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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Lockheed Martin Corporation

File: B-295402

Date: February 18, 2005

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Rand L. Allen, Esq., Paul F. Khoury, Esq., Scott M. McCaleb, Esq., Daniel P. Graham, Esq., and Michael S. Caldwell, Esq., Wiley Rein & Fielding, for The Boeing Company, an intervenor.

Bryan R. O'Boyle, Esq., Michael J. O'Farrell, Jr., Esq., and P. Alan Luthy, Esq., Department of the Air Force, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the record shows that performance requirements, and associated evaluation criteria, were altered to delete a significant requirement and an evaluation factor under which the protester was viewed as having an advantage, and a senior procurement official, who was involved in discussions that culminated in the deletion of the requirement, has acknowledged bias in favor of the ultimate awardee, the protest is sustained on the basis that the agency has failed to demonstrate that the senior official's acknowledged bias did not prejudice the protester and that the integrity of the procurement process was not compromised.

DECISION

Lockheed Martin Corporation protests various procurement actions taken by the Department of the Air Force in connection with the small diameter bomb (SDB) program under request for proposals (RFP) No. F08635-03-R-0038.¹ Specifically,

¹ At the time of inception, the SDB program contemplated development of a "miniature munition" weapon system to provide fighter and bomber aircraft with air-to-surface capabilities to attack "fixed and mobile/relocatable targets." Agency Report, Tab 82, Draft Operational Requirements Document, at 1. Consistent with the
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Lockheed Martin maintains that Darleen Druyun, in her capacity as the Air Force's Principal Deputy Assistant Secretary for Acquisition, improperly manipulated certain program requirements and the related evaluation factors in a manner that favored The Boeing Company and that, as a result, Boeing won the competition to perform system design and development (SDD) work under the SDB program.

We sustain the protest.

BACKGROUND

Lockheed Martin's protest relates, generally, to activities that took place between September 2001 (when Boeing and Lockheed Martin were each awarded component advanced development contracts under the SDB program) and August 2003 (when Boeing was selected for award of the SDD contract). However, the primary focus of the protest relates to activities that took place during the first few months of 2002 and culminated in the Air Force's decision to make significant changes to the SDB requirements and associated evaluation criteria--specifically, the deletion of phase II requirements for capabilities against moving targets.²

As a procedural matter, our Office's timeliness rules generally preclude consideration of protests challenging agency actions, such as these, that occurred in the relatively distant past. See Bid Protest Regulations, 4 C.F.R. § 21.2 (2004). Here, however, Lockheed Martin's protest is based on information it first obtained in October 2004 due to the public disclosure at that time of documents relating to Darleen Druyun's criminal conviction and sentencing for violation of the conflict of interest provisions codified at 18 U.S.C. § 208(a) (2000).³ Since Lockheed Martin had

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initial intent to use the SDB against both fixed and moving targets, the agency's initial source selection plan contemplated a two-phase effort, stating: "The Phase 1 variant will provide a capability against fixed targets, while the Phase 2 variant will provide a capability against mobile/relocatable targets." Agency Report, Tab 12, Source Selection Plan (Nov. 5, 2001), at 1.

² Lockheed Martin maintains that it agreed to participate in the SDB competition only after being assured that the program would include a moving target variant. Lockheed Martin's Comments on Agency Report, exh. 2, [deleted].

³ In April 2004, Druyun initially pled guilty in the United States District Court for the Eastern District of Virginia to violating the provisions of 18 U.S.C. § 208(a), which prohibit an officer or employee of the United States Government from "participat[ing] personally and substantially as a Government officer or employee . . . in a . . . contract . . . in which, to his knowledge . . . [an] organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." Agency Report, Tabs 67-70. In connection with that April 2004

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no reason to previously know of the information disclosed in those documents, we view the protest as timely.

Druyun's Bias in Favor of Boeing

The record establishes that, in 2000, Druyun contacted personnel at Boeing to request that Boeing employ her daughter and future son-in-law. Agency Report, Tab 69, Statement of Facts, at 3-4; Agency Report, Tab 71, Supplemental Statement of Facts, at 2-4. The record is also clear that, in response to Druyun's requests, Boeing created a position for Druyun's daughter and hired both the daughter and future son-in-law in the fall of 2000. In her supplemental statement of facts, signed by both Druyun and her attorney, and submitted to the Court in connection with her October 2004 criminal plea, Druyun stated:

Defendant acknowledges that Boeing's employment of her future son-in-law and her daughter in 2000, at the defendant's request, along with the defendant's desire to be employed by Boeing, influenced her government decisions in matters affecting Boeing.

Agency Report, Tab 71, Supplemental Statement of Facts, at 2.

