



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** Hago-Cantu Joint Venture

**File:** B-279637.2

**Date:** July 20, 1998

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Col. Nicholas P. Retson, and Capt. John C. Lavorato, Department of the Army, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

1. Agency did not conduct misleading discussions where protester and awardee both initially proposed similar number of staffing hours for food services and the agency advised both offerors that these staffing hours were understated; the fact that protester increased its proposed staffing hours more than the awardee reflects protester's business judgment.
2. Contracting agency reasonably evaluated awardee's experience and past performance as acceptable based on the combination of proposed subcontractor's strong past experience in food services and the awardee's own lack of experience in that area.
3. Protest that agency should have found awardee's proposal technically unacceptable because awardee may not comply with requirement that at least 50 percent of the cost of personnel incurred must be for employees of a small business concern is denied where awardee stated in its proposal that it would comply with the requirement and submitted a compliance certification to the Small Business Administration (SBA), which found the awardee eligible for award.
4. Agency's submittal of a request to SBA for an 8(a) eligibility determination and the resulting communications between the agency, SBA, and the 8(a) firm concerning SBA requirements for a teaming agreement do not constitute improper discussions.

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## **DECISION**

Hago-Cantu Joint Venture protests the award of a contract to Heritage Services, Inc. under request for proposals (RFP) No. DAHC77-97-R-0015, issued by the Department of the Army as a competitive 8(a) set-aside for full food and dining facility attendant services at various Army installations on the island of Oahu, Hawaii. Hago-Cantu challenges the agency's evaluation of technical proposals, the conduct of discussions, and the agency's participation in the Small Business Administration's (SBA) determination of the awardee's eligibility for award.

We deny the protest.

The solicitation, issued October 7, 1997, contemplated the award of a fixed-price contract for a base year with four 1-year options to the offeror whose proposal was determined the best overall value to the government. RFP § M.2. Section M.3 of the RFP identified the following evaluation factors and subfactors, listed in descending order of importance:

1. Technical
  - a. Staffing and Personnel Qualifications
  - b. Methodology
  - c. Mobilization/Phase-in Plan
2. Quality Control
  - a. Quality Control Plan
  - b. Safety
  - c. Training
  - d. Strike Contingency Plan
  - e. Key Control and Physical Security/Property Control
3. Experience and Past Performance
4. Supplies
  - a. Chemicals/Cleaning Supplies
  - b. Vehicles (for food transport)

In order to ensure that adequate staffing was provided, offerors were required to submit staffing charts showing the number of staff-hours proposed in each labor category. The staffing proposed in each chart would become the minimum required during the contract performance period unless the manning charts were modified by mutual agreement. RFP § L.24.

The RFP also required that proposals include a list of all contracts and subcontracts completed during the past 3 years and all contracts and subcontracts currently in

progress for the same or similar services. This information was to be provided for the offeror and proposed major subcontractors. The RFP specifically provided that information regarding significant subcontractors and key personnel would be considered. RFP § L.27.

Proposals were to be scored on the basis of adjectival ratings of "exceptional," "acceptable," "marginal," and "unacceptable." Evaluated price was based on the total price of all line items for the base and option years.

The RFP also included by reference the "Limitations on Subcontracting" clause set forth at Federal Acquisition Regulation (FAR) § 52.219-14, as is statutorily required for all solicitations reserved for exclusive small business participation.<sup>1</sup> 15 U.S.C. § 644(o)(1)(A) (1994). The clause provides that:

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for --

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

After submission of initial offers, discussions, and submission of revised proposals and best and final offers (BAFO), the Army concluded that the Heritage proposal represented the best value to the government.<sup>2</sup> The awardee's and the protester's BAFOs were found to be technically equal, with both assigned "acceptable" ratings on each evaluation factor and subfactor and both rated "acceptable" overall. Heritage's total price was \$17,337,532; Hago-Cantu's total price was \$19,311,979. After notifying Hago-Cantu of the selection decision on March 24, 1998, the Army provided a debriefing to the company, which was concluded on April 7. This protest followed.

