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**Comptroller General
of the United States**

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

Decision

Matter of: Ball Aerospace & Technologies Corp.

File: B-298522

Date: August 11, 2006

Michael R. Charness, Esq., Amy R. Napier, Esq., Amanda J. Dietrick, Esq., Alexander O. Levine, Esq., and Suzanne D. Reifman, Esq., Vinson & Elkins LLP, for the protester.

Scott M. McCaleb, Esq., Paul F. Khoury, Esq., Nicole J. Owren Wiest, Esq., Daniel P. Graham, Esq., and William J. Colwell, Esq., Wiley Rein & Fielding LLP, for The Boeing Company, the intervenor.

Bryan R. O'Boyle, Esq., Department of the Air Force, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest complaining that selection of the awardee's proposal under a procurement in 2001 was the result of the source selection authority's (SSA) bias in favor of the awardee is dismissed as untimely, where (1) protester initially challenged the agency's award decision in a protest filed with GAO in 2001 and withdrew its protest after reviewing the evaluation record, which showed that evaluation ratings had been changed in a way that appeared to favor the awardee; and (2) the SSA publicly admitted in 2004 to being biased in favor of the awardee as result of favors that she had received. The later issuance in 2006 of a report by the Department of Defense Inspector General that confirmed that the SSA's bias extended to the procurement at issue in this protest does not provide an independent basis for a timely protest, where the protester knew or should have known the basis of its protest allegation after the SSA's 2004 admission of bias in favor of the awardee.

DECISION

Ball Aerospace & Technologies Corp. protests the award of a contract to Boeing Satellite Systems, under request for proposals (RFP) No. F0701-01-R-0500, issued by the Department of the Air Force for the Conical Microwave Imager Sounder (CMIS) sensor design. Ball complains that Boeing's proposal was selected as a result of the bias of Darleen Druyun, the source selection authority (SSA) for this procurement;

that source selection personnel “used undefined and inconsistently applied evaluation ratings;” and that the evaluation was inadequately documented.

We dismiss the protest as untimely.

The CMIS program supports the National Polar-Orbiting Operational Environmental Satellite System (NPOESS), the mission of which is to provide a single, national, polar-orbiting remote-sensing capability to acquire, receive and disseminate global and regional environmental data for military and civilian users. The CMIS sensor—one of a number of sensors used by the NPOESS—is intended to collect microwave radiometry and sounding data, including atmospheric temperature and moisture profiles, clouds, sea surface winds, and all-weather land/water/ice surface information. Contracting Officer’s Statement of Fact, B-288554, Sept. 6, 2001, at 1.

The Air Force implemented the CMIS sensor acquisition in two phases. Under Phase I, Ball and Boeing were awarded contracts for sensor design and risk reduction. The RFP at issue here was issued on March 2, 2001 under phase II for further sensor design and provided for an award to a single contractor on the basis of a cost/technical tradeoff. Following discussions, the Air Force selected Boeing’s proposal for award.

On August 9, 2001, Ball timely protested the award to Boeing to our Office, arguing, among other things, that the agency had improperly changed Ball’s evaluation ratings and that Ball’s and Boeing’s proposals had not been evaluated in an “even-handed manner.” After its attorneys received a copy of the agency’s evaluation record, pursuant to our protective order, Ball withdrew its protest. The evaluation record showed that the offerors’ evaluation ratings had been changed in a way that appeared to favor Boeing after an initial briefing to Ms. Druyun in her role as the SSA.

On April 20, 2004, Ms. Druyun pled guilty in the United States District Court for the Eastern District of Virginia for conspiring with Boeing’s chief financial officer to help The Boeing Company win a tanker leasing contract with the Air Force. In a supplemental statement filed October 1, 2004 in federal court, which was publicly available, Ms. Druyun admitted favoring Boeing in certain negotiations, including four identified contracts—but not this procurement—as a result of her employment negotiations with Boeing and as a result of Boeing’s employment, at Ms. Druyun’s request, of her daughter and future son-in-law in 2000. Protest, attach. 5, Ms. Druyun’s Supplemental Statement of Facts, at 1-2.

On July 10, 2006, the Inspector General (IG) of the Department of Defense (DoD) issued a report on the CMIS phase II procurement, concluding that Ms. Druyun, then Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, lacked impartiality with respect to Boeing and that she had “manipulated complex proposal evaluation ratings to benefit [Boeing’s] and hinder [Ball’s] proposal[s].” Protest, attach. 1, DoD IG Report No. D-2006-097, July 10, 2006,

at 4. The report was posted on the IG's web-site on July 12, and Ball filed this protest of the award to Boeing with our Office on July 21.

The Air Force and Boeing request that we dismiss the protest as untimely, because it was filed more than 10 calendar days after the date upon which Ball knew or should have known the basis of its protest allegations. Specifically, the agency argues that Ball knew the bases of its protest "in August - September 2001, when Ball filed its first protest; or, at the latest, October 1, 2004, when Mrs. Druyun's Supplemental Statement of Facts was filed in her criminal proceeding wherein she admitted to corruptly favoring Boeing because of her employment negotiations and other favors provided to her by Boeing." See Agency Motion to Dismiss at 3. The agency and intervenor note that the DoD IG's report cites no new evidence supporting the IG's findings and that, rather, the report is based upon the 2001 evaluation record and Ms. Druyun's supplemental statement of fact. See *id.*; Intervenor's Dismissal Request at 1-2.

