

DECISION



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

61344

FILE: B-186375

DATE: August 16, 1976

MATTER OF: Sentinel Protective Services, Inc.

98681

DIGEST:

Protest of solicitation provision assessing liquidated damages for nonperformance of services on ground that provision acts as penalty is denied where damages assessed under clause appear related to possible actual losses when viewed from time agreement is made.

Sentinel Protective Services, Inc. (Sentinel) protests the liquidated damages clause in Invitation for Bids (IFB) No. DABT01-76-B-0085, issued by Fort Rucker, Alabama for security guard services for 1 year.

Section F, paragraph 19k(3) of the solicitation provides:

"In the event the contractor fails to provide guard service in accordance with PART II - SECTION H, para 3, Post and Tours of Duty Listing, or fails to provide any other personnel in accordance with his bid if accepted, the Contracting Officer may terminate the contract in accordance with the Default Clause, ASPR 7-103.11 (1969 AUG). Whether or not the Contracting Officer determines it is in the best interest of the Government to so terminate the contract, payment will not be made for services not rendered. The reduction in reimbursement will be the total guard man-hours of 229, 583 divided into total contract price, for each guard hour per unmanned post."

Sentinel claims that the clause is a penalty and, therefore, invalid because liquidated damages should be based only on the

costs avoided by the contractor for any guard man-hours not provided and on an estimate of the profit accordingly forfeited by the contractor for such nonperformance. Sentinel argues that there is no reasonable relationship between the price reduction specified under this clause and any losses contemplated. Sentinel further argues that the clause would result in different rates of damages for different bids whereas the contemplated losses to the Government and the direct costs avoided by the contractor from the guard man-hours not provided would be the same, regardless of the amount of the bid. The protester claims that this result reflects the punitive nature of the present clause in considering bid cost elements felt to be irrelevant to the actual guard man-hours provided.

Paragraph 1-310(b) of the Armed Services Procurement Regulation (ASPR) (1975) provides:

"* * * The rate of assessment of liquidated damages must be reasonably considered in the light of procurement requirements on a case-by-case basis, since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and therefore unenforceable.* * *"

In this regard, our Office has held that in determining whether a contract stipulation for liquidated damages is valid or whether it constitutes a penalty, the only consideration is the relation between the amount stipulated as liquidated damages and the losses which are in contemplation between the parties when the agreement is made. In order for a liquidated damage provision to be a penalty and therefore invalid, it must be conclusively shown that there is no possible relation between the amount stipulated for liquidated damages and the contemplated losses. Where it is difficult or impracticable, at the time a contract is executed, to calculate the damage which might result, reasonable agreements for liquidated damages are uniformly upheld, and it is not material that the actual loss caused by the delay is small as compared with the amount of liquidated damages agreed upon, or that such damages may even exceed the contract price, since the validity of the liquidated damage provision is for determination as of the time the agreement is entered into. 46 Comp. Gen. 252 (1966); B-183591, July 10, 1975, 75-2 CPD 26.

Here, of course, we are not dealing with an actual claim for liquidated damages but rather with a protest alleging that a liquidated damages clause should be eliminated from a solicitation for bids. The Army has chosen to express damages as a function of the guard man-hour rate computed with reference to the total price bid. While we may agree with the protester that this formula is an inexact measure of actual damages, we cannot agree that the contractor's man-hour rate bears no possible relation to the contemplated losses when viewed from the time of the agreement. Under the proposed formula, the bulk of the assessment consists of the largest foreseeable expenditure--direct and indirect labor costs. In addition, aside from other liability such as excess procurement costs, it limits the contractor's liability to the contract price, notwithstanding the possibility stated by the Army, that actual losses could exceed that amount. Consequently, we believe the liquidated damages clause is related to the predictable cost of nonperformance. Since the Army has presented a reasonable basis for including the provision in its solicitation, we find no reason to object.

Finally, the protester contends that the liquidated damages clause is inconsistent with the provision in ASPR § 14-406 which provides, in part, for an equitable price reduction if the Government accepts nonconforming services. The liquidated damages provision in this solicitation, however, is inapposite because it is intended to apply only if required services are not provided rather than if they are provided in a nonconforming manner.

Accordingly, the protest is denied.

In viewing this matter we have observed that the procuring activity failed to follow the procedures provided in ASPR § 1-310(a) and 7-105.5 (1975 ed.) for making the appropriate modification to the standard Default clause. We recommend that the agency follow the ASPR in future procurements.


Deputy Comptroller General
of the United States