In a footnote referenced at the end of the preceding quotation, that document further states:

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plea agreement, Druyun submitted a statement of facts disclosing that, in October 2002, Druyun met with a Boeing executive to negotiate Druyun's subsequent employment by Boeing. (Druyun retired from the Air Force in November 2002 and began employment with Boeing in January 2003.) At the time of the October 2002 secret meeting, Druyun was also negotiating with Boeing on behalf of the Air Force for the lease of 100 Boeing KC 767A tanker aircraft. Agency Report, Tab 70, at 30. In submitting her April 2004 plea, Druyun's position, as subsequently described by the Court, was that her actions constituted "more or less a technical violation [of the law]" in that she had always acted in the best interests of the United States. Agency Report, Tab 72, Sentencing Hearing Transcript (Oct. 1, 2004), at 13. Nonetheless, as part of her April 2004 plea agreement, Druyun agreed to take a polygraph examination. Following that examination, Druyun's position regarding the nature of her actions changed dramatically, as discussed in more detail below. On October 1, 2004, Druyun again submitted a plea agreement in connection with her violation of 18 U.S.C. § 208(a); with that plea, she submitted a supplemental statement of facts. Agency Report, Tabs 71-72. Various documents associated with the October 2004 criminal proceedings, including the supplemental statement of facts, were released to the public on October 1 or shortly thereafter.

The defendant also acknowledges contacting a senior official of Boeing in 2002 concerning the continued employment of her daughter by Boeing. The defendant had been told by her daughter that she feared termination by Boeing for employment performance issues. The defendant contacted a senior official of Boeing, with whom she was negotiating the KC 767A tanker lease, to prevent any adverse action by Boeing against her daughter. The daughter was not terminated and instead was transferred to a new position. This same senior Boeing official routinely updated the defendant concerning the daughter's employment with Boeing, for example advising the defendant of pay increases received by the daughter.^[4]

Changes to the SDB Performance Requirements and Related Evaluation Criteria

As discussed above, the agency awarded component advanced development (CAD) contracts under the SDB program to Boeing and Lockheed Martin in September 2001.⁵ The contractors were advised that, during the 24-month performance period of the CAD contracts, the agency intended to conduct a "rolling downselect evaluation" during which Boeing and Lockheed Martin would compete, on the basis of their performance under the CAD contracts, for award of the SDD contract. Agency Report, Tab 12, Source Selection Plan (Nov. 5, 2001), at 1. Boeing and Lockheed Martin were advised of the criteria on which the SDD selection would be made; these criteria included, among others, a factor focusing on the evaluation of the contractor's capabilities with regard to the phase I fixed target requirements

⁴ In addition to the statements quoted above, documents associated with the October 2004 criminal proceeding reflect Druyun's statements that, in negotiating the lease agreement for the Boeing KC 767A tanker aircraft, Druyun "agreed to a higher price for the aircraft than she believed was appropriate," Agency Report, Tab 71, Supplemental Statement of Facts, at 2-3; that as "chairperson for the NATO Airborne Early Warning and Control Program Management Board of Directors," Druyun "negotiated a payment of 100 million dollars to Boeing" although "she believed a lower amount to be an appropriate settlement," explaining that Druyun's agreement to the \$100 million settlement payment "was influenced by her daughter's and son-in-law's relationship with Boeing," *id.* at 3; that in selecting Boeing for award of a contract to upgrade the avionics of the C-130 aircraft, Druyun was "influenced by her perceived indebtedness to Boeing for employing her future son-in-law and daughter," *id.*; and that Druyun's agreement to pay approximately \$412 million in connection with a settlement with Boeing concerning "the C-17 H22 contract clause . . . was influenced by Boeing's assistance to [Druyun]." *Id.* at 3-4.

⁵ Award of the CAD contracts to Boeing and Lockheed Martin resulted from a procurement conducted as a full and open competition.

and a factor focusing on the evaluation of the contractor's capabilities with regard to the phase II moving target requirements. Id. at 20-21.

At the hearing conducted by our Office in connection with this protest,⁶ Judy Stokley, who initially served as the source selection advisory council (SSAC) chair and was designated as the source selection authority (SSA) in June 2002, testified that, at least initially, the agency "envisioned" the use of [deleted] to perform the phase II moving target requirements. Hearing Transcript (Tr.) at 396-98; Agency Report, Tab 31, at 2.⁷ The record indicates that early in 2002, Lockheed Martin was viewed as having an advantage over Boeing with regard to [deleted].⁸ Further, early in the procurement process, this advantage was interpreted as a "strength in Phase II" for Lockheed Martin. Specifically, in a document titled "SDB Program Office Comments," dated January 25, 2002, that was produced by the Air Force less than 3 weeks before GAO's statutory deadline for resolution of the protest,⁹ the following statements appear:

⁶ In resolving this protest, our Office conducted a hearing, on the record, at GAO headquarters in Washington, DC on January 11 and 12, 2005. At the hearing, five government witnesses and one Lockheed Martin witness provided testimony.

⁷ Stokley explained that a [deleted].

⁸ In this regard, the SDB program manager testified that "Lockheed would have more inherent knowledge of [deleted]. Tr. at 707. In addition to Lockheed Martin's "more inherent knowledge" regarding [deleted], the record indicates that Lockheed Martin possessed alternative technology, referred to as [deleted].

