[H.A.S.C. No. 110–157]

SOURCE SELECTION AND PATH FORWARD REGARDING THE AIR FORCE KC–(X) PROGRAM

HEARING

BEFORE THE

AIR AND LAND FORCES SUBCOMMITTEE

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

HEARING HELD
JULY 10, 2008

U.S. GOVERNMENT PRINTING OFFICE
45–258 WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
AIR AND LAND FORCES SUBCOMMITTEE,
Washington, DC, Thursday, July 10, 2008.

The subcommittee met, pursuant to call, at 2:07 p.m. in room 2118, Rayburn House Office Building, Hon. Neil Abercrombie (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. NEIL ABERCROMBIE, A REPRESENTATIVE FROM HAWAII, CHAIRMAN, AIR AND LAND FORCES SUBCOMMITTEE

Mr. ABERCROMBIE. Aloha, everyone. Thank you for coming. As you can see, we have separated the combatants as far as possible physically. And welcome to all interested Members.

We will proceed in regular order today. We do have—the subcommittee has guests, including the Chairman and the Ranking Member today. And we will try to move expeditiously with the hearing today. Subsequently, depending upon how the membership feels, we are going to have to go to a closed session. Certain proprietary elements associated with the issue require that. And we will have to make a decision then as to whether to move to 2337 or stay here while the equipment is taken out. We will decide that when the time comes. I would prefer to stay here if it can be done expeditiously, and maybe by that time people will want to take a break anyway. So I am just going to move ahead at this stage.

Today the Air and Land Forces Subcommittee meets to receive testimony from the Government Accountability Office (GAO) and the Office of the Secretary of Defense (OSD) on the Air Force's aerial tanker program. We will have two panels. The first panel includes Government Accountability Office witnesses, Mr. Daniel Gordon, who we are pleased to see. I have got Daniel. Right. There you are, Mr. Gordon. Sorry. This got in the way. Daniel Gordon, who is the Deputy General Counsel for the GAO; and Mr. Michael Golden, the Managing Associate General Counsel of the GAO, a friend of the committee already, the Procurement Law Division.

The second panel, witnesses will be the Honorable John J. Young, Jr., who is the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)), another friend to the committee. We are very grateful to have him here today.

We have members of the full committee, as I have indicated, including the Chairman and Ranking Member, and members from other committees that have asked to attend the hearing because of their interests. I ask unanimous consent that nonsubcommittee

members be allowed to participate in today's hearing after all committee members have had the opportunity to ask questions. Any objection?

Hearing none, we will move ahead with the idea that nonsubcommittee members will be recognized at the appropriate time.

After completion of the second panel with Secretary Young, as I indicated, we will adjourn the hearing and possibly reconvene in 2337, depending upon the situation at that time. We will convene a meeting of the subcommittee to address the acquisition-sensitive information. Ms. Sue Payton, who is the Assistant Secretary of the Air Force for Acquisition, will join our other witnesses at that closed meeting.

I don't have to tell anyone here how important the tanker program is, how important the integrity of the DOD acquisition process is, or how important the integrity of the GAO protest review process is, or indeed how important our constitutional role is in overseeing these processes.

When Secretary Young saw us back in March, he commented that the OSD staff was more involved in observing the tanker source selection, quote, because it is so important to the Nation that we successfully conduct these source selections, unquote. I couldn't agree more with the statement of Secretary Young then, nor could I agree more now. Yet with all the effort and oversight that went into this particular source selection, the acquisition system failed. And unfortunately, this isn't the first time in the recent past that the acquisition system has failed us.

We had been assured by the most senior Office of the Secretary of Defense and Air Force acquisition officials that the tanker source selection was handled fairly, openly, and quote, well executed, unquote. That does not appear to have been the case, resulting in huge expense to the taxpayers, seemingly endless delays, and personnel flying very old tanker aircraft that have become increasingly expensive to maintain. It is not an infrequent occurrence that we read about tanker aircraft experiencing in-flight emergencies and having to abort their missions for emergency landings, the most recent ones being in Afghanistan two weeks ago and the former Pease Air Force Base in New Hampshire last week.

These tankers are old and getting older. We have little experience with flying 45-year-old aircraft, and no experience in flying 70- to 80-year-old aircraft, which our constituents are going to have to do if we are not able to move expeditiously. The acquisition process, in my judgment, has to be fixed. The questions we need to answer include: Is it too complex? Do we have the right people? Do they have the right training? Does it consider the right factors? Is this primarily an Air Force problem? Are the selection criteria too subjective, providing such latitude to Pentagon and GAO reviewers that in close competitions well-intentioned professionals can come to opposite conclusions? Is the integrity of the process on all sides being confirmed?

This is the start of trying to get complete answers. We must act promptly. We must act properly. And we must fix the system. We have asked Mr. Gordon and Mr. Golden from the GAO to provide some context for the GAO decision relative to other protests, the

GAO protest consideration process, and the details of their decision on the specific tanker protest.

I want to add parenthetically that I believe that it serves the interests not only of the Armed Services Committee, but the Congress as a whole to have the GAO indicate in public how its decision-making process relative to other protests and the consideration of the process itself takes place, because that may be something with which we are simply not familiar. We take it for granted, but we don't know exactly how it works.

We will also want to hear their views on what needs to be done to fix the acquisition process. We have asked Secretary Young to tell us about how he will proceed, and what will be done differently in the new source selection to have a satisfactory acquisition outcome.

I am, of course, very pleased to have my mentor and Chairman here, Chairman Ike Skelton.

Mr. Chairman, do you have any opening remarks?

STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE FROM MISSOURI, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. Yes, I do.

Let me compliment Mr. Abercrombie on calling this hearing. I think it is of utmost national importance that we have this today, and I thank him for this opportunity.

Chairman Abercrombie, I welcome today's witnesses and will make just a few brief remarks, if I may.

As everyone in this room is painfully aware, this matter of replacing the Air Force's KC–135 fleet is one that has taken wrong turns and dragged on far longer than it should. Collectively, I believe we are letting down the American warfighter, not so much in current operations, but in future operations where the KC–135 fleet is at risk and reaching the end of its service life without adequate replacement. That really concerns me.

As concerned as I am about the impact of failures on the Air Force's tanker program and the tanker fleet, I am equally, if not more concerned about what these failures might mean for acquisition generally. This source selection was thought to be the most thoroughly vetted, carefully considered process in the Department's history. I was certainly told as much. However, the GAO uncovered basic and fundamental errors in the process that are highly troubling: unequal discussions with competitors, determinations on the basic acceptability of a proposal made without significant analysis or apparent documentation, even seemingly errors in arithmetic.

My hope is that today's hearing will focus not just on these issues, but on how our acquisition system allowed such errors to occur. We must have requests for proposals that represent what the Department actually wants and that doesn't mislead competitors. We must have decisions about whether proposals meet the government's basic requirements, made in ways that are sound and, of course, verifiable. We must have calculations of costs that are realistic and are accurate that we can actually produce. Do we have the people and the systems in place to produce those positive outcomes?

So I look forward to Secretary Young providing answers to those questions and recommendations on the issues before us today. I certainly wish to welcome the two witnesses we have before us, as well as Secretary Young in a later moment.

Again, I compliment Mr. Abercrombie on calling this very important meeting and hearing. Thank you.

Mr. ABERCROMBIE. Thank you very much, Mr. Chairman.

I will now turn to the Ranking Member of the full committee, the former Chairman of the committee, our colleague and my very good friend, and equally a mentor to me who is leaving, we all regret, I can tell you, Mr. Hunter. And if you have remarks, I would appreciate hearing them at this time.

STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE FROM CALIFORNIA, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. HUNTER. Well, thank you, Mr. Chairman. And thanks for inviting Ike and I to participate in the hearing, a very important hearing. And I think the Chairman said it well. I would just add that while the air bridge that is so important to the projection of American military power is obviously critical to us, and upgrading that air bridge with a new fleet of tankers is of great interest, and an important American national interest, equally important is maintaining the aerospace industrial base in this country upon which our military force and capability in the future is girded. So thank you again for having the hearing, and I look forward to the witnesses.

Mr. ABERCROMBIE. Thank you very much, Chairman Hunter.

And then just before we begin then formally, I would like to turn to our last speaker before the testimony, my good friend and colleague from New Jersey Mr. Jim Saxton, my partner not only on this subcommittee, but on other committees in the Congress as well, again whose leave-taking I most personally regret very, very much. And we wish to say to you, Mr. Saxton, at this time that we are looking forward to your remarks.

STATEMENT OF HON. JIM SAXTON, A REPRESENTATIVE FROM NEW JERSEY, RANKING MEMBER, AIR AND LAND FORCES SUBCOMMITTEE

Mr. SAXTON. I thought you were going to say you are looking forward to my demise.

Thank you, Mr. Chairman. I appreciate being here today, and I want to thank our witnesses for being here as well.

As you said, Mr. Chairman, we are here today to learn about the Department's plan for the way ahead with the KC-(X) tanker acquisition after the GAO upheld the contract award protest by the Boeing Company.

Yesterday Secretary of Defense Gates announced that the original request for proposal will be amended to address the GAO findings, and the competition will be reopened. I look forward to learning more about how this will be executed, and am specifically interested in learning about the timeline, because as both you, Mr. Chairman, and the Chairman of the full committee Mr. Skelton have said, time is not on our side on this issue.

As all the members of the subcommittee know, every day that goes by that we aren't fielding a new tanker is one day longer that the already aged KC–135s must continue to operate. We need to get on with this, and we need to get on with it as soon as possible.

As part of the discussion today, I hope we will be able to get into the broader issues of the defense acquisition process, what I would like to call the elephant in the room. How does the High-Priority Acquisition Program, with intense oversight and scrutiny at the highest levels of the Department of Defense, fall so short of the mark? Is it lack of personnel with the critical acquisition skills that are needed? Has the complexity of the modern weapons system raised the complexity of the acquisition process? Or are the policies and procedures in place adequate to guide decision-making?

The bottom line is that we need to get on with this process. But in that vein, I just want to say this: I am concerned about the requirements development process and the manner in which the requirements drive the acquisition. I have been told by an old friend—and I will tell you who the old friend is because he has written it himself for publication—his name is General John Handy, Retired. I have been told by him personally that on this subject that the Air Force very well—he served the Air Force very well, and he shared with me his opinion that the Air Force's original selection of the A330 was a terrible decision.

Now, let me just say I have no personal stake in this issue. Neither of the companies or any of their associated companies are located in my district or my State. My only concern is that we get a tanker that fits the bill. And his thought, he thought the decision had two fatal flaws, that is General Handy; first, that over time the life cycle of the operation of the A330, we were going to end up spending an awful lot more money keeping that airplane flying than it would have cost to fly the 767. He also said that if we buy these A330's, we won't be able to park enough of them in the theater because they are too large. They take too long of a runway to land, and he said now, in his mind, the warfighter requirement to have a tanker that we can afford to operate in the years to come and to have a tanker that we can actually park in the theater of operations are clear basic requirements.

Now, this is not somebody that has an axe to grind. I am not advocating for Boeing, and I am not advocating for their competitor. Our job here is to try to oversee a process that gets the right equipment for the warfighter. That is the only objective that we have. And I have relied over the years on people like General Handy, who are so knowledgeable about these issues, for guidance on these issues.

With that I welcome our witnesses, and I look forward to hearing the testimony, Mr. Chairman, and thank you. This is a really important hearing, and I hope that we can accomplish something good as a result.

Mr. ABERCROMBIE. Very good. As you just said, time is not on our side. Nice timing. Here, Mr. Gordon, I apologize to you. We have business at hand. It is the last business of the day. I understand there to be four votes, including a recommittal, which means we are likely to be gone for 40 minutes or better. This is not the way I would like——

Mr. GOLDEN. We understand, Mr. Chairman.

Mr. ABERCROMBIE. Just for the record, I wish we had days where we had hearings and days when we have voting. Unfortunately, we have hearings and voting on the same days. Of course, all of the witnesses' prepared statements will be included in the record. We now have 15 minutes to vote. How long is your opening statement?

Mr. GORDON. Less than five minutes, Mr. Chairman.

Mr. ABERCROMBIE. Why don't you proceed, and then we will go to Mr. Gordon and see if we can get the statements in before we have to leave, although Members, of course, can leave at any time.

STATEMENT OF DANIEL I. GORDON, DEPUTY GENERAL COUNSEL, GOVERNMENT ACCOUNTABILITY OFFICE; AND MICHAEL GOLDEN, MANAGING ASSOCIATE GENERAL COUNSEL, PROCUREMENT LAW DIVISION, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. GORDON. Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Saxton, and from the full committee Chairman Skelton and Ranking Member Hunter and other members of the committee, my colleague Michael Golden and I thank you for the opportunity to be here today to discuss GAO's June 18th decision sustaining the Boeing Company's protest of the Air Force's award of the aerial refueling tanker contract to Northrop Grumman. I understand, Mr. Chairman, that my written statement will be introduced into the record.

Mr. ABERCROMBIE. That is correct.

Mr. GORDON. Thank you.

With that, and with the 67-page decision that GAO has published, I will, and I think it will accommodate the committee's schedule, be very brief in my remarks today and limit them to some context for the GAO bid protest decision.

GAO has been deciding bid protests since the mid–1920's, and shortly after we were established in 1921.

Mr. ABERCROMBIE. Mr. Gordon, could you pull the mike just a tad closer?

Mr. GORDON. Yes, sir.

Bid protests are challenges, usually by unsuccessful bidders, to Federal agencies' procurement actions, and especially to the award of the contracts. Since the 1980's, our protest process has been set out in law, the Competition in Contracting Act, or CICA, as we often call it.

Two points are worth highlighting about our bid protest process under CICA. First, protests are a way of holding government accountable. Just as in GAO's primary audit role, our bid protest process serves as a way to hold agencies accountable for their actions. And our work is and must be independent, fact-based, and impartial.

Second, protests are legal disputes. Unlike GAO in its audit role, our bid protest function is a legal one, carried out by our Office of General Counsel. In deciding protests, GAO is acting in a quasi-judicial capacity, adjudicating, much like the Court of Federal Claims which also hears protests, the allegations raised by a protester and deciding whether the contracting agency followed procurement law and regulation. The resulting decision, such as our decision on the

Boeing protest, is a legal decision, and it does not address broad programmatic issues, as GAO routinely does in its audit work.

In that context, a few brief remarks about the Boeing protest and our ruling on it. Boeing raised many challenges, and GAO considered them all. To be sure that we had the facts that we needed to resolve the protest and that we were being fair to all of the parties, Boeing, the Air Force, and Northrop Grumman, we allowed the parties to make voluminous submissions to us, all the parties. We conducted a hearing over five full days at which we heard testimony from 11 Air Force witnesses that the Air Force selected. We invited Boeing and Northrop to provide witnesses, but they declined to.

Our review of that very large record led us to conclude that the Air Force had made a number of significant errors that could have affected the outcome of what was a close competition between Boeing and Northrop Grumman, and because of that, we sustained Boeing's protest.

We did also deny a number of challenges that Boeing raised. We recommended that the Air Force reopen discussions with the offerors, obtain revised proposals, reevaluate those revised proposals, and then make a new source selection decision.

But in closing these brief remarks, I do want to underscore what our protest decision does and does not say. It does say that we found serious errors in the procurement process that could have affected the outcome of, again, what was a close competition. But our legal decision does not say anything about the merits of Boeing's and Northrop's proposed tankers.

With those very brief remarks, Mr. Chairman, Michael Golden and I will be happy to respond to questions, whether it is before or, if you prefer, of course, after the break.

[The prepared statement of Mr. Gordon can be found in the Appendix on page 75.]

Mr. ABERCROMBIE. Mr. Golden, does Mr. Gordon's statement stand for you at this point?

Mr. GOLDEN. Yes, Mr. Chairman.

Mr. ABERCROMBIE. Thank you.

I am very pleased, Mr. Gordon, that you made that statement, because I think it sets exactly the foundation for the hearing.

Mr. GORDON. Thank you.

Mr. ABERCROMBIE. The GAO is not here to talk about the merits or demerits of the proposals as to the Air Force. The question that you are answering is how the protest—the circumstances and the context of the protest, your decision-making process, and then the reasons for your decision, which we will go into when we return.

Inasmuch as Mr. Golden has no remarks at this stage, I think rather than get into questions that can't necessarily be answered, I will adjourn—or recess rather until the final vote is taken. And then we will—within five minutes of the last vote being called, we will come back into session.

[Recess.]

Mr. ABERCROMBIE. Thank you very much for waiting. I am afraid the vote took a bit longer—votes took a bit longer than we anticipated. Mr. Skelton and Mr. Hunter are detained for other reasons for the moment. So we will proceed.

I was going to almost say Mr. Gordon, would you like to repeat what you said? But I think the statement was excellent, not only succinct, but insightful, and provides an excellent and firm foundation for our questions.

Mr. GORDON. Thank you.

Mr. ABERCROMBIE. I have a couple myself, and then we will go to the Members in the order of their appearance at the hearing. I do want to indicate as well, Mr. Gordon, no disrespect to you or Mr. Young, but some of the Members are required to leave because of plane reservations, and it was unavoidable.

Mr. GORDON. We understand.

Mr. ABERCROMBIE. We originally anticipated being in session tomorrow, and that has been altered, so some people have had to make alternative plans.

I want to preface this question to you, Mr. Gordon, and obviously, Mr. Golden, if you think it is appropriate, I would appreciate your answer as well. I want to preface this question by saying I am not trying to imply any wrongdoing during the GAO's evaluation of this or any other protest. For our benefit, can you explain to the committee what internal checks and balances the GAO Procurement Law Division implements to ensure integrity and objectivity as you evaluate protest allegations? You indicated in your testimony that you, in fact—that is, in fact, your goal and your object and the ethos, if you will, that you follow. But for purposes of the record, can you elucidate for us exactly how you implement the integrity and objectivity that you cited? That is, the GAO is charged with evaluating DOD source selection processes for fairness and in accordance with the request for proposals. How does the GAO ensure that its evaluation, that is to say GAO's evaluation, of the DOD source selection process is fair and unbiased?

Mr. GORDON. Thank you, Mr. Chairman. Let me offer an answer, and then if my colleague, Mr. Golden, wants to supplement it, that would be fine.

Several different layers are in the answer. And if you don't mind, I will go through several of them to give the committee a sense of what we do to ensure the reliability, fairness, and fact-based nature of our bid protest decisions.

First, as I said earlier, they are products of our Office of General Counsel. Attorneys only are working on them, and they are done by a separate group. The attorneys that handle our bid protests do only bid protests. They are specialized in the area, and they have extensive expertise. We were somewhat embarrassed when we did a quick count and added up the years of experience handling bid protests by the team that worked on this, because I am afraid we got to over a century of experience when we were totaling up the years. So we were dealing with a group——

Mr. ABERCROMBIE. You never embarrass Members of Congress by totaling up years of experience.

Mr. GORDON. In addition, we have a careful internal review process as a draft decision goes up where we rigorously check and question and doubt ourselves to be sure that we are getting the answer right. You will see citations throughout the decision. And, in fact, if I could, I would say that the decision itself is one of the best guarantees, because in this case, admittedly, it was an unusually

long decision, but in that sense it is actually a good example in the context of this hearing.

Mr. ABERCROMBIE. So the 67 pages, 69 pages, 67 pages is actually a distillation then of this process; is that fair?

Mr. GORDON. It is, but it is a very transparent distillation, Mr. Chairman. That is to say anybody reading those 67 pages can see what GAO was thinking. We are totally transparent. And we work very hard to be sure that we fairly state the arguments. As you read through the decision, I know everyone here has had a chance to look at it, you will see us say, this is what Boeing argued, this is what the Air Force responded, and in many cases Northrop made this argument, and we explain why we ultimately came down on one side or the other.

And a final layer, if I could, is external to us, but it is an important one, because I think you were saying in your opening remarks, Mr. Chairman, who audits the auditors? Of course, though, we are not auditors in this function, we are attorneys, but who checks on us? The fact is that once we issue the decision, that is not the end of the process. Not only is there appropriate congressional oversight, such as in this hearing, but the parties themselves have the right to request that we reconsider our decision, and that happens every year. We do get requests for reconsiderations. I would note that neither the Air Force nor Northrop Grumman, or, for that matter, Boeing requested in this instance that we reconsider our decision.

And finally, as I said, there is a completely external process, and that is a dissatisfied protester who thinks we haven't been fair can go to the Court of Federal Claims and file a protest there. And there are a handful of disappointed protesters each year who lose at GAO and file protests at the court. The court usually, but not in every case, agrees with GAO.

Mr. ABERCROMBIE. That has not happened in this case, right?

Mr. GORDON. That has not happened in this case.

Mr. ABERCROMBIE. Thank you.

Do you have anything else to add to it, Mr. Golden?

Mr. GOLDEN. No.

Mr. ABERCROMBIE. Then I have one other question, and we will move on. Thank you very much. I want to ask a question concerning historical data. In fact, you just mentioned that the decisions have been reversed only in a few instances. With regard, then, to the historical data you provided the committee concerning the Department of Defense's (DOD) last five years—we requested that of you, and you did provide it—and the GAO's protest sustainments, now in this instance regarding Air Force contracts, if I read your information—the information you sent me correctly, over the last 5 years the GAO has sustained 191 of 843, or 23 percent, of merit protests filed against DOD contract rewards, approximately 1 out of 4. The GAO has sustained 54 of 179, or 30 percent, of the merit protests filed against the Air Force contract awards. This makes the Air Force average 33 percent greater than the DOD average.

Has the GAO performed any trend analysis as to why the Air Force protest sustainments are higher than the DOD average? And if so, could you share those findings with the committee?

Mr. GORDON. The short answer, Mr. Chairman, is that unfortunately, we don't have a lot to offer in terms of explaining the difference in the rates of protests being sustained between the Air Force and the other services, or for that matter the other Federal agencies. I think, though, there are several points that the committee might find of interest in that regard.

First of all, we discuss the bases for protests being sustained internally and also externally. We have a very vigorous outreach program that goes to the Air Force, as well as the other services and Federal agencies, and includes the private bar as well, in which we talk through and explain what are the issues that are causing us to sustain protests?

Let me give you, if I could, one quick example. We ran into a series of protests being sustained now it is probably 7 or 8 years ago that involved public-private competitions under Circular A–76. That was an issue where we could point and say——

Mr. ABERCROMBIE. Would you say what the A–76 is for those who are not familiar with it?

Mr. GORDON. Of course, Mr. Chairman.

Circular A–76, issued by the Office of Management and Budget (OMB), calls for cost comparisons when the agency is making a decision to contract work out to the private sector, and in theory bringing work into the public sector. Those decisions were a nice example of a systemic problem that we were seeing. Similarly, you could point to, and we have pointed to, a series of decisions involving organizational conflicts of interest, where we have said there is an unusual number of protests that we are sustaining involving this issue. And both Mike Golden, who now heads the Bid Protest Unit at GAO, and I, who used to head that unit, have worked very hard in reaching out to the private sector and to the public sector, the agencies and the civilian side, and at DOD, to discuss those things.

There is one other thing, if I could, Mr. Chairman, about the statistics that you might find illuminating. We count protests in our data, but you will often get multiple protests in one procurement. For example, on the front page of the bid protest decision in the Boeing case, you will see that, in fact, in the GAO system it is actually eight protests, because Boeing filed multiple protests. But it is, of course, only one procurement that was at issue, albeit an extremely important one.

We went back and looked at the number of Air Force procurements—not protests, but Air Force procurements—that were successfully protested over the past five years, and I think that it helps put the numbers in proportion. In fiscal 2008 to date, there have been two Air Force procurements where GAO sustained the protests. One of the two, obviously, was the tanker. In fiscal 2007, there were seven Air Force procurements where GAO sustained the protest. In fiscal 2006, there were seven. Now, it is true that the number of protests was larger because there were multiple protests of one procurement. In fiscal 2005, there were four Air Force procurements that were successfully protested. And in fiscal 2004, there were three. The numbers are relatively small, but I don't want, when I say that, to discount the importance of the basis for protests that we sustain or the importance for our warfighters of

having a procurement held up because of the flaws in the procurement that causes GAO to sustain the protest.

Mr. ABERCROMBIE. So the number—if I understand you correctly, the number is less important than the reasons for it. Supposing you add all those up, and it is 12 or 13 or 14 sustainments. If there was a trend in those sustainments where the same problem appeared——

Mr. GORDON. Yes.

Mr. ABERCROMBIE [continuing]. Have you had a chance to look at that kind of thing, a particular way in which the process was implemented that caused the procurement protest to be sustained more than once?

Mr. GORDON. I am not sure, and I will give my colleague——

Mr. ABERCROMBIE. If you don't have the answer right now, I think it is something worth looking at.

Mr. GORDON. We have looked at it, Mr. Chairman. And that is what we will see, and what we tell the agencies when we do our outreach visits is often what is at issue is a very straightforward matter. We see situations in which they lay out evaluation criteria in the solicitation, and then they deviate from those criteria. They either add a criterion that is not included in the solicitation, so they have an undisclosed evaluation criterion, which isn't fair to the offerors, or they have one which they fail to take into account even though it is in the solicitation.

Mr. ABERCROMBIE. Are you citing that because you found that more than once?

Mr. GORDON. It is something that comes up with some frequency. And let me see if my colleague wants to supplement it.

Mr. GOLDEN. I thought prior to this, Mr. Chairman, you had expressed an interest when we talked last about this. I went back, and I will share this with the committee, where we are going through, because it requires us to research back and look at the cases individually.

But in 2007, for instance, there were a number of cases concerning the evaluation ground rules being deviated from and our holding the Air Force accountable. But there were a number of protests that bear no relationship that we were sustaining, small business issues, a sole source that was not justified, and we will share that information with you——

Mr. ABERCROMBIE. Okay. Very good.

Mr. GOLDEN [continuing]. Because it may be helpful to see in terms of identifying trends and what is going on, because I think you do have to look at the individual cases.

Mr. ABERCROMBIE. Very good. Thank you. Thanks for your answers. I wish every hearing we could have questions and responses as direct and as helpful as yours have been already.

Mr. GORDON. Thank you.

[The information referred to can be found in the Appendix on page 98.]

Mr. ABERCROMBIE. Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman. And again, thanks for letting myself and the Chairman sit in on the hearing.

Gentlemen, just real quickly, and then I may have a question or two at the end of the hearing, but it looked to me like the finding

that the Air Force credited Northrop Grumman for proposing to exceed what they call a solicitation key performance parameter objective for fuel offload versus unrefueled range, that is the amount of fuel a tanker could afford to offload to a receiver aircraft at a given distance of flight by the tanker without itself refueling, that they gave that a greater—gave that a heavy weight with respect to the Northrop Airbus aircraft even though the solicitation plainly provided that no consideration would be given for proposing to exceed key performance parameter objectives. And I agree with that, that it appeared that they did give—the Air Force did give weight to that particular aspect of performance.

I guess my question is is that factor, in analyzing this competition the way it is framed—in your professional opinion, should exceeding the performance parameters be a consideration that, in fact, should be redefined in a future competition? Do you have any opinion as to whether or not this competition was well-framed—I guess that is my—I guess that is my question, and you have had a chance to study the competition fairly carefully—in such a way that extra credit is given if the competitor comes with an aircraft that exceeds parameters in certain areas?

Mr. GORDON. I understand, Representative Hunter, and I want to be very careful here in my answer, and I want to be very precise in responding to your question.

We do not have an opinion about whether it is a good idea to give the offerors extra credit for exceeding the level of the objective in this case. It is a very good demonstration of what we are looking for in a protest in terms of deciding whether to sustain it.

When we have in front of us the award of a contract that is being challenged, the ground rules of the competition are a given for us. It is too late for anybody to say, oh, the ground rules should have been different. The only question in front of us is did the agency follow the ground rules when it assessed the competing proposals? And as you recognize, the problem here was that the agency had in a sense caught itself, because it had said in the ground rules that if there was an objective, you wouldn't get extra credit for exceeding it. There was an objective, Northrop exceeded it by quite a bit, and Northrop got all that extra credit. We have no opinion, we have no view on whether it was a good idea.

Incidentally, had we weighed in and said we think you should give extra credit in advance, had we taken a position, I would have concerns about our having independence. And it is critical for us to have independence. We have to be able to look in the protest and say did the agency follow its ground rules?

Mr. HUNTER. Okay. With respect to runways, you know, one thing that I saw after the competition was over were analyses of the number of runways available to U.S. forces for power projection around the world and a limited number of runways with one aircraft, that is a bigger 330, and a higher number of runways for the smaller aircraft, that is the Boeing aircraft. Was that, in fact, a weighted factor? Was there a minimum number of runways which could be accommodated, or was that considered to be a factor in which you had a graduated weighting?

Mr. GORDON. Well, I am more confident, if I could, Representative Hunter, in telling you it is not an issue in the protest, but let me check with my colleagues.

Mr. HUNTER. Yeah, I know you have got some comment there.

Mr. GORDON. I am told, Representative Hunter, that it, in fact, was not an evaluation factor at all. And as I said, it was not a protest issue whatsoever.

Mr. HUNTER. Let me just comment on this, and, Mr. Chairman, again, thank you for letting us sit in on this.

You know, I listened to Mr. Saxton, and he quoted General Handy, who is a person on whom we have relied greatly with respect to his professional expertise in these issues. And he points out that a large number of runways can't be accommodated by one of the planes. The fact that this wasn't in the parameters, in the competition parameters, the fact that it is difficult—and I know you can't comment on it, but it is difficult to explain the weighting system on such things as offloading fuel at range, because if offloading great amounts of fuel at range were important, the 777 offloads almost twice as much fuel at range than either one of the two competitors and has a 1,900-mile greater range.

It appears to me that this is an excellent illustration, this competition is an excellent illustration of the need for Congress to involve itself in the objectives of the competition, that is to say, whether or not we want to have aircraft that can utilize all the runways that are available for power projection; whether we want to have aircraft that have greater legs, shorter legs; and if there is a trade-off, where that trade-off should be.

And finally, on the issue of subsidy, you know, we have a defense industrial base here which is supported by the taxpayers of the United States, and the idea that we have allowed into this competition a company which is subsidized, in fact, which the U.S. Government believes, in fact, is unfairly subsidized, by the treasury of the nations which comprise the aircraft company, and yet that is not considered in this competition, also, I would think, compels us to come to the conclusion that Congress should weigh in on setting the parameters on this competition. And I think perhaps that is where we have missed the mark, because it appears to me that several important criteria and objectives were not set in this competition. And the party which has the oversight to set them is, in fact, the U.S. Congress.

I don't know if you have any comment on that or whether you can have a comment on it. But I think that you did your job very effectively in terms of looking at what you were handed and ascertaining as to whether the glove fit the hand. In this case it didn't.

Mr. GORDON. I appreciate——

Mr. ABERCROMBIE. Mr. Gordon, you need not tell the Congress what to do, but if you care to comment, you are welcome.

Mr. GORDON. On the contrary, Mr. Chairman, I was going to thank Mr. Hunter for his understanding that we can't comment on that. We defer to the Congress for their role and to the Air Force and the Department of Defense for theirs.

Mr. HUNTER. Thank you, Mr. Chairman, for letting me sit in on this. And I think that there clearly is a case to be made for our

involvement in setting these parameters before a future competition.

Mr. ABERCROMBIE. Mr. Skelton chooses to pass at this point, so Mr. Spratt is next.

Mr. SPRATT. In your opening paragraphs you indicate that you had 11 witnesses as part of your appeal. Did these witnesses include members of the Source Selection Team?

Mr. GOLDEN. Yes.

Mr. GORDON. Yes, they did.

I should say, sir, if I could, that we actually—it was a fairly unusual—there were several things that were unusual about this case, even though broadly it was handled under our normal procedures. One unusual thing was that none of the parties asked for a hearing. GAO initiated the hearing, which we have the right to under our regulations, because we thought it was important to be sure, A, that we understood everything that happened, and, B, that the parties got a chance to tell us their side of the story.

Boeing and Northrop Grumman did not want to provide witnesses, and we didn't feel we needed them, so that was fine. The Air Force we told we did need to have information. We gave them point by point what the issues were that we needed to hear from them about, and they selected, the Air Force selected, the 11 Air Force witnesses who came to address those issues. And in direct response to your question, that was both on the Cost Evaluation Team and on the Technical Evaluation Team.

Mr. SPRATT. For example, you took exception to the fact that Northrop Grumman had not shown that it could refuel all tanker-capable aircraft. There was a problem also, I think, with overrun velocity and things of this nature. When you presented that particular problem to the witnesses, the Air Force witnesses, did they have a corrective answer or an explanation?

Mr. GORDON. We asked those questions. We had testimony at length on each of the issues that you named, and our conclusion in the end was that the record did not provide an adequate basis.

Again, I want to underscore it is not the GAO decided that the Northrop plane wouldn't meet the requirements. We made no determination about the capacity of the Northrop plane or the Boeing plane. What we concluded was that the Air Force hadn't explained why it was comfortable in saying that, yes, the Northrop plane would meet the requirements.

If I could give you one example of those, in the overrun issue, and the overrun and breakaway both involve speed. Incidentally, this is an area where there is some proprietary information, but we think we can fully explain the decision without getting into proprietary information.

The Air Force during the procurement had concern about the overrun speeds for the Northrop Grumman plane. They raised questions about it. Northrop answered. We looked at the record. We couldn't understand why the Air Force had decided that it had gotten an adequate basis to say, yes, Northrop's plane meets the overrun requirement, and that is why we pursued that at the hearing. And at the end of the day, we still had concerns.

The breakaway procedures, actually that was not something that the Air Force raised concerns about during the procurement. So

overrun they raised during the procurement, Northrop responded, and we didn't think that the answer was satisfactory. Breakaway was raised for the first time during the protest. So it was particularly important when we raised questions about it in the pleadings and then in the hearing. And again, we found the answers unsatisfactory, not that GAO reached a conclusion about the capacity of the Northrop plane, but we did not think that the Air Force had a reasonable basis for its finding that the Northrop plane met the breakaway requirements.

Mr. SPRATT. Another of the exceptions that you raised was that the Air Force in its Request for Proposal (RFP) weighted certain requirements and certain features of the airplane, but then in awarding the contract did not adhere to those same weightings or features.

Mr. GORDON. Yes, sir.

Mr. SPRATT. Do you have an explanation for that, or did the Air Force provide you with an adequate explanation for that?

Mr. GORDON. They provided us an answer. We pursued it at length in this numerous record in the back and forth at the hearing. We just didn't find it persuasive.

Let me be fair, and we try to be fair to everybody on every issue, it is true that in the briefing slides to the Source Selection Advisory Committee (SSAC) and to the Source Selection Authority, they did begin essentially by saying, well, here is the weighting scheme. The key performance parameters (KPP) are weighted higher than the key system attributes (KSA), which are weighted higher than the others. But then when we looked at the evaluation decision itself, we saw no—no account being taken of the fact that Boeing's strengths tended to be associated with the more highly weighted KPPs, whereas Northrop's tended to be associated with the less highly weighted others. So our concern was that they simply hadn't followed the weighting scheme.

Mr. SPRATT. One final question. If the GAO wanted expert advice about runway speed, overrun speeds and things of this nature, or certain features of the airplane, where did you go for that advice? Or did you have access to that advice?

Mr. GORDON. We got a lot of advice. First of all, we had three parties that had a great interest in getting us advice, and each of the parties was able to bring in whether affidavits or declarations of consultants or experts that they wanted. The Air Force had the added opportunity through the hearing to provide witnesses that could educate GAO, walk GAO through the questions. GAO also has internal resources that we draw on, although that was done to a limited extent, but we have internal resources that were able to advise us. So we felt very comfortable that we understood the issues as articulated by Boeing and the responses of the Air Force and Northrop.

Mr. GOLDEN. Can I just clarify one thing?

Mr. SPRATT. Yes, sir.

Mr. GOLDEN. On the weighting issue, we looked at the record that we had, the evaluation record. We were looking for contemporaneous documentation that it was weighted in accordance with the evaluation criteria. And that was what was lacking in that situation, okay, the documentation from the evaluation team, from

the SSAC, that they looked and weighted appropriately and consistent with the evaluation criteria and the RFP.

Mr. SPRATT. Thank you very much.

Mr. ABERCROMBIE. Mr. Saxton.

Mr. SAXTON. Thank you, Mr. Chairman.

I would like to ask a question, and I hope that you will share your—if this doesn't come right in your lane, I hope that you will kind of step out of your lane a little bit and give us your opinion, because you have been very much involved in this process, and you have some insights that we can't have because we have not done the study that you have.

So it is my belief that the former Air Mobility Command (AMC) Commander, who I—tankers, of course, are assets of the Air Mobility Command. The former Air Mobility Command Commander, who I mentioned earlier, John Handy, has written quite articulately about what he believes—how he believes this situation went wrong. And I would just like to say what he has said in his words to you and then ask you if you would tell us why you think the criteria that he thinks important were either not considered or were not relevant to the final decision that was made by the Air Force. Is that fair?

Mr. GORDON. Yes, sir. You can certainly ask. We will do our best.

Mr. SAXTON. Okay. Here we go. Handy says that, first of all, you need to recall that we started this acquisition process in order to replace the Eisenhower-era KC–135 aircraft with a modern version capable of accomplishing everything the current fleet does. Now, that is the KC–135 fleet, of course. Thus, the required aircraft is of small to medium size, much like the KC–135. Makes sense if you are going to ask it to do all the things that the current fleet can do that it would be similar in size to the KC–135. Not a large aircraft, he says, like the KC–10, because the KC–10 has a different role. We use the KC–10 in what is called an air bridge. We fly them and refuel our aircraft on the way to and from the theater. That is the air bridge concept, and that is what the larger aircraft that we have to do today does. It doesn't perform—that is, the KC–10 does not perform well in theater, according to John Handy, because it is too large.

Why a smaller to medium aircraft he asks? Because first of all, you want tankers to deploy in sufficient numbers in order to accomplish the assigned tasks. You need to bed them down on the maximum number of fields around the world along with our forces, or close to our forces; that is, airborne fighters, bombers, and other mobility assets in need of fuel close to the fight or right over the fight. And he says that KC–135-like aircraft take up far less ramp space, is far more maneuverable on the ground, and does not have the risk of jet blast reorganizing the entire ramp.

Second set of requirements, he says, is survivability. The aircraft and crew must be able to compete in a threat environment that contains enhanced surface-to-air missiles and other significant threats. And I won't read the whole paragraph, but he concludes by saying all this means the warfighter has the requirement for a large number of highly flexible, agile, and survivable aircraft. A smaller airplane.

I also want to—he goes on the third set of requirements, his requirements. We also want the acquired aircraft to be integrated with current defense transportation system. That means—and I don't know what the number means exactly—that means that 463–L compatible pallets, floor-loaded—a floor-loaded on the freighter aircraft—the load on the freighter aircraft floor capable and compatible with the current modern airlift fleet. When we put passenger seats in the aircraft, we want to be sure that the existing aircraft seats fit the airplane. Again, this all mitigates to a small or medium-sized aircraft.

Mr. SAXTON. So if you look at these rather simple requirements and look at the previous offerings from industry, he says anyone would probably agree with me that the KC–767 more closely fits these needs.

So, again, my question is, if the operators define the requirements and if the requirements are these that are similar to these that former the boss of AMC has pointed out to us, how do we go so far in the other direction?

Mr. GORDON. Congressman, I will tell you that I am very proud of the attorneys in our bid protest shop and the work that they do. But part of their talent is knowing when not to get "out of their lane", to use your phrase; and I think we would be out of our lane, and not in a good way, for us to lose sight of what GAO's role is, what the Congress' role is and what the DOD and the Air Force's role is.

It is not for GAO to tell the Department of Defense or the Department of the Air Force how much flexibility they need in their planes, the survivability, the size of the planes. Those are issues that are within the province of the Department of the Defense, the Department of the Air Force, obviously, without minimizing Congress' role. It is not for GAO.

I would, though, if I could, make a couple of points that may be relevant. In the audit side of the House at GAO, we do look at some of these questions. We have been issuing reports since I believe at least 1996 about the need to replace the tanker fleet. It is something that GAO does look at.

Or, for example, last year there was testimony, I believe in front of this very subcommittee, by GAO expressing concern that the Air Force's decision to include the airlift capacity with the refueling capacity in the same plane was made—that decision was made without the required analysis.

So that in terms of looking at the decision-making process, GAO has looked at the decision-making process and expressed concern. But, that said, in determining the requirements, it is not for GAO to usurp the role of the Department of the Air Force and DOD.

Mr. ABERCROMBIE. Would you yield a moment?

I would suggest that Mr. Young is listening to the hearing so far and he may be making notes as we speak.

Mr. GORDON. He will be far better placed to respond to the questions along those lines than we can.

Mr. ABERCROMBIE. He may be not as quite as comfortable as you.

Is that it, Mr. Saxton?

Mr. Smith is next, to be followed by—we will figure it out.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Saxton really asked the question, and I know you are not the one in the position to answer it, so I won't restate it. But there is a sort of a different way of asking a similar question.

I mean, certainly it is baffling in this, because it seems in mid-process that the Air Force rather radically changed their mind about what they were looking for. And I think what the GAO went through and looked at was that they did not adequately justify that change of mind in terms of the cost, in terms of a lot of things. That, as we have heard from many witnesses here, it is just very difficult to understand that how they all of a sudden understand that bigger was better when there was considerable evidence to the contrary. But not your area.

The question I am curious about is how the RFP process works. Because it seems like that big of a change in the middle of it should require more than just sort of the nudging and moving that happened inside of this. It should require an entire rebid, which, as I understand it, they didn't do; and maybe you can explain to me how this works out.

Because there was a point in this process when in fact Airbus was rumored to be contemplating withdrawing their bid because they simply did not fit what was being asked for and for one very simple reason. Their plane was too big. It didn't fit the requirements.

And then all of a sudden there were some conversation, some letters from Members of Congress who were advocating on the Airbus side of the bid saying, can't you sort of look at this a little bit differently? And, presto, they looked at it a little bit differently; and Airbus submitted their bid.

And that seems bad, in a word, like sort of—well, how could I put this exactly—not within what the process should be. If you, in fact, look at it and say, okay, we made a mistake. We should—you know, we have a different requirement here. We are going to—shouldn't you go back and restart the process at that point a little more formally than the Air Force in fact did in this case?

If you can sift through that and address those points, that would be helpful.

Mr. GORDON. Representative Smith, accurately describing your requirements, telling the vendors what matters more to you and what matters less to you is extremely important. Because the vendors put together, the companies put together their proposals based on the ground rules. They read the solicitation very carefully, especially the evaluation criteria. They will put their proposal together based on what you and the government tell them you care about.

If you care more about price, they are going to sharpen their pencils more. If you care more about technical capability, they may give you a more expensive solution with more technical capability.

I do want, though, to point out some issues very relevant to our decision in this case. I don't think it is fair to say that we saw evidence that the Air Force changed its collective mind. We had very specific concerns where we, when we drilled down, we concluded that the Air Force had not followed the ground rules properly. But the talk of the Air Force changing its mind and deciding that it wanted a larger plane is not us speaking. It is not our bid protesters.

Mr. SMITH. Understood. Let me just say that the most important part in that to me is not so much whether or not they changed their mind but that they sort of decided that bigger was a little bit better without the sufficient rigor behind that decision that went into the original RFP that tracked what Mr. Saxton was saying in terms of what the requirements were.

And that is the problem. Not just because, you know, as you said, the vendors won't know what to ask for but because you wind up with something that the taxpayers aren't getting their money's worthy because you haven't actually analyzed all of these questions being raised, and all of a sudden you are asking for something on the fly. That is the larger concern.

Mr. GORDON. I understand your point, sir. I think that our decision doesn't go to the extent that you are saying.

If I could say a slightly different point but it may also be helpful to the committee; and that is that there is a long history, of course, of procurements and, in fact, in protest procurements to the Air Force.

In the Druyen matter, which happened several years ago, we had evidence, admitted evidence, in that case of criminal misconduct. We had no evidence no allegation of evidence of criminal misconduct, and we never saw a whit of evidence of criminal misconduct. There was no evidence, there are no allegations but also no evidence, not an iota of evidence of intentional wrongdoing by any Air Force official. This was not a case of criminal impropriety or of intentional wrongdoing. They had the rules, and there were several discrete areas in which they deviated from those rules.

Mr. SMITH. I understand.

One quick area and then I thank the chairman's indulgence.

In terms of lifecycle costs, that is one of the big things. I mean, the bigger the plane, the more fuel it is going to use. And we have all this evidence that the KC–135 very rarely even uses all the fuel that it has. So if you are expanding capacity—and the fuel I'm talking about here is the fuel that it takes to fly the plane, as opposed to what it is delivering—do you think that lifecycle costs with regard to the fuel costs were adequately considered when looking at these two bids?

Mr. GORDON. We had concerns about the lifecycle costs, although there are several different components. Partly there were some errors—as you know from the decision, the Air Force admitted a few errors in the calculation of costs. But, in addition, we had concerns with the methodology that the Air Force used in estimating the costs.

With respect to fuel, that was one of the issues where we didn't sustain the protest because of the fuel costs. We didn't think that the record gave us a basis to sustain it. But we had enough concern about the way the Air Force was calculating fuel costs that we said, since we are sustaining the protest anyway, we think that the Air Force should pursue that.

We made the same point with respect to the boom approach from Northrop Grumman. When the Air Force said Northrop's boom approach caused only low schedule of cost risk, we didn't sustain the protest of that issue, but we had enough concern that the——

Mr. ABERCROMBIE. Mr. Gordon, excuse me. Can you explain for those who don't know what the boom question actually involves physically?

Mr. GORDON. I want be to sure that I don't misspeak, Mr. Chairman. Northrop had their technical approach—and we are not going to get into proprietary information—but their approach of connecting the plane that was doing the refueling with the plane that was being refueled—and you are going to quickly get to the edge of my technical knowledge.

Mr. ABERCROMBIE. Okay, now everybody knows what we are talking about now.

Mr. GORDON. That boom approach had aspects to it which caused the Air Force to call it a weakness. Notwithstanding that, the Air Force said the approach didn't pose anything more than a low schedule to cost risk, a surprising juxtaposition to call it a weakness but then say there is only a low schedule to cost risk.

We explored the issue to a certain extent, didn't find enough to sustain the protest, but because of our concern in this area we suggested that the Air Force should go back and look at this issue and the fuel cost issue.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Thank you.

Mr. Miller is next.

Mr. MILLER OF FLORIDA. Thank you, Mr. Chairman.

In your opening comments, you had said that the GAO's role is quasi judicial: provide an objective, independent and impartial process for the resolution of disputes. Correct?

Mr. GORDON. Yes.

Mr. MILLER OF FLORIDA. But then you used words like significant, reasonable, unreasonable, improper, refused, which could inflame people one way or another—in fact, one member left this room as we were going to a vote—using some of your words, to boost their cause. So words do and wordsmithing does mean something different.

I am curious about GAO and the union issue, which nobody has raised at this point. Back in 2007, September, the analysts at GAO voted to join the International Federation of Professional and Technical Engineering, known as IFPTE.

IFPTE announced its campaign to support the Boeing bid in January of 2008 and lobbied Congress. February 2008, Air Force announced the award to Northrop Grumman. March, 2008, GAO's IFPTE issued a press release blasting the Air Force, claiming falsely that the contract was being awarded to a French company. April, IFPTE sent letters in a press release arguing that Congress should defund the program. It also stressed its strong relationship to Boeing which had brought the protest. June of 2008, GAO upholds Boeing's protest.

Can you tell me unequivocally and show me how you come to this decision that there was no bias by anybody at GAO in this report?

Mr. GORDON. Yes, sir. I can tell you that unequivocally there was no bias related to the union issue or any other issue in the way we handled this protest.

First of all, I am not sure that membership in the union would, in fact, disqualify GAO analysts for working on a job in which the union had a position. But we don't need to reach that question. The union—as you recognized in your statement, the union organized our analysts. The bid protests are decided by a separate shop. It has zero analysts in it, zero members of the union in it. Those who decide the bid protests are my colleagues in the Office of General Counsel. There is zero members of the union in the Office of General Counsel.

[The information referred to can be found in the Appendix on page 175.]

Mr. MILLER OF FLORIDA. What do the analysts do?

Mr. GORDON. Analysts write reports for Congress in response to congressional requests——

Mr. MILLER OF FLORIDA. They don't do anything for anybody within GAO, providing information for the attorneys or the team, providing—they just report to Congress. They don't report——

Mr. GORDON. They do our very important audit work.

Mr. MILLER OF FLORIDA. Did any analyst that is a member of the union provide any information to the team?

Mr. GORDON. There was——

Mr. MILLER OF FLORIDA. That is all right.

Mr. GORDON. I do have an answer for you.

Mr. MILLER OF FLORIDA. You are taking my time.

Mr. GORDON. No, sir.

Mr. MILLER OF FLORIDA. Yes, you are.

Mr. GORDON. I apologize.

Mr. ABERCROMBIE. That is all right. Jeff, you have time. Go ahead, Mr. Gordon.

Mr. MILLER OF FLORIDA. You are answering my question.

Mr. GORDON. Yes, sir.

Mr. MILLER OF FLORIDA. My question. Not the chairman's. Mine.

Mr. GORDON. The work was done, the writing was done 100 percent by our attorneys. Our attorneys consulted with one person, who was an auditor, in order to ensure that we were using the correct technical words. That auditor had no input whatsoever to the outcome of the protest.

Mr. MILLER OF FLORIDA. So somebody with the union did in fact have input into the writing of the report?

Mr. GORDON. No, sir. Absolutely not.

Mr. MILLER OF FLORIDA. They did provide information to the person that wrote the report.

Mr. GORDON. They checked to be sure we were using the right technical language. Nothing else. And that person was not involved in any way, shape or form in resolving the protest.

Mr. MILLER OF FLORIDA. You said that Northrop Grumman refused to commit to the required two-year time frame, referenced the depot issue. They refused to commit to the schedule. And I am just wondering, because the depot portion was—the funding was in the contract. Northrop Grumman said it would support the organic depot concept and meet any schedule that was required. Although you said that wording did not correspond to the two-year requirement, somehow an agreement to meet the requirement in the schedule is not good enough. You just needed it written down?

Mr. GORDON. The Air Force twice—at least twice—went to Northrop Grumman and they said they needed this commitment to provide support for the two year transition——

Mr. MILLER OF FLORIDA. But didn't the Air Force say it was an administrative oversight?

Mr. GORDON. After the fact.

Mr. MILLER OF FLORIDA. They didn't refuse. They didn't say we are not going to get it to you, correct?

Mr. GORDON. They did not provide it. And that is a difference.

Mr. MILLER OF FLORIDA. They did not refuse to provide it, correct?

Mr. GORDON. The words that Northrop Grumman's attorneys used in their final submission to us after the hearing was "Northrop Grumman made an intentional decision"—those are their attorney's words—"not to address this".

Mr. MILLER OF FLORIDA. Then why wouldn't you have used in your comments that same thing? You used an intentional—you used the word refused, instead of an intentional decision.

Mr. GORDON. When the Air Force twice asks for something that a company declines intentionally to provide them, I don't see the difference.

Mr. MILLER OF FLORIDA. And that is why we have got a problem with the report. Because you are saying out of 100 plus issues, we are down to 7. Yet you are saying that there are significant and serious issues, so you are feeding the fire in this decision.

My time has run out, and I will wait if we have another round. Thank you.

Mr. GORDON. May I respond.

Mr. ABERCROMBIE. Yes. No, Jeff take the time.

Mr. MILLER OF FLORIDA. I have two other people.

Mr. ABERCROMBIE. Okay. I want to make sure everybody understands. Take all the time you want. This is a serious issue. We have no place to go. So if you want—do you feel——

Okay. Mr. Larsen is next. We are going to limit his time. I know him.

Mr. DICKS. The witness can respond.

Mr. GORDON. On the issue of there being 100 or more than 100 issues that were raised, I have seen numbers like that floating around the press. We don't understand how people come up with those numbers. You can count the number of counts or issues or arguments or allegations that a protest raises in many different ways. We don't focus on this being 7 out of 100 or more than 100. We focus on the 7 that we found that caused us to sustain the protest.

Mr. MILLER OF FLORIDA. Mr. Chairman, then I need to respond.

Mr. ABERCROMBIE. Okay.

Mr. MILLER OF FLORIDA. It is very difficult. You are using a bureaucratic answer. You want to be able to say it could have been 10 and we found 7 serious issues. That is what you are implying. So that is what I am saying. Be very careful with how you word your answer, because you are continuing to fan the fire, and it is not necessary.

