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Matter of: Warvel Products, Inc.

File: B-281051.5

Date: July 7, 1999

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DIGEST

1. Where a court ordered an agency to reevaluate proposals, the General Accounting Office in reviewing the reevaluation in response to a subsequent protest will not consider any matter that was or could have been decided by the court in its review.
2. A protester's mere disagreement with an agency's evaluation conclusions does not demonstrate the unreasonableness of the agency's judgment, particularly where the agency's evaluation conclusions are supported by detailed narrative explanations and the protester does not show that the agency's findings were in error.
3. Protest that an agency was predisposed to make award to the awardee is denied where the protester does not show that the agency's evaluation judgment or source selection was unreasonable and fails to provide credible evidence demonstrating bias.

DECISION

Warvel Products, Inc. protests the award of a contract to Nightingale, Inc. under request for proposals (RFP) No. 1PI-R-0939-98, issued by Federal Prisons Industries, Department of Justice, for ergonomic seating. Warvel challenges the agency's evaluation of proposals and source selection.

We deny the protest.

Federal Prison Industries is a wholly owned government corporation within the Department of Justice that operates under the trade name UNICOR at various correctional institutions in the federal prison system. UNICOR's stated mission is to employ and provide skills training to the greatest practicable number of inmates. In so doing, UNICOR ensures the safety and security of operations at federal correctional facilities while producing market-priced, quality goods in a self-sustaining manner. RFP § C, at C-1. UNICOR states that it achieves this mission by manufacturing the products it sells, including many of the component parts and subassemblies. RFP § M.1.a.3.

The RFP, issued December 17, 1997, provided for the award of a fixed-price, requirements contract for seven styles of ergonomic chair kits for a 5-year contract term. RFP §§ B, F.7. Offerors were required to provide pricing for the kits, consisting of all parts necessary to construct each chair model, as well as pricing for each chair component.¹ UNICOR reserved the right to place delivery orders for either chair kits or components. The solicitation also informed offerors that UNICOR's intention was to become a manufacturer of the products under the contract, including any or all components and subassemblies. RFP § C, at C-3. Thus, the RFP requested a vertical integration plan, which would allow UNICOR the right to vertically integrate any components or subassemblies during the contract term. In addition, the contractor would be required to provide UNICOR with non-exclusive intellectual property rights for the products to commence after the expiration or termination of the contract. RFP at C-4.

Performance and design specifications were provided for the chairs. Among other things, the SOW required chairs to meet Human Factors Standards (HFS) 100 and to meet certain Washington State clean air requirements and California State flammability requirements. RFP at C-3.

The RFP provided for award on a cost/technical tradeoff basis and stated the following evaluation factors, in descending order of importance:

- Marketability
- Past Performance
- Vertical Integration Plan
- Product Rights/Proposed Royalties
- Inventory Management Plan
- Price

RFP § M.1.a. Offerors were informed that the technical evaluation factors combined were significantly more important than price.

¹The RFP required that the total price for all components for each product be equal to, or lower than, the total kit price for that product. RFP § L.13.

Narratives were provided to explain each evaluation factor. For example, with respect to the marketability factor, the solicitation set out examples of things that could be offered to enhance marketability, such as maintaining a “family” appearance between chairs, complementing UNICOR’s existing seating product lines, offering a variety of price points and product options, and offering industry standard, or better, warranty terms. RFP § M.1.a.1. With respect to the vertical integration plan, offerors were informed the agency would evaluate the level of additional inmate employment expected, the required investment in equipment or tooling, and the effect upon UNICOR’s cost to manufacture the products. RFP § M.1.a.3.

Detailed instructions for the preparation of written proposals were also provided. The RFP also provided for oral presentations, at which offerors were to exhibit samples of their proposed chairs. RFP § L.14.a.5. Offerors were informed that the “failure to bring at least one example of each product will likely have an adverse impact upon the evaluation of an offeror’s proposal” because the samples would be evaluated for “comfort, appearance, features, etc.” Id.

UNICOR received five offers, including those of Warvel, Nightingale, and Indiana Chair Frame Company (ICF), by the March 31, 1998 closing date for receipt of proposals. The proposals of Warvel, Nightingale, and ICF were included in the competitive range. Agency Report (AR), Competitive Range Determination, at 273, 279. After discussions, these three firms submitted revised proposals. Warvel’s proposal received 94 of 100 possible points and was evaluated to be outstanding; Nightingale’s proposal received 89 points and was evaluated to be excellent.² Warvel’s and Nightingale’s evaluated prices were \$44,162,021 and \$39,608,250, respectively. AR, Price Analysis, at 275. The source selection authority (SSA) determined that Nightingale’s proposal was the best value to the government. AR, Documentation of Award, at 277-78. On August 31, UNICOR awarded a contract to Nightingale. Warvel and ICF protested the award to our Office, arguing that the agency improperly evaluated proposals. Prior to submitting an agency report, UNICOR informed the parties and our Office that it would reevaluate proposals in accordance with the RFP. We dismissed Warvel’s protest as academic.

²Proposals were evaluated as outstanding (90-100 points), excellent (80-89), good (70-79), marginal (60-69), fair (50-59), or poor (0-49). AR at 267. Proposals were not point-scored after the first evaluation but received only an adjectival rating.

UNICOR reevaluated Warvel's and Nightingale's proposals as follows:³

Factor	Warvel	Nightingale
Marketability	Excellent	Excellent
Past Performance	Good	Excellent
Vertical Integration	Good	Excellent
Prod. Rts/Royalties	Good	Good
Inventory Mgmt	Excellent	Excellent
Social Benefits	Outstanding	Good
Price	Fair	Excellent

AR at 229-44. UNICOR did not perform a new price analysis. On December 2, 1998, the agency notified Warvel and ICF that the agency's reevaluation affirmed its earlier award to Nightingale. AR at 339.

Warvel and ICF filed complaints with the United States Court of Federal Claim, challenging UNICOR's evaluation of proposals and source selection.⁴ AR at 1367-497. These complaints challenged, among other things, UNICOR's price and technical evaluation methodology and source selection decision. On January 22, 1999 in a telephone conference, the court issued a preliminary injunction. As later memorialized by the court:

The court ruled that the challenged evaluation on the subject of royalties conducted by the Federal Bureau of Prisons was proper and in accordance with the solicitation, but granted the motions for a preliminary injunction due to the defendant's faulty evaluation proceedings as described more fully to the parties and discussed at length during the telephone conference. The court directed the agency to reevaluate and properly document the source selection from among those contractors previously identified as within the competitive range.

Indiana Chair Frame Co. v. United States, No. 98-927C, Slip Op. at 2 (Fed.Cl. Jan. 27, 1999), AR at 1551-52. In the telephone conference, UNICOR stated that in accordance with the court's order the agency would appoint a new technical evaluation panel and SSA to perform an independent technical evaluation and new source selection, would not permit revisions of written proposals but would allow

³UNICOR also reevaluated ICF's proposal.

⁴Warvel initially protested the reevaluation to our Office. Because ICF had filed suit in the Court of Federal Claims and the matter involved was the subject of litigation before a court of competent jurisdiction, we dismissed Warvel's protest pursuant to 4 C.F.R. § 21.11(b) (1999). Warvel then filed a complaint with the Court of Federal Claims.

new oral presentations, and would not change its price evaluation methodology. Intervenor’s Comments at 10. Warvel’s and ICF’s complaints were dismissed by the court.⁵ AR at 1553.