⁹ This document is one of several the agency failed to produce in a timely manner. The protest was filed on November 10, 2004 and, consistent with GAO's Bid Protest Regulations, all of the agency's documents relevant to the protest issues were required to be submitted by December 13. Competition in Contracting Act of 1984, 31 U.S.C. § 3553(b)(2)(A) (2000); 4 C.F.R. § 21.3(c). Although this document was in the possession of the SDB program manager, who testified at the hearing, this particular document, along with a significant number of additional documents, was not produced to GAO and to counsel for the protester until January 31, 2005--nearly 2 weeks after the conclusion of the GAO hearing. The result was that counsel for the protester was unable to meaningfully question the agency witnesses regarding this and many other late-produced documents.

ISSUES

- Users (XOR [Commander, Operational Requirements] Included, Maybe not CSAF [Air Force Chief of Staff]) See Phase II as Key . . . Phase I Stepping Stone
- Lockheed Bid After Seeing 2 Year CAD
 - Catch Up on Phase I
 - Strength is Phase II
- Boeing Weak on Phase II
 - [deleted]
 - [deleted]

Agency Report, Jan. 31, 2005 Document Production, at 6.¹⁰

Similarly, in briefing documents prepared by the SDB program manager in connection with briefings given to the Air Force Chief of Staff and the Secretary of the Air Force on March 12 and March 18, respectively, there are separate columns for Boeing and Lockheed Martin under the heading “Relative Contractor Strength (Today).” These documents contain check marks in Lockheed Martin’s column, indicating relative strengths, beside the terms “[deleted] (Spiral II)” and “[deleted] (Spiral II).” Agency Report, Tab 23, at 2; Agency Report, Tab 24, at 2.¹¹

In May 2002, following several months of meetings, briefings, and discussions within the Air Force, the Secretary of the Air Force approved various recommended changes to the SDB program—including the deletion of phase II requirements regarding moving targets. Agency Report, Tabs 31, 33.¹² Thereafter, the evaluation

¹⁰ Notwithstanding the clear statement that Lockheed Martin’s “Strength is Phase II” and that “Boeing [is] Weak on Phase II,” the agency now maintains that neither offeror was ever perceived as having an advantage with regard to the phase II requirements. See, e.g., Tr. at 755-56. Based on our review of the entire record, we give greater weight to this and other contemporaneous documents discussed here than to the agency’s post-protest position.

¹¹ There is no dispute that the term “spiral II” refers to the phase II requirements of the SDB program. See, e.g., Tr. at 705-08.

¹² The September 11, 2001 terrorist attacks precipitated various changes to the Department of Defense’s (DOD) prioritization of various programs. At the direction of DOD, following the terrorist attacks, the Air Force scrutinized various programs, including the SDB program, in anticipation of reduced available funding. The agency states that the May 2002 changes to the SDB program reflected a \$385 million projected funding shortfall, due to the DOD-directed reprioritization. Agency Report, Tabs 75-76, 79. At the time the phase II requirements were deleted, the Air Force also changed the carriage system from a six-place rack to a four-place rack,

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criteria applicable to the selection of an SDD contractor were similarly revised to eliminate consideration of the deleted requirements. Agency Report, Tabs 36(a), 36(b), 41, 43, 111.¹³

In August 2003, Boeing was selected for award of the SDD contract. Agency Report, Tabs 58-59. Also in August 2003, the Air Force discovered that “surplus funding may exist” that would facilitate reinstatement of the phase II requirements related to moving targets. In a Memorandum to the SDB program office, the Air Force’s Director of Requirements stated:

As you are aware, ACC [Air Combat Command] had to defer execution of the SDB phase II program due to funding constraints within the FY [fiscal year] 04 POM [program objective memorandum]. Our position was to pursue the baseline program to address fixed and stationary targets and defer mobile, time sensitive targets to the FY 06 POM. My staff has informed me that surplus funding may exist in the SDB program. My position is to apply this surplus funding towards the next spiral of SDB, which could incorporate a terminal seeker, Weapons Data Link (WDL), or both to engage moving targets.

Agency Report, Tab 55.

In November 2003, the Air Force executed a justification and approval (J&A) providing for the addition, on a sole-source basis, of the phase II moving target requirements to Boeing’s SDD contract. Agency Report, Tab 62, at 2.¹⁴

As discussed above, Druyun’s admissions regarding her bias in favor of Boeing were released to the public on or about October 1, 2004. On October 12, 2004, Lockheed Martin filed various agency-level protests with the Air Force, challenging the agency’s actions in this and other procurements on the basis that “Druyun acted to favor Boeing . . . in return for benefits improperly conferred by Boeing at her specific request.” Agency Report, Tab 3(a), at 3. By letter dated November 9, the Assistant Secretary of the Air Force for Acquisition advised Lockheed Martin that “[t]he Air Force is of the opinion that the protests . . . are more appropriately considered by the

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deleted the B-1 bomber from the program, and imposed a phase I accuracy requirement. Agency Report, Tab 33, E-mail from SDB Program Manager.

