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

**Statement Regarding the Bid Protest Decision Resolving the Aerial Refueling
Tanker Protest by The Boeing Company**
B-311344 et al., June 18, 2008

The Boeing Company protested the award of a contract to Northrop Grumman Systems Corporation under solicitation No. FA8625-07-R-6470, issued by the Department of the Air Force, for KC-X aerial refueling tankers to begin replacing its aging tanker fleet. Boeing challenged the Air Force's technical and cost evaluations, conduct of discussions, and source selection decision.

Our Office sustained Boeing's protest on June 18, 2008. The 69-page decision was issued under a protective order, because the decision contains proprietary and source selection sensitive information. We have directed counsel for the parties to promptly identify information that cannot be publicly released so that we can expeditiously prepare and release, as soon as possible, a public version of the decision.

Although the Air Force intends to ultimately procure up to 179 KC-X aircraft, the solicitation 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, including military construction 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 as "requirements," or in certain cases, as objectives) that offerors were encouraged, but were not required, to provide.

The agency received proposals and conducted numerous rounds of negotiations with Boeing and Northrop Grumman. The Air Force selected Northrop Grumman's proposal for award on February 29, 2008, and Boeing filed its protest with our Office on March 11, supplementing it numerous times thereafter. In accordance with our Bid Protest Regulations, we obtained a report from the agency and comments on that report from Boeing and Northrop Grumman. The documentary record produced by the Air Force in this protest is voluminous and complex. Our Office also conducted a hearing, at which testimony was received from a number of Air Force witnesses to complete and explain the record. Following the hearing, we received further comments from the parties, addressing the hearing testimony as well as other aspects of the record.

Our 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. Our bid protest process examines whether procuring agencies have complied with those requirements.

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.

Specifically, we sustained the protest for the following reasons:

1. The Air Force, 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. The agency also did not take into account the fact that Boeing offered to satisfy more non-mandatory technical "requirements" than Northrop Grumman, even though the solicitation expressly requested offerors to satisfy as many of these technical "requirements" as possible.
2. The Air Force's use as a key discriminator that Northrop Grumman proposed to exceed a key performance parameter objective relating to aerial refueling to a greater degree than Boeing violated the solicitation's evaluation provision that "no consideration will be provided for exceeding [key performance parameter] objectives."
3. The protest record did not demonstrate the reasonableness of the Air Force's determination that Northrop Grumman'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. The Air Force conducted misleading and unequal discussions with Boeing, by informing Boeing that it had fully satisfied a key performance parameter objective relating to operational utility, but later determined that Boeing had only partially met this objective, without advising Boeing of this change in the agency's assessment and while continuing to conduct discussions with Northrop Grumman relating to its satisfaction of the same key performance parameter objective.
5. The Air Force unreasonably determined that Northrop Grumman's refusal to agree to a 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. The Air Force's evaluation of military construction costs in calculating the offerors' most probable life cycle costs for their proposed aircraft was unreasonable, where the agency during the protest conceded that it made a number of errors in evaluation that, when corrected, result in Boeing displacing Northrop Grumman as the offeror with the lowest most probable life cycle cost; 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. The Air Force improperly increased Boeing's estimated non-recurring engineering costs in calculating that firm's most probable life cycle costs to account for risk associated with Boeing's failure to satisfactorily explain the basis for how it priced this cost element, where the agency had not found that the proposed costs for that element were unrealistically low. In addition, the Air Force's use of a simulation model to determine Boeing's probable non-recurring engineering costs was unreasonable, because 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.

We recommended 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 our decision. We further recommended that, if the Air Force believed that the solicitation, as reasonably interpreted, does not adequately state its needs, the agency should amend the solicitation prior to conducting further discussions with the offerors. We also recommended that if Boeing's proposal is ultimately selected for award, the Air Force should terminate the contract awarded to Northrop Grumman. We also recommended that the Air Force reimburse Boeing the costs of filing and pursuing the protest, including reasonable attorneys' fees. By statute, the Air Force is given 60 days to inform our Office of the Air Force's actions in response to our recommendations.

Information about GAO's bid protest process can be found at www.gao.gov.

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