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Decision

Matter of: Lockheed Martin Aeronautics Company; L-3 Communications Integrated Systems L.P.; BAE Systems Integrated Defense Solutions, Inc.

File: B-295401, B-293401.2, B-295401.3, B-295401.4, B-295401.5, B-295401.6, B-295401.7, B-295401.8

Date: February 24, 2005

Marcia G. Madsen, Esq., Michael E. Lackey, Jr., Esq., David F. Dowd, Esq., Michael J. Farley, Esq., Monica A. Aquino, Esq., Patricia H. Becker, Esq., Mayer, Brown, Rowe & Maw, for Lockheed Martin Aeronautics Company; Paul W. Searles, Esq., and Sharon N. Freytag, Esq., Haynes and Boone, for L-3 Communications Integrated Systems L.P.; Drew A. Harker, Esq., Michael E. Ginsberg, Esq., Elizabeth Leise, Esq., Joseph M. Catoe, Esq., Arnold & Porter, and John S. Pachter, Esq., Jonathan D. Shaffer, Esq., and Sophia R. Zetterlund, Esq., Smith Pachter McWhorter & Allen, for BAE Systems Integrated Defense Solutions Inc., the protesters.

Richard B. Clifford, Jr., Esq., Lee P. Curtis, Esq., Kelly A. Cameron, Esq., Suzette W. Derrevere, Esq., and Emily C.C. Poulin, Esq., Perkins Coie, for The Boeing Company, an intervenor.

Bryan R. O'Boyle, Esq., Lt. Col. David Bell, Maj. Rebecca Vernon, Peter M. Ditalia, Esq., Bridget E. Lyons, Esq., and Maj. Tishlyn Taylor, 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

1. Where a senior procurement official who functioned as the source selection authority has acknowledged bias in favor of the awardee, and was materially involved in the evaluation of proposals, indicating during the evaluation process that she believed the awardee's technical ratings should be raised in various areas and that the protesters' technical ratings should be lowered in various areas, the protests are sustained based on the agency's failure to demonstrate that the senior official's acknowledged bias did not prejudice the protesters and that the integrity of the procurement process was not compromised.

2. Protests are sustained where, following submission of final proposal revisions, the agency reopened discussions in order to permit the ultimate awardee to address an aspect of its proposal that was contrary to instructions previously given by the agency during discussions, but failed to identify similar concerns with the proposals of the protesters.

DECISION

Lockheed Martin Aeronautics Company, L-3 Communications Integrated Systems, L.P., and BAE Systems Integrated Defense Solutions, Inc. protest the Department of the Air Force's award of a contract to The Boeing Company pursuant to request for proposals (RFP) No. F33657-99-R-0033 to perform various activities related to the avionics modernization upgrade program (AMP) for C-130 aircraft. The protesters maintain that Darleen Druyun, in her capacity as the Air Force's Principal Deputy Assistant Secretary for Acquisition, improperly manipulated the evaluation and source selection process in favor of Boeing.

We sustain the protests.

BACKGROUND

The protests challenge an evaluation and source selection process that took place between June 2000 and June 2001. As a procedural matter, our Office's timeliness rules generally preclude consideration of protests challenging agency actions, such as these, that took place in the relatively distant past. See Bid Protest Regulations, 4 C.F.R. § 21.2 (2004). Here, however, the protests are based on information first obtained by the protesters 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).¹

¹ 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 10-12. In connection with that April 2004 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 12, at 30. In
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Since the protesters had no reason to know of the information disclosed in those documents, we view the protests 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 10, Statement of Facts, at 3-4. 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. *Id.* In her supplemental statement of facts, signed by both herself and her personal 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 13, Supplemental Statement of Facts, at 2.

More specifically, with regard to the C-130 avionics upgrade procurement, Druyun stated:

The defendant was the selection authority in 2001 for the C 130 AMP which was an Air Force procurement of more than four billion dollars to upgrade the avionics of C-130 aircraft. The defendant selected Boeing from four competitors, and now acknowledges that she was

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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 14, 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 13-14. 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.

influenced by her perceived indebtedness to Boeing for employing her future son-in-law and daughter. The defendant believes that an objective selection authority may not have selected Boeing.

