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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Advanced Scientific Applications, Inc.

File: B-400312.2

Date: February 5, 2009

Shahram Manighalam for the protester.

Adele Ross Vine, Esq., General Services Administration, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the solicitation for Federal Supply Schedule (FSS) contract is defective because it includes a standard contract cancellation clause set forth in General Services Administration (GSA) Federal Acquisition Regulation Supplement § 552.238-73, is denied where the protester has not shown that the clause exceeds the authority of the GSA in establishing FSS contracts, or otherwise conflicts with statute or regulation.

DECISION

Advanced Scientific Applications, Inc. (ASA), of Fullerton, California, a small business, protests the terms of request for proposals (RFP) No. FCIS-JB-980001-B, Refresh 21, by the General Services Administration (GSA). ASA argues that the RFP is defective because it includes a cancellation clause that, in the protester's view, improperly allows either party to cancel the contract on 30 days notice for no reason.

We deny the protest.

BACKGROUND

The RFP being challenged is "Refresh 21" of the solicitation for Schedule 70 of the Federal Supply Schedule (FSS), which is the general purpose information technology schedule.¹ GSA issued the "Refresh 21" RFP, the terms of which are at issue here, on

¹ As is typical for solicitations for FSS contracts, the RFP for Schedule 70 is perpetually open (or "standing"), although from time to time the GSA issues an

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June 13, 2007. ASA is seeking a Schedule 70 contract, so that it can provide electronic reverse auction services to federal agencies under the FSS program.²

Three provisions of the solicitation are relevant to this protest. First, the RFP includes a tailored version of the clause at Federal Acquisition Regulation (FAR) § 52.212-4, which the RFP stated was tailored pursuant to a FAR deviation. Since FSS contracts are indefinite-delivery/indefinite-quantity (ID/IQ) contracts under which orders may be placed by numerous federal agencies, the modification to FAR § 52.212-4 explicitly states the authority of an ordering agency to terminate an order for the convenience of the government. Specifically, where the standard clause provides that the “contract” may be terminated for the convenience of the government by the contracting agency, the modified clause substitutes the words “order” and “ordering activity.” RFP at 22-23.

Second, the RFP also contains the clause that is at the center of this protest; this clause provides both the GSA and the contractor with the authority to cancel the base FSS contract itself. RFP at 47. The cancellation clause provides as follows:

C.35 CANCELLATION (GSAR 552.238-73) (SEP 1999)

Either party may cancel this contract in whole or in part by providing written notice. The cancellation will take effect 30 calendar days after the other party receives the notice of cancellation. If the Contractor elects to cancel this contract, the Government will not reimburse the minimum guarantee.

General Services Acquisition Regulation³ (GSAR) § 552.238-73; see also GSAR § 538.273(a)(4) (requiring the cancellation clause to be incorporated in all FSS solicitations and contracts).⁴

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updated edition (known as a “refresh”) that, among other things, ensures that the RFP incorporates changes to law and regulation that have occurred since the previous “refresh” was issued.

² The FSS program, directed and managed by the GSA, gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.402(a).

³ GSAR is the GSA supplement to the FAR, and is found at 48 C.F.R. Part 501. See 48 C.F.R. § 501.101 (2008).

⁴ We note for the record that the GSA, as a part of the process of updating and reorganizing GSAR Part 538, has proposed to “redistribute” GSAR § 538.273 to GSAR § 538.1203(c)(49). 74 Fed. Reg. 4596, 4603, 4606, 4628 (daily ed. Jan. 25, 2009).

Third, the RFP includes a clause providing the minimum guaranteed quantity, and explaining its application in case of a cancellation, in relevant part, as follows:

C.5 GUARANTEED MINIMUM (I-FAS-106) (JUL 2003)

The minimum that the Government agrees to order during the period of this contract is \$2,500. If the Contractor receives total orders for less than \$2,500 during the term of the contract, the Government will pay the difference between the amount ordered and \$2,500. . . .

The guaranteed minimum applies only if the contract expires or contract cancellation is initiated by the Government. The guaranteed minimum does not apply if the contract is terminated for cause or if the contract is canceled at the request of the Contractor.

RFP at 28.

In the course of negotiating a contract with the GSA, ASA requested that the agency remove the cancellation clause. GSA denied that request, and this protest followed.

DISCUSSION

ASA argues that GSAR § 552.237-73 violates FAR §§ 8.4, 12.403, 49.000 and 52.212-4 as well as the spirit of the FAR. Protest at 13. ASA argues that the clause is unfair because it allegedly expands GSA's rights beyond a standard termination for convenience clause. Protester's Comments at 11. ASA also maintains that the clause eliminates a contractor's ability to seek damages for breach of contract if the agency cancels a schedule contract without cause. *Id.*; E-mail from Protester to GAO, Jan. 6, 2009, at 1.

GSA responds that the cancellation clause does not conflict with the FAR, and its use is required by the GSA Acquisition Manual. Legal Memorandum at 3-4; Contracting Officer's Statement at 3.⁵

Although the protester argues that the cancellation clause directly conflicts with particular FAR clauses, we see no basis to sustain this protest. An agency head, or his designee, has the authority to approve deviations from particular requirements of the FAR, including exempting the agency from a particular provision. FAR § 1.404; *See, e.g., Telos Field Eng'g*, B-257747, Nov. 3, 1994, 94-2 CPD ¶ 172 at 3-4 (agency properly deviated from FAR requirement to publicize solicitation requirement, even

⁵ In some sense, it appears that the cancellation clause is intended to restore to GSA some ability to terminate the base FSS contract, which is, at least, no longer explicit under the modified version of the termination for convenience clause at FAR § 52.212-4, described above.

though it also failed to obtain full and open competition required by statute). As required, the cancellation clause here was promulgated by GSA through the notice and comment rulemaking process. Although agency FAR Supplements generally may not conflict or be inconsistent with FAR content, FAR § 1.304(b)(2), we disagree with the protester's claim that the cancellation clause conflicts with any of the specified provisions of the FAR.

To the extent that the protester is arguing that the cancellation clause deprives it of rights to which it is entitled, the question of whether the GSA may cancel a contract for no reason, or for a bad faith reason, under the cancellation clause must ultimately be decided by other forums on specific facts. See, e.g., Commercial Drapery Contractors, Inc. v. United States, 967 F. Supp. 1, 4 (D.D.C. 1997), aff'd, 133 F.3d 1, 6 (D.C.Cir. 1998) (reviewing and rejecting claim that cancellation of FSS contracts was improper, and finding no support for claim that GSA cancellation clause was an allegedly invalid FAR deviation). Our Office does not have jurisdiction over matters of contract administration. 4 C.F.R. § 21.5(a) (2008).

On the other hand, while challenges to the legal sufficiency of a solicitation are not often raised in this forum, we have considered, and will consider, a protester's timely claim that a solicitation anticipates award of a contractual instrument that is legally insufficient in some way. For example, we will sustain a protest against the terms of a cancellation clause where it purports to deny a contractor under an indefinite quantity contract the benefit of the minimum guarantee. Southwest Lab. of Okla., Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368 at 4 (protest sustained where cancellation clause converted agency failure to meet the minimum guarantee into a termination for convenience to avoid liability for the minimum guarantee).

Here, however, the solicitation specifically recognizes the government's obligation to honor the minimum guarantee in the event of a cancellation by the government. The protester has shown no other basis to question the GSA's use of the cancellation clause in this RFP issued under the FSS program.

The protest is denied.

Gary L. Kepplinger
General Counsel