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

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## Decision

**Matter of:** Woodington Corporation  
**File:** B-245411  
**Date:** November 14, 1991

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David A. Hearne, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.  
Robert E. Beeton, Department of Veterans Affairs, for the agency.  
C. Douglas McArthur, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that solicitation improperly included agency clause inconsistent with Federal Acquisition Regulations is dismissed, where the contracting agency was granted a deviation from the regulations.

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### DECISION

Woodington Corporation protests the terms of invitation for bids (IFB) No. 590-88-119, issued by the Department of Veterans Affairs. The protester argues that a provision of the solicitation limiting the recovery of profit and overhead for changes conflicts with the Federal Acquisition Regulation (FAR).

We dismiss the protest.

Woodington protests the inclusion in the IFB of the clause at Veterans Affairs Acquisition Regulation (VAAR) § 852.236-88(b) (1990), which limits a contractor's recovery of overhead and profit for contract changes in the course of performance. The protester argues that this provision conflicts with FAR § 15.901(c) (FAC 90-7), which prohibits agencies from establishing administrative ceilings on the recovery of profit and fees, except when there are applicable statutory ceilings.

In a prior decision, Lecher Constr. Co., B-224357, Sept. 30, 1986, 86-2 CPD ¶ 369, we sustained a virtually identical protest against this solicitation provision. We found that this provision contained in an IFB for a fixed-price construction contract which limits the allowable percentage of

profit on certain change orders was inconsistent with the FAR § 15.901(c), which prohibits administrative profit ceilings. Since we concluded that the Veterans Administration clause was inconsistent with the FAR, we recommended that the VA follow the procedures required for deviating from the FAR in subpart 1.4 or revise the IFB for consistency with the FAR. As a consequence of our decision, the agency decided to continue the use of the clause, complying with our decision by processing a "class deviation" (that is, a deviation affecting more than one contracting action) under FAR § 1.404, thereby permitting continued use of the clause. The agency further advised us that it forwarded the deviation to the FAR Secretariat for approval but that the Secretariat did not consider the deviation to warrant a revision to the FAR or to require publication in the Federal Register. In any event, the agency published notice of the provision in question in the Federal Register of March 29, 1984. Under the circumstances, we will not object to the use of VAAR § 852.236-88(b) in this situation.<sup>1</sup> Since the agency has properly obtained a FAR deviation allowing it to use the protested provision, the protester does not state a valid basis of protest. See American Mut. Protective Bureau, B-243329, Apr. 22, 1991, 91-1 CPD ¶ 395.

Woodington has raised a supplemental issue of protest relating to the responsiveness of the low bid submitted under the solicitation. No award has been made. We view the supplemental protest as premature, since it presumes the agency will improperly accept an allegedly nonresponsive bid.

The protest is dismissed.



Michael R. Golden  
Assistant General Counsel

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<sup>1</sup>The protester also alleges that the provisions in question are contrary to the Standard Changes clause, FAR § 52.243-4. In addition to the fact that a deviation was obtained by the agency allowing it to use VAAR § 852.236-88(b), the United States Court of Appeals for the Federal Circuit has held that the two clauses do not conflict. See Santa Fe Eng'rs, Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986). The protester provides no reason for our Office not to follow this holding.