A Shifting Legal Landscape for Canceled Solicitations

The Court of Federal Claims applies a higher standard of review in bid protests challenging decisions to cancel solicitations.

BY STEPHEN BACON

For many years, agencies have enjoyed broad discretion to cancel solicitations in negotiated procurements. The Government Accountability Office (GAO) and the Court of Federal Claims (COFC) generally have allowed agencies to cancel a solicitation if they have a reasonable basis to do so.

A reasonable basis to cancel usually exists if the solicitation does not accurately reflect the agency's current needs or a resolicitation could potentially increase competition. Cancellation can occur after proposals have been submitted and evaluated, or even as part of corrective action in response to a post-award protest.

Contractors are often motivated to challenge an agency's decision to cancel a solicitation because it deprives them of an already awarded contract or because a new solicitation will expand the field of competitors. A cancellation decision may also deny a

protester the opportunity to compete if the agency intends to resolicit proposals under a multiple-award contract vehicle that the protester does not possess.

Historically, protesters have not had much success challenging cancellation decisions. The GAO and COFC generally have concluded that the relevant regulations provide a great degree of discretion to the agency to cancel a solicitation.

In a pair of recent decisions, however, two different COFC judges adopted a different interpretation of the regulations and applied a higher degree of scrutiny to the agency's decision to cancel the solicitations at issue. These decisions highlight an emerging split between the COFC and GAO on an important issue that is increasingly relevant for contractors and agencies.

"Broad Discretion" to Cancel Solicitations

In a procurement involving sealed bids under FAR Part 14, agencies must have "a compelling reason to reject all bids and cancel the invitation" for bids after they have been opened.[1] But in a negotiated procurement based on competitive proposals, the agency does not need a compelling reason to cancel a solicitation after proposals are submitted. Instead, FAR § 15.305(b) provides that "[t]he source selection authority may reject all proposals received in response to a solicitation, if doing so is in the best interest of the government."[2]

Based on this regulation, GAO has "consistently recognized that an agency has broad authority to decide whether to cancel a solicitation issued under competitive negotiated procedures, and to do so need only establish a reasonable basis."[3] The COFC has similarly held that "the regulatory standards for the cancellation of a negotiated procurement are so extraordinarily permissive that they impose no constraints upon a contracting officer's discretion beyond what reasoned judgment requires."[4]

In addition to the "best interest" standard under FAR § 15.305(b), another provision includes a more specific standard for canceling a solicitation. FAR § 15.206(e) states: "If, in the judgment of the contracting officer, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition."

In prior decisions, the GAO and COFC have concluded that proposed changes to a solicitation do not necessarily have to meet this standard to justify cancelling the solicitation even if the contracting officer cites FAR § 15.206(e) as the basis for the decision. In a 2010 decision, *Madison Services, Inc. v. United States*, the COFC explained that "nothing in the language of FAR 15.206(e) ... precludes the cancellation of a solicitation in response to more modest changes in a procuring agency's requirements, nor does this subsection otherwise exhaust the circumstances under which the contracting officer is *permitted* to cancel a negotiated procurement."[5]

The GAO also held in the 2016 protest of Social Impact, Inc. that there is "no legal support for the proposition that cancellation is impermissible in the absence of [the] criteria" set forth in FAR § 15.206(e).[6] In that case, GAO concluded that the agency's decision to cancel was reasonable even though the agency did not consider the criteria under FAR § 15.206(e) and "despite the fact that the anticipated changes to the solicitation might be characterized as minimal."[7] GAO reaffirmed its view that "the only pertinent inquiry is whether there existed a reasonable basis to cancel, since an agency may cancel at any time when such a basis is present."[8]

Seventh Dimension, LLC v. United States

In an opinion issued last year by Judge Matthew H. Solomson, the COFC considered a protest challenging the Army's decision to cancel a solicitation for Special Operations Forces training support.[9] After the Army awarded the contract and in response to a GAO protest filed by Seventh Dimension, the Army decided to cancel the solicitation due to certain changes in its requirements.