¹³ The revised evaluation criteria considered the offerors’ provision of a path to a moving target attack capability on a pass/fail basis. Agency Report, Tab 41.

¹⁴ In June 2003, the agency had executed a “class J&A,” that provided for the sole-source award of “future spiral development activities,” but did not refer to moving targets. Agency Report, Tab 50.

Government Accountability Office (GAO)” and that “the Air Force will not decide the protests.” Agency Report, Tab 3(c). Lockheed Martin then filed this protest with our Office on November 10.¹⁵

DISCUSSION

In light of the information first learned by Lockheed Martin in October 2004, the firm protests that Druyun “directed or contributed to the deletion of Phase II with the specific intention of benefiting Boeing,” and adds that the Air Force’s pending action to add phase II to Boeing’s SDD contract on a sole-source basis exacerbates the harm to Lockheed Martin. Protest at 4.

The Air Force responds that “Druyun did not play any significant role in the May 2002 decision by [the] Secretary [of the Air Force] to change the SDB technical requirements.” Agency Report, Legal Memorandum, at 3. In our view, as discussed below, the record fails to establish that Druyun had no significant involvement in the decisionmaking process that culminated in the changes to the SDB requirements.

The Federal Acquisition Regulation (FAR) provides as follows:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR § 3.101-1.

In addressing organizational conflicts of interest, our Office has held that, where the record establishes that a conflict exists, we will presume that the protester was prejudiced, unless the record establishes the absence of prejudice. See The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194; TDF Corp., B-288392, B-288392.2, Oct. 23, 2001, 2001 CPD ¶ 178. Similarly, where, as here, the record establishes that a procurement official was biased in favor of one offeror, and was a significant participant in agency activities that culminated in the decisions forming the basis for protest, we believe that the need to maintain the integrity of the procurement process requires that we sustain the protest unless there is compelling evidence that the protester was not prejudiced. See Department of the Air Force--

¹⁵ On November 10, Lockheed Martin also submitted a protest challenging various actions regarding the Air Force procurement to upgrade the avionics of the C-130 aircraft. We are addressing the issues raised in that protest in a separate decision.

Request for Recon., B-234060, B-234060.2, Sept. 12, 1989, 89-2 CPD ¶ 228. As discussed below, the agency has failed to provide compelling evidence that Druyun's bias in favor of Boeing did not influence the various decisions leading to the award of the SDD contract to Boeing.

In an effort to establish that Druyun was not materially involved in the changes made to the SDB requirements, Dr. Marvin Sambur, former Assistant Secretary of the Air Force for Acquisition and Druyun's immediate supervisor during the period in which the changes were made, submitted a declaration to our Office, stating: "To the best of my knowledge, Mrs. Druyun had nothing to do with the changes to the SDB requirements." Agency Report, Tab 79, Sambur Declaration, at 2. Various other procurement officials submitted similar declarations and, along with the Assistant Secretary, provided testimony at the GAO hearing.¹⁶ In our view, the record contradicts the agency's assertion that Druyun was not materially involved in the process that culminated in the May 2002 changes; to the contrary, the contemporaneous record shows significant involvement by her in that process.

In addressing the issue of Druyun's involvement, we first consider the formal matter of who was functioning as SSA—that is, the lead procurement official for this procurement—during the period leading up to the changes at issue. Until February 2002, Druyun was designated as the SSA for this procurement. Agency Report, Tab 12, Draft Source Selection Plan (Nov. 5, 2001).¹⁷ At the GAO hearing, Sambur, the former Assistant Secretary, testified that in February 2002, he removed Druyun as the SSA, designating himself as the SSA in her place. Tr. at 37; Agency Report, Tab 79 at 1. Sambur further testified that, in June 2002, he appointed Stokley, previously the SSAC chair, to be the SSA. Tr. at 38; Agency Report, Tab 79, at 2. Notwithstanding his own designation as the SSA, Sambur acknowledged during the GAO hearing that: "I never acted as an SSA, never made any decisions in that

¹⁶ In contrast to the clear recollection that agency witnesses fairly uniformly had that Druyun had no significant input to, or material involvement in, the decisionmaking process that culminated in the changes at issue here, those witnesses frequently were unable, when confronted with documentary evidence indicating Druyun's apparent input or involvement, to recall specific details surrounding various meetings, briefings or other communications. See, e.g., Tr. at 73, 83, 86-87, 89, 111, 297-98, 301, 303, 317, 324, 325-26, 341, 353, 627, 702, 710, 716-17, 728, 746. The witnesses' limited ability to recall specific information regarding the ultimate conclusions they assert leads our Office to place correspondingly limited weight on their unsupported conclusory assertions. Our decision primarily relies on the contemporaneous records that have been produced to date, including e-mails, notes, and memoranda, which indicate Druyun was materially involved in the decisionmaking process.

