



Comptroller General
of the United States

Washington, D.C. 20548

Mr. R. White

Decision

Matter of: Advanced Systems Technology, Inc.;
Engineering and Professional Services, Inc.

File: B-241530; B-241530.2

Date: February 12, 1991

Steve Webley and Thomas Gorman for Advanced Systems Technology, Inc., and Francesco A. Musorrafiti for Engineering and Professional Services, Inc., the protesters. Jeffrey I. Kessler, Esq., and Margaret M. Rioux, Esq., Department of the Army, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that agency improperly excluded a proposal from the competitive range after finding only the proposal's response to the sample task unacceptable is denied where the solicitation expressly advised offerors that proposals must receive a rating of at least acceptable to be considered for award and where agency, in fact, reviewed the technical proposal in its entirety and reasonably concluded that the proposal was unacceptable in three of the four subfactors under the technical factor and where protester fails to challenge the results of the technical evaluation provided in response to the protest.
2. Protest against elimination from competitive range after consideration of offeror's proposal, including offeror's response to a request for clarification, is denied where the questions, regardless of their description as request for clarification, were sufficient to lead the protester into areas of perceived deficiency in its proposal and permitted protester to supplement its initial proposal, and where the proposal, as clarified, was reasonably evaluated unacceptable.
3. Claim that protester's elimination from competitive range, leaving a competitive range of one offeror, was improper is denied where protester's proposal was reasonably found unacceptable.

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4. Protest that agency abandoned stated evaluation criteria because agency concluded protester's proposed approach was risky, even though the solicitation did not specifically enunciate risk as an evaluation factor or subfactor, is denied because consideration of risk is inherent in the evaluation of proposals.

5. Contention that evaluation is biased is denied where protester fails to show that improper conduct occurred resulting in a conflict of interest on the part of evaluation panel members and the chairman of the evaluation panel, and the record contains no evidence of bias against the protester or in favor of the awardee.

6. Protester's claim that tone of discussion questions indicates bias is denied because adversarial tone, standing alone, does not establish bias on the part of an agency or its contracting officials.

7. Agency's failure to provide written notice to unsuccessful offerors of intent to award a small business set-aside contract, as required by Federal Acquisition Regulation § 15.1001, constitutes harmless procedural error since neither offeror sought to challenge the small business size status of the apparent successful awardee.

DECISION

Advanced Systems Technology, Inc. (AST) and Engineering and Professional Services, Inc. (EPS) protest the exclusion of their proposals from the competitive range, and the award of a contract to Modern Technologies Corporation (MTC), under request for proposals (RFP) No. DAAB07-90-R-H280, issued as a small business set-aside by the Department of the Army's Communications-Electronics Command (CECOM). The solicitation sought contractor support for the Army's Life-Cycle Software Engineering Activity in support of the Aviation Systems Command. Both protesters argue that their proposals were improperly evaluated and thus erroneously eliminated from the competitive range. AST also argues that its exclusion was the result of evaluator bias against AST and in favor of MTC.

We deny the protests.

BACKGROUND

On June 21, 1990, the Army issued this solicitation for engineering support services for the Army's Life-Cycle Engineering Centers to 147 companies. The RFP was set aside for small businesses. These support services involve engineering and maintaining software for certain mission

critical defense systems. Since the services required are not fixed, the RFP envisioned award of an indefinite quantity time-and-materials type contract based on fixed-price labor rates for a 1-year base period with four 1-year options.

Section M.2 of the RFP advised that award would be made to the "best overall proposal" based on consideration of three factors: technical, management, and cost. This section further advised that the technical factor was approximately twice as important as the management and cost factors combined, while the management factor was twice as important as cost.

The RFP also established certain subfactors within the technical and management evaluation factors. The technical evaluation factor included four subfactors: (1) sample task, (2) personnel qualifications, (3) response to statement of work, and (4) technical management of software activities. The management factor included two subfactors: (1) management technique, and (2) corporate management experience. The RFP advised that proposals must be rated at least acceptable in the technical factor, and subfactors 1 and 2 therein, as well as the management factor, to be considered for award.

