DECISION

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

[Responsive Determination of Bid Not Complying with Mandatory Site Inspection Provision of IFB]

FILE: B-193045

DATE: May 10, 1979

MATTER OF:

Edw. Kocharian & Company, Inc.--request for modification

DIGEST:

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. However, such failure may be considered by contracting officer in determining whether bidder is responsible, i.e., whether bidder is able to so perform.

The Defense Mapping Agency (DMA) requests that we modify our decision in Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214 (1979), 79-1 CPD 20, in which we sustained a protest by Edw. Kocharian & Company against DMA's rejection of that firm's bid under invitation for bids (IFB) No. DMA 800-78-B-0052.

The IFB, which solicited bids to replace four air-handling units at the DMA Topographic Center, stated that a site inspection was "mandatory," and cautioned that a prospective bidder's failure to make the mandatory site inspection would result in rejection of the bid as nonresponsive. Although Kocharian was the apparent low bidder, the contracting officer determined that the firm did not comply with the site inspection requirement, and proposed to reject the bid as nonresponsive.

We stated in our decision:

"* * * provisions giving bidders the opportunity to visit a worksite and urging them to do so [see also Defense Acquisition

Regulation (DAR) § 18-204 (1976 ed.)] 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 * * * 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)."

Accordingly, we concluded that the prebid site inspection requirement provided no basis for disqualifying Kocharian from the competition, and recommended that award be made to the firm, if otherwise appropriate. In addition, since we had been advised that mandatory prebid site inspection had become a standard requirement in all IFB's issued from DMA's Engineering Division, Facilities Engineering Office, we advised the Director of DMA of our view by separate letter. The contract subsequently was awarded to Kocharian.

In its request for modification, DMA contends that the test of "responsiveness" as stated in our January 15 decision "is not an absolute test in that many prior decisions rejected protests [against the rejection of bids as 'non-responsive'] concerning other characteristics of an IFB." "Other characteristics" cited by DMA include the failure to provide a bid bond at bid opening; submission of a bid bond improper on its face; and failure to provide descriptive data with a bid even though offering to perform, without exception, the exact thing called for in the IFB. DMA argues that it "cannot discover how * * * the bidders' 'obligations to perform' were diminished or their 'assumptions of risk of performance' were dispelled. Yet they were determined to be non-responsive."

In view thereof, DMA suggests that a prebid site inspection may in fact be an appropriate responsiveness factor notwithstanding the stated

test, if determined by the procuring activity to be necessary to the submission of an "informed" bid. DMA concedes that inclusion in an IFB of a mandatory prebid site inspection should not be a standard matter. However, DMA contends that there are circumstances in which such inclusion represents a legitimate exercise of a contracting agency's discretion to determine what is reasonably necessary to meet its needs in the manner most advantageous to the Government. Those circumstances are essentially where DMA can foresee probable delays in performance by contractors who did not visit the construction site before bidding, which are caused by matters that would have been noted in prebid site inspections. Such delays result in otherwise unnecessary cost to the Government due to unavailability of the facility, as well as administrative inconvenience, notwithstanding the contractor's obligation to perform at the contract price. DMA is concerned that, although prebid site inspection does not necessarily result in problem-free performance, it reduces the possibility of problems arising by virtue of otherwise unexpected site conditions.

DMA is correct that we have held that certain factors which evidently do not affect a bidder's obligation to perform may have an impact on the bid's responsiveness. However, in each situation cited by DMA there is a consideration not present regarding site inspection.

