



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J. M. Yurick Associates, Inc.

File: B-243806.2

Date: September 16, 1991

Gilbert J. Ginsburg, Esq., and Catherine A. English, Esq., Epstein, Becker & Green, P.C., for the protester. David S. Cohen, Esq., Cohen & White, for Harry Kahn Associates, Inc., an interested party. Jonathan H. Kosarin, Esq., and Carolyn E. Riemer, Esq., Department of the Navy, for the agency. Linda S. Lebowitz, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester, the lowest technically rated, highest proposed cost offeror, abandons the issue concerning the agency's cost realism analysis of the second low offeror, which had a higher technical rating and a lower proposed cost than protester, protester lacks the requisite direct and substantial economic interest to be considered an interested party to protest the agency's cost realism analysis of the awardee, the highest technically rated, lowest evaluated cost offeror, as protester would not be next in line for award even if its protest were sustained.

DECISION

J. M. Yurick Associates, Inc. protests the award of a contract to Harry Kahn Associates, Inc., under request for proposals (RFP) No. N62269-90-R-0283, issued by the Department of the Navy for engineering writing, technical illustrating, and publishing services in support of aviation crew systems maintenance manuals for aircraft life support equipment. Yurick essentially argues that the agency improperly evaluated the cost realism of Kahn's cost proposal.

We dismiss the protest.

The RFP, issued on September 6, 1990 as a total small business set-aside, contemplated the award of a cost-plus-fixed-fee, level of effort contract for the base period and four option periods. The RFP stated that award would be made to the

responsible offeror whose proposal conformed to the requirements of the solicitation and was most advantageous to the government. The RFP stated that proposals would be evaluated on the basis of the following technical factors listed in descending order of importance (except for the first two factors which were of equal importance): technical approach; personnel qualifications; corporate experience; contractor facilities; and liaison. The RFP also stated that cost, which was secondary to an offeror's technical merit, would be evaluated on the basis of cost realism (i.e., whether an offeror's proposed costs were realistic and reasonable and demonstrated an offeror's understanding of the nature and scope of the work to be performed).

The RFP as originally issued identified and described seven categories of service employees expected to be employed under the contract. Pursuant to the Service Contract Act of 1965, 41 U.S.C. §§ 351 et seq. (1988), offerors were required to submit direct labor rates for each labor category identified in the RFP in accordance with the applicable Department of Labor (DOL) wage determination. Prior to issuing this RFP, the agency filed with the DOL Standard Form 98, captioned "Notice of Intention to Make a Service Contract and Response to Notice," listing Warminster, Pennsylvania, the location of the user activity, as the place of performance. Although the DOL had not issued a wage determination by the time the RFP was issued, the RFP did advise offerors that the agency's application process for a wage determination was in progress.

Eight firms submitted initial technical and cost proposals by the amended closing date of November 2. After the initial technical evaluation by the agency's four-member source evaluation board, three of the eight offerors--Kahn, the incumbent contractor, Dayton T. Brown, and Yurick--were found technically acceptable and included within the competitive range. The agency did not conduct technical discussions with any offeror in the competitive range.

By letter dated March 13, 1991, the agency sent to each offeror in the competitive range a DOL wage determination for Philadelphia, Pennsylvania, which included wage rates for the RFP's labor categories and, referencing 29 C.F.R. § 4.6(b)(2) (1990), outlined the standard "conformance" procedure by which a contractor could determine the appropriate wage rates, based on a comparison of skill levels, for labor categories listed in the RFP, but omitted from the wage determination. By March 27, the agency requested that each offeror either affirm its initial cost proposal or submit a revised cost proposal in light of the DOL wage determination for Philadelphia and in accordance with the conformance procedure as outlined in the wage determination.

Kahn submitted a revised cost proposal based on a wage determination for Washington County, Maryland, its place of performance. Kahn conformed the RFP's labor categories to those in the wage determination for Maryland. Kahn also submitted a certification from the union representing its service employees which stated that the union had reviewed and approved as acceptable the conformed labor categories and wage rates. Yurick, with the approval of the agency, submitted a revised cost proposal based on a wage determination for New Hampshire, its place of performance. Brown, whose place of performance was Nassau County, New York, affirmed the cost figures in its initial cost proposal.^{1/}

The final technical merit scores and proposed costs for the three offerors in the competitive range were as follows:

	<u>Technical Merit</u>	<u>Proposed Cost</u>
Kahn	89.63	\$2,431,812
Brown	85.79	\$4,355,166
Yurick	72.97	\$6,342,051

