

WHEN CAN AN AGENCY CANCEL A FAR PART 15 PROCUREMENT AND START FROM SCRATCH?

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The Court of Federal Claims recently considered whether and under what circumstances, the government may cancel a Federal Acquisition Regulation (“FAR”) part 15 procurement and start over from scratch. *Seventh Dimension, LLC v. United States*, No. 21-2275C (Fed. Cl. May 4, 2022). The procurement had a long history of cancellations to the solicitation, and a good discussion of what contracting officers (“COs”) are permitted to do under the FAR. In particular, does a CO have unfettered discretion to cancel a solicitation?

In March 2019, the Special Operations Command of the Army issued a solicitation for role player and training exercises for the JFK Special Warfare Center and School. The solicitation was set aside for a service disabled veteran owned small business (“SDVOSB”). This was for a single award, indefinite delivery, indefinite quantity (“IDIQ”) contract. Seventh Dimension filed six protests during the course of the procurement, as follows:

- 1) In September 2019, Seventh Dimension filed a pre-award protest at the Government Accountability Office (“GAO”) alleging that Amendment 006 did not reflect the Army’s needs, and violated other procurement aspects. In December 2019, the GAO denied the entire protest.
- 2) In January 2020, the Source Selection Authority issued his source selection decision, selecting Aquila for award, and in February 2020, Seventh Dimension filed a protest with the Small Business Administration (“SBA”) challenging Aquila’s status as an SDVOSB. In June 2020, after this protest was initially denied and subsequently appealed, the SBA Office of Hearings and Appeals (“OHA”) granted Seventh Dimension’s protest and soon thereafter the Army retracted this selection decision.
- 3) In February 2021, the Army awarded the contract to Reservoir, and Seventh Dimension filed a post award protest with the GAO, raising numerous challenges including the lack of required key personnel. The CO, in April 2021 decided to take corrective action, and the GAO dismissed Seventh Dimension’s protest.
- 4) In July 2021, the Army decided to cancel the solicitation, citing significant budget reductions.
- 5) In July 2021, Seventh Dimension filed a protest of the cancellation of the solicitation in the Court of Federal Claims. The Army in September 2021 notified the Court of its intent to take corrective action, and the complaint was dismissed at the request of both parties.
- 6) In November 2021, the Army formally announced the cancellation of the solicitation based on FAR 15.206(e) and stating its intent to resolicit the work. In December 2021 Seventh Dimension filed its protest against the cancellation of the solicitation in the Court of Federal Claims.

NOTE: FAR 15.206(e) states: “(e) 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.” (Emphasis supplied).

The Court of Federal Claims held that:

- An agency’s decision to cancel a solicitation pursuant to FAR 15.206(e) Must be based on market research or similar evidence and may not be based on conjecture or supposition. The government was incorrect in its view that this section is unbounded, and cancellation may be based on any type of research; it must be based on market research or evidence *similar to* market research. The government asserted that this FAR section merely requires a reasonable basis for a CO decision—and the court rejected that interpretation.
- The Army’s decision to cancel the solicitation is conclusory and fails to meet the FAR 15.206(e) requirements.

The court vacated the Army’s cancellation, required the solicitation be reinstated, and retained jurisdiction for 60 days, during which the Army was required to award to Seventh Dimension pursuant to the reinstated solicitation or issue a new cancellation decision in compliance with the applicable statutes and regulations.

Takeaway: CO’s have discretion to cancel a solicitation, but that discretion is not unfettered. CO’s who rely on FAR 15.206(e) as a basis for cancellation must fully comply with that FAR section.

This case may be contrasted with *Harmonia Holdings Group, LLC v. United States and Peraton, Inc.*, No. 21-1704C (Fed. Cl. June 22, 2022). In both *Harmonia* as well as *Seventh Dimension*, the Court of Federal Claims reviewed a challenged agency decision pursuant to the Administrative Procedure Act (“APA”) standard. 28 U.S.C § 1491(b)(4). Pursuant to the standard in these cases, the court asks if the decision is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). *Harmonia* also involved a protest of the cancellation of a solicitation and a decision to start over with a new solicitation. However, the court held that the agency’s reasons for cancelling were rational and supported by the record, and the agency’s process and timing were not arbitrary and capricious. The agency did not rely on a specific FAR provision, but, upon re-evaluation after a GAO protest, the agency’s officials found that the evaluation panel’s inability to draft a defensible reevaluation report supported cancellation. Furthermore, the agency’s concern about integrity issues (credible allegation that sensitive procurement information had leaked from the agency) was also not irrational, and a “cloud hung over” the procurement. The court found that the agency cited legitimate concerns to justify cancelling the solicitation, all of which (except one) were supported by the record.

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