Four firms responded to the RFP by the July 20 closing date: AST, EPS, MTC and Westar, Inc. After the initial evaluation, the proposals submitted by EPS and Westar were excluded from the competitive range because their proposals were considered technically unacceptable based on a review of the sample task subfactor. After discussions, the Army eliminated AST from the competitive range because AST's proposal was considered unacceptable in the personnel subfactor under the technical factor, and in both the management technique and corporate management experience subfactors of the management factor.

By letters dated September 18, the Army notified both AST and EPS that their proposals were found to be unacceptable and that no further consideration would be given to either company's proposal. After protests submitted to the agency by AST and EPS were denied, both companies protested to our Office. On September 29, the Army awarded the contract to MTC, but due to the protests, has not issued any work orders.

EPS protests that the Army unreasonably excluded its proposal from the competitive range after reviewing only the sample task portion of the proposal and concluding that EPS' response to the sample task was unacceptable. EPS argues that if the Army had reviewed the remainder of the proposal, its proposal might have been found acceptable, or susceptible to being made acceptable. According to EPS, the Army's unfavorable view of EPS' response to the sample task is based on an improperly imposed page limitation, causing the Army not to read the

entire sample task response. EPS also complains that the Army failed to give prompt notice of its intent to make award, as required by Federal Acquisition Regulation (FAR) § 15.1001; AST joins in the challenge to the Army's failure to give prompt notice.

AST likewise challenges the exclusion of its proposal from the competitive range, as well as the Army's evaluation of its proposal in each of the areas where the proposal was found unacceptable: the personnel subfactor under the technical factor; and the management technique and corporate management experience subfactors under the management factor. AST also argues that the Army's discussions were inadequate to alert AST to perceived deficiencies in its proposal and that it was improper for the agency to establish a competitive range of only one offeror. In addition, AST alleges that its evaluation was influenced by evaluator bias and conflict of interest.

COMPETITIVE RANGE DECISION

In a negotiated procurement, an agency may determine a competitive range for the purpose of selecting those offerors with which the contracting agency will hold oral or written discussions. FAR § 15.609; Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. The competitive range consists of all proposals that have a reasonable chance of being selected for award, that is, it includes those proposals that are technically acceptable as submitted or that are reasonably susceptible of being made acceptable through discussions. Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588.

Since agencies are responsible for defining their needs and for deciding the best method of accommodating them, the evaluation of proposals and the resulting determination of whether an offer is in the competitive range are matters within the discretion of the contracting agency. Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203. In reviewing protests against these determinations, our function is not to reevaluate the proposal and make our own determination of its merits; rather, we examine the agency's evaluation as a whole to ensure that it has a reasonable basis. See American Contract Health, Inc., B-236544.2, Jan. 17, 1990, 90-1 CPD ¶ 59; Madison Servs., Inc., B-236776, supra.

As explained above, the contracting officer here excluded the proposal submitted by EPS from the competitive range after initial evaluation because its proposal was considered technically unacceptable based on a review of the sample task subfactor. AST's proposal was eliminated from the competitive range after the Army received and reviewed AST's response to

the agency's request for clarification. According to the Army, AST's proposal, after clarification, was unacceptable in the personnel subfactor under the technical factor, and in both the management technique and corporate management experience subfactors of the management factor.

To review the Army's decision to exclude these proposals from the competitive range, we look first to the agency's evaluation of the proposals to determine whether it had a reasonable basis.

Evaluation of EPS

EPS' challenge to its evaluation focuses almost entirely on language used in the September 18 Army letter advising EPS that its proposal was found unacceptable and excluded from further negotiations. In that letter, the Army stated that it had reviewed only EPS' response to the sample task, and finding the sample task response unacceptable, had not reviewed the remainder of the proposal.^{1/} According to EPS, if the Army had reviewed the entirety of its proposal, the Army might have found the proposal acceptable. EPS also argues that it believes the Army applied an improper page limitation to its response to the sample task.