¹⁷ Druyun had been the SSA for the preceding CAD procurement.

part.” Tr. at 55. Rather, Sambur maintained that Stokley was actually functioning as the SSA after February 2002.¹⁸ However, Stokley’s testimony regarding her activities prior to June 2002 conflicts with Sambur’s. Specifically, Stokley testified that she functioned as the SSAC chair from February through June 2002, that Sambur was the SSA, and that she was “very surprised” when Sambur advised her, during a meeting in June, that he did not want to be the SSA. She further testified that she considered her appointment to the SSA position in June to be a “major change”¹⁹ and that, as a result of that appointment, she “had a much different level of responsibility.” Tr. at 266-71.

In short, the record shows that Sambur believed Stokley was performing the SSA duties from February through June 2002, while Stokley believed Sambur was performing those duties during this period.²⁰ In reality, the contemporaneous record suggests that, in the absence of either Sambur or Stokley stepping into the SSA’s role and performing the functions of the lead acquisition official during that period,

¹⁸ In this regard, Sambur testified as follows:

Sambur: I actually did nothing with making any decision in terms of who was selected in any shape or form.

GAO: Okay. But other than the final source selection decision, an SSA is involved in the procurement prior to that time.

Sambur: But Judy Stokley was basically--Judy Stokley was doing all of the SSA work.

....

GAO: So it’s your testimony that from February 2002 on, Judy Stokley was, in effect, the SSA?

Sambur: In effect, she held the meetings, and she reported to me if she felt there was anything unusual.

GAO: And you did not--again, just to summarize your testimony, you did not perform any SSA functions during that period?

Sambur: No.

Tr. at 55-56.

¹⁹ She elaborated, “I was sitting there with my brain spinning.” Tr. at 270.

²⁰ Druyun was Stokley’s immediate supervisor during this period. Tr. at 276.

Druyun continued to perform those functions—in much the same manner as she had before February 2002.²¹

Specifically, the record demonstrates multiple examples of Druyun's significant involvement in activities during the period leading up to the May 2002 SDB changes. For example, in late January 2002, Druyun received a briefing from Boeing regarding the potential to accelerate the SDB performance requirements. Agency Report, Tab 14, Boeing Briefing Slides.²² Following that meeting, Druyun issued a "tasker" to the source selection evaluation team chair to "put together an accelerated program for SDB to present to [the Air Force Chief of Staff] by the end of [February]." Agency Report, Tab 19.²³ The SDB program office subsequently complied with Druyun's "tasker" without further checking with Sambur. Tr. at 699-700.

Notwithstanding her formal removal as the SSA in February, Druyun met with Lockheed Martin personnel in early March to discuss their capabilities to accelerate the SDB program. Agency Report, Tab 21, Lockheed Martin Briefing Slides. Despite the fact that program acceleration was a "massive priority," Sambur was unaware of the meeting between Druyun and Lockheed Martin. Tr. at 83. The record further shows that Druyun reviewed an advance version of the acceleration briefing provided by the SDB Program Director to the Air Force Chief of Staff, before it was presented to Sambur and, again, that Sambur was unaware that Druyun had been so briefed. Agency Report, Tab 112; Tr. at 109-10.

The record further shows that, on April 24, the ACC's representative for the SDB program provided separate briefings to Druyun and Sambur regarding the pending changes to the SDB requirements. Druyun was briefed first, early in the morning; Sambur received the same briefing later in the day. Agency Report, Tab 124, at 51; Tr. at 583-84. Among other things, those briefings stated that Lockheed Martin's [deleted]; one of the slides from this briefing states: [deleted]. Agency Report, Tab 127, at 14, Air Force Briefing Slides.²⁴

²¹ It is clear that Druyun was not reluctant to assert herself. Sambur testified that Druyun performed her duties in a "very unique" manner, elaborating that she had a "dictatorial management style" and "was not the [kind of] person who usually said [']mother, may I[?']" Tr. at 76, 169.

²² Lockheed Martin was subsequently given a similar opportunity.

²³ The contracting officer describes this action, stating that Druyun "directed" the SDB program office to "determine if both Lockheed Martin and Boeing had acceleration strategies." Agency Report, Contracting Officer's Statement, at 7.

²⁴ In an e-mail dated April 25, sent by Stokley to a recipient list that began with Druyun, Stokley attached a proposed memorandum to be sent to the Secretary of the Air Force and his Chief of Staff summarizing the then-potential changes to the SDB
(continued...)

As noted above, an independent technical review of the [deleted] was conducted; despite the fact that Druyun no longer had any formal responsibility with regard to this procurement, she initiated that review. Agency Report, Contracting Officer's Statement, at 8; Agency Report, Tab 126, at 4; Tr. at 310, 674, 719.²⁵ Although the specific results of that evaluation are "highly classified," Tr. at 740, and were not reviewed in the context of our Office's bid protest proceedings, at the hearing Stokley testified that the independent review concluded that Lockheed Martin's technology [deleted],²⁶ and that the [deleted] was communicated to Druyun prior to the time the changes were made to the SDB requirements. Tr. at 311, 313.