UNICOR appointed a new SSA and technical evaluation panel, received new oral presentations, and reevaluated Warvel’s and Nightingale’s technical proposals. Contracting Officer’s Statement at 6-7. A detailed consensus evaluation report was prepared that provided adjectival ratings, supported by narrative explanation, for Warvel’s and Nightingale’s proposals under each technical evaluation factor.⁶ AR, Consensus Technical Evaluation Report, at 1252-89. The final technical evaluation results were as follows:

Factor	Warvel	Nightingale
Marketability	Good	Excellent
Past Performance	Fair	Excellent
Vertical Integration	Good	Good
Prod. Rts/Royalties	Fair	Excellent
Inventory Mgmt	Good	Excellent
Social Benefits	Good	Good
OVERALL	GOOD	EXCELLENT

AR at 1276, 1289.

Nightingale’s excellent rating under the most important factor, marketability, reflected the evaluators’ judgment that the firm had offered many product enhancements and options to improve the chairs’ appearance and comfort and to assist in establishing price points.⁷ AR at 1281. In this regard, the evaluators identified a multitude of design enhancements and options that Nightingale had offered, recognized that Nightingale’s chairs currently met or exceeded HFS 100, and noted that the firm’s name was recognizable in the marketplace, which would aid in

⁵The protester recognized that the court’s dismissal reflected the court’s conclusion that the order to “re-evaluate the proposals had decided the issues before the court.” Protester’s Comments at 10-11.

⁶The record also includes evaluators’ individual scoring and narratives for each offeror’s proposal under each factor. AR at 1089-246.

⁷“Enhancements” are design features of offered chairs that go beyond those of current chairs; “options” are alternative design features to those of the offered chairs; and price points reflects the chairs’ variable pricing as various options are added to the basic design. 2nd Day TR at 35, 36-37.

selling the chairs. AR at 1279-81; Hearing Transcript, second day, (2nd Day TR) at 34-42.⁸

In assessing Nightingale's proposal to be excellent under the second most important factor, past performance, the evaluators noted the firm's positive quality control plan, which conformed to International Standards Organization (ISO) standards;⁹ the ISO certification of the firm's manufacturing facility and several of its suppliers; the variety of customer service measures offered (such as [DELETED]); and excellent past performance on other agency contracts. AR at 1281-82; 2nd Day TR at 50-55.

Similarly, under the other technical evaluation factors, the evaluators noted the specific parts of Nightingale's proposal that supported their adjectival ratings. For example, under the vertical integration plan, the evaluators noted the excellent level of inmate employment projected under Nightingale's plan [DELETED] but also noted that Nightingale had not demonstrated the cost impact of its vertical integration plan on UNICOR's manufacturing. AR at 1283-85. Under the product rights/proposed royalties factor, the evaluators noted that Nightingale had provided a clear plan to provide non-exclusive product rights to a UNICOR except for [DELETED]. AR at 1286; 2nd Day TR at 61-62. Also, under the inventory management plan, the evaluators noted Nightingale's maintenance of [DELETED]. AR at 1286-87; 2nd Day TR at 65-66.

With respect to the protester's proposal, Warvel's good rating under the most important factor, marketability, reflected the evaluators' judgment that the firm had proposed a number of significant design options but had proposed limited enhancements to the basic chair design, that Warvel's warranty process was [DELETED], that Warvel's proposed chairs did not [DELETED], and that Warvel proposed [DELETED]. AR at 1268-69. The evaluators also noted that Warvel had failed to present one of the required chair models at its oral presentation. AR at 1269.

In assessing Warvel's proposal to be only fair under the second most important factor, past performance, the evaluators noted that, although Warvel presented a well thought-out quality control manual, the firm did not have ISO certification for its manufacturing facility and had not responded to discussions requests with regard to the ISO certification of its suppliers. AR at 1270. Warvel's proposal was also significantly downgraded under customer satisfaction because Warvel had not

⁸A 2-day hearing was conducted to receive the testimony of that agency's former deputy chief of procurement (on the first day), chair of the final technical evaluation panel, and final SSA (both on the second day).