As an initial matter, the Army denies applying a page limitation to EPS' response to the sample task. The Army explains that the RFP, at section L.19(1), limits the length of technical proposals to 250 pages, but excludes responses to the sample task from the page limitation. In addition, the Army states that it not only reviewed EPS' 304-page response to the sample task in its entirety, but also reviewed EPS' technical proposal--despite the language to the contrary in the September 18 letter.^{2/}

^{1/} As indicated by the first subfactor in the technical evaluation factor, the RFP included a sample task to aid in the evaluation of offers. The sample task required offerors to review software specification documents and to propose an approach to performing the technical software support required by the documents. As explained above, section M.2 of the RFP advised offerors that unless their response to the sample task was rated "acceptable" or higher, the proposal would not be considered for award.

^{2/} The agency report submitted in response to this protest explains that the September 18 letter was in error. The Army admits that while it did not read EPS' management proposal, it did, in fact, review and evaluate both EPS' technical proposal and its response to the sample task. In addition,
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With respect to the evaluation, the Army explains that EPS' proposal was rated unacceptable in three of the four technical subfactors: sample task; personnel qualifications; and response to the statement of work. As explained above, the RFP stated that proposals would not be considered for award unless they received a rating of at least acceptable for the sample task and personnel qualifications subfactors of the technical factor. Thus, the Army concluded the proposal was unacceptable. Also, the Army correctly notes that EPS does not challenge, either in its initial protest or its comments on the agency report, the determination that its sample task was unacceptable, only the fact that the Army did not review the entire proposal.

Based on our review, we find no basis to question the Army's evaluation of EPS' response to the sample task, or its conclusion that the response to the sample task renders the proposal unacceptable--nor does EPS suggest any basis for such a finding. The Army determined that the protester's response to the sample task was unacceptable because the response did not convey an understanding of the effort, was superficial, and failed to address the technical content of the provided documents. Based on these findings, the Army decided that the protester was unable to demonstrate an understanding of the design of mission critical defense systems, or a familiarity with avionics systems. Having found the response to the sample task unacceptable, the Army's determination that the proposal was unacceptable was in accordance with the evaluation criteria in the RFP. For these reasons, and because the protester fails to challenge any of the substantive findings of the evaluation panel, see Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398, aff'd, B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180, we find no basis to conclude that the evaluation was unreasonable.^{3/}

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the Army provided with its agency report an evaluation of EPS' technical proposal.

^{3/} We also do not agree with EPS' contention that the Army somehow acted improperly in providing the results of the evaluation of EPS' technical proposal with the agency report on this protest. The Army explained that the September 18 letter misstated the extent of its review and that the agency had, in fact, reviewed EPS' technical proposal, although the Army had not reviewed the management proposal. In any event, EPS, even now, makes no challenge to the Army's evaluation of the technical proposal, which concludes that the proposal is unacceptable in three of the four subfactors under the

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Evaluation of AST

The Army's September 18 letter notifying AST that its proposal was found unacceptable advised that a reevaluation of AST's proposal, together with its response to the Army's August 17 letter requesting clarification, had resulted in a determination to reject the proposal for technical and management inadequacies. With respect to the personnel subfactor of the technical factor, the Army explains that 8 of 13 proposed personnel were found unacceptable despite the agency's written questions in this area and its example of what was expected in terms of a response. With respect to the management technique subfactor of the management factor, the Army advises that AST's response to the request for clarification was unacceptable in 6 of 10 responses, leaving considerable risk in the proposal. With respect to the corporate management experience subfactor, the Army explains that AST's response was unacceptable in 7 of 12 areas.4/

In challenging its evaluation, AST complains generally that the Army conducted improper discussions. Specifically, AST argues that discussions were inadequate because the Army's letter of August 17 initiating discussions was written with an unnecessarily adversarial tone, was misleadingly labelled "clarification questions," and failed to alert AST to perceived deficiencies in its proposal.5/ AST also challenges each of the Army's conclusions regarding the three subfactors for which AST was found unacceptable: the personnel subfactor of the technical factor, and the management technique and corporate management experience subfactors of the management factor. AST argues that the evaluation of proposed personnel

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Technical factor. Even if this evaluation were made after the fact, it demonstrates, without challenge from EPS, that if the Army excluded EPS solely on the basis of its response to the sample task, no harm accrued to EPS as a result of that action.