The record further indicates that the Druyun-directed technical evaluation was the basis for imposing an accuracy requirement of "4 meters or better" into the evaluation criteria, and that this requirement was imposed over the objections of ACC officials, that is, the user community. Tr. at 619-20.²⁷ Specifically, in a

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requirements and asking the e-mail recipients to "Please let me know if I have missed any key points." Among other things, the draft memorandum to the Secretary and the Chief of Staff stated: "[W]e also conducted an independent review of the [deleted] that [deleted] Lockheed currently has Our review determined that [deleted]. Agency Report, Tab 120, at 39. On April 26, the memorandum was sent to the Secretary of the Air Force summarizing the proposed changes; however, the above-quoted portion of the draft memorandum was changed to read as follows: "[W]e also conducted an independent review of the [deleted] that [deleted] Lockheed currently has Our review determined that [deleted]. Agency Report, Tab 120, at 6-7. At the GAO hearing, none of the witnesses could recall who was responsible for this change.

²⁵ At the GAO hearing, the SDB program manager testified that [deleted] . . . after the contractors departed . . . she [Druyun] had us stick around, and she directed that we hire a guy named [deleted] to go do an independent [evaluation]. That is my recollection." Tr. at 720. At the hearing, Stokley testified that independent technical reviews are "quite typical," maintaining "we have lots of independent reviews and independent assessments." Tr. at 315. Stokley was, however, unable to identify any other independent technical review that had been conducted during the SDB procurement. Tr. at 316.

²⁶ Similarly, the ACC representative for the SDB program testified that the independent technical review concluded that [deleted]. Tr. at 618.

²⁷ At the GAO hearing, the ACC representative testified that there was a "disagreement" over the imposition of the 4-meter CEP requirement and that this "has been a touchy subject for some time." Tr. at 619, 622. The user community believed that an alternative measure for accuracy, referred to as "weapons effectiveness," should have been used. Id.

Memorandum for the Record created by the SDB program manager summarizing the final decision regarding the changes to the requirements, the program manager states:

Several changes were directed:

. . . .

Bring more accuracy to Phase I Pursuant to a previous independent tech[nical] eval[uation] by [deleted] (Ex DARPA consultant) and Mrs. Darleen Druyun, based on risk, this number was decided to be 4 meters or better Total Weapon System Delivery Accuracy.

Agency Report, Tab 126, at 4.²⁸

Finally, the record indicates that Druyun contacted Raytheon and requested that Raytheon communicate with Boeing, and that subsequently Boeing proposed to include Raytheon in its efforts to meet the SDB requirements.²⁹ The record indicates that, in fact, Raytheon provided support to Boeing in proposing to meet the SDB

²⁸ In the context of maintaining that Druyun was not materially involved or influential with regard to the SDB program changes, the Air Force has argued that the user community, that is, the ACC, was solely responsible for determining the SDB requirements, and since Druyun was not part of the ACC, she could not have influenced the requirements. Tr. at 31-35. While it may be true that the user community generally determines requirements, it appears this principle was not strictly followed with regard to the SDB requirements. The above discussion regarding the imposition of the 4-meter accuracy requirement “[p]ursuant to” the Druyun-directed technical evaluation—over the disagreement of the ACC user community—demonstrates the inaccuracy of the agency’s assertion that Druyun could not have affected the requirements because she was not part of the ACC user community.

²⁹ At the GAO hearing, the SDB program manager testified as follows:

Counsel: Do you have any knowledge of a contact by Mrs. Druyun to Raytheon regarding an accuracy approach for Boeing for SDB?

Program Manager: I have—I received a phone call from the Boeing program manager asking why would Druyun be calling them—or asking Raytheon to come talk to Boeing. . . .

Tr. at 745.

requirements. A Boeing presentation to the Air Force, made in September 2002, included the following statements:

- Raytheon Involvement
 - Independent Confirmation of our Trades
 - Additional Resources and Expertise will be Brought to the SDB Program

Agency Report, Tab 91(c), at 2.

Based on the record discussed above, we reject the agency's assertion that Druyun was not materially involved or influential in the process leading up to the SDB program changes made in May 2002.³⁰

CONCLUSION

We briefly summarize here the key points that the record establishes in this protest: Druyun felt "indebted" to Boeing; the SDB program initially contemplated an evaluation of the offerors' capabilities against moving targets; early in the process, Lockheed Martin was perceived as having a "strength" and Boeing was considered "weak" with regard to the moving target requirements; most of the requirements associated with moving targets and the associated evaluation factors were subsequently deleted; Druyun had significant involvement in the decisionmaking process that culminated in the deletion of the moving target requirements; Boeing was selected for award without consideration of its capabilities regarding the deleted requirements; and the agency is in the process of adding the previously-deleted requirements to Boeing's contract on a sole-source basis.