Ball responds that it was not until the IG reported that Ms. Druyun had manipulated the evaluation ratings in this procurement to favor Boeing that Ball had a basis for its protest. Ball argues that Ms. Druyun's supplemental statement of fact "made it appear that Druyun's illegal activities had been limited to a few, specific procurements" and that a protest alleging that Ms. Druyun steered an award to Boeing in this procurement would have been speculative prior to the IG finding that this was the case. Protester's Response to the Dismissal Requests at 6. Specifically, Ball states that

[a]lthough Ball knew before it received the [IG's] report that Druyun had previously admitted to influencing other unrelated procurements and Ball had previously believed that it had not been fairly evaluated by the Air Force, it could not have known prior to receiving the [IG's] report that Druyun possessed a bias that directly caused the unequal and unfair treatment it received on the CMIS Phase II procurement.

Id. at 3.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules require that a protest based on other than alleged improprieties in a solicitation be filed, either with the agency or our Office, no later than 10 calendar days after the protester knew, or should have known, the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2006). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94 at 3-4.

We conclude that, although Ms. Druyun's supplemental statement of fact did not specifically identify this procurement as one that she steered to Boeing, Ball knew or

should have known the basis of its protest that the award to Boeing was the result of Ms. Druyun's bias after Ball learned of the content of Ms. Druyun's supplemental statement. At that time, Ball knew that Ms. Druyun had admitted being biased in favor of Boeing as a result of favors received in 2000 and had acted on this bias in certain procurements, and Ball also knew that the evaluation ratings in this procurement had, in fact, been changed after the initial briefing to Ms. Druyun in a manner that favored Boeing and which Ball asserted was arbitrary when it filed its prior protest. These facts were sufficient to inform Ball of its protest grounds. In this regard, we disagree that a protest of this award in October 2004 on the basis of Ms. Druyun's bias would have been speculative. Evidence showing the change in evaluation ratings in this procurement coupled with Ms. Druyun's admitted bias in favor of Boeing for favors received in 2000 is more than sufficient to have supported a timely protest.

In our decisions in Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 at 2-3, and Lockheed Martin Aeronautics Co. et al., B-295401 et al., Feb. 24, 2005, 2005 CPD ¶ 41 at 2-3, we noted that our timeliness rules generally preclude consideration of protests challenging agency actions, such as presented in those cases and here, that occurred in the relatively distant past. Unlike the situation presented here, the protests filed in those two cases were timely filed with the agency after the public disclosure in October 2004 of documents relating to Ms. Druyun's criminal conviction. We recognize that the procurements at issue in those two cases were specifically identified in Ms. Druyun's supplemental statement as procurements that she had improperly influenced. However, contrary to Ball's arguments that Ms. Druyun's supplemental statement was limited to four identified procurements, not including the CMIS procurement at issue here, Ms. Druyun actually stated:

The defendant, since July 28, 2004, now acknowledges that she did favor the Boeing Company in certain negotiations as a result of her employment negotiations and other favors provided by Boeing to the defendant. 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. That as a result of the loss of her objectivity, she took actions which harmed the United States to include the following: [four identified procurements]

Protest, attach. 5, Ms. Druyun's Supplemental Statement of Facts, at 2 (footnote omitted). It is apparent that Ms. Druyun's statement does not restrict her bias in favor of Boeing to the four identified procurements; rather, the statement plainly indicates that her bias in favor of Boeing included, but was not limited to, the identified procurements.

Here, Ball knew from its review of the evaluation record that evaluation ratings had been changed in a way that appeared to favor Boeing and admits that it believed that

the Air Force had unfairly evaluated Ball's proposal. See Protester's Response to the Dismissal Requests at 3. In our view, Ball's review of the evaluation record when coupled with the public disclosure of Ms. Druyun's admitted bias in favor of Boeing at the time of this procurement placed Ball upon notice of its protest grounds. In this regard, we find that the IG's later confirmation in 2006 that Ms. Druyun's bias extended to this procurement does not provide Ball with an independent ground to timely challenge the selection of Boeing's proposal under the RFP. See, e.g., MR&S/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 93-1 CPD ¶ 245 at 8 n.2 (protester not entitled to await its own investigation to confirm facts where the record shows that the protester already knew the essential basis of its protest); Trend Constr. & Assocs.--Recon., B-222817.2, May 8, 1986, 86-1 CPD ¶ 445 at 3 (GAO's timeliness rules for filing protests are not tolled by the receipt of information through a Freedom of Information Act request that confirms a protest basis that the protester already knew).

Ball also argues that, even if its protest is untimely, we should consider the protest under our significant issue exception to our timeliness rules. Our Regulations provide that we may consider an untimely protest where we determine that a protest raises issues significant to the procurement system. See 4 C.F.R. § 21.2(c). We have limited this exception, however, to protests that raise issues of widespread interest to the procurement community and that have not been considered on the merits in a previous decision. See Systems Plus, Inc., B-297215 et al., Dec. 16, 2005, 2006 CPD ¶ 10 at 3 n.3. While we recognize that the corruption that Ms. Druyun's actions represent has been of widespread interest well beyond the procurement community, the fact is that we have twice addressed the impact of her bias in favor of Boeing. See Lockheed Martin Corp., supra; Lockheed Martin Aeronautics Co. et al., supra. Accordingly, we find that because Ball's protest does not provide novel issues that have not been previously considered by our Office, it would not be appropriate for us to invoke the "significant issue" exception to our timeliness rules here.

The protest is dismissed.

Gary L. Kepplinger
General Counsel