

**Office of Dispute Resolution for Acquisition  
Federal Aviation Administration  
Washington, D.C.**

**FINDINGS AND RECOMMENDATIONS**

**Matter: Protest of Information Systems & Networks Corporation**

**Under Solicitation No. DTFA01-98-R-16125**

**Docket No.: 99-ODRA-00116**

*Appearances:*

For Protester, Information Systems & Networks Corporation: Norman H. Singer, Esq.,

For the Intervenor, Universal Systems & Technology, Inc.: John R. Tolle, Esq. and  
William T. Welch, Esq., Barton, Mountain & Tolle, LLP

For the Agency Product Team: Diana R. Rabinowitz, Esq.

**I. Introduction**

This protest involves a decision by the Aeronautical Data Link ("ADL") Product Team to eliminate Information Systems & Networks Corporation ("ISN") from the competition under Solicitation No. DTFA01-98-R-16125 for award of a technical, engineering, and management assistance services contract. The Product Team's decision resulted from a re-evaluation ("Re-evaluation") ordered by the FAA Administrator on

December 18, 1998, FAA Order Number ODRA-98-100 ("the Order"). The Order was entered in ISN's original protest, docketed as 98-ODRA-00095 (hereinafter the "Original Protest").

In the Original Protest, ISN had asserted that it had been improperly excluded from the competition on the basis of a defective past cost performance evaluation. The FAA Administrator adopted the Findings and Recommendations of the Office of Dispute Resolution for Acquisition ("ODRA") and sustained ISN's Original Protest on the basis that the past cost performance evaluation failed to comply with the stated evaluation criteria in the Screening Information Request ("SIR").

In the Order, the Administrator directed the Product Team to: re-evaluate ISN's past cost performance in a manner consistent with the ODRA's Findings and Recommendations; and report the results of the Re-evaluation to the ODRA for further proceedings and

recommendations as deemed necessary by the ODRA. The ODRA had recommended that the evaluation team determine, in light of the Findings and Recommendations: (1) whether ISN's timekeeping system deficiency has been adequately corrected to the Team's satisfaction, and (2) whether or not corrected, such a deficiency poses a "risk of performance failure" to the ADL Contract. *Protest of Information Systems & Network Corporation*, 98-ODRA-0095, pages 36 – 37.

On January 19, 1999, the Product Team submitted its Re-evaluation of ISN's past cost performance to the ODRA. As part of the Re-evaluation, the Source Selection Official ("SSO") issued a formal decision, finding that exclusion was proper because ISN's timekeeping deficiencies pose an unacceptable risk of performance failure. Additionally, the SSO decision identified a second basis for exclusion, namely that the Defense Contract Audit Agency ("DCAA") allegedly had been unable to conduct an audit of ISN's rates (hereinafter the "Auditability Issue").

In response, on January 20, 1999, ISN indicated its intent to file a new protest with respect to the Auditability Issue. On January 22, 1999, the Product Team offered to formally withdraw, without prejudice, all references to the Auditability Issue. The Product Team then withdrew the SSO's January 19, 1999 decision, replacing it with a modified SSO decision on January 28, 1999. The modified SSO decision deleted any reference to the Auditability Issue.

On January 28, 1999, ISN filed a "protective" protest pertaining to both the Auditability Issue and to the alleged timekeeping deficiencies. ISN stated that it was doing so, in order to comply with the provisions of the Acquisition Management System ("AMS"), which requires protests to be filed within seven (7) business days of the agency action that is the subject of the protest. *See* AMS § 3.9.3.2.1.2. On February 12, 1999, the ODRA summarily dismissed ISN's protest grounds pertaining to the Auditability Issue as lacking a basis in fact, given the modified SSO decision.