⁹The RFP proposal preparation instructions had asked offerors to discuss under the past performance portion of their proposal whether their manufacturing facilities and major subcontractors had received ISO certification. RFP § L, at L-6.

responded to requests for information concerning measures taken for customer satisfaction and results of those actions. The evaluators also noted that Warvel had not responded to a number of other requests for information concerning sales of proposed products and warranty costs. Finally, the evaluators noted that, although Warvel had provided some components on the existing chair contract, the firm had limited experience in [DELETED].

The final consensus evaluation report also provided narrative explanations for the adjectival ratings of Warvel's proposal under the remainder of the evaluation factors. For example, under the vertical integration plan factor, for which Warvel's proposal was rated good, the evaluators noted that Warvel's plan provided a limited scope of components that could be manufactured by UNICOR and thus provided for [DELETED] inmate jobs.¹⁰ Warvel, however, was found to have provided an excellent plan presenting UNICOR's expected cost with respect to manufacturing products. AR at 1271-72. Under the product rights/proposed royalties factor, for which Warvel was rated as fair, the evaluators found that Warvel had not [DELETED] and that Warvel excluded from its grant of product rights all components that were excluded in its vertical integration plan. AR at 1273. Under the inventory management plan, for which Warvel was assessed as good, the evaluators noted that Warvel had presented a positive plan that would reduce the current overall delivery lead times; however, the evaluators were concerned that the plan required a lengthy implementation period ([DELETED]), required [DELETED], and placed [DELETED] upon UNICOR. AR at 1274.

The panel's final evaluation results, along with the administrative record as presented to the Court of Federal Claims, were reviewed by the SSA.¹¹ AR, SSA Final Decision and Analysis, at 1353. Except in three minor areas, which the SSA identified in his decision, the SSA agreed with the evaluators and adopted their technical findings as his own. AR at 1354, 1360; 2nd Day TR at 178. The SSA also considered Warvel's and Nightingale's proposed prices; the SSA found that Nightingale's evaluated price for the 5-year contract, including royalties, was \$39,608,250 while Warvel's evaluated price was \$43,343,756.¹² AR at 1364-65. Given Nightingale's higher evaluation rating and lower evaluated price, the SSA concluded that Nightingale's proposal represented the best overall value. AR at 1366. Accordingly, the award to Nightingale was again affirmed.

¹⁰The final evaluation team chair, noted in the protest hearing that Warvel's vertical integration plan excluded [DELETED]. This is in contrast to Nightingale's vertical integration plan, which excluded only [DELETED]. 2nd Day TR at 61.

¹¹The SSA states that he also observed the new oral presentations. AR at 1353.

¹²Considering only the firms' fixed prices for the 5-year contract, Nightingale's proposed price was [DELETED] and Warvel's price was [DELETED]. AR at 1364-65.

Warvel challenges the agency's reaffirmation of the award to Nightingale on a variety of grounds, including that the final (third) technical evaluation was motivated by a predisposition to validate the earlier selection of Nightingale's proposal and was thus not reasonable. Protest at 5-7. Warvel also complains that UNICOR improperly relaxed an RFP requirement for royalties for Nightingale, *id.* at 7-9, and that UNICOR's price analysis was inconsistent with the RFP in a number of regards. *Id.* at 9-11.

UNICOR and the intervenor object to a number of Warvel's protest grounds because these are matters that have already been the subject of a decision on the merits by a court of competent jurisdiction. Our Bid Protest Regulations provide that we will dismiss a protest where the matter involved has been decided on the merits by a court of competent jurisdiction. 4 C.F.R. § 21.11(b).

As described above, this procurement has a long history both before our Office and the Court of Federal Claims. The record reveals that, in fact, many of the arguments Warvel now raises in this protest were earlier raised to the court by either Warvel or ICF. Specifically, Warvel challenged the agency's price evaluation and price analysis methodology as being unreasonable and inconsistent with the solicitation and also argued that the RFP required that royalties be included in every offer. AR at 1457-73. It is undisputed that the agency's price analysis methodology has not changed from that which was considered by the court. In fact, the record shows that UNICOR informed the court and parties that the agency in performing the reevaluation required by the court's order would not change its price analysis methodology. Consistent with this position, the agency did not allow competitive range offerors to amend their price or technical proposals. Contracting Officer's Statement at 6.