## MISLEADING DISCUSSIONS

Hago-Cantu first argues that the Army engaged in improper discussions as a result of which the protestor was misled into raising its price. Specifically, Hago-Cantu argues that in discussions after the evaluation of initial proposals the agency

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<sup>1</sup>This requirement exists to prevent small business concerns from subcontracting to large businesses the bulk of a contract reserved for small business participation. Ann Riley & Assocs., Ltd., B-271741.2, Aug. 7, 1996, 97-1 CPD ¶ 120 at 2-3.

<sup>2</sup>Other proposals, including one that was higher rated but also higher priced than the eventual awardee's, are not discussed here, since they are not relevant to the protest.

improperly informed the protester that "it had proposed insufficient man-hours for eight of the nine facilities," yet "ultimately awarded the contract to an offeror who proposed approximately the same number of man-hours that the Army previously identified as deficient." Protester's Comments at 3. Hago-Cantu contends that these discussions caused it to increase its proposed staff-hours (and therefore its price), and asserts that had it not been directed to increase its staff-hours, the protester "would have been the lowest priced offeror and almost certainly would have received the award." Id. at 5.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. Hughes Space and Communications Co.; Lockheed Missiles & Space Co., Inc., B-266225.6 et al., Apr. 15, 1996, 96-1 CPD ¶ 199 at 11. Specifically, an agency may not, even inadvertently, mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Id. The record here provides no basis for concluding that Hago-Cantu was misled.

By letters dated February 13, the Army conducted written discussions. In the letter to Hago-Cantu, the Army stated, on page 1, that the protester's "[m]anning chart does not include hours for manager, assistant manager and mess attendant supervisor for the full food service dining facilities"<sup>3</sup> and that "[m]anning hours of Cook II, salad maker, DFA server, and DFA dishroom need corrections. Review hours for facilities to ensure facilities are adequately manned." The letter also stated, on page 2, that "[h]ours projected for NCO Academy are slightly understated. Hours projected for Headquarters Company Fort Shafter, Quads C, E, F, J, 65th Engineers Schofield Barracks, and 25th Aviation Battalion Wheeler Army Airfield are understated." Similarly, in the letter to Heritage, the Army stated, on page 2, that "[h]ours projected for Quad A Schofield Barracks are slightly understated. Hours projected for Quads C, F, J, NCO Academy Schofield Barracks, 25th Aviation Brigade Wheeler Army Airfield, and Headquarters Company Fort Shafter are understated."

The chart below shows the staff-hours initially proposed by Heritage and Hago-Cantu, separately for weekdays and weekends/holidays, for the nine installations covered by the RFP. Staffing figures for buildings identified by the agency during

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<sup>3</sup>Of the nine facilities to be serviced under the RFP, three (Quad A (Building 133), NCO Academy (Building 6056), and Headquarters Company Fort Shafter (Building 503)) were designated as full food services facilities and required, among other workers, dining facility managers and alternate dining facility managers. The other facilities were designated dining facility attendant (DFA) services facilities and required, in terms of managers, only DFA supervisors.

discussions as "slightly understated" are in bold; staffing figures identified as "understated" are in bold and underlined (because the agency did not distinguish, in its discussion questions, between weekday and weekend/holiday figures, we have marked them identically). The figures include management as well as staff-hours for all locations for which management hours were identified in the proposals. For Heritage, this was all buildings; because Hago-Cantu's initial proposal failed to identify management hours for the three full food service facilities, listed at the top of the chart, the figures for the protester's proposal listed here do not include management hours for those three buildings.<sup>4</sup>

<b>Building</b>	<b>Heritage</b>	<b>Hago-Cantu</b>
NCO Academy (6056)		
weekdays	<b><u>81.50</u></b>	<b>84.00</b>
weekends/holidays	<b><u>82.00</u></b>	<b>80.00</b>
Headquarters (503)		
weekdays	<b><u>86.00</u></b>	<b><u>84.00</u></b>
weekends/holidays	<b><u>59.50</u></b>	<b><u>66.00</u></b>
A Quad (133)		
weekdays	<b>129.80</b>	145.50
weekends/holidays	<b>88.50</b>	101.50
C Quad (357)		
weekdays	<b><u>53.50</u></b>	<b><u>53.25</u></b>
weekends/holidays	<b><u>33.00</u></b>	<b><u>40.00</u></b>
E Quad (550)		
weekdays	47.75	<b><u>50.25</u></b>
weekends/holidays	29.75	<b><u>36.50</u></b>
F Quad (650)		
weekdays	<b><u>47.75</u></b>	<b><u>50.75</u></b>
weekends/holidays	<b><u>29.75</u></b>	<b><u>35.00</u></b>
J Quad (844)		
weekdays	<b><u>63.00</u></b>	<b><u>72.00</u></b>
weekends/holidays	<b><u>31.50</u></b>	<b><u>58.50</u></b>
65th Engineers (1492)		
weekdays	35.50	<b><u>32.00</u></b>
weekends/holidays	23.50	<b><u>28.00</u></b>
25th Aviation (102)		
weekdays	<b><u>54.00</u></b>	<b><u>32.00</u></b>
weekends/holidays	<b><u>46.50</u></b>	<b><u>28.00</u></b>

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<sup>4</sup>Building numbers are identified in parentheses after the name. For the sake of simplicity, we have not identified slight variations occasionally proposed, such as slightly different hours for Fridays than for other weekdays.

Because award was ultimately made on the basis of Heritage's lower price (since the two proposals were found technically equal) and the protester increased its price substantially at BAFO as a result of the discussions, the protester challenges the reasonableness of the agency's concern about Hago-Cantu's understaffing and contends that the two offerors were not treated equally. While the record does not include government estimates of the number of hours needed for each facility, our review of the offerors' proposed hours and the discussion questions generally supports the reasonableness of the agency's evaluation and discussion questions (with two exceptions, as detailed below).

For the most part, where the two offerors proposed similar numbers of hours, they were treated similarly during discussions. For example, the figures proposed for C Quad were virtually identical (53.50 and 53.25 hours for weekdays for the awardee and protester, respectively), and both were advised that their figures appeared understated. The same is true for F Quad, where there was a difference of only 3 hours for weekdays between the two proposals.

In A Quad, where Heritage proposed considerably fewer hours than Hago-Cantu, the agency reasonably advised Heritage that its hours were slightly understated, but did not question Hago-Cantu's hours. While the protester was advised that its weekday hours for 65th Engineers were understated and the awardee was not, the protester had proposed fewer hours (although not many fewer) than the awardee for that location. While the two firms proposed very different levels of hours for J Quad and 25th Aviation (with Heritage much lower for J Quad and Hago-Cantu much lower for 25th Aviation), both firms were advised that their hours for those two locations were understated, and the protester has not pointed to any basis to question the reasonableness of the agency's concern during evaluation of initial proposals.

The two instances where the agency's evaluation and discussion question do not appear reasonable concern E Quad and weekend/holiday hours for the 65th Engineers building. For E Quad, the protester was advised that its figure was understated, while the awardee was not, even though the awardee proposed somewhat fewer weekday hours (47.75) than the protester (50.25). For the 65th Engineers building, the protester was advised that its weekend/holiday hours were understated, while the awardee was not, even though the protester's weekend/holiday hours (28.00) were higher than the awardee's (23.50). (We discuss the impact of these apparent errors below.)

The protester's failure to identify management hours for the full food service dining facilities is relevant to the protester's challenge to the reasonableness of the agency's concern regarding the initially proposed staffing at the Fort Shafter Headquarters Company and NCO Academy buildings. Thus, for the Headquarters building, where the awardee and protester proposed 86 and 84 weekday hours, respectively, they were both advised that their figures appeared understated. The

protester apparently believes that its hours for Headquarters should not have been found understated because it intended to include a significant number of management hours for that location. However, those hours were not identified in the initial proposal, and we therefore have no basis to question the reasonableness of the agency's finding understated the protester's proposed hours. A similar issue arises regarding the NCO Academy, where Heritage's proposed hours were lower than Hago-Cantu's, and the agency advised Heritage that its hours were understated, while advising Hago-Cantu that its hours were (merely) slightly understated: the protester apparently believes that, based on the management hours it intended to include for that location, the agency should not have found the hours understated at all. Again, because the protester had not identified those management hours for the NCO Academy in its initial proposal, we do not find the agency's evaluation unreasonable or the discussion question misleading.