4/ The Army's September 18 letter also erred in its claim that there were eight unacceptable responses to the clarification requests for the corporate management experience subfactor. At the debriefing for AST, the Army admitted that seven of the responses were unacceptable, rather than eight.

5/ For purposes of our review, we will not consider here whether the tone of the questions asked of AST rendered discussions inadequate; rather, we will consider whether the discussions met the standards required by the FAR. We will, however, discuss AST's challenge to the tone of the Army's questions in our review of AST's allegations of agency bias.

was unreasonable; that the Army's evaluation of the management technique subfactor did not follow the evaluation criteria in the solicitation; and that the Army's conclusions regarding corporate management experience failed to give AST appropriate credit for its prior performance as the incumbent contractor for this effort.

Adequacy of Discussions

The requirement for discussions with offerors is satisfied by advising them of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. FAR §§ 15.610(c)(2), (5); The Scientex Corp., B-238689, June 29, 1990, 90-1 CPD ¶ 597. Agencies are not, however, obligated to afford offerors all-encompassing discussions, or to discuss every element of a technically acceptable, competitive range proposal that has received less than the maximum possible score. Id.

As an initial matter, we note that the Army's caption on its August 17 letter describing the contents therein as "Clarification Questions" does not mean the questions were mere requests for clarification and not discussions. Discussions are defined by regulation as any oral or written communications between the government and an offeror involving "information essential for determining the acceptability of a proposal." FAR § 15.601(a). Thus, regardless of the caption, if the questions, and the concurrent opportunity to respond, are sufficient to lead an offeror into areas of perceived deficiency in its proposals, the agency has held adequate discussions. See Dowty Maritime Sys. Inc., Resdel Eng'g Div., B-237170; B-237173, Feb. 2, 1990, 90-1 CPD ¶ 147.

With respect to the substance of the Army's discussion questions, our review indicates that these questions were adequate to lead AST into areas where its proposal was viewed as deficient. The questions were organized by their applicability to each of the subfactors in which AST was later found unacceptable. Further, the questions provided detailed information about the perceived deficiencies in the proposal. For example, the questions regarding the personnel subfactor were prefaced with a paragraph explaining that the personnel information provided with the initial proposal did not meet the format requirements of the RFP, making it difficult to evaluate AST's response. This preface reminded AST that the RFP required from offerors certain information--such as specific dates of past experience for proposed employees, and not mere identification of the time an employee was affiliated with a company--and gave AST a second chance to provide the information. Under these circumstances, we cannot conclude that the Army failed to conduct meaningful discussions.

Reasonableness of Evaluation Conclusions

AST also challenges the conclusions of the evaluators in each of the areas where its proposal was found unacceptable. AST first complains that the evaluation of two proposed personnel was unreasonable.^{6/}

In reviewing AST's proposed personnel, the Army, in one instance, determined that it was unclear whether the individual proposed was committed to work for AST should the company be awarded the contract. The Army questioned the commitment of this individual because it was aware that the individual had left AST's employ and gone to work for a competitor after initial proposals were submitted. The Army was also aware that the individual had made an employment commitment to another offeror. To resolve its concerns about the availability of this individual, an Army official contacted the questioned individual and was left with the impression that the individual's commitment to return to AST was unclear.^{7/} Under these circumstances, we do not find

^{6/} In its comments on the agency report filed in response to this protest, AST for the first time raises detailed challenges to the Army's evaluation of every person found unacceptable by the evaluators. AST's initial protest only challenged the evaluation of two individuals in the personnel subfactor, along with a general challenge that the Army's questions did not alert AST to what was required in its response. Similarly, AST now challenges the Army's finding that its proposal was unacceptable in the technical management of software activities subfactor under the technical factor because of AST's proposed program manager. These additional challenges are based entirely on information received during the October 4 debriefing, prior to AST's protest, and not on information first received in the agency report. As such, these challenges should have been raised no more than 10 days after the basis for the challenge was known. AST's claims here--raised for the first time nearly 8 weeks after the debriefing--are untimely and will not be considered. 4 C.F.R. § 21.2(a)(2) (1990). In any event, these challenges appear to be mere disagreement with the evaluation conclusions, not a showing that the conclusions are unreasonable. Applied Research Technology, B-240230, Nov. 2, 1990, 90-2 CPD ¶ 358.