On January 29, 1999, ISN filed a response to the FAA Product Team's Re-evaluation of the timekeeping issue, asserting that the FAA's Re-evaluation (1) contravened the SIR's stated evaluation criteria and (2) was irrational. The ODRA elected to resolve the issues raised by ISN related to the Re-evaluation in the context of the new ISN protest, docketed as 99-ODRA-00116. The issues to be resolved in this protest are whether: (1) there is a rational basis for the Product Team's exclusion of ISN from the competition for the alleged timekeeping deficiencies; (2) the FAA Product Team is biased against ISN; and (3) the FAA's January 19, 1999 re-evaluation constitutes a *de facto* debarment of ISN.

For the reasons set forth herein, the ODRA recommends that the protest be denied. As is more fully discussed below, the Product Team's Re-evaluation decision to eliminate ISN from the competition had a rational basis and was consistent with the Order in the Original Protest. Secondly, ISN has failed to meet the high standard of proof necessary to establish bias on the part of the FAA Product Team. Finally, there is no evidence supporting the argument that the actions of the Product Team amount to a *de facto* debarment of ISN from FAA contracting.

## II. Findings of Fact

1. The record in this case, which incorporates the entire record of the Original Protest (*See* ODRA Conference Memorandum February 2, 1999), reflects a history of disagreements and difficulties related to ISN's timekeeping practices during the relevant time period. In 1997, the Defense Logistics Agency ("DLA") reviewed ISN's timekeeping practices, and by letter dated April 24, 1997, advised ISN's president of eight areas of deficiencies with ISN's timekeeping. The DLA noted that the ISN timekeeping system was "significant to the Government because a significant portion of ISN's work for the Government is labor and service oriented." Original Protest Agency Report ("AR"), Tab 23 (Bates stamp 101090 – 101091).

2. The DCAA also advised ISN by letter dated December 18, 1997 of five areas of what it considered to be "material" deficiencies in ISN's timekeeping system (similar to the deficiencies identified in the DLA's April 24, 1997 letter). ISN, in a letter dated January 19, 1998, took issue with the DCAA's recommendations as to two of the timekeeping deficiencies. AR, Tab 28 (Bates stamp 101200 – 101202). With respect to the DCAA recommendation that ISN's timekeeping policies be revised to incorporate the requirement for all employees to record all hours worked, ISN stated:

[a]s stated in our June 3, 1997 letter to the ACO, recording all hours worked by exempt employees is not required by the FAR or Cost Accounting Standards. Further, our current procedure satisfies all requirements and regulations such as the FAR, CAS, etc. Based on your recommendation ISN's [sic] has looked into Full Time Accounting procedures of recording hours worked. We are still trying to determine if ISN should change our [sic] policy to record all hours worked for exempt employees. Since about 95% of our employees either charge 100 % direct or 100% indirect, we are still researching the advantage of changing our timekeeping procedures.

3. As to the DCAA recommendation that ISN's payroll department should have the responsibility of distributing preprinted prenumbered timesheets to ensure adequate control over the timesheets, ISN stated:

ISN appreciates the recommendation and concurs that this could be an internal control weakness. But within ISN's current structure, we found that ISN can control the distribution of blank timesheets for our 200 employees without control numbers on our timesheets. If the employees are in compliance with our current timekeeping policies and procedures, our internal control on blank timesheets is adequate.

4. By letter dated July 30, 1998, the Contracting Officer for the Product Team identified negative past performance information, which included "protracted correction of timekeeping system practices," as evidence of unsatisfactory cost control. In that regard, the Contracting Officer afforded ISN "the opportunity to provide any mitigating

circumstances or facts that the evaluation team can consider." AR, Tab 16 (Bates stamp 101021). Original Protest Findings of Fact ("FF") 20.

5. ISN responded on August 6, 1998, as follows:

ISN is unable to address this issue because there is no statement of what timekeeping system practices require correction. As explanation, however, ISN uses a standard timesheets [sic] developed by our Accounting Department, copies of which have been regularly reviewed by the Defense Contract Audit Agency for purposes of recording employee hours. The DCAA has accepted such timesheets without exception for purposes of recording labor hours performed on contracts and for determination of allowable costs to be included in overhead and indirect cost rate pools. If there is information that ISN has not properly maintained its timekeeping system, or such system is inadequate for Government cost accounting, ISN has not been so advised.