It is beyond cavil that the Court of Federal Claims is a court of competent jurisdiction to render a decision on Warvel's and ICF's complaints challenging this procurement. It is also clear that the court issued a decision on the merits, granting a preliminary injunction and dismissing the complaints. AR at 1551-53. Where, as here, the court's decision constitutes a final adjudication on the merits with respect to the procurement, it is conclusive and bars further consideration of the issue by our Office. *Affiliated Textiles, Inc.*, B-242970.2, Aug. 5, 1991, 91-2 CPD ¶ 127 at 3. The effect of such a judgment extends to matters that might have been decided, as well as to matters that were actually decided. *Id.* at 4; *Techniarts Eng'g--Recon.*, B-238520.7, June 10, 1992, 92-1 CPD ¶ 504 at 2.

Accordingly, we will not consider any matter that was, or could have been, decided by the court. This includes Warvel's protest allegations concerning the agency's price evaluation and the acceptability of Nightingale's proposal not requesting royalties. Instead, we will review only those matters that were not, or could not have been, considered by the court; that is, we will review Warvel's objections only to the agency's final evaluation that was performed after the court's decision.

As to that final (third) technical evaluation, Warvel's complaint is essentially that UNICOR "was predisposed to award the contract under the Solicitation to Nightingale." Protester's Comments at 12. In support of this complaint, Warvel notes that the adjectival ratings its proposal received in the final evaluation are lower than those received in prior evaluations. *Id.* at 12-13. In addition, Warvel complains, pointing to the individual evaluators' scoring sheets, that all but one evaluator assessed Warvel's proposal as good under the past performance factor but that in the final consensus evaluation Warvel's proposal was assessed to be only fair. Warvel also points to two specific documents in the record, which Warvel asserts demonstrate the agency's bias for Nightingale, specifically, a December 15, 1998 e-mail from the agency's former deputy chief of procurement to the chief of its material management branch (AR at 925-26) and a June 15, 1998 letter from Nightingale's president to the chief of the technical evaluation panel for the final evaluation (AR at 217). Finally, Warvel complains the agency's bias was demonstrated by its summary denial of Warvel's request for a debriefing after the final reaffirmation of the agency's award to Nightingale (although the agency did not summarily deny ICF's request) and by the agency's determination to proceed with performance of Nightingale's contract and not await our decision on the merits of this protest.

Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Ameriko Maintenance Co., B-253274, B-253274.2, Aug. 25, 1993, 93-2 CPD ¶ 121 at 5. Thus, where a protester alleges bias on the part of government officials, the protester must provide credible evidence demonstrating a bias against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17; E.J. Richardson Assocs., Inc., B-250951, Mar. 1, 1993, 93-1 CPD ¶ 185 at 6.

In reviewing protests of alleged improper evaluations and source selection decisions, our Office examines the record only to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with an agency's judgment does not render it unreasonable. Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225 at 9.

Before addressing Warvel's bias contentions, we note that, with one exception that we address below, Warvel failed to timely challenge any aspect of the contemporaneous narrative explanation provided by the evaluators for their consensus adjectival scores.¹³ Because the narrative explanations provide ample

¹³In its post-hearing comments, Warvel identifies for the first time certain elements of Nightingale's proposal that the evaluators in their evaluation narrative noted were
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support for the adjectival ratings, Warvel's general objections to the ratings amount to no more than mere disagreement with the agency's judgment.

Warvel challenges the good rating it received under the vertical integration plan, arguing that this rating is based upon the agency's assessment that Warvel's oral presentation for this factor was minimal. Warvel contends that its oral presentation under this factor was not minimal. Protest at 6-7. Warvel argues that it should have received a higher score under the vertical integration plan than that received by Nightingale, which was also assessed as good under this factor.