^{7/} AST argues that the Army's decision to contact this employee was inappropriate given the employee's signed letter of commitment and is further evidence of agency bias against AST. Although we agree with AST that it is not unusual for individuals to be named in more than one proposal, we do not
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unreasonable the Army's decision to question the availability of the employee.

The evaluation of the second employee challenged by AST involved a finding that a proposed software engineer did not meet the educational requirements of the RFP. Section H.22 of the RFP established the educational backgrounds for various positions, including that of software engineer. The provision stated "[a] B.S. or B.A. in engineering, computer science, physics or mathematics is required. An advanced degree in one of the same disciplines is desirable." AST's proposed software engineer possessed an undergraduate degree in biology, rather than one of the specified disciplines, but possessed master's degrees in computer science and developmental genetics. This employee was found unacceptable by the Army.

AST argues that the Army's finding here is unreasonable since the proposed software engineer possessed an advanced degree in the area for which only an undergraduate degree was required. The Army responds that the engineer's master's degree in computer science was not an appropriate substitute for a bachelor's degree in that discipline because only a B.S. degree assured ". . . the broad background required here for successful contract performance." Even if we concluded that the Army was unreasonable in its evaluation of this employee, AST was not prejudiced as a result since several other employees were found unacceptable, thus supporting AST's overall rating of unacceptable under the personnel qualifications subfactor, and unacceptable ratings were received in both subfactors under the management factor.

With respect to the management technique and corporate management experience subfactors of the management factor, the Army found AST unacceptable on both counts. As explained above, the RFP required that proposals be found acceptable in the management factor to be considered for award. The Army explains that under the management technique subfactor, AST was found unacceptable because the proposal, as clarified, presented considerable risk to successful contract performance due to a lack of detail in the description of the procedures to be used to ensure successful completion of contract tasks.

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find it unreasonable for the Army to seek clarification from such individuals about their intentions. The Army's action is further justified by the fact that the individual left the employment of AST after initial proposals were submitted. As will be discussed below, the Army's decision to verify a proposed employee's commitment does not constitute agency or evaluator bias.

Under the corporate management experience subfactor, the Army found AST unacceptable despite AST's prior performance as the prime contractor for this effort. According to the Army, AST could not be given credit for experience in this area because the personnel involved in AST's prior performance were no longer employed by AST, or by its subcontractors. Further, the Army claims that much of AST's experience as the incumbent contractor was unacceptable.

AST responds that the Army abandoned the stated evaluation criteria under the management technique subfactor, and focused instead on risk. AST complains that risk was not an evaluation factor established in the RFP, and that the officials conducting the debriefing could not identify how risk was measured.

Although the RFP does not specifically enunciate risk as an evaluation factor within this subfactor, consideration of the risk involved in an offeror's approach is inherent in the evaluation of technical proposals. Honeywell, Inc., B-238184, Apr. 30, 1990, 90-1 CPD ¶ 435. In addition, the statement that the proposal involved unacceptable risk was a conclusion based on the findings of the evaluation panel, none of which is challenged, even though they were released to the protester as part of the document production related to this protest. For example, the evaluators found that AST failed to answer adequately how the contractor would provide continuity of support for projects, and how the contractor would maintain a continuity of support from the current contract to the next based on the personnel proposed. Given these findings, consistent with the stated evaluation criteria, together with the protester's failure to mount any substantive challenge to the findings, we cannot conclude that the evaluation in this regard was unreasonable.