In response to the agency's discussion questions, both offerors revised their proposed staffing. As noted above, the protester increased its staffing so much that its BAFO price was considerably higher than Heritage's; in effect, it priced itself out of the competition. In addition, Hago-Cantu identified the number of management hours it was offering for the three full food service facilities; the price of those hours had apparently been included in the initial proposal, even though the protester had not associated those hours with particular buildings by identifying them in its building-by-building staffing charts until its BAFO. Staff-hours, including managerial hours, proposed by each offeror in their staffing charts in their initial proposals and in their BAFOs are given in the following chart:

Building	Heritage		Hago-Cantu	
	INITIAL	BAFO	INITIAL	BAFO
NCO Academy (6056)				
weekdays	<b><u>81.50</u></b>	92.50	<b>84.00</b>	120.75
weekends/holidays	<b><u>82.00</u></b>	92.00	<b>80.00</b>	116.75
Headquarters (503)				
weekdays	<b><u>86.00</u></b>	94.50	<b>84.00</b>	117.75
weekends/holidays	<b><u>59.50</u></b>	67.50	<b>66.00</b>	95.75
A Quad (133)				
weekdays	<b>129.80</b>	137.80	145.50	153.50
weekends/holidays	<b>88.50</b>	97.50	101.50	121.00
C Quad (357)				
weekdays	<b><u>53.50</u></b>	58.50	<b><u>53.25</u></b>	62.75
weekends/holidays	<b><u>33.00</u></b>	37.25	<b><u>40.00</u></b>	49.50
E Quad (550)				
weekdays	47.75	46.38	<b><u>50.25</u></b>	59.75
weekends/holidays	29.75	28.75	<b><u>36.50</u></b>	45.00
F Quad (650)				
weekdays	<b><u>47.75</u></b>	53.00	<b><u>50.75</u></b>	60.75
weekends/holidays	<b><u>29.75</u></b>	36.25	<b><u>35.00</u></b>	43.75
J Quad (844)				
weekdays	<b><u>63.00</u></b>	69.50	<b><u>72.00</u></b>	81.50
weekends/holidays	<b><u>31.50</u></b>	38.00	<b><u>58.50</u></b>	67.00
65th Engineers (1492)				
weekdays	35.50	33.75	<b><u>32.00</u></b>	40.50
weekends/holidays	23.50	23.50	<b><u>28.00</u></b>	35.50
25th Aviation (102)				
weekdays	<b><u>54.00</u></b>	60.25	<b><u>32.00</u></b>	40.50
weekends/holidays	<b><u>46.50</u></b>	53.50	<b><u>28.00</u></b>	35.50

As can be gleaned from the chart, both offerors addressed the Army's staffing concerns in revisions to their BAFOs. Indeed, both offerors increased their proposed staffing for each of the facilities the agency had identified as understaffed.

The protester's primary support for contending that the discussions were misleading is the fact that the awardee's BAFO staffing was in several instances lower than the staffing level that the agency had advised the protester was understated. Specifically, while both offerors were told that their hours for J Quad were understated, Heritage's increased BAFO hours remained lower than Hago-Cantu's initial number of proposed hours. Similarly, Heritage's increased BAFO weekend/holiday hours for C Quad remained lower than Hago-Cantu's initial proposed staffing for that facility (Heritage's BAFO weekday hours for that facility, however, were greater than Hago-Cantu's initial number).

Even when combined with the apparent errors in the discussion question concerning E Quad and weekend/holiday hours for the 65th Engineers building (explained above), we do not believe that the instances where Heritage's increased staff-hours remained lower than Hago-Cantu's initially proposed staff-hours call into question the reasonableness of the agency's selection of Heritage. Even where we identify an error in the conduct of a procurement, we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996).