The record shows that the agency's assessment of Warvel's proposal as good under the vertical integration plan was based upon a number of elements, of which the strength of its oral presentation was only one. For example, the evaluators noted that Warvel's plan provided a limited scope of components that could be manufactured by UNICOR and thus only provided for [DELETED] inmate jobs. AR at 1271-73. Warvel does not challenge any of these other findings by the evaluation panel. We conclude that even were we to accept Warvel's arguments concerning its oral presentation under this factor, there is no reasonable possibility that this one element would have had more than minimal effect on Warvel's overall score under this factor and no effect upon the agency's assessment of the overall quality of Warvel's proposal.

With respect to Warvel's bias allegations, the protest record, including the hearing testimony, does not establish that UNICOR was predisposed in this final evaluation to select Nightingale or that UNICOR's actions in the procurement were motivated by bias. First, we do not find to be credible evidence of bias Warvel's complaint that its adjectival ratings under the final evaluation were lower than those it received under the two prior evaluations. Rather, we have long recognized that different evaluation panels could reasonably reach different conclusions regarding the quality of an offeror's proposal given the subjective judgment necessarily exercised by

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positive features that Warvel alleges were also present in its design but for which it did not receive evaluation credit. Protester's Post-Hearing Comments at 18-20. Our Bid Protest Regulations do not contemplate the piecemeal presentation of protests; instead, they require that protests not based upon alleged apparent solicitation improprieties be filed no later than 10 calendar days after the protester knew, or should have known, the basis for protest. 4 C.F.R. § 21.2(a)(2); Battelle Memorial Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32. Here, the record establishes that Warvel knew or should have known the basis of this objection at least by the time it received the agency's report containing the final evaluation record, which was more than 10 days prior to the date it filed its post-hearing comments. Moreover, by raising these allegations for the first time in the final protest pleading, the protester effectively precluded any response from the agency.

evaluators. See tg Bauer Assocs., Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549 at 7; Chemonics Int'l, B-222793, Aug. 6, 1986, 86-2 CPD ¶ 161 at 5-6. Here, as noted, above the final evaluation ratings are supported by detailed narrative explanation that Warvel has not shown to be unreasonable or inconsistent with the evaluation criteria.

We also do not find to be credible evidence of bias Warvel's complaint that the consensus evaluation score its proposal received under the past performance factor is lower than the majority of the individual scores assessed by the evaluators before the panel's consensus meeting.

The record shows that with respect to the final evaluation the individual evaluators, after the oral presentations, independently evaluated proposals. 2nd Day TR at 23. The evaluators' individual scoring sheets and narratives were presented to the technical evaluation panel chairman, who plotted the individual scores under each factor for each offeror. AR at 1248-50; 2nd Day TR at 25. The evaluators then met to discuss their evaluation findings and conclusions. This discussion resulted in the final adjectival ratings and supporting narrative explanation under each factor for each evaluator. 2nd Day TR at 25-26. Regarding Warvel's past performance score, the panel chair, who was the only evaluator that had not rated Warvel as good under this factor (he rated Warvel's proposal to be fair), pointed out in the consensus meeting a number of areas of Warvel's proposal that the other evaluators had missed, such as, for example, its failure to provide requested information concerning sales of proposed products or measures taken for customer satisfaction and results of those measures. Id. at 47-49. The evaluators were then unanimous in their judgment that Warvel's proposal should be assessed as fair under this factor. Id. at 49-50.

A consensus score need not be the same as the score initially assigned by the individual evaluators; rather, the final evaluation score may reasonably be determined after discussions among the evaluators. I.S. Grupe, Inc., B-278839, Mar. 20, 1998, 98-1 CPD ¶ 86 at 6. The overriding concern in these matters is whether the final scores assigned reasonably reflect the relative merits of the proposals. Id. Again, here, the protester has failed to show that the agency's final evaluation judgments, as reflected in the narrative explanation for the adjectival ratings, are unreasonable. Thus, we have no basis to object to the agency's final consensus scoring. Moreover, we note that, while Warvel complains about the final consensus score its proposal received under the past performance factor, the protester ignores that the majority of individual evaluator scores for its proposal under the vertical integration plan were fair but that its final consensus score under this factor was good. Compare AR at 1240 with AR at 1273. This, too, supports the agency's arguments concerning the consensus nature of its final evaluation scoring.

We similarly find that the two documents, the December 15, 1998 internal agency e-mail and the June 15, 1998 letter from Nightingale to UNICOR, do not provide credible evidence demonstrating bias for Nightingale or against Warvel.

With respect to the December 15 e-mail, this document was from the agency's then deputy chief of procurement to the chief of its material management branch and was sent after the agency's second evaluation and prior to either ICF or Warvel filing complaints with the Court of Federal Claims.¹⁴ In this document, the deputy chief expressed dissatisfaction with the limited debriefings provided to the unsuccessful offerors and with the method by which the second evaluation was conducted. AR at 925-26. The deputy chief also noted that, in his view, the evaluation board needed to be "reconstitute[d]," a new evaluation performed, and a new SSA appointed to make a new selection decision. The document goes on to state that "then you will be [in] a position to award to the proper contractor which I am sure is Nightingale." Id. at 925.

The agency and intervenor both object to consideration of this document on the basis that it was previously provided to the court as alleged evidence of bias. Although this is true and the record reflects that the court did not find that the December 15 e-mail evidenced bias, see Preliminary Injunction Hearing TR at 53-54, our concern with the document extends to the final evaluation that was conducted after the court's order. Specifically, our concern is with whether the contents, or substance, of the document may have improperly influenced the evaluation panel and/or SSA.

At the hearing conducted in connection with this protest, the deputy chief of procurement testified that, in his judgment, appointing a new evaluation board and SSA and conducting a new evaluation of the proposals already received would provide more credibility to the award determination. 1st Day TR at 65, 89-90. The deputy chief also explained his belief that, based upon the record of the first evaluation (which he candidly admitted was incomplete), Nightingale appeared to offer the best value to the government. Id. at 26. He also testified that he had no involvement in the third evaluation or source selection, that he did not even know who had been appointed as the new SSA or the chair of the technical evaluation panel, and that he had not discussed this e-mail message with the new SSA or the chair of evaluation panel (or provided them the message). Id. at 19, 27-30. The SSA and evaluation panel chair similarly testified that they had not seen this e-mail message prior to this protest and had not discussed its substance with its author or anyone else. 2nd Day TR at 18, 141. In fact, the technical team chair testified that the evaluation panel acted completely independently and that no person had attempted to influence their findings. 2nd Day TR at 67. The SSA also testified that no one within the agency had attempted to direct his decision. 2nd Day TR at 141, 156. In short, there is no evidence in this record showing that the deputy chief of procurement or this message in any way influenced the evaluation panel or the SSA.

¹⁴In November 1998, prior to the final evaluation, the deputy chief of procurement left the procurement side of UNICOR to take a management position on the program side of the agency. 1st Day TR at 17.

The other document that Warvel asserts demonstrates bias is the June 15, 1998 letter addressed to chair of the final technical evaluation panel with a copy to the deputy chief of procurement. In this letter, Nightingale's president thanks the final panel chair for visiting with him at a trade show in Chicago and states that:

I was very happy to learn from you that you believe that the contract for Solicitation #1PI-R-0939-98 for ERGO chairs will not be delayed and will be awarded by July 98. [The deputy chief of procurement] advised me during a separate conversation, that the resignation of [the first SSA] will not hold up the procurement process and steps have already been taken to ensure a smooth transition of responsibility to [the second SSA]. It is my understanding that the best and final stage for the ERGO chair solicitation is to proceed without delay and as planned.¹⁵

AR at 217. Warvel contends that this shows that the agency had improper discussions with Nightingale concerning this procurement and evidences the agency's predisposition in favor of Nightingale. Protester's Comments at 43, Protester's Post-Hearing Comments at 11-14.

The evaluation panel chair testified that he did not recall the letter or the specifics of the conversation at the Chicago trade show referenced in the letter. 2nd Day TR at 5-7. He testified, however, that the trade show referenced in the letter is a large show, at which UNICOR and vendors, such as Nightingale, have booths, meetings, and discussions. *Id.* at 80. The panel chair, as the agency's senior program manager of furniture products, *id.* at 8, regularly attends these trade shows and meets with vendors. *Id.* at 80. He also pointed out that Nightingale has other contracts with UNICOR and that it is not unusual for contractors to visit UNICOR's offices. *Id.* at 6-7. Finally, the panel chair stated that at the time of the Chicago trade show, which was prior to the agency's August 31 contract award to Nightingale, he had limited involvement with this procurement and did not serve on the evaluation panel. *Id.* at 11-16.

We do not find that this letter evidences agency bias for Nightingale. Although the protester speculates that, because the panel chair could not recall with specificity his conversation with Nightingale's president, this conversation may have included discussion of source selection sensitive information, Protester's Post-Hearing Comments at 11-12, there is simply no evidence in the record that this is the case. Rather, the evidence before us

¹⁵The first SSA left government service to accept a position with a commercial firm. 2nd Day TR at 8, 128. The second SSA was replaced before the final evaluation ordered by the court. AR at 1295.

establishes that the panel chair as a part of his job interacts with vendors such as Nightingale at trade shows and at UNICOR. In accordance with this usual practice, the panel chair apparently had a discussion with Nightingale's president at a Chicago trade show, at which the panel chair conveyed some information concerning the status on an on-going procurement. On its face, the information conveyed was not proprietary or source selection sensitive,¹⁶ and we note that at the time of this discussion the chair was not yet an evaluator for this procurement. In this regard, he testified that after his appointment as chair of the final (third) evaluation panel, he avoided talking to the offerors. 2nd Day TR at 102-03.

We also do not find that Warvel's arguments--concerning the agency's conduct of a debriefing after the final reaffirmation of Nightingale's award and concerning the determination to proceed with performance of the Nightingale's contract--demonstrate bias.

First, regarding Warvel's request for a debriefing: the record establishes that the agency believed that it provided sufficient information to Warvel to satisfy the firm's debriefing request. Agency's Post-Hearing Comments at 11. Specifically, the agency's March 19, 1999 letter informing Warvel of the agency's reaffirmation of the Nightingale award disclosed the significant weaknesses and strengths identified in Warvel's proposal, Warvel's and Nightingale's evaluated prices, and the overall ranking of the firms. AR at 1348-49. In addition, the agency provided Warvel's counsel with the complete final evaluation record and the SSA's selection decision under the court's protective order. Agency Post-Hearing Comments at 11-12. We do not conclude from this record that the agency deprived Warvel of a debriefing. To the extent that Warvel protests the content of the debriefing it received, we do not review such matters because this is a procedural matter concerning agency actions after award that are unrelated to the validity of the award. C-Cubed Corp., B-272525, Oct. 21, 1996, 96-2 CPD ¶ 150 at 4 n.3.

Regarding Warvel's complaint that UNICOR authorized the performance of Nightingale's contract rather than await our decision on Warvel's protest, the record shows that the agency concluded that urgent and compelling circumstances did not permit the agency to await our decision. Protester's Comments, exh. 7. We do not review the adequacy of an agency's determination to override the statutory stay and proceed with performance of

¹⁶In this regard, by letter of June 17, 1998, the chief of UNICOR's material management branch responded to Nightingale, stating that the agency was making all reasonable efforts to timely award a contract but that "a more realistic award date is in August." AR at 216.

a contract. Mark Group Partners and Beim & James Properties III, Joint Venture, B-255762 et al., Mar. 30, 1994, 94-1 CPD ¶ 224 at 5-6.

The protest is denied.

Comptroller General
of the United States