

GAO

Testimony
Before the Subcommittee on Airland,
Committee on Armed Services,
U. S. Senate

For Release on Delivery
Expected at 2:00 p.m. EDT
Thursday, April 14, 2005

AIR FORCE PROCUREMENT

Protests Challenging Role of Biased Official Sustained

Statement of Daniel I. Gordon, Managing Associate General
Counsel for Procurement Law





Highlights of [GAO-05-436T](#), a testimony to the Airland Subcommittee, Senate Committee on Armed Services

Why GAO Did This Study

Darlene Druyun, a former high-ranking Air Force procurement official convicted of violating a conflict of interest statute, admitted to bias in favor of The Boeing Company on various procurements. GAO subsequently received protests from other firms challenging the alleged improper influence of Mrs. Druyun regarding contracts awarded by the Air Force under the small diameter bomb program and the C-130 avionics modernization upgrade program.

The Competition in Contracting Act of 1984 provides statutory authority for GAO's bid protest function. Consistent with standard practices, GAO reviewed all available documentation, held hearings to receive testimony from witnesses, considered arguments from all interested parties, and issued decisions on each of the protests.

What GAO Recommends

GAO recommended that the Air Force recompetete the installation phase of the C-130 contract. GAO also recommended that the Air Force conduct a thorough analysis of the possibility of recompeteting the entire contract effort.

As to the small diameter bomb, GAO recommended that the Air Force conduct a competitive procurement for its moving target requirement.

www.gao.gov/cgi-bin/getrpt?GAO-05-436T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Daniel I. Gordon at 202-512- 8219 or gordond@gao.gov

AIR FORCE PROCUREMENT

Protests Challenging Role of Biased Official Sustained

What GAO Found

The Federal Acquisition Regulation (FAR) provides that 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. The documents supporting Mrs. Druyun's criminal conviction establish that she was biased in favor of Boeing. Where, as here, the record establishes that a procurement official was biased in favor of one offeror, the need to maintain the integrity of the procurement process requires that GAO sustain the protests unless there is compelling evidence that the bias did not prejudice the protesters.

In light of the admission by Mrs. Druyun that she was biased in favor of Boeing, we sustained the protests challenging the C-130 contract award and the protest challenging the small diameter bomb because the Air Force failed to show that her bias did not affect the contract award decisions, or otherwise prejudice the protesters.

In the case of the C-130, the record established that Mrs. Druyun functioned as the lead procurement official throughout the procurement. GAO rejected the Air Force's assertion that there was no evidence that Mrs. Druyun influenced the source selection evaluation team. Similarly, in light of the failure to treat offerors fairly during contract negotiations, GAO rejected the Air Force's assertion that the evaluation process had been conducted properly. Finally, because (1) the contracting officer directed the evaluators to destroy portions of the evaluation record, (2) the agency failed to have meaningful discussions with all of the offerors, and (3) the evidence showed Druyun's biased influence throughout the source selection process, GAO could not reasonably determine which of the four proposals should have been selected for award. The record therefore failed to establish that any one of the protesters was not prejudiced as a result of the various procurement flaws. Accordingly, GAO sustained the C-130 protests.

In the case of the small diameter bomb protest, the position of the Air Force was that the protester was not prejudiced by Mrs. Druyun's acknowledged bias in favor of Boeing because she "did not play a significant role" in the decision to change technical requirements. Contrary to the position of the Air Force, however, the record showed that Mrs. Druyun was significantly involved in the decisionmaking process that culminated in changes to technical requirements and the deletion of related evaluation criteria. In light of Mrs. Druyun's acknowledged bias in favor of Boeing and GAO's conclusion that she was materially involved in the decisionmaking process, GAO concluded that the record failed to establish that Druyun's bias did not prejudice the protester. Accordingly, GAO sustained the protest.

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to be here today to discuss the bid protest decisions recently issued by the Government Accountability Office (GAO) in response to protests challenging the actions of the Air Force under two programs—the C-130 avionics modernization upgrade (AMP) program and the small diameter bomb program. The protests were based on information disclosed by Darlene Druyun, formerly the Air Force’s Principal Deputy Assistant Secretary for Acquisition, in connection with her October 2004 criminal conviction for violation of the statutory conflict of interest provisions codified at 18 U.S. C. § 208(a) (2000).