As noted above, where, as here, the record establishes that a procurement official was biased in favor of one offeror, our Office believes that the need to preserve the integrity of the procurement process requires that the agency demonstrate that the protester was not prejudiced by the procurement official's bias in order for our Office to deny the protest. Here, in defending against Lockheed Martin's protest, the agency has maintained that Druyun had no significant involvement or influence in the agency's decisionmaking process leading up to the May 2002 changes and, further, that only the ACC, the user community--not the acquisition community of which Druyun was a part--was in a position to make determinations regarding the

³⁰ The record includes an additional document suggesting that Druyun was involved in the SDB procurement. In responding to Lockheed Martin's protest to our Office, the Air Force forwarded to us a letter [deleted].

contract requirements. As discussed above, the record in this case does not provide persuasive support for either position.³¹

On this record, the agency has failed to demonstrate that Lockheed Martin was not prejudiced by Druyun's acknowledged bias. The protest is sustained.

RECOMMENDATION

The record indicates that, although the agency intends to add the phase II requirements on a sole-source basis to Boeing's SDD contract, the contract has not yet been so amended. Tr. at 235. In the context of all of the facts discussed above, along with the fact that contract performance of the phase II requirements has not yet begun, we recommend that the agency conduct a competitive procurement to meet the previously deferred phase II requirements.³²

With regard to the phase I requirements, Lockheed Martin notes that a substantial portion of the contract has already been performed; accordingly, Lockheed Martin requests that we recommend that Lockheed Martin be reimbursed for the proposal preparation costs it expended in competing for the SDD contract.³³ As explained below, we decline to recommend recovery of Lockheed Martin's proposal preparation costs at this time.

In reviewing the record submitted by the agency in response to Lockheed Martin's protest, counsel for Boeing expressed concern regarding potential conflict of interest issues relating to a Lockheed Martin employee, former Air Force Brigadier General [deleted]. Until [deleted] 2001, [deleted] was the [deleted], for the user community for the SDB program. In [deleted] 2001, [deleted] retired from the

³¹ We agree that the record does not establish that, but for Druyun's involvement, the May 2002 changes would not have been made or that, absent the changes, Lockheed Martin would have won the competition.

³² In light of the passage of time, it may be that offerors other than Lockheed Martin and Boeing have capabilities to meaningfully compete for these requirements; accordingly, our recommendation does not reflect any position on whether the competition should be limited to Lockheed Martin and Boeing. Rather, at this point, we defer to the agency's reasonable discretion to determine whether inclusion of other potential competitors is feasible and otherwise appropriate.

³³ We note that, because the source selection decision regarding the SDD contract was based on Boeing's and Lockheed Martin's performance under their respective CAD contracts, and that Lockheed Martin has already been compensated for its CAD performance, there is some question as to what additional costs, if any, would be properly recoverable.

Air Force and immediately thereafter began employment with Lockheed Martin. In [deleted] 2002, [deleted] was appointed [deleted] for Lockheed Martin's [deleted], where he was responsible for supervising Lockheed Martin's efforts to [deleted] and "regularly attended briefings and meetings with Air Force officials regarding the SDB program." Tr. at 537; Lockheed Martin's Comments on Agency Report, exh. 7, Declaration of [deleted], at ¶ 2. In light of his SDB-related responsibilities prior to retiring from the Air Force in [deleted] 2001, and his SDB-related role on behalf of Lockheed Martin after [deleted] 2002, GAO requested that he appear and testify at the hearing conducted in connection with this protest.

At the hearing before our Office, [deleted] testified that, before retiring from the Air Force, he requested and received what is referred to as a "30-day letter" regarding post-employment restrictions from the Air Force Staff Judge Advocate (SJA).³⁴ In that letter the SJA provided certain opinions and advice regarding the statutory provisions of 41 U.S.C. § 423 (2000) and 18 U.S.C. § 207(c), (f) (2000).³⁵ In addition, following the SJA's discussion of those statutes, the "30-day letter" stated:

Restrictions under other laws that have not been addressed in this opinion may apply to you (Attachment).³⁶ In particular, the facts contained in your letter suggest that the post-government employment restrictions of Title 18, United States Code, Section 207(a)(1) and/or Section 207(a)(2) may apply to you with respect to your employment with any company.³⁷ If you have any questions regarding conflict of

³⁴ In [deleted] letter to the SJA, requesting the "30-day letter," [deleted] stated: "In no case in the last year have I personally been involved with a source selection nor has anyone who reports to me directly been involved with a source selection." Letter from [deleted] to Air Force ([deleted] 2001) at 2.

³⁵ There does not appear to be any issue regarding [deleted] compliance with the requirements of 41 U.S.C. § 423 and 18 U.S.C. § 207(c), (f), which impose 1-year restrictions on certain activities.

³⁶ At the bottom of the letter, the following notation appeared: "Attachment: Pre- and Post-Employment Restrictions." At the GAO hearing, [deleted] testified "I do not recall getting an attachment [with the letter]." Tr. at 496.

³⁷ The provisions of 18 U.S.C. § 207(a)(1) impose a permanent restriction with regard to an officer or employee of the United States who, after termination of his or her employment with the United States, makes any communication intended to influence a United States government employee in connection with "a particular matter" in which the former officer or employee "participated personally and substantially as such officer or employee" and "which involved a specific party or specific parties at the time of such participation." Similarly, the provisions of 18 U.S.C. § 207(a)(2) impose a 2-year restriction with regard to an officer or employee of the United

(continued...)

interest or post-retirement provisions, you may contact us or your nearest installation staff judge advocate for assistance.