The apparent errors identified above represent only a small percentage of the total work to be performed and thus could have had only a minor impact in terms of the protester's price. The record does not support the claim in the protester's comments, at 3, that "Heritage was awarded the contract despite proposing approximately the same or less man-hours as [the protester] for almost all the facilities that the Army had identified as being undermanned during discussions with [the protester]." Instead, review of the chart will confirm that the phenomenon was limited to the cases identified above.<sup>5</sup>

We note that in one instance Hago-Cantu's BAFO staffing was substantially lower than the level that the agency had advised Heritage was understated: for the 25th Aviation building, Hago-Cantu's final proposed staffing for weekday and weekend/holiday services for this facility remained lower (40.5 and 35.5 hours, respectively) than Heritage's initial proposed staffing for this facility (54 and 46.5 hours, respectively), even though Heritage had been told that its staffing was understated. Accordingly, to the extent that the protester questions the agency's

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<sup>5</sup>In a chart in its comments on the agency report, the protester indicates that the staffing for the NCO Academy and Headquarters buildings should be viewed as further instances of the awardee's BAFO figures being lower than the protester's initial ones. Protester's Comments at 4. The staffing of those two buildings is significant, since those two locations are full food service facilities and represent a significant proportion of the overall work (and therefore the overall dollars). Comparison of the protester's chart and the chart set out above, however, demonstrates that Heritage's BAFO figures for both buildings were higher--not lower, as the protester claims--than the figures in Hago-Cantu's initial proposal. The protester's claim to the contrary is based on the addition to its initial numbers of its management hours; as explained above, we view it as reasonable for the agency to have evaluated the hours that Hago-Cantu listed in its initial proposal's staffing charts, and those charts did not include management hours for either NCO Academy or the Headquarters building.

accepting a staffing level at BAFO that it considered understated in initial offers, the protester itself benefited from that approach for the 25th Aviation building.

For both offerors, however, we believe that it was reasonable for the agency to raise concern that an offeror's initially proposed staffing was understated but nonetheless ultimately consider acceptable a proposal with staffing remaining at an understated level. Nothing in the record supports the protester's claim in its comments, at 9, that "it is reasonable to assume that the Army considered [the protester's] proposed manning to be unacceptable prior to [the protester's] increase in man-hours." Our review of the record does not indicate that the agency ever viewed the understated hours as a basis for finding either proposal unacceptable. Accordingly, the fact that in a few instances Heritage's BAFO hours remained lower than the level that the agency had identified to Hago-Canto as understated does not mean that Heritage's BAFO should have been rejected as unacceptable.<sup>6</sup>

As explained above, the reason that the agency selected Heritage for award was primarily its low price. While the protester is correct in pointing out that it raised its hours, and therefore its price, substantially as a result of discussions, we do not agree that that increase was attributable to misleading discussions. Instead, the protester increased its hours, and its price, more than Heritage primarily for reasons within its business judgment. For example, after being told that its initial staffing for the NCO Academy was slightly understated, Hago-Cantu increased its proposed weekday hours for this building from 84 to 120.75. While these 120.75 hours include 15 hours of management time, even for non-management time, the protester increased its staffing by more than 20 hours, even though the agency had advised Hago-Cantu that its hours for this facility were only "slightly understated." In contrast, the awardee, who was advised that its hours were "understated" increased its staffing for the NCO Academy by only 11 hours. Similarly, after both offerors were told that their staffing for the Headquarters building was understated, Heritage increased its proposed weekday staff-hours 8.5 hours; Hago-Cantu increased its staffing by more than 18 hours (in addition to 15.50 management hours). Since the greater increase in its BAFO price was due to the protester's business judgment, rather than the content of the discussion questions, we conclude, notwithstanding the minor concerns we have pointed out regarding the agency's action, that the discussion questions sent to the protester were not misleading.

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<sup>6</sup>Indeed, if the protester's suggestion that a BAFO should have been viewed as unacceptable if it proposed fewer hours for any building than the agency had advised any offeror during discussions was an understated level, then the protester's BAFO would have to be rejected as unacceptable, since, as explained above, the protester's BAFO proposed considerably fewer hours for the 25th Aviation building than the 54 hours that the agency had advised Heritage represented understated staffing.

## TECHNICAL EVALUATION

Hago-Cantu next argues that the Army's evaluation of Heritage's past performance and experience was unreasonable. As noted above, the agency evaluated the awardee's past performance and experience as "acceptable." Hago-Cantu complains that this evaluation is unreasonable because Heritage has no experience in food service. While the protester recognizes that the Army may consider the past performance of Heritage's subcontractor, Son's Quality Food Company, the protester contends that the Army improperly relied solely on the past experience of Son's. Hago-Cantu argues that total reliance on Heritage's subcontractor's past experience is unreasonable, especially where, as here, Heritage must perform 50 percent of the contract.

The evaluation of technical proposals is a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Loral Sys. Co., B-270755, Apr. 17, 1996, 96-1 CPD ¶ 241 at 5. In reviewing an agency's technical evaluation, we will not reevaluate the proposal, but will examine the record of the evaluation to ensure that it was reasonable and in accordance with stated evaluation criteria and not in violation of procurement laws and regulations. Id.

Here, there is no basis to conclude that the agency improperly evaluated Heritage's proposal concerning past experience/performance. The record shows that the agency recognized Heritage's lack of experience in food services as a weakness. However, the Army also identified the awardee's subcontractor's past experience as a strength because of its significant food service experience. Indeed, the subcontractor lists 16 current contracts, ranging in value from \$200,500 to \$13 million, numerous awards and commendations, and its successful completion of at least two contracts where the original awardees had been terminated for poor performance. The agency balanced Heritage's weakness with its subcontractor's strength and assigned an "acceptable" rating for this evaluation factor. Thus, contrary to the protester's assertions, the "acceptable" rating was not based solely on the subcontractor's past experience and performance; rather, it reasonably reflected a blend of the experience of both the prime and subcontractor. Seair Transport Servs., Inc., B-252266, June 14, 1993, 93-1 CPD ¶ 458 at 4-5; Premier Cleaning Sys., Inc., B-249179.2, Nov. 2, 1992, 92-2 CPD ¶ 298 at 4 (experience of a large business subcontractor properly may be considered in evaluation of offeror's proposal submitted in response to solicitation set-aside for small business concerns).

Hago-Cantu also contends that the Army should have determined Heritage to be technically unacceptable for failing to comply with the mandatory limitation on subcontracting requirement. The protester argues that Heritage's proposal does not sufficiently indicate an intent to comply with this requirement. To support its

position, Hago-Cantu points to various parts of Heritage's proposal which the protester argues indicate that Heritage's subcontractor will perform work. Hago-Cantu notes that "Heritage is hardly mentioned in the proposal," the initial narrative discussion addresses only the subcontractor's experience and ability to perform the contract, the discussion of personnel makes virtually no reference to Heritage and the staffing charts carry the heading "Son's Quality Food Company." Protester's Comments at 11. Under these circumstances, Hago-Cantu argues that the Army should have determined that Heritage was technically unacceptable because it did not intend to comply with the limitation on subcontracting clause.

While the protester is correct that much of Heritage's proposal discusses the experience and personnel of its subcontractor, the protester ignores references to Heritage in the proposal that clearly show Heritage's proposed involvement in the contract and Heritage's intent to hire the necessary personnel to perform the contract. For example, the offeror's proposal states that, as required by the collective bargaining agreement, the offeror will, upon award, offer to hire the incumbent senior or first cooks, storeroom clerks, second cooks, short-order/grill cooks, bakers and dining facility attendants. Additionally, of the 20 proposed managers, only 5 are currently employed by Heritage's subcontractor; the others named in the proposal will be hired upon award. The proposal also includes financial information on both Heritage and its subcontractor. In addition, in the first revision of its proposal, Heritage specifically stated that it would be "the prime contractor performing 51% of the requirement with [Son's] being the subcontractor performing 49% of the work." Heritage Response and Offer Revision, Feb. 24, 1998, Attachment 1-1. The awardee also included copies of its initial notification letter to SBA, informing SBA of its intent to submit a proposal under the RFP and its signed and dated certification that at least 50 percent of the cost of contract performance would be incurred by Heritage. *Id.*, Attachments 1-2, 1-3. Based on this information, the agency reasonably concluded that Heritage's proposal evidenced its intent to comply with the limitation on subcontracting clause.