Id. at 3.²

The C-130 Procurement

In April 2000, the agency issued RFP No. F33657-99-R-0033, seeking proposals to perform various activities associated with the C-130 AMP.³ Pursuant to the agency's source selection plan, offerors were advised that proposals would be evaluated on the basis of the following equally-weighted factors: mission capability, past performance,⁴ cost/price,⁵ and proposal risk. With regard to mission capability, the

² In addition to the statements quoted above, documents associated with the October 2004 criminal proceedings reflect Druyun's statements that, during 2000, Druyun negotiated a settlement with Boeing concerning "the C-17 H22 contract clause," which occurred at the time Druyun was seeking employment at Boeing for her daughter's boyfriend, and that Druyun's "decision to agree to a payment of approximately 412 million dollars to Boeing in connection with the C-17 H22 clause was influenced by Boeing's assistance to the defendant." Id. at 3-4.

³ The C-130 AMP is intended to modernize the C-130 avionics in approximately 500 aircraft "to meet the latest standards for performance and safety and to lower the total cost of ownership." Agency Report, Tab 16, Source Selection Plan, at 4. Specifically, the program will "increase survivability of the U.S. military's C-130 fleet, while complying with Global Air Traffic Management (GATM) requirements and the Air Force Navigation and Safety (Nav/Safety) Master plan." Id. Additional equipment needed to meet night vision imaging system requirements and to improve the C-130's precision approach and landing capability will also be installed, as well as interfaces necessary to integrate "Real Time Information in the Cockpit." Id. Finally, the program will lower the overall ownership cost of the C-130 fleet by generating a reduction of cockpit crew manning, and "by implementing a cost effective and open architecture to increase Reliability, Maintainability, and Sustainability (RM&S) of the avionics suite." Id.

⁴ Possible past performance ratings were "high confidence" (exceptional), "significant confidence" (very good), "confidence" (satisfactory), "unknown confidence" (neutral), "little confidence" (marginal), and "no confidence" (unsatisfactory). Agency Report, Tab 6, at 108.

⁵ With regard to cost/price, offerors were advised that the agency would calculate a most probable total ownership cost (MPTOC) for each proposal that incorporated various projected costs, including those associated with engineering manufacturing development, production, and installation. Agency Report, Tab 16, at 32.

following subfactors were listed in descending order of importance: management, system development, software, production and installation, and small business subcontracting. Offerors were advised by the RFP that, in evaluating the mission capability subfactors, the agency would assign a color rating and risk assessment for each subfactor.⁶ In conjunction with the color ratings and risk assessments, the agency employed what it referred to as a “star convention” (not disclosed in the RFP), whereby the agency assigned varying numbers of “stars” to evaluated strengths and weaknesses in order to establish the relative significance of those strengths and weaknesses. Agency Report, Tab 8, at 1.⁷

Initial proposals were submitted during the summer of 2000 by Lockheed, Raytheon,⁸ BAE, and McDonnell Douglas Corporation, a wholly-owned subsidiary of Boeing.⁹ Upon receipt, the source selection evaluation team (SSET) began its evaluation of the proposals and, thereafter conducted discussions by preparing and providing “evaluation notices” to the offerors concerning various aspects of their proposals.

After the evaluations had begun, there were a series of meetings between Druyun and the SSET to discuss the ongoing evaluation. Specifically, during the period leading up to submission of final proposal revisions (FPR), Druyun met with some or all of the evaluators on September 15, October 16, December 5, December 21, and January 23. Agency Report, Box 28, Notebooks 1-4.

