasonable relationship to the agency's actual potential losses, and thus the deduction schedule essentially constitutes an unreasonable liquidated damages provision. According to the protester, which is the incumbent contractor at Fort Leonard Wood, the maximum deduction percentage under its current contract totals only 15.75 percent, and this figure rather than the 75-percent maximum under the solicitation, accurately reflects the potential loss to the government for unsatisfactory performance. EDP specifically contends that because the RFP provides that the deductions are for "the reduction of the services performed," the Army may not properly take into consideration potential costs other than the monetary value of the services.

The Army reports that the percentages contained in the RFP represent a reasonable estimate of the losses that could arise from inadequate performance, and reflect similar percentages found in a prototype solicitation for food service contracts developed by the agency's Training and Doctrine Command (TRADOC). According to the Army, the percentages used in earlier contracts did not accurately reflect the reduced value of the services to the government, and also did not provide adequate incentive for contractors to perform in an acceptable manner. The Army maintains that the current provisions are reasonable and properly take into consideration potential losses, including those that do not arise directly from inadequate performance. The Army contends, by way of example, that the substantial medical and personnel costs that could result from food poisoning may properly be considered as a part of the measure of damages that the government would suffer from inadequate performance; the Army concludes that such damages are properly cognizable under the RFP's "reduced value of the services performed" language.

The Federal Acquisition Regulation (FAR) § 12.202, specifically authorizes the use of liquidated damages

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<sup>2</sup>The RFP contains a formula for calculating the amount of the deduction. Deductions are calculated based on the percentage of defects as compared to the size of the sample taken. For example, if a contractor is found to have defects in 20 percent of the samples taken in the food serving category (a category worth 10 percent of the contractor's monthly payment), its contract payment is reduced by roughly 20 percent of the 10 percent it is entitled to for food serving or roughly 2 percent of its overall monthly payment.

provisions where adequate performance is such an important factor that the government may reasonably expect to suffer damages if the contract is improperly performed, and the extent or amount of such damages would be difficult or impossible to ascertain or prove. The rate of liquidated damages imposed must be reasonable and bear some relationship to the losses contemplated. FAR § 12.202(b). In considering the liquidated damages to be assessed, agencies may properly consider losses beyond the reduced value of the services performed, since the impact of deficient performance may extend beyond the mere loss of the services to be provided. See H H & K Builders, B-237885, Mar. 30, 1990, 90-1 CPD ¶ 349; W.M.P. Sec. Serv., Co., B-238542, June 13, 1990, 90-1 CPD ¶ 553. Where a protester contends that a liquidated damages provision is improper, it must show that there is no possible relationship between the liquidated damages to be assessed and the reasonable contemplated losses. R Squared Scan Sys., Inc., B-249917; et al., Dec. 23, 1992, 92-2 CPD ¶ 437.

Based on our review of the record, it appears that the deduction percentages assigned to the various categories of work are the result of a careful tailoring of the prototype TRADOC solicitation to the particular statement of work in this procurement.

The agency adjusted downward the maximum potential deduction (85 percent) set forth in the prototype TRADOC solicitation to account for differences in the required work under the contemplated contract. Further, in calculating the potential losses from unsatisfactory performance, the agency considered, reasonably in our view, losses beyond the approximate value of the foregone services. In this regard, the agency reports that the serious potential impact of food-borne illness was recently illustrated at a contractor-operated dining facility at another installation where a large number of personnel were affected by an outbreak of food poisoning. Given the agency's effort to tailor the schedule of deductions to the particular circumstances of this procurement, the potential costs beyond the value of the foregone services that could result from inadequate performance, and EDP's failure to refute in detail the agency's position, we have no basis for concluding that there is no reasonable relationship between the specified deduction percentages and the reasonably contemplated losses.<sup>1</sup>

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<sup>1</sup>EDP's concern seems to stem primarily from the fact that the total potential deduction--as much as 75 percent--is higher than the total potential deduction under its predecessor contract. However, the mere fact that the Army has revised the deduction schedule used under the earlier