FF 22.

6. In the initial evaluation of ISN's past cost performance for the instant procurement, the FAA evaluators identified problems with ISN's timekeeping system as being a consideration in their review of ISN's proposal. FF 18, 21 and 24. The timekeeping deficiency was among four items called "Secondary Factors" which the Team identified as creating an "Environment of Concern". In its Findings and Recommendations in the Original Protest, the ODRA found insufficient evidence in the record to determine whether, based on the timekeeping deficiency alone, the Product Team would have failed ISN for past cost performance. *See Protest of Information Systems & Network Corporation*, 98-ODRA-0095 at 36.

7. As indicated above, the Administrator sustained the Original Protest on the basis that the past cost performance evaluation failed to comply with the stated evaluation criteria in the SIR. The Administrator, in the above-referenced Order, directed the Product Team to determine (1) whether ISN's timekeeping system deficiency has been adequately corrected to the Team's satisfaction, and (2) whether or not corrected, such a deficiency continues to pose a "risk of performance failure" within the ADL Contract. *Protest of Information Systems & Network Corporation*, 98-ODRA-0095, pages 36 – 37.

8. Pursuant to the Order, the Product Team conducted the Re-evaluation of ISN's proposal with respect to past cost performance, and set forth the results in a document entitled "Group Report, Past Performance Re-evaluation," dated January 15, 1999. Statement of Position, Tab 1, Exhibit A. The Group Report shows that in performing the Re-evaluation, the evaluation team reviewed a DCAA audit report dated February 23, 1998, that specifically evaluated the adequacy of ISN's timekeeping policies, procedures, internal controls and practices, as well as the consistency of application of the established timekeeping procedures. Statement of Position, Tab 1, Exhibit A.

9. The February 23, 1998, DCAA audit report identified five deficiencies in ISN's timekeeping policies and procedures, stating that ISN's "timekeeping is inadequate in part." The five deficiencies paralleled those identified in the DCAA's letter to ISN, dated December 18, 1997: (1) timekeeping policies (not requiring exempt employees to record all hours worked); (2) employee hours not recorded on a daily basis; (3) use of different timesheets; (4) lack of knowledge concerning timesheet error correction; and (5) distribution of timesheets. Although the DCAA deemed ISN's proposed corrective action to be sufficient to correct three of the deficiencies, it considered two of the deficiencies to continue to require correction. Specifically, these were the very same deficiencies with respect to which ISN had earlier taken issue in its letter of January 19, 1998, *i.e.*, the recordation of all overtime hours and the lack of control in the distribution of timesheets. Statement of Position, Tab 1, Exhibit A; AR, Tab 28 (Bates stamp 101200- 101202).

10. The Product Team Re-evaluators contacted the DCAA and the Defense Contract Management Command ("DCMC") during the latter part of December, 1998 to determine whether ISN had taken any action to correct the previously identified timekeeping deficiencies. Specifically, on December 21, 1998, the Re-evaluators contacted an Administrative Contracting Officer ("ACO") for the DCMC. Re-evaluation Report, Exhibit D. The ACO indicated that her office had no information that would change the status of the timekeeping system deficiencies identified in the February 23, 1998 DCAA Report.

11. The Re-evaluators also reviewed a letter from DCAA, dated December 24, 1998. Re-evaluation Report, Exhibit B. The letter stated that although ISN had proposed certain corrective actions with which the DCAA concurred, the DCAA had not confirmed whether those actions were actually taken. Furthermore, the letter stated ISN had not provided a satisfactory response and continued to be considered deficient with respect to the two deficiencies which the February 23, 1998 audit report identified as requiring correction.

