

DECISION

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

FILE: B-215873

DATE: February 4, 1985

MATTER OF: Hydro-Dredge Corporation

DIGEST:

Protest that agency unduly restricted competition in determining that hopper dredge was required to perform work is denied where protester disagrees with agency's technical conclusions but has not shown that the agency's conclusions are unreasonable. Where the procuring agency has established prima facie support for the necessity for specifications which are alleged to be unduly restrictive, the protester's disagreement with the agency's technical conclusions does not establish that the specifications are unreasonable.

Hydro-Dredge Corporation protests as unduly restrictive solicitation No. DACW33-84-B-0046, for dredging services, issued by the New England Division of the Army Corps of Engineers.

The solicitation sought bids for the rental of a hopper dredge ^{1/} with operating personnel and attendant plant for work in the Connecticut River. The low bidder was Hydro-Dredge, in the estimated amount of \$651,000; the

^{1/} As stated in Tom Shaw Inc., Merritt Dredging Company, B-210781; B-210781.2, Aug. 16, 1983, 83-2 C.P.D. ¶ 218, a hopper dredge is a ship equipped to perform a dredging operation by making repeated passes over the area to be dredged, removing the material, and transporting the material to an ocean dumping site. By contrast, a pipeline dredge consists of a dredging machine located on a barge-like platform and connected by a pipeline to an onshore disposal site. Unlike the hopper dredge the pipeline dredge remains substantially stationary over a dredge site, removes the material at that site, and then moves on to the next site.

second low bidder was T. L. James & Co., Inc., in the estimated amount of \$1,215,000; North American Trailing Co. bid \$1,308,250 for the number of hours estimated. The Corps subsequently informed Hydro-Dredge that its bid was rejected as nonresponsive in that it offered a hydraulic cutter section dredge, whereas the specifications required the use of a self-propelled, double-drag hopper dredge. Hydro-Dredge then protested this determination and the award of a contract to any other firm. For the reasons that follow, we deny the protest.

Prior to bid opening, Hydro-Dredge had protested the Corps' restriction of the solicitation to the rental of hopper dredges as the best and most economical equipment to employ. The Corps did not amend the solicitation in this respect; instead it denied the protest; proceeded with bid opening; and rejected the protester's bid which was based on the use of another type of equipment. In bringing its protest to this Office a few days later, Hydro-Dredge asserts that the solicitation was unduly restrictive, and disputes the underlying evaluation that is relied upon to support the Corps' assessment that its minimum needs required hopper dredges.

The record in this case evidences the considerable study of the dredging method to be utilized in performing this project. Hydro-Dredge and the Corps corresponded at length on this subject prior to when Hydro-Dredge filed its protest here. The protester and the Corps, however, have divergent views on the analysis and application of daily dredging records from other completed projects.

Hydro-Dredge contends that cost data supporting the Corps' hopper dredge restriction was the result of an unequal comparison between the hopper and hydraulic dredge equipment options and unbalanced in such a manner as to make the hopper dredge a more attractive option. For example, in one letter to Hydro-Dredge the Corps indicated that the reasonable expected performance of a hydraulic dredge on this project would be 450 feet of advance per day as compared with Hydro-Dredge's estimate of 1,200 feet per day. Hydro-Dredge indicated in a subsequent letter to the Corps that the production figures used in the analysis for a hydraulic dredge were based on dredging to the actual

project depth on the Connecticut River compared to theoretical tolerance set for a hopper dredge that provided optimum usage of the latter method. As Hydro-Dredge contended, these optimum dredging tolerances have never been achieved, and if more realistic tolerances were set for the hopper dredge the increased time to perform the work makes the hydraulic dredge economically competitive.

Responding to the point that the estimated performance of a hopper dredge is speculative since one has never dredged in the Connecticut River, the contracting officer points out that Hydro-Dredge's claimed performance capability is equally as speculative since it has not shown a capability of averaging 1,000 feet per day in the river. The Corps further maintains that Hydro-Dredge's low bid is misleading in terms of performing the total required work. Although the price per hour is low, the time required to dredge the total length of all the shoals would probably more than double the estimated time of 900 hours. Thus, the final cost would be correspondingly higher.

Ultimately, the contracting officer reports, the principal consideration of the Division in making its determination to use a hopper dredge was that a hopper dredge could perform more work within the time constraints imposed by environmental and weather factors.

Hydro-Dredge counters that the Corps based its determination to restrict the work on unreasonable performance data. In Hydro-Dredge's view, the bid format should have allowed for a contractor to bid on the work, using hydraulic dredges or multiple dredges against an appropriate number of corresponding hours to do the work. Under these conditions if any method other than hopper dredging was, in fact, not economical, the bid results would have been the deciding factor, rather than the contracting officer's opinion.

As further evidence of the inadequacy of competition in this procurement, Hydro-Dredge asserts that the contracting officer's reliance on the existence of a second dredge available to perform the work is inherently suspect because the second hopper dredge was committed to other

work and was not available for this contract. Asserting that this Connecticut River project has historically attracted five or six bidders whereas in the present case there was only one responsive bidder,^{2/} Hydro-Dredge reasons that the Corps restricted the work to hopper dredges solely to eliminate all other competition. In this way, and citing to our decision in Bowne Time Sharing, Inc., B-190038, May 9, 1978, 78-1 C.P.D. ¶ 347, Hydro-Dredge attempts to provide clear and convincing evidence that the contracting officer's judgment is in error since competition was unduly restricted where only one responsive bid was received.