On February 13, 2001, the contracting officer requested submission of FPRs, which all four offerors submitted on March 2. On March 9, the contracting officer reopened discussions and a second round of FPRs was requested; the second FPRs were submitted on March 19. On April 9, the SSET briefed Druyun regarding its evaluation

⁶ Possible color ratings were “blue” (exceptional), “green” (acceptable), “yellow” (marginal), and “red” (unacceptable); possible risk assessments were “low,” “moderate,” and “high.” Agency Report, Tab 6, at 15.

⁷ This concept augmented the color ratings and risk assessments assigned for each subfactor. In the context of such ratings, the evaluators assigned three stars to an “exceptional” strength, two stars to an “outstanding” strength, and one star to a “significant” strength. Similarly, the evaluators assigned three stars to a weakness that could create “significant disruption,” two stars to a weakness with “some risk potential,” and one star to a weakness with “little risk potential.” Agency Report, Tab 8, at 1-2.

⁸ This proposal was submitted by Raytheon Company Aircraft Integration Systems. L-3 Communications has submitted uncontested documentation indicating that it is the complete successor-in-interest to this business entity. L-3 Communications Protest, Nov. 12, 2004, attach. 1.

⁹ Technical proposals addressing the mission capability factors were submitted on June 27; cost proposals were submitted on August 28. Agency Report, Tab 8, at 2.

of the final FPRs. During the April 9 meeting, Druyun expressed various concerns regarding the evaluation; following that meeting, changes were made to the evaluations. On April 23, the SSET again briefed Druyun on its evaluation of FPRs. On June 4, Druyun selected Boeing for award. Agency Report, Contracting Officer's Statement at 3.¹⁰

As discussed above, Druyun's admissions regarding her bias in favor of Boeing were released to the public on or about October 1, 2004. Thereafter, the three protesters filed various agency-level protests with the Air Force, challenging the agency's actions on this and other procurements on the basis of the information disclosed by Druyun in connection with her criminal proceedings.¹¹ By letter to each protester dated November 9, the Assistant Secretary of the Air Force for Acquisition advised the protesters that "The Air Force is of the opinion that the protest is more appropriately considered by the Government Accountability Office (GAO)" and that "the Air Force will not decide the protest." Agency Report, Tab 3. The protests were filed with our Office on or about November 10.¹²

DISCUSSION

The protesters maintain that Druyun's recently disclosed bias in favor of Boeing and her specific identification of the C-130 procurement as one in which "an objective selection authority may not have selected Boeing," along with the information previously disclosed to the protesters regarding the agency's purported bases for rejecting their proposals, demonstrates that their proposals were not evaluated in a fair and unbiased manner.

¹⁰ On July 30, two contracts were awarded to Boeing. One contract was for engineering and manufacturing development (EMD) with a value of \$453 million and included production/installation price commitments for years 2004-2016, with a "potential total value of \$1.873 billion." Agency Report, Contracting Officer's Statement at 3. Concurrent with award of the EMD contract, an indefinite-delivery/indefinite-quantity (ID/IQ) contract was awarded to Boeing as a vehicle to acquire separately-funded C-130 aircraft modifications and services. The ceiling for the ID/IQ contract is \$1 billion. Id.

¹¹ The agency-level protests were filed within 10 days of the time the protesters reasonably obtained complete disclosure of the information contained in the documents associated with Druyun's criminal conviction.

¹² Lockheed's protest was filed on November 10; L-3 Communication's protest was filed on November 12; BAE's protest was filed on November 15. By notice dated November 15, our Office advised the parties that we were consolidating the protests. Thereafter, in response to the agency's ongoing production of documents, which extended through December 31, various supplemental protests were filed.

The agency responds that, notwithstanding Druyun's acknowledged bias in favor of Boeing, the award to Boeing was proper because "there is no evidence that Mrs. Druyun influenced the SSET." Agency Report, Legal Memorandum, at 11. Overall, the agency maintains that "the evaluation process was conducted properly and in accordance with the evaluation criteria." *Id.* As discussed below, the record does not support the agency's assertions.

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 The Department of the Air Force--Request for Recon., 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 evaluation and selection of Boeing.