12. The Product Team concluded in the Group Report on the Re-evaluation that ISN's timekeeping system "has not yet been adequately corrected to the FAA's satisfaction, nor has it been corrected to the DCAA's satisfaction" and that "the deficiencies continue to pose an unacceptable cost performance risk to the ADL contract." Statement of Position, Tab 1, Exhibit A (Bates stamp 101472). In this regard, the Product Team observed:

ISN's timekeeping problems present an unacceptable risk to the FAA, particularly under a direct labor/time and materials type contract (which will be awarded for the ADL Support Services). Under this contract type, the direct labor hours performed are charged and billed to the Government, while other direct charges (ODC's), e.g., materials, are reimbursed to the contractor. The direct labor/time and materials contract that will be awarded for the ADL Support Services, contains 207,000 direct labor hours per year and ODC's totalling [sic] approximately \$2,000,000 per year to be billed to the Government. ISN's failure to control timesheets greatly increases the opportunity for ISN to

inaccurately bill Government contracts and charge for time that employees may not have actually worked. Where recording of hours directly correlates to the amount charged to the government, failure to correct this deficiency puts the government at risk of paying for work not performed. In fact, the ADL Team placed offerors on notice that they may be required to substantiate the number of hours worked by incorporating clause 3.3.1-5 "Payments under Time and Materials and Labor-Hour Contracts (October 1996)" into Section G of the Screening Information Request (SIR). That clause states in part that "The Contractor shall substantiate vouchers by evidence of actual payment and by **individual daily job timecards**, or other substantiation approved by the Contracting Officer .... The Contracting Officer has not identified any other substantiation vehicle for this contract. Given the hundreds of thousands of hours contemplated for the performance of this contract, if the team is unable to trust the accuracy of the timecards, due to a timekeeping practices deficiency which ISN refuses to correct, then a significant and unacceptable cost performance risk exists.

Statement of Position, Tab 1, Exhibit A, (Bates stamp 101470 – 101471) (Emphasis in original).

13. The Group Report further states:

Upon review of the information provided to the FAA by the Defense Contract Management Command and the Defense Contract Audit Agency regarding the timekeeping system deficiencies, it is evident that any attempt to award ISN the ADL Support Services contract in the face of such information cannot be supported due to undue cost and performance risk. The timekeeping system deficiency meets all of the requirements of the SIR criteria for cost performance evaluation. As identified in the ODRA Findings and Recommendations, "the ISN timekeeping system deficiency (1) occurred within the last three years; (2) pertains to a risk of potential cost increase under the ADL contract; (3) relates to costs within the responsibility of ISN; and (4) reflects potential deficiencies in performance which directly relate to requirements of the SOW [Statement of Work], i.e., whether ISN will be able to perform tasks within the hours estimated for those tasks. The ADL contract SOW requires the contractor to maintain daily work records. These records are used to monitor contractor performance and to provide a basis for payment. Thus any past performance deficiencies concerning the manner in which ISN maintains its work records can be properly considered in performing a past cost performance evaluation under the terms of the SIR." As evidenced by the updated information provided by the Defense Contract Audit Agency, the records available reflect that the deficiencies have not been corrected.

Statement of Position, Tab 1, Exhibit A, (Bates stamp 101471 – 101472).

14. Relying on the Product Team's Re-evaluation, the SSO determined on January 28, 1999 that "ISN should be eliminated from the ADL Contract competition, as the timekeeping deficiencies continue to pose an unacceptable risk to contract cost and performance."