The Competition in Contracting Act of 1984 (CICA) provides statutory authority for GAO’s bid protest function. GAO has issued implementing regulations establishing the procedural framework for our bid protest forum in Title 4, Part 21, of the Code of Federal Regulations. GAO provides an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts. Our procedures provide all interested parties—the protester, the awardee and the contracting agency—an opportunity to present their positions prior to GAO’s resolution of the protest.

GAO’s bid protest decisions differ from the reports GAO issues in connection with its program audits and reviews. In this regard, our protest decisions do not address broad programmatic issues such as whether or not a weapons program is being managed effectively or consistent with best practices; instead, our bid protest decisions address specific allegations raised by unsuccessful offerors challenging particular procurement actions as contrary to procurement laws and regulations. Our protest decisions are necessarily limited to the record as we developed it, largely shaped by the allegations raised by the protesters and the responses but forward by the agency and awardee.

With that background, my testimony today will summarize our two recently issued decisions concerning allegations of improper influence by Darlene Druyun. Our testimony is based on the public version of our decisions. A limited amount of information that is proprietary to the protesters, source selection sensitive, or law enforcement sensitive has been redacted from these decisions, but none of the redacted information is critical to understanding the decisions.

The Protest Decision Regarding the C-130 Avionics Modernization Program (AMP)

Background

As was widely publicized, in October 2004 Darleen Druyun pled guilty to violating the conflict of interest provisions of 18 U.S.C. § 208(a) based on the fact that she engaged in employment negotiations with The Boeing Company while she was negotiating on behalf of the Air Force for the lease of 100 Boeing KC 767A tanker aircraft. In addition to her employment negotiations, documents submitted by Druyun in connection with the criminal proceedings establish that, in 2000, Druyun contacted Boeing personnel to request that Boeing provide employment for both Druyun's daughter and the daughter's boyfriend (who subsequently became Druyun's son-in-law). In response to these requests, Boeing created a position for Druyun's daughter and hired both her daughter and future son-in-law in the fall of 2000. In the documents filed in the criminal proceedings, Druyun further states that her decisions in matters affecting Boeing were "influenced by her perceived indebtedness to Boeing for employing her future son-in-law and daughter," and that with regard to the contract awarded in the C-130 AMP procurement, "an objective selection authority may not have selected Boeing."

Following Druyun's disclosures in October 2004, agency-level protests were filed at the Air Force by the three offerors who unsuccessfully competed for the C-130 contract: Lockheed Martin Aeronautics Company, L-3 Communications Integrated Systems, (the successor-in-interest to Raytheon Company Aircraft Integration Systems), and BAE Systems Integrated Defense Solutions, Inc. The Assistant Secretary of the Air Force for Acquisition subsequently advised each of the protesters that "the Air Force is of the opinion that the protest is more appropriately considered by the Government Accountability Office," and that "the Air Force will not decide the protest." Each of the companies subsequently filed protests with our Office maintaining that Druyun's recently disclosed bias in favor of Boeing, along with the information previously disclosed to the protesters regarding the agency's purported bases for rejecting their proposals, demonstrated that their proposals were not evaluated in a fair and unbiased manner.

In response to the protests, the Air Force argued 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 [source selection evaluation team]" and that, overall, "the evaluation process was conducted properly and in accordance with the evaluation criteria."

The Legal Standard

The Federal Acquisition Regulation (FAR), § 3.101-1, provides that:

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.

Where, as was the case here, the record establishes that a procurement official was biased in favor of one offeror, we believe that the need to maintain the integrity of the procurement process requires that we sustain the protests unless the agency demonstrates that the bias did not affect the contract award decision—in legal terms, that the bias did not prejudice the protesters.

GAO's Review of the Record

As discussed above, the documents supporting Druyun's criminal conviction establish that she was biased in favor of Boeing. In reviewing the protest allegations, GAO conducted a 3-day hearing on the record during which testimony was provided by nine government witnesses. The record developed by GAO, including the hearing testimony, established the following key points. First, Druyun functioned as the lead procurement official throughout this procurement and employed a forceful management style. In this particular procurement, she left no doubt about who was in control from the outset. Before the evaluators had even completed their initial proposal review, Druyun requested that they come to Washington, D.C. to discuss the "status" of their evaluations; this meeting was subsequently referred to as the "15 September massacre." From September 15, 2000 through the first request for final proposal revisions in February 2001, Druyun had the evaluators come to Washington five times to brief her on the ongoing evaluations; during these briefings, Druyun expressly or implicitly directed multiple changes to the evaluators' ratings, many of

which favored Boeing. In our decision, we identify specific examples of Druyun's directions regarding each of the offerors' proposals.