There can be no dispute that Druyun employed a forceful management style; at the hearing conducted by GAO in connection with this protest,¹³ there was significant testimony to this effect.¹⁴ Specifically, in the C-130 AMP procurement, Druyun left no

¹³ In resolving this protest, our Office conducted a hearing, on the record, at GAO headquarters in Washington, D.C. on January 25-27, 2005. During the hearing, testimony was provided by nine government witnesses. Citations to the separate transcripts provided for each of the 3 days are "Tr1. at ___," "Tr2. at ___," and "Tr3. at ___," respectively.

¹⁴ She was "demanding" and "intimidating," Tr2. at 297, 299; she communicated "forcefully" and "made . . . sarcastic remarks," Tr3. at 25; she "came across as angry a
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doubt as to who was in control from the outset. Before the evaluators had even completed their initial review of proposals, Druyun requested that they come to Washington, D.C. to discuss the “status” of their evaluations. Tr1. at 51-52. This meeting was subsequently referred to as the “15 September massacre.” Agency Report, Compact Disc 24 of 24, [deleted] E-mail. At the GAO hearing, the SSET chair elaborated on this characterization, stating: “Some of these folks had never worked with [Druyun] before. They didn’t expect blood on the floor after the meeting. I kind of did.” Tr1. at 207.

In this context, we reviewed the contemporaneous record documenting Druyun’s involvement in the evaluation process. Contrary to the agency’s assertion that “there is no evidence that Mrs. Druyun influenced the SSET,” the record is replete with documentation regarding her influence. More specifically, the contemporaneous notes and documents regarding the various meetings between Druyun and members of the various evaluation teams leading up to submission of FPRs reflect Druyun’s repeated questioning of the evaluators’ ratings, and expressions of her belief that various aspects of Boeing’s proposal should be rated more favorably and that various aspects of the protesters’ proposals should be rated less favorably.

For example, with regard to the evaluation of Boeing’s proposal under the [deleted] subfactor, the record shows that, prior to a December 5 meeting with Druyun, the SSET had rated Boeing’s proposal as “green,” based on Boeing’s reliance on a system referred to as [deleted].¹⁵ At the December 5 briefing, the record shows that Druyun asked the evaluators “What did you give to Lockheed [in this area?];”¹⁶ Druyun then stated, “Not convinced this [Boeing’s proposal] isn’t a Blue.” Agency Report, Book 28, Notebook 1, Briefing to Druyun, Dec. 5, 2000, at 12; Tr2. at 315-17. Boeing’s proposal rating was subsequently raised to blue in this area. Tr2. at 317. Similarly, at the December 21 briefing to Druyun, the evaluators had assessed Boeing’s proposal with regard to [deleted] as a “one-star” strength. Agency Report, Box 28, Notebook 1, Briefing to Druyun, Dec. 21, 2000, at 51. The record shows that Druyun expressed the opinion that “[the] user [will] see as a 2[-star] strength.” Agency Report, Box 28, Briefing to Druyun, Jan. 23, 2001, at 25; Tr2. at 176-77, 217. Subsequently, this aspect

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large percentage of the time,” Tr1. at 75; “[i]f you showed any weakness . . . she went after it,” she “questioned everything,” and “[s]he didn’t trust [that] you did your job.” Tr1. at 206.

¹⁵ The portion of Boeing’s proposal referred to as [deleted] related to an [deleted]. The lead evaluator for the [deleted] explained that [deleted].

¹⁶ The evaluators had rated Lockheed’s proposal “blue” and “low” risk in this area, based on its reliance on an approach referred to as [deleted]. Agency Report, Book 28, Briefing to Druyun, Dec. 5, 2000, at 8.

of Boeing's proposal was rated as a "two-star" strength, although the language describing the strength did not change. Agency Report, Tab 18D, at 14.