Mr. ABERCROMBIE. Mr. Larsen.

Mr. GOLDEN. May I say something, Mr. Chairman?

Mr. ABERCROMBIE. Yes.

Mr. GOLDEN. It is not our intention to be fanning any flames.

What happened—and it is really a two-step process and—when we do these cases and, obviously, it is a process that—for the first time, one of the few times we are talking about, we look, identify flaws in the procurement, and then we assess whether they are prejudicial, whether they could have resulted in prejudice to the company, in this case Boeing. And that is our—that is the assessment we made.

Whether it was three, four, five, okay, six or seven, we found the totality of those issues, okay, to result in prejudice; and I don't think—you know, the language used in this decision is not very different than other decisions where we have similar issues.

Mr. ABERCROMBIE. Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Just to point on this, I don't feel sorry for Northrop Grumman/Airbus. I don't feel sorry for Boeing in this. I feel sorry for the warfighter in all this. And sometimes your job at GAO is to come tell us things that we don't like to hear. And that is usually what you come tell us, honestly. And so, you know, thank you for doing that and not just today but every time we ask you to come up here.

So the first question I want to ask you is having to do with the KPPs and the KSAs. Just to clarify for me, the Air Force RFP specifically said it wouldn't award extra credit for a tanker that had additional fuel off-load capability; and then essentially extra credit was given anyway. Is that about right?

Mr. GORDON. Right. Again, it has nothing to do with their sense of the merits. It was just a ground rule that says, if there was an objective, you don't get extra credit for exceeding it. And there was an objective, and yet they gave Northrop extra credit.

Mr. LARSEN. On the flip side, page 30 of the report, the Air Force failed to give the Boeing offer credit for meeting far more systems requirement documents (SRD) requirements than the Airbus proposal. Is that correct?

Mr. GORDON. Yes. We saw no evidence that Boeing was given credit for offering many more SRD requirements than Northrop.

Mr. ABERCROMBIE. Excuse me. Mr. Gordon, can you say what that—you characterized it with an alphabet.

Mr. GORDON. I apologize. Systems requirements document. And the most unfortunate thing, Mr. Chairman, is that we used the word requirement here, and they don't mean a requirement. It was sort of a desirable.

The solicitation said the Air Force wanted as many as possible of those systems requirements, documents requirements; and Boeing offered far more of those than did Northrop. But we didn't see evidence that Boeing was given credit for it.

Mr. ABERCROMBIE. Can I ask everybody, if you get to the acronyms and so on, use the full designation and then say what it is. It is because most everybody here knows what it is all about but not everybody does, and this is for the record. So just for clarity's sake.

Mr. GORDON. Point well made. Thank you, Mr. Chairman.

Mr. LARSEN. A-OK, Mr. Chairman.

Then you also determined that Air Force failed to consider that Boeing's proposal—the proposal's strengths referred to as major discriminators were in vital KPP, or key performance parameter, areas, whereas the Airbus proposal strengths were in areas that were weighted relatively lower in non-key performance and key system attribute requirements. Is that correct?

Mr. GORDON. It is.

Mr. LARSEN. Page 31.

Mr. GOLDEN. Yes.

Mr. LARSEN. So it does seem that the Air Force gave Northrop Airbus extra credit when it wasn't supposed to and didn't give the Boeing offer credit when it was supposed to.

Mr. GORDON. In those instances, that is true.

Mr. LARSEN. In those instances.

Moving—as we move forward, there has been some discussion about how the Air Force would potentially amend a new RFP. And I don't know if you can answer this, and maybe it is a question I am asking for the next panelist. But if you can please offer an answer, how should Congress—or perhaps how would you as well—but how should Congress look at an amended RFP that changes the relative weights for certain requirements that were weighted differently in this RFP but not other requirements?

Mr. GORDON. Two parts to the answer, if I could, Representative Larsen.

First of all, I am sure your next panelist, Secretary Young, will be the better person to answer than we would; and that relates to the second point.

GAO, what is going to happen is this, assuming, as I understood from Secretary Gates' press conference yesterday, that the Air Force is in fact going to implement our recommendation, amend the solicitation, have discussions, get revised proposals and then move forward. We can't speak about what particulars the agency, the Air Force should or should not—what steps they should take in those amendments for at least two reasons. Reason number one, it is up to the Air Force to decide its requirements, not us. Reason number two, in fact, one of the private companies when it sees the amendments, could file a protest with us. And we have to maintain our independence.

They could—one of the companies could say, by what the Air Force is doing in the solicitation, they are skewing the competition in favor of the other side, either one of the companies; and they have the right to protest the amendment to the solicitation. And, as a result, we can't speak to the particulars of what the Air Force should or should not do in amending the solicitation.

Mr. LARSEN. If I may, Mr. Chairman, just another question.

Mr. ABERCROMBIE. One more.

Mr. LARSEN. As a "for instance" on that, if the DOD—in this case AT&L—should be responsible for the next steps in this, said, fuel off-load capability is going to be more important and we are going to add more points for that this time around, but fuel costs which you did not say they ought to but it certainly seemed from the report said they may want to certainly take that into consideration, fuel costs and fuel use, fuel costs should not be a heavy factor. That would seem to some to say that that might skew the process. They

may try to make it look objective, but it would certainly look to some like it would skew the process toward one offeror over the other offeror.

Mr. GORDON. Your example proves my point. Someone could protest and say that that was an anti-competitive change to the solicitation and it restricted the competition unduly. We will not be able to speak to that.

Mr. ABERCROMBIE. Thank you.

Mr. Akin.

Mr. AKIN. Thank you.

Mr. ABERCROMBIE. Excuse me. Mr. Akin, just before we proceed, the reference was made to AT&L. That means acquisition, technology and logistics and refers to the Under Secretary of Defense, Mr. Young.

Mr. GORDON. Mr. Chairman, I apologize.

Mr. ABERCROMBIE. You are A–OK.

Mr. GORDON. What does A–OK stand for?

Mr. ABERCROMBIE. I hesitate to say.

Mr. AKIN. Thank you, Mr. Chairman.

The third finding in your comments here, we found that the Air Force determined that Northrop Grumman's proposed aircraft could refuel all current Air Force fixed-wing tanker-compatible aircraft using current Air Force procedures required by the solicitation. Is it my understanding that the KC–10 could not fly slow enough for some assets that had to be refueled currently? Is that the problem?

Mr. GORDON. The Northrop plane. The KC–10 is one of the current tankers.

Mr. AKIN. Excuse me. The Northrop plane, did it have trouble flying slow enough to refuel some of the aircraft that we wanted to refuel?

Mr. GORDON. We are very close to proprietary information, but I can tell you that, in fact, the issue wasn't that it couldn't fly slow enough.

Mr. AKIN. But the report's findings was that it could not refuel some of the planes that the KC–135 could refuel.

Mr. GOLDEN. What it concluded was that the record did not demonstrate—the evaluation record that we got from the Air Force did not demonstrate that. Therefore, we could not find their conclusion reasonable.

Mr. GORDON. Nothing in the decision goes to the capabilities of the Northrop plane or the Boeing plane. It goes to the way the Air Force did the evaluation.

Mr. AKIN. I see. So it may be that Northrop plane could do it fine.

Mr. GORDON. Absolutely.

Mr. AKIN. But it was just in terms of procedurally there was no proof that it could.

Mr. GORDON. I am not sure it would use the word "procedural", but we are not expressing a view on whether the Northrop or the Boeing plane could meet the requirements.

All we know is that when we looked at the record and we went through these issues, these are, in fact, the overrun and breakaway issues we were talking about earlier. We investigated these at

great lengths with the witnesses at the hearing as well as in the written record; and they did not provide, in our view, a reasonable basis for their conclusion. The planes may well have had the capability.

Mr. GOLDEN. Typically, what we are doing in this kind of record is we are looking for an analysis. And what you said is right, documentation, exactly what you said.

Mr. AKIN. As other members have commented, I appreciate you are very strict in keeping on that line very precisely in terms of doing what your job is and all of us have an interest in making sure that you do that. We don't want to pull you over the line. So I appreciate your clarifying that point.

That is all I had. Thank you.

Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Thank you.

Mr. Dicks, to be followed by Mr. Rogers.

Mr. DICKS. Mr. Chairman, I think Mr. Rogers is a member of the committee. Do you want to go with him first?

Mr. ABERCROMBIE. We are going Republican, Democrat, Democrat, Republican.

Mr. DICKS. Thank you, Mr. Chairman. Thank you very much.

One of the findings of GAO's protest decision is that the Air Force conducted misleading and unequal discussions with Boeing. Could you tell us what part of the proposed evaluation this related to and why it was a concern and how the source selection was conducted?

Mr. GORDON. Thank you.

The question goes to—actually, I should point out that this is an instance where this word that has certainly caught people's attention—the word "misleading"—it is, for better or for worse, a standard word in the case law in this area both at GAO and in the Court of Federal Claims and that is——

Mr. DICKS. Is it equivalent to lying?

Mr. GORDON. No, sir.

Mr. DICKS. Okay.

Mr. GORDON. No, sir. What happened in this case with regard to one of the objectives of a key performance parameter, and this one related to operational utility, was that the Air Force told Boeing at one point that Boeing had fully satisfied the objective. At some point thereafter, the Air Force changed its assessment, which they are permitted to do. They changed their assessment and concluded that Boeing had only partially met the objective.

The problem was they continued with discussions with Boeing and with Northrop Grumman and didn't tell Boeing that they had changed their mind. Had they told Boeing, we have decided you only partially met this particular key performance parameter objective, that would have been permissible. But, as it was, Boeing was left advised that they had fully met it, all right, and understandably felt that they didn't need to make any change in their proposal, and that the impact of that was to meet the standard of what we call in the case law misleading discussions. In the discussions, they said you fully met it. After the fact, it turned out that was no longer true.

Mr. DICKS. Now you said that there was nothing done here that was illegal. But if you read your report, it comes across to me as if there was a bias or a predisposition to go in one direction here and that they did everything twisting and turning to make the thing come out the way they wanted to.

You talked about the fact that there was three to one in these key discriminators in favor of Boeing, but that was discounted, that there was a miscalculation in the addition on military construction, a very major issue, that made Northrop Grumman the low bidder. And if there hadn't been a protest, no one could have ever known. If Boeing hadn't protested, no one would have ever known.

Now this bothers me very much. Because there was—you didn't say "illegality". You said there wasn't any illegality. But there was certainly unauthorized discussions with the press immediately after the release of the decision, which is not supposed to happen. It is unfair to Congress. It is unfair to the Boeing Company. And it was done immediately. This was an overwhelming decision. It is a slam dunk. They won on every single point. And this was directly from the Air Force. Is that proper? Is that appropriate conduct for the Air Force?

Mr. GORDON. Congressman, I can't speak to the propriety of those contacts between the Air Force and the press. What I can say—I want to go back and be sure the record is clear.

On the issue of illegality, it is a word that we tend not to use. When we sustain the protest, it means that we conclude that the procuring agency, the Air Force in this case, violated procurement law, either statute or regulation, in a way that was detrimental, prejudicial, as we say, to this protester's ability to get the contract. So, in that sense, we did make a finding of unlawful action.

What we didn't find—it wasn't alleged by Boeing, and we didn't see an iota of evidence of it. We didn't find that there was intentional wrongdoing, no evidence of bias, no evidence of criminality. That is absolutely true.

On your comment, Congressman, with respect to the value of the protest in terms of airing these concerns, we very much concur. The protests provide a very important avenue for holding agencies accountable for their actions.

Mr. DICKS. You know, I have been around here a long time. General Handy mentions it in his op-ed, that this is almost an unprecedented series of charges or protests sustained by the GAO against the Air Force and that these are not minor matters, that these were major matters that could have changed the outcome. In fact, the addition mistakes, in fact, changed who was the low bidder. So from your perspective, these are not—as people are characterizing these, these are not minor matters. These are significant issues that the GAO has decided, isn't that correct?

Mr. GORDON. Yes. We choose our words very carefully. We would not characterize the errors we found as minor. We, after great deliberation, would characterize them as significant errors that could have affected the outcome of what was a close competition between Northrop Grumman and Boeing.

Mr. DICKS. Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Thank you.

Mr. Rogers.

Mr. ROGERS. Thank you, Mr. Chairman.

That is a perfect segue——

Mr. ABERCROMBIE. Excuse me. To be followed by Mr. Tiahrt and then Mr. Bonner.

Mr. ROGERS. That was a perfect segue into what I want to talk about, and that is I want to limit my comments to process. I understand that is all that you reviewed and you did say "could have." There is no evidence that you found, from my reading of this, that these seven or eight points where there is a deviation in process did in fact change the outcome. Is that correct?

Mr. GORDON. That's right. We are not saying that Boeing should have been selected. That is not what we were saying in the report.

Mr. GOLDEN. What we said in the report is that it meets the legal standard of showing prejudice. That doesn't mean that the result would necessarily change.

Mr. ROGERS. Right. I want to make it clear. I know you touched on this a couple of times. There is no evidence that bribes was offered this time around in the bidding of this contract, is that correct?

Mr. GORDON. That is absolutely correct. Neither bribes nor any other criminal conduct.

Mr. ROGERS. No malfeasance, no impropriety of any kind Northrop Grumman demonstrated in winning in this contract?

Mr. GORDON. No intentional impropriety.

Mr. ROGERS. It was a clean bid process in the way of misbehavior is concerned.

Mr. GORDON. We saw no evidence of intentional misconduct.

Mr. ROGERS. I want to make the point—I know several folks want to talk about the merits of the contract being issued to Northrop, and I know we are going to talk more about that on the next panel. But you found nothing as to the merits of which plane was better or not.

Mr. GORDON. That's right. Nothing in our decision should be read to say that the Northrop plane is better or the Boeing plane is better.

Mr. ROGERS. In this process, the Air Force is the customer, is that correct?

Mr. GORDON. In the sense that they are making the purchase, yes.

Mr. ROGERS. They are making the purchase, and the Air Force selected the Northrop Grumman plane, and from what I read there is no evidence that there was impropriety in the way they made their selection. So you are not saying they didn't get the best plane?

Mr. GORDON. We are not expressing an opinion about it one way or the other.

Mr. ROGERS. I want to go back to a point that you were talking about with Mr. Miller and that is the number of issues. We had a briefing with your office a couple of weeks ago that was not public and there was a specific number of protests that were offered by Boeing. Do you know that number?

Mr. GORDON. It depends what you mean. There were eight protests that were filed. One moment.

Mr. GOLDEN. Are you talking about—I think I identified 22 major issues at that briefing.

Mr. ROGERS. That is my point. There were 22 issues that they visited as being possible deviations.

Mr. GOLDEN. Yes, and I pointed out there were subsets and other arguments related to those major——

Mr. ROGERS. So that may have been where the hundred or so items came from that Mr. Miller referenced?

Mr. GOLDEN. I have seen it even higher at times, to be honest with you.

We looked at everything. We didn't spend a lot of time counting. We had a deal with all the issues in the protest.

Mr. ROGERS. But of the 22 that were offered you found 14 that was no problem.

Mr. GORDON. I am not sure we would count them that way.

Mr. GOLDEN. I think that the issues are integrated. It is hard to divide them in the way people would like to. We found seven issues that we sustained, that we found in favor of the protest, that we found problems with the procurement.

Mr. ROGERS. I guess the point I want to leave here with knowing is that you folks just dealt with process. You are just a legal team looking at the process, and you are not making any statement that the wrong plane was selected or that this process deviation in fact changed the outcome or would have changed the outcome. You are just saying that it could have, but there is no evidence of impropriety or criminal behavior or anything that would lead somebody looking at this to go to say, well, but for those seven items, Boeing would have won this contract.

Mr. GOLDEN. I think we have been pretty clear in the written testimony and our testimony today that we did not—our job is not to evaluate the merits of the planes or decide which plane—what we focus on is violations. Our role is to look and examine when a protest is filed, deal with allegations of violations of law regulations in the selection process.

Mr. ROGERS. That is my point. I hear too many of my colleagues and folks in the private sector who point at this as if it was like the last contract where there was all this improper behavior, and that is not what I have been reading or hearing from you all in our private briefing or in this one. And that is just there are seven deviations in process that may or may not have made any difference at all.

Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Is that it for you, Mr. Rogers?

We will go to Mr. Tiahrt.

Mr. TIAHRT. Thank you, Mr. Chairman.

I am a little worried when I have the only seat in the House without a microphone.

Mr. ABERCROMBIE. I am sorry, Mr. Tiahrt. I was distracted. Did you ask me something?

Mr. TIAHRT. No, I was just making a comment without an acronym.

As I count—I am reading through the report of your executive summary, whatever you call it. I find eight areas that you have,

rather than seven. I have heard seven repeated a couple times, but I think eight is probably the proper number.

You guys look at about 1,200 different protests a year, is that about right? This year you have already looked at I think 1,000, is that about right?

Mr. GORDON. I didn't hear the last statement.

Mr. TIAHRT. How many protests have you looked at this year, approximately?

Mr. GORDON. We get something on the order of 1,300 protests a year, plus or minus 200.

Mr. TIAHRT. What has been your experience when one of the bidders to a proposal fails to meet the requirements of that proposal?

Mr. GORDON. I think you probably mean when the company that receives the contract is alleged not to have met the requirements of the competition, am I right?

Mr. TIAHRT. No. I mean, during the bidding process, what usually occurs when one of the bidders fails to meet the requirements?

Mr. GORDON. It depends on the context. We have a complicated procurement system.

In brief, there are some situations in which they are simply out. That is the end of the matter. They are nonresponsive, and they are not considered.

There are other situations in the negotiated procurement context where it is perfectly normal for the agency to decide that this bidder, this offeror, fails to meet the requirements in this area, that area and the other. You then have discussions, negotiations, and during those discussions you raise with them your concern. You haven't met the requirements here, there and the other. After discussions, all the companies get a chance to revise their proposals and then they will be evaluated. So you hope that at the end of the process they have acceptable proposals.

Mr. TIAHRT. Would you consider this a negotiated contract or——

Mr. GORDON. Yes, this was a negotiated procurement.

Mr. TIAHRT. And so, even in a negotiated contract, when a contractor fails to meet the requirements or chooses not to meet the requirements, what is the normal process?

Mr. GORDON. If at the end of the day you have a proposal that doesn't meet the requirements, you can't make award to it. You are either going to have another round of discussions or they are not going to get the contract.

Mr. TIAHRT. So if a contractor chooses not to meet the requirements then either you need to go into renegotiations or reject the contract, is that what you said?

Mr. GORDON. Yes, if it is a material requirement.

Mr. TIAHRT. Okay, and I noticed in one of the material requirements according to your report that—I think it was the second one—that one of the two bidders made a decision not to meet the requirement, made a decision not to meet the requirement and therefore was noncompliant. And according to the FAR, Federal Acquisition Regulations, section 14.404–2, it falls into the category of rejection of individual bids. Was it not a little bit peculiar that this bid was not rejected because of failure or noncompliance?

Mr. GORDON. It actually goes back to what I was saying before when I said there is a dichotomy between some situations——

Mr. TIAHRT. You also clarified that by saying even in a negotiated contract that if one party chooses not to meet the requirements, then it is not an acceptable bid.

Mr. GORDON. I understand. But the part of the Federal Acquisition Regulation that you cited actually is not relevant here. Because you have cited a part of the Federal Acquisition Regulation which would be important in the context of invitation for bids, sealed bidding.

In negotiated procurements, the agency has the right to pursue the matter, all right? What they can't do is say, we have a material requirement, this company hasn't met it, and yet we are still going to make award to them. That is an unacceptable solution. They have to do one or the other.

Mr. TIAHRT. I understand that. And perhaps I got the wrong section in the FAR, but it is still applicable that if you fail to meet the requirements, even in a negotiated contract, as you explain this is, and in confirmation in your report, it says that there is a choice made to not comply with the requirements of this contract. And yet the Air Force accepted the procurement and awarded the contract.

Mr. GORDON. They essentially concluded that the requirement to provide the help with the transition to the organic level—the organic depot level maintenance capability was not material. Because they called it an administrative oversight, and we just didn't see that as supported.

Mr. TIAHRT. And, further, in areas where it was not clear whether one of the two bidders met the requirements, they failed to provide any evidence that they did.

You cited earlier the off-load of fuel. You cited the overrun requirements. You cited the breakaway requirements. You cited the boom requirements. You also mentioned the depot levels maintenance requirements. So here we have multiple areas where there was no evidence that one of the bidders met the requirements of the contract, or of the proposal, the RFP. Is that unusual?

Mr. GORDON. The way you characterize the situation goes beyond what we found. The Air Force found——

Mr. TIAHRT. Wait a minute. Did you not find there was insufficient information on the boom? Whether it could meet the requirements or not? Did you not tell me that there were requirements that there were insufficient information about? Did you not say the same thing about the breakaway requirements?

Mr. GORDON. We had concern about the sufficiency of the basis of the agency's findings.

Mr. TIAHRT. So it appears to me that, where they couldn't meet the requirements, the Air Force was obviously vague about whether they even analyzed it properly and they couldn't provide you with the information to confirm that they did meet the requirements.

Mr. GORDON. We certainly had concerns as to each one of the issues. But I don't want to overstate the concerns. We were not in a situation where we would have ever considered saying, oh, Northrop cannot meet the requirements and therefore the contract should go to Boeing. What we saw was that the agency—that the Air Force hadn't done enough to establish that Northrop's solution would work.

Mr. TIAHRT. Thank you for confirming what I thought; and that was, were there areas where there was a question on whether they met the requirements or not, there was insufficient data provided by either the Air Force or the bidders to the contract. Because it is appearing several times at least, on five different occasions—and you specified two of them—two of the eight items that you identify directly address it, and then you mentioned several others at the end of your report. I think it is a considerable problem.

I also was a little bit concerned about the extra credit item that was referred to earlier. It seems that you found that extra credit was considered when one of the two bidders exceeded a threshold——

Mr. GORDON. An objective, yes.

Mr. TIAHRT [continuing]. And then exceeded the objective. Because normally the way this works—and correct me if I am wrong—but a request for a proposal has a threshold. In this case, it is the KC–135R. That is what is characterized in the request for the proposal. That is the threshold.

Normally, there is an objective. And when you reach the objective then you get the extra credit and all parties that reached that objective get the extra credit. Is that not correct?

Mr. GORDON. I am not sure that I would characterize that as normal. But the situation here was fairly straightforward. If you met the objective, you were to get credit for it as it's a meets. If you went above the objective, all right, you weren't supposed to get extra credit. And as to one of the objectives, Northrop exceeded the objective and got extra credit.

Mr. TIAHRT. In one? What about passenger capacity? Was there extra credit given there?

Mr. GORDON. That, I understand from my colleagues who are more expert on technology, was not a KPP objective. So the issue of exceeding the objective and improperly being given credit, it is improper only because the solicitation said we will not give you credit for exceeding the objective. If it hadn't said that, they could have done it. But that arose only in connection with the one objective that we cite.

Mr. TIAHRT. Which was the fuel capability?

Mr. GORDON. Yes.

Mr. TIAHRT. I guess I was referring to Secretary Payton when she mentioned in the contract award that there was extra credit for passenger and extra credit for cargo, and I think she may even—the medical package pallets may be mentioned.

Mr. GOLDEN. The cargo capability, that was permissible under the solicitation. These other items you are talking about were—it was permitted on the solicitation to give credit for that. It was not for the fuel, for want of a bad summary, the fuel capability requirement.

Mr. ABERCROMBIE. Mr. Tiahrt, Ms. Payton will be in the closed session, if you want to pursue that further.

Mr. TIAHRT. Thank you for your assistance, Mr. Chairman. I will wait until then to pursue that then.

Mr. ABERCROMBIE. Mr. Bonner.

Mr. BONNER. Thank you, Mr. Chairman. Also, thank you for allowing those of us who are not a member of your subcommittee and full committee to be here.

Mr. ABERCROMBIE. May I say before you begin, Mr. Bonner, Mrs. Boyda chooses to pass at this juncture, and unless there is a second round we will move to Mr. Young. And then, subsequent to that, I am going to take a show of hands as to whether we just stay here and allow the media to leave or whether we adjourn to 2337.

Mr. BONNER. Thank you.

Good evening, Mr. Gordon. Please help me and help especially the people back in my district who were so excited on February 29th when the Air Force made the decision that the Northrop Grumman EADS team had won the account contract. Help us understand the process, because that is in fact what you all are here to discuss.

Am I right or wrong that in the conclusion and recommendation of the findings of the GAO where you said, but for these errors we believe that Boeing would have had a substantial chance of being selected for award—would you ever sustain a protest if you didn't have a sufficient number of findings where the protester would have had a chance for the award?

Mr. GORDON. No. Prejudice, as we call it, is a requirement for us to sustain the protest. And we often see cases where the agency made errors of procurement law, but it didn't make a difference.

We have to have a situation where the protester—not only were there violations of procurement law regulation but where the "but for those errors" the protester would have had a substantial or significant—you see both words in the case law—chance of obtaining the award.

Mr. BONNER. The reason I raise that, as my colleague, Mr. Miller, raised earlier, words are powerful, and many people have chosen to take the word "substantial" and make it into something perhaps bigger than it is or perhaps what it is. Is "substantial" anything other than a justification for the sustaining of the protest?

Mr. GORDON. It is the basis for sustaining the protest, but it is a meaningful word. It is not—it can't be a situation where the chances of the company winning the contract would have been negligible, de minimis. There was a substantial——

Mr. BONNER. It they had been negligible, then you would not very likely have had reasons to sustain the protest.

Mr. GORDON. Yes. Yes.

Mr. BONNER. Further in this conclusion, did either of you have a chance to see the press conference yesterday with Secretary Gates?

Mr. GORDON. We both did. We watched it together.

Mr. BONNER. Then in the conclusion where you say, we recommend the Air Force reopen discussion with the offerors, obtain revised proposals, re-evaluate the revised proposals and make a new source selection decision consistent with this decision—I know some parts of that recommendation have not necessarily had time to come to fruition, but, based on what you saw yesterday, do you believe Secretary Gates, on behalf of the Department of Defense, has acted in good faith on the GAO's recommendations and the

process going forward is adequate, based on your recommendations?

Mr. GORDON. Adequate goes to the colloquy that we had earlier. We need to see the details. We have gotten nothing in writing. And even when we get something in writing, we will wait to see whether the private companies, either one of them, files a protest.

But if you want an initial informal opinion, it certainly sounded to me like Secretary Gates was acting in good faith to implement the recommendations, but that doesn't bind GAO in terms of a protest that we might get down the road. I think he used words very close to "we intend to implement GAO's recommendation."

Mr. BONNER. Would I be correct or incorrect if I said in that, in the report, the GAO stated that the Air Force calculated correctly that the KC–45 could off-load more fuel over distance?

Mr. GORDON. I didn't understand the question.

Do you understand it?

Could you restate the question?

Mr. BONNER. Sure. Would I be correct or incorrect if I said that the GAO stated that the Air Force calculated correctly that the KC–45 could offload more fuel over distance?

Mr. GOLDEN. I think the answer is yes.

Mr. BONNER. Would I be correct or incorrect if I stated that the GAO found that the Air Force correctly reported that the KC–45 was superior in air refueling efficiency?

Mr. GOLDEN. I think the wording is—could you repeat the wording? We didn't——

Mr. BONNER. Sorry, I am from Alabama.

Mr. GOLDEN. It is not your fault.

We are very careful in these decisions. What we are reviewing is the reasonableness of the agency's actions. And so——

Mr. ABERCROMBIE. Mr. Golden, excuse me. Could you speak a little more into the microphone? I realize you are addressing Mr. Bonner.

Mr. GOLDEN. I am sorry.

What we are doing in these decisions is reviewing the reasonableness of the Air Force's actions, their evaluation findings. And I am not sure that either of these now that you are raising really were, in a sense, a protest issue that we went to the merits and assessed. So I am hesitant to say definitively, you know, give you a definitive response on these things.

Mr. BONNER. Okay, forgive me. I thought that you had nodded in the affirmative that they both were correct.

I could go down a list, just as our friends on the other side could as well, making their point. I don't intend to do that.

Mr. GOLDEN. No. Is what you are saying did the Air Force report that to us in the record?

Mr. BONNER. It was my understanding that the GAO stated that the Air Force in both cases calculated correctly that the KC–45 could offload more fuel over distance and that the Air Force correctly found that the KC–45 was superior in air refueling efficiency.

And I was just asking if that is consistent with your understanding of your work.

Mr. GORDON. I hesitate to say this, Congressman, but if you could point us to someplace in our decision where it is there.

Mr. GOLDEN. Right.

Mr. GORDON. We don't think that is actually in the decision. But it is a very long decision——

Mr. BONNER. It is.

Mr. GORDON [continuing]. And perhaps our collective memories are——

Mr. DICKS. I thought we weren't getting into the planes.

Mr. BONNER. Well, I won't take any more of your time on that. I would just like to, since so much has been made earlier——

Mr. ABERCROMBIE. Could I say, Mr. Bonner?

Mr. BONNER. Yes, sir.

Mr. ABERCROMBIE. If you would yield for a moment.

Mr. BONNER. Absolutely.

Mr. ABERCROMBIE. Could I suggest that you take a look and get back to Mr. Bonner?

Mr. BONNER. With pleasure.

Mr. GORDON. Okay, with pleasure.

Mr. ABERCROMBIE. And to the committee.

Mr. BONNER. Mr. Chairman, I don't have another question, just a comment in closing for this panel.

Mr. ABERCROMBIE. Go ahead.

Mr. BONNER. So much has been made of General Handy's opinion. He is a respected leader in the Air Force. I think it should be noted that he is also a former commander of U.S. TRANSCOM. He retired in 2005. And the current commander of U.S. Transport Command (TRANSCOM) , General Schwartz, as well as the current commander of Air Mobility Command, General Lichte, were both very involved in setting the requirements for tanker. And those requirements from the Air Force expressed a preference for a larger, more capable, more flexible aircraft.

I don't say that on the record to ask for your comment. I just wanted to say, with no disrespect to the general whose name has been mentioned so often, there are many generals, current and retired, who have expressed an opinion on this. And I don't know that that necessarily has anything to do with the process; I just wanted to get it on the record.

Mr. Chairman, thank you.

Mr. ABERCROMBIE. Thank you, Mr. Bonner.

Mr. Miller has a follow-up question, I believe, and I have one question for the record. And then unless someone else has a desire to ask questions again at this stage, we will go to Mr. Young.

And I would remind the other members that after Mr. Young, as I say, we will take a show of hands, which I hope will say we are going to stay here. Both Mr. Gordon and Mr. Golden, as well as Mr. Young and I believe Ms. Payton, will be at the closed session. We will just take a very short break and continue.

Oh, Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

Real quick, and I know and appreciate the time that you have given to us today and the clarity with which you provided the answers.

You had said in one of the items that the Air Force said that the KC–45 could, in fact, refuel all Air Force aircraft. You said that you felt as though they had not provided enough documentation to prove that. Is that correct?

They needed to provide better documentation to prove that they thought that the boom could refuel all aircraft.

Mr. GORDON. You pointed out earlier, Congressman, and rightly so, that words matter. I want to look at our words and be sure that I answer you with the right words.

Mr. MILLER. Okay.

Mr. GORDON. All right. Our finding was that the record didn't show that the Air Force reasonably determined that Northrop Grumman's proposed aircraft could refuel all current Air Force fixed-wing tanker-compatible aircraft using current Air Force procedures, which was required by the solicitation.

Mr. MILLER. And I lay that as groundwork to ask this question. Is that one of the significant errors that could have affected the outcome of the contract?

You consider a judgment on GAO's part that the Air Force made—I mean, I would rather have somebody who flies for a living make the determination rather than somebody who flies a desk make the determination as to whether or not it could provide air fueling requirements for the Air Force.

And so I am just saying, do you still contend that is a significant issue, that the Air Force didn't prove it?

Mr. GORDON. We think it is a significant issue, yes, sir.

Mr. MILLER. That is all.

Thank you very much.

Mr. ABERCROMBIE. Mr. Dicks, did you have a follow-up?

Mr. DICKS. Yeah, just briefly. On page 66 of the report, in a footnote, I think it says, "The report also recommends that fuel costs, because of their dramatic effect on lifecycle cost, be considered in a future evaluation of proposals."

And I have a chart, Mr. Chairman, that I would like to see submitted into the record, along with General Handy's statement, which basically lays out the difference in fuel consumption between these two aircraft.

Mr. ABERCROMBIE. Without objection. Without objection, the document will be entered in the record.

[The chart referred to can be found in the Appendix on page 95.]

[The prepared statement of General Handy can be found in the Appendix on page 90.]

Mr. ABERCROMBIE. Now, did you want to re-ask your question?

Mr. DICKS. Did you say yes—you just said yes to the fact that there was a recommendation that fuel costs be considered in the future in the footnote?

Mr. GOLDEN. It is footnote 89 I believe you are talking about. And we said, "Given our recommendation below that the Air Force re-evaluate proposals and obtained revised proposals, this is another matter that the agency may wish to review to ascertain whether a more detailed analysis of the fuel costs is appropriate."

That is the language in the decision that I think you are referring to.

Mr. DICKS. Yes. Thank you very much.

Mr. ABERCROMBIE. Can you site the page that you are referring to?

Mr. GOLDEN. I am sorry. It is page 66, footnote 89.

Mr. ABERCROMBIE. Thank you.

And Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Just to clarify, I, too, hope that the Air Force can certainly define what their requirements are. Your job is not to do that, and you have been very clear about that. Your job is to ensure that, in this process, the agency followed what they said they were supposed to do under the law. And so your conclusions are based on whether or not the agency did.

And if they can't back it up with documentation, as I understand it, then you have to call foul on them. They have to back up what they say they are going to do. And, in many regards, when you cite these significant errors, they were not able to back that up.

And that is what your job is to do in these protests. It is not to fly an airplane or fly a desk or anything else. It is to hold the agency accountable. In this case, it happens to be the Air Force. In other protest decisions, it is whatever agency is having to make a procurement decision.

Is that generally correct?

Mr. GOLDEN. Yeah. Under the Federal Acquisition Regulations, the agencies are required to document and support their evaluation record. There are specific requirements. And——

Mr. LARSEN. And when they don't, you have to call them on it if there is a protest.

Mr. GORDON. But I want to be very concrete here. With respect to the overrun speeds, the Air Force itself had concerns during the procurement about whether the Northrop plane would, in fact, meet the requirement.

With respect to breakaway, that didn't come up until the protest. But the problem isn't our making a judgment about whether the plane meets the requirement.

Mr. LARSEN. Right.

Mr. GORDON. Our question is to the Air Force, tell us why you made that determination.

Agencies, including the Air Force in this procurement, in this protest, get enormous leeway. This is not, in this case or in any case that we have, a question of "reasonable minds can differ, and GAO decided X." This is, if you will, the agencies get to make the decision. The agencies have huge leeway. We give them deference in making those decisions.

What we do is say, we want to be sure that you follow the evaluation criteria and that what you said holds together. It is when we ask and get an answer that doesn't hold together—not because we are experts in the technology, but because we are seeing a concern, and we are asking what is the response to the concern, and the response is simply not satisfactory. That is why we sustained this protest ground.

Mr. LARSEN. But, gentlemen, I can assure you that the pro-GAO faction in Congress is bigger than the pro-Northrop, pro-Boeing and pro-Air Force factions put together. I assure you of that. You do a great job, and we rely on you for a lot of things.

Mr. GORDON. Thank you.
Mr. GOLDEN. Thank you.
Mr. LARSEN. Thanks.
Mr. ABERCROMBIE. Thank you.

One question for the record before Mr. Young comes, because I am not clear on it, and I think everybody needs to know this on the subcommittee and those who are interested.

Did the GAO call Secretary Payton, who is the source selection authority, and/or Lieutenant General Hudson, the chair of the Source Selection Advisory Council, as witnesses during the protest hearings?

And with regard to your answer, why would they be called or why would it be likely that they should be called or not likely? Why or why not, depending on your answer, affirmative or negative.

Mr. GORDON. Absolutely. Neither one was called. But it is a very helpful question in terms of giving us a chance to explain to the subcommittee how this process works.

We told the Air Force and the private parties exactly what our questions were. We told them what the issues were that we intended to explore in the hearing. We let the Air Force identify the people they felt were best qualified to answer those questions. If the Air Force had picked the source selection authority, we would have been delighted to have the SSA in front of us, and we would have proceeded with that.

In fact, we gave the Air Force and the private parties fairly extensive notice of the need to hold a hearing, because we recognized that, when you are calling high-level officials, it is tough to get on their calendars.

So we gave them advance notice of the hearing dates in order that they would be able to bring both the SSA, the source selection authority, and the chair of the SSAC that you mentioned. We wanted to provide them every opportunity so they could do it if they felt that those people should be the witnesses for the Air Force.

Mr. ABERCROMBIE. You understand why I asked the question. Because it was clear from your testimony that you did not pick the people coming to answer the questions; the Air Force did.

Mr. GORDON. We nor Northrop nor Boeing picked them.

Mr. ABERCROMBIE. Right. And that is why I asked the question, because it struck me as, I don't know, strange. Again, regardless of the side one is on or if one doesn't have a side, it struck me as almost incomprehensible that either the source selection authority or the General in charge of the advisory council would not be among those chosen to come to speak to you.

The fact that they were not is something I am going to have to find out about. And I think all the members will be interested in that.

Maybe you can't answer that. When I said "why not," simply because they didn't choose them, right?

Mr. GORDON. Yes.

Mr. ABERCROMBIE. That is your answer?

Mr. GORDON. Mr. Chairman, I would say there are occasionally protests——

Mr. ABERCROMBIE. I am editorializing here a bit, I realize, because it is incomprehensible to me that they wouldn't come.

Mr. GORDON. I understand. Mr. Chairman, that was their call. There are situations in which GAO says, we need a particular official. The classic example would be where we have gone through the record—and we always go through the written record before we have the hearing. We sometimes go through the record and we can see a particular evaluator or sometimes a source selection official has changed their mind or there is an inconsistency in the record. We will say, "We have a document that shows that Mr. Jones did something. We want to hear from Mr. Jones." This was not a case like that.

Mr. ABERCROMBIE. I understand that.

Mr. GORDON. We left it to the agency.

Mr. GOLDEN. Yeah. And, Mr. Chairman, in all fairness, we identified issues, and we told the parties, "Hey, give us the people who can best talk about these issues." I mean, and, you know, I think your question is best raised with the Air Force.

Mr. ABERCROMBIE. Right. It is going to be raised there. I just wanted to make sure that I had it correct, because I will tell you that I assumed—and I will tell you, I would be very surprised if any member sitting here didn't assume that the source selection authority and/or the Chief Advisory Council general wouldn't be the first two to be, you know, cited to come. So we are going to have to find out about that.

But I recognize that that wasn't something that you had to pursue. That is something we have to pursue. And I wanted to make sure I was right.

And if that is it—I know you are still standing by. I appreciate that. I must confess to you that I—well, I thought we had a different set of timing. So I didn't make any arrangements for dinner and so on. I am just going to have to keep right on going. So I presume that also part of the GAO charter is this fortitude.

Mr. GORDON. We live to serve, sir.

Mr. ABERCROMBIE. Thank you.

Mr. GOLDEN. Be glad to do it.

Mr. ABERCROMBIE. So I am going to ask you to stand by, and then we will ask Mr. Young to come at this point.

Mr. DICKS. How about a three-minute break, Mr. Chairman?

Mr. ABERCROMBIE. Yes. While Mr. Young is coming—Norman, wait, wait, wait. Norm, time out. Before you go—well, okay.

Mr. DICKS. Yes, Mr. Chairman?

Mr. ABERCROMBIE. I have his proxy.

Mr. DICKS. I am still here.

Mr. ABERCROMBIE. Can we take a vote right now? Can we just stay here and have them clear, rather than everybody having to—okay.

That is what we will do, Doug.

Mr. DICKS. But that is after Mr. Young.

Mr. ABERCROMBIE. Yeah, after Mr. Young. Then we will have the second part of the hearing, and we will give the media a chance to break. Maybe you can have your offices send over a sandwich or something.

So we will recess for three minutes while Mr. Young puts on his armor and gets into his chair.

[Recess.]

Mr. ABERCROMBIE. Secretary Young, thank you for your patience. I trust you were listening in.

And you have a statement, which we will incorporate into the record. If you wish to summarize it or take sections of it, that is fine. And I think we will just move ahead.

Mr. Skelton has been able to join us again.

And then, subsequent to your statement, we will go to questions or commentary for your observations and your commentary and/or answer to questions. And then we will take a short break again, and then we will go into the closed session.

Secretary Young, please proceed. And thank you, again, for coming.

STATEMENT OF HON. JOHN J. YOUNG, JR., UNDER SECRETARY OF DEFENSE FOR ACQUISITIONS, TECHNOLOGY AND LOGISTICS

Secretary YOUNG. Certainly.

Chairman Abercrombie, Chairman Skelton, Ranking Member Saxton and distinguished members of the subcommittee, thank you for the chance to testify on the Department's——

Mr. ABERCROMBIE. Can you bring the mike just a touch closer, please? Thank you.

Secretary YOUNG. Thank you for the chance to testify on the Defense Department's plans for proceeding with the Air Force tanker competition.

After seven years, it is critical that the Defense Department move forward with the purchase of a new tanker for our warfighters. The KC–(X) replaces the KC–135 tanker aircraft that are rapidly reaching the end of their service life. The oldest tanker is 50 years old, and the average age is 47 years.

KC–(X) represents the first phase of a three-phase tanker replacement program. And the Defense Department intends to compete for the future KC–(Y) and KC–(Z) phases.

This afternoon I will briefly summarize how the Defense Department plans to move forward. I want to note that the Department is in the middle of an active, competitive source selection. We generally do not discuss ongoing source selections or competing proposals.

First, such a discussion could taint the competition. In this case, we have a solid competition that is advantageous to the warfighter and the taxpayer. We want to protect and encourage that competition.

Second, complete discussion of the proposals or their evaluation would include proprietary information of the companies and source selection information of the Government. Public release of such information would not only affect the competition but also implicate the Trade Secrets Act, a criminal statute, and the Procurement Integrity Act, which provides both criminal and civil sanctions.

Thus, I am very limited in my ability to discuss these matters in open session. I would ask your patience and assistance in main-

taining the integrity of this process, while I also try to be as forthcoming as possible at this hearing.

The Government Accountability Office completed a comprehensive review of the KC–(X) tanker competition. The Defense Department accepts the GAO findings. In reviewing roughly 110 protest issues, which do include a number of overlapping issues, the GAO issued eight specific findings. The GAO found no basis to sustain the vast majority of the protest issues.

The eight findings are correctable. None of the findings suggest a concern with our acquisition strategy. And we will continue with a best-value source selection approach, with the intention of awarding a single contract.

I want to assure you the Department will address each of the findings in completing a new source selection for the tanker program. Building on a carefully and thoroughly reviewed foundation of documents and discussion, the Defense Department will amend the tanker request for proposals, or RFP, and seek modified proposals from industry bidders. We anticipate releasing a draft RFP amendment to industry for comment in late July or early August. The Department will conduct a new source selection based on modified proposals submitted in response to the amended RFP.

Grounded in the warfighters' requirements and the pursuit of best value for the taxpayer, the Defense Department is the only organization that can fairly and knowledgeably conduct this competition. The Department plans to complete the proposal evaluation and reach a source selection decision by late 2008 or early 2009.

Secretary Gates directed, with the full support of the Air Force, the appointment of a new source selection authority and completely new joint membership on the Source Selection Advisory Committee. Secretary Gates made these changes to maintain objectivity and to assure all interested parties that the process would be fair and equitable.

The Defense Department has reviewed and considered the idea of awarding a contract to both companies. In the Department's judgment, this approach would be a mistake, because it would result in an extraordinarily higher cost, as well as complicated logistics, training and operations for the Air Force. A dual award ill-serves both the taxpayer and the Air Force. The Defense Department and the taxpayer are far better served by reserving the opportunity to hold competition for KC–(Y) and KC–(Z). Competition has driven innovation and cost control in this Nation, and a strategy to award to both companies undermines these principles.

We will seek to make only adjustments in the RFP which are grounded in the GAO findings, the warfighters' requirements, and our obligation to get best value for the taxpayer. I would ask the support of this committee and your colleagues in allowing the Defense Department to conduct a fair, open and transparent new source selection process. We will make every effort to earn the confidence of industry, the Congress and the American people in the new solicitation.

The Defense Department does not care which tanker wins the competition. The Defense Department's sole objective is to get the required capability for the men and women who serve this Nation at the best price for the taxpayer.

I look forward to working with the Congress in support of this important program, and I am prepared to answer your questions.

Mr. ABERCROMBIE. Thank you, Mr. Young.

In that context that you just outlined, where you said that you are prepared to earn the confidence in the American people, on March 11th of this year you testified before this subcommittee that, and I quote, "I asked part of my acquisition, technology and logistics team to observe the source selection process and help the Air Force," unquote. And quote, "The Department did its very best," underlined by me, emphasis by me—"The Department did its very best to evaluate two very high-quality proposals with excellent dialogue with both industry partners," unquote.

If the Department did its very best during this past source selection, what specific changes are you going to make for the upcoming KC–(X) source selection process to regain that confidence that you just stated you wish the public to have in you and the Department of Defense?

Secretary YOUNG. Well, as I noted, Secretary Gates will change the source selection authority. We will change the Source Selection Advisory Committee. And we have studied in great detail all of the GAO findings. We will seek to address those findings, again, grounding ourselves in the requirements document and the pursuit of best value for the taxpayer.

We will have an independent team review this. One of my only regrets is that what I told you was we would begin the independent team review process in December. Final proposals were turned in in, I think, March. We needed to start from the very beginning. We now have the opportunity to start at the very beginning and have a team, and an independent team, observe this process and try to make sure we have multiple eyes looking at all angles of the competition.

Mr. ABERCROMBIE. When you say "observe the process," are you not taking over the process?

Secretary YOUNG. That is correct, sir.

Mr. ABERCROMBIE. So you won't be observing; you will be implementing.

Secretary YOUNG. But I will have an independent team observing the process also and advising me.

Mr. ABERCROMBIE. All right. Then that leads me to the timing question. Do you have confidence that the Department can make a sound KC-(X) source selection decision by the end of the year? And what challenges do you foresee that could prevent the Department from doing so?

I think for our purposes here in the Congress, from an oversight point of view, this is an election year, I expect we will adjourn well before the election. There is some question as to whether we might come back. I think we need to have confidence that this can be done by the end of the year, especially because of the length of time that it has taken to get to this stage.

Secretary YOUNG. Mr. Chairman, that is an excellent question. I think when you start on a journey you have to have a goal, one. Two, this competition has drawn out for seven years now. It is very important to get on with it.

I cannot guarantee you we will make that schedule. This is an event-driven schedule. Every single day is critical. There is probably an infinite number of obstacles. As you heard in earlier testimony, when we release the draft RFP, the draft request for proposals, that is a protestable issue. The air is charged around this competition. The Congress is watching it very carefully.

So I have a personal obligation, the Department has an obligation to the warfighter and to you to try to deliver this product. I can't anticipate all the roadblocks that will come up, but we have laid out an aggressive schedule. We will try to make it. I cannot guarantee you we will make it.

Mr. ABERCROMBIE. Okay, again, though, but I am sorry, I have to pursue this with you a little bit.

An aggressive schedule—is it by the end of the year? Is it going to be before the new Congress is sworn in and a new President is sworn in?

Because, I will tell you, if you don't, if you aren't finished by the end of the year, then this thing is going to start all over again. And it is going to take a heck of a lot longer.

And this also, I suppose, takes me to my next and last question, which has to do with the acquisition system then. I mean, if you are going to change all the criteria, then it may take longer. If it is just going to be something else—we need to go into that a little bit.

And I think everybody here has their—some more than others because of the constituency situation and all the rest, but our principal constituency, as has been pointed out, is the warfighter and the taxpayer.

Now, is the timing question—and I will ask you my other question, and perhaps you can combine the answer.

The DOD currently maintains control of Air Force space system acquisition decisions and now the KC–(X). As the DOD's senior acquisition official—and you know how much respect I have for the work that you are doing. I have expressed that both publicly and privately to you. And I say again publicly that the procedures that you are using in your everyday work, including your work on the weekends, is something that I approve of personally and I think the Congress appreciates.

As the DOD's senior acquisition official, what is your view of the Air Force acquisition system? And what changes, if any, is your office going to implement to ensure that the Air Force deficiencies are corrected in a timely manner?

And will the DOD solution be to maintain permanent control of major Air Force acquisition decisions? Now, that is obviously a little bit of a separate question, but you have that power right now.

Secretary YOUNG. Yes, sir.

Mr. ABERCROMBIE. And I realize there is another administration coming and a new Congress to be elected. So the question, I think, is pertinent, because whatever time you have left—my view has always been you do your job, regardless of whether somebody else has done theirs or will do theirs or whether there is going to be some change in the future. There are no excuses for not doing your job when it is your responsibility. That is an observation, not an accusation.

Secretary YOUNG. No, but could I try to address it?

Mr. ABERCROMBIE. Yes.

Secretary YOUNG. I have spoken to the entire acquisition team several times now, and I speak to them weekly in notes. And I fundamentally reject the notion that we are into the drift period at the end of the administration.

Mr. ABERCROMBIE. Good.

Secretary YOUNG. This is a precious opportunity for me, for the next several months, to do as many things right as I possibly can. My principles disagree with putting this process on auto-pilot. So I have to do the best I can to start a process that could yield a source selection. If forces object to that, I still have to try to make progress, and I have to try to do it right. I may not make the end of the year, but I am going to make every effort to do that.

With regard to the Air Force acquisitions process and control, I will speak on the specific term you mentioned, space. Personally, my personal opinion, I fundamentally disagree that a single service should have the total acquisition decision authority, milestone authority for a set of programs, as was done in space. And I would intend to retain acquisition authority over space programs. It provides a check and balance in the system.

I am very happy with the service, the Air Force, or any of the services to execute their programs to the standards that I am trying to set. When those standards are not met, I intend to pull milestone decision authority, make programs special interest programs, and exercise OSD oversight of programs to achieve better results, which is what you are asking for.

Mr. ABERCROMBIE. And you will do that with the KC–(X)?

Secretary YOUNG. I will do that initially with the KC–(X) on the source selection. I would potentially yield contract execution to the Air Force until such time as I felt that execution was not meeting the standards.

Mr. ABERCROMBIE. Very good. Thank you.

We are going to move to Representative Boyda and then to Representative Saxton.

Mrs. BOYDA. Thank you very much, Mr. Chairman, for such an important hearing.

And we all appreciate the work that you are doing.

I have the pleasure of representing two very large and important Army installations and the head of the National Guard in Kansas. We just very proudly put to bed a KC–135E after 51 years of service. You can imagine where my question is going.

It would appear, when you are looking at it, as if there is a surely unintentional but yet significant bias that is brought into the whole program when we look at a lifecycle that is 25 years.

Can you just comment on that? I have some follow-up questions, too. But why was 25 years chosen? Do you think that it, in fact, does have a bias?

I think the KC–135s were initially predicted to last for 10 years. As I say, it was lovingly tucked in bed after 51 years, the oldest one in our fleet.

Could you just comment on that, please?

Secretary YOUNG. Certainly. I apologize, but I do want to be clear: I absolutely reject the notion of bias in the enterprise.

Mrs. BOYDA. Certainly, I fully believe that it would have been unintentional, had it been there. But do you think it put some bias into it?

Secretary YOUNG. I want to talk about moving forward.

Mrs. BOYDA. Okay.

Secretary YOUNG. I think——

Mrs. BOYDA. My question, maybe in the interest of time for everybody, can we get to 40, 50 years, is where we are going? Why would we not have a lifecycle that is more representative of what the expected lifecycle of this is to really be? Why would we cut that in half?

Secretary YOUNG. Well, I don't know—there are a couple of things. The truth is, KC–135s currently have, on average, 17,000 hours, and they have a structural life of 36,000 to 39,000 hours. Those airplanes have plenty of life. We could continue with those airplanes structurally. Those airplanes were designed in a time where we developed more robust structures. Today's airplanes have less robust structures. I think it remains to be seen whether those planes can serve for 25, 40 or 50 years.

Having said that, also there is another important piece. And we are constantly having this discussion across the board in acquisition in the Defense Department about lifecycle costs and properly prioritizing lifecycle costs, which are still a predicted and projected issue versus the known cost of developing and purchasing something.

We should assess both. But the future is somewhat soft. We have seen in many systems, particularly our fighter aircraft, that how we use those aircraft are different than what we projected, and so we experience different lifecycle costs associated with them. So it is very hard to predict that.

And the Air Force made a decision that was grounded in the concept that it is hard for us to predict lifecycle costs accurately, and certainly out to longer periods of time, you certainly can't predict what the price of fuel will be out——

Mrs. BOYDA. Excuse me for interrupting, but it seems as if, in the evaluation, some of the criteria would be looking at if they were 25, if they were 35, if they were 45, or 20, 30 and 40, to have a full evaluation of what some contingency may be.

It seems as if, you know, again, these 135s, maybe the next ones aren't going to last for 50 years, but there is, I think, a very strong possibility that they will last beyond the 25 years. And so should that not be included as a criteria for what if these go?

The price of gas—do you know what is the price of fuel that will be put into that equation?

Secretary YOUNG. I could get that for the record for you.

[The information referred to can be found in the Appendix beginning on page 174.]

Mrs. BOYDA. Okay. I assume that, as greenhouse emissions, all of these political and important factors are taken in, the fact that this aircraft uses so much less fuel I would think would be a very, very significant portion of this, in addition, of course, weighed into all of these. But the lifecycle costs—you know, I just bought a new car, and clearly, what do you think the number-one issue that I was worried about?

Secretary YOUNG. I am sure fuel consumption, in today's environment.

Mrs. BOYDA. Yes.

Secretary YOUNG. You don't know whether that car will last 5 years or 10 years or 15 years and what it will cost you at year 15 versus year 5.

Mrs. BOYDA. I understand that. But, again, I think we have a historical record to say that these planes—you know, let me point out again, too, I think everybody in this room knows it, but that 51-year-old KC–135 was built by the Boeing Corporation. I think everybody always appreciates that. It was projected to be out there for 10 years; it stayed out there for 50 years.

So when will we know what the lifecycle projections in the RFP will be? You will be putting that out with the RFP, or will you be able to comment on that any earlier?

Secretary YOUNG. We will put that in the RFP.

I had a chance to talk with one of your colleagues, Congressman Dicks, yesterday, and so I wanted to adjust the discussion I had with him. I can do it in responding to your question. But I have gone——

Mrs. BOYDA. Let me just say in closing, too, as I see that I am getting to the yellow, that, you know, the people in Kansas ultimately want the very best value for our fighters and the very best value for our tax dollars as well. Ultimately, that is what they all want; would never suggest anything else.

But this has become something that has gotten so much attention. I would just ask that you would consider, if you are going to use 25, then also consider if it would do. So that, when this comes out, we will be able to say to the good people of America, not just Kansas, that you have considered what the consequences are of this over the long term in any of these given scenarios and evaluated those and weighted those accordingly.

So I certainly appreciate your——

Secretary YOUNG. As I said in my opening statement—and I had to go back and review the record after my discussion with Congressman Dicks—the capability development document, or the requirements document, suggests that the tanker should have a life of 40 years. So we are going to consider lifecycle costing for 40 years, because I told him I would ground myself in the requirements documents.

Mrs. BOYDA. All right.

Secretary YOUNG. I also, though, as I said, intend to ground myself in best value and reasonably known costs for the taxpayer. So we intend to evaluate the development costs and the procurement costs, and have that as a higher-confidence estimate, I believe, than the lifecycle costs, but we will evaluate both.

Mrs. BOYDA. So you will be using the 40 years in the lifecycle cost? Is that what you are saying?

Secretary YOUNG. I said we are going to consider that. I need to understand—and I am not going to make changes based on discussions in hearings and with Members of Congress. But I will tell you——

Mr. DICKS. I think it is in the document that you suggested.

Secretary YOUNG. Right. It is grounded in the document. And I need to understand how I will do that. Because I don't want either of the bidders to perceive there was unfairness or not. But at least one grounded number is 40 years. Another grounded number is the original competition to 25 years. We need to decide how to handle that. But, for sure, I would expect, based upon the requirements document, that we will added 40. We may delete 25. I need some room to make those decisions.

Mrs. BOYDA. Thank you very much.

I yield back.

Mr. ABERCROMBIE. Thank you.

Mr. Saxton, to be followed by Mr. Skelton, Mr. Miller and Mr. Courtney.

Mr. SAXTON. Mr. Secretary, thanks for being with us today.

As you indicated earlier, under your leadership, DOD will now assume the responsibility for the completion of this acquisition program. And we know how hard you work and how diligent you are about your commitment to these types of matters. And so it gives us a good feeling that you are in the position that you are.

Can you tell us, in as specific a way as you can, how you will do this differently going forward? Are there changes that you will make in the process? Are there changes that you will make in requirements? How will this process move forward under your leadership?

Secretary YOUNG. I think it will be hard for me to talk about it in specific terms, particularly without the draft RFP.

To the extent I can talk to you about it, one, I have already mentioned the personnel changes that Secretary Gates directed.

I think the other major issue we have to do is prioritize the requirements. As has been noted, there were some 808 specific requirements. And I believe it is fair to say the GAO said, if we had a prioritization, we needed to indicate that and state that. And so the RFP will work to make that clear, so that both the industry teams can understand what we value, what the warfighter values, grounding ourselves in the requirements document, and then use that to let them modify their proposals. And then we will grade those proposals.

We will have the more independent team. And I think we will, as I have just discussed, look at costs a little differently. I think we will elevate cost in that discussion, so that we are balancing the requirements with the cost in trying to get what the warfighter needs and what the taxpayer can afford.

Mr. SAXTON. If you were watching the hearing earlier, you may have heard several discussions regarding the size of the aircraft.

There are those who believe that the intent in replacing the KC–135 fleet was to do so with an aircraft that could do the mission that the KC–135 does. And there are those, as you probably heard, that believe that the larger aircraft cannot do the mission in the same manner as efficiently and as safely, perhaps, as the more moderate-sized aircraft.

Any comments?

Secretary YOUNG. Certainly. I prefer to not talk about the size of the aircraft.

The requirement, the threshold requirement or minimum requirement for fuel offload is the current capability of the KC–135R. The capability development document clearly states that exceeding the fuel offload or radius threshold—this is how much fuel can be offloaded at different distances—is the objective requirement, exceeding it.

The requirements document record indicates that the objective is greater than the threshold, and that there is added value—I quote—that there is "added value to the warfighter for additional offload." It was debated in the Defense Department making the threshold and the objective the same, and it was determined that there was clearly operational value associated with additional fuel offload.

Fuel offload is one of 800 factors. It should be given consideration because this is a tanker. While the objective is for more fuel, it should be bounded and I think will be bounded by cost. And those are how we will approach this going forward, in this and other areas.

Mr. SAXTON. Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Mr. Secretary, in the absence of Mr. Abercrombie, I am claiming seniority and will take this opportunity to ask a few questions, if I may.

It struck me a few moments ago, you used the phrase "maintain objectivity." And that, of course, is what everyone sees a necessity for. There was a necessity for it before. And the good gentlemen seated behind you from the GAO said the train came off the tracks seven different times.

Now, as I understand it, you were not personally involved in assisting the Air Force in this decision. Is that correct?

Secretary YOUNG. As the senior DOD acquisition official, I approved the milestone that let the Air Force award the contract. So I don't want to tell you I was totally uninvolved. But I was not part of the source selection process or the——

The CHAIRMAN. Right. That is my question. Some of your staff was; is that correct?

Secretary YOUNG. Some of the staff participated in an oversight team that I established, as I noted, late in the game. I don't know that any of my staff was on the Source Selection Advisory Committee.

No, there were no OSD staff members on that committee.

The CHAIRMAN. Did any of your staff members that were familiar with this procedure note any of the seven sustained objections that the GAO sustained——

Secretary YOUNG. I think the answer is——

The CHAIRMAN [continuing]. Before the decision?

Secretary YOUNG. Right. The answer is, no, we did not. And we have talked about that at some length.

The CHAIRMAN. Well, what assurance do we have, in light of the train coming off the tracks seven times in the past, that the objectivity will be maintained in the future process?

Secretary YOUNG. Mr. Chairman, one thing I think, I don't want to confuse objectivity with the seven findings. I would add to that, one, we will start with objectivity.

Two, I believe the two proposals totaled 11,000 pages. The RFP was a thousand pages. And then the record goes well beyond that. And I certainly would compliment GAO for combing through that record.

There were some very detailed things found in that record that I agree probably should have been seen. But it will be difficult, in an enterprise of this scope, to guarantee there will be absolutely no error. We will make that effort, going forward.

That is part of why Secretary Gates believes we should address the GAO findings and build on this substantial record and make corrections to the record through the amended RFP and the modified proposals, in an effort to hopefully mitigate and avoid any further mistakes or errors or issues.

The CHAIRMAN. The previous selection was made upon an RFP that was made public and available to the contractors. Will that same RFP remain in force and effect in the future for a future selection?

Secretary YOUNG. Well, it won't be the same RFP. We will amend that RFP, put it out in draft form, give industry a chance to comment, and obviously the Congress will have a chance to see it.

And then, as you heard in the previous panel, that RFP action is a protestable action. Were that to be protested, to Chairman Abercrombie's point, we cannot possibly make a source selection decision this year.

The CHAIRMAN. The potential contractors have the right to question the RFP. Is that correct?

Secretary YOUNG. That is correct, sir. They have the right to protest it. They certainly have the right to engage the Government in discussions about aspects of the RFP that they are comfortable with or uncomfortable with. That is the avenue I hope they will take, so that we can get an RFP—you know, obviously, both parties will jockey for that RFP to be to their advantage. The Government will try to continue to navigate the water of the requirements and getting best value for the taxpayer.

The CHAIRMAN. What is the remedy if one or more of the contractors disagree with the RFP? This is a procedural question. Do they have the right to protest that to the GAO, as well?

Secretary YOUNG. Yes, sir.

The CHAIRMAN. The RFP?

Secretary YOUNG. Yes, sir, they can protest the RFP.

The CHAIRMAN. For a layman such as I, if there is a new RFP—which stands for what, Mr. Secretary?

Secretary YOUNG. We would call it, in the legal terms, it would be we will amend the request for proposal, the RFP.

The CHAIRMAN. All right. So to a country boy like me, we would say the criteria will be changed for any future source selection.

Secretary YOUNG. I am less likely to say the criteria will be changed, because we have a capability development document that has been modified a time or two, but in existence, I think finalized in 2006. It states our requirements.

What we need to do, and I believe consistent with the GAO findings, is the Government has the right to make clear which of those requirements we may place greater or lesser value on.

There was some concern on the part of the GAO that we—I really don't want to speak for the GAO, and I want to limit my talking about the past. But, in this case, I will give myself a little license to answer your question.

We told the offerors we would like you to meet as many of our requirements as possible, and we did not do, I think, an adequate job of saying which of those requirements were most important to the warfighter.

We need to, in the new RFP—I don't think we want to change the requirements; there is a long history there—but we do need to state for the industry bidders which ones are important, so they can address those in their proposals and then we can evaluate their efforts.

The CHAIRMAN. I think I understand you, Mr. Secretary.

Secretary YOUNG. Okay.

The CHAIRMAN. A basic question, and I would hope you could answer this. In Title 10, subsection A, part 4, chapter 144, section 2440, entitled "Technology and Industrial Base Plans," it states that, "The Secretary of Defense shall prescribe regulations requiring consideration of the national technology and industrial base in the development and implementation of acquisition plans for each major defense acquisition program." And I would assume that this proposed contract is a major defense acquisition program.

Did the Department prescribe regulations as prescribed by this section?

Secretary YOUNG. I believe we have existing regulations to implement this section. And I would like to get for, if I could borrow your words, the country boy that cited the code to me how exactly those regulations were applied in this particular solicitation. I think that is your question.

The CHAIRMAN. Would you answer that for the record?

Secretary YOUNG. Yes, sir.

The CHAIRMAN. I would appreciate it.

Well, my objective is the same as yours, Mr. Secretary, is that the objectivity be maintained in this whole process. And I wish you well.

Secretary YOUNG. Thank you.

[The information referred to can be found in the Appendix beginning on page 174.]

The CHAIRMAN. Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

Mr. Secretary, I know you have already said you don't want to go back, but I want to know a couple of things. Because I asked some questions to GAO, and we are just trying to find out some parameters.

You used the number 110 in the protest from Boeing, and they said they don't know where that number came from. And I am just trying to figure, where did that number come from? Where do you come with 110?

Secretary YOUNG. Because I had the luxury of watching the hearing, the Air Force could answer this question, but I will tell you what they told me, because I asked the same question.

It is my understanding the Air Force, who had to be able to address these issues, counted the number of issues in each filing, and

that totalled 110 issues. The Air Force has analyzed that, and they feel—and this is subject to judgment—that there are 52 discrete issues. So there is, as I said, a significant degree of overlap in the issues.

I heard the GAO say a different view of this. So I don't know. We can go do some homework for you on the record on that. But the Air Force came up with that number, and I asked them the basis for it, and those are the two pieces of information they gave me.

Mr. DICKS. Mr. Chairman? Could we get an answer from the GAO on the same subject?

The CHAIRMAN. Let's let the gentleman——

Mr. MILLER. For the record?

The CHAIRMAN. For the record. Let the gentleman testify. If we need to recall witnesses, we can do that at the proper time.

Mr. MILLER. Also, to your knowledge, were there any protests to the RFP, the original RFP?

Secretary YOUNG. Not to GAO, sir. That is the only forum for a protest. There were——

Mr. MILLER. Well, I am sorry, then I misunderstood what you said. You said there was a way that contractors could be engaged in the process. And you said they try to mold to their specifications.

Secretary YOUNG. As part of our open and transparent efforts, when we issue a draft RFP, we issue it for industry to offer their comments. So there is no question industry offered comments to that draft RFP. We adjudicated those in some manner.

I mean, the Government reserves the right to request what it seeks to buy. The only avenue beyond that, you know, we try to be responsive and listen to industry, but then when we issue a final RFP, they would have to protest it.

And to be clear, neither bidder protested this RFP. They understood the terms and conditions of the RFP and accepted it.

Mr. MILLER. And, Mr. Secretary, that was my question, did either one protest the final RFP, and your answer is no.

Secretary YOUNG. No, sir.

Mr. MILLER. What process——

Secretary YOUNG. Can I add another comment, too?

Mr. MILLER. Please.

Secretary YOUNG. My team has pointed out the Inspector General was asked to review whether the RFP reflected our requirements document, and the Inspector General did review that and did issue a report stating that the RFP reflected our requirements document.

Mr. MILLER. What process is the Department going to employ to deal with, again, proprietary information, given the fact that the contractor that was selected, much of their information is now known, in protecting in this limited rebidding process?

Secretary YOUNG. We are going to continue to protect proprietary information. It is required, as I noted, by law.

I am not sure I know everything that has been said or discussed. Some of the information that is out there is speculation. And some of it, though, is not proprietary. It reflects the total cost to the Government. That includes Government costs, Government-furnished equipment.

So I am not sure to what degree very vendor-specific proprietary information is out there. It should not be. We will continue to protect it and not release that information.

Mr. MILLER. This question may have been asked already, but do you anticipate giving additional credit in the new RFP for cargo or passenger capacity?

Secretary YOUNG. I believe that cargo and passenger capacity were issues that were discussed in the protest. The GAO findings do not disagree with how the Government handled those issues. I am not seeking to change issues that were not subject to sustained protests unless they don't reflect the requirements document. And, again, I believe the RFP reflects the way the Government wanted to handle cargo and passengers in the RFP.

Mr. MILLER. My question surrounds maybe a change in the platform that one of the contractors might offer. Do you anticipate the possibility that Boeing may put the 777 in, knowing that there may be an opportunity to gain additional points? And if that happens, are we going away now from the KC–135 to more like KC–10 requirements in the type of aircraft that we are trying to procure?

Secretary YOUNG. Well, the requirement will not change. And I would again note that the requirements document clearly says the threshold is the KC–135R and the objective is to carry more fuel than that aircraft.

Legally, it is my understanding that modified proposals can be modified to the degree that they are substantially new proposals. You can change the item you initially proposed; you can propose a totally new item. The industry bidders have substantial license in modifying their proposal to propose a different aircraft.

Mr. MILLER. My time is running out. I am sorry, Mr. Secretary, but if they were to propose the 777, what would that do to the expedited proposal process that you are talking about trying to get done by the end of the year?

Secretary YOUNG. It is one of the issues that I alluded to with Chairman Abercrombie. We will take whatever time is necessary to properly evaluate that. If a totally new aircraft is proposed, I expect it will take more time than we have allotted in the schedule to evaluate that proposal.

Mr. MILLER. Thank you.

Mr. ABERCROMBIE. Mr. Miller, I suggest that when we get to the following session that we can pursue this in a little more depth.

Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman.

Secretary Young, I am sure you probably don't want to keep going back to this question of objectivity, but, frankly, for people watching this hearing in the public, I think there are still a lot of questions about Secretary Gates's decision to have your office now in charge of this, given the fact that your office has a history in terms of the prior decision.

And I am still a little unclear from your testimony so far about exactly what the involvement of your office was in the last go-around. You described earlier that it was, sort of, late in the game. And I was just wondering if you can help me understand what you mean by that.

Are you saying that your office did an after-the-fact review after the Air Force completed its process, or was your office involved at an earlier stage?

Secretary YOUNG. There was an enormous amount of history that preceded me. I became acting in July. I was confirmed by the Senate in November. The members of the staff in that office worked with the Air Force through this process in the way we work with people on every acquisition.

I took the step in December of asking a small team in my office to go observe the source selection process. They had a limited amount of time. They did not have the kind of time to comb through in the level of detail that the GAO did. And I think that is probably the answer as to why we did not find these things, because we had highly-qualified people go and start to observe the process, but not do it from the beginning, and they did not spend the 120 days in the hearing process that GAO did.

But, in the end, my team's primary role was to observe that process. They made suggestions to the Air Force that the Air Force corrected. And I think you would hear that from Secretary Payton. But they did not participate in making the source selection decision. I did not participate in making the source selection decision.

Mr. COURTNEY. So then your testimony is basically that you started to get involved with this process in December of 2007, with the decision in February.

Secretary YOUNG. But they were looking at it from the point of view of, was the Air Force properly evaluating the proposals? I did not want us to make basic mistakes in evaluating the proposals or grading. I wanted to be able to ensure fairness. Those are the kinds of questions I ask my team, to make sure that everyone was being treated equally and fairly.

Mr. COURTNEY. And in terms of the people who were involved in it, I mean, is it your intention to have those individuals continue or to take on this task from this point forward?

Secretary YOUNG. Yes.

Mr. COURTNEY. Same people?

Secretary YOUNG. I would expect those same people to, again, provide independent oversight. I have not put those people on the—or Secretary Gates has not put those people on the Source Selection Advisory Committee. That is a new set of people.

Mr. COURTNEY. So that is a completely different cast of characters?

Secretary YOUNG. Yes, sir.

Mr. COURTNEY. Who are not in any way connected to the prior decision?

Secretary YOUNG. That is correct. All of the joint people we are putting on the panel were in no way connected. And we are seeking to have people—the Air Force people that will be on that panel, we are seeking to have people that were not involved in the previous source selection decision.

Mr. COURTNEY. Well, again, as Mr. Skelton said, I think the Secretary's decision and announcement yesterday certainly gave a lot of people the impression that we are starting with a clean, new process. But given the fact that people have had contact with the prior decision, I think there is a lot of concern that is starting to

surface now about really whether or not, you know, we are dealing with the same umpire making the same call. And——

Secretary YOUNG. Sir, all I can tell you is that discussion originates in a point of view that people in the Pentagon, in the acquisition team, have a bias as to what they want to buy. As I said in the beginning, and I have issued notes to this effect, the acquisition team does not favor any entity or any proposal or any company.

The acquisition team takes the requirements and goes out and takes advantage of what has made America work. We ask companies to propose creative and innovative and competitive ideas. We evaluate those ideas and make a source selection decision.

I have X amount of expertise in the Department to successfully pick a tanker. I would tell you the one thing to do is go take people that have never touched or seen a tanker and have a source selection through that process. I mean, I have to use some of the expertise that is in the Department to do this. And, mostly, I am using expertise in the acquisition team.

And, indeed, we have made an effort, through the Secretary's direction, to pick people for the Source Selection Advisory Committee that were not party to the first source selection to get the very objectivity you seek.

Mr. COURTNEY. Well, I hope for your sake and our country's sake that it all, sort of, plays out in a way that the confidence level is there. But, to me, I can understand why some people would be concerned.

But one other question I guess is just, you testified earlier that there could be an amendment to the RFP, given——

Secretary YOUNG. That is a term of art, that we need to amend the RFP to address the GAO findings and make sure the requirements are—well, to address the GAO findings.

Mr. COURTNEY. And you indicated that would be something that would then be——

Secretary YOUNG. Issued in draft form for comment.

Mr. COURTNEY. By Congress, as well?

Secretary YOUNG. Congress can review that, yes, sir.

Mr. COURTNEY. And are you envisioning that by the end of September or October?

Secretary YOUNG. It is my hope that we could issue the draft RFP—my team cringes—I say late July, they say early August. Every day here——

Mr. ABERCROMBIE. Excuse me, Mr. Young. Will you defer for a moment?

Mr. COURTNEY. Absolutely.

Mr. ABERCROMBIE. If you say July——

Secretary YOUNG. Late July.

Mr. ABERCROMBIE [continuing]. You get a team that says July. If somebody says August, show them the door.

Secretary YOUNG. Yes, sir.

Mr. ABERCROMBIE. My staff and every staff of every Member here works for the public interest . If they don't want to work for the public interest, tell them to get a job that pays wages by the hour.

Thank you, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. I have no further questions.

Mr. ABERCROMBIE. Mr. Rogers.

Mr. ROGERS. Thank you, Mr. Chairman.

I have two questions.

The amended RFP, are you just going to reopen the eight items that GAO addressed when you amend?

Secretary YOUNG. As a minimum, we are going to seek to address the GAO findings. I want to make sure the requirements are reflected in that RFP.

We obviously have to—one of the findings says that we to indicate any prioritization or weighting the Government wants to assign to those requirements. So I need to address the GAO finding by also making sure my requirements are well-reflected and properly reflected in the RFP. And if there are things in the RFP that are beneficial to the taxpayer, I will address those.

Obviously, we have discussed how we evaluate cost. Evaluating cost as one giant lifecycle bundle I think is awkward. I think we should assign some value to the known cost of developing and buying the aircraft, but we also will likely make an adjustment and make sure we properly evaluate the lifecycle costs, but look at those two in terms of our relative confidence in the two numbers.

Mr. ROGERS. Well, to use your phrase, the GAO went through this with a fine-toothed comb and they only found these eight areas where there seem to be at least the hint of a problem. So why would you go outside the four corners of those eight areas? Seems like you are inviting more of a problem when you do that.

Secretary YOUNG. I don't want to give you the wrong impression. It is my intent to try not to go outside the four corners of those areas.

But the GAO—I don't think there is a specific finding related to cost. And I think it is in the interest of the taxpayer to make sure we—well, there is a specific finding with regard to the cost model. But the totality of the cost evaluation, I think we want to consider making sure we properly evaluate that for the benefit of the taxpayer. It overlaps with the GAO finding. So we are going to try and stay in that box, sir.

Mr. ROGERS. Right. Thank you.

The other thing, it goes back to Chairman Abercrombie's point. I am very concerned about this dragging on too long. We should have had this thing being built already.

And I may be displaying my ignorance here and you may have already talked about it, but why would it possibly take more than six months to complete this? You talked about getting it done by the end of the year. That seems awfully bureaucratic and bogged down. Why would it take that long?

Secretary YOUNG. I ask myself these questions regularly, Congressman. But I would tell you, I have learned—I have been involved, in the far past, with one protested source selection. I have been involved in four other source selections that were not protested. There is a substantial—I mean, it takes time to receive 11,000 pages, review 11,000 pages, and grade it to a level of scrutiny that the GAO will decide is adequate.

Source selections have become extraordinarily sophisticated endeavors. If we limit the change—I mean, that is what the answer would be. And the answer to me is, if we limit the change, and industry is cooperative, and the Congress allows us the opportunity to proceed, we may be able to do it in six months and, in that process, create a record that can withstand what may well result in additional GAO scrutiny through another protest. Because it is hard to see a situation where either company is going to accept whatever outcome of this competition.

Mr. ROGERS. Okay.

Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Thank you, Secretary Young, for being here.

And I am sure you are aware of this, but just for the record, there is a lack of confidence at this point in the process because of a lot of the mistakes that were made. And I take you at your word that there was not a bias on your part or within the Air Force. It just seems coincidental that all of the mistakes were made in the favor of one company and against another. That many of the subjective judgments were made that way as well has given to a lack of confidence.

I mean, at the most fundamental level, you got the math wrong, okay? The low bidder that was identified was not the low bidder if you added it up correctly. And you can comment on that in a minute; I will give you that opportunity. But it does lead to a lack of confidence. So this is going to be very well-scrutinized when you say you are going to go back and change the RFPs.

And my first question on changing the RFPs, as I look at what the GAO found, I don't see why it is necessary, off the top, to change the RFPs to meet them.

I mean, just three of the findings: The Air Force did not reasonably evaluate the capability of Northrop Grumman's proposed aircraft to refuel all current Air Force planes—there is other stuff there—that was one of them. The Air Force unreasonably evaluated Boeing's estimated nonrecurring engineering costs, blah, blah, blah. The Air Force did not reasonably evaluate military construction costs associated with the aircraft.

Why couldn't you just go back and get it right? Why do you need to change the RFP? Couldn't you go back and reasonably assess those things?

So that is the first question, is the necessity of changing the RFP. And, like I said, we are skeptical about the needs to change that RFP and what will happen in those changes.

That is a question. Why are you changing the RFP when you could simply go back and do correctly what the GAO identified that the Air Force is doing incorrectly?

Secretary YOUNG. We are going to change the RFP in order to address the GAO findings.

Mr. SMITH. I thought I asked a fairly clear question there. Maybe I didn't.

Secretary YOUNG. I think the rest of the question is an editorial comment based on——

Mr. SMITH. The first time part was an editorial comment. I had to get that out. I apologize. I will give you perfect time to respond to that. The second part of the question was a very specific question.

You are saying you are going to go back in and change the RFPs in response to the GAO. Makes us a little nervous, where the RFPs have been shifting, and the whole issue about—I know you don't want to talk about the size of the tanker, but at the end of the day that is the issue. The Air Force, back in 2002, laid out a very clear set of specifics as to why a larger tanker wouldn't work, and now they have said they are going back to change that on the fly, which has created a large number of problems.

But the question is, specifically, you have said you have to change the RFPs in response to the GAO. I just read you three of their findings, which simply said that the Air Force did not reasonably evaluate what happened. I don't see why there is a need to change the RFP for that. They could go back in and reasonably evaluate those things.

That is my question. Does that make sense?

Secretary YOUNG. Yes. And I think, when I say "change," in some areas we may not have to change the RFP. We just may have to issue the RFP and let the bidders propose modified proposals and make crystal-clear that, in the proposals and through discussions with industry, they must provide certain pieces of information required by the RFP. And I think some of the GAO findings demand that information. We will make clear that information is required.

Mr. SMITH. In what areas do you think the GAO does require the changing of the RFP?

Secretary YOUNG. I believe the first two findings of the GAO, one—again, I hesitate, but I have studied this. Well——

Mr. ABERCROMBIE. Want to take a moment and refer to notes or take a look?

Secretary YOUNG. No, no. It is really an issue—some of this can be better discussed in the closed session. I will seek to address it in the open session.

The first finding says that we had 808 requirements and we graded them down at the detailed level, and we had not, I think, if I can paraphrase—GAO is here, and they can comment in the closed session—but we needed to be clear with industry on the relative value of those 800 requirements. And we agree with that. Because everything in those 800 requirements is not equal. In the source selection process, we did not make that adequately clear. So we need to clarify that in a new RFP so industry can bid accordingly.

I think the other issue is fuel offload. That is the second finding. In that area, as I noted, we accept the GAO finding. I would tell you we don't agree. Because the capability development document clearly with a record says that the objective was to provide more fuel offload capability than a KC–135R. And I have documents I can provide to you that say it was discussed and that there is operational value for the warfighter to carry additional fuel. And so we need to clarify that in the RFP and let industry teams bid accordingly.

Mr. SMITH. Okay.

I am out of time, Mr. Chairman. Thank you.

Mr. ABERCROMBIE. Thank you.

At this juncture, before I move to Mr. Larsen, Mr. Courtney has requested that a letter addressed to the committee for today's hearing from the Honorable M. Jodi Rell, who is the Governor of Connecticut, be submitted for the record, which I will do, without objection.

[The information referred to can be found in the Appendix on page 96.]

Mr. ABERCROMBIE. And now Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Secretary Young, thanks for coming today.

I want to just clarify some terms. Are you the new source selection authority?

Secretary YOUNG. Secretary Gates announced at a press conference that I am the new source selection authority. We would normally not reveal that information. That is a decision he can make.

Mr. LARSEN. Okay. Okay. All right.

And the new Source Selection Advisory Committee, is that the independent team that you talk about, or is that something separate?

Secretary YOUNG. No, that is—through the normal source selection procedure, people use different acronyms but we have a source selection evaluation team that evaluates and analyzes in technical detail the proposal. They provide that data, with possibly some judgments, to a Source Selection Advisory Committee, who begins to aggregate and evaluate and pass judgment on that data, so that committee can make a recommendation or at least provide relative values to the final source selection authority.

Mr. LARSEN. So the independent team that you discuss, then, is what?

Secretary YOUNG. Independent team would be a small team of people who will watch the work of the Source Selection Advisory Committee and ensure that they fairly judge, fairly use and equitably use tools, if we do an analysis or a model or a review, we do it equally between all parties and just make sure all procedures are followed.

And then I hope, given the chance to start from the very beginning, they will have a chance to see whether the process the SSAC is taking and make sure they create, as I think you heard from the GAO today, an adequate record to explain the Government's action so that we can have a decision supported fully by the record.

Mr. LARSEN. Okay.

Mr. Chairman, I will just note that the red light is on. I know I haven't been at this for five minutes. If you could take care of my light there, so I don't use too much of Norm's time.

Mr. ABERCROMBIE. I don't know if you can get a consensus on that. Go ahead. Take all the time you want. [Laughter.]

Mr. LARSEN. If I could, Mr. Smith from Washington brought up a point about the GAO's findings and whether or not you actually need to do just a better job of documenting the decision versus actually changing the RFP.

Can you help me understand, help the committee understand, how you will choose to make a decision about does something need to change versus we just need to do a better job of documenting a decision?

Secretary YOUNG. Well, that is the process we are going through right now. To the extent we need to change it, it will be based on the findings that GAO had and then how well those findings are grounded in our requirements document, because we are going to give that the greatest weight.

I think in every case, though, we are going to seek to have as robust a record as possible, because I have to anticipate another protest.

Mr. LARSEN. You have mentioned a couple of times, used the term, that you need to elevate the costs. As I recall in the original RFP, the cost price criteria was not the number-one criteria. In other words, you weren't going to necessarily decide on the least-expensive-per-unit offer. It was going to be a factor, but that doesn't necessarily define best value.

But now you are discussing more, I have heard several times you say "bounded by costs," "elevating costs." Are you trying to tell us something there? Are you trying to tell us something, that costs might have more weight this time around than before?

Secretary YOUNG. I need to talk with you about that in closed session. I can answer that question.

I can just tell you that cost was significantly further down the list and——

Mr. LARSEN. In the——

Secretary YOUNG. In the major factors. And I believe, across the board in the Defense Department, I am being asked by the Congress to make cost a more important factor.

Mr. LARSEN. I will take that as a general comment, and we can explore that maybe a little bit later.

And then also with regards to costs, you talked about development and procurement. And you sound like you feel much more confident in trying to develop development costs and procurement costs for the sake of trying to evaluate a decision. But lifecycle costs, you are still a little less confident about how to develop something that is a little more hard and fast.

Is that accurate?

Secretary YOUNG. I think I just want—well, I don't know. I shouldn't speak for you. There is a greater certainty——

Mr. LARSEN. I am asking objectively. I am not trying to——

Secretary YOUNG. No, there is a greater certainty—well, for one, the day I make a source selection, if I am able to award the contract, the development costs, I am going to sign and start paying them tax money. I should know that pretty well. I am going to have bid prices for the first five lots of airplanes.

So those are going to be higher-confidence numbers than lifecycle. That does not relieve me of the burden of doing the best I can to predict lifecycle costs. I have just tried to tell you I think I am going to, under any circumstance, have the most confidence in the development and production costs, and I am going to do my best to have some level of confidence in the lifecycle costs.

And then I have to recognize that I can't predict the price of fuel and that the warfighter is going to use this airplane like every other airplane and weapon in a different way, no matter how well I predict it.

Mr. LARSEN. I will just conclude with this, because I see the yellow light is on, and I know I am probably over my time in reality; certainly now, with the red light.

But you have mentioned the eight points in the GAO findings, you have to address those at a minimum. You are looking at the capabilities and requirements document and best value.

But with regards to fuel costs, that is really fully mentioned and more fully discussed in a mere footnote in the GAO report, footnote 89 on page 66. We have all that memorized over here.

However, with fuel costs being what they are today, does that elevate itself out of a footnote for you and into something much more important for you to be looking at?

Secretary YOUNG. Well, I disagree with the idea that it wasn't important to start with. We evaluated lifecycle costs. But I would agree with you that from—we respect even the footnotes. And I have already asked the team and we have agreed and made plans that we will, as a minimum, re-evaluate our lifecycle process. And if we think there are changes to be made to give it higher confidence for everyone participating, we will do that. I accept that and respect GAO's comment in that regard.

Mr. LARSEN. Great.

Thank you, Mr. Chairman.

Thank you, Secretary Young.

Mr. ABERCROMBIE. Thank you, Mr. Larsen.

Mr. Marshall is the last member of the committee, so rather than go to Mr. Tiahrt right now, we will go to Mr. Marshall and then to Mr. Tiahrt.

Mr. MARSHALL. Thank you, Mr. Chairman.

I apologize for me being here earlier. We have been in a commodities market hearing all day long, trying to get a handle on these prices that people are suffering with.

I guess I have two questions.

First, I assume in the source selection process, as it goes forward, you will not be taking into account impact on the U.S. economy jobs-wise, you won't be taking into account whether or not the competition is appropriately balanced in light of foreign subsidies, that neither of those things will be taken into account. Is that correct?

Secretary YOUNG. We don't expect to do that.

Mr. MARSHALL. So you don't expect to. You don't plan to. You are legally prohibited from doing that? Have you discussed this?

Secretary YOUNG. I think we could probably talk further in the closed session. But in the open session, as I—competition, innovation and open markets are the principles that guide this country. And they are embedded in our laws and rules governing Pentagon acquisition. And so we will execute the new procurement within those laws and regulations. And those laws and regulations do not direct and don't require and, I think, don't necessarily yield best value for the warfighter if we factor in certain economic aspects of the competition.

Mr. MARSHALL. I think the only way that I can ask the second question is by generally referring to an experience that I had in a closed session on this matter and then use that to inquire concerning process.

Shortly after the decision was announced, the acquisition decision was announced, we had a closed briefly at which those making the decision explained why the decision was made that way. And one of the things that struck me is that there was a particular characteristic of the platform that was selected that the decision-makers found very attractive. That particular characteristic was included in the RFP. And if you could look at me, this would help me. Let's say both parties were required by the RFP to reach a standard of 50 percent, let's say, and then the RFP generally says that going beyond that is desirable, you know, that would be great. And in the discussion that we had in closed session, classified session, the decision-makers were saying that the platform that was chosen went well beyond in this particular characteristic, and we really liked that, and here are the reasons we really like that.

In a subsequent closed session with GAO, I was left with the impression that going beyond in a particular category was not something that was supposed to be given weight unless both parties understood that it was going to be given weight. And I asked GAO whether or not a protest had been made about this particular thing, and the answer was, no, no protest had been made. And then it occurred to me, well, of course no protest would have been made, because the other party, the party that lost, Boeing in this instance, would not have known that the decision-makers were particularly attracted to this particular characteristic.

So it concerns me that both parties, as we move forward, have to know very clearly what kind of weight is going to be put on all these different characteristics. Because it really would be very unfortunate if we get to a point where we are finding out that some characteristic became particularly attractive to the decision-makers and both parties did not know that, and that characteristic was not necessarily decisive but an important one in making the actual decision.

Secretary YOUNG. Let me try to address that.

My guess is you are talking about fuel offload. That has been discussed here. The Air Force intended to assign credit for carrying more fuel than the KC–135R, consistent with the warfighting requirements. The requirements document makes——

Mr. MARSHALL. That is not what I was talking about, but go ahead.

Secretary YOUNG. Okay. Well, I won't read that statement if you are not talking about that.

Mr. MARSHALL. It is a general inquiry about the process as this has evolved. I have kind of been left with the impression that a factor was taken into account that to a degree that one party didn't even appreciate and wouldn't have known to protest about because nobody would have even told the party. Certainly, I wasn't going to go tell the party.

Secretary YOUNG. Yeah, it is hard. Maybe we could do this in the closed session.

But I think we are in agreement that, in the amended RFP, we need to be very clear with industry about any parameters or grouping of parameters that we assign as a priority to get the capability that the warfighter wants, so that industry can bid accordingly. And so we will make that robust effort to be very clear in the RFP about the things we will value and how we will grade them, so that industry can respond.

Mr. MARSHALL. Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Mr. Tiahrt.

Mr. TIAHRT. Thank you, Mr. Chairman. And thanks for allowing us non-committee members to be involved in the process.

Mr. ABERCROMBIE. It is a pleasure.

Mr. TIAHRT. Specifically you were going to read something on the fuel offload. And the RFP has a baseline or a threshold of the KC–135R, as far as fuel offload. Normally, when an RFP is evaluated, you have a threshold and then an objective, and if both parties meet the objective they both get scored equally.

You mentioned that the objective was more fuel offload capability. More fuel offload capability means one more pound. So technically, if that is still in the RFP, then both parties would be scored equally by having one more pound of fuel than a KC–135R. Is that correct?

Let me restate this. If the threshold is a KC–135R and objective is more fuel offload, then one pound of more fuel to offload at any point in, you know, a thousand aeronautical miles or whatever you choose, technically then both bidders, in this case, would qualify the maximum amount allowable for additional fuel capacity. Is that not correct?

Secretary YOUNG. You are speaking from the perspective of the GAO finding——

Mr. TIAHRT. No, I am from the perspective of the RFP.

Secretary YOUNG. The RFP was intended to reflect the requirements document. And the requirements document clearly says that the objective is to carry additional fuel. There is a record that says there is benefit to the warfighter for having additional fuel offload capacity.

Mr. TIAHRT. It is the key performance parameters—excuse me—where this was stated. What I am saying is that additional fuel capability is one pound. So if both bidders——

Secretary YOUNG. The GAO interpretation is to assign equal value to 1 pound, 1 gallon or 1,000 gallons. But I do not believe the requirements document nor the American people believe that 1 gallon more is the same as 1,000 gallons more.

Mr. TIAHRT. Well, then what is the expected criteria? Because this is very critical, and it can predetermine who wins. And you said yourself you don't want that to happen.

Secretary YOUNG. That is correct.

Mr. TIAHRT. So what is the criteria?

Secretary YOUNG. The criteria is going to be grounded in the requirements document, which says the objective is to carry additional fuel. And that will have to be balanced against the other 800 requirements. And it will have to be balanced against the costs we will have to pay to get that capability.

Mr. TIAHRT. Well, if you don't define the objective, then you won't know if both parties have met the objective. Because what you have created is a very subjective scenario. And according to the key performance parameters, objective means it is a finite level. So I think this is something to be looked at very cautiously in the future, and I think you need to keep that in mind.

Second thing: According to the manufacturing plan, as I understand it, about 90 percent of one of the two bidders will be built overseas in foreign countries. So it will be by companies in foreign countries.

The airplane that the Boeing company proposes is subject to five regulations that have waived by the DFARs, the Defense Federal Acquisitions Regulations, for foreign suppliers in North Atlantic Treaty Organization (NATO) countries. I think it is paragraph 225 in the DFARs.

Will you waive the Foreign Corrupt Practices Act for EADS of Europe?

Secretary YOUNG. We are buying—the bidders in this competition are—well, I was going to try to not say the company names today. We have two bidders in this competition, and they are both American companies. They are subject to all the rules and regulations that are in place.

Mr. TIAHRT. I didn't ask that. I said, will you require the European companies that are providing parts, which is about 90 percent of the parts for one of the two bidders here, will you require that they are subject to the Foreign Corrupt Practices Act? Or are you going to waive that regulation for 90 percent of one product and apply it to 100 percent of the other product?

Secretary YOUNG. We are not waiving regulations application to the industry proposers, either industry——

Mr. TIAHRT. Are you going to require cost accounting standards for the European companies that are going to provide parts that you will have to maintain and service once they have been purchased?

Secretary YOUNG. We are treating each bidder equally. And that is, the U.S. company bidders must comply with all regulations, including cost accounting standards.

Mr. TIAHRT. So you are going to waive them for the Europeans then. You are going to waive these regulations for the Europeans.

Secretary YOUNG. We are not waiving any regulations, sir.

Mr. TIAHRT. You are waiving the regulations for the Europeans, by the way you just explained it to me. And, in doing so, you have created an unlevel playing field and an unfair advantage to one bidder over the other.

Ninety percent of the product is built in Europe. And they don't have to comply with five specific regulations: the cost accounting standards, the Foreign Corrupt Practices Act, the international trafficking in arms regulations, the Berry amendment, and the buy-American provisions. Those are the five regulations that have been waived by the Department of Defense—not Congress, by you guys.

Are you going to force them to comply with them, just like you do the American companies? Because if you don't, American workers are put at a disadvantage.

Secretary YOUNG. Both companies, both bidders, must comply with all the regulations and laws you just cited. Both of those bidders are reaching outside of their defense company headquarters to get commercial products. Both of those commercial product providers are not subject to some elements of all those regulations you talked about.

But all the commercial products are subject to the same regulations. And the defense companies that are bringing those commercial products into and modifying them to deliver the U.S. Government a tanker are fully subject to all the regulations. And we will not be waiving regulations with regard to that.

Mr. TIAHRT. You will not apply these five regulations to 90 percent of one of the two bids. That is just what you have told me. You said the American portion will. Well, fine, we will apply the regulations equally for 10 percent of the product. But for 90 percent, we are going to make a disadvantage for American workers here by allowing no cost accounting standards, no Foreign Corrupt Practices Act, no international trafficking in arms regulations.

Those are very expensive regulations to implement. And you going to implement it entirely on one body, and you are waiving it entirely for 90 percent of another body. That is an unfair advantage.

Secretary YOUNG. We are implementing it uniformly to the two bidders.

Mr. TIAHRT. For all parts that are going to be supplied?

Secretary YOUNG. Equally. We are applying it equally to the two bidders.

Mr. TIAHRT. Okay. I am glad to hear that.

And you are going to do an industrial capability assessment that was brought up earlier by Mr. Skelton?

Secretary YOUNG. I would like to answer that for the record. I believe we will do that. It is required.

[The information referred to can be found in the Appendix beginning on page 175.]

Mr. TIAHRT. I see my time is up, Mr. Chairman, but I have some additional questions.

Mr. ABERCROMBIE. In a manner of speaking only.

Let's see. Mr. Dicks, then Mr. Bonner. And if there is no other round of questions or commentary sought, then I suggest we will move right to the closed session. I think some of this may be able to be dealt with a little bit more explicitly at that point. Mr. Saxton will have a follow-up, and that will be it.

So Mr. Dicks is in the barrel right now.

Mr. DICKS. Thank you, Mr. Chairman.

In March 2007, the GAO issued a report entitled, "Air Force Decision to Include a Passenger and Cargo Capability in Its Replacement Refueling Aircraft Was Made Without Required Analysis." Has that been corrected?

If you want to answer that one for the record.

Secretary YOUNG. I will get you a record document. I believe the requirements document does reflect that requirement.

[The information referred to can be found in the Appendix on page 174.]

Mr. DICKS. They have stated that the proper analysis wasn't done. This was 2007, so maybe we can get that corrected as well.

Let me just say—and I have great respect for Mr. Young—I am very troubled by this whole thing. And I go back to Mr. Saxton and his comments about General Handy. I have been in this game for 30 years up here, okay, and 30 years on the Defense Appropriations Subcommittee.

And what bothers me here is that we were misled, the Congress was misled. Secretary Wynne testified before our committee, and I was talking to him, and I asked him, how we are going forward on this? And he says, "Sir, as we look at this, we would tell you that our highest motivation is actually medium-sized tankers. Then our highest motivation is mixed fleet. Our last thing we want to do is to have a whole fleet of large airplanes." The A–330 is larger than the KC–10. And so to describe both of these as medium-sized tankers is not accurate. Okay? This is a great, big airplane.

Now, yesterday, Senator Levin was briefed by Secretary Gates, and in that briefing the Secretary told Chairman Levin that we are going to give extra credit in the next competition to the bigger size of the 330. And this was stated, and I have checked it and verified it with the Senator himself. This means that you are predisposed here. There has been no consultation with Congress up until today. You are going to say that the bigger tanker gets more credit, and for these issues, for fuel offload I guess. I don't know about passengers and aeromedical and cargo.

But this is the wrong decision, John, the wrong decision, because you don't want this great, big monstrous airplane that is going to take up space on the runways. This plane is so big that it is going to require billions of dollars in military construction.

What we want is a replacement for the—Congress was told—a replacement for the KC–135. And smaller is better. Because when we get down to the calculation of fuel, our analysis is that if you have 140 of the bigger airplanes, the airbuses, and they fly for 750 miles, which is in the RFP, over 40 years, that the difference in fuel is $35 billion, an extra $35 billion. This is what we are spending today for these tankers. This is like I have enough money then to buy another 179 tankers.

So I am pleased that you are going to use 40 years in lifecycle cost. But I feel that we were misled. I mean, Mr. Miller came up day after day with all these charts. "We want medium-sized tankers, we want medium-sized tankers." This was in the testimony. And all of a sudden, lo and behold, we get this great, big monster that doesn't fit into any of our military construction facilities. This is going to cost billions of dollars in extra military contruction (MILCON) at a time when we don't have that kind of extra money.

So lifecycle cost has to be looked at properly. It was just a cursory thing in the first go-around. They just looked at the submissions from both companies and said, "You know, I guess they are okay." No independent analysis was done. And we need to have independent analysis. We need to know the truth for the American people.

We cannot afford to squander $35 billion on fuel, and especially when we are now supposed to be committed to dealing with greenhouse gasses and we are supposed to be having a conservation

ethic. You know, the Secretary got up there the other day and started complaining about the fuel costs. He said every time the cost of fuel goes up $1 a barrel, my bill goes up $130 million. So fuel is a big issue.

And I plead with you, stay with the existing RFP. You know, what really bothers me is that the people on the House side were not told, we were not told what Secretary Gates told Senator Levin. We were not told that they were going to give additional credit in the new RFP so that the bigger plane would get more credit. I wasn't told that. You didn't tell me that when you briefed me. I checked with Mr. Murtha; he wasn't told that. Only one person that I can tell was Senator Levin. Now, he happens to confirm people. He confirmed the Secretary of Defense, and I would assume that the Secretary would want to be open and candid. Nobody else was open and candid.

Now, I hope you can tell me—and I hope and plead for you to take this thing seriously that you cannot change this thing now in a way that will be prejudicial. Or you know what is going to happen. You know what is going to happen. There will be another protest, and we won't get anything done.

I mean, this is a serious problem. And I say to you, stay with the existing RFP. Let's see where the chips fall. But don't make a modification that is going to look just like you are giving this thing to Northrop Grumman and EADS. I plead with you not to do that.

Mr. ABERCROMBIE. Mr. Young, now that you have that information, Mr. Young, perhaps in the closed session Mr. Dicks will ask you a question. But——

Secretary YOUNG. Could I please have the chance to comment?

Mr. ABERCROMBIE. Yes, you can comment, but you can answer at length, I think, in the closed session as well.

Secretary YOUNG. I think these are much more open-session issues.

For one, I have every personal reason to believe that Secretary Gates has been extremely open and candid with everyone. And I cannot leave that on the record.

Two, I have had——

Mr. DICKS. Well, I checked with the other people, and they were not told. I was not told.

Secretary YOUNG. Can I——

Mr. ABERCROMBIE. Go ahead.

Secretary YOUNG. I have had discussions with Secretary Gates. He has expressed an interest in understanding the parameters, but he has also given me and the team license to go figure out how the requirements should be stacked and not. So I can assure you Secretary Gates, in personal discussions with me, has made no decision about how we would score anything and what we would weight. So I do not think he would have said that to Senator Levin, Chairman Levin.

We announced as alternatives, as I have right here, the briefing characterizes the 767, the 787, and the 330 as medium-class airplanes. They are viewed in the analysis alternatives as medium airplanes.

We will not give extra credit for additional fuel. We will give credit for how much fuel you carry. You must carry the threshold

amount, and then we intend to give credit, consistent with the requirements document, for the fuel you carry beyond that. And we are working those details in the RFP.

The military construction costs are included in the analysis, and they were assessed. Both airplanes are significantly bigger than a KC–135 and do drive a certain amount of military construction.

I disagree with your estimates of the fuel burn. We have data and I have seen the data, I can't comment on the data in public, but those are not accurate estimates of the fuel burn.

We will do exactly what you have said, and that is have an independent team look at how we estimate the lifecycle costs. Because I think you have a very good point about that.

And I think those are the key things I wanted to be sure and discuss with you.

Mr. ABERCROMBIE. Thank you.

Mr. Bonner.

Mr. BONNER. Thank you, Mr. Chairman.

Any time I am in the same room with my friends and colleagues from Washington State and Kansas, I sometimes feel compelled to respond to their comments. But I know that is not the purpose of this hearing, so I will choose not to do that.

Mr. Secretary, after the lease scandal that resulted in officials from the Air Force and Boeing losing their jobs and, in some instances, going to jail, is it not true that it was Congress that charged the Department of Defense and the Air Force with the responsibility—it was a congressional mandate, was it not, to go down the path of a competitive source selection process, not a sole source contract as was the case in 2001, but a competitive selection process, charging you with the responsibility to provide the warfighter and the taxpayer with the best-value tanker?

Secretary YOUNG. That is correct, Congressman. And the one thing I would tell you—I was trying to look forward, but in looking back, that process yielded some very attractive aircraft from both bidders for the Government at very attractive prices.

Mr. BONNER. And so I guess my question is, do you still feel bound by that congressional mandate to go down the path of a competitive source, not a sole source contract?

Secretary YOUNG. Absolutely, sir. I see no benefit in my experience across the acquisition enterprise, setting this aside—sole sources limit our flexibility in negotiating prices.

And I talked earlier about the fact that, even in a dual source process, which some have discussed, we have considered that and rejected that, because I believe that will cost the taxpayer more in the end. We get best value through a competitive source selection of a single source who has bid in a competitive environment and offered us, hopefully, an excellent deal.

Mr. BONNER. If, by chance, someone sitting back home in Wichita, Kansas, or Seattle, Washington, or Mobile, Alabama, were watching this hearing this evening, there might be some confusion, because it seems that at times some Members have said, "Stick with the RFP," and other times have said, "Go against the RFP." So let me go back to a point that Congresswoman Boyda raised and make sure that I am clear in understanding your response.

I believe you said that the Inspector General looked at the RFP and determined in the affirmative that the RFP reflected the requirements document. Yet, in the response to Congresswoman Boyda's question, did I hear you correctly in saying that you would consider going to a 40-year lifecycle cost, even though the current RFP was for a 25-year lifecycle cost?

Is that not inconsistent with the requirements document? Because, to my knowledge, the GAO did not bring this up as one of the eight issues that was raised.

Secretary YOUNG. Yes, Congressman, in continuing to research this issue, I have learned that the capability development document does require a 40-year life for this aircraft. And so I need to, with our team, reconcile the RFP at 25 years but the requirements document at 40. That would lead me to conclude that we should at least consider lifecycle estimate through 40 years, because I am going to continue to try to ground myself in the existing documents and buying what the warfighters ask me to buy.

Mr. BONNER. Just a couple more questions. So much has been said today, but probably not enough has been said about yesterday's announcement that Secretary Gates had and that you participated in.

Could you give the committee and the American people some idea of what type of schedule and process for revealing RFP changes to the offerors we might be looking at?

Secretary YOUNG. Congressman, by necessity, this process has to be event-driven. So I can lay out our notional schedule and what we would like to do by working aggressively. And that is, we would like to issue the draft request for proposals in late July, early August, for industry comment. Hopefully we can finalize that and issue the final request for proposals in mid-August.

We would give industry 45 days to submit their proposals, asking them to turn in proposals in early October. They were given 60 days the first time. We believe this is an adequate amount of time.

And then we would seek to evaluate the proposals and create this record of how we evaluate the proposals, which will be necessary for any future protests, and announce a source selection decision by the end of the year.

As I have noted, there are any number of factors that can delay those events and, therefore, mean I can't make the schedule. This is not going to be a schedule-determined program. It will be a event-determined program. We are going to seek to make this decision in a timely manner for the sake of the warfighter.

Mr. BONNER. And, again, just for the record, my last question, I want to make certain we are all clear. To your knowledge, neither you nor Secretary Gates have predisposed in terms of a decision about which tanker the Department of Defense will end up choosing? Because there has been some allegation that that decision has already been made.

Secretary YOUNG. I can assure you, Congressman, that Secretary Gates is indifferent and has absolutely no opinion about which tanker we buy. And I also would like to assure you, as I said in my discussion, I do not care which tanker we buy.

I want to get the best deal for the taxpayer. I want this program to be successfully executed, so I can tell the chairman we did it.

And I want to meet the warfighters' requirements. I could care less which airplane does that.

Mr. BONNER. Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Thank you very much, Mr. Bonner.

Mr. Saxton has one brief follow-up question, and then we are going to close out this portion and get right to the closed briefing.

Mr. SAXTON. Mr. Secretary, as you well know, following your receipt and the evaluation of the former proposal and presumably the follow-on proposal, there is a review that is called the Milestone B Review, which is intended to determine whether or not the next phase is ready to start, which would be the development phase. And following the Milestone B Review, you issued a Milestone B report, or decision.

I assume that the process will involve Milestone B process again, since there will be potentially new proposals?

Secretary YOUNG. We are reviewing that and whether I would revoke the Milestone B that I granted and have a new Milestone B or how we would approach that.

If I could, I would use that as an opportunity to comment. In the Milestone B process, I approve that the program is fully funded. I meet some of the criteria that the Congress has levied on the Department, to say the technology is ready, the program is fully funded, et cetera, et cetera. I approve those criteria.

I have adopted a practice of asking people to talk to me in neutral terms about the multiple bids so that I have some sense that the source selection process was done properly and I have grounds for approving Milestone B.

I, in this case, in most cases, do not get the source selection specific information or the specific bidder information. I seek to grant the Milestone B in accordance with your certification criteria and my reasonable confidence that the process has been executed well.

Mr. SAXTON. So you are saying that you haven't made a decision about how——

Secretary YOUNG. I haven't made a decision yet about whether it is proper to revoke the Milestone B. That would be my inclination, and have a new Milestone B process.

This is a little bit awkward in that I will be, as Secretary Gates announced, both the source selection authority and the Milestone B official, which is extremely unusual in the Department.

Mr. SAXTON. Thank you.

Mr. ABERCROMBIE. Very good. Thank you, Mr. Young.

As soon as I adjourn the hearing, I would appreciate everyone except for the members, the witnesses and their staffs and the committee staff—that is to say, the subcommittee and/or full committee staff. Personal staff will not be able to stay. So everyone else will have to clear the room, including our media friends, as soon as possible.

The moment that is done, we will proceed to a closed meeting of the subcommittee with Mr. Young, our GAO friends and Ms. Payton. And everyone will be at the table at the same time.

[Whereupon, at 7:35 p.m., the subcommittee proceeded in Closed Session.]

A P P E N D I X

JULY 10, 2008

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 10, 2008

United States Government Accountability Office

GAO

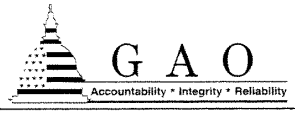
Testimony before the Air and Land Forces Subcommittee, Committee on Armed Services, House of Representatives

For Release on Delivery
Expected at 2:00 p.m. EDT
Thursday, July 10, 2008

AIR FORCE PROCUREMENT

Aerial Refueling Tanker Protest

Statement of Daniel I. Gordon, Deputy General Counsel



GAO-08-991T

GAO
Accountability-Integrity-Reliability

Highlights

Highlights of GAO-08-991T, a testimony to the Air and Land Forces Subcommittee, Committee on Armed Services, House of Representatives

GAO's Role Under The Competition in Contracting Act

The Boeing Company protested the award of a contract to Northrop Grumman Systems Corporation by the Department of the Air Force for KC-X aerial refueling tankers. Boeing challenged the Air Force's technical and cost evaluations, conduct of discussions, and source selection decision. Because Boeing competed for the contract, it is an interested party for purposes of filing a protest. Under the Competition in Contracting Act of 1984, GAO is required to consider protests of contract awards filed by interested parties. In deciding protests, GAO makes a determination of whether the agency's actions complied with procurement statutes and regulations.

GAO's Recommendations

In its decision, GAO recommends that the Air Force reopen discussions with the offerors, obtain revised proposals, re-evaluate the revised proposals, and make a new source selection decision, consistent with GAO's decision. GAO further recommends that, if the Air Force believed that the solicitation does not adequately state its needs, the agency should amend the solicitation prior to conducting further discussions with the offerors. GAO recommends that if Boeing's proposal is ultimately selected for award, the Air Force should terminate the contract awarded to Northrop Grumman.

To view the full product, click on GAO-08-991T. For more information, contact Daniel I. Gordon at (202) 512-8219 or gordond@gao.gov or Michael R. Golden at (202) 512-8233, goldenm@gao.gov.

July 10, 2008

AIR FORCE PROCUREMENT

Aerial Refueling Tanker Protest

GAO's Findings

Review of the extensive record, including a hearing, led GAO to conclude that the Air Force had made a number of significant errors that could have affected the outcome of what was a close competition between Boeing and Northrop Grumman. The errors included not assessing the relative merits of the proposals in accordance with the evaluation rules and criteria identified in the solicitation, not having documentation to support certain aspects of the evaluation, conducting unequal and misleading discussions with Boeing, and having errors or unsupported conclusions in the cost evaluation. Accordingly, GAO sustained Boeing's protest.

The redacted decision is at www.gao.gov/decisions/bidpro/311344.htm.

Mr. Chairman, Mr. Ranking Minority Member, and Members of the Subcommittee:

Thank you for the opportunity to be here today to discuss the June 18, 2008 decision of GAO in response to The Boeing Company's protest of the Air Force's award of the aerial refueling tanker contract.

GAO has been deciding bid protests since the 1920s. The Competition in Contracting Act of 1984 (CICA) now provides specific statutory authority for our bid protest function. The Act codified GAO's role as a quasi-judicial forum to provide an objective, independent, and impartial process for the resolution of disputes concerning the awards of federal contracts. We handle protests following the procedures set out in the Bid Protest Regulations in Part 21 of Title 4 of the Code of Federal Regulations. We conduct outreach and exchange views with the Department of Defense (DoD) and civilian agencies on a regular basis with regard to best practices and lessons learned from our bid protest decisions.

In Fiscal Year 2007, we received nearly 1,300 bid protests challenging procurements across the federal government. GAO received between 700 and 775 protests of DoD procurements over each of the past 5 years. Because there are often multiple protests of a single procurement action, we would estimate that 750 protests would involve approximately 500 defense procurements—out of the many tens of thousands of defense procurement actions that could be protested each year. Bid protest statistics and a detailed breakdown by DoD components are included in our appendices to this statement.

The bid protest process is a legal one, and both the process and the resulting product differ from those associated with the reports that GAO issues in connection with its program audits and reviews. Protests are handled solely by GAO's Office of General Counsel (OGC), not by its audit teams. In developing the record, OGC provides all protest parties—the protester, the awardee, and the contracting agency—an opportunity to present their positions. In some cases, OGC conducts a hearing to further develop the record. Under CICA, as amended, we have 100 calendar days to decide a protest.

The product of a protest before GAO—our legal decision—does not address broad programmatic issues such as whether or not a weapons program is being managed effectively or consistent with best practices. Instead, a bid protest decision addresses specific allegations challenging particular procurement actions as contrary to procurement laws,

regulations and the evaluation scheme set forth in the solicitation. We sustain a protest when we find that the procuring agency has not complied with procurement laws, regulations, and the solicitation's evaluation scheme, and that this prejudiced the protester's chances of winning the contract.

With that background, my testimony today will summarize our recently issued decision in the Boeing protest of the Air Force's award of a contract to Northrop Grumman Systems Corporation. The tanker procurement is a large and complex one, and Boeing advanced numerous protest grounds, which required us to use almost all of the 100 calendar days allowed by CICA to resolve the protest. In this regard, Boeing supplemented its initial protest seven times, raising more than 20 main challenges to the agency's evaluation and source selection.

Our review of the record led us to conclude that the Air Force had made a number of significant errors that could have affected the outcome of what was a close competition between Boeing and Northrop Grumman. We therefore sustained Boeing's protest. We also denied a number of Boeing's challenges to the award to Northrop Grumman, because we found that the record did not provide us with a basis to conclude that the agency had violated the legal requirements with respect to those challenges.

Several other points should be noted. First, our protest decision does not reflect any view on the merits of Boeing's and Northrop Grumman's proposed tankers or the firms' proposals. Judgments about which company will more successfully meet the Air Force's needs are for the Air Force, not GAO, to make. Second, bias, undue influence or other intentional wrongdoing was not alleged by Boeing in its protest, nor did GAO see any evidence of such intentional wrongful conduct by the Air Force in this procurement. Third, this statement is based on the public version of our decision. A limited amount of information that is proprietary to the parties or source selection sensitive has been redacted from the decision, but none of the redacted information is critical to understanding the decision. Finally, we made a number of recommendations to the Air Force in sustaining the protest. By statute, the Air Force has 60 days to inform our Office of the Air Force's actions in response to our recommendations. We recognize that acquiring new aerial refueling tankers is a critical need for the Air Force and the nation. We think that it is important that the Air Force act with all due dispatch to correct the procurement flaws indicated in our decision and to move forward to meet the agency's mission needs.

Background

Aerial refueling is a key element supporting the effectiveness of DoD's air power in military operations and is, as such, an important component of national security. The Air Force's tanker fleet, consisting of the medium-sized KC-135 and larger KC-10, is old; the KC-135 aircraft currently has an average age of 46 years and is the oldest combat weapon system in the agency's inventory. To begin replacing the aging refueling tanker fleet, the Air Force established a three-pronged approach under which it intended to first conduct a procurement to replace the older KC-135 tankers, while maintaining the remaining KC-135 and KC-10 tankers; the first procurement, which is the acquisition that is the subject of our decision, was identified by the Air Force as the KC-X procurement or program.

Although the Air Force intends to ultimately procure up to 179 KC-X aircraft, the agency's solicitation that led to the contract award at issue here provided for an initial contract for system development and demonstration of the KC-X aircraft and procurement of up to 80 aircraft. The solicitation provided that award of the contract would be on a "best value" basis, and stated a detailed evaluation scheme that identified technical and cost factors and their relative weights. With respect to the cost factor, the solicitation provided that the Air Force would calculate a "most probable life cycle cost" estimate for each offeror's proposal, including military construction and fuel costs. In addition, the solicitation provided a detailed system requirements document that identified minimum requirements (called key performance parameter thresholds) that offerors must satisfy to receive award. The solicitation also identified desired features and performance characteristics of the aircraft (which the solicitation identified, in certain cases, as "objectives" that offerors were encouraged, but were not required, to provide).

The Air Force received proposals and conducted numerous rounds of negotiations with Boeing and Northrop Grumman. The agency selected Northrop Grumman's proposal for award on February 29, 2008, and Boeing filed its protest with our Office on March 11. In accordance with our Bid Protest Regulations, we obtained a report from the Air Force and comments on that report from Boeing and Northrop Grumman. The documentary record produced by the Air Force in this protest was voluminous and complex. Our Office also conducted a 5-day hearing to receive testimony from a number of Air Force witnesses to complete and explain the record. Neither Boeing nor Northrop Grumman produced any witnesses at the hearing, although each was invited to do so. Following the hearing, we received further comments from the parties, addressing the hearing testimony as well as all other aspects of the record.

The Legal Standard

Procuring agencies are obligated to conduct proposal evaluations in accordance with the evaluation scheme set forth in the solicitation. Such proposal evaluation judgments are by their nature often subjective; nevertheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced criteria upon which the successful competitor is to be selected. In order for GAO to perform a meaningful review, the protest record must contain adequate documentation showing the bases for the agency's evaluation conclusions and source selection decision.

In negotiated procurements, when procuring agencies conduct discussions with offerors with respect to their proposals, the discussions must be meaningful and fair, and they must not be misleading.

Judgments about which offeror will most successfully meet governmental needs are for the procuring agencies. Our protest decisions are limited to the record we develop, shaped by the allegations raised by the protester and the responses put forward by the agency and awardee, and measured against the criteria established for the procurement by applicable statutes, regulations, and the agency's solicitation.

GAO's Review of the Record

As discussed above, each of the parties—the Air Force, Boeing, and Northrop Grumman—had a full and complete opportunity to submit argument and evidence for the record. The documentary evidence in the record was voluminous. From our review of the record, including the hearing testimony of 11 Air Force witnesses, GAO found a number of significant errors in the Air Force's technical and cost evaluation and that the agency conducted misleading and unequal discussions with Boeing.

First, we found that, although the solicitation identified the relative order of importance of the requirements and features of the aircraft solicited by the Air Force, the record did not show that the Air Force, in its evaluation and source selection decision, applied the identified relative weighting in assessing the merits of the firms' proposals. In comparing Boeing's assessed advantages against Northrop Grumman's assessed advantages, the Air Force did not account for the fact that many of Boeing's assessed advantages were derived from requirements and features of the aircraft which the solicitation identified as being more important than those from which Northrop Grumman's assessed advantages were derived. Moreover, the solicitation requested that offerors propose to satisfy as many of the solicitation's desired aircraft features and performance as possible, but the record did not show that the Air Force in its evaluation or source selection

decision credited Boeing with satisfying far more of these features and functions than did Northrop Grumman.

Second, we found that a key discriminator relied upon by the Air Force in its selection of Northrop Grumman's proposal for award was not consistent with the terms of the solicitation. Specifically, the Air Force credited Northrop Grumman for proposing to exceed a solicitation key performance parameter objective for fuel offload versus unrefueled range (that is, the amount of fuel a tanker could offload to a receiver aircraft at a given distance of flight by the tanker without itself refueling) to a greater extent than Boeing proposed, but the solicitation plainly provided that no consideration would be given for proposing to exceed key performance parameter objectives.

Third, we found that the record did not show that the Air Force reasonably determined that Northrop Grumman's proposed aircraft could refuel all current Air Force fixed-wing, tanker-compatible aircraft using current Air Force procedures, as was required by the solicitation. During the procurement, the Air Force twice informed Northrop Grumman that the proposed maximum operating velocity for that firm's proposed aircraft would not be sufficient under current Air Force procedures to achieve overrun speeds for various Air Force aircraft. (In aerial refueling operations, if a receiver aircraft overruns the tanker during the final phase of rendezvous, the tanker and receiver pilots are directed to adjust to specified overrun speeds, and after overtaking the receiver aircraft, the tanker will decelerate to a refueling airspeed.) In response to the Air Force's concerns, Northrop Grumman promised a solution to allow its aircraft to achieve the required overrun speeds. The record did not show that the Air Force reasonably evaluated the capability of Northrop Grumman's proposed aircraft to achieve the necessary overrun speed in accordance with current Air Force procedures.

In addition, we found that the Air Force did not reasonably evaluate the capability of Northrop Grumman's proposed aircraft to initiate emergency breakaway procedures, consistent with current Air Force procedures, with respect to a current fixed-wing, tanker-compatible Air Force aircraft. A breakaway maneuver is an emergency procedure that is done when any tanker or receiver aircraft crewmember perceives an unsafe condition that requires immediate separation of the aircraft. In such a situation, the tanker pilot is directed to accelerate, and if necessary to also climb, to achieve separation from the receiver aircraft.

Fourth, we found that the Air Force conducted misleading and unequal discussions with Boeing. The agency informed Boeing during the procurement that it had fully satisfied a key performance parameter objective relating to operational utility. Later, the Air Force decided that Boeing had not fully satisfied this particular objective, but did not tell Boeing this, which would have afforded Boeing the opportunity to further address this. GAO concluded that it was improper for the Air Force, after informing Boeing that it had fully met this objective, to change this evaluation conclusion without providing Boeing the opportunity to address this requirement in discussions. In contrast, Northrop Grumman, whose proposal was evaluated as only partially meeting this requirement, received continued discussions addressing this same matter during the procurement.

Fifth, GAO found that the Air Force improperly accepted Northrop Grumman's proposal, even though that firm took exception to a material solicitation requirement. Specifically, the solicitation required offerors to plan and support the agency to achieve initial organic depot-level maintenance within 2 years after delivery of the first full-rate production aircraft. Northrop Grumman was informed several times by the Air Force that the firm had not committed to the required 2-year timeframe, but Northrop Grumman refused to commit to the required schedule. GAO concluded that Northrop Grumman's refusal to do so could not considered an "administrative oversight" as was found by the Air Force in its evaluation.

Sixth, we found that the Air Force did not reasonably evaluate military construction costs in evaluating the firms' cost proposals. The solicitation provided that the Air Force would calculate a most probable life cycle cost estimate for each offeror. A most probable life cycle cost estimate reflects the agency's independent estimate of all contract, budgetary, and other government costs associated with all phases of the aircraft's life cycle from system development and demonstration through production and deployment and operations and support; military construction costs were specifically identified as a cost that the agency would evaluate in calculating the firms' most probable life cycle costs. Because the agency believed that its anticipated requirements could not be reasonably ascertained, the Air Force established a notional (hypothetical) plan, identifying a number of different types of airbases, to provide for a common basis for evaluating military construction costs. GAO found that, in addition to four errors related to military construction costs that the Air Force conceded during the protest, the record otherwise showed that the agency's military construction cost evaluation was flawed, because the

agency's evaluation did not account for the offerors' specific proposals and because the record did not otherwise support the reasonableness of the agency's notional plan.

Seventh, we found that the Air Force improperly increased Boeing's estimated non-recurring engineering costs in calculating that firm's most probable life cycle cost. Specifically, the Air Force assigned a moderate risk to Boeing's system development and demonstration costs, because, despite several efforts to obtain support from Boeing for its proposed non-recurring engineering costs, Boeing had not sufficiently supported its estimate. Although we found the Air Force's assignment of a moderate cost risk reasonable, GAO also found that the Air Force unreasonably increased Boeing's estimated non-recurring engineering costs in calculating the firm's most probable life cycle cost where the Air Force did not find that Boeing's estimated costs were unrealistic or not probable.

Finally, GAO found unreasonable the Air Force's use of a simulation model to determine the amount by which Boeing's non-recurring engineering costs should be increased in calculating that firm's most probable life cycle cost. Although such simulation models can be useful evaluation tools, here the Air Force used as data inputs in the model the percentage of cost growth associated with weapons systems at an overall program level, and there was no indication that these inputs would be a reliable predictor of anticipated growth in Boeing's non-recurring engineering costs.

There were two other aspects of the Air Force's evaluation that GAO found troubling, but which did not factor into our sustaining the protest. Specifically, GAO received much argument and hearing testimony addressing the Air Force's evaluation of the fuel costs associated with the firms' proposed aircraft, and the record indicated that the agency did not do much more than assess whether the offerors' proposed fuel burn rates (gallons of fuel burned per hour) were reasonable. The record also showed that even a small increase in the amount of fuel that is burned per hour by a particular aircraft would have a dramatic impact on the overall fuel costs. Although we did not sustain Boeing's challenge to the Air Force's evaluation of the firms' respective fuel burn rates, we suggested that this was a matter that the agency may wish to review to ascertain whether a more detailed analysis of the fuel costs was appropriate.

Similarly, the Air Force evaluated a weakness for Northrop Grumman's boom approach but concluded that this evaluated concern posed a low schedule or cost risk. Because the record did not contain any

documentation explaining why the Air Force's evaluated concern with Northrop Grumman's proposed boom design represented low risk, we received hearing testimony addressing the agency's evaluation. Although the record, including the hearing testimony, indicated that some analyses of the impact of the agency's evaluated concerns with Northrop Grumman's boom may have been performed, little detail was provided. Here too, we did not find a sufficient basis in the record to sustain Boeing's challenge, but suggested that this was another matter that the agency may wish to review further.

In sum, GAO concluded from its review of the record that the Air Force had made a number of significant errors that could have affected the outcome of what was a close competition between Boeing and Northrop Grumman. Accordingly, GAO sustained Boeing's protest. GAO also denied a number of Boeing's challenges to the award to Northrop Grumman, because the record did not provide a basis to conclude that the agency had violated the legal requirements with respect to those challenges.

Our Recommendations

GAO recommends that the Air Force reopen discussions with the offerors, obtain revised proposals, re-evaluate the revised proposals, and make a new source selection decision, consistent with this decision. If the Air Force believes that the solicitation does not adequately state its needs, the agency should amend the solicitation prior to conducting further discussions with the offerors. If Boeing's proposal is selected for award, the Air Force should terminate the contract awarded to Northrop Grumman. GAO also recommended that Boeing be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees.

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

Appendix I: Statistics for All GAO Bid Protests

2004-2008 Statistics for All GAO Bid Protests				
Fiscal Year	Total Cases[a]	Dismissals[a]	Merit Results[a] (Sustain + Deny)	Protests Sustained[a]
2004	1354	989	365	75
2005	1262	956	306	71
2006	1223	974	249	72
2007	1277	942	335	91
2008[b]	1071	845	226	49

[a]These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

[b]These figures cover the period between October 1, 2007 to June 27, 2008.

Appendix II: 2004-08 Statistics for GAO Bid Protests Involving DOD Components

2004 DOD Component Statistics				
Component	Total Cases[a]	Dismissals[a]	Merit Results[a] (Sustain + Deny)	Protests Sustained[a]
Air Force	132	84	48	3
Army	324	245	79	18
Defense Logistics Agency	115	103	12	1
Marine Corps	14	10	4	3
Navy	112	64	48	11
DOD (Misc.)	34	12	22	0
Defense -Total	731	518	213	36

2005 DOD Component Statistics				
Component	Total Cases[a]	Dismissals[a]	Merit Results[a] (Sustain + Deny)	Protests Sustained[a]
Air Force	127	93	34	13
Army	282	223	59	7
Defense Logistics Agency	121	108	13	0
Marine Corps	12	4	8	1
Navy	135	105	30	5
DOD (Misc.)	29	19	10	2
Defense -Total	706	552	154	28

2006 DOD Component Statistics				
Component	Total Cases[a]	Dismissals[a]	Merit Results[a] (Sustain + Deny)	Protests Sustained[a]
Air Force	148	105	43	13
Army	334	277	57	12
Defense Logistics Agency	70	62	8	3
Marine Corps	32	29	3	1
Navy	101	73	28	4
DOD (Misc.)	54	42	12	5
Defense Total	739	588	151	38

[a]These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

2007 DOD Component Statistics				
Component	Total Cases[a]	Dismissals[a]	Merit Results[a] (Sustain + Deny)	Protests Sustained[a]
Air Force	136	103	33	16
Army	323	242	81	22
Defense Logistics Agency	97	80	17	0
Marine Corps	20	18	2	0
Navy	129	96	33	8
DOD (Misc.)	70	36	34	16
Defense Total	775	575	200	62

[a]These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

2008 DOD Component Statistics[b]				
Component	Total Cases[a]	Dismissals[a]	Merit Results[a] (Sustain + Deny)	Protests Sustained[a]
Air Force	122	101	21	9
Army	309	247	62	9
Defense Logistics Agency	57	50	7	1
Marine Corps	11	10	1	0
Navy	93	61	32	8
DOD (Misc.)	38	36	2	0
Defense Total	630	505	125	27

[a]These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

[b]These figures cover the period between October 1, 2007 to June 27, 2008.

Human Events™.com

Let's Solve the Tanker Mess

by Gen. John Handy (more by this author)
Posted 07/07/2008 ET

Most of us in the Air Force mobility community were a bit surprised by the decision to buy the quite large Airbus-330 tanker instead of the smaller Boeing 767 tanker. But the real shock was in the unusually harsh language used by the Government Accountability Office in overturning that decision. It was the harshest language used to overturn an action by the Air Forces choice that I have read in my entire career.

In that career -- spanning 39 years in the Air Force -- I was fortunate enough to have been the Commander of the United States Transportation Command (USTRANSCOM) and the USAF Air Mobility Command (AMC) from November 2001 until retiring from the Air Force in October 2005.

I devoted many years to the operation of air refueling tankers in support of the hundreds of other aircraft and tens of thousands of soldiers, sailors, airmen, marines and Coast Guardsmen who depend on them to create the "air bridge" that enables American forces and relief supplies to reach any corner of the world in only a few hours. Without the tankers performing when and where needed, America would not -- quite literally -- be a "superpower."

In the many challenges we faced in those years, the soldiers, sailors, airmen and marines in TRANSCOM pulled together as a joint team to get the job done on a daily basis throughout the entire time I was blessed to be their commander. We engaged in multiple crises around the world -- humanitarian disasters as well as significant military conflicts in both Afghanistan and Iraq.

The most serious limitation we had was our equipment: the shortage of adequate mobility assets -- meaning airlift and air refueling aircraft. First among those problems was then, and is now, the tankers.

I spoke about the air refueling tanker age and shortages on a routine basis with anyone who would listen. And I did so in the context of the other requirement those badly needed assets would support which includes virtually everything the armed services have to move from one place to another that can be loaded onto an airplane.

The shocking language of the GAO decision compels me to do something I've never done before: to speak out publicly. I am not employed by either Boeing or Northrop-Grumman. But the service I've devoted most of my life to appears to need a bit of help.

Somewhere in the acquisition process, it is obvious to me that someone lost sight of the requirement. Based on what the GAO decided, it's up to people such as myself to remind everyone of the warfighter requirement for a modern air refueling tanker aircraft.

Recall that we started this acquisition process in order to replace the Eisenhower era KC-135 aircraft with a modern version capable of accomplishing everything the current fleet does plus additional needs for the future. Thus the required aircraft is of small to medium size much like the KC-135. Not a very large aircraft like the current KC-10, which may be replaced later with a comparably large aircraft.

Why a smaller to medium size aircraft? Because, first of all, you want tankers to deploy in sufficient numbers in order to accomplish all assigned tasks. You need to bed them down on the maximum number of airfields around the world along with or close to the customer -- airborne fighters, bombers and other mobility assets in need of fuel close to or right over the fight or crisis. This allows the supported combatant commander the ability to conduct effective operations around the clock. The impact of more tankers is more refueling booms in the sky, more refueling orbits covered, wider geographic coverage, more aircraft refueled, and more fuel provided. A "KC-135 like" aircraft takes up far less ramp space, is far more maneuverable on the ground and does not have the risk of jet blast reorganizing your entire ramp when engine power is applied.

The second requirement is survivability. The aircraft and crew must be able to compete in a threat environment that contains enhanced surface to air missiles and

other significant threats. The crew must receive superior situational awareness to include automatic route planning and re-routing and steering cues to avoid those threats. They must have maximum armor protection, fuel tank explosion protection and world class chemical/biological protection. All of this means the warfighter has the requirement for a large number of highly flexible and survivable air refueling aircraft.

I also want the acquired aircraft to be integrated with the current defense transportation system. That means 463L compatible pallets; floor loaded on a freighter capable floor all compatible with the current modern airlift fleet. When I put passenger seats in this aircraft, I want to be able to use existing airlift aircraft seats and pallets. When tasked with our precious aero medical mission, I want to be able to use integral medical crew seats, onboard oxygen generation systems, more outlets and be able to use the USAF patient support pallet. I do not want to harness the USAF with the problem of going out to acquire unique assets due to a more radically sized and equipped tanker aircraft.

Now, if you look at these rather simple requirements and look at the previous offerings from industry, you might agree with me that the KC-767 more closely meets these needs than the competition. If that's what the warfighters need, that's what they should get.

My purpose is only to help select the right aircraft that meets the warfighter's requirements. It is not anything else. With that thought in mind, the KC-767 -- or another that is the same size and has the same capabilities -- is the right aircraft for the USAF. Now let's see what the new leadership of the Air Force does to obtain the right aircraft for the warfighter.

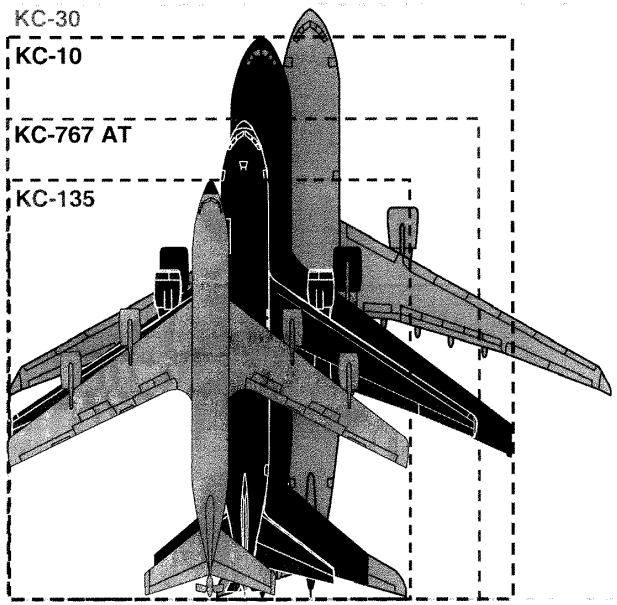
General John Handy, USAF (Ret.) is the former commander of both Air Mobility Command, where he had responsibility for all Air Force tanker operations and US Transportation Command where he was responsible for the air, land and sea movement of all DOD personnel. He is now the executive vice president of a domestic over-ocean shipping company based in Charlotte, NC.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 10, 2008

Size Comparison

[Provided by Rep. Norm Dicks]



- **KC-30 is 53% Larger than the KC-767.**
- **KC-30 is 27% Larger than the KC-10.**
- **KC-30 carries 30% Less Fuel than the KC-10.**

	KC-135	KC-767	KC-30	KC-10
Length	136.3'	160.4'	192.9'	181.6'
Wingspan	130.8'	156.1'	197.8'	165.4'
Max. Fuel Load	202,000 lbs	205,000 lbs	250,000 lbs	347,000 lbs

- **Larger Size = Fewer Airfields**
- **Larger Size = More Required Construction (Runways, Ramps, Hangars)**
- **Larger Size = Lower Fuel Efficiency**
- **Larger Size = Higher Maintenance Costs**

KC-30 is Overkill

STATE OF CONNECTICUT
EXECUTIVE CHAMBERS

M. JODI RELL
GOVERNOR

The Honorable M. Jodi Rell
Governor of Connecticut
Testimony on the Air Force Refueling Tanker Source Selection
U.S. House of Representatives
Air and Land Forces Subcommittee
Washington, DC
July 10, 2008

Chairman Abercrombie and Ranking Member Saxton, thank you for the opportunity to testify to the House Air and Land Forces Subcommittee on the KC-X source selection and the future development and procurement of up to 179 aerial refueling aircraft. I have already made my views on the tanker selection known to several congressional leaders and the Comptroller General. I am pleased to share those thoughts with your committee today.

Companies in the State of Connecticut are at the forefront of our nation's aerospace field, so I have paid particularly close attention to the KC-X contract. Like many Americans, I was disappointed by the Air Force's initial decision to choose the KC-45A over the Boeing Corporation's KC-767 Advanced Tanker, which would be powered by engines manufactured by Connecticut-based Pratt & Whitney, a division of United Technologies Corporation. As Governor of Connecticut, I was especially concerned about tens of thousands of U.S. jobs that would have gone overseas with this tanker selection.

Thanks to the Government Accountability Office (GAO), we now know that the Air Force's initial decision was the result of a flawed process that included erroneous technical and cost evaluations, among other problems. Quite frankly, but for the errors, Boeing would have had a substantial chance of winning the $35 billion contract.

The GAO has strongly recommended that the Air Force reopen discussions with the bidding parties, obtain and re-evaluate revised proposals, and make a new source selection decision. I strongly support the GAO's recommendation, but not only because of the American jobs at stake. Equally important are the long-term implications for our national defense and public confidence in the federal government. Outside of Washington, DC, some people have lost faith in the Pentagon as a reliable, evenhanded broker in the source selection process, and recent acquisition failures have only served to undermine taxpayer trust.

Notably, in January 2005 the Department of Defense (DoD) chose a foreign-designed helicopter to serve as the next Marine One, passing over Sikorsky Aircraft, a U.S. company that had transported the President without incident since 1957. DoD initially cited savings in cost and engineering for its decision to go with a prime contractor that had never before delivered a helicopter. But only four months ago, the Pentagon confirmed that the new Marine One program is years behind schedule and has nearly doubled in cost from about $6 billion when the contract was signed in 2005 to more than $11 billion today.

I raise the unfortunate example of Marine One because of its parallels to this year's tanker decision. In both cases DoD underestimated the true cost of the winning bid. The Air Force now concedes that the Boeing tanker proposal is more cost-effective. Also in both cases, DoD overestimated the ability of an industry newcomer that had partnered itself with a foreign firm. In fact, the prime contractor for the KC-45A has never delivered a tanker. By contrast, Boeing has provided the Air Force with hundreds of

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high quality refueling aircraft since its first delivery. History is about to repeat itself unless we change its course.

DoD has opted to soldier on with its unsuccessful Marine One decision, having already invested billions of dollars into the struggling program. The Air Force has not yet responded to the GAO's recommendation for a new tanker decision. However, I believe this course of action is the only way to achieve a responsible outcome that can begin to restore credibility to the acquisition process. I urge Congress to support GAO's recommendation for a new tanker decision.

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GAO Protests of Air Force Procurements Sustained during FY 2005 – FY 2008

FY 2008:

1. **The Boeing Co., B-311344, B-311344.3, B-311344.4, B-311344.6, B-311344.7, B-311344.8, B-311344.10, B-311344.11, June 18, 2008. (Requirement for aerial refueling tankers)**

The agency did not assess the relative merits of the proposals in accordance with the evaluation criteria, violated the solicitation provision that no consideration would be provided for exceeding key objectives, did not demonstrate the reasonableness of its determination that the awardee's proposed aircraft could refuel all aircraft required by the solicitation, conducted misleading and unequal discussions, unreasonably determined that the awardee's refusal to agree to a specific solicitation requirement was an administrative oversight, and unreasonably evaluated the offerors' most probable life cycle costs.

2. **Pemco Aeroplex, inc., B-310372, December 27, 2007. (Requirement for depot maintenance of the KC-135 aircraft).**

In a solicitation that required the agency to perform a price realism and risk assessment, the agency failed to document any analysis of the awardee's final proposal revisions, which appeared to conflict with agency projections.

FY 2007:

1. **Systems Research and Applications Corporation; Booz Allen Hamilton, Inc., B-299818; B-299818.2; B-299818.3; B-299818.4, Sept. 6, 2007. (Requirement for engineering and technology acquisition support services)**

The agency failed to adhere to the "best value" evaluation scheme set forth in the solicitation where the agency did not qualitatively assess the merits of the offeror's differing approaches as promised by the solicitation.

2. **Lockheed Martin Systems Integration-Owego; Sikorsky Aircraft Company, B-299145.5; B-299145.6, Aug. 30, 2007. (Requirement for the Combat Search and Rescue Replacement Vehicle)**

The agency precluded offerors from generally revising their proposals after modifying the solicitation's evaluation scheme, in violation of the fundamental rule that where an agency revises the criteria against which offers are to be evaluated or otherwise materially changes the solicitation's evaluation scheme, offerors must be given a reasonable opportunity to respond to the revised criteria or evaluation scheme.

3. **MCS Portable Restroom Service, B-299291, Mar. 28, 2007. (Requirement for portable chemical toilet services)**

The agency failed to make reasonable efforts to ascertain whether an acquisition was suitable for a set-aside for service-disabled veteran-owned small business concerns before proceeding with a small business set-aside, in violation of regulation.

4. **TYBRIN Corporation, B-298364.6; B-298364.7, Mar. 13, 2007. (Requirement for advisory and assistance services to support aerospace research, development, test, and evaluation activities)**

The agency improperly awarded a contract set aside for small business where the awardee's proposal clearly did not meet the material solicitation requirement that at least 50 percent of the contract's personnel costs be expended for employees of the small business awardee. (The Court of Federal Claims concurred with our analysis).

5. **Sikorsky Aircraft Company; Lockheed Martin Systems Integration-Owego, B-299145; B-299145.2; B-299145.3, Feb. 26, 2007. (Requirement for the Combat Search and Rescue Replacement Vehicle)**

The agency failed to adhere to the evaluation criteria set forth in the solicitation where the agency provided that cost/price would be calculated on the basis of Most Probable Life Cycle Cost, including both contract and operations and support (O&S) costs, but nevertheless normalized cost of maintenance when calculating O&S costs, thereby ignoring potentially lower cost of asserted low maintenance helicopters.

6. **Barnes Aerospace Group, B-298864; B-298864.2, Dec. 26, 2006. (Requirement for the repair of certain F100 engine parts)**

The agency improperly justified a sole-source procurement on the ground that only one source was available when the agency did not consider interest expressed by a second source that had made significant progress towards becoming an approved source under the agency's source approval rules. The agency also improperly treated offerors unequally with respect to the application of its qualification requirements by requiring that a source seeking approval follow qualification rules while ignoring requalification requirements in those same rules for a previously approved source.

7. **SunEdison, LLC, B-298583, Oct. 20, 2006. (Requirement for the construction and operation of a photovoltaic solar power array)**

The agency accepted a conditional offer for a fixed price contract in violation of a solicitation requirement that offerors propose fixed pricing. The offeror's proposed pricing was contingent upon "successful completion" of an agreement with a third party.

FY 2006:

1. **Magnum Medical Personnel, A Joint Venture, B-297687.2, June 20, 2006. (Requirement for clinical support services)**

The agency did not reasonably evaluate in accordance with the terms of the solicitation and the protester, the lowest priced offeror, was prejudiced by the agency's flawed evaluation.

2. **University of Dayton Research Institute, B-296946.6, June 15, 2006. (Requirement for design, engineering and technical support)**

The agency's communications with awardees following submission of initial proposals constituted discussions and required that the agency establish a competitive range and conduct discussions with all competitive range offerors, which the agency did not.

3. **United Paradyne Corp., B-297758, Mar. 10, 2006. (Requirement for fuel management services)**

The agency improperly evaluated the protester's past performance where the agency used a methodology that penalized offerors with relevant experience for the non-relevant experience and that effectively gave equal weight to highly relevant and non-relevant past performance.

4. **WorldWide Language Resources, Inc., B-296993, B-296984. B-296993.2, B-296993.3, B-296984.2, B-296984.3, B-296984.4, Nov. 14, 2005. (Requirement for bi-lingual, bi-cultural advisors/subject matter experts)**

The agency improperly made a sole-source award where the agency initially attempted to procure cultural advisors under an environmental services contract which did not include such a requirement within its scope, constituting a lack of advance planning that resulted in the agency's inability to obtain competition and directly resulted in the sole-source award. The agency's justification and approval prepared in support of the sole source award was unreasonable where agency concluded that the awardee was the only capable firm without considering the capabilities of any other firms.

5. **J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005. (Requirement for grounds maintenance services)**

The agency improperly made a negative responsibility judgment concerning a HUBzone small business, which must be submitted to the Small Business Administration for a possible certificate of competency. The agency improperly evaluated the awardee's past performance where the record fails to explain why the awardee's past performance contracts were relevant, given their relatively low value compare to the value of the solicited contract.

6. **BAE Technical Servs. Inc., B-296699, Oct. 5, 2005. (Requirement for the operation and maintenance of the Eglin Test and Training Complex)**

In the evaluation of proposed initiatives to reduce staffing, the agency improperly applied a more exacting standard to the protester's proposed initiatives than to the awardee's proposed initiatives.

FY 2005:

1. **Poly-Pacific Technologies, Inc., B-296029, June 1, 2005. (Requirement for the lease and recycling of acrylic plastic material)**

The agency made an improper out-of-scope modification to an existing contract.

2. **Lockheed Martin Aeronautics Co.; L-3 Communications Integrated Systems L.P.; BAE systems Integrated Defense Solutions, Inc., B-295401, B-295401.2, B-295401.3, B-295401.4, B-295401.5, B-295401.6, B-295401.7, Feb. 24, 2005. (Requirement for activities related to the avionics modernization upgrade program for the C-130 aircraft)**

The agency's source selection official, a senior procurement official, acknowledged bias in favor of the awardee, and the agency failed to demonstrate that the official's acknowledged bias did not prejudice the protesters. The agency improperly reopened discussions in order to permit the awardee to address an aspect of its proposal that was contrary to instructions, where the agency failed to identify similar concerns in the protester's proposals.

3. **Lockheed Martin Corp., B-295402, Feb 18, 2005. (Requirement related to the Air Force small diameter bomb program)**

The agency changed evaluation criteria to delete a factor under which the protestor was perceived to have an advantage and a senior procurement official who was involved in the discussion that culminated in the removal of the factor had an acknowledged bias toward the ultimate awardee.

4. **Cooley/Engineered Membranes; GTA Containers, Inc., B-294896.2, B-294896.3, B-294896.4, Jan. 21, 2005. (Requirement for collapsible fuel containment bladders)**

The agency lacked a reasonable basis to conclude that the awardee's proposal was technically acceptable where the record shows that the awardee's proposed alternative test was not comparable to the tests required by the solicitation.

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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: The Boeing Company

File: B-311344; B-311344.3; B-311344.4; B-311344.6; B-311344.7; B-311344.8; B-311344.10; B-311344.11

Date: June 18, 2008

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

DIGEST

1. Protest is sustained, where the agency, in making the award decision, did not assess the relative merits of the proposals in accordance with the evaluation criteria identified in the solicitation, which provided for a relative order of importance for the various technical requirements, and where the agency did not take into account the fact that one of the proposals offered to satisfy more "trade space" technical requirements than the other proposal, even though the solicitation expressly requested offerors to satisfy as many of these technical requirements as possible.

2. Protest is sustained, where the agency violated the solicitation's evaluation provision that "no consideration will be provided for exceeding [key performance parameter] KPP objectives" when it recognized as a key discriminator the fact that the awardee proposed to exceed a KPP objective relating to aerial refueling to a greater degree than the protester.

3. Protest is sustained, where the record does not demonstrate the reasonableness of the agency's determination that the awardee's proposed aerial refueling tanker could refuel all current Air Force fixed-wing tanker-compatible receiver aircraft in accordance with current Air Force procedures, as required by the solicitation.

4. Protest is sustained, where the agency conducted misleading and unequal discussions with the protester, where the agency informed the protester that it had fully satisfied a KPP objective relating to operational utility, but later determined that the protester only partially met this objective, without advising the offeror of this change in its assessment and while continuing to conduct discussions with the awardee relating to its satisfaction of the same KPP objective.

5. Protest is sustained, where the agency unreasonably determined that the awardee's refusal to agree to the specific solicitation requirement that it plan and support the agency to achieve initial organic depot-level maintenance within 2 years after delivery of the first full-rate production aircraft was an "administrative oversight," and improperly made award, despite this clear exception to a material solicitation requirement.

6. Protest is sustained, where the agency's evaluation of military construction costs in calculating the offerors' most probable life cycle costs for their proposed aircraft was unreasonable, where the evaluation did not account for the offerors' specific proposals, and where the calculation of military construction costs based on a notional (hypothetical) plan was not reasonably supported.

7. Protest is sustained, where the agency improperly added costs to an element of cost (non-recurring engineering costs) in calculating the protester's most probable life cycle costs to account for risk associated with the protester's failure to satisfactorily explain the basis for how it priced this cost element, where the agency did not determine that the protester's proposed costs for that element were unrealistically low.

8. Protest is sustained, where the agency's use of a "Monte Carlo" simulation model to determine the protester's probable cost of non-recurring engineering associated with the system demonstration and development portion of the acquisition was unreasonable, where the model's inputs concerned total weapons systems at an overall program level and there is no indication that this is a reliable predictor of anticipated growth of the protester's non-recurring engineering costs.

9. Protester is not required to file a "defensive protest" when during the procurement it is apprised of an agency's evaluation judgments with which it disagrees or where it believes the evaluation is inconsistent with the solicitation's evaluation scheme, because GAO's Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2008), require that where the protest involves a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, these protest grounds can only be raised after the offered debriefing.

10. While an agency, in an appropriate case, may request under GAO's Bid Protest Regulations, 4 C.F.R. § 21.3(d) (2008), that a protester provide specific relevant documents, of which the agency is aware and does not itself possess, this does not allow for "wide-open" document requests by an agency of broad categories of documents.

DECISION

The Boeing Company protests the award of a contract to Northrop Grumman Systems Corporation under request for proposals (RFP) No. FA8625-07-R-6470, issued by the Department of the Air Force, for aerial refueling tankers.[1] Boeing challenges the Air Force's technical and cost evaluations, conduct of discussions, and source selection decision.[2]

As explained below, we find that the agency's selection of Northrop Grumman's proposal as reflecting the best value to the government was undermined by a number of prejudicial errors that call into question the Air Force's decision that Northrop Grumman's proposal was technically acceptable and its judgment concerning the comparative technical advantages accorded Northrop Grumman's proposal. In addition, we find a number of errors in the agency's cost evaluation that result in Boeing displacing Northrop Grumman as the offeror with the lowest evaluated most probable life cycle costs to the government. Although we sustain Boeing's protest on grounds related to these errors, we also deny many of Boeing's challenges to the award.

Specifically, we sustain the protest, because we find that (1) the Air Force did not evaluate the offerors' technical proposals under the key system requirements subfactor of the mission capability factor in accordance with the weighting

[1] This acquisition has been identified as a Major Defense Acquisition Program. See Agency Report (AR), Tab 8, Acquisition Strategy Report, at 1.

[2] The record in this case, which the agency largely provided electronically to GAO and the private parties, is voluminous and complex, and some of the record is classified. Although we considered the classified information, it is not discussed in this decision.

established in the RFP's evaluation criteria; (2) a key technical discriminator relied upon in the selection decision in favor of Northrop Grumman relating to the aerial refueling area of the key system requirements subfactor, was contrary to the RFP; (3) the Air Force did not reasonably evaluate the capability of Northrop Grumman's proposed aircraft to refuel all current Air Force fixed-wing, tanker-compatible aircraft using current Air Force procedures, as required by the RFP; (4) the Air Force conducted misleading and unequal discussions with Boeing with respect to whether it had satisfied an RFP objective under the operational utility area of the key system requirements subfactor; (5) Northrop Grumman's proposal took exception to a material solicitation requirement related to the product support subfactor; (6) the Air Force did not reasonably evaluate military construction (MILCON) costs associated with the offerors' proposed aircraft consistent with the RFP; and (7) the Air Force unreasonably evaluated Boeing's estimated non-recurring engineering costs associated with its proposed system development and demonstration (SDD).

BACKGROUND

Aerial refueling is a key element supporting the effectiveness of the Department of Defense's (DoD) air power in military operations and is, as such, an important component of national security. See AR, Tab 333, Capability Development Document, Dec. 27, 2006, at 2, 7; see also Air Force Refueling: The KC-X Aircraft Acquisition Program, Congressional Research Service (CRS) Report for Congress, No. RL34398, Feb. 28, 2008, at 1. Currently, the Air Force uses two types of aircraft for aerial refueling: the KC-135, which is considered to be a medium-sized airplane, and the larger KC-10. The Air Force's fleet of KC-135 aircraft currently has an average age of 46 years and is the oldest combat weapon system in the agency's inventory;[3] for the newer KC-10 aircraft, the average age is over 20 years. Defense Acquisitions: Air Force Decision to Include a Passenger and Cargo Capability in Its Replacement Refueling Aircraft Was Made without Required Analyses, GAO-07-367R, Mar. 6, 2007, at 1.

To begin replacing the aging refueling tanker fleet, the Air Force established a three-pronged approach under which it intended to first conduct a procurement to replace the older KC-135 tankers, while maintaining the remaining KC-135 and KC-10 tankers; the first procurement, which is the acquisition protested here, was identified by the Air Force as the KC-X procurement or program. See AR, Tab 4, Acquisition Strategy Plan Briefing, at 9-10. The Air Force intends to replace the remaining

[3] The Air Force acquired 732 KC-135A aircraft between 1957 and 1965. In the 1980s, a number of KC-135A aircraft were upgraded to the KC-135E aircraft, and later other KC-135A aircraft were upgraded to the KC-135R aircraft. Currently, the Air Force has 85 KC-135E aircraft and 418 KC-135R aircraft in its fleet. The agency also has 75 newer KC-10A aircraft in its fleet. See Air Force Refueling: The KC-X Aircraft Acquisition Program, CRS Report for Congress, at 4-5.

KC-135 and KC-10 aircraft in later procurements under programs the agency identified as the KC-Y and KC-Z.

Solicitation

The RFP, issued January 30, 2007, provided for the award of a contract with cost reimbursement and fixed-price contract line items. In this regard, offerors were informed that, although the agency would procure up to 179 KC-X aircraft over a 15 to 20-year period, the initial contract would be for the SDD of the KC-X aircraft and the procurement of up to 80 aircraft, beginning with the delivery of four SDD aircraft and two low rate initial production (LRIP) aircraft.[4] Offerors were also informed that the agency contemplated receiving an existing commercial, Federal Aviation Administration (FAA) or equivalent certified transport aircraft modified to meet the agency's requirements. RFP, Statement of Objectives (SOO) for KC-X SDD, at 1.

A detailed system requirements document (SRD) was provided in the RFP that presented the technical performance requirements for the KC-X aircraft. In this regard, the SRD stated that

> [t]he primary mission of the KC-X is to provide world-wide, day/night, adverse weather aerial refueling . . . on the same sortie to receiver capable United States (U.S.), allied, and coalition military aircraft (including unoccupied aircraft). [The KC-X aircraft will] provide robust, sustained [aerial refueling] capability to support strategic operations, global attack, air-bridge, deployment, sustainment, employment, redeployment, homeland defense, theater operations, and special operations. Secondary missions for KC-X include emergency aerial refueling, airlift, communications gateway,

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[4] LRIP is defined as:

> The first effort of the Production and Deployment (P&D) phase. The purpose of this effort is to establish an initial production base for the system, permit an orderly ramp-up sufficient to lead to a smooth transition to Full Rate Production (FRP), and to provide production representative articles for Initial Operational Test and Evaluation (IOT&E) and full-up live fire testing. This effort concludes with a Full Rate Production Decision Review (FRPDR) to authorize the Full Rate Production and Deployment (FRP&D) effort.

Glossary of Defense Acquisition Acronyms & Terms, Defense Acquisition University, 12th ed., July 2005, at B-96-97.

aeromedical evacuation (AE), forward area refueling point (FARP), combat search and rescue, and treaty compliance.

RFP, SRD § 1.2.1. The SRD identified the minimum and desired performance/capability requirements for the aircraft. The minimum performance capabilities of the aircraft were identified in nine key performance parameters (KPP), which the Air Force summarized as follows:

KPP	Parameter	Required Performance
1	Tanker Air Refueling Capability	Air refueling of all current and programmed fixed wing receiver aircraft
2	Fuel Offload and Range	Fuel, offload, range chart equivalent to KC-135
3	Communications, Navigation, Surveillance/Air Traffic Management	Worldwide flight operations at all times in all civil and military airspace
4	Airlift Capability	Carry passengers, palletized cargo, and/or aeromedical patients on entire main deck
5	Receiver Air Refueling Capability	Refueled in flight from any boom equipped tanker aircraft
6	Force Protection	Operate in chemical/biological environments
7	Net-Ready	Meet enterprise-level joint critical integrated architecture requirements
8	Survivability	Operate in hostile environments (night vision and imaging systems, electromagnetic pulse, defensive systems: infrared detect and counter, radio frequency detect, no counter)
9	Multi-point Refueling	Multi-point drogue[5] refueling

AR, Tab 46, Source Selection Evaluation Team (SSET) Final Briefing to Source Selection Advisory Council (SSAC) and Source Selection Authority (SSA), at 18.

The RFP provided for award on a "best value" basis and stated the following evaluation factors and subfactors:

[5] A drogue is a small windsock placed at the end of a flexible hose that trails from a tanker aircraft in flight in order to stabilize the hose and to provide a funnel for the receiver aircraft, which inserts a probe into the hose to receive fuel. See Aerial Refueling Methods: Flying Boom versus Hose-and-Drogue, CRS Report for Congress, No. RL32910, June 5, 2006, at 1.

Mission Capability	
	Key System Requirements
	System Integration and Software
	Product Support
	Program Management
	Technology Maturity and Demonstration
Proposal Risk	
Past Performance	
Cost/Price	
Integrated Fleet Aerial Refueling Assessment (IFARA)	

Offerors were informed that the mission capability, proposal risk, and past performance factors were of equal importance and individually more important than the cost/price or IFARA factors, and that the cost/price and IFARA factors were of equal importance. The subfactors within the mission capability factor were stated to be of descending order of importance. RFP § M.2.1.

The RFP stated that the agency, in its evaluation of proposals under the mission capability subfactors, would assign one of the color ratings identified in the solicitation,[6] and one of the proposal risk ratings that were also identified.[7] RFP

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[6] For example, a "blue" rating reflected an exceptional proposal that

> [e]xceeds specified minimum performance or capability requirements in a way beneficial to the Government; proposal must have one or more strengths and no deficiencies to receive a blue.

A "green" rating reflected an acceptable proposal that

> [m]eets specified minimum performance or capability requirements delineated in the [RFP]; proposal rated green must have no deficiencies but may have one or more strengths.

RFP § M.2.2.

[7] For example, a "low" risk rating reflected a proposal that

> [h]as little potential to cause disruption of schedule, increased cost or degradation of performance. Normal contractor effort and normal Government monitoring will likely be able to overcome any difficulties.

A "moderate" risk rating reflected a proposal that

(continued...)

§§ M.2.2, M.2.3. In this regard, offerors were informed that proposal risk would only be assessed at the mission capability subfactor level and for only the first four subfactors. RFP § M.2.3.

With respect to the key system requirements subfactor, the most important mission capability subfactor, offerors were informed that the agency would assess the offerors' understanding of, and substantiation of their ability to meet, the requirements of the SRD (with the exception of the logistics requirements that were to be evaluated under the product support subfactor). The RFP provided that the offerors' approaches to meeting the SRD requirements would be evaluated under the key system requirements subfactor in the following five areas: aerial refueling, airlift, operational utility, survivability, and "other system requirements." RFP § M.2.2.1.2.

In order for a proposal to be found acceptable under this subfactor (and overall), an offeror was required to meet the various identified minimum, mandatory KPP "thresholds" identified in the SRD for each of the nine KPPs. The SRD also identified KPP "objectives" relating to some, but not all of, the identified KPP thresholds. In this regard, the RFP stated that

> [a]ll KPP thresholds [relating to the aerial refueling, airlift, operational utility, and survivability areas] must be met. Depending on substantiating rationale, positive consideration will be provided for performance above the stated KPP thresholds up to the KPP objective level. No consideration will be provided for exceeding KPP objectives. If there is no stated objective and, depending on substantiating rationale, positive consideration will be provided when the specified capability above the KPP threshold is viewed as advantageous to the Government.

RFP § M.2.2.1.1.a.

Among the minimum requirements identified in the SRD was a KPP No. 1 threshold that required the offeror's proposed aircraft to be "capable of aerial refueling all current [Air Force] tanker compatible fixed wing receiver aircraft using current [Air Force] procedures . . . ." RFP, SRD § 3.2.10.1.1.9. Another minimum requirement

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(...continued)

> [c]an potentially cause disruption of schedule, increased cost, or degradation of performance. Special contractor emphasis and close Government monitoring will likely be able to overcome difficulties.

RFP § M.2.3.

was a KPP No. 2 threshold that required the offeror's aircraft to be capable of satisfying the fuel offload versus unrefueled radius range as depicted in a linear graph contained in the RFP; this threshold charted the minimum pounds of fuel an aircraft must be capable of offloading to a receiver aircraft at a given distance of unrefueled flight by the tanker.[8] See RFP, SRD § 3.2.1.1.1.1. Also identified under KPP No. 2, as an objective, was that the "aircraft should be capable of exceeding the fuel offload versus unrefueled radius range as depicted in" this chart. RFP, SRD § 3.2.1.1.1.2.

In addition, the SRD identified numerous key system attributes (KSA) for the aerial refueling, airlift, operational utility, survivability, and "other system requirements" areas, as well as numerous other "non-KPP/KSA requirements" for these areas that were desired but not required.[9] The RFP provided that these "requirements" did not have to be satisfied by the offerors, but were desired and considered part of the offerors' "design trade space."[10] RFP § M.2.2.1.1.b. With respect to these aspects of the evaluation of the key system requirements subfactor, offerors were informed that

> [f]or non-KPP requirements, the Government may give consideration for alternate proposed solutions or capabilities below the stated SRD requirement, depending on substantiating rationale. The Government may give additional consideration if the offeror

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[8] For example, the graph indicated an aircraft must be capable of offloading 117,000 pounds of fuel at a radius of 500 nautical miles and 94,000 pounds at a radius of 1,000 nautical miles. RFP, SRD § 3.2.1.1.1.1, Figure 3-1, Fuel Offload vs. Radius Range.

[9] Although identified as "requirements" by the RFP, these non-KPP "requirements" were not mandatory, but reflect features and performance of the aircraft that the agency desired. There were thresholds and objectives identified for some of the KSAs and the other SRD requirements.

[10] The Air Force described "trade space" as follows:

> [the RFP] also provided the offerors considerable "trade space," meaning some performance parameters of the tanker were required, while others were not. The optional capabilities or attributes could be traded away for better or different performance in other areas depending on the offeror's unique approach. . . . Essentially, this asked the offerors to tender their best proposals, and encouraged them to be creative in doing so. With such a structure, the RFP harnessed the power of the commercial marketplace competition to drive innovation as well as efficiency.

Air Force's Memorandum of Law at 5.

proposes to meet (or exceed if there is an objective) the SRD threshold or requirement, depending on substantiating rationale.

RFP § M.2.2.1.1.b. The RFP further stated that the Air Force sought an affordable KC-X system that not only met all of the KPP threshold requirements, but as many KSA and other SRD requirements as possible. RFP, SOO for KC-X SDD, at 2.

Finally, with regard to the overall evaluation of the key system requirements subfactor, the RFP stated that "evaluation of the offeror's proposed capabilities and approaches against the SRD requirements will be made in the following descending order of relative importance: KPPs, KSAs, and all other non-KPP/KSA requirements." RFP § M.2.2.1.1.c.

With respect to the aerial refueling area of the key system requirements subfactor, offerors were informed that the agency's evaluation would include "tanker aerial refueling, receiver aerial refueling, fuel offload versus radius range, drogue refueling systems (including simultaneous multi-point refueling), the operationally effective size of the boom envelope, the aerial refueling operator station and aircraft fuel efficiency." RFP § M.2.2.1.2.a. With respect to airlift area, the RFP provided that the agency's evaluation would include "airlift efficiency, cargo, passengers, aero-medical evacuation, ground turn time, and cargo bay re-configuration." RFP § M.2.2.1.2.b. Offerors were instructed with regard to this area to provide an airlift efficiency calculation, based upon a calculation procedure stated in the solicitation, that would result in a "payload pounds - nautical miles per pound fuel used" calculation (in other words, the weight of cargo per pound of fuel burned). RFP § L.4.2.2.4.1. Under the operational utility area, the agency's evaluation would include "aircraft maneuverability, worldwide airspace operations, communications/information systems (including Net-Ready capability), treaty compliance support, formation flight, intercontinental range, 7,000-foot runway operations, bare base airfield operations, and growth provisions for upgrades." RFP § M.2.2.1.2.c. The survivability area evaluation would include "situational awareness, defensive systems against threats, chemical/biological capability, [electromagnetic pulse] protection, fuel tank fire/explosion protection, and night vision capability." RFP § M.2.2.1.2.d. The remaining "other system requirements" area evaluated SRD requirements were not included in any of the other areas. RFP § M.2.2.1.2.e.

Under the system integration and software subfactor, the evaluation was to consider the offeror's ability to implement a systems engineering approach and software development capability to satisfy the KC-X performance requirements, considering a number of listed attributes. RFP § M.2.2.2.

Under the product support subfactor, the evaluation was to consider the offeror's product support approach that includes logistics planning and analysis; interim contractor support; transition to organic two-level maintenance support; approach and rationale for proposed operational availability, reliability and maintainability and

mission capable rates; logistics footprint; site activation/beddown; and training. RFP § M.2.2.3.

With respect to the program management subfactor, offerors were informed that the agency would assess whether "the offeror's proposal demonstrates a capability to effectively and efficiently implement and manage the KC-X Program." RFP § M.2.2.4. Included in this evaluation was whether the offeror demonstrated a "sound approach to achieving FAA Certification/Validation" and a "feasible, effective, low risk manufacturing and quality assurance approach to integrating military capability into the commercial baseline aircraft and transition to full rate production." RFP §§ M.2.2.4.C, M.2.2.4.F.

With respect to the past performance factor, the RFP informed offerors that the agency's performance confidence assessment group (PCAG) would conduct an in-depth review and evaluation of all performance data to determine how closely the work performed under those efforts related to the effort solicited under the RFP. The RFP provided that for this factor the agency would assess the degree of confidence that the agency had in an offeror's ability to perform the tanker contract, based upon an assessment of the offeror's demonstrated record of performance, and focusing on performance in five areas: the four mission capability subfactors and the cost/price factor.[11] RFP § 2.4.1. In this regard, the RFP stated that the agency would consider each offeror's, and its major/critical subcontractor's, demonstrated record of performance. Offerors were also informed that, in assessing an offeror's past performance, the agency would consider the relevance of an offeror's (and its subcontractor's, joint venture's, and teaming partner's) present and past performance, and that "[m]ore recent and more relevant performance by the same division/organization may have a greater impact on the performance confidence assessment than less recent or less relevant effort." Id. § M.2.4.5.3. With respect to an offeror's performance problems, the RFP stated:

> Where relevant performance records indicate performance problems, the Government will consider the number and severity of the problems and the appropriateness and effectiveness of any corrective actions taken (not just planned or promised). The Government may review more recent contracts or performance evaluations to ensure corrective actions have been implemented and to evaluate their effectiveness.

RFP § M.2.4.4.

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[11] The RFP provided that the PCAG would assign a confidence rating of high confidence, significant confidence, satisfactory confidence, unknown confidence, little confidence, or no confidence.

With respect to the IFARA evaluation factor, the RFP provided that the agency would assess the utility and flexibility of a fleet of the offeror's proposed aircraft "by evaluating the number of aircraft required to fulfill the peak demand of the aerial refueling elements evaluated in the 2005 Mobility Capabilities Study."[12] Specifically, offerors were informed that the Air Force would analyze offeror-provided data in the evaluation scenario "primarily using the Combined Mating and Ranging Planning System (CMARPS) modeling and simulation tool" to calculate a "fleet effectiveness value," and would report this finding to the source selection authority (SSA), along with "any major insights and observations gleaned from the evaluation."[13] To calculate the fleet effectiveness value, the agency, using the CMARPS modeling tool, would calculate the number of KC-135R aircraft and the number of the offeror's proposed aircraft needed to satisfy the scenario, and then divide the number of KC-135R aircraft required by the number of the offeror's aircraft. The RFP stated that, with respect to this ratio, a fleet effectiveness value of 1.0 would be equal in effectiveness to the KC-135R, while a value in excess of 1.0 would be viewed as more advantageous to the agency. RFP § M.2.6.

Under the cost/price factor, the RFP provided that offerors' proposed costs and prices would be evaluated for realism and reasonableness, respectively. RFP § M.2.5. Offerors were also informed that the agency would calculate a most probable life cycle cost (MPLCC) estimate for each offeror, which was described by the solicitation to be "an independent government estimate, adjusted for technical, cost, and schedule risk, to include all contract, budgetary and other government costs associated with all phases of the entire weapon system life cycle (SDD, [Production and Deployment], and Operations and Support (O&S))." RFP § 2.5.2. The RFP provided that, as part of the "other government costs," the agency would

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[12] The 2005 Mobility Capabilities Study assessed the mobility capabilities of DoD against the backdrop of a revised National Security Strategy; the study was intended to support decisions on future strategic airlift, aerial refueling, aircraft, and sealift procurements needed to meet varying military requirements. See Defense Transportation: Study Limitations Raise Questions about the Adequacy and Completeness of the Mobility Capabilities Study and Report, GAO-06-938, at 6.

[13] CMARPS is a system that is comprised of the Contingency Mating and Ranging Program, Tanker Mating and Ranging Program, and Graphically Supported Interactive Control System user interface. Using inputs, such as aircraft performance characteristics, and assumptions and ground rules (such as the maximum number of a particular aircraft that could be located at a particular base given "ramp geometrics and aircraft dimensions" and pavement strengths of ramps and runways), the agency would conduct simulations, or "runs," where a proposed tanker fleet attempts to satisfy tanker demand; the results of these simulations are intended to reflect the effectiveness of those runs. See Fourth Supplemental Contracting Officer's Statement (COS) at 9-12.

evaluate anticipated MILCON costs associated with the offerors' proposed aircraft. RFP § 2.5.2.4. The RFP also provided that the agency would assess "technical, cost, and schedule risk for the entire most probable life cycle cost estimate based upon the offeror's proposed approach," and that the "impact of technical, schedule, and/or cost risk will be quantified (dollarized), where applicable, and included in the MPLCC." RFP § M.2.5.2.5.

The RFP instructed the offerors to provide detailed cost information supported by a basis of estimate. Offerors were informed that the basis of estimate must

> completely describe the cost element content . . . philosophy, and methodology used to develop the estimate including appropriate references to any historical supporting cost date.

RFP § L.6.4.7. The basis of estimate was required to include a "narrative with supporting data explaining how the proposed cost estimates (SDD, [production and deployment], O&S) were created." RFP § L.6.2. With respect to proposed O&S costs, which include fuel costs, offerors were informed that they should assume a 25-year system life from the date each aircraft is delivered and "calculate their O&S costs for 2 years beyond the date of their final production delivery"; to support their O&S cost projections, offerors were required to provide all "assumptions, ground rules, methodology, and supporting data."[14] RFP §§ L.6.1.1.13, L.6.4.9. In this regard, the offerors were informed that if the historical data did not support the proposed prices, the cost documentation would be considered adequate only if the agency could understand the technical content, estimating methodology, and the "build-up" of the offerors' costs. RFP § L.6.4.7.

Proposals

The Air Force received proposals from Boeing and Northrop Grumman in response to the RFP. Boeing proposed as its KC-X aircraft the KC-767 Advanced Tanker, a derivative of its commercial 767-200 LRF (long range freighter) aircraft.[15] The KC-767

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[14] With regard to fuel costs, offerors were requested to provide a fuel-consumption "sample calculation" for an average mission-ready KC-X, including fuel, crew, and mission equipment on board, in gallons per hour per primary aircraft assigned multiplied by the number of flying hours in a given fiscal year. Offerors were required to document the source of the input data and rationale. RFP § L, attach. 15, KC-X O&S Data Form, at 7.

[15] Boeing stated in its proposal that the "767-200LRF is a new minor model (a family of variants as defined by the FAA such as 767-200, 767-300F, or 767-400ER) that includes design features that satisfy KC-X requirements." AR, Tab 61, Boeing Executive Summary, at V1-ES-1.

was composed of elements of a number of Boeing commercial aircraft, including the 767-200ER, 767-300F, 767-400 ER, 737, and 777 models. AR, Tab 61, Boeing Initial Technical Proposal, Executive Summary, at V1-ES-1. Boeing's proposed production plan for its SDD and production KC-X aircraft was to build the 767-200 LRF baseline aircraft at the Everett, Washington facility of its commercial division, Boeing Commercial Airplanes (BCA), and then fly the aircraft to its Wichita, Kansas facility for installation of military equipment and software by its military division, Integrated Defense Systems (IDS). Id. at V1-ES-2.

Northrop Grumman proposed the KC-30 aircraft, which was a derivative of the Airbus A330-200 commercial aircraft.[16] AR, Tab 140, Northrop Grumman Initial Technical Proposal, Executive Summary, at I-1. Northrop Grumman proposed a production plan that provided for a number of changed locations for the production, assembly, and modification of its SDD and LRIP aircraft. For the first SDD aircraft, Northrop Grumman proposed to build the commercial A330 aircraft in sections in various European locations, then assemble the aircraft in Toulouse, France, add the cargo door in Dresden, Germany, and complete militarization of the aircraft in Madrid, Spain. For the second and third SDD aircraft, Northrop Grumman proposed using its own Melbourne, Florida facility, in place of EADS's Madrid facility, to complete militarization. For the last SDD aircraft, Northrop Grumman proposed replacing its Melbourne facility with a new facility it proposed to build in Mobile, Alabama. For the first LRIP aircraft, Northrop Grumman proposed to have the Toulouse facility not only assemble the commercial baseline aircraft but also install the cargo door, and the Mobile facility would complete the militarization of the aircraft. Beginning with the second LRIP aircraft, and thereafter through the production phase, Northrop Grumman proposed to build the A330 baseline aircraft in sections at various locations in Europe and then ship those sections to the Mobile facility, which would assemble the aircraft, install the cargo door, and complete militarization of the aircraft. Id. at I-6; see also Hearing Testimony (HT) at 1343-52.[17]

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[16] Airbus is a division of European Aeronautic Defence & Space Company (EADS), Northrop Grumman's principal subcontractor for this procurement. After award, the Air Force changed the designation of Northrop Grumman's aircraft to the KC-45; throughout this decision, however, we refer to Northrop Grumman's aircraft by the firm's KC-30 designation.

[17] Although not requested by the parties, we conducted a hearing to receive testimony from a number of Air Force witnesses to complete and explain the record. In this regard, we provided a detailed description of the hearing issues to the parties in a pre-hearing conference and in a written Confirmation of Hearing notice. We also expressly informed the parties that identification of some of the protest issues as hearing issues did not indicate GAO's views as to the merits of any issue in the case. The Air Force was informed that it was responsible for identifying and producing those witnesses who could knowledgeably testify with respect to the identified issues. Although invited to do so, neither Boeing nor Northrop Grumman offered

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SSET Evaluation

The proposals were evaluated by the agency's SSET, which initiated discussions with the offerors by issuing evaluation notices (EN).[18] After evaluating the offerors' EN responses, the SSET provided a "mid-term" evaluation briefing to the SSAC and SSA. Because there were "concerns regarding how to properly show that all SRD requirements had been evaluated," the SSET prepared and provided another briefing to the SSA that detailed how each offeror's proposal was evaluated against each SRD requirement. COS at 24. Following the SSA's approval of the mid-term briefing, the SSET provided mid-term briefings to Boeing and Northrop Grumman, at which each offeror was provided with the agency's evaluation ratings of their respective proposals.[19] AR, Tabs 129, 130, Boeing's Mid-Term Briefings; Tabs, 199, 200, Northrop Grumman's Mid-Term Briefings.

Following the offerors' mid-term briefings, the SSET provided a MPLCC/schedule risk assessment briefing to the SSAC and SSA, and subsequently the SSET provided MPLCC/schedule risk assessment briefings to the offerors. AR, Tab 133, Boeing's MPLCC/Schedule Risk Assessment Briefing; Tab 203, Northrop Grumman's MPLCC/Schedule Risk Assessment Briefing.

Extensive discussions were conducted with each offeror, after which a "pre-final proposal revision" briefing was provided to the SSAC and SSA by the SSET that presented updated evaluation ratings of Boeing's and Northrop Grumman's proposals and discussion responses. Following approval of this briefing by the SSA, the SSET again provided to each offeror the agency's evaluation ratings of their respective proposals. AR, Tab 135, Boeing's Pre-Final Proposal Revision Briefing; Tab 205, Northrop Grumman's Pre-Final Proposal Revision Briefing.

"Final revised proposals" were received from the offerors. Although intended by the agency to be the final proposal revisions, shortly after receipt of these proposals, the Air Force reopened discussions with the offerors in response to the enactment of the

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any witnesses. At the conclusion of the hearing, the parties were informed that they could address any aspect of the protest in their post-hearing comments and rebuttal comments. HT at 1524.

[18] The Air Force conducted numerous rounds of written and oral discussions with the firms; in total, Boeing received 271 ENs, and Northrop Grumman received 295 ENs. AR, Tab 46, SSET Final Briefing to SSAC and SSA, at 9-10.

[19] Limited information was provided to the offerors in the mid-term briefing with respect to the agency's schedule risk assessment and its impact on the offeror's MPLCC. COS at 24.

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 208-12, 222-24 (2008).[20] As a part of these discussions, the Air Force provided offerors with additional information concerning the firms' respective IFARA evaluations and with a "clarified chart on Airlift Efficiency." COS at 25. Subsequently, the agency received the firms' final proposal revisions.

The protester's and awardee's final proposal revisions were evaluated by the SSET as follows:

		Boeing	Northrop Grumman
Mission Capability/Proposal Risk			
	Key System Requirements	Blue/Low	Blue/Low
	System Integration/Software	Green/Moderate	Green/Moderate
	Product Support	Blue/Low	Blue/Low
	Program Management	Green/Low	Green/Low
	Technology Maturity/Demonstration	Green	Green
Past Performance		Satisfactory Confidence	Satisfactory Confidence
Cost/Price (MPLCC)		$108.044 Billion	$108.010 Billion
	Cost Risk SDD Phase/Production & Deployment Phase	Moderate/Low	Low/Low
IFARA Fleet Effectiveness Value		1.79	1.9

AR, Tab 46, SSET Final Briefing to SSAC and SSA, at 508, 532.

As indicated by the nearly identical evaluation ratings received by both firms' technical proposals and the nearly identical evaluated MPLCCs, the competition was very close, and, as evaluated, both firms' proposals were found to be advantageous to the government. Ultimately, the SSAC concluded, however, that Northrop Grumman's proposal was more advantageous to the agency than Boeing's under the mission capability, past performance, cost/price, and IFARA factors; the two firms were found to be essentially equal under the proposal risk factor. AR, Tab 55, Proposal Analysis Report (PAR), at 46-48.

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[20] Discussions were conducted with the offerors to address any possible impact on their proposals from section 804 of the National Defense Authorization Act for Fiscal Year 2008 (related to Buy American Act requirements with respect to specialty metals) and section 815 of the Act (related to treatment of major defense acquisition program systems, components, and spare parts as commercial items). Air Force's Memorandum of Law at 20 n.6.

SSAC's Mission Capability Factor Evaluation

Northrop Grumman's evaluated advantage under the mission capability factor was largely based upon the firm's perceived superiority under the key system requirements and program management subfactors; the two firms were found essentially equal under the remaining three subfactors. Id. at 46-47.

The SSAC assigned both firms' proposals, under the key system requirements subfactor (the most important mission capability subfactor), blue, low risk ratings, noting:

> Both Offerors proposed to meet all KPP Thresholds. Both Offerors proposed capability beyond KPP Thresholds and offered significant trade space KSA capability. Additionally, both offered numerous non-KPP/KSA trade space capabilities deemed beneficial to the Government.

Id. at 12. This assessment was documented in the SSAC's PAR, which identified evaluated "major discriminators," "discriminators offering less benefit" and weaknesses in each offeror's proposal in the aerial refueling, airlift, operational utility, survivability, and "other system requirements" areas of this subfactor.[21] Id. at 13-28.

In the aerial refueling area, the SSAC noted "major discriminators" in favor of Boeing under several KPP No. 1 objectives, including its capability to [Deleted] and [Deleted], and for a "noteworthy non-KPP/KSA capability to [Deleted]. Id. at 13.

The SSAC also noted a number of "major discriminators" in favor of Northrop Grumman in the aerial refueling area, including one under the KPP No. 2 objective for Northrop Grumman's proposal to exceed the RFP's fuel offload versus

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[21] A "major discriminator" was defined to be

> an offered feature evaluated as a strength that provided extensive capability and a substantial difference in magnitude of benefit to the Air Force, when compared to the other Offeror.

A "discriminator offering less benefit" was defined to be

> an offered feature evaluated as a strength that provided some capability and some difference in benefit to the Air Force when compared to the other Offeror.

AR, Tab 55, PAR, at 12.

unrefueled radius range (Boeing's aircraft was also evaluated as exceeding this KPP objective but to a lesser degree),[22] and for a number of non-KPP/KSA requirements, including the proposal of a better aerial refueling efficiency (more pounds of fuel offload per pound of fuel used) than Boeing's; a "boom envelope" that was [Deleted] times greater than that defined by the Allied Technical Publication (ATP)-56[23] (Boeing proposed a boom envelope that was [Deleted] times greater than that defined by the publication); and a higher offload and receive fuel rate than Boeing. Id. at 13-14.

In the aerial refueling area, the SSAC also identified five "discriminators offering less benefit" for Boeing that were assessed under 14 different SRD requirements and one such discriminator for Northrop Grumman that was assessed under 2 SRD requirements. Id. at 15-16.

The SSAC found that Boeing's proposal had no weaknesses in the aerial refueling area, but identified the following two weaknesses in Northrop Grumman's proposal:

> The first weakness is related to the specified lighting around the fuel receptacle of the KC-30. The specified lighting for refueling as a receiver may provide [Deleted]. The second weakness is related to Northrop Grumman's boom approach. The [Deleted].

Id. at 16. The concern that Northrop Grumman's [Deleted] was assessed under a KPP No. 1 threshold; the other weaknesses were assessed under non-KPP/KSA requirements. No schedule or cost risk was assigned by the SSET or SSAC for either of Northrop Grumman's evaluated weaknesses. See AR, Tab 46, SSET Final Briefing to SSAC and SSA, at 196, 198; Tab 55, PAR, at 16.

In the airlift area, the SSAC found that both offerors met all threshold requirements for the airlift KPP (there was only one KPP in this area), and that both offerors exceeded the threshold requirement for efficiently transporting equipment and

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[22] The SSAC reported that the KC-30 met the objective by offering a fuel offload versus unrefueled range capability of [Deleted] pounds at 1,000 nautical miles and [Deleted] pounds at 2,000 nautical miles, which exceeded the threshold by [Deleted] percent at 1,000 nautical miles and by [Deleted] percent at 2,000 nautical miles. The KC-767 was also found to meet the objective by offering a capability of [Deleted] pounds at 1,000 nautical miles and [Deleted] pounds at 2,000 nautical miles, which exceeded the threshold by [Deleted] percent at 1,000 nautical miles and [Deleted] percent at 2,000 nautical miles. AR, Tab 55, PAR, at 13-14.

[23] The ATP is an aerial refueling publication issued by the North Atlantic Treaty Organization.

personnel. AR, Tab 55, PAR, at 16. There were no KPP objectives identified by the SRD in the airlift area.

The SSAC identified one "major discriminator" in favor of Boeing in the airlift area: Boeing satisfied the non-KPP/KSA requirement for the capability to [Deleted]. Id. at 17. With respect to Northrop Grumman, the SSAC identified a number of "major discriminators" in the airlift area. That is, with respect to carrying cargo, the SSAC found that Northrop Grumman had a better airlift efficiency capability than Boeing, showing an improvement of [Deleted] percent over that of the KC-135R, while Boeing's airlift efficiency showed only a [Deleted]-percent improvement over the KC-135R.[24] The SSAC noted that the KC-30 could carry more 463L pallets[25] than Boeing,[26] and that Northrop Grumman offered the capability to carry 463L pallets on both the main cargo deck and a lower cargo compartment, while Boeing only offered the single cargo deck. The SSAC also identified "major discriminators" in Northrop Grumman's proposal for passenger carriage ([Deleted] passengers to Boeing's [Deleted] passengers) and for aeromedical evacuation capability (Northrop Grumman could carry more litters and ambulatory patients). Id. at 18-19.

Three "discriminators offering less benefit" were identified for Boeing in the airlift area and one such discriminator identified for Northrop Grumman. No proposal weaknesses were identified for either offeror in the airlift area. Id. at 19-20.

In the operational utility area, the SSAC found that both offerors satisfied the three KPP thresholds identified in this area, and partially met the one KPP objective identified.[27] The SSAC also found that both offerors met the KSA thresholds and objectives in this area. Id. at 20. Two "major discriminators" were identified for Boeing in this area: (1) [Deleted] and (2) [Deleted]. Id. at 21. Two "major

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[24] Airlift efficiency was calculated using the following formula: (pounds of payload) x (nautical miles)/(pounds of fuel). The SSET performed this calculation at various distances for the offerors to derive a payload-range curve to provide for a comparative analysis. AR, Tab 55, PAR, at 17.

[25] The 463L pallet is the standard air cargo pallet used by the Air Force and within the defense transportation system.

[26] The SSAC noted, however, that the KC-30's total weight carriage capability on the main cargo deck was not substantially greater than that of the KC-767. AR, Tab 55, PAR, at 17.

[27] The KPP No. 7 objective, the only objective under this KPP, provides that the offeror's "system should be capable of accomplishing all operational activities identified in Table 5." RFP app. A, Net-Ready Key Performance Parameter for the KC-X SRD, Feb. 23, 2007, at 3. Table 5 of the appendix identified a number of information exchange requirements. Id. at 15-25.

discriminators" were also identified for Northrop Grumman: (1) the KC-30 could operate from a 7,000-foot runway carrying approximately [Deleted] percent more fuel than the KC-767,[28] and (2) the KC-30 provided a ferry range of [Deleted] nautical miles as compared to the KC-767's ferry range of [Deleted] nautical miles.[29] Id. at 21-22. Numerous "discriminators offering less benefit" were identified for both Boeing and Northrop Grumman. Among such discriminators identified for Boeing was the KC-767's smaller ground footprint, which the SSAC found would enable the KC-767 to operate from bare base airfields with confined ramp space.[30] Id. at 22. No proposal weaknesses were identified for either offeror in this area.

Ultimately, the SSAC concluded, largely based upon Northrop Grumman's evaluated advantages in the aerial refueling and airlift areas, that Northrop Grumman's proposal was superior to Boeing's under the key system requirements subfactor.[31] Specifically, the SSAC noted:

> While [the] KC-767 offers significant capabilities, the overall tanker/airlift mission is best supported by the KC-30. [The] KC-30 solution is superior in the core capabilities of fuel capacity/offload, airlift efficiency, and cargo/passenger/aeromedical carriage. These advantages in core capabilities outweigh the flexibility advantages of the attributes which Boeing offered (e.g. [Deleted], etc.)

Id. at 29.

Under the program management subfactor, the SSAC assigned both offerors green, low risk ratings, identifying no strengths, deficiencies, or uncertainties in either firm's proposal. Id. at 34. Nevertheless, the SSAC concluded that Northrop Grumman's program management approach was superior to that of Boeing, finding:

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[28] The capability to operate from a 7,000-foot runaway at sea level at the aircraft's maximum gross weight was a non-KPP/KSA trade space requirement, see RFP, SRD § 3.2.1.1.4.2, which both Boeing and Northrop Grumman satisfied. AR, Tab 55, PAR, at 21.

[29] An unrefueled ferry range of 9,500 nautical miles starting at maximum takeoff gross weight and using a maximum range flight profile was identified as a non-KPP/KSA trade space requirement. RFP, SRD § 3.2.1.1.1.4.

[30] The SRD provided that the "KC-X shall be capable of supporting aerial refueling operations from bare base airfields with confined ramp space." RFP, SRD § 3.2.10.1.1.3.

[31] The SSAC did recognize that Boeing's proposal was more advantageous than Northrop Grumman's in the survivability area. AR, Tab 55, PAR, at 29.

> Northrop Grumman's approach of providing four "green" aircraft for use early in SDD, by leveraging the existing A330 commercial production line, is deemed to be of benefit to the Government by reducing program risk. Northrop Grumman's approach adds value for the Government through increased confidence in overall program management.

Id. at 46-47.

Past Performance Factor Evaluation

The SSAC found that both offerors had equal confidence ratings in four of the five past performance areas; the only difference in ratings was with respect to the program management area, under which Northrop Grumman's past performance was assessed as "satisfactory confidence" but Boeing's proposal was assessed as "little confidence."[32] Id. at 36. Boeing's little confidence rating for the program management area was based upon the Air Force's assessment of Boeing's past performance of the [Deleted] contract with [Deleted], of the [Deleted] contract with the [Deleted], and of the [Deleted] with the [Deleted]. The Air Force evaluated as marginal Boeing's past performance of these contracts, which were assessed as "very relevant." Id. at 37-38.

IFARA Factor Evaluation

The SSET also calculated a fleet effectiveness value for each proposed aircraft based upon offeror-provided data, which was analyzed under a variety of scenarios using the CMARPS modeling and simulation tool.[33] As noted above, the fleet effectiveness value reflected the quantity of an offeror's aircraft that would be required to perform the scenarios in relation to the number of KC-135R aircraft that would have been

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[32] A "satisfactory confidence" rating was assigned where

> [b]ased on the offeror's performance record, the government has confidence the offeror will successfully perform the required effort. Normal contractor emphasis should preclude any problems.

A "little confidence" rating was assigned where

> [b]ased on the offeror's performance record, substantial doubt exists that the offeror will successfully perform the required effort.

RFP § M.2.4.1.

[33] Much of the information detailing the agency's evaluation under the IFARA factor is classified.

required. See RFP § M.2.6. The agency concluded that, whereas [Deleted] KC-135R aircraft would be required to perform the identified scenarios, the offerors' aircraft could perform the scenarios with fewer aircraft, that is, [Deleted] KC-30 aircraft and [Deleted] KC-767 aircraft. AR, Tab 55, PAR, at 45. The SSET calculated a fleet effectiveness value of 1.79 for the KC-767, and a higher (superior) value of 1.90 for the KC-30. Id. at 44.

The SSAC also noted a number of insights and observations concerning the IFARA evaluation of the offerors' aircraft. With respect to Boeing's proposed aircraft, the agency stated that, as compared to the KC-135R in the peak demand scenario:

> [the] KC-767 used [Deleted]% more ramp space (without requiring additional bases), burned [Deleted]% more fuel and was able to accomplish the scenarios with [Deleted] fewer aircraft when taking the aerial refueling receptacle into account. Additional aircraft were needed if every runway in the scenario were interdicted to 7,000 feet. In the base denial scenarios, when a base was closed, [Deleted]% of the Air Tasking Order (ATO) could be completed by basing KC-767s within the remaining bases' ramp space. Within the scenarios, [the] KC-767 offloaded between [Deleted]% and [Deleted]% of its fuel.

Id. at 45. With respect to Northrop Grumman's aircraft, the agency stated:

> [the] KC-30 used [Deleted]% more ramp space (needing some additional bases), burned [Deleted]% more fuel and was able to accomplish the scenarios with [Deleted] fewer aircraft when taking the aerial refueling receptacle into account. In the base denial sensitivity assessment, in some cases when a base was closed, the [Deleted]. [The] KC-30 has exceptional short field capability if the runway is interdicted to 7,000 feet (as noted in Subfactor 1.1). Within the scenarios, [the] KC-30 offloaded between [Deleted]% and [Deleted]% of its fuel.

Id.

Cost/Price Evaluation

The Air Force calculated a MPLCC for each offeror, which, as noted above, was intended to be an independent government estimate of each proposal, adjusted for technical, cost and schedule risk and including all contract, budgetary and other government costs associated with all phases of the aircraft's entire life cycle (SDD, production and deployment, and O&S). See RFP § 2.5.2; COS at 124.

With respect to Boeing's proposal, the Air Force made a number of adjustments in Boeing's proposed costs in calculating its MPLCC. For example, the agency added

an additional $[Deleted] million to Boeing's proposed costs of $[Deleted] billion for SDD because the agency concluded that the firm had not adequately supported its basis of estimate for these costs, despite repeated discussions on this issue. Most of this adjustment ($[Deleted] million) was associated with a moderate risk rating that was assigned to Boeing's cost proposal to account for the agency's concern that Boeing had not adequately supported its proposed $[Deleted] billion for non-recurring engineering costs that Boeing estimated it would incur in the development of its proposed aircraft. As another example, the Air Force added $[Deleted] billion to Boeing's proposed costs for the production and deployment lots 6 through 13 (the budgetary aircraft) because the agency concluded that Boeing had not substantiated an approximately [Deleted]-percent decrease in proposed costs for these lots following the fixed-price production lots (lots 1 through 5). The Air Force also upwardly adjusted Boeing's MPLCC by $[Deleted] billion for "other government costs," the bulk of which ($[Deleted] billion) reflected additional O&S repair costs because the Air Force did not accept Boeing's estimating methodology of these costs. The agency also added additional costs to Boeing's MPLCC to account for the agency's estimated MILCON costs of $[Deleted] billion. AR, Tab 46, SSET Final Briefing to SSAC and SSA, at 451-76; Tab 55, PAR, at 40-42.

The Air Force also made a number of adjustments in Northrop Grumman's proposed costs, including upwardly adjusting the proposed SDD costs by $[Deleted] million and the firm's estimated costs for lots 6 through 13 (budgetary aircraft) by $[Deleted] million. In addition, the Air Force added additional costs to Northrop Grumman's MPLCC to account for the agency's estimated MILCON costs of $[Deleted] billion. AR, Tab 46, SSET Final Briefing to SSAC and SSA, at 479-502; Tab 55, PAR, at 42-43.

The Air Force calculated a MPLCC for Boeing of $108.044 billion and a MPLCC for Northrop Grumman of $108.010 billion.

In comparing the firms' evaluated costs, the SSAC noted that Northrop Grumman had a lower evaluated MPLCC, but that the firms' evaluated MPLCCs were within $34 million of each other (approximately a .03-percent difference). The SSAC noted, however, that Boeing's slightly higher evaluated MPLCC was "driven" primarily by the firm's much higher SDD costs, "which reflected Boeing's more complex design, development, and integration activities." AR, Tab 55, PAR, at 43. In addition, the SSAC accepted the SSET's evaluation that Boeing's proposal presented a moderate cost risk for SDD. Northrop Grumman's proposal was assessed as a low cost risk for SDD costs. The SSAC viewed this difference in cost risk for the SDD phase to be the discriminator under this factor. Id. at 44.

SSAC Recommendation

Ultimately, the SSAC recommended to the SSA that [the SSA] select Northrop Grumman's proposal for award, because the SSAC concluded that Northrop Grumman's proposal was more advantageous under the mission capability, past performance, cost/price, and IFARA evaluation factors. With respect to cost/price, the SSAC noted that, although the difference between the two proposals' MPLCC was "negligible," Northrop Grumman's risk rating under this factor (low risk) for the SDD phase was lower than that assigned to Boeing's proposal (moderate cost/price risk) for the SDD phase. Id. at 46-48.

Selection Decision

As noted above, the SSA was presented with the SSET's evaluation results in a number of briefings at various stages in the procurement. In addition, the SSA was briefed by the SSAC with respect to that council's recommendation for award and was presented with the SSAC's detailed PAR, which documented the SSAC's weighing of the offerors' respective strengths and weaknesses and the SSAC's award recommendation.

The SSA agreed with the SSAC's recommendation that Northrop Grumman's proposal reflected the best value to the agency, and [the SSA] identified Northrop Grumman's evaluated superiority under the mission capability, past performance, cost/price, and IFARA factors as supporting this conclusion; [the SSA] also concluded that neither offeror had an advantage under the proposal risk factor. With respect to the mission capability factor, the SSA emphasized that Northrop Grumman's evaluated superiority in the aerial refueling and airlift areas of the key system requirements subfactor were key factors in [the SSA's] decision.[34] AR, Tab 54, Source Selection Decision, at 9. Although not key to [the SSA's] determination that Northrop Grumman's proposal was more advantageous than Boeing's under the key system requirements subfactor, the SSA noted Boeing's evaluated superiority in the survivability area; [the SSA] also noted that neither offeror had an advantage in the operational utility area. Id. at 8-9.

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[34] The SSA concluded that the offerors' proposals were essentially equal under the remaining four mission capability subfactors. Regarding the evaluation of Northrop Grumman's proposal under the product support subfactor, although the Air Force found that Northrop Grumman had failed to specifically commit to providing planning and support for the "initial organic D-level [depot-level] maintenance capability" within 2 years following delivery of the first full-rate production aircraft as required by the RFP, see RFP, SOO for KSC-X SDD, at 14, the SSA agreed with the SSAC that this was "merely an administrative oversight." AR, Tab 54, Source Selection Decision, at 10. (The SSAC termed Northrop Grumman's failure in this regard to be "an administrative documentation oversight." AR, Tab 55, PAR, at 34.)

With respect to the aerial refueling area, the SSA noted that Northrop Grumman exceeded the KPP objective for fuel offload capability for the unrefueled radius range to a greater degree than did Boeing; this, the SSA found, demonstrated that a "single KC-30 can refuel more receivers or provide more fuel per receiver than a single KC-767." AR, Tab 54, Source Selection Decision, at 5-6. In addition, the SSA noted that Northrop Grumman offered a larger boom envelope than Boeing, and proposed a superior fuel offload and receive rate than Boeing. Id. at 6. Although Northrop Grumman had weaknesses in the aerial refueling area, and Boeing did not, the SSA agreed with the SSAC that the weaknesses (associated with receiver lighting and the firm's boom design) would have no impact on program cost and schedule. Id. at 6-7.

With respect to the airlift area, the SSA noted Northrop Grumman's superior airlift efficiency, dual cargo deck configuration, and ability to carry more passengers and aeromedical litters and patients. The SSA concluded that the KC-30's airlift capability was "compelling to my decision." Id. at 7.

In sum, the SSA selected Northrop Grumman's proposal for award, finding

> Northrop Grumman's proposal was better than Boeing's proposal in four of the five factors evaluated and equal in one. Northrop Grumman's offer was clearly superior to that of Boeing's for two areas within KC-X's Mission Capability factor: aerial refueling and airlift. Additionally, Northrop Grumman's KC-30's superior aerial refueling capability enables it to execute the IFARA scenario described in the RFP with [Deleted] fewer aircraft than Boeing's KC-767 -- an efficiency of significant value to the Government. I am confident that Northrop Grumman will deliver within the cost, schedule, and performance requirements of the contract because of their past performance and the lower risk of their cost/price proposal.

Id. at 19.

Award was made to Northrop Grumman on February 29, 2008, and following receipt of a required debriefing,[35] Boeing protested to our Office on March 11.

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[35] Where, as here, a procurement is conducted on the basis of competitive proposals, "an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and award." 10 U.S.C. § 2305(b)(5)(A) (2000); Federal Acquisition Regulation (FAR) § 15.506(a)(1).

DISCUSSION

In its protest, which was supplemented numerous times as evaluation documents were provided during the development of the case,[36] Boeing challenges the Air Force's evaluation of technical and cost proposals, conduct of discussions, and source selection decision. In this regard, the protester identifies what it alleges are prejudicial errors under each of the RFP's evaluation factors and subfactors, and contends that, if the proposals had been evaluated in accordance with the RFP, its proposal would have been selected for award. As discussed below, we find a number of significant errors in the Air Force's evaluation under the key system requirements and product support subfactors of the mission capability evaluation factor and in its cost evaluation, and that the agency conducted misleading and unequal discussions with Boeing.[37]

Document Production

During the development of the record, Boeing requested that the Air Force provide various documents pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(g). We granted Boeing's requests in part where we were persuaded that the requested documents were relevant to the protest issues.

The Air Force also requested that Boeing produce certain broad categories of documents bearing upon, among other things, Boeing's interpretation of the solicitation and several of its protest allegations. Boeing objected to that request, asserting that the documents sought were not relevant. The agency responded that its request was reasonable and limited, and sought relevant documents, which would be "necessary to allow GAO to perform a complete and accurate review of the issues in Boeing's protests." Air Force's Response to Boeing's Objection to Air Force's Document Production Request (Apr. 11, 2008) at 1.

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[36] Although our regulations allow a procuring agency 30 days to provide relevant documents to the protester, see 4 C.F.R. § 21.3(d) (2008), the Air Force provided many relevant, core documents to Boeing and Northrop Grumman within days of the filing of the initial protest. The Air Force, however, continued to produce relevant documents even after the filing of its agency report and up to the date of the hearing conducted in this protest, which resulted in Boeing filing a series of supplemental protests.

[37] Although we have not sustained all of Boeing's protest allegations, nor do we address them all in this decision, we considered them all, which required substantial development of the issues during the protest.

Our Bid Protest Regulations provide, in pertinent part, that "[i]n appropriate cases, the contracting agency may request that the protester produce relevant documents, or portions of documents, that are not in the agency's possession." 4 C.F.R. § 21.3(d).

We denied the Air Force's request, because our regulations do not provide for broad agency request for documents whose existence and relevance are not at all apparent.[38] Rather, our regulations are intended to permit a contracting agency, in an appropriate case, to request a specific relevant document or documents, of which the agency is aware and does not itself possess. See 60 Fed. Reg. 40737, 40738 (wherein, in establishing this rule, we indicated that our regulations were not intended to allow "wide-open" document requests of protesters); see also Bid Protests at GAO: A Descriptive Guide, 8th ed. 2006, at 28, in which our Office described the purpose for our "reverse discovery" rule as follows:

> Occasionally, the agency may be aware of the existence of relevant documents that only the protester possesses. In appropriate cases, the agency may request that the protester produce those documents.[39]

Dismissal Requests

Prior to the submission of the agency's report, the Air Force and Northrop Grumman requested that we summarily dismiss a substantial portion of Boeing's protest as untimely. The agency and intervenor argued that some of Boeing's protest grounds were untimely challenges to alleged, apparent solicitation improprieties. They also argued that some of Boeing's challenges to the agency's evaluation of proposals were untimely because Boeing was allegedly aware of the bases of these protest grounds during the competition, but did not protest until after award and the firm's receipt of a post-award debriefing.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair

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[38] Our document production rules are much narrower than other federal discovery rules, such as the Federal Rules of Civil Procedure (FRCP), which permits litigants to seek the existence of documents that are reasonably calculated to lead to the discovery of admissible evidence. See, e.g., FRCP Rule 26(b)(1). In contrast, our regulations provide for the production of relevant documents. See 4 C.F.R. § 21.3(d).

[39] Although we denied the Air Force's request for documents from Boeing, we also informed the agency that if, during the further development of the case, the agency became aware of a specific relevant document, or documents, that only the protester possesses, the agency was permitted to request that document or documents. No such request was made.

opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94 at 3-4; Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). Protests based on other than alleged improprieties in a solicitation must be filed not later than 10 days after the protester knew or should have known of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our regulations provide an exception to this general 10-day rule for a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." Id. In such cases, as here, with respect to any protest basis which is known or should have been known either before or as a result of the requested and required debriefing, the protest cannot be filed before the debriefing date offered, but must be filed not later than 10 days after the date on which the debriefing is held. Id.; see Bristol-Myers Squibb Co., B-281681.12, B-281681.13, Dec. 16, 1999, 2000 CPD ¶ 23 at 4.

We did not, and do not now, agree with the Air Force and Northrop Grumman that Boeing's protest is a challenge to the ground rules established by the RFP for this procurement. We find that Boeing, rather than objecting to any of the RFP's requirements or evaluation criteria, is instead protesting that the Air Force failed to reasonably evaluate proposals in accordance with the RFP's identified requirements and evaluation criteria.[40] We also do not agree with the agency and intervenor that, because Boeing was informed during the competition of the agency's view of the merits of its proposal and/or how the proposals were being evaluated, Boeing was required to protest the agency's evaluation or evaluation methodology prior to award and to the protester's receipt of its required debriefing. Even where the protester is apprised of agency evaluation judgments with which it disagrees or where it believes the evaluation is inconsistent with the solicitation's evaluation scheme, our Bid Protest Regulations require that these protest grounds be filed after the receipt of the required debriefing.[41] See 4 C.F.R. § 21.2(a)(2); see also 61 Fed. Reg. 39039, 39040

[40] We will more fully address below certain of the agency's and intervenor's dismissal requests, such as the arguments concerning the evaluation of Northrop Grumman's proposal with respect to the fuel offload versus unrefueled radius range.

[41] To require an offeror to file a protest each time during a procurement that it is advised of an evaluation judgment with which it disagrees or believes is inconsistent with the RFP would not be consistent with the regulatory requirement that such protests can only be filed after a required debriefing. The objective of this regulation is to avoid the filing of "defensive protests" out of fear that our Office may dismiss the protests as untimely and the associated potential to unnecessarily disrupt procurements.

(July 26, 1996) ("to address concerns regarding strategic or defensive protests, and to encourage early and meaningful debriefings," a protester shall not file an initial protest prior to its required debriefing); Rhonda Podojil–Agency Tender Official, B-311310, May 9, 2008, 2008 CPD ¶ 94 at 3 (application of debriefing exception to A-76 competitions conducted on the basis of competitive proposals).

Key System Requirements Subfactor Evaluation

Boeing complains that the Air Force failed to evaluate the firms' proposals under the key system requirements subfactor–the most important subfactor of the mission capability factor–in accordance with the RFP's identified evaluation scheme. As noted above, under this subfactor, the agency was to assess the offerors' understanding of, and ability to meet, the various SRD requirements. Boeing argues that the Air Force did not reasonably consider the weighting assigned to the various SRD requirements by the RFP in making its source selection,[42] even though they involve the "major discriminators" referenced in justifying the award to Northrop Grumman.[43] Boeing also asserts that the evaluation did not account for the fact that the RFP specifically requested offerors to propose as many of these "trade space" requirements as possible. In this regard, Boeing complains that the agency assigned no credit for the fact that Boeing's aircraft satisfied significantly more trade space SRD requirements than did Northrop Grumman's under the key system requirements subfactor. See Boeing's Post-Hearing Comments at 18.

The Air Force and Northrop Grumman deny that the agency failed to evaluate the firms' proposals in accordance with the solicitation criteria. They contend that the SSET performed an elaborate evaluation, "identifying specifically how Boeing and [Northrop Grumman] met or exceeded KPP thresholds, and how each traded, partially met or met desired requirements (trade space)." See, e.g., Air Force's Memorandum of Law at 62. The Air Force notes that the SSET identified potential strengths, which the SSAC categorized, as relevant here, as "major discriminators" or "discriminators offering less benefit." Id. The agency argues:

> Because Boeing and [Northrop Grumman] offered significant trade space and the benefits for each [SRD] reference line capability were not of equal value, the SSAC gave positive consideration for

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[42] As noted above, the RFP provided that KPP requirements were more important than KSA requirements, which were in turn more important than non-KPP/KSA requirements.

[43] As discussed above, the RFP indicated that KPP thresholds were minimum, mandatory requirements that must be satisfied and that the remaining "requirements," including KPP objectives and KSA thresholds and objectives, were desired functions or characteristics that the firms could choose to offer.

> additional capability beyond the applicable threshold based upon the magnitude of benefit to the Air Force. The offerors' approaches, their relative benefits, advantages, and operational contributions for the five areas within [the] Key System Requirements [subfactor] were evaluated by the SSAC for accomplishing the comparative analysis. The SSAC deliberated extensively, using expert technical, engineering, and operational judgment to carefully evaluate the capabilities offered, consistent with the RFP Measures of Merit and the priorities of KPP, KSA, and non-KPP/KSAs. Both offerors proposed highly capable solutions to the requirements that offered tremendous benefit above current Air Force tanker capability.

Id. at 63-64.

An agency is obligated to conduct an evaluation consistent with the evaluation scheme set forth in the RFP. FAR § 15.305(a); Serco, Inc., B-298266, Aug. 9, 2006, 2006 CPD ¶ 120 at 8. We recognize that proposal evaluation judgments are by their nature often subjective; nevertheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced criteria upon which competing offers are to be selected. Systems Research and Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 at 11. In order for our Office to perform a meaningful review, the record must contain adequate documentation showing the bases for the evaluation conclusions and source selection decision. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

Here, we agree that the SSET's evaluation identified and documented the SRD requirements under which the firms' evaluated strengths and weaknesses were assessed. Nevertheless, the record does not establish that the SSAC and SSA, in considering those strengths and weaknesses, applied the relative weights identified in the RFP for the various SRD requirements (under which the KPPs were most important). Moreover, the record does not show any consideration by the SSAC or SSA of the fact that Boeing's proposal was evaluated as satisfying significantly more SRD requirements than Northrop Grumman's.