Also, the record shows that following the request for final proposal revisions, but before the source selection process was complete, the contracting officer sent an e-mail to a recipient list that included virtually everyone involved in the source selection process, directing that the recipients "clean up" and "delete" various portions of the evaluation record. Specifically, this e-mail directed the recipients to "delete any comments where evaluators/advisors have suggested ratings," explaining that "[i]f the rating doesn't match the suggestion, we have protest fodder." The e-mail also specifically directed the evaluators to "[d]elete any derogatory or exceedingly glowing comments."

The first round of final proposal revisions was submitted on March 2. On March 9, the contracting officer reopened discussions and requested a second round of proposal revisions. At the GAO hearing, the contracting officer unambiguously testified that discussions were reopened to permit Boeing to "take care of" a "problem" in its cost proposal, explaining that, at that point, Boeing's proposal failed to comply with instructions the agency had previously given the offerors. No substantive questions were asked of any other offeror during these discussions. Nonetheless, during the GAO hearing, agency witnesses identified specific aspects of the protesters' final proposals that should have been brought to their attention, including aspects of the protesters' proposals that appear very similar to the "problem" Boeing was permitted to "take care of."

The second round of final proposal revisions was submitted on March 19. Thereafter, the source selection evaluation team briefed Druyun on the evaluations of final proposals. During this briefing the cost team was directed to review their analysis to "assure its accuracy." Upon receiving that direction, the cost team reduced Boeing's evaluated price and increased Lockheed's evaluated price. Additionally, in a subsequent meeting with Druyun, the source selection evaluation team described a specific approach to performance that Boeing had proposed as one "which tends to induce problems." Druyun directed that this description be crossed out of the evaluation record and replaced with the words: "Boeing will work out details post award."

Based on the record discussed above, we rejected the Air Force's assertion that there was no evidence that Mrs. Druyun influenced the source selection evaluation team. Similarly, in light of the failure to treat offerors fairly regarding discussions, we rejected the Air Force's assertion that the

evaluation process had been conducted properly. Finally, because the contracting officer directed the evaluators to destroy various portions of the evaluation record and the agency failed to conduct meaningful discussions with all of the offerors, along with the evidence of Druyun's influence throughout the source selection process, we could not reasonably determine which of the four proposals should have been selected for award. We concluded that the record failed to establish that any one of the protesters was not prejudiced by the various procurement flaws. Accordingly, we sustained the protests.

Recommendation

Ordinarily, where our Office finds fundamental flaws in an agency procurement, we will recommend that the agency reopen negotiations with all competitive range offerors, conduct meaningful discussions, request final revised proposals, and evaluate those proposals in a fair and unbiased manner. Here, however, the contract was awarded more than 3 years ago, and performance has been ongoing since that time. In the course of developing the protest record, the Air Force reported that while recompetition of the installation phase of the contract is feasible, recompetition of the entire contract would not be in the best interests of the taxpayer or consistent with national security concerns.

Based on the Air Force's acknowledgment that recompetition of the installation phase of the contract was feasible, we recommended that the agency recompute those requirements. In light of the broader concerns raised by the Air Force, we were reluctant to recommend recompetition of the entire contract effort. Nonetheless, we had some concern that the Air Force's position regarding recompetition of the entire effort was forged in the heat of litigation, and may not reflect a completely objective review. Accordingly, we recommended that the agency conduct and document a thorough analysis of the competing concerns and provide that analysis to our Office. In the event the agency ultimately determines that the broader concerns preclude recompetition of the entire contract effort, we recommended that each of the protesters be reimbursed the costs incurred in preparing and submitting their proposals. We also recommended that the protesters be reimbursed for their costs of filing and pursuing the protests.

The Protest Decision Regarding the Small Diameter Bomb

We turn now to the Air Force's award of a contract to Boeing under the small diameter bomb program. Lockheed Martin Corporation was the only competitor for this effort, and following the October 2004 disclosure of Druyun's bias, filed a protest alleging that Druyun improperly manipulated certain program requirements and the related evaluation factors in a manner that favored Boeing.