The record similarly contains documentation of Druyun's involvement in the evaluators' assessments of Lockheed's proposal with regard to its approach to [deleted]. Specifically, during the SSET briefing to Druyun on December 21, the SSET described Lockheed's proposal of its [deleted] as an "exceptional approach" that reflected a "superb understanding of AF [Air Force] requirements," identifying four separate strengths. Agency Report, Box 28, Notebook 1, Briefing to Druyun, Dec. 21, 2000, at 40.¹⁷ The record shows that Druyun directed that the four separate strengths be combined into a single strength. *Id.*¹⁸ Again, with regard to the evaluation of Lockheed's proposal under the [deleted] subfactor, the SSET had initially rated the proposal "blue" with "low" risk. Druyun questioned this rating, asking "Are we sure this is low [risk]?" Agency Report, Box 28, Notebook 2, Briefing to Druyun, Sept. 15, 2000, at 33; Tr2. at 141. At the next briefing to Druyun a month later, Lockheed's proposal was rated "moderate" risk, even though the charts contained the same strengths and weaknesses as at the prior briefing. Agency Report, Box 28, Notebook 2, Briefing to Druyun, Oct. 16, 2000, at 72. Again, with regard to the evaluation of past performance, the performance risk assessment group (PRAG) initially assigned a rating of [deleted] to Lockheed's proposal. Agency Report, Compact Disc 1 of 24, Dec. 5 Update Brief Folder, at slide 216.¹⁹ The lead evaluator for the past performance factor testified that, during the December 5 meeting with Druyun, "literally the only sentence spoken to [me] the entire time I was at her table," was a directive that he review Lockheed's performance on two specific contracts—identified as [deleted] and [deleted]. Tr3. at 182-83.²⁰ Thereafter, Lockheed's past performance rating was lowered to [deleted]. Agency Report, Tab 8, at 88.

With regard to Raytheon's proposal, the record shows that its proposal of [deleted] under the [deleted] subfactor was initially evaluated by the SSET as "blue" with "low" risk, and assigned a "three-star" strength. Agency Report, Box 28, Notebook 1, Druyun Briefing, Dec. 21, 2000, at 1, 80. During the SSET briefing to Druyun on December 21, Druyun stated she was "not convinced it's a blue." *Id.* Similarly, Druyun recommended that various aspects of Raytheon's proposal that had been

¹⁷ Specifically, the SSET briefing identified one "three-star" strength, two "two-star" strengths, and one "one-star" strength. *Id.*

¹⁸ The contracting officer's contemporaneous notes reflect Druyun's comment that they should "make [the lower three strengths] a subset not separate stars." *Id.*

¹⁹ The contemporaneous documentation elaborates: [deleted].

²⁰ The lead evaluator for the PRAG testified that Lockheed's performance was [deleted] rated with regard to these two contracts. Tr. at 170-71, 183-84.

identified as “two-star” weaknesses should be changed to “three-star” weaknesses, and that one of its risk ratings should be increased from “moderate” to “high.” Agency Report, Box 28, Notebook 2, Briefing to Druyun, Oct. 16, 2000, at 1, 44; Power Point Slides, at slides 51, 87.

With regard to BAE’s proposal under the [deleted] subfactor, the SSET initially evaluated BAE’s proposal as “blue” with “low” risk. At the September 15, 2000 briefing, Druyun expressed disagreement, stating she “wouldn’t give them [a] blue [rating]—maybe green.” Agency Report, Box 28, Notebook 2, Briefing to Druyun, Sept. 15, 2000, at 34. Similarly, under the [deleted] subfactor, Druyun suggested during the December 21 briefing that the evaluation record “list as a weakness” an aspect of BAE’s proposal related to [deleted]. Agency Report, Box 28, Notebook 1, Briefing to Druyun, Dec. 21, 2000, at 28. Finally, the record reflects that Druyun summarily rejected a BAE [deleted] proposal as a “non-starter.” Agency Report, Box 28, Notebook 1, Briefing to Druyun, January 23, 2001, at 20.²¹ Nonetheless, Druyun had no objection to what appears to be a similar [deleted] aspect of Boeing’s proposal to provide [deleted]. Agency Report, Box 28, Notebook 1, Briefing to Druyun, Dec. 21, 2000, at slide 20.