15. On February 16, 1999, after the instant protest was filed and in response to ISN's contention that "ISN's current policy is to require that all employees use pre-numbered timesheets" (*See* Protest, January 28, 1999, page 11), the Product Team requested audit services from the DCAA to verify the status of the timekeeping system deficiencies identified in Audit Report No. 6311-98A10310364, dated February 23, 1998. Statement of Position, Tab 3. A floorcheck review was conducted on February 23, 1999. The resulting Audit Report No. 6221-99F13010.505, dated March 4, 1999, found that ISN had commenced a new timekeeping policy as of January 1, 1999. As for the issue of uncompensated overtime, the audit found that the old policy of not recording overtime hours was still in effect. The audit report further stated: "We consider the most recent policies and procedures to be generally adequate for government accounting requirements, but would be improved by addressing therein or in another document, the topic of uncompensated overtime." Statement of Position, Tab 4. ISN made the DCAA audit the subject of a supplemental protest filed on March 4, 1999. Subsequently, however, ISN agreed that the issue of the March 4, 1999 audit would be treated as additional support for the allegation of bias made in its earlier protest of January 28, 1999. *ODRA Status Conference Memorandum*, dated March 8, 1999.

### **III. Discussion**

#### **A. Scope and Standard of the ODRA's Review**

In making recommendations concerning substantive protest issues, the ODRA will apply the standard of review under the Administrative Procedure Act, 5 U.S.C. § 706 ("Act"). In accordance with the Act, the courts and the ODRA have consistently held that the review must concern itself with "whether the agency's decision was legally permissible, reasoned, and factually supported." *Protest of Washington Consulting Group Inc.*, 97-ODRA-00059, *citing Delbert Wheeler Construction, Inc. v. United States*, 39 Fed. Cl. 239, 247 (1997). The reviewer may not substitute his or her judgment for that of the agency. *Id.*, *citing Wheeler Construction, supra; Latecoere International, Inc. v. United States*, 19 F.3d 1342, 1356 (11th Cir. 1994); *Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492, 1496-97 (10th Cir. 1994).

Agencies have broad discretion with regard to the evaluation of proposals, since evaluation is "inherently a judgmental process which cannot accommodate itself to absolutes." *Id.*, *citing Wheeler Construction*, 39 Fed. Cl. at 247. Thus, agency actions will generally be upheld, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Information Systems & Networks Corporation*, 98-ODRA-00095, *citing Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated).

In the Original Protest, the ODRA found, inter alia, that ISN's timekeeping deficiencies fall squarely within the express criteria of the SIR and are rationally related to a risk to the ADL Support Services contract. The ODRA expressly found that the timekeeping system deficiencies: (1) occurred within the last 3 years; (2) pertain to a risk of potential cost increase under the ADL Contract; (3) relate to costs within the responsibility of ISN; and (4) reflect potential deficiencies in performance which directly relate to requirements of the SOW. *Information Systems & Networks Corporation*, 98-ODRA-00095 at 35-36. We will not revisit that determination here since, notwithstanding ISN's arguments, none of the established requirements for reconsideration are present. *See Camber, supra* (Decision on Reconsideration).

**B. The Product Team's Re-evaluation Decision Complied with the Administrator's December 18, 1998 Order and Has a Rational Basis.**

It is well established both at the GAO and under the FAA's Acquisition Management System, that the evaluation of past performance is a matter within the sound discretion of the contracting authority and that the reviewing body will not substitute its judgment for a rationally based past performance rating. *Rohmann Services, Inc.*, B-280154.2, November 16, 1998, 98-2 CPD ¶134; *Information Systems & Networks Corporation*,

98-ODRA-00095 at 25. However, the ODRA will consider the entire record in to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria. *Id.* at 26.

The Administrator's Order had instructed the evaluators to determine in the Re-evaluation (1) whether the timekeeping system deficiency had been adequately corrected to its satisfaction and (2) whether or not corrected, such a deficiency continued to pose a "risk of performance failure" within the ADL contract. The record demonstrates that the Product Team's Re-evaluation decision was consistent with the stated evaluation criteria and the Administrator's December 18, 1998 Order; and was rationally based on specific and substantial evidence.

