

DECISION

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

27097

FILE: B-212771**DATE:** December 21, 1983**MATTER OF:** Tom Shaw, Inc.**DIGEST:**

Contention that a solicitation provision prohibiting the use of hydraulic dredges is unduly restrictive is dismissed as academic where bids were opened after the protest was filed, and the protester's bid was only the sixth lowest received; since the protester is not the low bidder, it would not be in line for award even had the solicitation not contained the allegedly restrictive prohibition.

Tom Shaw, Inc. protests the use of an allegedly restrictive provision in invitation for bids No. DACW35-83-B-0028, for dredging services, issued by the Detroit District of the Corps of Engineers. We dismiss the protest.

The solicitation sought bids under Schedules I, II, and III¹ for maintenance dredging in the Duluth-Superior Harbor, Minnesota and Wisconsin. Section 2A-1b of the solicitation's technical provisions stated that no hydraulic-type dredge could be used.

The Corps states that the restriction precluding the use of hydraulic-type dredges is necessary because the Minnesota dredging permit covering Schedule I prohibits the overflow or discharge of effluent material from the disposal site which would occur with the use of a hydraulic dredge. Further, the Corps maintains that the use of this type dredge with its attendant pipeline would pose a hazard to navigation in the Schedule II area.

¹Schedule III, concerning contractor furnished disposal, was not the subject of an award and is not involved in this protest.

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Shaw contends that there are numerous methods of handling the potential overflow problem. It also disagrees with the Corps' position that its pipeline would pose a navigational hazard and contends that the Corps is not acting in the best interest of the taxpayers by precluding the use of hydraulic dredges because this type of dredging is the most cost effective method of performing the required work.

Shaw submitted a bid dated June 24, 1983 based on its use of a hydraulic dredge. On the June 28 bid opening date, but before the hour set for bid opening, Shaw telephoned the agency and complained about the prohibition of the use of hydraulic dredges. According to the Corps' memorandum of that conversation, Shaw indicated that its bid was based on the use of a hydraulic dredge and that it did not discover the restriction until its final review of the specifications on June 28. Shaw followed its oral protest with a written protest to the agency. Although the Corps opened the bids as scheduled at 2:00 p.m. on June 28, it informed Shaw that it would consider its protest. Of the six bids received, Shaw's bids of \$2,038,000 on Schedule I, and \$1,000,000 on Schedule II, were the highest. The low bids were \$749,185 on Schedule I, and \$357,800 on Scheduled II. The Corps denied Shaw's protest to it by letter dated August 8 and awarded contracts for both schedules to the low bidders.

In view of Shaw's standing as only the sixth low bidder under Schedules I and II, we will not consider the merits of its protest. Shaw was rejected not because it offered a hydraulic dredge, but because it was not the low bidder. We will not review a timely protest of allegedly restrictive specifications where bid opening subsequently discloses that the protester is not the low bidder, and it does not appear that the specifications complained of had a material impact on the protester's bid price. Ven Tel, Inc., B-204233, March 8, 1982, 82-1 CPD 207. Such appears to be the case here, since Shaw, bidding on what it believes to be the "most cost effective method" of performing the work, was not the low bidder. Under these circumstances, the protest is academic; no immediate purpose would be

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served by our review of the matter. Somers Construction Company, B-209843.3, October 25, 1983, 83-2 CPD 490; S.A.F.E. Export Corporation, B-208526, September 27, 1982, 82-2 CPD 283.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel