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Accountability \* Integrity \* Reliability

Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Lockheed Martin Corporation--Costs

**File:** B-295402.2

**Date:** November 1, 2005

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Marcia G. Madsen, Esq., David F. Dowd, Esq., and William L. Olsen, Esq., Mayer, Brown, Rowe & Maw, for the protester.  
Bryan R. O'Boyle, 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.

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### DIGEST

Based on consideration of the record as whole, Government Accountability Office declines to recommend reimbursement of proposal preparation costs.

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### DECISION

Lockheed Martin Corporation requests that our Office recommend reimbursement of proposal preparation costs incurred by Lockheed Martin in competing for a system design and development (SDD) contract under the Department of the Air Force's small diameter bomb (SDB) program pursuant to request for proposals (RFP) No. F08635-03-R-0038.

We decline to make the requested recommendation.

### BACKGROUND

In February 2005, this Office sustained a protest filed by Lockheed Martin challenging certain government actions related to the SDB program. Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24. Specifically, Lockheed Martin protested that Darleen Druyun, in her capacity as the Air Force's Principal Deputy Assistant Secretary for Acquisition, improperly manipulated certain SDB program requirements in a manner that favored The Boeing Company.<sup>1</sup>

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<sup>1</sup> In 2004, Druyun pled guilty to certain criminal actions involving her contacts and relationships with Boeing. See id. at 2-4 & nn.3, 4.

In resolving Lockheed Martin's protest, we found that the SDB program initially contemplated two phases of contract performance--phase I, involving capabilities against fixed targets, and phase II, involving capabilities against moving targets. The record further established that, early in the procurement process, Lockheed Martin was perceived as having a "strength" and Boeing was considered "weak" with regard to the phase II requirements; that most of the phase II requirements were subsequently deleted; that, at the time of the deletions, Druyun felt "indebted" to Boeing, and that she was significantly involved in the decisionmaking process culminating in the deletions; that Boeing was selected for award without consideration of the deleted phase II requirements; and that, at the time of our decision, the agency was in the process of adding the previously-deleted phase II requirements to Boeing's contract on a sole-source basis. See id. at 14. We sustained Lockheed Martin's protest on the basis of Druyun's acknowledged bias favoring Boeing, along with our conclusion that Druyun was significantly involved in the decisionmaking process culminating in deletion of the phase II requirements.

In connection with our decision, we recommended that the agency conduct a competitive procurement for the phase II requirements. We also recommended that the Air Force reimburse Lockheed Martin for the costs it incurred in filing and pursuing the protest.<sup>2</sup> However, in response to Lockheed Martin's additional request for reimbursement of proposal preparation costs, we expressed reservations, noting that Lockheed Martin had already been compensated for performance of its component advanced development (CAD) contract--on which the competition for the SDD contract was based.<sup>3</sup> See id. at 15 n.33. We further deferred consideration of Lockheed Martin's additional request for reimbursement, asking that the agency review another matter that came to light during the protest process concerning Lockheed Martin's employment of a former Air Force Brigadier General.<sup>4</sup>

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<sup>2</sup> The agency has advised our Office that it is complying with our recommendations.

<sup>3</sup> In September 2001, the agency awarded CAD contracts under the SDB program to Boeing and Lockheed Martin. The contractors were advised that, during the 24-month performance period of the CAD contracts, the agency would 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. See id. at 4.

<sup>4</sup> In reviewing the procurement record, certain potential conflict of interest issues were raised with regard to Lockheed Martin's employment of a former Air Force Brigadier General who had been involved in the SDB program prior to his retirement and, immediately upon retirement, began employment with Lockheed Martin, where he subsequently became responsible for supervising certain Lockheed Martin activities related to the SDB program. We requested that the agency review specific issues related to this matter; the agency has complied with our request.

## DISCUSSION

Following the Air Force's completion of the requested review, Lockheed Martin renewed its request regarding reimbursement of its proposal preparation costs.

Under the Competition in Contracting Act (CICA), when our Office finds that an agency's procurement activities fail to comply with the requirements of statute or regulation, we are given discretionary authority to recommend the reimbursement of proposal preparation costs. Specifically, CICA states: "If the Comptroller General determines that . . . the award of a contract does not comply with a statute or regulation, the Comptroller General *may* recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of . . . bid and proposal preparation." 31 U.S.C. § 3554(c)(1) (2000) (*italics added*).<sup>5</sup>

Here, as discussed above, Lockheed Martin has already received the agreed-upon compensation for its performance of the fixed-price CAD contract, under which its technical solution for the SDD contract was evaluated. Further, Lockheed Martin will have an opportunity to compete for the phase II requirements that were deleted from the solicitation. Finally, it is clear that, following deletion of the phase II requirements, Lockheed Martin continued to compete for the modified phase I requirements; its protest, which we sustained, challenged the basis for the changes to those requirements—not the source selection process following the changes.<sup>6</sup>

Based on our consideration of the record as a whole, we decline to exercise our discretionary authority to recommend reimbursement of Lockheed Martin's proposal preparation costs.

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General Counsel

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<sup>5</sup> In contrast to the discretionary authority quoted above, CICA identifies other remedies that our Office "shall recommend" under certain circumstances. See 31 U.S.C. § 3554(b)(1).

<sup>6</sup> Indeed, Lockheed Martin's submissions to this Office expressly acknowledge that "Druyun did not continue to influence the shape or the outcome of the SDD competition after the Summer of 2002." Lockheed Martin Post-Hearing Comments, Jan. 18, 2005, at 76. Similarly, with regard to the agency's evaluation of the offerors' demonstrated capabilities regarding certain phase I requirements, Lockheed Martin states: "we have not placed the evaluation at issue." *Id.* at 49.