Waiver of a bid bond requirement or of a failure to submit a proper bid bond would make it possible for a bidder to decide after opening whether or not to have its bid rejected, cause undue delay in effecting procurements, and create, by the necessary subjective determinations by different contracting officers whether waiver is appropriate, inconsistencies in the treatment of bidders. 38 Comp. Gen. 532, 536 (1959). A blanket offer to comply with an IFB's requirements is not sufficient to overcome a failure to supply descriptive literature with the bid, to be used for bid

evaluation, because such descriptive literature is necessary for the Government to be able to determine exactly what the bidder is offering, and whether the product offered meets the IFB's specifications. 36 Comp. Gen. 415 (1956). Other factors that simiarly may cause the rejection of a bid as nonresponsive involve comparable considerations: failure to submit with a bid a required list of proposed subcontractors (to prevent "bid shopping," 50 Comp. Gen. 839, 842 (1971)); failure to indicate in a bid for construction work that a certain specified minimum percentage of the work will be performed by the bidder's own forces (to prevent "brokering," see 45 Comp. Gen. 177 (1965)); conditioning a bid on payment provisions differing from those contained in the IFB (would modify the legal obligations of the parties concerning payment under the contract, contrary to the express terms of the invitation, 47 Comp. Gen. 496, 499 (1968)).

However, consideration of a bid submitted by a firm that did not inspect the construction site does not pose the same prejudice to the competitive bid system or to the contracting agency's mission as do the above factors. As long as a bidder is given the opportunity to visit a worksite and warned that site conditions could affect the cost of performance (see DAR § 18-204 (1976 ed.), and paragraph 2 of Standard Form 22, "Instructions to Bidders"), the bid price is in effect presumed by law to include consideration of the effects of observable site conditions. Blauner Constr. Co. v. U.S., 94 Ct. Cl. 503 (1941). Thus, the low bidder who has not inspected the site cannot, without consequences such as forfeiture of a bond or incurring excess reprocurement costs, after bid opening withdraw its bid, or after contract award stop work or claim additional money, by contending that it is encountering or will encounter problems at the site, if such problems would have been mitigated by a prebid site inspection.

We remain of the same view regarding prebid site inspections in relation to "responsiveness" as that expressed in our earlier decision and it is therefore affirmed.

However, in view of DMA's concern as reflected above, and its apparent belief that it is our position that award must be made to the low bidder notwithstanding the bidder's failure to make a prebid site inspection, we offer the following comments.

DAR section 1, part 9 (1976 ed.), entitled "Responsible Prospective Contractors," provides at § 1-902:

"General Policy

"* * * The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional procurement or administrative costs. * * *"

We believe that such provision reflects the same concern as that expressed by DMA in the instant request. Because of that concern, DAR § 1-902 (1976 ed.) requires that a prospective contractor must demonstrate affirmatively his "responsibility," i.e., the apparent ability to successfully meet the contract requirements, before being awarded the contract. DAR § 1-903 (1976 ed.) prescibes certain minimum standards for responsible prospective contractors. DAR § 1-903.1 (1976 ed.) sets out general responsibility standards, including adequate financial resources; ability to comply with the performance schedule; and satisfactory records of performance and integrity. DAR § 1-903.2 (1967 ed.) provides additional standards

for certain contracts, including construction contracts: "the necessary organization, experience, operational controls and technical skills, or ability to obtain them," and "the necessary production, construction, and technical equipment and facilities, or the ability to obtain them."

Thus, the appropriate time to judge whether the firm that did not inspect the construction site before bidding would be able to perform the contract in a timely manner at the contract price is during the responsibility survey. The contracting officer either may decide that failure to inspect is reflected in the bid price to the extent that the firm cannot perform satisfactorily, or he may still find the firm responsible. In fact, the contracting officer may determine a firm that did visit the site before submitting its bid to be nonresponsible notwithstanding such visit. To the extent that DMA is concerned that it may determine responsible a firm that did not inspect the site, and the firm may nevertheless encounter problems because of site conditions, we can only point out that the projection of a bidder's ability to perform if awarded a contract is largely within the sound administrative discretion of the contracting officer. The basis therefor is precisely because he is in the best position to assess responsibility, and must bear the consequences of any difficulties experienced by reason of the contractor's inability to perform in the time and manner required. 51 Comp. Gen. 448, 452 (1972). We will not question a contracting officer's determination of nonresponsibility absent a showing of either bad faith or that it lacked a reasonable basis. Hydromatics International Corporation, B-181240, September 4, 1974, 74-2 CPD 142.

R. F. Keller

Deputy Comptroller General
of the United States