With respect to the finding that AST was unacceptable in the corporate management experience subfactor, AST argues that the Army unreasonably refused to give credit to AST for its prior performance as the incumbent on this contract. AST also argues that the Army has misrepresented AST's prior experience. Our review of the record shows that the Army correctly noted that many of the individuals who received experience under the prior contract are no longer employed by AST.^{8/}

^{8/} AST's own arguments in this protest support the Army's conclusion. In its response to the agency report, AST challenges the Army's contention that its subcontractor, Teledyne Brown Engineering (TBE), not AST, was largely responsible for any success on the prior contract effort. AST argues that ". . . (4) the five personnel assigned to

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Thus, the Army concludes that AST can no longer claim that such experience inures to AST. In addition, the record supports the claim that AST's prior subcontractor, TBE, contributed substantially to AST's performance of the contract. Under these circumstances, we find the Army reasonably evaluated AST's experience.^{9/}

Determination of Competitive Range

Based on the evaluation panel's determination that EPS' initial proposal was unacceptable because of its response to the sample task, it was excluded from the competitive range. As stated above, agencies are not required to include in the competitive range offerors whose proposals it reasonably concludes are unacceptable, or proposals that could not be made acceptable without preparation of a virtually new proposal. Madison Servs., Inc., B-236776, supra. Since we have determined that EPS' proposal was reasonably found unacceptable--whether one looks only at the evaluation of the response to the sample task, or looks also at the evaluation of the technical proposal--we find that the Army reasonably excluded EPS from the competitive range.

Unlike EPS, AST was not excluded from the competitive range until after receipt of its response to additional questions from the agency. Based on the review of AST's initial proposal, together with its responses to the agency's clarification questions, the Army decided that the deficiencies in AST's proposal could not be cured without submission of major proposal revisions. At this point, AST's proposal was determined unacceptable and was excluded from further negotiations. AST argues that its exclusion from the competitive range was unjustified and unreasonable since it left only one offeror in the competitive range.

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[the V-22 effort], all members of AST, still support that effort and the MH-47E program albeit in the employ of another contractor since the DLCSE contract expired, and (5) four of AST's five St. Louis personnel are still supporting their POC's albeit under another contractor." (Emphasis added.)

^{9/} We do not address the issue of whether AST's prior performance was acceptable to the Army despite ample argument about this matter in the record. Since we conclude that the Army reasonably determined AST to be unacceptable in the corporate management experience subfactor without considering this issue, we need not address the adequacy of AST's current or prior performance.

In reviewing a firm's exclusion from the competitive range, we closely scrutinize an agency decision that results in a competitive range of one. Herley Indus., Inc., B-237960, Apr. 5, 1990, 90-1 CPD ¶ 364, aff'd, B-237960.2, Aug. 29, 1990, 90-2 CPD ¶ 173. Nonetheless, we will not disturb the decision unless it was unreasonable or in violation of applicable procurement statutes and regulations. See Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273.

In this case, we have conducted a detailed review of the evaluation of AST, and concluded that the proposal, once clarified, was reasonably found unacceptable. At that point, the agency appropriately excluded AST from the competitive range.^{10/} Even though AST's exclusion left only one offeror in the competitive range, we find no basis to question the determination, nor does the protester offer such a basis. Accordingly, we find that the competitive range determination here was reasonable. Institute for Int'l Research, B-232103.2, supra.

EVALUATION PANEL COMPOSITION AND AGENCY BIAS

AST argues that several evaluators or key agency officials in this procurement appear to have been biased against AST, or were subject to a conflict of interest because of business or personal relationships. AST's concern in this regard began when it received the Army's August 17 letter with clarification questions. AST claims it became concerned because the questions were written with an unnecessarily adversarial tone, indicating that someone on the evaluation panel was biased against AST. After completing its response to the Army's clarification questions, AST brought its concerns to the attention of the contracting officer by letter dated September 6. When the contracting officer failed to respond to AST's September 6 letter--instead notifying AST by letter dated September 18 that its proposal was found unacceptable and excluded from the competitive range--AST reiterated its concerns to the contracting officer, and wrote to the agency's Competition Advocate. Both parties responded that there was no evidence of bias in the procurement.