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EDP objects to the definition of "lot size" found in the RFP. The lot size is a measurement of the work to be performed which will form the basis for calculating any deductions; using standard tables in the TRADOC prototype solicitation, the lot size determines both the number of samples that the Army is required to take during its monthly inspections and the number of defects which are permissible before a deduction from the monthly payment is made. Under the RFP, the lot size is defined as the total number of operational days for all facilities for each month. Because there are nine dining facilities, the lot size (assuming a 30-day month) is 270 units (9 buildings x 30 days = 270). Under EDP's predecessor contract, the lot size was defined as the number of meal serving periods for all buildings per month, which amounted to 720 (9 buildings x 80 meal servings = 720). EDP challenges the reduction in the lot size because it results in a significant reduction in the number of defects which are permissible before the contractor's payment is reduced.

EDP has not shown, nor is it otherwise apparent, how the change in lot size is prejudicial. Under the prototype solicitation, the number of inspections and defects are dictated by the lot size. While it is true that a larger number of defects would be permissible if a larger lot size were used, the number of inspections that would be required also increases correspondingly. For example, where the lot size is between 151 and 280, only 32 inspections per month are required. In contrast, where the lot size is between 501 and 1,200 (the lot size preferred by the protester) 80 inspections per month are required. Since both the number of inspections and the permissible number of defects are functions of the lot size, it makes no difference what lot size is used; the contractor is held to the same standard of performance, which is dictated by the AQL percentages. The AQL percentages remain constant regardless of the lot size, sample size, and number of defects. Thus, a change in the lot size will have no effect on the standard of performance to which the contractor is held.

In any event, the Army has explained its use of the smaller lot size for this solicitation as based on the availability of quality assurance personnel to perform inspections. The agency no longer has the quality assurance personnel necessary to perform the number of inspections that would be

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<sup>3</sup>(...continued)

contract does not show that the current schedule is unreasonable; each procurement action is a separate transaction and the action taken under one is not relevant to the propriety of the action taken under another procurement for purposes of a bid protest. Komatsu Dresser Co., B-251944, May 5, 1993, 93-1 CPD ¶ 369.

required if the old lot size definition were used. EDP does not challenge the agency's position in this regard. Under these circumstances, we cannot say that the lot size used in this RFP is unreasonable.

EDP also argues that two other aspects of the RFP are improper. First, EDP contends that each work category improperly bundles together a large number of tasks that were previously broken down into more work categories. According to EDP, this creates the potential for disproportionately high deductions because failure to perform adequately in only a few tasks can result in a deduction for an entire work category.

The Army states that it agrees with EDP and intends to issue an amendment to the RFP that will provide for prorating deductions within each work category for the tasks found to be deficient. Under the proposed scheme, a contractor will only receive a deduction for tasks that are actually found deficient, and will not suffer deductions for tasks within a work category that are performed acceptably. Since the Army has proposed corrective action that is responsive to EDP's concern, we need not consider this allegation, and accordingly dismiss it as academic. Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139.<sup>4</sup>

Second, EDP claims that the RFP improperly fails to segregate the cost of services (which may be subject to deductions for inadequate performance) from the cost of expendable supplies to be furnished under the contract. EDP argues that as a result of deductions made for inadequate performance of the services, it might not be reimbursed for moneys spent for supplies. As already noted, however, the maximum deduction to which the contractor may be subject is 75 percent of the total monthly payment. The remaining 25 percent is for services not subject to deductions and expendable supplies. The RFP thus segregates the cost of supplies from the portion of the monthly payment subject to

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<sup>4</sup>EDP requests that it be awarded its protest costs for this issue since the agency is taking corrective action in response to its protest. We deny EDP's request. Our Office will only award bid protest costs where we find that the agency unduly delayed its corrective action. PLX Inc.-- Request for Declaration of Entitlement to Costs, B-251575.2, Mar. 10, 1993, 93-1 CPD ¶ 224. Here, the agency proposed corrective action in its report to our Office, and we view its action as a reasonably prompt response to EDP's protest.

the deductions. Consequently, EDP's concern is already addressed by the terms of the solicitation. Robert Wall Edge--Recon., 68 Comp. Gen. 352 (1989), 89-1 CPD ¶ 335.

The protest is denied in part and dismissed in part.



*for* Robert P. Murphy  
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