Finally, Hydro-Dredge reports "since the project is now underway using a Training Hopper Dredger we feel confident that independent analysis of the actual work performed will substantiate our position."

A protester who objects to the requirements in a solicitation bears a heavy burden. The contracting agency has the primary responsibility for determining its minimum needs, the method of accommodating them and the technical judgments upon which they are based, since it is most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 C.P.D. ¶ 44; Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 C.P.D. ¶ 56. It follows that government procurement officials are generally in the best position to know the government's actual needs and, therefore, are best able to draft appropriate specifications. Bataco Industries, Inc., B-212847, Feb. 13, 1984, 84-1 C.P.D. ¶ 179, citing Particle Data, Inc.; Coulter Electronics, Inc., B-179762; B-178718, May 15, 1974, 74-1 C.P.D. ¶ 257.

As a result, while agencies should formulate their needs so as to maximize competition, burdensome requirements which may limit competition are not unreasonable,

^{2/} Although the protester asserts that James submitted the only responsive bid, it has not explained why the third low bid of North American Trailing was nonresponsive and there is nothing in the record to suggest that it was.

so long as they reflect the government's, legitimate minimum needs. Duroyd Manufacturing Company, B-213046, Dec. 27, 1983, 84-1 C.P.D. ¶ 28. Because the adoption of any specification or requirement necessarily limits competition to some extent, the question is not whether competition has been restricted, but whether it has been unduly restricted. Bataco Industries, Inc., B-212847, supra, citing Big Bud Tractors, Inc., B-209858, Feb. 4, 1983, 83-1 C.P.D. ¶ 127.

In view of these considerations, our Office will not question agencies' decisions concerning the best methods for accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable, Four-Phase Systems, B-210642, supra, and we will not substitute our judgment for that of the contracting agency absent clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of the specifications would unduly restrict competition. Bowne Time Sharing, Inc., B-190038, supra. A mere difference of opinion between the protester and the agency concerning the agency's needs is not sufficient to upset agency determinations. Julian A. McDermott Corporation, B-191468, Sept. 21, 1978, 78-2 C.P.D. ¶ 214.

This analysis is particularly persuasive where highly technical supplies or services are involved. Radix II, Incorporated; Northwest Electric Company, B-212267, B-212267.2, Jan. 24, 1984, 84-1 C.P.D. ¶ 113. We have held that a procuring agency's technical conclusions concerning its actual needs are entitled to great weight and will be acceptable unless there is clear showing that the conclusions are arbitrary. Industrial Acoustics Company, Inc., et al., B-194517, Feb. 19, 1980, 80-1 C.P.D. ¶ 139. Where a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring activity to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. Once the agency establishes this support, the burden shifts to the protester to show that the requirements objected to are clearly unreasonable. Rack Engineering Company, B-208615, Mar. 10, 1983, 83-1 C.P.D. ¶ 242, citing Mid-Atlantic Industries, Inc., B-202682, Aug. 26, 1981, 81-2 C.P.D. ¶ 181. We have also

stated that in technical disputes, a protester's disagreement with the agency's technical opinion does not invalidate that opinion. Polymembrane Systems, Incorporated, B-213060, Mar. 27, 1984, 84-1 C.P.D. ¶ 354.

In this case there is a difference of opinion as to whether a hopper dredge is the best and most economical equipment to perform the required services, and there has been considerable study of the dredging method to be utilized. The Corps determined that a hopper dredge could more completely perform the required work within the time constraints imposed by environmental and weather factors. While Hydro-Dredge disagrees with this position and contends it could provide economically competitive services with other than a hopper dredge, it has not presented clear and convincing evidence that the Corps' technical conclusions concerning its actual needs are arbitrary or that the requirements objected to are clearly unreasonable. Rather, the protester has shown only why it believes the Corps' underlying technical conclusions are wrong. Such evidence and such arguments point out the existence of a technical dispute and not that the agency is wrong.

Hydro-Dredge has failed to sustain the burden of showing that the Corps' position is arbitrary or otherwise unreasonable. Under the circumstances we have no basis to question the Corps' judgment that it needed a hopper dredge to perform this work. See Tom Shaw, Inc., Merritt Dredging Company, B-210781, supra. And, although Hydro-Dredge suggests that independent analysis of the actual work performed by a hopper dredge will substantiate its position on the technical merits of this case, it is not the function of this Office to conduct an independent analysis of the best method available to an agency to accommodate its needs and we decline to do so here. Storage Technology Corporation; Falcon Systems, Inc., B-215336; B-215336.2, Aug. 17, 1984, 84-2 C.P.D. ¶ 190, citing Rack Engineering Company, supra. We do note that the Corps has stated that it will evaluate the results of this contract to determine if the same methodology should be used in the future.

The protest is denied.


Comptroller General
of the United States