
Boeing's KC-35 Tanker Protest: What Happened and What Are Its Implications

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This is Air Force's Third Attempt to Procure The Tanker

- 2001 October – Air Force Proposes to Lease 100 Air Refueling Tankers from Boeing at a Cost of \$20 Million or More
- Senator McCain calls it “a sweet deal” for Boeing that would cost taxpayers more than alternative plans
- RFP issued and evaluated but that is overturned when it is discovered that Darlene Druyun, top Air Force Acquisition Officer overseeing the tanker contract, steered this contract to Boeing while she was negotiating for employment
- Both Druyun and Boeing CFO go to jail
- May 2004 Secretary Rumsfeld cancels tanker deal

Chronology

- Draft RFP September 2006
- RFP January 30, 2007
 - 152 pages long plus two exhibits, 38 attachments, 52 pages of proposal preparations and instructions to which there are 23 additional attachments
 - Call for an 8-Volume Proposal Submission
 - Volume 2 “Mission Capability and Proposal Risk” is to contain technical descriptions of the proposed aircraft and was limited to 750 pages
 - Instructions for that volume alone were 25 pages long and required the competitors to address hundreds of topics

Chronology (continued)

- Receipt of two proposals April 2007
- Air Force Team of more than 150 personnel evaluated
- Decision to award to Northrop Grumman (“NG”) February 29, 2008
- Debriefing
- Boeing files protest with GAO March 11, 2008
- B311344.11--There were seven supplemental protests as evaluation documents were provided during the development of the case

Boeing Protest

- “An extraordinary step rarely taken by our company, and one we take very seriously.”
CEO Jim McNerney
- Boeing has 15 lawyers from itself and two law firms on the protest
- Northrop Grumman has 9 lawyers from a law firm and from Northrop Headquarters
- The Air Force puts 19 lawyers on to defend

Procedural Issues

- Air Force request for documents
- Air Force and NG motion to dismiss

Prejudice

- To win protest you must not only prove errors, but also prove prejudice
- Only two bidders
- “But for these errors” Boeing would have had a substantial chance of award

The GAO Decision – June 18, 2008

- GAO's reasons for sustaining the protest:
 1. First, the Air Force ("AF") did not credit Boeing with satisfying more non-mandatory technical "requirements" than NG even though the RFP "expressly requested" competitors to satisfy as many such requirements as possible
 2. The AF credited NG with exceeding a "key performance parameter" even though the RFP said that the AF would not credit competitors in that way
 3. The AF did not show that it had reasonably determined that NG's proposed tanker could satisfy the RFP requirement for refueling

The GAO Decision (continued)

4. AF conducted “misleading and unequal” discussions with Boeing
5. AF accepted NG’s proposal although the company took “clear exception” to a “material solicitation requirement”
6. AF’s determination of “most probable life-cycle cost” was erroneous because it miscalculated estimated military construction costs
7. AF improperly increased Boeing’s estimated non-recurring engineering costs in calculating that firm’s most probable life cycle cost

GAO Recommendation

- Re-open discussions
- Obtain revised proposals
- Conduct a new evaluation
- If Boeing's proposal selected for award, AF should terminate the contract to NG
- Recommend that Boeing be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys fees

Embarrassment for Air Force

- Secretary Gates takes away from Air Force the decision making authority
- July 9, 2008 – Gates selects John Young, Undersecretary of Defense for Acquisition, Technology and Logistics as the new SSA
- New SSAC as well as a new independent review team were appointed

New Developments

- September 10 – RFP Cancelled
 - Cannot Award by January
 - Let New Administration Decide
- September 18 – Termination Costs
 - Tens of Millions