#### SBA DETERMINATION

Finally, the protester argues that, after the receipt of BAFOs and the close of discussions, the agency improperly held further discussions only with Heritage. The protester argues that the discussions were used by the agency to determine the acceptability of Heritage's proposal. The protester also complains that the agency improperly involved itself with SBA's determination of Heritage's eligibility for award.

The record shows that the contracting officer was unsure whether Heritage's "teaming arrangement" with Son's required SBA approval. Therefore, according to the contracting officer, after the agency had determined to award the contract to Heritage, the contracting officer contacted SBA and was informed that a teaming arrangement constituted a prime/subcontractor relationship that did not require

pre-approval from the SBA. To expedite the eligibility determination process, SBA forwarded to the contracting officer a list of questions normally posed by the SBA to the apparently successful 8(a) offeror in determining eligibility. The contracting officer then forwarded the questions to Heritage by letter dated March 11. Heritage responded by letter dated March 12 and those responses were sent to SBA the same day. By letter dated March 20, the SBA informed the Army that Heritage was eligible for the contract.

Hago-Cantu argues that Heritage's responses to the SBA were used by the Army to determine the acceptability of Heritage's proposal and thus constitute discussions. The protester relies on language in the Army's March 11 letter to Heritage which lists the SBA questions and states, "To render a determination as to the nature of the relationship and its acceptability under a competitive 8(a) award, the following questions must be answered to make an affirmative determination of eligibility . . . ." Hago-Cantu argues that there is no evidence that a final award had been made at the time these questions were sent to the intended awardee.

Discussions occur when the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal. FAR § 15.601 (June 1997); Global Assocs. Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 4. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. FAR § 15.610(b); Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 at 10-11. It is the actions of the parties that determine whether discussions have been held, and not merely the characterization of the communications by the agency. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. Id. at 11.

The protester mischaracterizes the communication between Heritage and the contracting officer after the receipt of BAFOs. As noted above, the contracting officer has stated that the Army had already made an award determination before she contacted SBA concerning teaming agreements and before she received questions from SBA which she forwarded to Heritage for Heritage's response. The contact with the SBA was merely to clarify for the contracting officer SBA's requirements concerning teaming agreements; the SBA questions given to the agency to be forwarded to Heritage for Heritage's response were for SBA's use in making its eligibility determination. The award had not been made because the agency needed SBA approval of Heritage as an eligible 8(a) firm. This SBA approval is what the Army alluded to in its March 11 letter which refers to rendering "a determination as to the nature of the relationship and its acceptability under a competitive 8(a) award." The protester incorrectly interprets this sentence as going to the acceptability of Heritage's proposal. Indeed, the Army had previously accepted Heritage's statement and certification that it would comply with

the subcontracting limitation and therefore the agency had no need to obtain additional information to determine the acceptability of Heritage's proposal. Heritage was not permitted to revise its proposal in any way.

The protester also asserts that the Army improperly involved itself in the SBA's eligibility determination. Hago-Cantu argues that by involving itself in the process, "the Army permitted Heritage to submit significantly less information than would normally be required by the SBA." Protester's Comments at 14.

Under the applicable regulations, the SBA is responsible for verifying that a section 8(a) firm is eligible for a particular procurement that has been reserved for the 8(a) program, and is the sole arbiter of such eligibility, which cannot be challenged by a program participant or any other party. FAR §§ 19.805-2(c), (e).

We see no reason to question the agency's actions here. While the protester objects to the method employed, the Army properly referred the question of Heritage's eligibility to the SBA and the SBA found Heritage eligible for award with full knowledge of its relationship with Son's. If, as the protester asserts, SBA required more information to make its determination, it could have requested such information.

The protest is denied.

Comptroller General  
of the United States