In addition to Druyun's feeling of "indebtedness" to Boeing due to Boeing's employment of her daughter and future son-in-law, the record we developed, which included a hearing at GAO during which five government witnesses and one Lockheed Martin witness testified, established the following key points. The small diameter bomb program initially contemplated an evaluation of offerors' capabilities against both fixed and moving targets; early in the procurement process (during the first few months of 2002), Lockheed Martin was perceived as having a "strength" with regard to the moving target requirements and Boeing was considered "weak" in this area; in May 2002, most of the requirements associated with moving targets and the associated evaluation factors were deleted; thereafter, Boeing was selected for award without consideration of its capabilities regarding the deleted moving target requirements. At the time our decision was issued, the Air Force was in the process of adding the previously deleted requirements to Boeing's contract on a sole-source basis.

The Agency's Position and GAO's Conclusion

In responding to Lockheed's protest, the Air Force maintained that Druyun "did not play any significant role" in the decision to change the small diameter bomb's technical requirements and, therefore, Lockheed was not prejudiced by Druyun's acknowledged bias in favor of Boeing.

Contrary to the agency's assertion, the contemporaneous record established that Druyun was significantly involved in the decisionmaking process that culminated in the May 2002 changes to the technical requirements and deletion of the related evaluation criteria. As discussed in our decision, Druyun was the de facto lead acquisition official during the period in which the changes were made. In that capacity, she received briefings from the competing offerors, directed the source selection evaluation team to perform various activities, directed an independent technical review of Lockheed Martin's technology applicable to moving targets, was directly involved in other changes made to the requirements for fixed targets, and contacted Raytheon to request that Raytheon communicate with Boeing. Following Druyun's contact, Raytheon

provided support to Boeing in its efforts to meet the small diameter bomb requirements.

On the basis of our review of the protest record, we rejected the Air Force's assertion that Druyun was not materially involved in the process culminating in the May 2002 changes to the technical requirements.

The Legal Standard and Conclusion

As discussed above, the FAR provides that procuring agencies must strictly avoid conflicts of interest or even the appearance of conflicts in Government-contractor relationships and, where, as here, the record establishes that a procurement official was biased in favor of one offeror, the need to maintain the integrity of the procurement process requires that we sustain the protest unless the agency demonstrates that the bias did not prejudice the protester.

In light of Druyun's acknowledged bias in favor of Boeing and our determination that she was materially involved in the decisionmaking process culminating in deletion of the moving target requirements, along with the fact that Lockheed Martin was perceived as having a "strength" and that Boeing was "weak" regarding the deleted requirements, we concluded that the record failed to establish that Druyun's bias did not prejudice the protester. Accordingly, we sustained the protest.

Our Recommendation

At the time our decision was issued, the Air Force had not yet amended Boeing's contract to add the previously deleted requirements regarding moving targets. Accordingly, we recommended that the Air Force conduct a competitive procurement to meet those requirements. Consistent with the provisions of CICA, we also recommended that Lockheed Martin be reimbursed its costs of filing and pursuing the protest.

Finally, Lockheed requested that we recommend reimbursement of the proposal preparation costs Lockheed incurred in competing for the contract awarded to Boeing. As discussed in our decision, we deferred ruling on that request, pending the Air Force's review of certain concerns regarding potential conflict of interest issues relating to a former Brigadier General who, after leaving the Air Force, was involved in Lockheed's proposal preparation efforts.

Mr. Chairman, this concludes our prepared statement. I would be happy to respond to any questions regarding our bid protest decisions that you or other Members of the Subcommittee may have.

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

GAO's Mission

The Government Accountability Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's Web site (www.gao.gov). Each weekday, GAO posts newly released reports, testimony, and correspondence on its Web site. To have GAO e-mail you a list of newly posted products every afternoon, go to www.gao.gov and select "Subscribe to Updates."

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are \$2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. Government Accountability Office
441 G Street NW, Room LM
Washington, D.C. 20548

To order by Phone: Voice: (202) 512-6000
TDD: (202) 512-2537
Fax: (202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm

E-mail: fraudnet@gao.gov

Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Gloria Jarmon, Managing Director, JarmonG@gao.gov (202) 512-4400
U.S. Government Accountability Office, 441 G Street NW, Room 7125
Washington, D.C. 20548

Public Affairs

Susan Becker, Acting Manager, BeckerS@gao.gov (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, D.C. 20548