During the weeks following December 18, 1998, the Product Team performed its Re-evaluation of ISN's past cost performance with respect to the timekeeping deficiency by reviewing: (1) the ODRA's Findings and Recommendations in the Original Protest; (2) a telephone record of contact with DCMC, dated December 21, 1998; (3) a DCAA letter, dated December 24, 1998; and (3) a DCAA audit report, dated February 23, 1998. The ODRA's Findings and Recommendations set forth the history of ISN's timekeeping issues based on the administrative record in the Original Protest. As noted above, since April of 1997, ISN's timekeeping system had been the subject of reviews and findings of deficiencies. The two timekeeping deficiencies specifically at issue here, *i.e.*, the recordation of uncompensated overtime hours worked and distribution of blank unnumbered timesheets, had been identified by the DCAA to ISN in February of 1998. AR, Tab 28 (Bates stamp 101200 – 101202).

The record also shows that the issue of ISN's timekeeping was raised by the contracting officer in the context of discussions with ISN on July 30, 1998. FF 20. The contracting officer identified "protracted correction of timekeeping system practices" as evidence of unsatisfactory cost control. ISN's only response was that it had *no knowledge* that its timekeeping system was not considered to be properly maintained and that the DCAA had accepted its timesheets "without exception." FF 22. These assertions by ISN contradict the language of the DCAA report, which specifically identified ISN's timekeeping policies concerning its recordation of overtime hours and timesheet distribution as deficient. ISN's assertions that it was unaware of a problem also are contradicted by the information the evaluators later received from the DCAA on December 21, 1998, and the DCMC on December 24, 1998. Moreover, DCAA specifically advised the Product Team evaluators on December 24, 1998 that ISN had not provided a satisfactory response and was *still considered to be deficient* with respect to its timekeeping policies concerning recordation of all hours worked and timesheet distribution.

As a general matter, agencies are entitled to rely upon advice of DCAA in their evaluations of proposals, and are not required to look behind its conclusions. *See, e.g. Systems Integration & Research, Inc.; Presearch Inc.*, B-279759.2; B-279759.3, 1999 U.S. Comp. Gen. LEXIS 45 (February 16, 1999); *SRS Technologies*, B-238403, May 17, 1990, 90-1 CPD ¶ 484; *NKF Eng'g, Inc., et al.*, B-232143, B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497; *Allied Maritime Management Organization, Inc.*, B-222918, B-222918.2, Aug. 26, 1986, 86-2 CPD ¶ 227. Based on the information they obtained, the evaluators reasonably concluded on January 15, 1999, that ISN posed an unacceptable risk to the FAA in terms of cost performance. The SSO subsequently issued her

January 28, 1999 determination to eliminate ISN from the competition.

### **The Timesheet Issue**

ISN argues that it corrected one of the two timekeeping policy deficiencies effective on January 1, 1999, and thus that the Re-evaluation was flawed. In its Response to the Re-evaluation, ISN asserts: "ISN's current policies address DCAA's concerns for an audit trail and eliminate the risk that may have previously existed." ISN's Response to Re-evaluation, page 12. ISN argues that the Product Team failed to conduct meaningful discussions with ISN and thus failed to verify the current timekeeping policy of ISN. *See Protest, dated January 28, 1999, page 11.*

ISN's position fails to recognize that the Product Team *did*, in fact, conduct discussions with ISN in 1998 and gave ISN the opportunity to provide current information with respect to ISN's alleged "timekeeping deficiencies." In the ODRA's view, those discussions were adequately specific to notify ISN of the evaluation area considered deficient and enable it to provide a meaningful response. [1] The Product Team's inquiry concerning "protracted correction of timekeeping deficiencies" should have prompted a response from ISN that took into account any issues relative to its timekeeping policies that existed during the past 3 years.