Because Kahn proposed the lowest cost, the agency evaluated the cost realism of Kahn's cost proposal. The agency concluded that Kahn's proposed costs were fair and reasonable and in accordance with the DOL wage determination for Maryland. The agency found that although Kahn proposed a more conservative labor mix--more lower paid employees to perform a greater number of the RFP's requirements--the labor mix proposed by Kahn was reasonable and consistent with the level of effort specified in the RFP and with its proposed technical approach. For cost realism purposes, the agency added a 4 percent annual labor rate escalation factor to Kahn's proposal, thereby resulting in an evaluated cost for Kahn of \$2,634,296. On April 19, based on the results of the technical and cost evaluations, the agency awarded a contract to Kahn, the highest technically rated, lowest evaluated cost offeror.

On April 26, Yurick filed a protest challenging the award to Kahn. Yurick argued that the agency failed to perform a reasonable cost realism analysis of Kahn's cost proposal. Yurick requested that our Office recommend that the agency terminate the award to Kahn and award it the contract. On June 3, the agency filed its administrative report. At that time, it became apparent that Yurick was not an interested party to protest the agency's cost realism analysis of Kahn's cost proposal and the award to Kahn. By letter of

^{1/} The record shows that the wage rates for Philadelphia were higher than those for Maryland, New Hampshire, and New York.

June 13, our Office dismissed Yurick's protest, stating that under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 and 3553(a) (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1991), a protester must be an "interested party" before we will consider its protest. We explained that an interested party for purposes of eligibility to protest must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract. A protester is not an interested party if it would not be in line for award if its protest were sustained. See Hydroscience, Inc., B-227989; B-227989.2, Nov. 23, 1987, 87-2 CPD ¶ 501.

The record showed that even assuming the agency failed to perform a reasonable cost realism analysis of Kahn's cost proposal as Yurick contended, there was an intervening offeror--Brown--which would be next in line for award with a higher technical rating and a lower proposed cost than Yurick. As Yurick only protested the agency's evaluation of Kahn's cost proposal and the award to Kahn, it thus lacked the requisite direct and substantial economic interest with regard to the award to be considered an interested party. See Kaiserslautern Maintenance Group, B-240067, Oct. 12, 1990, 90-2 CPD ¶ 288.

In the interim on June 7, based on documents released by the agency in response to its initial protest, Yurick filed this protest, "supplementing" its cost realism argument for the purpose of establishing its status as an interested party. In its supplemental protest, Yurick continued to protest as unreasonable the agency's cost realism analysis of Kahn's cost proposal and, for the first time, also protested as unreasonable the agency's cost realism analysis of Brown's cost proposal. Yurick requested that the agency terminate the award to Kahn and recompute the solicitation.

On July 22, the agency filed a separate administrative report for Yurick's supplemental protest, addressing in detail the reasonableness of its cost realism analysis of both Kahn's and Yurick's cost proposals. On August 7, Yurick filed its comments to the agency's second administrative report. While Yurick responded to the agency's position concerning the cost realism analysis of Kahn's cost proposal, Yurick did not even attempt to rebut in its comments the agency's position concerning the cost realism analysis of Brown's cost proposal. Accordingly, we deem Yurick's allegation concerning the reasonableness of the agency's evaluation of Brown's cost proposal to be abandoned, and we will not address it. Pacifica Servs., Inc., B-242290; B-242290.2, Apr. 8, 1991, 91-1 CPD ¶ 357; The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218. In view of Yurick's abandonment of this

issue, Yurick again is not an interested party to protest the reasonableness of the agency's evaluation of Kahn's cost proposal and the award to Kahn. Accordingly, Yurick's supplemental protest is dismissed. See Kaiserslautern Maintenance Group, supra, 2/

The protest is dismissed.

Michael R. Golden

Michael R. Golden
Assistant General Counsel

2/ Yurick also argues that the offerors did not compete on an equal basis because the agency requested and subsequently incorporated into the RFP a wage determination for Philadelphia, applicable to the location of the user activity, but not to any offeror's place of performance. The record shows, however, that in submitting revised cost proposals, both Kahn and Yurick, on their own initiative, obtained wage determinations from the DOL for their places of performance--respectively, Maryland and New Hampshire--and disregarded the allegedly improper wage determination for Philadelphia. The record also shows that Brown's cost proposal was consistent with the applicable wage determination for its place of performance. The matter is therefore academic.