Seventh Dimension protested the Army's cancellation decision at the COFC, and the Army took corrective action to reconsider its decision including whether it could make an award based on existing proposals

without canceling the solicitation. During the corrective action period, the contracting officer determined that cancellation was warranted due to "significant changes and reductions to the requirement" and the Army's desire to change the contract type from an indefinite delivery, indefinite quantity (IDIQ) contract to a firm-fixed-price contract.[10]

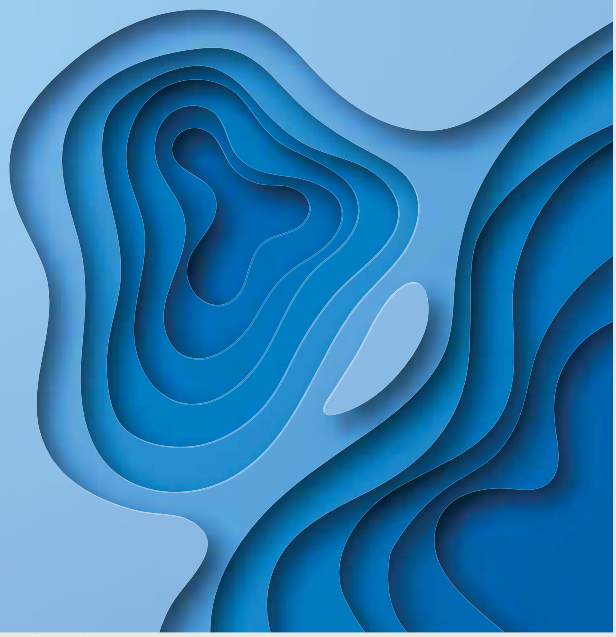
The Army relied "*solely* upon the CO's determination pursuant to FAR 15.206" as the basis for the cancellation.[11] Unlike the prior decisions referenced above, the COFC scrutinized whether the cancellation decision met the criteria under FAR § 15.206(e) because that was the specific authority cited by the contracting officer.

The COFC's interpretation of FAR § 15.206(e) diverged from prior GAO and COFC decisions in several respects. As an initial matter, the COFC noted that Title 10, which applies to military procurements, includes statutory provisions that "require an agency to award a contract unless the 'head of the agency' properly 'determines' that the 'public interest' favors rejecting all proposals."[12] In light of this requirement, the COFC concluded that the contracting officer's authority under FAR § 15.206(e) is "naturally constrained" to circumstances where the regulation's specific criteria are satisfied.[13]

The COFC also explained that FAR § 15.206(e) "effectuates" the statutory requirement for "full and open" competition under the Competition in Contracting Act (CICA).[14] That is because an agency may unfairly restrict competition if it proposes a solicitation amendment that is "so substantial" it would not have been anticipated by potential offerors reviewing the initial solicitation.[15] Such amendments constitute so-called "cardinal changes" that require the agency to cancel the solicitation and reopen the competition in accordance with CICA and FAR § 15.206(e).

The COFC held that when a contracting officer (CO) invokes FAR § 15.206(e) to cancel a solicitation, the CO must "have some concrete basis for concluding *both* that the

These decisions highlight an emerging split between the Court of Federal Claims and GAO on the issue of canceling solicitations.



proposed amendment is a cardinal change *and* 'that additional sources likely would have submitted offers had the substance of the amendment been known to them.'"[16] According to the COFC, the CO's determination must be "based on market research or evidence similar to market research," such as "data already in the agency's possession or perhaps even the agency's concrete experience."[17]

The COFC specifically rejected prior decisions, including *Madison Services*, that permitted agencies to cancel a solicitation based on an "assumption" that an amendment may increase competition.[18] In the COFC's view, the CO's "mere hypothesis" that changes in the Army's requirements would increase competition was not adequate to support a decision to cancel the solicitation.[19]

BAE Systems Norfolk Ship Repair, Inc. v. United States

Following the opinion in *Seventh Dimension*, Judge Somers of the COFC resolved a protest involving the Navy's decision to cancel a solicitation for maintenance and repair work on the USS Bainbridge.[20] The original solicitation included a requirement to drydock the ship in Norfolk, Virginia, no later than December 22, 2022. General Dynamics NASSCO-Norfolk ("NASSCO") informed the Navy that it could not submit a proposal because it did not have a drydock available to accommodate the Bainbridge within the required timeframe.

After the protester, BAE, submitted the only proposal in response to the original solicitation, the Navy canceled it pursuant to FAR § 15.206(e) and issued a second solicitation that permitted the contractor to drydock the ship at a later date. BAE's protest argued that the Navy's cancellation decision was arbitrary, capricious, and in violation of FAR § 15.206(e).

Although the Navy cited FAR § 15.206(e) as the basis for its decision, the government argued the "relevant standard here is whether the Navy had a reasonable basis to cancel the first solicitation."[21] The COFC rejected the government's argument and, instead, ruled that the record had to support the Navy's determination that the cancellation was justified under FAR § 15.206(e)'s standard.

The COFC would not entertain the government's "post hoc" argument that the cancellation was reasonable on other grounds, such as the more flexible "best interest" standard under FAR § 15.305(b).[22] This meant that the Navy had to defend its actions under FAR § 15.206(e) or seek a remand from the COFC to prepare a new justification for the decision to cancel the solicitation.

After establishing the legal standard it would apply to review the Navy's action, the COFC ultimately held that the Navy's cancellation decision did not violate FAR § 15.206(e). The CO's judgment was informed by sufficient market research, including communications with NASSCO, which showed that it did not submit a proposal on the first solicitation because of the drydocking requirement.[23] And, unlike the cancellation decision at issue in *Seventh Dimension*, the COFC concluded that the CO's determination in *BAE Systems* was based on facts and evidence and not mere conjecture.

Moreover, the COFC held that the Navy reasonably determined that the change to the drydocking requirement was "so substantial" under the criteria in FAR § 15.206(e).[24] Specifically, the COFC found that prospective offerors could not have anticipated the Navy's proposed amendment given that the drydocking requirement was a major contract milestone and the Navy refused to relax it in similar recent procurements. The record also demonstrated that NASSCO, the only other potential source for the required services, was likely to bid if the Navy relaxed the drydocking requirement.

Implications

The COFC's decisions underscore the importance of the specific regulatory authority invoked by the CO to justify a cancellation decision. Prior GAO and COFC decisions have been willing to look past the specific authority cited by the CO to determine whether there was any reasonable basis to cancel the solicitation. *Seventh Dimension* and *BAE Systems*, however, reject that approach and assess whether the agency has satisfied the criteria under FAR § 15.206(e) if the CO chooses to invoke that authority.

In light of these decisions, agencies may be more inclined to invoke the "best interest" standard under FAR § 15.305(b) to justify a cancellation decision because it is less onerous to meet than the "cardinal change" standard under FAR § 15.206(e). While FAR § 15.206(e) may be used to justify a cancellation based on cardinal changes, FAR § 15.305(b) may be appropriate in situations where the proposed changes are not "so substantial." Agencies may cite FAR § 15.305(b) in lieu of FAR § 15.206(e) or as an alternative basis to support the agency's cancellation decision.

For offerors, *Seventh Dimension* and *BAE Systems* suggest that the COFC may be a more favorable forum than GAO to protest a cancellation decision, particularly one that is based on FAR § 15.206(e). That is because the judges in those cases scrutinized whether the CO's judgment was adequately supported by concrete facts and reasonable under the specific criteria in FAR § 15.206(e) as opposed to the more forgiving "reasonableness" inquiry applied in previous cases.

The number of offerors frustrated by canceled solicitations appears on the rise based on the increasing number of protests involving this issue. *Seventh Dimension* and *BAE Systems* create new potential protest opportunities for disappointed offerors and indicate that agencies must do more than previously required to adequately document and justify cancellation decisions under FAR § 15.206(e).

The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

ENDNOTES

1 FAR § 14.404-1(a).
2 FAR § 15.305(b).
3 North Shore Medical Labs Inc.; Advanced BioMedical Laboratories, LLC, B-311070.1, B-311070.2, Apr. 21, 2008, 2008 CPD ¶ 144 at 3.
4 Madison Services, Inc. v. United States, 92 Fed. Cl. 120, 126 (2010); see also DCMS-ISA, Inc. v. United States, 84 Fed. Cl. 501, 513 (2008).
5 Madison, 92 Fed. Cl. at 128-219 (emphasis added).
6 Social Impact, Inc., B-412655.3, Jun. 26, 2016, 2016 CPD ¶176 at 6.
7 Id.
8 Id. (quoting VSE Corp, B-290452.2, Apr. 11, 2005, 2005 CPD ¶ 111 at 7) (cleaned up).
9 Seventh Dimension, LLC v. United States, 160 Fed. Cl. 1 (2022).
10 Id. at 13.
11 Id. at 17.
12 Id. at 18 (citing 10 U.S.C. §§ 3301(b), 3303(c))
13 Id. at 20.
14 Id. at 18-21.
15 Id. at 19.
16 Id. 20 (quoting FAR § 15.206(e)) (emphasis in original)
17 Id. at 24.
18 Id.
19 Id. at 30.
20 BAE Systems Norfolk Ship Repair, Inc. v. United States, Case No. 22-1263C, 2022 WL 16985017 (Fed. Cl. Nov. 3, 2022).
21 Id. at *5.
22 Id. at *5-6.
23 Id. at *8-10.
24 Id. at *11-14.