AST first argues that the Division Chief of the using activity--whom AST erroneously believed to be the source selection authority for this procurement--has an ongoing

^{10/}There is nothing improper per se in an agency's making more than one competitive range determination and in dropping a firm from further award consideration, so long as the firms' exclusion was ultimately justified. A.T. Kearney, Inc., B-237731, Mar. 19, 1990, 90-1 CPD ¶ 305.

personal friendship with an individual who was formerly employed by AST's subcontractor on the prior contract, TBE. AST argues that this individual is now employed by Analytics, the subcontractor for the awardee, MTC.^{11/} AST next argues that the mother-in-law of the Source Selection Evaluation Board (SSEB) chairman has recently been hired by Mission Performance Corporation, a corporate subsidiary of Analytics.^{12/} Finally, AST argues that the evaluation panel improperly includes at least one individual who was formerly employed by AST's former subcontractor, TBE. According to AST, these conflicts of interest on the part of the evaluation panel and the source selection official have injured AST's ability to get an impartial evaluation of its proposal.

The Army disputes several of the factual bases of AST's allegations, and disagrees with AST's conclusion that it was denied an impartial evaluation. In affidavits submitted to the protester, and to our Office, both the Division Chief of the using activity and the Chairman of the SSEB deny any conflict of interest in this procurement. As an initial matter, the Division Chief explains in his affidavit that the contracting officer was the source selection official here.^{13/} In addition, while the Division Chief acknowledges a business relationship with the individual who formerly worked for TBE and who now works for Analytics, he denies having any personal relationship with him. Further, he explains that he had no access to proposals and did not influence the evaluation process in any way.

In the affidavit submitted by the Chairman of the SSEB, he admits that his mother-in-law accepted employment with Mission Performance Corporation on August 6, 1990, but states that he

^{11/} According to AST, this individual, while searching for employment after leaving TBE, boasted to potential employers that he could assure his employer's receipt of the upcoming Life-Cycle Software Engineering contract because of his close relationship with the Division Chief of the using activity.

^{12/} AST also notes that the mother-in-law in question is married to the contracting officer's representative on another contract on which Analytics has been a major subcontractor for the last 18 months. AST makes no connection, however, between that contract and the instant procurement.

^{13/} The Division Chief's role was limited to contacting the employee, discussed above, whose commitment to AST was unclear because she no longer worked for the company. He also reviewed the technical evaluation and participated in AST's debriefing.

was not aware of a connection between Mission Performance Corporation and Analytics at that time. The SSEB Chairman explains that he learned that Mission Performance Corporation was owned by Analytics Corporation--MTC's proposed subcontractor--on September 10, well after the final evaluation report was completed. In addition, the SSEB Chairman explains that his mother-in-law's employment had no impact on his evaluation of AST's or MTC's proposals--either favorably or unfavorably.

The Army also admits that at least one member of the evaluation team was previously employed by AST's former subcontractor, TBE. The Army explains that half of the professional staff of the Directorate of Life Cycle Support Engineering, Avionics Division, served on the evaluation panel, according to workload and availability. The Army claims that the panel member in question, like all panel members, was advised to disqualify herself if for any reason a conflict of interest arose. According to the Army, the fact that this individual was once employed by TBE does not disqualify her from serving on an evaluation panel here and does not create a conflict of interest with her service on the SSEB.

When a protester alleges bias on the part of evaluation officials, the protester must submit convincing proof that contracting officials had a specific and malicious intent to harm the protester, since contracting officials are presumed to act in good faith. Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93. We have held that the opportunity for bias is not a sufficient basis to question an award of a contract, but that the protester must show actual bias. Booz, Allen & Hamilton, 63 Comp. Gen. 599 (1984), 84-2 CPD ¶ 329. Thus, when a protester, as here, infers that evaluators are biased due to their past experiences or relationships, we focus on whether the individuals involved exerted improper influence in the procurement on behalf of the awardee, or against the protester. See Quality Sys., Inc., B-235344; B-235344.2, Aug. 31, 1989, 89-2 CPD ¶ 197. We examine the circumstances of the procurement and the involvement of the agency personnel who allegedly engaged in the improper conduct to determine if the award decision was improperly influenced. Id.