Letter from Air Force SJA to [deleted] ([deleted] 2001).

At the GAO hearing, [deleted] testified that, notwithstanding the above-quoted advice within the “30-day letter” that “Restrictions under other laws that have not been addressed in this opinion may apply to you” and that notwithstanding the specific reference to the restrictions of 18 U.S.C. § 207(a)(1), (a)(2), he was subsequently advised, orally, by the SJA “not to worry about it,” and that these provisions were only put into the letter to “Cover their butt.” Tr. at 495.³⁸

(...continued)

States who makes a communication intended to influence a United States government employee in connection with a “particular matter” which the former officer or employee “knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States,” and “which involved a specific party or specific parties at the time it was so pending.”

³⁸ In this regard, [deleted] testified as follows:

GAO: Then the next paragraph says “Restrictions under other laws that have not been addressed in this opinion may apply to you (attachment).” What did you think that sentence meant?

[deleted]: When I asked [the SJA] about that, my recollection of the conversation was that is a paragraph that we have to put in there to cover their—I don’t know how to put this politely.

GAO: You’re thinking the word “butt”?

[deleted]: Cover their butt because of the breadth of this code. He told me—I was advised not to worry about it.

GAO: So your interpretation was that this sentence had no application to you?

[deleted]: That’s correct, that once I got through the one year [restrictions imposed by 41 U.S.C. § 423 and 18 U.S.C. § 207(c) (f)], there were no other known restrictions.

Tr. at 494-95.

[deleted] also testified that, to his recollection, Lockheed Martin never requested that he identify the particular matters in which he was personally and substantially involved, or which were under his official responsibility during the period preceding his retirement from the Air Force, nor did Lockheed Martin raise the issue of his compliance with the requirements of 18 U.S.C. § 207(a)(1) and (a)(2) in any way. Tr. at 497-98.

Subsequently, at the GAO hearing, counsel for Boeing questioned [deleted] regarding attendance at an Acquisition Strategy Planning (ASP) meeting for the SDB program that was conducted by Druyun on April 10, 2001. [deleted] testified that he was not sure whether he attended this meeting, but he did recall attending a meeting with Druyun in which the small diameter bomb was discussed. With regard to that meeting, [deleted] testified, “I did not participate in that discussion.” Tr. at 500.

Following the GAO hearing, the agency produced a document titled “Acquisition Strategy Panel (ASP) Minutes[,] Small Diameter Bomb (SDB)[,] 10 April 2001, SAF/AQ Conference Room.” Agency’s Jan. 31, 2005 Document Production, at 1-3. Under the heading, “Major Discussion Items,” this document states: “The purpose of the ASP was to review the acquisition strategy for the Small Diameter Bomb program. These minutes will follow the sequence of the slides as presented, but will only address those slides where significant discussion occurred, or where action items were assigned.” ASP Minutes at 1. Following this statement, the following entries appear:

Slide 7: General [deleted] discussed the possibility of identifying weapon effectiveness as a Key Performance Parameter (KPP), in addition to loadout and interoperability. Given the stage of the program, however, it was determined that staying with just the two KPPs would be the best strategy.

....

Slide 25: . . . Gen [deleted] indicated that the Navy will not have internal carriage capabilities for several years and if the Navy determines that there is a need to integrate SDB on the F-14 or F-18, the external integration would not be significantly different than that of the F-15 or F-16.

....

Slide 28: Gen [deleted] reiterated that weapon effectiveness will remain a requirement, but will not be designated as a KPP.

....

Slide 31: Gen [deleted] expressed an interest in moving the Phase I schedule to the end of FY05, but realizes the funding and production ramp-rate are limiting an earlier production date.

....

Slide 38: Gen [deleted] indicated that a combined DT and OT for SDB will be moved to Eglin, and that there will be no duplication in OT of tests completed in DT.

ASP Minutes at 1-2.

Whether or not [deleted] violated the post-employment restrictions of 18 U.S.C. § 207 is not within the purview of our bid protest regulations, because 18 U.S.C. § 207 is a criminal statute and its interpretation and enforcement, and the interpretation and enforcement of related regulations, are matters for the procuring agency and the Department of Justice. Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132 at 4. Based on all of the above, however, we have concerns regarding the propriety of [deleted] involvement in Lockheed Martin's efforts to win the SDD contract; his allegation that the Air Force SJA told him "not to worry" about the post-employment restrictions imposed by 18 U.S.C. § 207(a)(1), (a)(2); and his statement that Lockheed Martin failed to discuss post-employment restriction issues with [deleted].

Accordingly, we recommend that the Air Force perform a thorough review of this matter and report its findings back to this Office. Pending our receipt of that review, we decline to recommend reimbursement of Lockheed Martin's proposal preparation costs. We will entertain a renewed request from Lockheed Martin regarding payment of such costs following our receipt of the Air Force review of this matter. However, we do recommend that Lockheed Martin be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. Lockheed Martin should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel