

**DECISION**



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

*J. Cohen  
Proc.*

*8849*

FILE: B-193045

DATE: January 15, 1979

MATTER OF:

Edw. Kocharian & Company, Inc.

*[Bidder's Failure to Make Mandatory Prebid Site Inspection Does Not Justify Bid Rejection as Nonresponsive]*

1. Protester argues that bid rejection as nonresponsive for failure to comply with mandatory prebid site inspection requirement was improper, on basis that prebid site inspection is not appropriate responsiveness criterion. Agency contends that protest is untimely, since it was not filed prior to bid opening. However, since agency states that requirement is now standard in all of its IFB's, protest presents principle of widespread interest for consideration under "significant issue" exception to GAO's timeliness rules.
2. Where bid does not take exception to Government's requirements, bidder's failure to make mandatory prebid site inspection does not justify bid rejection as "nonresponsive," since acceptance of bid would effectively bind bidder to perform at bid price in accordance with advertised terms and specifications. Purpose of site inspection provision must be viewed as warning bidders that site conditions could affect performance cost and bidders therefore assume risks of increased performance cost caused by observable site conditions, and to protect Government from necessity of permitting bid withdrawal or claims after contract award.

Invitation for bids (IFB) No. DMA 800-78-B-0052 was issued on September 7, 1978, by the Defense Mapping Agency (DMA) to replace four air-handling units at the DMA Topographic Center. Paragraph 11 of an addendum to Standard Form 22, "Instructions to Bidders," was entitled "SITE INSPECTION" and provided:

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"A site inspection in connection with work covered under this solicitation is MANDATORY. Prospective bidders shall inspect the site of the proposed work to inform themselves of all general and local conditions that may affect the work or cost thereof, to the extent such information is reasonably obtainable. The site will be available for inspection, by appointment, Mondays thru Fridays, between the hours of 7:00 a.m. and 2:00 p.m. Bidders shall contact Mr. William E. Shimmel \* \* \* to make the necessary appointment.\* \* \*

"CAUTION: FAILURE ON THE PART OF THE BIDDER TO MAKE THE MANDATORY SITE INSPECTION WILL RESULT IN REJECTION OF HIS BID AS NONRESPONSIVE."

DLG-00617 Bids were opened on September 27, and Edw. Kocharian & Company, Inc. (Kocharian), was the apparent low bidder. However, it was determined that Kocharian did not comply with the site inspection requirement, and the contracting officer proposes to reject the bid as nonresponsive. Kocharian has filed a protest in our Office against such proposed action.

Kocharian contends that it in fact fulfilled the solicitation's site inspection requirement. Kocharian states that it did not receive a complete IFB until Friday, September 22. In view of the short time left to inspect the site and prepare a bid, a Kocharian representative visited the site on Saturday, September 23, at which time, Kocharian states, "he was able to make an inspection sufficient to assure himself of the type of construction of the interior." That inspection consisted of a view of the building from the door, accompanied by the security officer on duty.

Kocharian further argues that even absent a site inspection the rejection of its bid as nonresponsive would be improper, notwithstanding the warning in the IFB quoted above. Kocharian contends that its bid represents an objective, unequivocal offer to perform the required work at the bid price. Kocharian states:

"\* \* \* unless a bidder takes exception to, or otherwise manifests an intention not to be bound to perform the contract in strict accordance with the requirements of the contract then the bid is not non-responsive. \* \* \* if a bid constitutes a definite and unqualified offer to meet the substantive terms of the solicitation, i.e., those that could affect price, quality, quantity or delivery, then the bid is responsive.\* \* \*"

Kocharian further states:

"\* \* \* The sole effect of a bidder's failure to conduct a pre-bid site inspection in the face of this mandatory language would be to provide the government with a defense, should, during the course of performance, claims be presented for equitable adjustments under the Changes or the Differing Site conditions clause where the matter in issue could have readily been ascertained through a pre-bid site inspection.\* \* \*"

Thus, it is Kocharian's position that a failure to perform a prebid site inspection is not relevant to the responsiveness of a bid, i.e., that it would in no way diminish the responsibility of a firm offering to perform the contract in strict accordance with the invitation's specification to in fact do so.

In a report on the protest, DMA first argues that the protest, which DMA characterizes as being against the inclusion in the IFB of a mandatory site inspection provision, is untimely under section 20.2(b)(I) of our Bid Protest Procedures, 4 C.F.R. part 20 (1978) Procedures, since it was filed after bid opening and, therefore, should not be considered on the merits. That provision in our Procedures requires that protests based on alleged improprieties in an IFB which are apparent prior to bid opening be filed by that date. DMA argues that by having failed to protest the requirement Kocharian accepted it as a valid responsiveness matter and, therefore, should be estopped from protesting its application.

However, the report indicates that mandatory prebid site inspection is now a standard requirement in all IFB's issued from DMA's Engineering Division, Facilities Engineering Office. Therefore, we consider the issue as characterized by DMA to present a principle of widespread interest. On that basis, even if untimely filed, we will consider the merits under section 20.2(c) of our Procedures as involving an issue "significant to procurement practices or procedures." See 52 Comp. Gen. 20 (1973).

We note here that it is the contracting officer's opinion that the September 23 site visit by Kocharian does not constitute a valid site inspection under the IFB requirement, although the reason therefor is not provided. Although we recognize that the visit took place on other than a day specified in the IFB and did not involve the named DMA representative, we are not convinced that Kocharian did not comply with at least the intent of the requirement. However, this issue is academic since, for the reasons discussed below, we must agree with the protester that even if it had not inspected the site at all it would be improper for DMA to reject its bid as nonresponsive.

In regard to the propriety of the subject provision, DMA contends that a site inspection could affect price, quantity, quality or delivery and as such is a material requirement and, therefore, a legitimate responsiveness criterion. DMA concedes that, as Kocharian contends, the standard site inspection clause essentially operates as a defense to subsequent contractor claims, but argues:

"\* \* \* the intention of the Agency in requiring a mandatory site inspection was addressed to affirmative contract formation principles rather than preserving a possible defense.

"It was our intention that the contract be interpreted based on informed mutuality of assent, devoid of waivers which could possibly involve us in avoidable claims. \* \* \*

"\* \* \* we sought a contract based on fully informed, intelligent mutuality of assent, rather than mutuality based on a promise instinct with a waiver."

In this regard, the report also states the following reasons for making mandatory prebid site inspection a standard IFB requirement.

"[1] Experience has proven that only if the prospective contractor visits the site can he become familiar with all aspects of the job which may influence his bidding.

"[2] It is literally impossible to depict in drawings all of the details of existing conditions that the contractor has to work around during various phases of construction. Only site inspection will confirm and identify these conditions.

"[3] The site inspection will identify, first-hand, the working conditions, enable the contractor to make a realistic bid package, and minimize misunderstandings and change orders during the period of the contract.

"[4] Site inspections will also give the contractors a feel for the lost time, which may be experienced by his mechanics in getting to the job site due to security procedures. This lost time would also be reflected in his bid package."

Finally, DMA cites as support for its view a number of our decisions in which we indicated that failure to

perform a nonmandatory site inspection would not affect a bidder's eligibility for award; DMA suggests that the "implicit corollary" of those decisions is that failure to perform a mandatory site inspection is a proper ground for bid rejection.

Defense Acquisition Regulation (DAR) § 18-204 (1976 ed.) advises procuring agencies that appropriate provisions should be made for bidders to inspect construction sites. Paragraph 2 of Standard Form 22, "Instructions to Bidders," included in the DMA solicitation, urges bidders to visit the construction site to ascertain the nature and location of any factors which could affect the work or the cost thereof, and warns that failure to do so will not relieve bidders of the responsibility to properly estimate the difficulty or cost of successfully performing the work. (Note that the mandatory site inspection provision was contained in an addendum to this paragraph.)

As DMA points out, we have considered protests involving solicitations that reflect such advice by containing provisions that strongly suggest that bidders inspect the worksite before submitting bids. See, for example, Southern Industrial Laundry d/b/a Alabama Laundries and Linen Supply, B-191095, April 21, 1978, 78-1 CPD 310, and B-170294, October 5, 1970. In resolving those protests, we indicated that the failure to attend a site inspection was not sufficient reason to reject a bid. We have also considered a protest where a prebid site inspection was mandatory, although we there found that the Government nevertheless intended to consider a bid for award even though the bidder may have failed to inspect the site. See 52 Comp. Gen. 955 (1973).

In both situations, we stated that provisions giving bidders the opportunity to visit a worksite and urging them to do so are designed to warn bidders that site conditions could affect the cost of contract performance and to protect the Government from the necessity of permitting the withdrawal of a bid submitted by a firm that failed to inspect, or a claim by such firm after award of the contract.

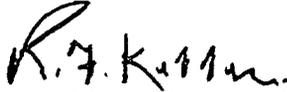
The test to be applied in determining the "responsiveness" of a bid, however, is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation. 49 Comp. Gen. 553, 556 (1970). If the test is met, the bidder is effectively bound to perform in accordance with the invitation's requirements, see 42 Comp. Gen. 464 (1963), and we do not see how a failure to make a prebid site inspection would define or limit that obligation. To the extent that a site inspection affects the bidder's price, as DMA argues, it does so only in the context of that price's reflection of the bidder's business judgment as to his performance cost; it does not affect the obligation to perform at the price bid.

In fact, we see no difference between the above-stated purposes for recommending prebid site inspections and those proffered by DMA for making the inspection mandatory, notwithstanding that DMA distinguishes its rationale in the present case as being based on a desire for "informed, intelligent mutuality of assent" as opposed to "mutuality based on a promise instinct with a waiver." Whether expressed in mandatory terms or not, the provision is viewed as advising bidders that they bear the risk of problems that could have been resolved by a reasonable prebid site inspection. See 52 Comp. Gen. 389, 391 (1972).

We understand how DMA could draw the "implicit corollary" it suggests from our decisions in this area. However, since the issue was never directly decided in the cited cases, we reject the view that they support DMA's position in the present protest. In fact, we have in dictum cited our decision in 52 Comp. Gen. 955 (1973), for the proposition that the Government cannot make attendance at a prebid site inspection a mandatory condition of submitting a bid. See Southeastern Services, Inc., and MC&E Service and Support Co., Inc., B-183108, June 16, 1975, 75-1 CPD 366.

In view of the above, the prebid site inspection requirement provides no basis for disqualifying Kocharian from the competition. Compare our similar view regarding attendance at scheduled preproposal conferences. See 50 Comp. Gen. 355 (1970).

The protest is sustained, and award should be made to Kocharian under the IFB, if otherwise appropriate. In addition, we are advising DMA by separate letter of our view concerning mandatory prebid site inspections in relation to "responsiveness."



Deputy Comptroller General  
of the United States