Here, despite the protester's claims of conflict of interest, we find no evidence of improper conduct, nor does the protester do more than infer improper conduct. As an initial matter, we do not agree with AST that the discussion questions included in the Army's August 17 letter demonstrate agency bias. Although our review of the record indicates there is some merit to AST's concern about the adversarial tone of the discussion questions, the wording of the questions alone, without more, does not establish bias and does not establish

that the questions were inadequate to lead AST into areas of its proposal that needed clarification. See Lee J. Kriegsfeld, B-222865, Aug. 22, 1986, 86-2 CPD ¶ 214 (protest denied where protester suggests bias based on questions asked during an oral presentation to the contracting officials); NAHB Research Found., Inc., B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248 (aggressive questioning of offeror during oral presentation, without additional concrete evidence of impropriety, does not constitute agency bias).

Regarding the agency officials, the record shows that the Division Chief was not the source selection official for this procurement, and he appears to have had no role in the evaluation of proposals. Even if the Division Chief had been involved in the evaluations, he denies the alleged personal relationship with the Analytics employee in a sworn affidavit, and there is no evidence--nor is any put forward by the protester--that he acted to improperly influence the evaluation panel or the outcome of the procurement. Likewise, the Chairman of the SSEB denies, in a sworn affidavit, that he was aware of a corporate relationship between Analytics and Mission Performance Corporation--his mother-in-law's new employer. In addition, the record shows that if the SSEB Chairman first learned of this corporate relationship on September 10, as claimed, this knowledge came 10 days after completion of the final evaluation report. Finally, there is no evidence--nor is any offered by AST--that the evaluation panel member who was formerly employed by TBE was biased in any way against AST. Accordingly, given the record, the protester's suspicions regarding potential conflicts of interest do not justify overturning the award to MTC.^{14/} Quality Sys., Inc., B-235344; B-235344.2, supra.

NOTIFICATION OF AWARD

Both AST and EPS complain that the Army improperly failed to provide notification of its intent to award to MTC as required by FAR § 15.1001(b)(2). Under this provision, agencies are required to provide unsuccessful offerors with written notice of the agency's intent to make award--including the name and location of the apparent successful offeror--prior to actually doing so in cases where the requirement has been set aside for

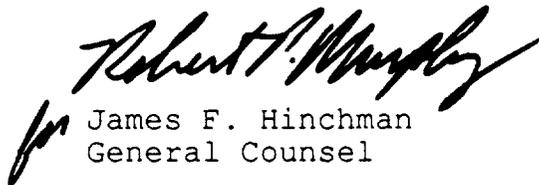
^{14/} In addition to the above discussion of bias, we note that the protester repeatedly asserts that agency conclusions regarding the evaluation constitute bias. The fact that the protester disagrees with the evaluation--an evaluation found to be reasonable when reviewed on the merits--does not establish agency or evaluator bias. See D-K Assocs., Inc., B-213417, Apr. 9, 1984, 84-1 CPD ¶ 396.

small business. The purpose of this provision is to give unsuccessful offerors the opportunity to mount a timely challenge to the successful offeror's small business size status. United Power Corp., 69 Comp. Gen. 476 (1990), 90-1 CPD ¶ 494.

In its response to the protest, the Army admits it did not comply with this requirement, but argues that the protesters suffered no harm, since neither challenged the size status of MTC and both were able to file a timely protest here. We agree. The Army's error, in this case, was only procedural and caused no prejudice to AST or EPS. Since we will only sustain a protest on this basis where a firm is prejudiced by the agency's failure to provide the required notice, we have no basis to sustain the challenges here. Antenna Products Corp., B-236933, Jan. 22, 1990, 90-1 CPD ¶ 82.

CONCLUSION

For the reasons above, we find no basis upon which to object to the award to MTC. Accordingly, the protests are denied.


for James F. Hinchman
General Counsel