On February 13, 2001, following completion of the agency’s discussions with the offerors, the contracting officer requested that FPRs be submitted by March 2. On February 23, while the evaluation was still ongoing, the contracting officer sent the evaluators an e-mail, carrying the subject heading “Database Cleanup/Organization,” directing the evaluators to “clean up” and “delete” various portions of the evaluation record. Specifically, the e-mail stated:

1. Purge EZSource [source selection database] E-Mail[.]
2. Start populating EZSource Lessons Learned file.
3. Clean up the comments section of all the forms. For example, delete any comments where evaluators/advisors have suggested ratings (color or risk) on the analysis worksheets or other forms. If the rating doesn’t

²¹ BAE’s proposal stated that it “aims to [deleted]” and “is prepared to [deleted],” offering to [deleted]. Id.

match the suggestion, we have protest fodder. Delete any derogatory or exceedingly glowing comments.^[22]

Agency Report, Compact Disc 23 of 24, [deleted] E-mail.

The record contains nothing to suggest that the evaluators failed to follow the contracting officer's direction with regard to deletion of the evaluation record.

On March 2, the offerors submitted their FPRs. On March 9, the contracting officer reopened discussions and requested a second round of FPRs. At the GAO hearing, the contracting officer unambiguously testified that discussions were reopened to permit Boeing to address a portion of its cost proposal that failed to comply with instructions the agency had previously given the offerors.²³ No other substantive questions were asked of any other offeror during these discussions. However, during the GAO hearing, agency witnesses identified specific aspects of the protesters' final proposals that should have been brought to their attention. For example, in its March 2 FPR, Lockheed increased the number of labor hours it proposed to provide under the [deleted] subfactor. In evaluating this aspect of Lockheed's FPR, the agency assessed a weakness due to Lockheed's [deleted]. Agency Report, Compact Disc 22 of 24, EZSource Database, at 22; Tr1. at 91, 96-97. The lead evaluator for the [deleted] subfactor testified: "We did not have an

²² At the GAO hearing, the contracting officer testified that she meant for the evaluators to delete only "inaccurate" comments, but could not recall ever clarifying her instructions in this regard. Tr2. at 115-16. Even if we were to accept the contracting officer's post-protest explanation regarding her purported intent, we fail to understand why the directions she gave were provided while the evaluation was still ongoing and, presumably, no source selection decision had been made.

²³ Specifically, the contracting officer testified:

Q. Did you have occasion to reopen discussion[s] on the C-130 AMP source selection?

A. I did have occasion to reopen discussions on March the 9th.

Q. Why did you reopen them?

A. I reopened discussions because the proposal submitted by Boeing, included a [deleted]. That was contrary to instructions that we had given all the offerors during discussions. And so I reopened in order to take care of that problem.

Tr2. at 96-97.

opportunity to issue an evaluation notice. I believe discussions were terminated. Had I had that available, I would have done that obviously.” Tr1. at 91-92.²⁴

Similarly, the costs proposed by BAE and Lockheed in their FPRs reflected [deleted] that appear very similar to Boeing’s proposed [deleted]—a “problem” for which the agency reopened discussions to permit Boeing to address. The record shows that the cost evaluation team increased Lockheed’s evaluated price by [deleted] and BAE’s by [deleted], without giving these offerors an opportunity to discuss the matter. Agency Report, Box 28, Notebook 3, Briefing to Druyun, Apr. 23, 2001, at 19-20; Tr3. at 88-89.

Following the second submission of FPRs on March 19, the FPRs were again evaluated and, on April 9, the SSET briefed Druyun regarding the evaluation. At that briefing, Druyun gave various directions that resulted in changes to the final evaluation record. Specifically, the proposal analysis report (PAR) states: “During the final [April 9] briefing to the SSA the cost team was directed to review their analysis to assure its accuracy.” Agency Report, Tab 8, at 106. After receiving that direction, the cost team determined that certain Lockheed costs “should have been added back into the MPTOC,” and “found an overcharge in the Boeing estimate [of a cost item] that should have been subtracted.” Id. at 106-07. Overall, following the directions given at the April 9 SSA briefing, Boeing’s MPTOC was basically reduced from [deleted] to [deleted], and Lockheed’s was increased from [deleted] to [deleted].²⁵ Id. at 107. After these changes, the PAR described the difference between the offerors’ respective MPTOCs as [deleted]. Id.

On April 23, the SSET provided a final briefing to Druyun, referred to as an “Action Item Closeout” meeting. Agency Report, Box 28, Notebook 3, SSA Decision Brief, Apr. 23, 2001. In addition to the revisions to the offerors’ MPTOCs, discussed above, an item discussed during this “Closeout” meeting was the offerors’ approaches to [deleted]. The SSET had summarized Boeing’s approach as “[deleted] which tends to induce problems [deleted]” and further stated, “[deleted].” Id. at 5. The contracting officer testified that, at Druyun’s direction, the above-quoted language was crossed out of the evaluation documentation and replaced with the following words: “Boeing will work out details post award.” Id.; Tr2. at 200-01.²⁶ It is clear that no changes

²⁴ This evaluator also maintained that he was not aware that discussions had been reopened following the initial submission of FPRs on March 2. Tr1. at 94.

²⁵ As noted above, MPTOC included contractor costs associated with engineering manufacturing development, production, and installation. Additionally, the MPTOC reflected other ownership costs that will be incurred by the government, including “20 years steady state” operation and support, along with government furnished property, information, supplies and services. Agency Report, Tab 16, at 32.

²⁶ In evaluating this aspect of Raytheon’s proposal, the SSET stated that Raytheon’s proposed approach “does improve [deleted].” Agency Report, Box 28, Notebook 3, (continued...)

had been made to Boeing's proposal between the time the evaluators determined that Boeing's approach "tends to induce problems," and the time Druyun directed the record to read, "Boeing will work out details post award," and the record contains no further explanation regarding the basis for this change. Further, at the time this change was directed, presumably, no awardee had been selected. Tr. at 201. On June 4, 2001, Druyun formally selected Boeing for award.

Based on the record discussed above, we reject the agency's assertion that "there is no evidence that Mrs. Druyun influenced the SSET." The record establishes that Druyun specifically directed various changes to the evaluation record and repeatedly questioned the evaluators' ratings in a manner that reasonably suggested Boeing's technical ratings should be higher and the protesters' technical ratings lower. Similarly, following Druyun's direction that the cost evaluators review their analysis, Boeing's MPTOC was decreased and Lockheed's MPTOC was increased.

We similarly reject the agency's assertion that "the evaluation process was conducted properly." As discussed above, the agency clearly failed to treat offerors fairly with regard to discussions. In this regard, the FAR provides that, in conducting discussions, agency personnel "shall not engage in conduct that . . . favors one offeror over another. FAR § 15.306(e)(1); see also Martin Elecs., Inc., B-290846.3, B-290846.4, Dec. 23, 2003, 2003 CPD ¶ 6; Chemonics Int'l., Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61. Here, the agency expressly acknowledged that it reopened discussions after FPRs were submitted in order to permit Boeing to "take care of [a] problem"—yet failed to discuss similar problems with the protesters.

As discussed 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 all three protests, the agency first maintains that the record supports the agency's selection of Boeing and, accordingly, that the protesters were not prejudiced by Druyun's acknowledged bias. Alternatively, the agency asserts that, if our Office concludes that the record fails to support award to Boeing, we should conclude from the record provided that Lockheed was the appropriate awardee;²⁷ thus, the agency maintains that BAE and L-3 Communications were not prejudiced by Druyun's acknowledged bias.

(...continued)

Briefing to Druyun (Apr. 23, 2001). Similarly, with respect to this aspect of BAE's proposal, the SSET stated that it "does the most for aircraft [deleted] and it is least likely to induce problems [deleted]." Id.

