

DECISION

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

FILE: B-218261.2 **DATE:** June 13, 1985
MATTER OF: Feinstein Construction, Inc.

DIGEST:

Where agency's needs change after bid opening so that instead of relying on established procedures for asbestos containment as stated in the solicitation it wishes to experiment with new techniques, it has a compelling reason to cancel the solicitation in view of the evolving knowledge concerning the danger of asbestos.

Feinstein Construction, Inc., (FCI), protests the General Services Administration's cancellation of invitation for bids (IFB) No. IFB-OPR-9PPC-84-20221 for repairs and alterations at the Federal Building, 450 Golden Gate Avenue, San Francisco, California. FCI contends that there was no compelling reason to cancel the IFB and that since FCI was the only bidder, award should be made to it.

We deny the protest.

FCI originally protested to our Office on March 1, 1985; we dismissed this protest as untimely. FCI has now shown, and GSA does not dispute, that the protest was initially timely filed.

FCI submitted the only bid by bid opening on October 3, 1984. On February 22, 1985, GSA issued a notice canceling the IFB. The reason for canceling the solicitation was that the specifications were deficient in that they inadequately covered asbestos removal and the associated containment requirements.

FCI states that this is the third time GSA has canceled the solicitation after bid opening and it is the second time cancellation has occurred as a result of inadequate specifications.

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FCI argues that no compelling reason existed here because the solicitation's requirements concerning asbestos abatement incorporate the various regulations, codes and ordinances which must be followed to ensure proper asbestos abatement. It contends that given the stringent criteria set out in the regulations which are incorporated in the solicitation ". . . it is difficult--if not impossible--to imagine additional containment procedures which could be undertaken so as to permit any kind of renovation or construction."

GSA, however, contends that it had a compelling reason to cancel the solicitation because the contracting officer found that "the asbestos containment precautions needed at [the] federal building would not be guaranteed by a contractor performing pursuant to the specifications of the solicitation." GSA explains its cancellation of the solicitation in light of the growing concern expressed by the building tenants over the asbestos exposure risks in the San Francisco federal building. In view of this concern, GSA, in March 1984, requested the National Institute of Occupational Safety and Health (NIOSH) to conduct a comprehensive health hazard evaluation for asbestos exposure risks at the building. The NIOSH recommendations were issued in August 1984. In September 1984, representatives of GSA, NIOSH, the Occupational Safety and Health Administration (OSHA) and the National Bureau of Standards (NBS) agreed that although the current GSA practices in the building met and sometimes exceeded the practices required by OSHA, a pilot project should be instituted at the San Francisco federal building to test new measuring techniques and to introduce a more ambitious asbestos control level. Implementation of the NIOSH recommendations represents a pilot project to improve the state-of-the-art in asbestos techniques. The program will be reviewed and closely monitored by NIOSH, as well as OSHA and NBS. This program is intended to allow the flexibility necessary to change procedures as refinements are made in the techniques and as new information is gathered. Given the experimental nature of this project, GSA anticipates that the program will have national impact on its overall asbestos program, and may also have an impact on the entire field of asbestos in office environments.

A contracting officer must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1984); Energy Maintenance Corp.; Turbine Engine Services Corp., B-215281.3, B-215281.4, Mar. 25, 1985, 64 Comp. Gen. ____, 85-1 C.P.D. ¶ 341. While specification deficiencies may constitute a

compelling reason to cancel, cancellation on this ground generally is not justified except where an award under the ostensibly deficient IFB would not satisfy the government's actual needs, or would prejudice other bidders. American Mutual Protective Bureau, 62 Comp. Gen. 354 (1983), 83-1 C.P.D. ¶ 469.

A contract award will satisfy an agency's needs, essentially, even in the face of some solicitation deficiency, where bidders can be said to have offered to perform the work actually required by the agency. Energy Maintenance Corp.; Turbine Engine Services Corp., supra. Although the solicitation requirements here do reflect present OSHA standards in asbestos control techniques, the purpose of GSA's pilot project and the reason it canceled the solicitation is so that it could improve on asbestos abatement procedures and develop more stringent asbestos control limits. This could not be accomplished by merely following past standards of asbestos control. In view of the fact that GSA's needs had changed after the solicitation was issued so that it needed a more experimental approach to asbestos removal and abatement procedures, we find that GSA had a cogent and compelling reason to cancel the solicitation. The government simply could not obtain its needs (the development of better asbestos abatement procedures) by relying on past established practices. Rather, the pilot project to test new asbestos measuring techniques now reflects the work actually required by GSA.

We will look critically at similar or identical solicitations which are successively canceled after bid opening. In this case, the protester states that this is the third cancellation. The basis for the cancellation of the first solicitation issued on November 13, 1985, is not addressed by the parties. The second solicitation issued on October 15, 1983, was canceled because the specifications were inadequate and a third solicitation, the one at issue here, was issued with revised specifications. Although this pattern shows some uncertainty on GSA's part, we note that the scientific knowledge concerning the danger from airborne asbestos fibers and the standards to be used in determining acceptable levels of exposure are not clearly defined but are actively evolving. In light of the growing concern over standards which were previously thought to control asbestos fiber levels at safe amounts, we think it prudent of GSA to authorize a more ambitious approach to its present asbestos control procedures.

FCI also contends that it could perform renovation under the solicitation where asbestos related tasks are not

involved. FCI estimates that the non-asbestos related requirements constitute 49 percent of the estimated requirements set forth in the solicitation. It asserts, therefore, that GSA can segregate the asbestos-related work and proceed to order its requirements for non-asbestos related work from FCI. GSA, however, states that the work which FCI describes as being asbestos free is not really asbestos free as it would involve running electrical wiring which would necessitate disturbing some asbestos. Any contract based on purely asbestos free renovation would be very different from a contract under this solicitation and would likely create significant competition.

Finally, FCI argues that since a GSA official has stated that GSA's own work force will handle the safety and precautionary set-up work on construction projects where asbestos material is not intentionally disturbed, FCI should be allowed to handle the work where asbestos material is intentionally disturbed. The purpose of GSA's cancellation, however, appears to be broader than FCI supposes. GSA states that all asbestos abatement under the pilot project will be performed by a specially trained GSA work force. Moreover since the abatement procedures have changed materially, an award to FCI would not satisfy GSA's needs.

The protest is denied.

Harry R. Van Cleve
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General Counsel