For example, the record shows that most of Boeing's evaluated "major discriminators" in the aerial refueling area were assessed under KPP requirements, and conversely most of Northrop Grumman's evaluated "major discriminators" were assessed under less important non-KPP/KSA "requirements." Specifically, the SSAC identified as "major discriminators" the following requirements that Boeing's aircraft satisfied but Northrop Grumman's aircraft did not: (1) the capability to [Deleted] (a KPP No. 1 objective); (2) the capability, [Deleted] (another KPP No. 1 objective); (3) the capability to [Deleted] (another KPP No. 1 objective); and (4) the capability to

[Deleted] (a "noteworthy" non-KPP/KSA requirement).[44] See AR, Tab 55, PAR, at 13. The SSAC identified as a "major discriminator" for Northrop Grumman that firm's satisfaction of one KPP objective (KPP No. 2 objective for exceeding the fuel offload unrefueled range), where Boeing also satisfied this objective but to a lesser degree. The Air Force also identified as "major discriminators" for Northrop Grumman under this area the firm's better air refueling efficiency, larger boom envelope, and better offload and receive rates, all of which were non-KPP/KSA requirements.

Although the record thus evidences that most of Boeing's evaluated "major discriminators" were assessed under KPP requirements, and conversely most of Northrop Grumman's evaluated "major discriminators" were assessed under less important non-KPP/KSA requirements,[45] we have found no document in the contemporaneous evaluation record that shows that the SSAC or SSA gave any meaningful consideration to the weights that were to be assigned to the various KPP, KSA, and other requirements. That is, the SSAC's briefing slides to the SSA and its PAR do no more than identify the SRD requirements for which the evaluated discriminators were assessed, but do not evidence any consideration of the descending order of importance assigned to these various SRD requirements.

In its briefing to the SSA, the SSAC merely reports each of the firms' "advantages" without any analysis of whether or not Boeing's "advantages" (which as indicated above are mostly derived from KPP objectives) were entitled to greater weight than Northrop Grumman's advantages (which are mostly derived from less important non-KPP/KSA requirements). See, e.g., AR, Tab 55, SSAC Recommendation Briefing to SSA, at 6-7 (aerial refueling discriminators). Similarly, in the PAR, the SSAC duly reports the relative order of importance that was to be assigned to the KPP, KSA and other requirements, see AR, Tab 55, PAR, at 4, but there is no suggestion that the assigned weights to these requirements were applied in any of the SSAC's comparative analyses of the firms' evaluated discriminators. See, e.g., id. at 13-14 (aerial refueling discriminators). Thus, although it is true that the SSAC reported in the PAR that it considered the "priorities of KPP, KSA, and non-KPP/KSAs," see id. at 29, the record does not provide any evidence of such a weighing.

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[44] The PAR combined the (1) and (2) major discriminators into one major discriminator, although they actually concern separate KPP No. 1 objectives.

[45] Although the Air Force credited Northrop Grumman with exceeding to a greater degree than Boeing the KPP No. 2 objective related to fuel offload versus unrefueled range, we find, as discussed below, that this was inappropriate, given that the RFP provided that no additional credit would be provided for exceeding KPP objectives. The evaluation record thus shows that, instead of this being a discriminator, Northrop Grumman and Boeing should have received equal credit for satisfying this KPP objective.

Similarly, in [the SSA's] selection decision, the SSA reports that the evaluation of the "offerors' proposed capabilities and approaches against the SRD requirements were made in the following order of importance: KPPs, KSAs, and all other non-KPP/KSA requirements." See AR, Tab 54, Source Selection Decision, at 5. Despite this reported recognition of the varying weights assigned to the different SRD requirements, the SSA's decision document does not evidence any consideration of the fact that Boeing's assessed "major discriminators" were derived from requirements that were identified as being more important than most of the requirements from which Northrop Grumman's discriminators were derived. See id. at 5-7.

We agree with the Air Force that it is permissible to identify relative strengths found under less important evaluation factors to be discriminators for selection purposes, where there are lesser relative differences favoring another proposal under more important evaluation factors. However, we find no evidence in this record that any such analysis, which considered the relative weight of the KPPs, KSAs and non-KPP/KSA requirements, was performed here.

The Air Force also identified more "discriminators offering less benefit" for Boeing's proposal than for Northrop Grumman's proposal in the aerial refueling area. Specifically, the SSAC identified five such discriminators for Boeing that were assessed under 13 different SRD requirements, and only one such discriminator for Northrop Grumman that was assessed under 2 SRD requirements. As noted above, the RFP requested that offerors satisfy as many of the "trade space" SRD requirements "as possible." See RFP, SOO for KC-X SDD, at 2. Despite having solicited proposals that satisfy as many SRD requirements as possible, there is no evidence in the record showing that either the SSAC or the SSA accounted for the fact that Boeing's proposal was evaluated as satisfying significantly more SRD requirements in the aerial refueling area than did Northrop Grumman's proposal. In fact, in deciding that Northrop Grumman had a significant advantage in the aerial refueling area, the SSA did not even discuss the fact that Boeing had more "discriminators offering less benefit" than did Northrop Grumman, much less that Boeing satisfied far more SRD requirements than did Northrop Grumman in this area.

As noted by the Air Force, the assignment of adjectival ratings and the source selection should generally not be based upon a simple count of strengths and weaknesses, but upon a qualitative assessment of the proposals. See Kellogg Brown & Root Servs., Inc., B-298694.7, June 22, 2007, 2007 CPD ¶ 124 at 5. Such a qualitative assessment must be consistent with the evaluation scheme, however. Here, although the RFP expressly encouraged offerors to satisfy as many of the "trade space" SRD requirements "as possible," see RFP, SOO for KC-X SDD, at 2, the record shows no evidence that the Air Force gave any consideration to Boeing's offer to satisfy significantly more trade space SRD requirements. This, in our view, is not a matter of simply counting strengths and weaknesses, but of evaluating the

advantages and disadvantages of competing proposals consistent with the RFP's evaluation scheme. See, e.g., Systems Research and Applications Corp.; Booz Allen Hamilton, Inc., supra, at 14.

In short, our review of the record indicates that, as illustrated by the aerial refueling area examples above, the Air Force failed to evaluate proposals in accordance with the RFP's evaluation criteria.[46] That is, the record evidences that the Air Force failed to assess the relative merits of the offerors' proposals based upon the importance assigned to the various SRD requirements by the RFP or to account for the fact that Boeing proposed to satisfy far more SRD requirements than did Northrop Grumman.

Fuel Offload versus Unrefueled Radius Range KPP Objective

Boeing protests that one of the key discriminators relied upon by the SSA in [the SSA's] selection decision was contrary to the RFP's evaluation criteria. This contention concerns the significant discriminator assessed by the Air Force under the aerial refueling area of the key system requirements subfactor. The assessed significant discriminator reflects the conclusion that Northrop Grumman's proposed aircraft exceeded to a greater degree than Boeing's aircraft a KPP objective to exceed the RFP's identified fuel offload to the receiver aircraft versus the unrefueled radius range of the tanker. The SSA noted in this regard that Northrop Grumman's aircraft exceeded the threshold by [Deleted] percent at 1,000 nautical miles and by [Deleted] percent at 2,000 nautical miles, whereas Boeing's aircraft exceeded the threshold by [Deleted] percent at 1,000 nautical miles and by [Deleted] percent at 2,000 nautical miles. AR, Tab 54, Source Selection Decision, at 5. This was a key reason supporting the SSA's determination that Northrop Grumman's proposed aircraft was more advantageous than Boeing's aircraft in the aerial refueling area and was superior overall to Boeing's. See id. at 6-7, 9, 19.

The RFP informed offerors that the agency would evaluate the offerors' approach to meeting the SRD requirements related to aerial refueling, which would include the fuel offload versus radius range. RFP § M.2.2.1.2.a. With respect to fuel offload versus unrefueled range, the RFP identified as a KPP threshold (a mandatory minimum requirement) the range that offerors must satisfy to be found acceptable. See RFP, SRD § 3.2.1.1.1.1. The RFP also identified as a KPP objective that the offerors' "aircraft should be capable of exceeding" the threshold. See RFP, SRD § 3.2.1.1.1.2. Finally, the RFP specifically informed offerors that "[n]o consideration will be provided for exceeding KPP objectives." RFP § M.2.2.1.1.a.

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[46] While we here illustrate this issue in our discussion of the aerial refueling area, as further illustrated below, the agency's failure to account for the relative weights given the various SRD requirements or consider the RFP's request that offerors propose to satisfy as many of the "trade space" requirements as possible permeates the evaluation of the key system requirements subfactor.

Boeing argues that section M.2.2.1.1.a. of RFP unambiguously prohibited crediting Northrop Grumman for exceeding the fuel offload versus unrefueled range objective to a greater extent than Boeing. Boeing asserts that this limitation on providing credit for exceeding KPP objectives "played an important role in shaping . . . how offerors designed and selected the aircraft that was proposed to meet the stated SRD requirements," see Protester's Comments at 14, and states that, had Boeing known of the agency's desire for a larger aircraft which can carry more fuel, it likely would have offered the agency an aircraft based upon the 777 aircraft platform.[47] See Protest at 2, 40.

The Air Force and Northrop Grumman respond that the agency "appropriately found [Northrop Grumman's] superior ability to offload fuel at radius to be a major discriminator and of operational benefit to the Air Force." Air Force's Memorandum of Law at 70; see Northrop Grumman's Comments at 18-19. In this regard, the agency and intervenor argue, despite the plain solicitation language cited above by the protester, that the RFP, read as a whole, indicated to offerors that the agency would consider, and award credit for, the amount by which offerors proposed to exceed the fuel offload versus unrefueled radius range chart identified in the KPP. In this regard, the Air Force and Northrop Grumman argue that this KPP objective did not identify an objective level, and therefore this particular objective was "unbounded," such that unlimited credit could be provided for exceeding this KPP objective. See, e.g., Air Force's Request for Partial Dismissal at 19; Northrop Grumman's Post-Hearing Comments at 102. The Air Force argues that:

> [t]he RFP made clear that the Air Force desired maximum fuel offload at radius because it described the objective in qualitative rather than quantitative terms, thereby placing both offerors on notice that the extent to which each offeror's proposed solution exceeded the threshold could become a potential discriminator between the offerors.

Air Force's Memorandum of Law at 70. The agency also argues that, reading this KPP objective to exceed the fuel offload versus radius range threshold, see RFP, SRD § 3.2.1.1.1.2, in conjunction with the non-KPP/KSA trade space requirement that the aircraft "should operate with maximum fuel efficiency," see RFP, SRD § 3.2.1.1.1.3, offerors should have known that the agency would be giving credit under this KPP objective for the degree to which the offerors would exceed the charted KPP threshold with no upward limits. See Air Force's Request for Partial Dismissal at 17. Northrop Grumman contends that Boeing's reading of this provision

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[47] The Air Force recognizes that Boeing could have proposed an aerial refueling tanker based upon the larger 777 platform. See, e.g., Air Force's Memorandum of Law at 84 n.30.

is inconsistent with the general nature of what the Air Force sought, which Northrop Grumman argues was "a greater refueling capacity, including the possibility of reducing the number of airplanes required to complete a mission." Northrop Grumman's Comments at 27.

Where, as here, a dispute exists as to the actual meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, an interpretation of a solicitation must be consistent with such a reading. Stabro Labs., Inc., B-256921, Aug. 8, 1994, 94-2 CPD ¶ 66 at 4.

We find from our review of the solicitation that the offerors were unambiguously informed that their proposals would not receive additional consideration or credit for exceeding a KPP objective. This is true whether we look to the express provision itself, the meaning of which is plain, or whether we view this restriction within the context of the whole solicitation. The only reasonable interpretation of the KPP objective here is that an offeror would be credited for meeting the fuel offload versus unrefueled radius range objective if its aircraft exceeded the charted KPP threshold, and that no additional credit would be provided for exceeding the charted threshold amount to a greater degree than other proposed aircraft.

Contrary to the Air Force's and Northrop Grumman's positions that this KPP objective was "unbounded" because no finite number or level is stated as part of the objective, the plain language of section M.2.2.1.2.a. of the RFP unequivocally prohibited any consideration for exceeding the stated KPP objective and the RFP did not suggest that the stated objective must be finite or be at an objective level in order for this section to be applicable. To read this provision as suggested by the intervenor and agency would render meaningless section M.2.2.1.2.a, and be inconsistent with identification of an objective for this KPP threshold. See Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 8 (a solicitation should be reasonably read to give effect to all of its provisions). We do not find such a reading reasonable.

The Air Force, as the drafter of the RFP, could have provided for unbounded consideration of the degree to which offerors exceeded the fuel offload versus unrefueled range, but did not. In fact, the last sentence in section M.2.2.1.1.a. states that "[i]f there is no objective and, depending on substantiating rationale, positive consideration will be provided when the specified capability above the KPP threshold is viewed as advantageous to the Government." Thus, according to the RFP, "unbounded" credit could be given for exceeding the KPP where no KPP objective is stated (depending on the substantiating rationale and when

advantageous to the government).[48] Indeed, the solicitation contained a number of KPP thresholds that did not have corresponding KPP objectives, see, e.g., RFP, SRD § 3.2.1.6.1. (KPP No. 4, Airlift Capability); § 3.2.8 (KPP No. 8, Survivability), but that is not the case with respect to this KPP threshold.

We also note that the RFP elsewhere specifically informed offerors of other objectives for which their proposals could receive additional consideration for exceeding objectives; that is, with respect to non-KPP requirements, the RFP stated that the agency may give "additional consideration if the offeror proposes to meet (or exceed if there is an objective) the SRD threshold or requirement, depending on the substantiating rationale." See RFP § M.2.2.1.1.b. In addition, offerors were informed with regard to certain non-KPP objectives that they should try to exceed the requirement by as much as possible. See, e.g., RFP, SRD § 3.2.10.1.5.2.2 ("The boom envelope should exceed the ATP-56 envelope as much as possible (OBJECTIVE).")

We also agree with Boeing that the RFP, read as whole, established a complex set of trade-offs for offerors to consider in determining what aircraft to propose to the agency, and we do not agree that "common sense" mandates that "unbounded" refueling capabilities were being sought by the RFP.[49] Although it is apparent that a larger aircraft could provide greater refueling capabilities, there could be associated disadvantages with respect to costs and space constraints. Thus, given that the RFP did not establish any size requirements or limitations upon the aircraft that could be proposed, the restriction on credit for exceeding this KPP objective provided offerors with a key consideration in determining what sort of aircraft to offer, as well as how to best structure their proposals.

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[48] Thus, the Air Force's and Northrop Grumman's interpretation of this objective as unbounded would render the last sentence of section M.2.2.1.1.a meaningless, given that that sentence addresses the situation where unbounded credit will be given for exceeding a KPP threshold.

[49] The Air Force and Northrop Grumman argue that Boeing's interpretation is unreasonable because this would mean that meeting and exceeding the KPP threshold relating to fuel offload versus unrefueled radius range would necessarily approximate one another because both would be bounded by a single line on a chart, which would render the establishment of an objective meaningless. We do not agree. As Boeing notes, the establishment of KPP objectives was expressly for the purpose of limiting the KPP trade space available to offerors, and we find from our review of the entire record that Boeing had a reasonable basis for believing that this limitation--that no credit would be given for exceeding the KPP threshold amount--was "consistent with real-world tanker operations." See Boeing's Comments at 16.

As indicated above, the Air Force and Northrop Grumman argued that Boeing's protest of the agency's evaluation of the firms' proposal under this KPP objective is untimely because it is actually a challenge to the terms of the solicitation.[50] They base this argument upon their contention that Boeing learned of the agency's interpretation from the agency's briefings during the competition. However, we agree with Boeing's contention that the agency's briefings supported Boeing's understanding that no credit would be given for exceeding this KPP objective. For example, in Boeing's mid-term briefing, the Air Force reported to Boeing with regard to the aerial refueling area of the key system requirements that, although its aircraft exceeded the fuel offload versus unrefueled range and the agency identified by how much Boeing's aircraft exceeded the range, its proposal was evaluated to have "met" the objective.[51] See AR, Tab 129, Mid-term Briefing to Boeing, at 26. Similarly, in its pre-Final Proposal Revision Briefing, Boeing was informed that its offer to exceed the KPP threshold for this requirement was evaluated as having "met" the objective.[52] See AR, Tab 135, Pre-Final Proposal Revision Briefing to Boeing, at 30. Based on our review of the record, Boeing was not informed in its briefings of the SSA's and SSAC's interpretation that the RFP allowed "unbounded" credit to be given for exceeding the fuel offload versus unrefueled radius range KPP objective, and only became aware of the agency's interpretation from the redacted source selection decision that was provided to Boeing at its post-award required debriefing.[53]

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[50] Both the Air Force and Northrop Grumman cite our decision in PM Servs. Co., B-310762, Feb. 4, 2008, 2008 CPD ¶ 42, for the proposition that Boeing, having learned how its proposal was being evaluated with respect to this KPP objective, was required to protest before the next closing time for receipt of proposals. In that case, we therefore concluded, unlike here, that the protester was informed during discussions of the agency's interpretation of a solicitation provision that was otherwise clear on its face, and that the protester's later post-award challenge of this provision was an untimely protest of an apparent solicitation impropriety. Id. at 3.

[51] The Air Force's mid-term briefings to Boeing and Northrop Grumman stated that "[o]nly SRD KPP Threshold requirements must be met -- strengths may be awarded for greater capability, but not beyond Objective levels (if an Objective is stated)." See AR, Tab 129, Mid-term Briefing to Boeing, at 17; Tab 199, Mid-Term Briefing for Northrop Grumman, at 17. The parties' pre-final proposal revision briefings did not include this language.

[52] Although the pre-award briefings provided to Boeing identified "benefits" associated with the firm's offer to exceed the fuel offload versus unrefueled radius range threshold, Boeing could not know until it received the source selection decision that the agency was actually providing additional credit for the degree to which the offerors were exceeding the fuel offload versus unrefueled radius range.

[53] Even were we to consider the limitation on consideration above the KPP objective for the fuel offload versus unrefueled range requirement to be a latent ambiguity,

(continued...)

In sum, we find that a key discriminator relied upon by the SSA in making [the SSA's] selection decision--that is, the assessment related to the KPP objective to exceed the fuel offload versus unrefueled range--was not consistent with the RFP. It is a fundamental principle of competitive procurements that competitors be treated fairly, and fairness in competitions for federal procurements is largely defined by an evaluation that is reasonable and consistent with the terms of the solicitation. For that reason, agencies are required to identify the bases upon which offerors' proposals will be evaluated and to evaluate offers in accordance with the stated evaluation criteria. See Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(2)(A), (b)(1) (2000); FAR §§ 15.304(d), 15.305(a); Sikorsky Aircraft Co.; Lockheed Martin Sys. Integration-Owego, B-299145 et al., Feb. 26, 2007, 2007 CPD ¶ 45 at 4. The Air Force did not fulfill this fundamental obligation here.

KC-30 Overrun and Breakaway Capability

Boeing also complains that the Air Force did not reasonably assess the capability of Northrop Grumman's proposed aircraft to refuel all current Air Force fixed-wing tanker-compatible aircraft using current Air Force procedures, as required by a KPP No. 1 threshold under the aerial refueling area of the key system requirements subfactor.[54] See RFP, SRD § 3.2.10.1.1.9. Specifically, Boeing notes that current Air Force refueling procedures require that the tanker aircraft be capable of "overrun" and "breakaway" procedures when necessary, which would require the tanker aircraft to fly faster than the receiver aircraft or quickly accelerate during refueling.[55]

(...continued)
Boeing's protest would still be timely. See Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136 at 3 n.1 (protest filed within 10 days of the date the protester learned of an agency's interpretation of a latent solicitation ambiguity is timely).

[54] The capability of Northrop Grumman's proposed aircraft to satisfy this KPP threshold concerns a matter of technical acceptability; stated differently, if Northrop Grumman could not establish the capability of its aircraft to refuel all current fixed-wing tanker-compatible fixed wing aircraft using current Air Force procedures, its proposal could not be accepted. HT at 625, 649.

[55] In aerial refueling operations, tankers maneuver to a rendezvous point and establish an orbit pattern at a constant airspeed to await receiver aircraft. See, e.g., AR, Tab 289, Flight Manual, KC-10A Aircraft, Flight Crew Tanker Air Refueling Procedures, USAF Series, Technical Order (T.O.) 1-1C-1-33, Sept. 1, 2002, as revised Jan. 31, 2005, at 2-2, 2-15. If a receiver aircraft overruns the tanker during the final phase of rendezvous, the tanker and receiver pilots are directed to adjust to specified overrun speeds, and after overtaking the receiver aircraft, the tanker will decelerate to a refueling airspeed. Id. at 2-16. A breakaway maneuver is an emergency procedure that is done when any tanker or receiver aircraft crewmember perceives
(continued...)

Boeing's Second Supplemental Protest at 29. Boeing contends that the Air Force unreasonably determined that Northrop Grumman's proposed aircraft would meet these requirements.

With regard to the overrun issue, the record shows that Northrop Grumman was twice informed by the Air Force during discussions that the firm's initially identified maximum operational airspeed of [Deleted] Knots Indicated Air Speed (KIAS) would not be sufficient under current Air Force overrun procedures to achieve required overrun speeds of [Deleted] KIAS for various fighter aircraft, including the [Deleted], or [Deleted] KIAS for the [Deleted].[56] See AR, Tab 184, EN NPG-MC1-003, at 2; EN NPG-MC1-003a, at 1-2. Ultimately, Northrop Grumman informed the Air Force that a [Deleted] limited the aircraft's operational speed, but that Northrop Grumman proposed to include a [Deleted] to achieve the necessary overrun speed.[57] See id., Northrop Grumman Response to EN NPG-MC1-003a, at 2-7. The Air Force accepted Northrop Grumman's proposed solution as satisfying this KPP threshold. HT at 628.

(...continued)
an unsafe condition that requires immediate separation of the aircraft. See id. at 6-2; see also HT at 619. In such a situation, the tanker pilot is directed to accelerate in level flight to achieve separation, or, if required, to accelerate and climb (during which the tanker pilot is directed to "not allow the airspeed to decrease below that indicated at the start of climb.") See, e.g., AR, Tab 289, Flight Manual, KC-10A Aircraft, Flight Crew Tanker Air Refueling Procedures, USAF Series, T.O. 1-1C-1-33, Sept. 1, 2002, as revised Jan. 31, 2005, at 6-2.

[56] In the first EN to Northrop Grumman addressing that firm's aircraft overrun capability, the Air Force identified [Deleted] KIAS, as the required overrun speed for the [Deleted]. See AR, Tab 184, EN NPG-MC1-003, at 2. In the second EN to Northrop Grumman, the agency corrected this to [Deleted] KIAS, see id., EN NPG-MC1-003a, at 1, which reflects the overrun speed identified for the [Deleted] in the KC-135 flight manual. See Tab 289, Flight Manual KC-135 (Tanker) Flight Crew Air Refueling Procedures, Supp. III, T.O. 1-1C-1-3, Jan. 1, 1987, at [Deleted].

[57] Initially, Northrop Grumman informed the Air Force that the agency should change its current overrun procedures. See AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003, at 1-3. Thereafter, Northrop Grumman asserted that there was nothing in the RFP requirements that established airspeed limitations for specific aircraft in overrun situations. Id., Northrop Grumman Response to EN NPG-MC1-003a, at 1-2. As noted by the Air Force in the second EN provided to Northrop Grumman on this issue, the agency's current procedures are established by its flight manuals for the KC-135 and KC-10 that provide operational airspeed and overrun airspeed requirements specific for each receiver aircraft type. See id., EN NPG-MC1-003a, at 1; e.g., Tab 289, Flight Manual KC-135 (Tanker) Flight Crew Air Refueling Procedures, Supp. III, T.O. 1-1C-1-3, Jan. 1, 1987, at [Deleted]; see also HT at 622.

Boeing complains that Northrop Grumman's proposed solution of [Deleted] to achieve overrun speed requires [Deleted], which is not consistent with the Air Force's current procedures as is required by the KPP.[58] See Boeing's Second Supplemental Protest at 29-32; Boeing's Comments at 64. Boeing also argues that the agency did not note that Northrop Grumman qualified its promise to increase its maximum operational airspeed in its EN response. Specifically, Boeing points out that Northrop Grumman stated that, [Deleted], the KC-30 had a maximum airspeed of [Deleted] KIAS, and not the [Deleted] KIAS evaluated by the Air Force. See AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, at 9.

At the hearing that our Office conducted in this protest, the Air Force produced its SSET mission capability factor team chief to testify regarding the agency's evaluation of the capability of Northrop Grumman's aircraft to satisfy this KPP threshold.[59] This witness, in response to direct examination, stated that the SSET found that [Deleted] would allow the KC-30 to achieve the necessary airspeed to perform the required overrun and breakaway procedures. Specifically, he testified that the SSET was convinced that, by [Deleted], the KC-30 could achieve an operational airspeed of [Deleted] KIAS, because Northrop Grumman had informed the agency in its EN response that the commercial A330 aircraft had a maximum "dive velocity"[60] of 365 KIAS and had been flight tested to a dive velocity of [Deleted] KIAS, and that analysis had been done showing that the A330 could even achieve a dive velocity of [Deleted] KIAS. HT at 626-27. The mission capability factor team chief testified that the SSET evaluated Northrop Grumman's response to indicate that the [Deleted], see

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[58] The Air Force and Northrop Grumman contend that Boeing's contention–that Northrop Grumman's [Deleted] causes [Deleted]–was untimely raised in Boeing's comments and must be dismissed. Air Force's Post-Hearing Comments at 18; Northrop Grumman's Post-Hearing Comments at 141. We disagree. In its second supplemental protest (filed within 10 days of receipt of the first production of documents), Boeing specifically challenged the Air Force's evaluation of Northrop Grumman's proposal to [Deleted], arguing that the "Air Force never considered the feasibility of this extreme measure or its implications on the KC-30's ability to carry out the refueling mission." See Boeing's Second Supplemental Protest at 29-31. The arguments concerning the [Deleted] are thus within the scope of Boeing's timely protest.

[59] As noted above, our Office requested that the Air Force provide knowledgeable witnesses who could testify with respect to the previously identified hearing issues.

[60] FAA's regulations provide that the design dive speed of an aircraft be established so that the design cruise speed is no greater than 0.8 times the design dive speed. See 14 C.F.R. § 25.335(b) (2008).

HT at 637-38, and that in any event Air Force current procedures did not require the use of the [Deleted] during aerial refueling operations. HT at 638-39.

From this record, we cannot conclude that the Air Force reasonably evaluated the capability of Northrop Grumman's proposed aircraft to satisfy the KPP threshold requirement to refuel all current Air Force fixed-wing tanker-compatible aircraft using current Air Force procedures. The contemporaneous record, as explained by the hearing testimony, does not establish that the Air Force understood Northrop Grumman's response in discussions concerning its ability to satisfy the solicitation requirements, nor does it demonstrate that the agency had a reasonable basis upon which to accept Northrop Grumman's promises of compliance.

First, we agree with Boeing that the SSET erred in concluding that the [Deleted] in tanker refueling operations was not a current Air Force procedure.[61] See HT at 638, 735; Air Force's Post-Hearing Comments at 19. As noted above, the contemporaneous evaluation record shows that the agency interpreted the solicitation requirement to comply with "current [Air Force] procedures" to mean compliance with the procedures set forth in the agency's flight manuals for the KC-135 and KC-10 tanker aircraft, and expressly informed Northrop Grumman during discussions that the flight manuals for the KC-135 and KC-10 established the current Air Force procedures for refueling operations. See AR, Tab 184, EN NPG-MC1-003a, at 1, wherein the agency stated "[a]erial refueling procedures were contained in T.O. 1-1C-1-3 and 1-1C-1-33 for the KC-135 and KC-10 respectively when the RFP was released."[62] These manuals show that current Air Force procedures provide that tanker pilots [Deleted] in refueling operations. For example, the KC-135 manual under Section IV, Air Refueling Procedures, warns tanker pilots that they "must be prepared to assume aircraft control [Deleted]," and under Section V, Emergency Air Refueling Procedures, instructs tanker pilots that in a breakaway situation, if a climb is required, they must "[Deleted]." See AR, Tab 289, Flight Manual KC-135 (Tanker) Flight Crew Air Refueling Procedures, Supp. III,

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[61] The record indicates that the evaluators did not consider during the procurement whether the [Deleted] during aerial refueling operations was a current Air Force procedure and how this may affect Northrop Grumman's proposed solution to satisfying the overrun speed requirements. Rather, these issues apparently were only considered in response to Boeing's protest allegations. See HT at 711.

[62] The flight manuals for the KC-135 and KC-10 both state that the "[p]rocedures in this manual are mandatory and must be performed in the prescribed manner except where deviations are required in the interest of safety of flight." AR, Tab 289, Flight Manual KC-135 (Tanker) Flight Crew Air Refueling Procedures, Supp. III, T.O. 1-1C-1-3, Jan. 1, 1987, as revised Sept. 1, 2004, at i; Tab 289, Flight Manual, KC-10A Aircraft, Flight Crew Tanker Air Refueling Procedures, USAF Series, T.O. 1-1C-1-33, Sept. 1, 2002, as revised Jan. 31, 2005, at ii.

T.O. 1-1C-1-3, Jan. 1, 1987, as revised Sept. 1, 2004, at [Deleted]. Similarly, the KC-10 flight manual provides under Section III, Air Refueling Procedures, that the "[Deleted]." Id., Flight Manual, KC-10A Aircraft, Flight Crew Tanker Air Refueling Procedures, USAF Series, T.O. 1-1C-1-33, Sept. 1, 2002, as revised Jan. 31, 2005, at [Deleted]. In this regard, Boeing provided the statement of a retired Air Force pilot, who had extensive experience as both a KC-10 and KC-135 tanker pilot and had operated each aircraft as both a tanker and a receiver in refueling missions; this individual stated:

> Refueling is more demanding and difficult for both tanker and receiver aircraft if the tanker [Deleted]. For the tanker pilot, [Deleted]. For the receiver pilot, [Deleted]. Due to these realities, existing refueling guidelines dictate that [Deleted] should be used for refueling under normal circumstances. [Citations omitted.] Beginning aerial refueling [Deleted] should it become necessary, violates this policy. As previously noted, [Deleted].

Boeing's Comments, attach. 14, Declaration of Retired Air Force Pilot, at 3-4. Although the Air Force and Northrop Grumman generally disagree with Boeing's consultant that the Air Force's current procedures provide for the [Deleted], neither the agency or intervenor have directed our attention to anything in the KC-135 or KC-10 flight manuals or to any other source that would establish that Boeing's view, which appears to be reasonable on its face, is in error.

We also find unsupported the agency's conclusion that Northrop Grumman's proposed solution of [Deleted] did not also involve [Deleted]. In its EN response, Northrop Grumman informed the Air Force that 330 KIAS was the normal design maximum operating velocity of the commercial A330 aircraft, and that "selection of a [maximum operating velocity] drives overall design characteristics of the aircraft, specifically aerodynamic and structural design limits, handling quality definition, and thrust." See AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, at 2. Northrop Grumman explained that its [Deleted] limited the aircraft to its maximum operating velocity, but that the firm could [Deleted] to exceed the maximum operating velocity. The awardee then stated "three cases . . . to illustrate the performance of the KC-30 with and without [Deleted]." Id. at 3. The three cases that Northrop Grumman identified and separately described were (1) KC-30 [Deleted]; (2) KC-30 [Deleted]; and (3) KC-30 [Deleted], which indicated that the KC-30 could only meet the overrun requirement under the third case where both the [Deleted]. Id. at 3-6.

The SSET read, as described by the testimony of its mission capability factor team chief, Northrop Grumman's EN response to describe a "fourth case" (although not identified as such) under the "third case" heading, but located at the end of that section, where, the agency contends, the KC-30's [Deleted] but the [Deleted]. See HT at 664. However, we are unable to accept such a reading of Northrop Grumman's EN

response. It ignores the logical structure of Northrop Grumman's response to the agency, which only identified and described three cases. Moreover, nowhere in its response to the agency's EN does Northrop Grumman suggest a "fourth case" where the [Deleted]; rather, the only reference to both the [Deleted] in the third case expressly states that the [Deleted] ("Case 3: KC-30 [Deleted]").[63] See AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, at 6. In any event, given the uncertainty surrounding the agency's interpretation of Northrop Grumman's solution to a matter the agency believed could render the firm's proposal unacceptable, see HT at 625, 649, this is something the agency should have continued to clarify and resolve during discussions with the firm.[64]

Even apart from the agency's apparent misreading of Northrop Grumman's EN response and disregard of the current Air Force procedure to [Deleted], the record does not establish that the agency had a reasonable basis for concluding that Northrop Grumman's proposed solution would allow its aircraft to obtain the requisite overrun airspeeds to satisfy this KPP threshold. The witness that the Air Force produced to support its arguments on this point testified that the SSET had concluded that the KC-30 had the "inherent capability" of reaching airspeeds greater than [Deleted] KIAS (the aircraft's certified maximum operational airspeed) based upon the far greater airspeed ([Deleted] KIAS) identified by the firm for its certified dive velocity.[65] See HT at 624-28; Air Force's Post-Hearing Comments at 17-18. In

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[63] In its post-hearing comments, Northrop Grumman argues that [Deleted]. See Northrop Grumman's Post-Hearing Comments at 141-43. We provide little weight to this post-procurement description of Northrop Grumman's proposed design, given that this argument seems inconsistent with Northrop Grumman's EN response and is not supported by statements of consultants or other knowledgeable sources, and it represents information that was not presented to the agency for its consideration during the procurement.

[64] In this regard, in response to cross examination, the SSET mission capability team chief testified that, although Northrop Grumman in its EN response was not "very good at articulating what they were doing at the end there, okay," the evaluation team did not ask Northrop Grumman to clarify what it was proposing in its EN response. See HT at 664.

[65] Northrop Grumman provided to the Air Force with its EN response a FAA Type Certificate for the Airbus A330-200 and A330-300 series aircraft, which identified the maximum operating limit airspeed as 330 KIAS and the design diving speed as 365 KIAS. AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, attach., FAA Type Certificate Data Sheet No. A46NM, Rev. 10, Mar. 19, 2007, at II-J-72. In November 2007, the FAA-type certificate for the A330 aircraft was revised, but stated the same maximum operating limit and dive speeds. See Boeing's Airspeed Hearing exh. 13, FAA Type Certificate No. A46NM, Rev. 11, Nov. 13, 2007, at 12.

this regard, the SSET apparently believed that simply [Deleted] would enable the aircraft to achieve its indicated dive velocity airspeed as its operational airspeed.

Although the SSET mission capability factor team chief repeatedly testified that the dive speed indicated that the aircraft would have the structural ability to fly at the dive speed limitation, see, e.g., HT at 674, he also admitted under cross examination that he did not know what the relationship was between maximum operating airspeed and design dive speed:

> Q: What's your understanding of what the general margin is between maximum operational velocity and dive velocity?
>
> A: I'm not aware.
>
> Q: Was there somebody on your team that was advising you about what the general margin is or difference is between maximum operational velocity and dive velocity?
>
> A: There could have been. We had advisors for handling qualities.
>
> Q: I know you had advisors. I'm asking you, were there any advisors who actually helped you with understanding the difference between dive velocity and maximum operational velocity?
>
> A: They did not help me, no.
>
> Q: Did they help the team?
>
> A: Not that I'm aware of.

HT at 669-70. The SSET mission capability factor team chief's (and presumably the SSET's) lack of knowledge concerning the relationship between maximum operating airspeed and design dive airspeed[66] is particularly troubling given the definition of maximum operating limit speed in FAA's regulations:

> The maximum operating limit speed . . . is a speed that may not be deliberately exceeded in any regime of flight (climb, cruise, or descent), unless a higher speed is authorized for flight test or pilot

[66] We have been presented with no testimony, statements or documentation from any member of the SSET professing to understand the relationship of maximum operational airspeed and dive velocity or airspeed, or to otherwise support the agency's conclusion that the A330's certified design dive velocity indicated that the aircraft was capable of achieving that speed as a maximum operational airspeed.

> training operations. [The maximum operating limit speed] must be established so that it is not greater than the design cruising speed . . . and so that it is sufficiently below [dive speed and velocity] to make it highly improbable that the latter speeds will be inadvertently exceeded in operations.

14 C.F.R. § 25.1505.

In sum, despite having identified, as an issue for the hearing, the capability of Northrop Grumman's proposed aircraft to satisfy the airspeed requirements of this KPP threshold, we have been presented with no testimony or documented analysis that explains why simply [Deleted] on the KC-30 would ensure that the proposed aircraft would achieve required overrun airspeeds that are in excess of its FAA certified maximum airspeed.[67] Furthermore, neither the Air Force nor Northrop Grumman has directed us to any documentation establishing that the agency analyzed what would be entailed in designing the KC-30 to exceed the certified maximum operational airspeed limit.[68] Given Northrop Grumman's recognition in its

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[67] The SSET mission capability factor team chief also testified that Northrop Grumman's response indicated to the SSET that the KC-30 could achieve [Deleted] KIAS with both the [Deleted]. HT at 636. In this regard, Northrop Grumman's EN response contained a "Note" under case two ([Deleted]), which stated that the [Deleted]. AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, at 6. It is unexplained in what situation this occurs, given that the [Deleted] is supposed to [Deleted]. Moreover, neither the Air Force nor Northrop Grumman has identified any evidence in the contemporaneous record of the agency's consideration of this note.

[68] Although the Air Force argues that it considered whether there was any schedule or cost risk associated with the proposed changes to Northrop Grumman's aircraft to satisfy the airspeed requirements, see Air Force's Post-Hearing Comments, at 18, we have not been directed to documentation in the record establishing that such an analysis was performed. Instead, the Air Force relies upon the testimony of the SSET mission capability factor team chief that the SSET concluded that Northrop Grumman had provided "associated costs and schedule impact" for the firm's proposed approach to satisfying the airspeed requirements. See HT at 629. However, he was unable to point to anything in the record to support his testimony, except his statement that a structural engineer on the SSET reviewed Northrop Grumman's EN response and determined that any required changes to the proposed aircraft could be accomplished within Northrop Grumman's proposed schedule. HT at 721. The totality of that review by the structural engineer, however, was apparently captured in an e-mail sent during the evaluation. See HT at 757-59, 783 (proffer by Air Force counsel). This e-mail does not establish that the structural engineer validated the capability of Northrop Grumman's aircraft to satisfy the overrun airspeed requirements or that changes in the aircraft's maximum operational (continued...)

EN response that selection of the maximum operational airspeed limit "drives overall design characteristics of the aircraft, specifically the aerodynamic and structural design limits, handling quality definition, and thrust," see AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, at 2, it would seem apparent that some design and FAA re-certification efforts could be necessary.

Boeing also complains that the Air Force did not reasonably evaluate the capability of Northrop Grumman's aircraft to initiate emergency breakaway procedures when refueling the [Deleted].[69] Current Air Force procedures, as reflected by the KC-135 flight manual, specifies that the tanker will refuel the [Deleted] at an airspeed of [Deleted] KIAS, see AR, Tab 289, Flight Manual KC-135 (Tanker) Flight Crew Air Refueling Procedures, Supp. III, T.O. 1-1C-1-3, Jan. 1, 1987, as revised Sept. 1, 2004, at [Deleted], and Northrop Grumman's EN response indicates that the KC-30's airspeed is limited to [Deleted] KIAS with the aircraft's [Deleted]. See AR, Tab 184, Northrop Grumman Response to EN NPG-MC1-003a, at 9. Boeing contends, citing the statement of its former tanker/receiver pilot consultant, that there is insufficient margin between airspeed at which [Deleted] are refueled and the KC-30's operational airspeed limit during refueling (a [Deleted]-KIAS margin) to allow for emergency breakaway maneuvers. See Boeing's Comments, attach. 14, Declaration of Retired Air Force Pilot, at 3-4.

As was true with respect to whether the KC-30 can satisfy the current Air Force procedures with respect to overrun airspeed, there is no documentation in the record setting forth an analysis of whether Northrop Grumman's proposed aircraft has sufficient operational airspeed when refueling the [Deleted] to initiate an emergency breakaway procedure. The agency's counsel provided a proffer at the hearing that the SSET's analysis of whether the KC-30 was capable of performing a breakaway maneuver with the [Deleted] was contained in the SSET's Final Evaluation Summary Report for Northrop Grumman. See HT at 784; see AR, Tab 215, Evaluation Summary Report for Northrop Grumman, at 3. Neither the page referenced by agency counsel or any other part of that document contains any analysis of whether Northrop Grumman's proposed aircraft can perform a breakaway procedure while refueling the [Deleted]; rather, the page referenced by agency counsel merely states that "[t]he Offeror has substantiated the ability to

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(...continued)
airspeed could be achieved within the offeror's proposed schedule or cost. Rather, the e-mail states that the effect of higher airspeed on the integrity of KC-30 aircraft structure has not been analyzed and that "[b]ottom line, these [Deleted] are major concerns that must be addressed by Analysis for sure and Flight Test if warranted." AR, Tab 332, E-mail 32002 re: EN NPG-MC1-003a, Jan. 25, 2008.

[69] The Air Force did not contemporaneously express any concern to Northrop Grumman with respect to its aircraft's ability to achieve breakaway speeds. HT at 619.

deliver a KC-X aircraft that meets (minimum requirement) all KPP thresholds associated with aerial refueling," and provides no reasons or analysis supporting this conclusion. AR, Tab 215, Evaluation Summary Report for Northrop Grumman, at 3.

Although the SSET mission capability factor team chief was examined extensively about the SSET's consideration of the KC-30's ability to perform breakaway procedures, he recalled little about the SSET's discussions in this regard. His testimony does indicate, however, that the SSET accepted that the KC-30's maximum operational airspeed when refueling ([Deleted]) was [Deleted] KIAS, and that the SSET apparently believed that, to initiate the emergency breakaway procedure, with Northrop Grumman's proposed aircraft, the tanker would have to start accelerating and [Deleted] simultaneously. See HT at 706. During cross examination, the SSET mission capability factor team chief admitted that he did not know how long it would take [Deleted] Northrop Grumman's proposed [Deleted] or what the procedure was for [Deleted], nor was he aware of whether this was ever analyzed by the agency in its evaluation.[70] HT at 685-87, 707.

In sum, we conclude that the record does not demonstrate that the agency reasonably determined that Northrop Grumman's proposed aircraft would be able to refuel all current Air Force fixed-wing tanker-compatible receiver aircraft in accordance with current Air Force procedures as was required by this KPP No. 1 threshold.

Operational Utility Area

Boeing also complains that the Air Force unreasonably evaluated the firms' proposals in the operational utility area under the key system requirements subfactor. The RFP provided that evaluation of this area would consist of an assessment of the offeror's approach to meeting (or exceeding, where appropriate) SRD requirements, "including the following: aircraft maneuverability, worldwide airspace operations, communication/information systems (including Net-Ready capability), treaty compliance support, formation flight, intercontinental range, 7,000-foot runway operations, bare base airfield operations, and growth provisions for upgrades." RFP § M.2.2.1.2.c. Boeing contends that its proposal should have been found technically superior to Northrop Grumman's in this area, and not

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[70] Boeing argues, citing the procedures identified in Northrop Grumman's final proposal, that [Deleted] Northrop Grumman's [Deleted] could take as long as [Deleted], which would require the tanker pilot to either accelerate beyond [Deleted] KIAS before [Deleted] or delay initiating the breakaway until after [Deleted]; Boeing contends that the Air Force did not assess these concerns. See Boeing's Post-Hearing Comments at 68, citing, AR, Tab 187, Northrop Grumman's Final Proposal Revision, vol. II, Mission Capability/Proposal Risk, Jan. 4, 2008, at II-SF116-16a.

essentially equal, as the SSA and SSAC concluded. See AR, Tab 54, Source Selection Decision, at 8.

As noted above, the SSET found that both offerors satisfied the three KPP thresholds identified in this area, and partially met the one KPP objective identified; the SSET also found that both offerors met all associated KSA thresholds and objectives. See AR, Tab 55, PAR, at 20-21. The SSAC also identified two "major discriminators" in each of the firms' respective proposals; the discriminators for Boeing were the firm's (1) [Deleted] and (2) [Deleted], and for Northrop Grumman were (1) the ability of the KC-30 to operate from a 7,000-foot runway carrying more fuel than the KC-767, and (2) the KC-30's longer ferry range compared to the KC-767's. Id. Boeing's two "major discriminators" were assessed under 17 different SRD requirements, while Northrop Grumman's two discriminators were assessed under only 2 SRD requirements. The SSAC also identified a number of "discriminators offering less benefit" for each firm: six such discriminators for Boeing assessed under 19 SRD requirements, and five such discriminators for Northrop Grumman assessed under 6 SRD requirements. Id. at 22-24.

Here, too, as we described above with respect to the aerial refueling area, the record does not evidence that the SSAC and SSA, in determining that the firms' proposals were essentially equal in the operational utility area, gave any consideration to the fact that Boeing's proposal was evaluated as satisfying more SRD requirements than Northrop Grumman's in this area, as was sought by the RFP. Given this failure by the SSAC and SSA to address Boeing's apparent advantage in meeting more SRD requirements than Northrop Grumman, we conclude that the agency's evaluation and selection decision was unreasonable in this regard.

Boeing also complains that the agency conducted misleading discussions with Boeing with respect to whether Boeing had fully satisfied the KPP No. 7 objective, Net-Ready Capability. RFP, SRD § 3.2.4.1.1; app. A, Net-Ready Capability KPP, at 3. The KPP No. 7 objective provides that the offeror's "system should be capable of accomplishing all operational activities identified in Table 5." RFP, SRD, app. A, at 4. Table 5 of the appendix identified a number of information exchange requirements. Id. at 15-25.

Specifically, Boeing complains that at its mid-term briefing it was informed of an uncertainty regarding the firm's net ready capability, see AR, Tab 129, Mid-Term Briefing to Boeing, at 77, and that ultimately the firm responded to an EN concerning the firm's System Requirements Matrix and System Specification with respect to complying with the SRD requirements for KPP No. 7. See AR, Tab 210, Boeing Response to EN BOE-MC1-041. Boeing believed that its EN response charted how its proposal met the KPP No. 7 thresholds and objective in total, see Boeing's Comments at 29, and during the firm's Pre-Final Proposal Revision Briefing the Air Force informed Boeing that the firm "met" both the KPP thresholds and the objective requirements for KPP No. 7. See AR, Tab 135, Boeing's Pre-Final Proposal Revision

Briefing, at 57. Accordingly, Boeing made no further revisions to its proposal in this area. Boeing's Second Supplemental Protest at 53. The Air Force, however, changed its evaluation rating of this aspect of Boeing's proposal to "partially met" the KPP objective (the same rating that Northrop Grumman received) without further notice to Boeing.[71] Boeing contends that the Air Force's misleading discussions prevented the firm from addressing the agency's concerns with respect to this objective.

The Air Force does not dispute that it informed Boeing during discussions that the firm had satisfied all of the thresholds and the objective under KPP No. 7, but contends that at the time it later determined that Boeing had not fully satisfied this objective, discussions had already been closed. See Second Supplemental COS at 77. The agency argues that, in any event, it was under no obligation to inform Boeing of the changed evaluation rating associated with this objective because the objective "constituted trade space," the absence of which would not be a deficiency or weakness. Agency Memorandum of Law at 131.

We do not agree with the Air Force that the agency was permitted, after informing Boeing that its proposal fully met this objective, to change this evaluation conclusion without affording Boeing the opportunity to satisfy this requirement. It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. See 10 U.S.C. § 2305(b)(4)(A)(i); AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 6. Here, by informing Boeing prior to the submission of the firm's final proposal revision that it satisfied all aspects of KPP No. 7, the Air Force deprived the firm of the opportunity to further address these particular requirements. See AT&T Corp., supra, at 12; see also Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 13.

In contrast, the Air Force informed Northrop Grumman prior to the submission of that firm's final proposal revision that it had only partially met this KPP objective, which permitted that firm the opportunity to further address the KPP objective requirements. See AR, Tab 205, Northrop Grumman's Pre-Final Proposal Revision Briefing, at 61. Moreover, Boeing submitted its final submission addressing this KPP objective several months prior to the pre-FPR briefing, and, as indicated above, the agency actually reopened discussions on other subjects after submission of the FPRs and obtained revised FPRs. Boeing's Protest at 66; Boeing's Second Supplemental Protest at 53. In short, the Air Force misled Boeing when the agency advised the firm that it met this objective, but later determined that Boeing did not fully meet this objective, and did not reopen discussions with Boeing on this issue. The Air Force also treated the firms unequally when it provided Northrop Grumman, but not Boeing, with continued discussions on this same objective. It is axiomatic that procuring agencies may not conduct discussions in a manner that favors one offeror

[71] It is unclear from the record when the Air Force changed its evaluation of this KPP objective.

over another. See FAR § 15.306(e)((1); Chemonics Int'l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61 at 8-9.

We also find a reasonable possibility that Boeing was prejudiced by the Air Force's misleading and unequal discussions, given the greater weight that KPPs were supposed to receive in the agency's evaluation. In this regard, if Boeing had been evaluated as fully satisfying this KPP objective, which was the only KPP objective in the operations utility area, it could well have been considered to be superior in this area to Northrop Grumman, which was evaluated as only partially satisfying this KPP objective.

Other Key System Requirements Subfactor Issues

Boeing also protests the Air Force's conclusion in the aerial refueling area that Northrop Grumman's proposed larger boom envelope (relative to that offered by Boeing) offered a meaningful benefit to the Air Force. See AR, Tab 55, PAR, at 14. From our review of the record, including hearing testimony on this issue, we do not find a basis to object to the Air Force's judgment that Northrop Grumman had offered a larger boom envelope and that this offer provided a measurable benefit.[72]

Boeing also challenges the Air Force's evaluation judgment in the airlift area that Northrop Grumman's proposed aircraft offered superior cargo, passenger, and aeromedical evacuation capability than did Boeing's aircraft. From our review of the record, including the hearing testimony, we see no basis to conclude that the Air

[72] As set forth above, the agency also identified a weakness for Northrop Grumman in the aerial refueling area related to the firm's boom approach. Because the record did not contain any documentation explaining why the Air Force's evaluated concern with Northrop Grumman's proposed boom design represents a low risk as to schedule or cost, we also identified this as an area in which hearing testimony would be required to "explain why evaluated weaknesses in Northrop Grumman's boom have low schedule or cost risk." See GAO Confirmation of Hearing, Apr. 29, 2008, at 3. The Air Force produced its SSET team chief to address this issue, and, although he clearly articulated the SSET's evaluated concerns with regard to Northrop Grumman's boom design, his testimony regarding any schedule and/or cost risk associated with these concerns was conclusory. See, e.g., HT at 1009-13, 1016-17, 1022. Although the record, including the SSET team chief's testimony, indicates that some analyses of the impact of these evaluated concerns may have been performed, little detail has been provided. In this regard, we have been provided with no other testimony or statements from SSET members or citation to documentation in the record that would otherwise support the agency's judgment that there is little schedule or cost risk associated with these evaluated concerns. Given our recommendation below that the Air Force obtain and re-evaluate revised proposals, we think that this is also a matter that the agency should consider further.

Force's evaluation that Northrop Grumman's aircraft was more advantageous in the airlift area is unreasonable.

Product Support Subfactor Evaluation

Boeing also complains that the Air Force misevaluated Northrop Grumman's proposal under the product support subfactor. This subfactor required the agency to evaluate the "offeror's proposed product support approach for an efficient, effective and comprehensive support program for the service life of the KC-X fleet." RFP § M.2.2.3. Specifically, Boeing contends that the Air Force improperly ignored Northrop Grumman's refusal to commit to providing the required support necessary to allow the agency to achieve initial organic depot-level maintenance capability within the time required by the RFP, namely, within 2 years after delivery of the first full-rate production aircraft.[73] Boeing's Post-Hearing Comments at 84. The Air Force evaluated Boeing's and Northrop Grumman's proposals to be essentially equal under the product support subfactor.[74] See AR, Tab 54, Source Selection Decision Document, at 10; Tab 55, PAR, at 34.

Offerors were informed that the long-term support concept for the KC-X program was for two levels of organic maintenance: organization level and depot level, and that a program objective was a product support approach that effectively addressed all the integrated support elements, including "[t]imely, cost effective transition to organic support." RFP, SOO for KC-X SDD, at 1-2. One of the specific minimum program tasks required by the SOO with regard to "logistics" was for the contractor to

> [p]lan for and support the Government to achieve an initial organic [depot]-level maintenance capability in accordance with the [Source of Supply Assignment Process] for core-designated workloads, at a minimum, within two years after delivery of the first full-rate production aircraft.

Id. at 14; see also RFP, SOO for KC-X LRIP and Full-Rate Production, at 1.[75] The RFP instructed offerors to ensure that their proposed contractual statements of work

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[73] "Organic" maintenance refers to maintenance that the agency does for itself as opposed to maintenance provided by the contractor. See HT at 1215.

[74] Unlike Northrop Grumman, Boeing committed to providing the required planning and support services within the specified 2-year timeframe. HT at 1221.

[75] The agency's product support subfactor team chief testified regarding this requirement:

(continued...)

(SOW) would "conform to the Government's SOO" and that "[t[he proposed SOWs shall define the tasks required for the KC-X program, ensuring all minimum requirements of the Government provided SOOs and preliminary [work breakdown structure] have been addressed." See RFP §§ L.2.1, L.8.3.7.2.

The Air Force recognized in its evaluation that, although Northrop Grumman promised to provide the necessary planning and support for the agency to achieve an initial depot-level maintenance capability, the firm did not commit to providing this required support within 2 years after delivery of the first full-rate production aircraft, as required by the RFP. Thus, at the mid-term briefing, Northrop Grumman was informed that the timing of the firm's proposed depot level maintenance support was "unclear," see AR, Tab 199, Northrop Grumman's Mid-Term Briefing, at 134, and then again at the pre-final proposal briefing, Northrop Grumman was informed that the agency had assigned it a weakness for its failure "to include the time frame for initial organic depot standup in Offeror's Production SOW (SOO states within two years after delivery of the first full-rate production aircraft)."[76] See AR, Tab 205, Northrop Grumman's Pre-Final Proposal Revision Briefing, at 141. Northrop Grumman did not resolve its failure to commit to the 2-year timeframe for this product support requirement during the procurement. In the firm's final proposal revision, Northrop Grumman stated in one place that resolution of this "timing issue will be determined in coordination with the Government at contract award" and, in another place, that action to "resolve government identified weaknesses" would occur "after contract award." See AR, Tab 187, Northrop Grumman's Final Proposal Revision, KC-X Program Summary Document, at 2-3.

In its final evaluation, the SSET evaluated Northrop Grumman's refusal to commit to providing these product support services within the 2-year timeframe as a weakness. AR, Tab 46, SSET Final Briefing to SSAC and SSA, at 360, 362. The SSAC concluded that this was an "administrative documentation oversight" because Northrop

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(...continued)

> the idea behind that is to support the government in standing up this capability, so their approach would have to include the planning and support, the planning part being those type of actionable steps that support the type of things they would support us within that time constraint.

HT at 1215.

[76] The SSET product support subfactor team chief stated that the pre-final proposal revision briefing slide erroneously did not also refer to the SDD SOW, in addition to the production SOW, and that both SOWs would be implicated by Northrop Grumman's failure to commit to providing these services within the required 2-year timeframe. See HT at 1266-67.

Grumman had promised to provide the required services and its "cost/schedule documentation is consistent with standing up depot capability within two years of delivery of the first full-rate production aircraft." AR, Tab 55, PAR, at 34. The SSA concurred with the SSAC that this was "merely an administrative oversight." AR, Tab 54, Source Selection Decision, at 10.

We agree with Boeing that Northrop Grumman's refusal to commit to the required 2-year timeframe within which to provide these depot-level maintenance planning and support services cannot be reasonably viewed as an administrative or documentation oversight. As noted above, Northrop Grumman was clearly informed several times by the Air Force of the agency's concern that the firm had not committed to the required timeframe, and Northrop Grumman responded that it was not resolving this failure before award. Although throughout the protest and during the hearing, the agency steadfastly asserted that Northrop Grumman's failure to so commit was an "oversight,"[77] see, e.g., Air Force's Memorandum of Law at 151-53, in its post-hearing rebuttal comments, the agency admitted for the first time that Northrop Grumman's "omission" appeared to be a conscious decision. See Air Force's Post-Hearing Rebuttal Comments at 9. Northrop Grumman also finally admits in its rebuttal comments that its decision to not commit to the 2-year timeframe was "intentional."[78] Northrop Grumman's Post-Hearing Rebuttal Comments at 29 n.13.

The Air Force and Northrop Grumman argue, however, that, apart from Northrop Grumman's refusal to commit to the 2-year timeframe, Northrop Grumman committed generally and specifically to performing the planning and support services solicited by the RFP in its proposal and proposal revisions, and that the firm would otherwise be obligated to perform the required services under whatever schedule the agency chooses. See, e.g., Air Force's Post-Hearing Rebuttal Comments at 11; Northrop Grumman's Post-Hearing Rebuttal Comments at 29. The parties disagree as to whether Northrop Grumman's proposal demonstrates the ability to provide the required services within 2 years of delivery of the first full-rate production aircraft, and based on our review of Northrop Grumman's proposal and

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[77] Similarly, the SSET's product support subfactor team chief doggedly insisted that Northrop Grumman's failure to agree to perform the required services within the specified time frame was merely an oversight, even where he admitted under cross examination that "Northrop [Grumman] didn't forget about this issue," that Northrop Grumman's "[final proposal revision] was not silent on the issue," and that in fact "Northrop Grumman did consider the issue; they just decided not to address it in their [final proposal revision]." See HT at 1274-76.

[78] Northrop Grumman does not explain why it made the "intentional" choice not to specifically include the 2-year requirement in the contractual SOW, even though it was repeatedly requested to do so by the Air Force.

revisions, we find that it is far from clear whether or not Northrop Grumman's proposed schedule establishes that it would perform these services within the 2-year time frame.

Whether or not Northrop Grumman's proposed schedule accommodates providing these product-support services within the 2-year timeframe misses the point, however. By explicitly refusing to contractually commit to the 2-year timeframe for providing these services in the SOW as it was repeatedly requested to do, we think that Northrop Grumman has taken exception to this solicitation requirement. See C-Cubed Corp., B-272525, Oct. 21, 1996, 96-2 CPD ¶ 150 at 3. It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. See TYBRIN Corp., B-298364.6; B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

The Air Force and Northrop Grumman also argue that the 2-year requirement is not a material solicitation provision. However, their arguments in this regard are belied by the agency's contemporaneous actions during the procurement and the testimony of the SSET product support subfactor team chief. As noted above, the agency repeatedly raised this matter with Northrop Grumman during discussions in an unsuccessful effort to have the firm commit to this solicitation requirement, and Northrop Grumman just as steadfastly refused to commit. Moreover, the SSET product support subfactor team chief identified the purpose or intent of this particular SOO requirement as follows: "It was a binding function to bind it to a specific time line," see HT at 1216, and that this 2-year requirement was "an important requirement." HT at 1245. We find, from our review of the record, that the requirement to plan for and support the agency's achieving an initial organic depot-level maintenance capability within 2 years after delivery of the first full-rate production aircraft was a material requirement.

In sum, the Air Force improperly accepted Northrop Grumman's proposal, where that proposal clearly took exception to a material solicitation requirement.[79]

System Integration and Software Subfactor Evaluation

Boeing also complains that, although both firms were evaluated as acceptable but with a moderate risk under the system integration and software subfactor, the Air Force should have viewed Northrop Grumman's proposal as riskier than Boeing's. See Boeing's Comments at 100-01. The Air Force states that it viewed both firms'

[79] In any event, the SSAC's and SSA's judgment that the firms' proposals were essentially equal under the product support subfactor is undermined by their erroneous conclusion that Northrop Grumman's failure to commit to the 2-year timeframe was an oversight.

offers of substantial software reuse to be risky, and this, with other weaknesses the agency noted in each firm's proposal under this subfactor, resulted in an assignment of a moderate risk. We see no basis in this record to object to the agency's evaluation under this subfactor.

Program Management Subfactor Evaluation

Boeing also complains that the Air Force did not reasonably assess schedule or cost risks under the program management subfactor with respect to Northrop Grumman's proposed changes during contract performance in its production approach and production lines. See Boeing's Comments at 75-96. The Air Force contends that Northrop Grumman agreed to appropriate mitigation measures that supported the agency's conclusion that the firm presented low cost or schedule risk under the program management subfactor. From our review of the record, including hearing testimony on this issue, we do not find a basis to object to the Air Force's evaluation of Northrop Grumman's proposal under this subfactor.

Past Performance Factor Evaluation

Boeing also challenges the Air Force's evaluation of Boeing's and Northrop Grumman's past performance, arguing that the agency's assessment of the relevance of contracts to be considered was unreasonable, that the agency treated the offerors disparately, and that the past performance evaluation judgments were not adequately documented. See Boeing's Comments at 148. We find from our review of the record no basis to object to the Air Force's past performance evaluation, under which both firms' past performance received a satisfactory confidence rating. We also find no basis to question the SSA's judgment that, despite the equal confidence ratings that the firms received under this factor overall, Northrop Grumman's higher "satisfactory confidence" rating, as compared to Boeing's "little confidence" rating, under the program management area was a reasonable discriminator. The Air Force evaluated Boeing's past performance as marginal in this area based on the agency's judgments as to Boeing's program management performance under the [Deleted] contract, the [Deleted] contract, and the [Deleted] contract. We have no basis, on this record, to find the Air Force's judgment unreasonable.

IFARA Factor Evaluation

Boeing also challenges the Air Force's evaluation of the firms' proposals under the IFARA evaluation factor. Boeing complains that the Air Force unreasonably concluded that Northrop Grumman's proposed aircraft was superior to Boeing's under this factor based only upon the fleet effectiveness value and without considering evaluated major insights and observations, which Boeing asserts favored its proposal. See Boeing's Comments at 146. Our review of the record discloses that the SSAC and SSA did consider the agency's evaluated insights and observations in

their evaluation of the firms' proposals under this factor, and therefore find no basis to object to the agency's evaluation.

Evaluation of MILCON Costs

Boeing also complains that the Air Force did not reasonably evaluate the firms' cost/price proposals in accordance with the RFP. As noted above, the solicitation provided that the Air Force would calculate an MPLCC estimate for each offeror, which reflected the agency's independent estimate of all contract, budgetary, and other government costs associated with all phases of the aircraft's life cycle from SDD through production and deployment and O&S; MILCON costs were specifically identified as a cost that the agency would evaluate in calculating the firms' MPLCCs. See RFP § M.2.5.2. Boeing contends that the Air Force's evaluation of MILCON costs greatly understated the difference between the firms' MILCON costs and that Northrop Grumman's much larger and heavier aircraft would have correspondently higher MILCON costs. See Boeing's Comments at 110-18; Boeing's Post-Hearing Comments at 117-18.

The Air Force disputes Boeing's complaint, contending that it reasonably assessed the likely life cycle costs associated with each firm's proposed aircraft. In this regard, the agency states that, because it did not know at which bases ("beddown sites") the new KC-X aircraft would be assigned, it conducted site surveys at four airbases ([Deleted] Air Force Base (AFB), [Deleted] AFB, [Deleted] AFB, and [Deleted] AFB) to determine what military construction would be required at those bases for the offerors' proposed aircraft. The agency then extrapolated those results to six other airbases to calculate the agency's MILCON costs for the offerors. Air Force's Memorandum of Law at 221-22; Air Force's Post-Hearing Comments at 120-22. As indicated above, the agency added $[Deleted] billion in MILCON costs to Boeing's MPLCC and $[Deleted] billion in MILCON costs to Northrop Grumman's MPLCC. AR, Tab 55, PAR, at 40-43.

An agency's life cycle cost evaluation, like other cost analyses, requires the exercise of informed judgment concerning the extent to which proposed costs or prices represent a reasonable estimation of future costs. Our review of the agency's cost analysis is limited to the determination of whether the evaluation was reasonable and consistent with the terms of the RFP. See Cessna Aircraft Co., B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132 at 21. The agency's analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate to provide some measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are realistic in view of other cost information reasonably available to the agency at the time of its evaluation. See Information Ventures, Inc., B-297276.2 et al., Mar. 1, 2006, 2006 CPD ¶ 45 at 7.

As a threshold matter, the Air Force admits that in "defending this protest" it discovered five errors in its assessment of MILCON costs, which, when corrected,

would result in Boeing displacing Northrop Grumman as the offeror with the lowest evaluated MPLCC. Specifically, the Air Force states that it underestimated Northrop Grumman's MILCON costs by $122.5 million, and overestimated Boeing's costs by $3.3 million. After correction of these $125.8 million in errors, Boeing's MPLCC would be $108.041 billion and Northrop Grumman's would be $108.133 billion.[80] Air Force's Memorandum of Law at 201-02.

Here, the record shows that the agency's MILCON cost evaluation was otherwise flawed. In this regard, the RFP contemplated that the agency's MILCON cost evaluation would be based upon "the offeror's proposed KC-X aircraft solution," see RFP § M.2.5.2.4, which is consistent with the rule that an agency must consider an offeror's proposed approach in estimating the likely costs associated with that offeror's proposal. See Hughes STX Corp., B-278466, Feb. 2, 1998, 98-1 CPD ¶ 52 at 8. The record shows, however, that the agency's evaluation of MILCON costs was based upon site surveys that were conducted prior to the receipt of proposals in response to the RFP. HT at 472-73, 1293; Air Force's Post-Hearing Comments at 120. Admittedly, the agency's site surveys were based upon the size and dimensions of the A330-200 and 767-200, the commercial aircraft from which the offerors' proposed KC-X aircraft were derived. See, e.g., AR, Tab 297, Site Survey Report for [Deleted] Air Force Base, at 3. However, it is equally clear that the Air Force could not and did not evaluate MILCON costs associated with some aspects of the offerors' proposed aircraft because the site surveys were conducted before the receipt of proposals, and no further evaluation of the additional MILCON costs for the improvements/changes necessary to support each of these particular aircraft was performed after the proposals were received.

For example, although the Air Force recognizes that there will be a "need for seat storage" associated with the KC-X aircraft, the survey teams were unable to assess the likely MILCON costs associated with this need because, at the time of the surveys, the agency did not know the number of seats associated with the firms' respective aircraft.[81] See Air Force's Post-Hearing Comments at 127. Accordingly, at [Deleted] AFB, the team assumed that the offerors' aircraft had seating capacities similar to that of the KC-10 and, on this basis, concluded that the facilities at [Deleted] AFB were adequate. HT at 497. The KC-10, however, has only 75 seats, which is far less than the [Deleted] seats carried by the KC-30 and less than the

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[80] Thus, the Air Force essentially concedes that the conclusion in the source selection decision that Boeing's evaluated MPLCC was more than Northrop Grumman's was in error. [In preparing the public version of the protected decision, as the Air Force correctly points out, one of the five acknowledged errors was actually with respect to repair costs. The magnitude of these five errors remains unchanged.]

[81] The KC-30 is capable of carrying [Deleted] passengers, while the KC-767 can carry [Deleted] passengers. AR, Tab 55, PAR, at 18-19.

[Deleted] seats carried by the KC-767. Similarly, at [Deleted] AFB, the survey team assigned no MILCON costs associated with seat storage because it determined, without any actual knowledge of the number of seats the proposed aircraft would carry, that there would be adequate storage available. Air Force's Post-Hearing Comments at 128. At [Deleted] AFB, the survey team concluded that there would be insufficient storage space to accommodate the seats and that an additional storage facility would need to be constructed; the cost of this facility ($[Deleted] million) was estimated to be the same for both offerors because the team did not know how many seats the aircraft carried and therefore "assigned a seat requirement the same for both aircraft." HT at 499-500.

As another example, the survey team at [Deleted] AFB noted that the battery shop at the base may not have enough capability to service the batteries for the KC-X aircraft, if the new aircraft used different batteries from the other aircraft (the KC-135 and C-17 aircraft) at the base. AR, Tab 297, Site Survey Report for [Deleted] AFB, at 13. The team assigned no cost for this concern:

> Battery concern was noted because we did not know what the requirements were for the two different batteries, since we did not know the battery type on the A330, does that mean you only need to be separated by certain amount of spaces in the facility? Could you put up a wall? Would you actually need a whole new facility? So we didn't have enough detail to know if we needed to build anything or if there was going to be no cost.

HT at 506. Other hearing testimony indicated that Boeing's proposed aircraft uses the same batteries as the [Deleted] aircraft, but that Northrop Grumman's aircraft may not. HT at 546-47; see also Boeing's Comments at 116.

Also unexplained in the contemporaneous record is the agency's failure to consider in its evaluation of MILCON costs the offerors' own estimates of likely MILCON at Fairchild AFB that were included in their proposals. Specifically, the RFP instructed offerors, as part of its response to the product support subfactor, to

> describe the offeror's approach to meet the government's 2-level maintenance requirements. This proposal shall lay out:
>
> * * * *
>
> KC-X facilities, infrastructure requirements and design criteria.
>
> Facilities required to support the first operational bed down location at (assume Fairchild AFB, WA), including requirements for space, utilities or special requirements (such as clean rooms, special storage, etc.) with sufficient detail to assess installation capabilities to support the KC-X. The offeror shall describe facilities

> recommended to support the KC-X aircraft. The offeror shall, at a minimum, address the square footage for parking, maintenance facilities, infrastructure (e.g., power requirements, compressed air, office requirements, storage), personnel, and support equipment required to operate two squadrons of 16 aircraft for Main Operating Base (MOB) 1 and MOB 2. MOB 3, MOB 4 and MOB 5 will be determined at a later date.

RFP §§ L.4.2.4.4, L.4.2.4.4.5, L.4.2.4.4.6.

Northrop Grumman informed the Air Force in its proposal that based upon a

> [Deleted].

AR, Tab 167, Northrop Grumman's Pre-Final Proposal Revision, vol. II, Mission Capability/Proposal Risk, Book 2, at II-SF3-48. Northrop Grumman also informed the agency that, among other changes that would be needed, [Deleted] in an identified building on Fairchild AFB would require "[Deleted]." Id. at II-SF3-49.

The Air Force argues that it was reasonable to ignore the offerors' views as to the sufficiency of the facilities at Fairchild AFB with respect to their proposed aircraft because this information was requested in the solicitation instructions for the product support subfactor, and the offerors were not informed that this information would be used in the agency's evaluation of MPLCCs.[82] See Air Force's Post-Hearing Rebuttal Comments at 22-23. The agency does not explain, however, for what purpose this information was requested if not to aid in its evaluation of the facilities that would be needed to support the KC-X aircraft at Fairchild AFB. Given that both offerors responded to this solicitation instruction, it is apparent that neither offeror was confused as to the purpose of this instruction, which plainly sought the offerors' views as to whether the facilities at Fairchild AFB were adequate for their respective aircraft. In short, we find no reasonable basis to ignore the information that both offerors provided with respect to the adequacy of, or need for changes to, facilities with respect to their proposed aircraft.

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[82] The Air Force also suggests that the RFP "directed that the MILCON portion of the MPLCC would be estimated entirely by the Air Force, with inputs from both Air Mobility Command (AMC) and Air Force Materiel Command (AFMC)." Air Force's Post-Hearing Comments at 119; see Air Force's Memorandum of Law at 221. This argument is based upon section M.2.5.2.4 of the RFP, which informed offerors that the agency's assessment of MPLCC would include evaluating MILCON costs and further informed offerors: "Note: Air Mobility Command and Air Force Materiel Command are estimating MILCON." This section does not, however, inform offerors that the Air Force would not consider their proposals in preparing this estimate.

We also find, as described below, that the record does not otherwise demonstrate the reasonableness of the Air Force's notional (hypothetical) methodology for assessing likely MILCON costs. A notional beddown plan was developed because the agency did not know where the KC-X aircraft would be assigned. Under this scheme, the KC-X aircraft would be assigned in specified numbers to a test base (Air Force Materiel Command), a training base (Air Education & Training Command), three major operating bases (Air Mobility Command) within the continental United States (CONUS), four air reserve command (ARC) bases, and two major operating bases outside the continental United States (OCONUS).[83] See AR, Tab 309, Notional KC-X Beddown Plan Memorandum, June 29, 2007. As noted above, to assess the MILCON costs associated with each offeror's aircraft, the agency conducted site surveys at [Deleted] AFB, [Deleted] AFB, and [Deleted] AFB (major operating bases) and at [Deleted] AFB (a training base). See Air Force's Memorandum of Law at 221-22. The agency then extrapolated the results of its [Deleted] AFB survey to six other bases (four unspecified air reserve command bases and two unspecified OCONUS major operating bases) to calculate the agency's MILCON costs for the offerors. With respect to the two OCONUS airbases, the agency added a 10-percent premium to the extrapolated costs. Air Force's Post-Hearing Comments at 122. The sole reason identified by the Air Force for selecting [Deleted] AFB as the base from which it would extrapolate costs to the four ARC airbases and two OCONUS major operating bases was that a roughly comparable number of aircraft would be assigned at each of these bases. See HT at 63, 1299-1300; Air Force's Post-Hearing Comments at 122.

Where, as here, anticipated requirements cannot be reasonably ascertained, an agency may establish a reasonable hypothetical, or notional, plan to provide for a common basis for evaluating costs. See, e.g., PWC Logistics Servs., Inc., B-299820, B-299820.3, Aug. 14, 2007, 2007 CPD ¶ 162 at 11-15 Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 11. But that said, we are unable to conclude on this record that the agency's extrapolation of the [Deleted] AFB MILCON costs to the ARC airbases provided a reasonable basis to evaluate these costs. In this regard, Boeing argues that [Deleted] AFB, as a former Strategic Air Command, bomber base, has "a great deal more infrastructure" than do ARC airbases and thus cannot be used as a reasonable forecast of potential MILCON costs, such as for pavement improvements for runways, ramps, and parking aprons, at other bases. See Boeing's Post-Hearing Comments at 136-41.

Although the Air Force dismisses Boeing's argument as being speculative and argues that many ARC airbases have substantial infrastructure, see Air Force's Post-Hearing Rebuttal Comments at 28, the agency has not produced any explanation for selecting [Deleted] AFB other than its similar squadron size, nor presented any evidence, either through testimony or by reference to documentation in the record, showing

[83] The test base was not included in the agency's MILCON cost evaluation.

why the infrastructure at [Deleted] AFB would be similar enough to ARC airbases to find that the costs evaluated for [Deleted] AFB are a reasonable representation of the MILCON costs to be expected for ARC airbases.

Similarly, no evidence has been presented by the Air Force to explain why the application of a 10-percent premium to the costs assessed for [Deleted] AFB provides a reasonable estimate of MILCON costs for the OCONUS major operating bases. In this regard, Boeing contends, with no rebuttal, that the OCONUS airbases would have different issues associated with MILCON costs, such as compliance with foreign labor laws and foreign exchange rates, and that overseas bases would have to accommodate parking for all of the assigned KC-X aircraft, as opposed to the 75 percent of assigned aircraft that was done for CONUS airbases, such as [Deleted] AFB. See Boeing's Post-Hearing Comments at 137. The only evidence supporting the 10-percent factor is the testimony of the agency's SSET cost/price factor team chief that it was "based on estimator judgment" of one of the cost/price factor evaluators. HT at 209. No contemporaneous written description or explanation of that judgment has been provided for the record, however.

In sum, we do not find reasonable support in the record for the agency's evaluation of the MILCON costs.

Evaluation of Boeing's Non-recurring Engineering Costs

Boeing also protests the Air Force's MPLCC adjustment for Boeing's estimated non-recurring engineering costs in the SDD phase of the contract. The Air Force added $[Deleted] million to the MPLCC beyond the $[Deleted] billion for non-recurring engineering that Boeing estimated for the SDD phase. Boeing states that its proposal approach is to acquire the baseline 767-200 LRF aircraft (which Boeing asserts and the Air Force concedes is a commercial item) from its commercial division, BCA, under a fixed-price subcontract, and that its estimated non-recurring engineering costs are included in the subcontract's fixed price.[84] Boeing argues that the agency unreasonably did not accept Boeing's commercial data in support of its estimated non-recurring engineering costs, and that it was improper to add costs to its MPLCC, given that the non-recurring engineering costs are part of a fixed-price subcontract for a commercial item. See Boeing's Comments at 118-22.

The Air Force responds that, despite repeated discussions with Boeing regarding the firm's need to substantiate its estimated non-recurring engineering costs, see, e.g., AR, Tab 116, EN BOE-CP-001, EN BOE-CP-023, Boeing did not adequately support its estimated non-recurring engineering costs, and that the agency therefore concluded

[84] The SDD aircraft are provided to the Air Force under a cost reimbursement line item.

that there was a moderate risk associated with Boeing's non-recurring engineering cost estimate, although the agency did not determine that Boeing's estimated non-recurring engineering costs were unrealistic. COS at 136-37; HT at 111-12.

The agency also decided that it was necessary to upwardly adjust the MPLCC by $[Deleted] million to reflect this risk. To calculate this amount, the agency used a "Monte Carlo" analysis,[85] and concluded that Boeing was likely to incur a 36-percent cost growth with respect to its non-recurring engineering costs during the SDD phase of the procurement, which the agency then adjusted to account for a cost sharing provision that Boeing had proposed. COS at 139-40; HT at 221. The agency also states that as a "crosscheck" it looked at Boeing's P-8A Poseidon Multi-Mission Maritime Aircraft contract with the Navy, under which the Air Force contends that Boeing had an overall [Deleted]-percent cost growth, and that this compared favorably with the overall 36-percent cost growth it forecast using its Monte Carlo model. Air Force's Memorandum of Law at 205-06.

We find reasonable the agency's assignment of a moderate risk to Boeing's proposal because of its failure to adequately substantiate its SDD non-recurring engineering costs. As noted above, the RFP placed upon the offerors the responsibility for substantiating their cost estimates. See, e.g., RFP §§ L.6.1.2, 6.4.7. Here, the Air Force found, reasonably we conclude, that despite repeated requests during discussions Boeing failed to substantiate its SDD non-recurring engineering cost estimate. In this regard, we disagree with Boeing that, even if its purchase of the baseline aircraft from its commercial division, is considered to be the purchase of a commercial item, this prohibited the Air Force from requesting substantiating cost information from Boeing. Although FAR § 15.403-1(b)(3) provides that a contracting officer should not request the submission of certified cost or pricing data when a commercial item is being procured, this does not limit the right of the agency to request other cost information to determine price reasonableness or realism. See FAR § 15.403-3(c). We also note that it is not clear that the subcontract between Boeing and its commercial division is a fixed-price subcontract, as Boeing asserts, given Boeing's response in discussions that indicated that the price would not be

[85] A Monte Carlo simulation is a cost risk analysis model that is generally used for quantifying the lowest and highest possible costs of weapons systems, based upon estimated costs of various components. See TRW, Inc., B-234558, June 21, 1989, 89-1 CPD ¶ 584 at 3 n.1. Developed in 1946 by a mathematician who pondered the probabilities associated with winning a card game of solitaire, a Monte Carlo simulation is used to approximate the probability outcomes of multiple trials by generating random numbers. In determining the uncertainty associated with a program's point estimate, a Monte Carlo simulation randomly generates values for uncertain variables over and over to simulate a model. Cost Assessment Guide: Best Practices for Estimating and Managing Program Costs, GAO-07-1134SP, July 2007, at 154.

fixed until the aircraft's configuration specifications were established, which had not yet happened. See AR, Tab 119, Boeing Response to EN BOE-K-015, at 2-3; Tab 259, Subcontract between Boeing and BCA.

Nevertheless, as discussed below, we conclude for a somewhat different reason that the Air Force's MPLCC adjustment of Boeing estimated non-recurring engineering costs for SDD was unreasonable. When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. Earl Indus., LLC, B-309996, B-309996.4, Nov. 5, 2007, 2007 CPD ¶ 203 at 8. As a result, a cost realism analysis is required to determine the extent to which an offeror's proposed costs represent the offeror's likely costs in performing the contract under the offeror's technical approach, assuming reasonable economy and efficiency. See FAR §§ 15.305(a)(1), 15.404-1(d)(1). A cost realism analysis involves independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR § 15.404-1(d)(1); Advanced Commc'n Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3 at 5. Based on the results of the cost realism analysis, an offeror's proposed costs should be adjusted "to realistic levels based on the results of the cost realism analysis." FAR § 15.404-1(d)(2)(ii).

Here, the record shows that the Air Force made no determination that Boeing's estimated $[Deleted] billion for SDD non-recurring engineering costs was unrealistic. See Air Force's Post-Hearing Comments at 90-91. In this regard, the SSET cost/price factor team chief testified under cross examination as follows:

> Q: Yes. You're supposed to look at whether what – what Boeing proposed for the [non-recurring engineering], for the fixed price [non-recurring engineering] was realistic for the work to be performed. . . .
>
> A: No.
>
> * * * *
>
> Q: But when you made your adjustment, for example, one of the things that I would expect you would do is you would try to make an adjustment to make it, looking at the third item there, consistent with unique methods of performance and materials described in the offeror's technical proposal. Did you make any adjustments consistent with the unique methods of performance and materials described in Boeing's proposal when you adjusted upward using this Rand study?

A: We added cost risk.

HT at 111-12.

The Air Force and Northrop Grumman argue that section M.2.5.2.5 of the RFP provided for the quantification of "pure cost risk," and for including that quantified dollar amount in the agency's evaluated MPLCC. Air Force's Post-Hearing Comments at 87; Northrop Grumman's Post-Hearing Comments at 27-28. We disagree. This solicitation section states in its entirety:

> Risk Adjustments. The Government will assess the technical, cost, and schedule risk for the entire most probable life cycle cost estimate based upon the offeror's proposed approach. The Government will perform a Schedule Risk Assessment (SRA) and quantify the schedule risk accordingly. The Government will also assess risks associated with technical content as identified in the evaluation of the Mission Capability factor/subfactors 1 through 4, and other pure cost risks as identified during the cost evaluation. The impact of technical, schedule, and/or cost risk will be quantified (dollarized), where applicable, and included in the MPLCC. Additionally, the Government reserves the right to adjust budgetary estimates for technical, cost, and schedule risk.

RFP § M.2.5.2.5.

We do not agree that this section allows the agency to upwardly adjust the cost element of an offeror's "probable" costs of performance where the agency does not conclude that the proposed cost element is unrealistic or not probable. Rather, we find that this section allows the agency to assess the risk associated with an offeror's probable costs and, "where applicable," to quantify that risk and add the quantified amount in the agency's evaluated MPLCC for an offeror.[86] The increase to the

[86] We have in a number of decisions explained the relationship between probable cost adjustments and proposal risk, but in no case have we found that an agency's adjustment of an offeror's proposed costs of performing a contract should be based only upon risk, and not upon a reasoned assessment of the realism of the proposed costs being adjusted. Thus, for example, we have recognized that an agency is not required to upwardly adjust an offeror's proposed costs which the agency found realistic, even where the agency also assessed some risk with regard to those costs. See, e.g., ITT Indus., Inc., B-294389 et al., Oct. 20, 2004, 2004 CPD ¶ 222 at 15-16; Vinnell Corp., B-270793, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271 at 6. Conversely, an agency may both make cost realism adjustments and assign proposal risk, where "the cost adjustments are necessary to reflect the offeror's probable costs of performance based on its proposal," and that there continued to be proposal risk

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MPLCC is "applicable" where the agency concludes that the higher number is more probable or more realistic than the lower one. The Air Force's and Northrop Grumman's reading is also inconsistent with other sections of the RFP that provided that the Air Force would assess the realism of offerors' proposed costs in accordance with FAR § 15.404-1 and that the agency's evaluated MPLCCs would be the agency's estimates of the probable or likely life cycle costs associated with the offerors' aircraft. See RFP §§ M.2.5.1.1, M.2.5.2. Such a reading is also inconsistent with FAR § 15.404-1, which, as noted above, provides for adjusting an offeror's proposed costs "to realistic levels based on the results of the cost realism analysis." See FAR § 15.404-1(d)(2)(ii).

Moreover, even assuming a cost realism adjustment would have been proper in this case, we do not find reasonable the agency's use here of its Monte Carlo simulation model. Although we have recognized that a Monte Carlo model can be a useful evaluation tool, see TRW, Inc., supra, at 5, the validity of a Monte Carlo simulation, like all cost estimation models, depends upon the quality of the data used in the simulation or model. See Cost Assessment Guide: Best Practices for Estimating and Managing Program Costs, supra, at 144. Here, the cost evaluators used three inputs, "best case, worst case, and most likely case," in the Monte Carlo simulation to provide for a triangular distribution. HT at 29. Those three inputs were: (1) no cost growth (the best case); (2) 28-percent cost growth, which was derived from a GAO report, AR, Tab 281, Defense Acquisitions: Major Weapon Systems Continue to Experience Cost and Schedule Problems under DoD's Revise Policy, GAO-06-368, April 2006, (the most likely case); and (3) 58-percent cost growth, which was derived from a Rand Corporation study, AR, Tab 282, Historical Cost Growth of Completed Weapon System Programs, (RAND 2006), (the worst case). See COS at 139. These reports, however, are discussing weapon systems and cost growth at an overall program level, and the reported cost growth would likely be attributable to a number of factors, including program changes and delays. In any event, we fail to see how overall program cost growth is a reliable predictor of anticipated growth in a single cost element, such as non-recurring engineering costs, nor has the Air Force or Northrop Grumman provided any explanation as to why that should be so.[87]

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despite the cost adjustment. See Raytheon Co., B-291449, Jan. 7, 2003, 2003 CPD ¶ 54 at 16 n.12.

[87] Similarly, we do not see any validity to using the overall cost growth associated with the Boeing's Multi-Mission Maritime Aircraft contract with the Navy to forecast cost growth associated with Boeing's SDD non-recurring engineering costs. In addition, Boeing asserts, without rebuttal, that the cost growth under that contract was due to reasons unrelated to non-recurring engineering costs. See Boeing's Protest at 85.

Cost Evaluation Errors Conclusion

In sum, we find that the Air Force unreasonably evaluated the MILCON costs associated with the firms' proposed aircraft and unreasonably adjusted Boeing's estimated non-recurring engineering costs, without finding those costs to be unrealistic. The correction of these errors in the Air Force's cost evaluation result in Boeing's MPLCC being lower than that of Northrop Grumman's.[88]

Other Cost Issues

Boeing also challenges a number of other aspects of the Air Force's evaluation of its cost proposal, including the Air Force's addition of $[Deleted] billion to Boeing's proposed costs for budgetary aircraft (lots 6 through 13) and the addition of $[Deleted] billion to reflect additional O&S repair costs. In addition, Boeing challenges a number of aspects of the Air Force's evaluation of Northrop Grumman's proposed costs, including that the agency did not evaluate the fuel costs associated with that firm's larger and heavier aircraft and the costs of upgrades (such as the [Deleted]) that may be added to Northrop Grumman's aircraft in the future. We find no basis from our review of the record to object to the agency's evaluation of these other aspects of the Air Force's evaluation of costs.[89]

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[88] The Air Force argues that Boeing is not prejudiced by these errors because the SSA in [the SSA's] selection decision stated that [the SSA] would have selected Northrop Grumman's proposal for award "even if Boeing's proposed cost/price had not been adjusted upward by the Government and Boeing's cost/price risk rating for SDD had been rated as LOW." AR, Tab 54, Source Selection Decision, at 19-20. We disagree. As concluded above, the Air Force erred in the evaluation of technical proposals and the conduct of discussions and this statement by the SSA does not address any of those errors. In any event, this statement by the SSA, which is unsupported by specific analysis, would not seem to reflect the reasoned consideration of cost or price to the government that a selection official is required to provide in performing a trade-off analysis. See, e.g., Shumaker Trucking and Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD 169 at 6.

[89] The Air Force's evaluation of the fuel costs associated with the firms' proposed aircraft has been the subject of much argument and hearing testimony, and the record indicates that the agency did not do much more than an assessment that the offerors' own proposed fuel burn rates (gallons of fuel burned per hour) was reasonable. The record also shows, however, that even a small increase in the amount of fuel that is burned per hour by a particular aircraft would have a dramatic impact on the overall fuel costs (for example, Boeing notes that even a [Deleted]-percent increase in the amount of fuel per hour that is burned by the KC-30 would result in a $[Deleted] million increase in Northrop Grumman's life cycle costs for fuel, see Boeing's Post-Hearing Comments, at 139). Given our recommendation below that the Air Force reevaluate proposals and obtain revised proposals, this is

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CONCLUSION AND RECOMMENDATION

This decision should not be read to reflect a view as to the merits of the firms' respective aircraft. Judgments about which offeror will most successfully meet governmental needs are largely reserved for the procuring agencies, subject only to such statutory and regulatory requirements as full and open competition and fairness to potential offerors. Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3 at 43. Here, we find, as described above, a number of errors in the Air Force's conduct of this procurement, including the failure to evaluate proposals in accordance with the RFP criteria and requirements and to conduct discussions in a fair and equal manner. But for these errors, we believe that Boeing would have had a substantial chance of being selected for award.[90] Accordingly, we sustain Boeing's protest of the Air Force's award of a contract to Northrop Grumman for the aerial refueling tankers.

The protest is sustained.

We recommend that the Air Force reopen discussions with the offerors, obtain revised proposals, re-evaluate the revised proposals, and make a new source selection decision, consistent with this decision. If the Air Force believes that the RFP, as reasonably interpreted, does not adequately state its needs, the agency should amend the solicitation prior to conducting further discussions with the offerors. If Boeing's proposal is selected for award, the Air Force should terminate the contract awarded to Northrop Grumman. We also recommend that Boeing be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Boeing should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel

(...continued)
another matter that the agency may wish to review to ascertain whether a more detailed analysis of the fuel costs is appropriate.

[90] Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. See McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed.Cir. 1996).

WITNESS RESPONSES TO QUESTIONS ASKED DURING THE HEARING

JULY 10, 2008

RESPONSE TO QUESTION SUBMITTED BY MR. SKELTON

Secretary YOUNG. It is important to note that industrial policy issues such as the health of the overall industrial base supporting defense are broader than individual source selections. The primary focus of the source selection process is to select the best acquisition option, evaluated on the basis of warfighting capability, cost, and schedule. However, the Department also has in place the industrial policies and structured procedures necessary to identify, evaluate, and preserve when necessary essential industrial and technological capabilities that might otherwise be lost. Within these policies and procedures, the Department has the ability to establish, and has established, administratively imposed (by DOD policy, not statute) restrictions within the Defense Federal Acquisition Regulations (DFARS) precluding the use of foreign products for specific defense applications when necessary to ensure military readiness.

10 U.S.C. 2440 requirements are implemented by Federal Acquisition Regulations (FAR) Part 34 and Department of Defense Initiative (DODI) 5000.2, which require development of a program acquisition strategy, and the Defense Acquisition Guidebook (Chapter 2.3. Systems Acquisition: Acquisition Strategy), which describes best practices. The Industrial Capability section of the Guidebook states that "to satisfy 10 U.S.C. 2440, development of the acquisition strategy should include an analysis of the industrial base capability to design, develop, produce, support, and, if appropriate, restart an acquisition program." The Guidebook further describes that the industrial capability analysis (as summarized in the Acquisition Strategy) should consider DOD investments needed to create or enhance certain industrial capabilities; and the risk of industry being unable to provide program design or manufacturing capabilities at planned cost and schedule.

When the analysis indicates that industrial capabilities needed by the Department of Defense are in danger of being lost, the DOD Components should determine whether government action is required to preserve the industrial capability.

Industrial capability assessments are conducted at Milestones B and C. In addition, earlier in the program—at Milestones A and B or whenever technology opportunities are identified—market surveys are conducted. The market survey is a primary means of determining the availability and suitability of commercial items and the extent to which these items have broad market acceptance, standards-organization support, and stability. Market research supports the acquisition planning and decision process, supplying technical and business information about commercial technology and industrial capabilities. Market research tailored to program needs continues throughout the acquisition process and during post-production support. FAR Part 10 addresses market research and FAR Subpart 7.1 requires the acquisition plan to include the results of completed market research and plans for future market research.

With respect to the KC–X, the Department has already conducted several industrial capabilities-related assessments and more are planned. It is important to note that because the majority of technological and industrial capabilities employed by the KC–X are commercial in nature, the Department focused its attention on those capabilities that are defense-unique.

In 2003, the Air Force identified aerial refueling as a "defense-unique capability" and evaluated companies that produced boom refueling equipment to determine their technical capabilities and financial viability.

In December 2006, to support source selection, the Air Force completed the official KC–X program market analysis required by the Program Acquisition Strategy. The result of the market research confirmed the most cost effective solution to the Air Force requirement for a new aerial refueling tanker to replace the current tanker fleet was a new medium-to-large commercial-derivative aircraft modified to meet specific military requirements for refueling, net-centric communication, cargo capacity, and aeromedical evacuation. Two companies indicated a willingness and capability to perform the entire set of tasks. Because the contemplated tanker aircraft were to be commercial-derivative aircraft, the Air Force market research team evaluated risks associated with the KC–X program by reviewing industry publications and technical studies, attending industry technical symposia, as well as visiting air-

craft manufacturers, potential engine suppliers, companies specializing in aircraft modification and overhaul, U.S. and European aircraft certification agencies, current and projected future refueling tanker users (i.e., militaries of United Kingdom and Australia), airlines, supply chain managers, and other military users of commercial-derivative aircraft. During those evaluation visits, the team reviewed the performance characteristics of the proposed commercial items and ability of those items to meet user requirements, the extent to which the follow-on support systems were unique or common to already-fielded fleets, commercial contracting business practices being employed to date, and how technology insertion was and could be handled. Specifically, the team evaluated contracting, test and evaluation, logistics, program management, and engineering as they applied to ongoing programs and how they might apply to the KC–X program. The survey identified no industrial or technological problems that would negatively impact program performance. The Air Force summarized the results of the market research in the Milestone B Acquisition Strategy.

In March 2008, following the source selection decision, the Air Force and the Office of the Deputy Under Secretary of Defense for Industrial Policy conducted a post source selection industrial capabilities assessment to evaluate the industrial base impacts of the KC–45A tanker award, focused on: (1) the extent to which the decision promoted/retarded a competitive marketplace; (2) the viability of any associated essential industrial/technological capabilities; and (3) potential economic impacts on Boeing as an enduring competitor for defense products.

All assessments completed to date have concluded that the industrial base is well positioned to not only meet the needs of the KC–X program, but also the Department's future tanker requirements. Moreover, assessments did not identify any technological or industrial problems that would negatively impact program performance, nor did they identify any at-risk essential technological or industrial capabilities.

In accordance with DODI 5000.2 and the Defense Acquisition Guidebook, the KC–X program will revisit and update these industrial capability assessments for future milestone decisions. System producibility will be addressed in detail at the Milestone C decision. [See page 50.]

RESPONSE TO QUESTION SUBMITTED BY MR. DICKS

Secretary YOUNG. In a May 4, 2007 memorandum, the Department of Defense formally non-concurred with the Government Accountability Office (GAO) findings, citing the lack of passenger and cargo analysis as "contrary to fact." Through the Joint Capabilities Integration and Development System (JCIDS) process, the Air Force presented analysis and rationale for the passenger and cargo capability required in its replacement tanker aircraft. The Joint Requirements Oversight Council (JROC) and the Air Force concluded that the analysis was sufficient justification for the capability, and the JROC validated the passenger and cargo requirement (See Capability Development Document for KC–135 Replacement Aircraft (KC–X), December 27, 2006). Requirements so promulgated are deemed sufficient to initiate an acquisition program. As required by section 2366a of title 10, United States Code, I certified on February 28, 2008 that the JROC had accomplished its duties, including an analysis of the operational requirements for the program. [See page 64.]

RESPONSE TO QUESTION SUBMITTED BY MR. ABERCROMBIE

Mr. GORDON. GAO prepared a document that identifies the protests of Air Force procurements that were sustained during fiscal years 2005 through 2008 and that describes the bases for the sustains. GAO has not identified trends beyond what is in the document. [See page 11 and document on page 98.]

RESPONSE TO QUESTION SUBMITTED BY MRS. BOYDA

Secretary YOUNG. As part of the life cycle cost analysis, the government will use $4.07 in Fiscal Year 2008 as the price for a gallon of gas (jet fuel). Fuel cost per gallon will be updated at final proposal revision to reflect latest available information at that time. [See page 45.]

RESPONSE TO QUESTION SUBMITTED BY MR. MILLER

Mr. GORDON. As we explained at the hearing, the protest was handled by GAO attorneys, and no GAO attorneys are within the IFPTE bargaining unit. Since the hearing, we have verified, and we can now confirm and expand on a number of points that we made at the hearing. During the protest, the attorneys responsible for drafting the decision consulted with four other GAO employees who are not attorneys. Specifically, the attorneys consulted with one analyst, who is within the IFPTE bargaining unit, and three other employees who are not (two economists and an assistant director). These employees provided technical assistance to GAO's attorneys handling the protest, but did not have any substantive input into GAO's resolution of the protest. [See page 21.]

RESPONSE TO QUESTION SUBMITTED BY MR. TIAHRT

Secretary YOUNG. It is important to note that industrial policy issues such as the health of the overall industrial base supporting defense are broader than individual source selections. The primary focus of the source selection process is to select the best acquisition option, evaluated on the basis of warfighting capability, cost, and schedule. However, the Department also has in place the industrial policies and structured procedures necessary to identify, evaluate, and preserve when necessary essential industrial and technological capabilities that might otherwise be lost. Within these policies and procedures, the Department has the ability to establish, and has established, administratively imposed (by DOD policy, not statute) restrictions within the Defense Federal Acquisition Regulations (DFARS) precluding the use of foreign products for specific defense applications when necessary to ensure military readiness.

10 U.S.C. 2440 requirements are implemented by Federal Acquisition Regulations (FAR) Part 34 and Department of Defense Initiative (DODI) 5000.2, which require development of a program acquisition strategy, and the Defense Acquisition Guidebook (Chapter 2.3. Systems Acquisition: Acquisition Strategy), which describes best practices. The Industrial Capability section of the Guidebook states that "to satisfy 10 U.S.C. 2440, development of the acquisition strategy should include an analysis of the industrial base capability to design, develop, produce, support, and, if appropriate, restart an acquisition program." The Guidebook further describes that the industrial capability analysis (as summarized in the Acquisition Strategy) should consider DOD investments needed to create or enhance certain industrial capabilities; and the risk of industry being unable to provide program design or manufacturing capabilities at planned cost and schedule.

When the analysis indicates that industrial capabilities needed by the Department of Defense are in danger of being lost, the DOD Components should determine whether government action is required to preserve the industrial capability.

Industrial capability assessments are conducted at Milestones B and C. In addition, earlier in the program—at Milestones A and B or whenever technology opportunities are identified—market surveys are conducted. The market survey is a primary means of determining the availability and suitability of commercial items and the extent to which these items have broad market acceptance, standards-organization support, and stability. Market research supports the acquisition planning and decision process, supplying technical and business information about commercial technology and industrial capabilities. Market research tailored to program needs continues throughout the acquisition process and during post-production support. FAR Part 10 addresses market research and FAR Subpart 7.1 requires the acquisition plan to include the results of completed market research and plans for future market research.

With respect to the KC–X, the Department has already conducted several industrial capabilities-related assessments and more are planned. It is important to note that because the majority of technological and industrial capabilities employed by the KC–X are commercial in nature, the Department focused its attention on those capabilities that are defense-unique.

In 2003, the Air Force identified aerial refueling as a "defense-unique capability" and evaluated companies that produced boom refueling equipment to determine their technical capabilities and financial viability.

In December 2006, to support source selection, the Air Force completed the official KC–X program market analysis required by the Program Acquisition Strategy. The result of the market research confirmed the most cost effective solution to the Air Force requirement for a new aerial refueling tanker to replace the current tanker fleet was a new medium-to-large commercial-derivative aircraft modified to meet specific military requirements for refueling, net-centric communication, cargo capac-

ity, and aeromedical evacuation. Two companies indicated a willingness and capability to perform the entire set of tasks. Because the contemplated tanker aircraft were to be commercial-derivative aircraft, the Air Force market research team evaluated risks associated with the KC–X program by reviewing industry publications and technical studies, attending industry technical symposia, as well as visiting aircraft manufacturers, potential engine suppliers, companies specializing in aircraft modification and overhaul, U.S. and European aircraft certification agencies, current and projected future refueling tanker users (i.e., militaries of United Kingdom and Australia), airlines, supply chain managers, and other military users of commercial-derivative aircraft. During those evaluation visits, the team reviewed the performance characteristics of the proposed commercial items and ability of those items to meet user requirements, the extent to which the follow-on support systems were unique or common to already-fielded fleets, commercial contracting business practices being employed to date, and how technology insertion was and could be handled. Specifically, the team evaluated contracting, test and evaluation, logistics, program management, and engineering as they applied to ongoing programs and how they might apply to the KC–X program. The survey identified no industrial or technological problems that would negatively impact program performance. The Air Force summarized the results of the market research in the Milestone B Acquisition Strategy.

In March 2008, following the source selection decision, the Air Force and the Office of the Deputy Under Secretary of Defense for Industrial Policy conducted a post source selection industrial capabilities assessment to evaluate the industrial base impacts of the KC–45A tanker award, focused on: (1) the extent to which the decision promoted/retarded a competitive marketplace; (2) the viability of any associated essential industrial/technological capabilities; and (3) potential economic impacts on Boeing as an enduring competitor for defense products.

All assessments completed to date have concluded that the industrial base is well positioned to not only meet the needs of the KC–X program, but also the Department's future tanker requirements. Moreover, assessments did not identify any technological or industrial problems that would negatively impact program performance, nor did they identify any at-risk essential technological or industrial capabilities.

In accordance with DODI 5000.2 and the Defense Acquisition Guidebook, the KC–X program will revisit and update these industrial capability assessments for future milestone decisions. System producibility will be addressed in detail at the Milestone C decision. [See page 64.]

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JULY 10, 2008

QUESTIONS SUBMITTED BY MR. ABERCROMBIE

Mr. ABERCROMBIE. My question is (a) Whether GAO "believed it would be beneficial for GAO to be involved in DOD's source selection processes prior to contract award to ensure objectivity and process adherence is followed? If so, should it only be for Major Defense Acquisition Programs, or all DOD acquisition programs? If not, why not" and (b) "Please provide GAO's views of how protests of the source selection process could be changed to significantly reduce extensive delays between events, yet remain fair to all parties."

Mr. GORDON. In response to the direction of the Competition in Contracting Act of 1984 (CICA), which directs GAO to provide for the independent, expeditious, and inexpensive resolution of protests, 31 U.S.C. § 3554, GAO has developed a protest process that balances the need to hold procuring agencies accountable and to protect aggrieved offerors' due process rights with the need to ensure that government procurements are not unduly disrupted. While CICA provides for procurements to be suspended pending resolution of protests, CICA also allows for agencies to move forward with a procurement, when a determination is made that the procurement is urgent or that it is otherwise in the interest of the United States to proceed, notwithstanding a pending protest. 31 U.S.C. § 3553.

We do not think that involving GAO in DOD's source-selection processes prior to contract award would be beneficial to the procurement process or consistent with our traditional bid protest role. Indeed, involvement by GAO in the source-selection process prior to contract award could jeopardize GAO's ability to later review post-award protests of DOD's evaluation and source selection decision: such involvement prior to award would raise questions regarding GAO's independence and objectivity. Also, to the extent that the Chairman is asking whether it would be helpful for GAO to hear protests of source-selection processes prior to award, we think that this would be ill advised. Contract awards are rarely protested, and allowing pre-award protests of source-selection processes would likely lead to "defensive" protests by firms that, in fact, would have been chosen for award of the contract. It is, in our view, wiser to allow protests of source-selection processes only by firms that have been harmed by those processes—that is, firms that learn that they were not selected for award.

That said, we constantly review our protest process for ways to make it more efficient and expeditious, and recent figures demonstrate the result. So far in fiscal year 2008, GAO has closed over 1,200 protests; the average number of days during which a protest is open was only 43 calendar days. We frequently use alternative dispute resolution, which results in many protests being resolved early. Even for protests for which a decision was issued on the merits (approximately 250 cases), GAO decided those cases in an average of 81 calendar days, a substantially shorter time than the 100 days permitted under CICA.

Mr. ABERCROMBIE. Secretary Payton, according to GAO written testimony, the Air Force over the last five years has the highest percentage of all the military services for sustained source-selection protests. What are the systemic acquisition issues in the Air Force and how do these issues get resolved in a timely manner? What changes are you planning to make in either personnel or processes within the Air Force source-selection and acquisition system?

Secretary PAYTON. The Air Force did see a marked increase in the protest sustain rates in FY05 and subsequent years following investigations into source selections potentially influenced by a former Air Force acquisition official. The ten sustained protests in FY05 and FY06, as a result of this individual's actions, skewed the numbers. However, when viewed in the longer historical context, it appears current bid protest sustain rates for the Air Force have returned to historical norms.

In FY08, the Air Force has only 2 out of 89 protested solicitations sustained. This number is comparable to the Army (2) and the Navy (4). In some cases, the statistics reported by GAO appear to show a higher number of sustained protests than are actually the case. In a protest for a particular procurement, the disappointed offeror may submit a number of filings for the same protest. For statistical purposes, the GAO treats each filing as a separate protest. In the KC–X protest, the

protestor made eight filings, which the GAO counted as eight protests. Protests in most high-dollar, complex acquisitions, result in multiple filings.

In terms of systemic acquisition issues, the Air Force will be assessing many areas as part of its September response to the Acting Secretary of the Air Force regarding Air Force acquisition and KC–X GAO lessons learned. We will also be commissioning the Center for Naval Analysis (CNA) to conduct an independent review. Some common themes that have already emerged include assessing evaluation methodology for Most Probable Life Cycle Cost, proper evaluation of bidder proposals for responsiveness to requests for proposal, assigning more people with contracting experience to the source selection team, employing independent review teams beginning with requirements definition and continuing throughout the entire source selection process and enhancing the skills and numbers of subject matter experts.

Following the release of our analysis and the delivery of the CNA report, we will study the recommendations and codify, as appropriate, in Air Force Instructions. We look forward to discussing more definitive personnel and process improvements upon completion of our reviews.

Mr. ABERCROMBIE. Secretary Payton, were you allowed to review the appropriate protest documentation from Boeing to substantiate their 100+ issues?

Secretary PAYTON. I was allowed to review all of the information that Boeing filed with the Government Accountability Office, including the 100+ protest issues contained in eight different filings. However, I was not allowed to review any Boeing documentation such as emails or briefing charts that could have substantiated their alleged interpretations of the solicitation during the conduct of the source selection from January 2007 through early 2008 because the GAO denied the Air Force request for Boeing's substantiating documentation. Please find attached the public version of the Air Force document request and Boeing's objection to the document request that further identifies the specific documents the Air Force requested from Boeing.

Mr. ABERCROMBIE. Secretary Payton, why did your legal team not allow you to testify at the GAO protest hearing?

Secretary PAYTON. In April, in accordance with its bid protest procedures, 4 C.F.R. 21.7(b), GAO conducted a pre-hearing conference that identified the specific issues it would review at the KC–X bid protest hearing. The specific detailed technical evaluation issues identified by GAO for testimony at the KC–X bid protest hearing could not be answered by me, and were best answered by the Air Force technical evaluators who performed the evaluation as members of the Source Selection Evaluation Team. A more complete answer that covers constraints on my hearing participation from early March through the conclusion of the hearing, is under GAO protected information and can be provided upon Boeing and Northrop Grumman consent.

Mr. ABERCROMBIE. Secretary Payton, as a source-selection authority that has now gone through GAO protest proceedings and hearings, what in your opinion would you change about the way GAO conducts the protest and hearing process and are there any changes you would suggest to make it equitable for the agency involved? Would you consider it fair, equitable, and productive for the agency to have an opportunity to cross-examine or call as witnesses representatives from each competitor involved in the source-selection protest?

Secretary PAYTON. The Air Force is collecting and analyzing lessons learned from the KC–X protest. We are carefully considering proposed changes that would make the protest process more equitable and efficient for both the agency and the taxpayer. We look forward to sharing these recommendations with the committee after we complete this assessment.

Mr. ABERCROMBIE. Secretary Young, do you agree or disagree with all of GAO's findings and recommendations contained in their protest decision? Why or why not?

Secretary YOUNG. We have fully accepted the GAO's findings and recommendations and we are taking the necessary steps to fully implement those findings and recommendations.

Mr. ABERCROMBIE. Secretary Young, given the scrutiny and diligence that the Air Force states they used to select the platform for KC–(X) and the subsequent GAO findings that resulted during the protest review, what in your opinion needs to be corrected within the Air Force acquisition system and can it be corrected in a timely manner?

Secretary YOUNG. Air Force acquisition professionals need to ensure the Request for Proposal (RFP) requirements are clearly stated and that the evaluation criteria are clearly laid out in the RFP. They also need to ensure the evaluation is consistent with the RFP evaluation criteria. It is essential that well experienced contracting, technical and legal personnel are involved throughout the major system

competitions. I also think the Air Force, and the rest of the Defense Department, will need to exercise greater care and discretion in specifying requirements. I have already taken steps to ensure that is the case with regard to the KC–X competition. For many DOD programs, the number of requirements (hundreds) and the length of requirements documents (hundreds of pages) has become excessive.

Mr. ABERCROMBIE. Secretary Young, what metrics and evaluation factors will you use to determine whether or not the Air Force will regain programmatic control of the KC–(X) program after your source-selection decision?

Secretary YOUNG. What has changed since GAO's sustainment of portions of the protest is the elevation of the Source Selection Authority (SSA) to OSD. In addition, a new Source Selection Advisory Council has been identified to assist in source selection. Programmatic and execution authority of the KC–(X) program has not changed and remains with the Air Force. As an Acquisition Category (ACAT) - 1D program, OSD will serve as the Milestone Decision Authority. In that role, OSD will continue to chair Defense Acquisition Boards and program status reviews to continually assess progress. Therefore, following the source-selection, the KC–(X) program will receive the same level of oversight as our other ACAT - 1D programs.

Mr. ABERCROMBIE. Secretary Young, how will you ensure that the future source-selection processes for Air Force major acquisition programs are in accordance with established acquisition policies/procedures and that proposals are evaluated in accordance with requests for proposals?

Secretary YOUNG. I have directed that the Director of Defense Procurement ensure that a complete review of Air Force policies/procedures takes place and that those policies/procedures are in accordance with established acquisition policies/procedures. I have directed that the Director of Defense Procurement issue policy guidance institutionalizing the process of independent reviews of major weapon system competitions to ensure that evaluation criteria are reasonable and are adhered to. Further, we are using this opportunity to review all Service and Agency source selection procedures to identify differences and best practices. The Department will seek greater standardization around a common set of best practice procedures as we execute future competitive procurements.

Mr. ABERCROMBIE. Secretary Young, as the senior acquisition official for DOD, what internal mechanisms do you have in place to incorporate acquisition "lessons learned" or recommendations that result from outside agency reviews and studies of the DOD acquisition system? Can you provide recent examples of changes that DOD has incorporated from "outside experts" and what metrics are you using to evaluate the changes?

Secretary YOUNG. As the senior acquisition executive for DOD, I have several internal mechanisms to incorporate acquisition "lessons learned" or recommendations that result from outside agency reviews and studies of the DOD acquisition system. I have a strong personal interest in this area and have taken specific actions to ensure we learn from our mistakes as well as our successes. First, I would mention the guidance that I incorporate with decisions on defense acquisition programs. A good example is the implementation of innovative solutions for specific system components, proven through the testing process. In the Mine Resistant Ambush Protected (MRAP) vehicle program, this played a key role enabling future vehicle survivability and performance improvements. In this example, testing demonstrated a need to revise our requirement for vehicle gun ports. We shared this information among all vendors, and changes were immediately made. The MRAP Joint Program Office (JPO) encouraged the vehicle contractors to share information on lessons learned and technology enhancements. We made every effort to leverage commercial vehicle technologies and determined the program would, to the extent consistent with meeting Warfighter needs, procure MRAP vehicles with only the technical data and computer software license rights absolutely necessary to satisfy our requirement to procure the vehicles rapidly and in quantity. From the first pre-solicitation MRAP conference, the leadership of the MRAP program emphasized to all offerors, government offices, and supporting organizations that sharing of best practices is both expected and encouraged. There are also many instances where Government Accountability Office (GAO) recommendations were implemented by the Department. One example, GAO report 07–675R, "Defense Transportation Coordination Initiative (DTCI)," illustrated how DOD took numerous actions to incorporate lessons learned from the prototype program in its planning for DTCI. Specifically, GAO identified 36 lessons learned including successes and problems from the prototype, and determined that DOD had taken actions that were responsive to each of these. As part of my Strategic Goals Implementation Plan, Strategic Thrust 3, we established a Defense Acquisition University (DAU) Living Library to host a collection of video presentations of program managers sharing lessons learned with the acquisition workforce. In Fiscal Year 2008, we set a goal to populate the library with 10

interviews and 20 lessons documents by June 2008. We exceeded the goal with examples that include: "JSF Lessons Learned from the PEO," RADM Enewold, NAVAIR; "Uniqueness of Shipbuilding Acquisition Process," RADM (ret) Hamilton, PEO for Ships; "Implementing Lean Six Sigma," Michael Joyce, Lockheed-Martin; and "Structuring Programs for Success," Major General Riemer, PEO F–22. Numerous lessons documents are also available at the web site (www.dau.mil). My weekly e-mail notes to our Component Acquisition Executives, Program Executive Officers and major program managers provide leadership guidance on procedures, processes, behaviors and sharing of lessons learned with the acquisition workforce. Feedback indicates the workforce is vigilantly tuned into the weekly notes as they are widely considered a powerful leadership message directly from the Defense Acquisition Executive. While these are just several highlights, the Department continues to emphasize sharing of lessons learned and partnerships through technical performance reviews, information exchange meetings and various outreach and communications media such as WebCasts, and conferences. We also host the DOD Acquisition Best Practices Clearinghouse (BPCh), which facilitates the selection and implementation of systems engineering and software acquisition practices appropriate to the needs of individual acquisition programs.

Mr. ABERCROMBIE. Secretary Young, are there any statutory barriers preventing DOD from regaining the required acquisition expertise to successfully perform a source-selection?

Secretary YOUNG. Generally, no. Specifically, there are, the Congressional caps of management headquarters personnel, the inflexibility of hiring processes, the limited flexibility of the budget process, and constraints on salaries make timely hiring of highly qualified acquisition expertise extremely difficult if not impossible.

Mr. ABERCROMBIE. Secretary Young, do you believe it would be beneficial for GAO to be involved in DOD's source-selection processes prior to contract award to ensure objectivity and process adherence is followed? If so, should it only be for Major Defense Acquisition Programs, or all DOD acquisition programs? If not, why not?

Secretary YOUNG. The Government Accountability Office (GAO) absolutely should not be involved in the source selection process. GAO needs to be impartial in the protest process and having them engaged in the actual source selection will make it extremely difficult for the GAO to be independent and impartial when hearing protests. Further, the issue in most cases is not process adherence but flaws in establishment of the process, flaws with varying degrees of importance. GAO takes an extremely literal view of process adherence without regard to the importance and likely impact or relevance of flaws. Under this construct, given the complex nature of defense procurements and the propensity of industry to protest, there is a great risk that the Defense Department will lose significant time and money on procurements in the future.

Mr. ABERCROMBIE. Secretary Young, the Air Force requested approximately $832.0 million for the KC–(X) program in the fiscal year 2009 budget request. Do you anticipate a reduced funding requirement for fiscal year 2009? If so, what is your estimate?

Secretary YOUNG. We do not anticipate a reduced funding requirement for fiscal year 2009. In the 2009 budget request, the Department requested $894.5M for the KC–X program. This requirement remains valid based on contract award in late December 2008. The funding provided in the amended RFP will be based on full support of this budget request.

Mr. ABERCROMBIE. Secretary Young, as a previous source-selection authority that has gone through GAO protest proceedings and hearings, what in your opinion would you change about the way GAO conducts the protest and hearing process? Would you consider it fair, equitable, and productive for the agency to have an opportunity to cross-examine or call as witnesses representatives from each competitor involved in the source-selection protest?

Secretary YOUNG. The Government Accountability Office (GAO) adjudicates the protest issues brought forward by the protesting offeror. Generally, a protest addresses an issue where the protestor believes the DOD did not follow the required Request for Proposal (RFP) evaluation processes. If the protestor has information appropriate to the issue under protest, it should be made available during the GAO protest process. I do believe that, depending on the nature of the protest issue, it may be appropriate for representatives to be witnesses at the GAO hearing.

Mr. ABERCROMBIE. Secretary Young, what is the Department's record in being able to estimate the life cycle—years in inventory—of various major programs of record?

Secretary YOUNG. To estimate the life cycle of a major program, the Department makes assumptions about certain aspects of a program, using engineering studies and a variety of factors such as the anticipated operational concepts, expected usage

rates, etc., which are used to inform estimates at program decision points. Other factors such as in-service modifications, actual usage, maintenance strategies, and upgrades also affect the life cycle after program initiation. We do not retroactively go back and make detailed comparisons of how all these factors played out over the life cycle of the systems, and any estimate we would produce would be specific to the weapons systems we would sample. In my experience, we frequently use systems in manners different than originally postulated, ensuring that the true life cycle costs are different. Further, I have seen a number of programs promise significant life cycle savings through hardware design, technology or new maintenance practices. Again, these savings are not always realized for a variety of reasons. These realities about estimation of lifecycle costs suggest to me that DOD should not overly weigh life cycle costs in program decisions and program competitions.

Mr. ABERCROMBIE. Secretary Young, what is the Department's record in being able to estimate the life cycle costs (LCC) of various major programs of record?

Secretary YOUNG. To estimate life cycle costs, the Department makes assumptions about certain aspects of a program, using engineering studies and a variety of factors such as the anticipated operational concepts, expected usage rates, etc., which are used to inform estimates at program decision points. Other factors such as in-service modifications, actual usage, maintenance strategies, and upgrades also affect the life cycle after program initiation. We do not retroactively go back and make detailed comparisons of how all these factors played out over the life cycle of the systems, and any estimate we would produce would be specific to the weapons systems we would sample.

I believe a review of the record would reveal that DOD makes reasonable, informed projections of life cycle costs and frequently finds that the projections, assumptions and promised results all change.

Mr. ABERCROMBIE. Secretary Young, is it of value and how much value to include LCC as a discriminator in source selections for major acquisition programs?

Secretary YOUNG. In general, Government ownership Life Cycle Costing (LCC) should be included as a technical factor in the evaluation process. LCC should not be a cost/price factor because of the uncertainty associated with estimating costs out for 20–40 years which is typically the range of service life for our systems. In my opinion, Life Cycle cost certainly should not be an equal factor to the development and acquisition cost. While Operation and Support (O&S) cost represent a significant portion of the life cycle costs, these costs should not be over weighted in this or other source selections for several reasons. First, it is impossible to predict life cycle costs over 15–40 with accuracy. Second, all systems have significant life cycle costs—it is only the relative difference which is of interest, and this relative difference has a high degree of uncertainty. Third, most DOD programs have historically optimistically underestimated life cycle costs. Finally, DOD frequently uses platforms in very different ways than originally planned, significantly altering the life cycle costs. For these and other reasons, I believe it is a disservice to the taxpayer to give substantial weight to O&S cost in a source selection. O&S cost should be considered, but generally not on an equal basis with the development and acquisition costs.

Mr. ABERCROMBIE. Secretary Young, is it not better practice to provide a range of most probable life cycle costs estimates, plus or minus 10 or twenty percent of the best estimate of LCC, to preclude inferring greater fidelity in LCC than experience or cost estimating tools allow?

Secretary YOUNG. I believe Government Ownership Life Cycle Costing (LCC) estimates are just that; estimates, especially since we generally project the costs out 20 to 40 or more years. I believe LCC should be done in discounted constant dollars. It is appropriate for the estimators to discuss the confidence they have in their estimates and use a range where appropriate.

Mr. ABERCROMBIE. Secretary Young, please provide the Department's views of how the source selection protest process could be changed to significantly reduce the extensive delays between events, yet remain fair to all parties.

Secretary YOUNG. The Government Accountability Office (GAO) protest process has been developed over time. There is an "express option" that results in a GAO finding within 65 days. To my knowledge, the GAO has always honored the Department's requests to use the express option. Whether or not the GAO can further streamline the process is a question that would be more appropriate for GAO to answer.

Mr. ABERCROMBIE. Secretary Young, please provide the amount reimbursed by the Department to Boeing for its costs associated with its tanker contract award protest.

Secretary YOUNG. The Air Force estimates that it will reach an agreement with Boeing on legal fees near the end of calendar year 2008. We will then inform Congress.

QUESTIONS SUBMITTED BY MR. DICKS

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that DOD "will conduct a new source selection." Does DOD agree that a future source selection process for the KC–X Tanker will be a totally new process that is free from information and conclusions that were part of the previous source selection? If not, why not?

Secretary YOUNG. The current solicitation will be amended with appropriate changes taking into account the Government Accountability Office (GAO) findings and recommendations and to allow the Department to make a new source selection. The offerors will be able to make an entirely new proposal or update the proposal they previously submitted. The Source Selection official and the Source Selection Advisory Committee will be staffed with an entirely new set of individuals. The Source Selection Evaluation Team factor or subfactor leads who were involved in sustained GAO findings are also being replaced.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that DOD "will conduct a new source selection." What measures will be taken to ensure that a future source selection evaluation process is totally new and free from "carry-over" effects of the previous evaluation? Will all evaluation data, notes, correspondence and records from the previous source selection process be removed and sequestered so that they are not accessible to personnel at all levels of a new source selection process?

Secretary YOUNG. The Department intends to amend the Request for Proposal (RFP), as appropriate, request revised proposals, engage in negotiations to resolve any issues found as a result of the evaluation of revised proposals, and conduct a new source selection on the basis of those revised proposals. In areas where the offerors make no changes, the prior evaluation materials will be available for use by the Source Selection Evaluation Team (SSET). In those areas involving sustained Government Accountability Office (GAO) findings, if the offerors updated proposal does not resolve the issue to the satisfaction of the Department, then negotiations will be conducted. The technical evaluation of proposals is a technical evaluation of facts and data. Despite representations to the contrary, these technical evaluations are not subject to "carryover" effects.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that DOD "will conduct a new source selection." What guidance will the SSET and the SSAC be given with respect to using or ignoring past evaluation information, materials and conclusions?

Secretary YOUNG. Offerors will be asked to update their proposals. The Source Selection Evaluation Team (SSET) will reevaluate the complete updated proposal and provide their findings to the Source Selection Advisory Council (SSAC) and Source Selection Authority (SSA). The SSET will be permitted to utilize previous evaluation materials and analyses if an Offeror's proposal remains unchanged in the area being evaluated. The new SSAC, since it is an entirely new set of individuals, will do a new comparative analysis of the offers and make an award recommendation to the SSA.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that DOD "will conduct a new source selection." Does DOD agree that it is a leadership imperative to give extra attention to ensuring that a new source selection be conducted in a manner that is free of any "carry-over" from the previous evaluation and bias of the existing situation?

Secretary YOUNG. Yes. The Department assigned a new Source Selection Authority (SSA) and a new Source Selection Advisory Council (SSAC) with no members from the prior SSAC being included. Further, the Department assigned advisors to both the SSA and the SSAC to ensure the process is conducted in accordance with the Federal Acquisition Regulation/DOD Federal Acquisition Regulations (FAR/DFARS) and the Request for Proposal (RFP). A peer review process has been established to review the source selection process at key points and provide their findings to the SSA. However, in some cases where offeror proposals haven't changed, the Source Selection Evaluation Team (SSET) will be allowed to utilize the relevant evaluations and analysis previously performed to support the SSET evaluation.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that DOD "will conduct a new source selection." The previous solicitation process entailed a period of 9 months from time of release of the Request for Information (RFI) and the release of the final Request for Proposals (RFP). The time from initial draft RFP to final RFP was 4 months. If the future amended KC–X Tanker RFP leads either industry bidder to conclude that it must offer a substantially different solution and proposal, will DOD allow sufficient time for the bidder to develop the new proposal if industry requests additional time?

Secretary YOUNG. It is important to note that the requirements will not change in the revised RFP. Indeed the requirements to be used were validated in 2005 and have been consistently used in the tanker acquisition process. Thus, it is a matter of fact that all bidders have literally had years to understand DOD requirements and develop an appropriate, competitive proposal. Nonetheless, the Department will allow sufficient time to the offerors. If a legitimate basis for additional time is made by one or both of the offerors, we will give that request careful consideration recognizing that we must be fair to both offerors.

Mr. DICKS. The GAO decision of the Boeing protest to the KC–X Tanker source selection concludes that the Air Force did not properly evaluate the relative value of the two proposals as it considered the many requirements that they offered to satisfy. In summing up this point, GAO concluded that "our review of the record indicates that & the Air Force failed to evaluate proposals in accordance with the RFP's evaluation criteria. That is, the record evidences that the Air Force failed to assess the relative merits of the offerors' proposals based upon the importance assigned to the various SRD requirements by the RFP or to account for the fact that Boeing proposed to satisfy far more SRD requirements than did Northrop Grumman." (page 33) The RFP reflects requirements that have been established in the Capability Development Document, and the prior "RFP provided that KPP requirements were more important than KSA requirements, which were in turn more important than non-KPP/KSA requirements." Will a future RFP and source selection evaluation maintain the same weighting valuation of all requirements in which KPP requirements are more important than KSA requirements, which are more important than non-KPP/KSA requirements?

Secretary YOUNG. Yes.

Mr. DICKS. The GAO decision of the Boeing protest to the KC–X Tanker source selection concludes that the Air Force did not properly evaluate the relative value of the two proposals as it considered the many requirements that they offered to satisfy. In summing up this point, GAO concluded that "our review of the record indicates that & the Air Force failed to evaluate proposals in accordance with the RFP's evaluation criteria. That is, the record evidences that the Air Force failed to assess the relative merits of the offerors' proposals based upon the importance assigned to the various SRD requirements by the RFP or to account for the fact that Boeing proposed to satisfy far more SRD requirements than did Northrop Grumman." (page 33) Will a follow-on source selection evaluation process document the use of those weighted requirements at all stages of the source selection, including the SSAC and SSA?

Secretary YOUNG. We have clearly articulated the relative importance of the evaluation factors, sub-factors, elements and sub-elements to both Offerors. We will document the use of those weighted requirements at all stages of the source selection.

Mr. DICKS. In the prior source selection, the System Requirements Document (SRD) for the KC–X Tanker is clear that "the Primary mission of the KC–X is to provide worldwide, day/night, adverse weather aerial refueling (AR) on the same sortie to receiver capable United States, allied and coalition military aircraft." That SRD established the requirement for refueling in paragraph 3.2.1.1.1 (Fuel Offload and Radius Range (KPP #2)), which defined a threshold level of fuel offload vs. radius range. The objective for this was to be "capable of exceeding the fuel offload versus unrefueled radius range" threshold. In his July 10th testimony to the Air and Land Forces Subcommittee, Under Secretary Young testified that the "capability document record indicates that the objective is greater than the threshold and that there is added value, I quote, 'that—there is added value to the war fighter for additional offload.'" Other than paragraph 3.2.1.1.1 of the previous SRD, where else in the RFP documents was it clear to bidders that added value would be given for additional offload capacity?

Secretary YOUNG. I referred to the CDD which is the Capability Development Document. That document is clear that the Warfighter's requirement was and is that there is added value to providing fuel above the threshold amount. We have modified section 3.2.1.1.1 to reflect that exact intent.

Mr. DICKS. In the prior source selection, the System Requirements Document (SRD) for the KC–X Tanker is clear that "the Primary mission of the KC–X is to provide worldwide, day/night, adverse weather aerial refueling (AR) on the same sortie to receiver capable United States, allied and coalition military aircraft." That SRD established the requirement for refueling in paragraph 3.2.1.1.1 (Fuel Offload and Radius Range (KPP #2)), which defined a threshold level of fuel offload vs. radius range. The objective for this was to be "capable of exceeding the fuel offload versus unrefueled radius range" threshold. In his July 10th testimony to the Air and Land Forces Subcommittee, Under Secretary Young testified that the "capability document record indicates that the objective is greater than the threshold and that

there is added value, I quote, 'that—there is added value to the war fighter for additional offload.'" In a future RFP, will there be an explicit numerically bounded objective level?

Secretary YOUNG. No.

Mr. DICKS. In the prior source selection, the System Requirements Document (SRD) for the KC–X Tanker is clear that "the Primary mission of the KC–X is to provide worldwide, day/night, adverse weather aerial refueling (AR) on the same sortie to receiver capable United States, allied and coalition military aircraft." That SRD established the requirement for refueling in paragraph 3.2.1.1.1 (Fuel Offload and Radius Range (KPP #2)), which defined a threshold level of fuel offload vs. radius range. The objective for this was to be "capable of exceeding the fuel offload versus unrefueled radius range" threshold. Under Secretary Young testified to the Air and Land Forces Subcommittee that "While the objective is for more fuel, it should be bounded and I think will be bounded by cost." Does DOD agree that the objective for fuel offload also should be bounded by other significant factors such as the major operational negative impacts resulting from larger aircraft being able to operate out of fewer airfields and the congestion that large aircraft create on the ground at airfields?

Secretary YOUNG. No. The objective will only be bounded by the amount that an Offeror proposes above threshold.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that "While the objective is for more fuel, it should be bounded and I think will be bounded by cost." Does DOD agree that the objective for fuel offload also should be bounded by other significant factors such as the major operational negative impacts resulting from larger aircraft being able to operate out of fewer airfields and the congestion that large aircraft create on the ground at airfields? In the context of statements that there is great value in additional fuel offload capacity, respond to the following:

What are the average fuel offload per sortie figures for the KC–135 fleet and the KC–10 fleet? What are the average offload per sortie figures for the KC–135 fleet and for the KC–10 fleet in recent combat theater environments? If, as has been reported, the average combat scenario fuel offload is 60,000-65,000 pounds of fuel per sortie, what is the basis for putting great emphasis on much larger fuel offload capacity? Has either DOD or the Air Force established and documented a changed operational construct for aerial refueling such that it is clear that additional refueling capacity will be used?

Secretary YOUNG. In recent combat theater environments, the average scheduled offloads for the KC–135 and KC–10 in 2007 were 62,000 and 84,000 pounds respectively. For January through March of 2008 the average scheduled offload for the KC–135 was 68,000 pounds while for the KC–10, it was 105,000 pounds.

Smaller offloads may be reflected if training sorties and other peace time activities are included. Figure 1 below reflects inclusion of all sorties flown by KC–10 and KC–135 aircraft from 1 October 2006 through 30 Sep 2007.

Tanker Refuel Summary
1 Oct 2006 To 30 Sep 2007

Aircraft Type	Sorties	Fuel Offloaded	Average
KC-10	13,440	500,240,824	37,220
KC-135	42,468	1,136,060,931	26,751
Total/Average:	***55,908***	***1,636,301,755***	***29,268***

Tanker Refuel summary includes CHOPed ATO Tanker numbers, as provided by CENTCOM. Includes US tankers only.

Figure 1. Average fuel offloaded by AMC tankers FY2007. Fuel offloaded in pounds, one gallon JP–8 equals approximately 6.7 pounds. Source: 618 TACC/XOND Data Division

The requirement does not put greater emphasis on much larger fuel offload capacity. The requirement recognizes the benefit of increased fuel offload capacity in effectively accomplishing a range of warfighting scenarios. The requirement is defined by analyzing and integrating the tanker capacity required to meet various DOD warfighting plans. The average peacetime fuel offload does not define the warfighting requirement and purchasing a tanker which only meets peacetime demand would result in a tanker fleet that was totally inadequate to meet any DOD war plans.

The need for additional refueling capacity is not based on a changed operational construct. These capabilities are derived from validated operational requirements resident in the current construct that has for years defined the number of tanker and airlift platforms necessary to meet the National Military Strategy. The last Mobility Capabilities Study provided a range of aircraft numbers that could meet operational objectives based on the acceptance of different levels of risk. When combined together, fiscal realities and acceptable risk have resulted in the acquisition and sustainment of a fleet of mobility aircraft at or near the lower end of that scale. As we recapitalize aging aircraft in the mobility fleet, the primary objective is to maintain existing air refueling and airlift capabilities along with the associated level of risk. A secondary objective is to expand capabilities in refueling capacity when fiscally and operationally feasible; thus reducing overall risk and increasing the ability/certainty to fully meet all objectives (wartime and peace time) in an effective and efficient manner.

Mr. DICKS. As a percentage of available capacity, what is the average cargo transport that has been performed by the KC–135 fleet and the KC–10 fleet?

Secretary YOUNG. Air Mobility Command (AMC) does not track percentage of available capacity in relationship to average cargo movements on the tanker fleet as a metric. However, overall cargo movement is tracked and is provided below for fiscal year 2007.

KC-10 and KC-135 Summary
Fiscal Year 2007

Description	Mission Category	Aircraft Type	Sorties	% of Sorties	Pax	% of Pax	STons	% of STons
All AMC	REFUEL	KC-10	7,216	21.10%	0	0.00%	0	0.00%
		KC-135	20,408	59.67%	0	0.00%	0	0.00%
	REFUEL Total		27,624	80.77%	0	0.00%	0	0.00%
	AIRLIFT	KC-10	1,540	4.50%	11,076	27.20%	6,963	63.72%
		KC-135	2,696	7.88%	14,601	35.86%	888	8.13%
	AIRLIFT Total		4,236	12.39%	25,677	63.07%	7,852	71.84%
	REFUEL AND AIRLIFT	KC-10	1,451	4.24%	11,020	27.07%	2,985	27.31%
		KC-135	888	2.60%	4,018	9.87%	92	0.84%
	REFUEL AND AIRLIFT Total		2,339	6.84%	15,038	36.93%	3,077	28.16%
All AMC Total			34,199	100.00%	40,715	100.00%	10,929	100.00%

Includes AMC missions. Does not include Guard and Reserve O&M.
Business Rules for Mission categorization:
If mission has Refuel Activity and no Cargo or Pax offloads Then "Refuel"
If mission has no Refuel Activity and has Cargo or Pax offloads Then "Airlift"
If mission has both Refuel Activity and Cargo or Pax offloads Then "Refuel and Airlift"

Figure 1: Table displaying the percentage of refueling, airlift and dual role tanker sorties. Source of data: 618 TACC/XOND Data Division.

Mr. DICKS. What has been the average cargo transport performed by the KC–135 fleet and the KC–10 fleet in recent combat theater environments?

Secretary YOUNG. Figure 1 displays fiscal year 2007 collected data with regard to cargo movement on GWOT tanker missions.

KC-10 and KC-135 Summary
Fiscal Year 2007

Description	Mission Category	Aircraft Type	Sorties	% of Sorties	Pax	% of Pax	STons	% of STons
GWOT	REFUEL	KC-10	11,283	57.45%	0	0.00%	0	0.00%
		KC-135	6,554	33.37%	0	0.00%	0	0.00%
	REFUEL Total		17,837	90.82%	0	0.00%	0	0.00%
	AIRLIFT	KC-10	521	2.65%	2,023	23.59%	2,513	86.10%
		KC-135	1,026	5.22%	6,203	72.33%	304	10.42%
	AIRLIFT Total		1,547	7.88%	8,226	95.92%	2,818	96.52%
	REFUEL AND AIRLIFT	KC-10	213	1.08%	301	3.51%	93	3.19%
		KC-135	44	0.22%	49	0.57%	9	0.29%
	REFUEL AND AIRLIFT Total		257	1.31%	350	4.08%	102	3.48%
GWOT Total			19,641	100.00%	8,576	100.00%	2,919	100.00%

Includes AMC missions. Does not include Guard and Reserve O&M.
Business Rules for Mission categorization:
If mission has Refuel Activity and no Cargo or Pax offloads Then "Refuel"
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If mission has both Refuel Activity and Cargo or Pax offloads Then "Refuel and Airlift"

Figure 1: Table displaying the percentage of refueling, airlift and dual role tanker sorties. Source of data: 618 TACC/XOND Data Division.

Mr. DICKS. Has the DOD/Air Force established and documented a changed operational construct for how refueling tankers will be used such that a significantly larger cargo capacity is anticipated? If so, what is it?

Secretary YOUNG. The DOD/Air Force has not changed the operational construct for employing air refueling assets. Mobility requirements have always remained grounded in the National Military Strategy, providing a range of tanker and airlift capability that can meet operational objectives based on the acceptance of different levels of risk. When combined together, fiscal realities and acceptable risk have resulted in the acquisition and sustainment of a fleet of mobility aircraft at or near the lower end of that scale. As we recapitalize aging aircraft in the mobility fleet, the primary objective is to maintain existing capabilities along with the associated level of risk. A secondary objective is to expand capabilities when fiscally and oper-

ationally feasible; thus reducing overall risk and increasing the ability/certainty to fully meet all objectives (wartime and peace time) in an effective and efficient manner.

Mr. DICKS. As a percentage of available capacity, what is the average passenger transport that has been performed by the KC–135 fleet and the KC–10 fleet?

Secretary YOUNG. Air Mobility Command (AMC) does not track percentage of available capacity in relationship to average passenger movements on the tanker fleet as a metric. As specified by current mission planning guidance (AFPAM 10–1403), AMC uses planning factors of 68 passengers/23 pallet positions for the KC–10 and 46 passengers/6 pallet positions for the KC–135.

A good example of mission data that is tracked and useful in response to this question is in figure 1. Figure 1 shows fiscal year 2007 data with regard to cargo movement on AMC tanker missions. This data is driven by mission requirements versus aircraft capacities.

KC-10 and KC-135 Summary
Fiscal Year 2007

Description	Mission Category	Aircraft Type	Sorties	% of Sorties	Pax	% of Pax	STons	% of STons
All AMC	REFUEL	KC-10	7,216	21.10%	0	0.00%	0	0.00%
		KC-135	20,408	59.67%	0	0.00%	0	0.00%
	REFUEL Total		27,624	80.77%	0	0.00%	0	0.00%
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Includes AMC missions. Does not include Guard and Reserve O&M.
Business Rules for Mission categorization:
If mission has Refuel Activity and no Cargo or Pax offloads Then "Refuel"
If mission has no Refuel Activity and has Cargo or Pax offloads Then "Airlift"
If mission has both Refuel Activity and Cargo or Pax offloads Then "Refuel and Airlift"

Figure 1: Table displaying the percentage of passengers (pax) on refueling, airlift and dual role tanker sorties. Source of data: 618 TACC/XOND Data Division.

Mr. DICKS. What has been the average passenger transport performed by the KC–135 fleet and the KC–10 fleet in recent combat theater environments?

Secretary YOUNG. Figure 1 displays fiscal year 2007 data with regard to passenger movement on GWOT tanker missions. This data is driven by mission requirements versus aircraft capacities.

KC-10 and KC-135 Summary
Fiscal Year 2007

Description	Mission Category	Aircraft Type	Sorties	% of Sorties	Pax	% of Pax	STons	% of STons
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	REFUEL Total		17,837	90.82%	0	0.00%	0	0.00%
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	REFUEL AND AIRLIFT	KC-10	213	1.08%	301	3.51%	93	3.19%
		KC-135	44	0.22%	49	0.57%	9	0.29%
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If mission has both Refuel Activity and Cargo or Pax offloads Then "Refuel and Airlift"

Figure 1: Table displaying the percentage of refueling, airlift and dual role tanker sorties. Source of data: 618 TACC/XOND Data Division.

Mr. DICKS. Has the DOD/Air Force established and documented a changed operational construct for how refueling tankers will be used such that a significantly larger passenger capacity is anticipated? If so, what is it?

Secretary YOUNG. The DOD has not changed its construct for passenger capacity within its air refueling fleet. The inherent capability for self deployment and opportune cargo provides the warfighter flexibility in meeting today's and tomorrow's fight. Maintaining this capability is one of the DOD's primary considerations while expanding this capability is desired, if fiscally and operationally feasible.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that there will be a new Source Selection Authority (SSA) and Source Selection Advisory Council (SSAC) for a future KC–X Tanker source selection process. Will the membership of the Source Selection Evaluation Team (SSET) be entirely different from the previous SSET?

Secretary YOUNG. No. The SSET factor and sub factor leads who were involved in a sustained Government Accountability Office (GAO) finding are being replaced.

Some 150 individuals were involved in the SSET evaluation. Much of the prior evaluation was not a subject of the protest.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that there will be a new Source Selection Authority (SSA) and Source Selection Advisory Council (SSAC) for a future KC–X Tanker source selection process. Who will determine the membership of the SSET for the re-competition of the KC–X program?

Secretary YOUNG. As the Under Secretary of Defense for Acquisitions, Technology and Logistics, I will approve the SSET membership.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that there will be a new Source Selection Authority (SSA) and Source Selection Advisory Council (SSAC) for a future KC–X Tanker source selection process. The GAO decision on the KC–X Tanker protest highlighted gaps in knowledge and expertise of some key personnel on the SSET (pages 44 and 63 of the GAO report). In staffing a future SSET, what steps will DOD take to ensure that it is staffed with personnel with the necessary background, expertise and judgment?

Secretary YOUNG. Source Selection Evaluation Team (SSET) membership is being reviewed to ensure the personnel have the appropriate background, expertise and judgment. Where appropriate, new members, including functional area leads, will be appointed.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that there will be a new Source Selection Authority (SSA) and Source Selection Advisory Council (SSAC) for a future KC–X Tanker source selection process. Will the membership of the SSAC be entirely different from the previous SSAC?

Secretary YOUNG. Yes.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that there will be a new Source Selection Authority (SSA) and Source Selection Advisory Council (SSAC) for a future KC–X Tanker source selection process. Who will determine the membership of the SSAC for the re-competition of the KC–X program?

Secretary YOUNG. As the Under Secretary of Defense for Acquisition, Technology and Logistics, I will make recommendations for SSAC membership to the Deputy Secretary of Defense. The Deputy Secretary of Defense will appoint the new SSAC members.

Mr. DICKS. Under Secretary Young testified to the Air and Land Forces Subcommittee that there will be a new Source Selection Authority (SSA) and Source Selection Advisory Council (SSAC) for a future KC–X Tanker source selection process. Will the SSAC include senior military personnel with operational experience in air mobility (refueling and airlift)?

Secretary YOUNG. Yes.

Mr. DICKS. In testimony to the Air and Land Forces Subcommittee, Under Secretary Young stated that DOD will "have an independent team look at how we estimate the life-cycle cost" in the source selection. Does Secretary Young's statement mean that an independent team will develop a life-cycle cost estimate? Or does the statement mean that an independent team will review the approach that a DOD team takes?

Secretary YOUNG. An independent team will review the methodology that the Source Selection Evaluation Team (SSET) uses. They will also review whether the SSET follows that methodology in their evaluation.

Mr. DICKS. In testimony to the Air and Land Forces Subcommittee, Under Secretary Young stated that DOD will "have an independent team look at how we estimate the life-cycle cost" in the source selection. Will the independent cost analysis team be from an organization outside of DOD? How will the team be selected?

Secretary YOUNG. A Federally Funded Research & Development Center (FFRDC) will review the work of the Source Selection Evaluation Team (SSET) to ensure the evaluation was done in accordance with the Request for Proposal (RFP) requirements. The FFRDC was selected on the basis of its experience and the fact that it has no relationship with either of the offerors.

Mr. DICKS. Under Secretary Young's testimony to the Air and Land Forces Subcommittee included the statement that "Evaluating cost as one giant bundle, I think, is awkward. I think we should assign some value to the known cost of developing and buying the aircraft, but we also will likely make an adjustment and make sure we properly evaluate the life cycle costs, but look at those two in terms of our relative confidence in the two numbers." Under Secretary Young's comments clearly show intent to more strongly weight near-term program costs over longer term operation and support (O&S) costs. Historical data shows that O&S costs for Air Force programs represent approximately 70% of total ownership costs (GAO letter report to Sen. Inhofe, August 2000). Historical data also shows that development costs are

not well known as evidenced in GAO's July 2008 report (GAO–08–619) that found that "eight of the 20 programs [studied] have reported development cost growth of more than 35 percent, resulting in the need for nearly $19 billion in additional funding." Since development costs and O&S costs both have significant uncertainty, but O&S costs represent the high burden on the taxpayer, does DOD agree that O&S costs should be given very substantial weight in evaluating total life-cycle costs of proposals? If not, why not?

Secretary YOUNG. O&S costs will be evaluated as part of the Most Probable Government Ownership Life Cycle Costs (MPGOLCC). We will be estimating these costs over a 40 year period. As with any estimate that is projected out beyond 40 years, there will be a high degree of uncertainty and approximation associated with this MPGOLCC estimate.

On the other hand, we are confident that we can more accurately evaluate the Contractor's proposed Acquisition costs. The government is seeking to buy a commercial derivative product and this effort contains significantly less risk than other weapon systems development efforts which are developing new capability and relying on unproven technology. Hence, acquisition will have more weight than Government Ownership Costs in the Cost/Price factor.

While Operation and Support (O&S) cost represent a significant portion of the life cycle costs, these costs should not be over weighted in this or other source selections for several reasons. First, it is impossible to predict life cycle costs over 15–40 with accuracy. Second, all systems have significant life cycle costs—it is only the relative difference which is of interest, and this relative difference has a high degree of uncertainty. Third, most DOD programs have historically optimistically underestimated life cycle costs. Finally, DOD frequently uses platforms in very different ways than originally planned, significantly altering the life cycle costs. For these and other reasons, I believe it is a disservice to the taxpayer to give substantial weight to O&S cost in a source selection. O&S cost should be considered, but generally not on an equal basis with the development and acquisition costs.

Mr. DICKS. At the Air and Land Forces Subcommittee hearing, Congressman Norm Dicks submitted for the record a fuel consumption chart published by Conklin & de Decker Aviation Information. The chart estimates and compares life-cycle fuel consumption and fuel costs for the Airbus A–330 commercial aircraft and the Boeing 767–200 aircraft, based on actual usage. In his testimony at the hearing, Under Secretary Young told Congressman Dicks, "I disagree with your estimates of the fuel burn. We have data, and I have seen the data, I can't comment on the data in public, but those are not accurate estimates of the fuel burn."

What is the basis for DOD's data for fuel consumption? Are DOD's data based on actual usage experience for aircraft? Are they based on bidders' proposals? Are they based on an independent estimate?

Secretary YOUNG. The offerors provided fuel burn rates for computing life cycle costs. The source selection evaluation team did independent estimates of fuel burn rates to cross check the offerors' data. The estimates were based on flight profiles that allowed the assessment of average fuel burn rates over a wide range of operating conditions. The cross check demonstrated that both offerors' proposed fuel burn rates were reasonable. therefore the offerors' burn rates were used in the life cycle cost calculations.

Mr. DICKS. The data that Congressman Dicks submitted for the record is based on commercial aircraft. It would be reasonable to expect that a commercial aircraft that is modified for use as a tanker would have different fuel consumption, but that both competing aircraft would be affected in the same manner and approximately to the same extent. Does DOD agree with this? What unit cost for aviation fuel was used in the previous life-cycle cost estimation that was used in developing Most Probable Life Cycle Cost? What unit cost for aviation fuel will be used as the basis for a future life cycle cost calculation in a new source selection evaluation and how was the figure derived?

Secretary YOUNG. The previous evaluation priced fuel at $2.35/gal. It was the established price used across the Department at the time the Request for Proposal (RFP) was issued (or time of Final Proposal Revision (FPR)). The current Department price is $4.07/gal. The evaluation will be done using whatever price the Department has in place at time of FPR.

It is reasonable to assume two commercial aircrafts fuel consumption would be affected in the same manner and to reasonably the same extent if both are modified to a tanker role in a similar fashion. We note that in the data Congressman Dicks submitted for the record, one aircraft is significantly different than the baseline aircraft proposed to the Air Force. As such, it is not reasonable to conclude that the results presented in the Congressman Dicks submitted data can be used to draw inferences about the KC–X program. Fuel consumption by commercial and commer-

cial-derivative aircraft is very mission profile dependent and generally highly proprietary information. The Defense Department will evaluate all proposed air craft using data.

Mr. DICKS. The GAO decision on the KC–X Tanker protest identified some significant issues concerning the evaluation of military construction costs. Not only were there computational errors, but the evaluation also neglected to consider unique costs of the specific proposals, and neglected to use representative costs for basing at Fairchild AFB from the bidders. Will a future source selection evaluation consider the unique MILCON costs of each bidder's proposal by conducting site surveys after receipt of the proposals? Will bidders again be asked to submit estimated cost for basing at Fairchild AFB, and will those costs be used in the source selection evaluation?

Secretary YOUNG. No.

Mr. DICKS. Will a future source selection evaluation consider construction costs that would be incurred at bases around the world in fighting the wartime scenarios that are part of the Integrated Fleet Aerial Refueling Assessment?

Secretary YOUNG. No.

Mr. DICKS. Personnel costs are a significant portion of the O&S costs for any weapon system. How did the Air Force evaluate personnel costs in estimating Most Probable Life Cycle Cost (MPLCC) for the previous KC–X source selection?

Secretary YOUNG. The costs of Air Force, Air National Guard, and Air Force Reserve personnel were based on the number of personnel in the KC–X Manpower Estimate Report (MER) provided by Air Mobility Command and salary rates taken from Air Force Instruction (AFI) 65–503. The numbers of Air Force, Air National Guard, and Air Force Reserve personnel were multiplied by the appropriate salary rates from AFI 65–503 to yield the cost of personnel for KC–X. Identical manpower estimates were used for all offerors.

Mr. DICKS. Personnel costs are a significant portion of the O&S costs for any weapon system. Did the cost estimating models account for system-specific or industry-standard differences? For example, is it common to evaluate personnel costs for aircraft weapon systems based on the weight of an aircraft or the addition of OBOGGS?

Secretary YOUNG. No. Personnel manning is based on wartime conditions and typically do not vary based on peacetime conditions. Adjustments to manning can only be made after extensive use of the aircraft in the operational environment.

Mr. DICKS. Personnel costs are a significant portion of the O&S costs for any weapon system. Were personnel costs for organizational- and depot-levels developed using current Air Force organizational constructs? If not, did the model assume that all 179 aircraft were going to be stationed at one base?

Secretary YOUNG. Personnel costs were estimated in accordance with Air Force personnel methodologies which considered Air Force organizational constructs for both organizational and depot level maintenance.

Mr. DICKS. Maintenance costs are a significant portion of the O&S costs for a weapon system. How did the Air Force evaluate maintenance costs in estimating Most Probable Life Cycle Cost (MPLCC) for the previous KC–X source selection?

Secretary YOUNG. The Air Force asked offerors to provide both unscheduled and scheduled maintenance costs for KC–X as part of the Request for Proposal (RFP). Offeror inputs were evaluated by source selection team members with backgrounds in cost, logistics, and depot operations. Based on the source selection team's analysis, maintenance costs were adjusted as appropriate. Resulting maintenance costs were included as part of the MPLCC and offerors were briefed on all adjustments.

Mr. DICKS. Maintenance costs are a significant portion of the O&S costs for a weapon system. Were supply costs considered at the organizational and depot levels?

Secretary YOUNG. Yes.

Mr. DICKS. Maintenance costs are a significant portion of the O&S costs for a weapon system. Does the cost estimating model used for the KC–X Tanker source selection consider the frequency of planned depot visits, i.e., a 6-year depot cycle versus an 8-year depot cycle?

Secretary YOUNG. The Operation and Support (O&S) evaluation will consider the frequency of planned depot visits. The original source selection and cost estimates considered these factors.

Mr. DICKS. In performing the KC–X source selection, are relative environmental impacts of proposals a part of the evaluation? Will DOD consider the relative contributions to green house gases of the aircraft that are proposed?

Secretary YOUNG. No.

QUESTION SUBMITTED BY MR. MILLER AND MR. DICKS

Mr. MILLER and Mr. DICKS. Did GAO count the total number of issues raised by The Boeing Company in the protest, where the Air Force represented that there were a total of 110 issues?

Mr. GORDON. We did not count the total number of issues raised by Boeing in its protests, and we have no position on what the "correct" number would be. From our review of these pleadings, we identified, after issuance of our decision, 22 main protest issues, many of which had sub-issues. We recognize that different parties can count issues, and sub-issues, differently, and counting issues is not germane to our protest process. More importantly, as we stated in our decision and in our testimony, we considered all of Boeing's protest allegations.

QUESTION SUBMITTED BY MR. BONNER

Mr. BONNER. Did GAO find that the Air Force had properly calculated that Northrop Grumman's proposed aircraft could offload more fuel over distance and had a better air refueling efficiency than Boeing's?

Mr. GORDON. GAO did not make such a finding.

QUESTIONS SUBMITTED BY MRS. MCMORRIS RODGERS

Mrs. MCMORRIS RODGERS. Representing eastern Washington which is home to Fairchild AFB, one of the Air Force's largest tanker hubs, I understand first-hand the importance of the American Tanker to not only military operations, but humanitarian efforts around the world. I consider myself, and I hope others do too, a strong supporter of the Air Force and all the good things the Service does each and every day. I know each Airman embodies the core values of Integrity First, Service before Self and Excellence In All We Do&..Throughout this entire award process, we've heard the Air Force boast about making the KC–X contract award an "open and transparent" process&that the Air Force wanted to make sure they "got this one right." Although Boeing submitted a laundry list of concerns in their GAO protest, I'm surprised by how basic the 7 items the GAO based their decision on seem to be, and I quote: The agency did not assess the relative merits of the proposals in accordance with the evaluation criteria. The agency violated evaluation provisions for giving consideration for exceeding KPP objects when it said it wouldn't Awarding the contract without being able to show that the Northrop Grumman submission meets all stated requirements Using "notional" (or hypothetical) reasoning and modeling when calculating Boeing's life cycle costs and non-recurring engineering costs—These seem like basic acquisition concepts—My question is simply WHAT HAPPENED? How could these issues have been overlooked? Were the wrong people assigned key oversight responsibilities, is proficiency lacking in the acquisition career field, was the process too cumbersome&what? And what needs to be done to fix the problems?

Secretary PAYTON. Your reputation as a strong supporter of the Air Force is well known and I appreciate that support for the mission. The Air Force is collecting and analyzing lessons learned from the KC–X source selection. We are reviewing every step of the process from requirements definition, to RFP development and release, to proposal evaluation and documentation of the source selection record, to the Most Probable Life Cycle Cost calculations with a focus on personnel, procedures, processes, schedule pressures and complexity levels. These lessons learned will map the GAO sustained items with a root cause assessment and resulting recommendations for source selection improvements. While it is important to note that the GAO did not find any intentional wrong doing or bias on the part of the Air Force, we must take adequate time and apply rigor as we discover and institutionalize the KC–X lessons learned. We will provide our initial findings to Acting Secretary of the Air Force Donley in September. Also in September, we will ask the Center for Naval Analysis to initiate an independent review of the KC–X source selection with findings reported out to Acting Secretary Donley in December. I look forward to discussing the findings of our internal review of lessons learned with you as soon as they are complete. Again, thank you for your strong support of the Air Force.

Mrs. MCMORRIS RODGERS. I've heard Sectary Gates is considering moving other Air Force acquisition programs under OSD oversight. Can you provide a brief summary of those programs?

Secretary PAYTON. The Air Force is not aware of any programs being considered for OSD oversight.

Mrs. MCMORRIS RODGERS. The GAO report included a recommendation that Boeing be "reimbursed the reasonable costs of filing and pursuing their protest, including reasonable attorneys' fees." Do you have an estimate of how much these "reasonable costs" are?

Secretary PAYTON. The amount of bid protest costs incurred by Boeing is proprietary data and was submitted by Boeing under the GAO protective order, preventing the release of the details publicly. At this time, it is inappropriate for the Air Force to comment on what are Boeing's "reasonable costs." Pursuant to the GAO bid protest rules, 4 C.F.R. § 21.8(f), the Air Force contracting officer will negotiate with Boeing to resolve the claim or otherwise issue a decision on the claim.

Mrs. MCMORRIS RODGERS. If the re-bid process results in Boeing receiving the contract award, is the Air Force liable to pay Northrop Grumman a penalty for terminating the contract award? If so, how much?

Secretary PAYTON. The Northrop Grumman contract contained a standard contract provision from the Federal Acquisition Regulation ("FAR") that allowed the Air Force to issue a proper stop work order to Northrop Grumman when Boeing filed its protest. 48 C.F.R. § 52.233–3, FAR contract clause entitled "Protest After Award (Aug 1996)." The Northrop Grumman contract also contains a FAR provision that allows the Air Force to terminate the contract for its convenience. 48 C.F.R. § 52.249–6, FAR contract clause entitled Termination (Cost Reimbursement) (May 2004). This FAR contract provision governs the general termination proceedings and establishes costs that are payable by the Air Force to Northrop Grumman upon a contract termination. Generally, the costs reimbursable are those incurred for performance of the contract before the effective date of the termination, a portion of the contract fee, costs to terminate subcontracts, and reasonable settlement costs of the work terminated. The termination costs would not be known until a termination decision is made and a settlement is negotiated.

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