²⁷ The record does not reflect any contemporaneous ranking of the offerors.

As discussed above, the contracting officer expressly directed the evaluators to destroy various portions of the evaluation record while the selection process was ongoing; accordingly, there is no certainty that GAO has received the complete contemporaneous evaluation record. Nonetheless, the existing record we received provides multiple examples of Druyun's pervasive influence throughout the source selection process, including specific instances where she either expressly or implicitly directed that the ratings of all three protesters, along with that of the awardee, be revised. Further, the agency failed to conduct meaningful discussions with all of the offerors; we will not speculate on the impact meaningful discussions would have had on the relative standing of the offerors. Given what may well be an incomplete evaluation record, evidence of Druyun's influence throughout the source selection process, and the flawed discussions, we have no basis to determine which of the four proposals should have been selected for award. The agency simply has failed to establish that any one of the protesters was not prejudiced.

The protests are sustained.

RECOMMENDATION

In situations where, as here, we find fundamental procurement flaws, including the failure to conduct meaningful discussions, our Office ordinarily recommends that the agency reopen negotiations with all competitive range offerors, conduct meaningful discussions, request final revised proposals, and evaluate those final submissions in a fair and unbiased manner. See, e.g., Martin Elecs., supra. Here, however, the contract was awarded more than 3 years ago, and performance has been ongoing since that time.

The agency asserts that, because it has already obligated \$500 million of the program's approximately \$1 billion value and Boeing has been performing the contract for more than 3 years, the agency is "committed to [Boeing's] solutions to the avionics modernization." Agency's Post-Hearing Comments at 25. The agency also states that it does not have sufficient technical data rights under the Boeing contract to conduct a reprocurement of the entire contract. Tr3. at 232-34, 237-41.²⁸ Additionally, the agency maintains that termination of Boeing's contract would cost approximately \$150 million, that the complete reprocurement of the program would delay implementation significantly, and that this significant delay would negatively impact the C-130's ability to fly in certain portions of worldwide airspace, including Europe, Southwest Asia, Iraq, and Afghanistan. Tr3. at 232; Agency's Post-Hearing Brief at 25.

²⁸ The agency acknowledges that competition would be feasible for the installation phase of the contract. Tr3. at 239.

In response, the protesters maintain that preserving the integrity of the procurement process requires reopening of the competition, and further maintain that performance of the contract to date is behind schedule. In this regard, the record shows that, although contract performance has been ongoing for more than 3 years, the contract performance period is currently scheduled to extend through fiscal year 2011. Tr3. at 234.

As noted above, the agency has acknowledged that recompetition of the installation requirements currently within Boeing's contract is feasible. Accordingly, we recommend, that the agency conduct a recompetition of those requirements. In the event an offeror other than Boeing is selected to perform the recompleted requirements, Boeing's contract should be appropriately modified.

In light of the facts presented, and taking into consideration the best interests of the taxpayer, as well as national security concerns, we are reluctant to recommend recompetition of the entire contract effort. We do, however, have some concern that the Air Force's position regarding recompetition of the entire contract was forged in the heat of litigation, and may not reflect a completely objective review. Accordingly, we recommend that the agency conduct, and document, a thorough analysis of the competing concerns with regard to recompetition of the entire contract, and that this analysis specifically include consideration of the quality of Boeing's performance to date, and the costs associated with reimbursement of the protesters' proposal preparation costs.²⁹ The agency's documentation of its analysis should be provided to our Office. In the event the agency determines that the competing factors preclude recompetition of the entire contract effort, or has failed to reach any determination on this issue within 60 days after receipt of this decision, we recommend that each of the protesters be reimbursed the costs incurred in preparing and submitting their proposals.

Finally, we recommend that the protesters be reimbursed their costs of filing and pursuing this protest, including reasonable attorneys' fees. The protesters should submit their 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. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

²⁹ In performing its analysis, the agency should obtain information regarding the protesters' proposal preparation costs to facilitate as accurate an analysis as possible.