Ultimately, the burden is on the offeror to demonstrate the acceptability of its offer and to provide sufficient information to convince the procuring activity that it meets the agency's needs. *See Addisco Industries, Inc.*, B-233693, March 28, 1989, 89-1 CPD ¶317. ISN chose to take no action at all on one of the two identified timekeeping deficiencies; and to take belated action on the other, only after the Original Protest was sustained. Moreover, the record is devoid of any evidence that ISN attempted to notify the Product Team or anyone else of its corrective action regarding timesheets until after the Re-evaluation was completed and ISN filed its current protest. [2]

In any event, there was no demonstrable prejudice to ISN from the Product Team's failure to hold additional discussions with ISN during the Re-evaluation in January, 1999. Had the Product Team held discussions with ISN during the Re-evaluation it would have learned that only one of the two deficiencies was being corrected. Moreover, the late correction of the timesheet deficiency did not, under the terms of the SIR, preclude the Team from considering the problem as posing a risk to the contract. In the Original Protest, the ODRA expressly stated that it "does not intend to suggest that any such correction vitiates the past cost performance deficiency or proscribes consideration of it by the evaluation team." Original Protest, Findings and Recommendations, page 36, footnote 19.

### **The Overtime Issue**

It is undisputed that ISN's policy regarding recordation of uncompensated overtime hours was not changed prior to completion of the Re-evaluation. However, ISN contends that the Product Team's consideration of ISN's overtime policy ignores the ODRA's guidance on the evaluation of past cost performance. In support of this argument, ISN presents the declaration of an expert, Mr. Darrell J. Oyer, for the proposition that ISN's failure to record overtime hours cannot be the basis for a deficiency relating to past cost performance, because the policy does not relate to a cost increase or decrease and does not present a risk of performance failure to the ADL contract. Oyer Declaration, Paragraphs 8 - 11.

Notwithstanding Mr. Oyer's Declaration, the record reflects that he has recognized the potential cost performance risk that could emerge from a contractor's practice of not recording uncompensated overtime hours. In an article that he co-authored and which was published in 1988, Mr. Oyer observed:

- • An accounting system used by a Government Contractor that does not fully account for all actual hours worked by its employees poses the potential for "gaming." The following hypothetical situation illustrates this.

Consider that an employee of a Government contractor works ten hours in a given day; five hours are spent on a fixed-price Government or commercial contract and five hours are spent on a Government cost-reimbursement contract or an indirect activity, such as independent

research and development or bid and proposal preparation (so-called IR&D/B&PP). It obviously would be to the contractor's advantage to account for the maximum eight recorded hours by having the employee charge five hours (the actual hours worked) to the cost-reimbursement contract and three hours to the fixed-price contract or indirect activity.

V. Lehman Woods and Darrell J. Oyer, *Uncompensated Overtime, The "Forty-Hour" Debate*, CP&A Report (Federal Publications, Inc. November 1988). The DCAA's expressed concern regarding ISN's failure to account for and record uncompensated overtime hours was a concern Mr. Oyer apparently has long considered "understandable." V. Lehman Woods and Darrell J. Oyer, *supra*, page 5.

Under the circumstances presented here, the ODRA cannot fault the Product Team's decision to eliminate ISN from the competition based on past cost performance. While contractors clearly differ in their accounting approaches to uncompensated overtime, and while the ODRA might itself have reached a different conclusion had it stood in the shoes of the evaluators, the Product Team's perception of potential risk from ISN's accounting system cannot be said to have been irrational. ISN's disagreement with the results of the Re-evaluation does not render it irrational. *Camber, supra, citing Aero Tech Services, Incorporated*, 96-ODRA-00017.

### **C. ISN Failed to Demonstrate the Requisite "Well-Nigh Irrefragable Proof" of Product Team Bias**

The high evidentiary standard for demonstrating bias requires "well nigh irrefragable proof" to overcome the presumption that public officials act conscientiously and in good faith. *Camber, supra*. Where a protester alleges bias on the part of Government officials, the protester must provide credible evidence clearly demonstrating a prejudice against the protester *and that the agency's bias translated into action that unfairly affected the protester's competitive position*. *Protest of J. Schouten Construction, Inc.*, 98-ODRA-00064. The ODRA will not attribute unfair or prejudicial motives to Government officials on the basis of mere inference or supposition. *Id.*; *Rohmann Services, Inc.*,

B-280154.2, November 16, 1998, 98-2 CPD ¶134, *citing Lancaster & Co.*, B-254418, Dec. 14, 1993, 93-2 CPD ¶319 at 7. Where an evaluation is otherwise rational, there is no basis for a finding of bias. *See ECC International Corporation*, B-277422, B-277422.2, October 14, 1997, 1997 U.S. Comp. Gen. LEXIS 495, *citing Hagler Bailey Consulting, Inc.*, B-265708, Dec. 19, 1995, 95-2 CPD ¶276 at 3.

ISN argues that "the cumulative weight of the FAA Product Team's actions" demonstrates that its Re-evaluation decision to eliminate ISN was based on bad faith. As evidence of bad faith, ISN points to ODRA findings in the Original Protest, as well as discovery disputes that occurred in, and litigation positions taken during, the course of litigating the Original Protest and this protest. Specifically, ISN relies on the ODRA's

December 18, 1998 Findings and Recommendations that (1) only one of the multiple bases used to initially disqualify ISN fit within the plain language of the stated evaluation criteria; (2) the past performance group leader's approach to filling out her evaluation form lacked a rational basis; and (3) the Product Team's request to dismiss ISN's protest was based on a hypothetical (as opposed to an actual) basis for rejection. ISN further identifies language in the January 25, 1998 ODRA Conference Memorandum, which states "the Product Team's re-evaluation submission went beyond the 'limited re-evaluation' required by the Findings and Recommendations ... and excluded ISN from the competition on *two* grounds" as evidence of the Product Team's alleged bad faith. ISN also points to discovery and factual disputes as further evidence of the Product Team's bad faith, *i.e.*, its alleged failure to timely produce relevant documents and misrepresentation of the role of the past performance group leader during the discovery phase of the Original Protest. ISN also cites as examples of bias, a misstatement by counsel for the Product Team as to ISN's actual direct labor rates and the Product Team's request for the March 4, 1999 audit of ISN.

The ODRA will not infer bad faith on the part of the Product Team based on the fact that ISN's Original Protest was sustained; and the decision in the Original Protest provides no evidence of bias. *Protest of Information Systems & Networks Corporation, 98-ODRA-00095*, page 25. The ODRA's Findings and Recommendations in the Original Protest found that the group leader's approach to filling out her evaluation *was not prejudicial*. *Id.*, page 17, footnote 7. Nor can we find that the Product Team's filing of a motion to dismiss demonstrates bias. It is well established that Adversarial communications, without more, do not establish bias. *Advanced Systems Technology, Inc.; Engineering and Professional Services, Inc.*, B-241530; B241530.2, February 12, 1991, 91-1 CPD ¶153, *citing 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); *NAHB Research Found., Inc.*, B-219344, Aug. 29, 1985, 85-2 CPD¶ 248 (aggressive questioning of offeror does not constitute agency bias). With respect to the addition of a second basis in the Re-evaluation for excluding ISN, we note that the Product Team voluntarily withdrew that basis, removing any potential prejudicial impact. With respect to the remaining discovery and factual disputes cited by ISN as evidence of bad faith, we can discern no prejudicial impact that such actions could have had on ISN's competitive position with respect to the January 28, 1999 Re-evaluation decision.

The incidents cited by ISN viewed individually and cumulatively simply do not approach the required "well nigh irrefragible proof" of basis. Nor do they demonstrate prejudicial impact on the Product Team's Re-evaluation decision. The mere fact that ISN disagrees with the Re-evaluation -- an evaluation found to be rational when reviewed on the merits -- does not establish agency or evaluator bias. *Advanced Systems Technology, supra*, *citing D-K Assocs., Inc.*, B-213417, Apr. 9, 1984, 84-1 CPD ¶396.

**D. Elimination of ISN from the ADL Support Services Procurement Does Not Constitute a De Facto Debarment**



