

# DECISION



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

**FILE:** B-218317

**DATE:** June 6, 1985

**MATTER OF:** Feinstein Construction, Inc.

## DIGEST:

1. Cancellation of solicitation after bid opening is proper where agency reasonably determined that the solicitation did not reflect the agency's actual needs.
2. Federal Acquisition Regulation provision precluding an agency from canceling a solicitation due to increased requirements applies when the agency is buying a supply of items, not where the agency is procuring services to perform specified work.
3. When after bid opening but before contract award an agency learns that its requirements exceed those in the solicitation, the agency may not award a contract under the initial solicitation with the intention of modifying that contract to include the increased requirements.
4. Requests for bid preparation costs and the cost of pursuing a protest with GAO against the cancellation of an IFB are denied where the cancellation was proper under applicable procurement regulations.

Feinstein Construction, Inc. protests the post-bid opening cancellation of Department of the Air Force invitation for bids (IFB) No. F04626-85-B-0008. Feinstein also requests reimbursement for the costs it incurred in submitting a bid and in pursuing its protest with this Office.

The protest and the request for reimbursement are denied.

The IFB was issued on November 14, 1984, for bids to renovate the N.C.O. Mess Hall at Travis Air Force Base.<sup>1/</sup>

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<sup>1/</sup> Although the N.C.O. Mess Hall is generally maintained by nonappropriated funds, the Air Force advises that most of the construction work here will be paid for with appropriated funds.

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The Air Force received two bids by the December 28 bid opening date, with Feinstein submitting the apparent low bid. Following bid opening, the contracting officer requested the Base Civil Engineer (BCE) to review the bids for technical acceptability. As part of this review, the BCE looked at the specifications, and found that they were ambiguous and inadequate. A comparison with actual site conditions also showed that the specifications did not include certain required work. Consequently, the Air Force decided to cancel the IFB. In this regard, Federal Acquisition Regulation (FAR), 48 C.F.R. § 14-404-1(e)(1) (1984), permits cancellation after bid opening when the invitation contains inadequate or vague specifications.

The Air Force contends that the following defects in the solicitation justify its decision:

- (1) the specifications required the contractor to furnish kitchen equipment, while other documentation in the solicitation indicated that the government would furnish kitchen equipment;
- (2) the drawings indicated that a particular walk-in cooler was both in place and not yet in place;
- (3) the drawings did not show the plumbing locations, sizes or tie-ins for a new restroom; and
- (4) there were discrepancies between the mechanical, electrical, architectural and structural drawings and the construction details.

The Air Force further justifies its decision on the basis that the specifications did not require the contractor to replace the flooring in the main bar area, which had dry-rotted; remodel a restroom to comply with Occupational Safety and Health Administration (OSHA) standards; replace a bar and sound system; and relocate conduits and ducts. Also, the drawings did not reference the relocation, expansion or replacement of existing telephone and public address systems.

FCI argues that none of these alleged defects represents a compelling reason to cancel. As to the allegedly discrepant specifications, FCI states that the

specifications do clearly indicate which kitchen equipment will be provided by the government and which must be provided by the contractor, and notes that since the contractor is not required to replace the walk-in cooler it was irrelevant to the bidders whether that cooler is new or not. FCI further contends that the drawings for the new restroom are sufficiently detailed, and points out that, in any event, the Air Force has not specified what discrepancies otherwise exist in the drawings and construction details.

Concerning the omitted requirements, FCI reasons that the government still has a need for the work required by the original IFB, and that an award under the IFB will meet the government's actual needs for that work and will not prejudice other bidders. FCI concludes that the omitted requirements represent additional needs that should be satisfied by a new procurement, or by modifying the contract awarded under the initial IFB to include them. FCI notes that under FAR, 48 C.F.R. § 14.404-1(a)(3), a contracting agency may not cancel a solicitation after bid opening simply because its requirements have increased.

Because of the potential adverse impact on the competitive bidding system of canceling an IFB after bid prices have been exposed, a procuring activity must have a compelling reason to cancel after bid opening. Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 C.P.D. ¶ 484. We have recognized, however, that contracting officers must have broad discretion in determining whether a compelling reason exists, so that we will sustain a contracting officer's decision if it reflects a reasoned judgment based upon the investigation and evaluation of the information available at the time the decision is made. Id.

We cannot conclude that the Air Force acted unreasonably here. The agency's review of the drawings and specifications, and inspection of the premises to be renovated, showed that, in addition to the defective descriptions of some required efforts, the IFB as written did not require the contractor to perform all the work the agency needed performed. When an agency issues a solicitation for construction work and after bid opening learns that its needs exceed those stated in the IFB, we do not believe it is unreasonable for the agency to determine that all

required work at the particular site should be performed under one contract--the agency is not required to award a contract under the defective IFB and issue a new solicitation for additional work, as Feinstein contends. We thus have found that a compelling reason to cancel an IFB generally exists where, after bid opening, the agency learns that its needs exceed those stated in the IFB. Dyneteria, Inc., B-211525.2, supra; W. M. Grace, Inc., B-202842, Aug. 11, 1981, 81-2 C.P.D. ¶ 121. The regulation that FCI cites, FAR, 49 C.F.R. § 14.404-1(a)(3), which precludes an agency from canceling an IFB after bid opening due to increased requirements, applies where an agency is procuring a supply of items and not where, as here, the agency is procuring services needed to perform specified work. See Garrison Construction Co., B-211359.2, Oct. 31, 1983, 83-2 C.P.D. ¶ 515.

Further, insofar as FCI argues that the Air Force should award a contract under the initial IFB and modify the contract to include the additional requirements, the integrity of the competitive bidding system precludes an agency from awarding a contract competed under given requirements with the intention of increasing those requirements after award. Such action clearly would be prejudicial to the other bidders under the IFB because the contractor would be awarded the new requirements essentially on a sole-source basis, thereby circumventing the competitive procurement statutes. Dyneteria, Inc., B-211525.2, supra.

Consequently, we find that the Air Force was justified in canceling the IFB after bid opening on the basis of the omitted requirements. Since we have reached this conclusion, we need not address the other reasons given by the Air Force for canceling the IFB.

Feinstein also alleges that the contracting officer did not justify the cancellation with an adequately-prepared Determination and Findings. Such failure, however, would not in itself provide a basis to sustain the protest where the cancellation in fact is warranted. Tom Shaw, Inc., et al., B-210781, et al., Aug. 16, 1983, 83-2 C.P.D. ¶ 218.

Finally, Feinstein has requested reimbursement for the costs it incurred in submitting a bid and pursuing its

protest with this Office. Since the Air Force complied with applicable procurement regulations, these costs are not recoverable. 4 C.F.R. § 21.6(d) (1985).

The protest is denied.

*for* *Samuel E. Van*  
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General Counsel