

**THE RESULTS OF THE INVESTIGATION BY THE
DEPARTMENT OF DEFENSE AND THE DEPART-
MENT OF THE AIR FORCE INTO THE RELEASE
OF PROPRIETARY DATA IN THE KC-X COM-
PETITION**

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JANUARY 27, 2011

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THURSDAY, JANUARY 27, 2011

U.S. SENATE
COMMITTEE ON ARMED SERVICES
Washington, D.C.

The committee met, pursuant to notice, at 9:33 a.m. in room SD-G50, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, McCaskill, McCain, Inhofe, Sessions, Graham, Wicker, and Brown.

Committee staff members present: Richard D. DeBobes, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Creighton Greene, professional staff member; Peter K. Levine, general counsel; and Jason W. Maroney, counsel.

Minority staff members present: Pablo E. Carrillo, minority investigative counsel; David M. Morriss, minority counsel; and Christopher J. Paul, professional staff member.

Staff assistants present: Kathleen A. Kulenkampff, Hannah I. Lloyd, and Brian F. Sebold.

Committee members' assistants present: Tressa Guenov, assistant to Senator McCaskill; Joanne McLaughlin, assistant to Senator Manchin; Anthony J. Lazarski, assistant to Senator Inhofe; T. Finch Fulton, assistant to Senator Sessions; and Sarah Drake, assistant to Senator Wicker.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody.

The committee meets today to address the inadvertent release of proprietary data in the process of the KC-X tanker procurement.

We recognize that the Air Force is currently conducting a source selection in this procurement, and we need to avoid any action, comment, or answer that might compromise that source selection. This hearing will focus on, first, the nature of the information released by the Air Force; second, the steps that the Air Force took to determine what happened, and to determine if there was any damage to the fairness and integrity of the source selection process; and third, any remedial actions taken by the Air Force.

I would ask both Senators and witnesses to avoid any lines of inquiry that could compromise the source selection process.

The issue that needs to be addressed is whether the Air Force releasing proprietary or source-selection-sensitive data to the competitors during the ongoing third tanker procurement process has damaged that process.

My understanding of the current situation is as follows: Boeing and the European Aeronautic Defense and Space Company (EADS) are competing for the contract to furnish the next generation strategic refueling contract, called the KC-X, for the Air Force.

As part of this competition, the Air Force is evaluating the capability of the competitors' aircraft in a model referred to as the Integrated Fleet Aerial Refueling Assessment (IFARA). In this analysis, the Air Force is evaluating potential KC-X aircraft using several postulated real-world scenarios. In deriving an IFARA score, the Air Force uses the model to compare candidate aircraft with the current tanker, the KC-135R.

As part of the official discussions, within the current competition, the Air Force intended to share with each contractor the Air Force IFARA assessment on that contractor's aircraft, to ensure that there were no substantive disagreements on the calculations on the score.

In November 2010, personnel working for the Air Force Program Office inadvertently sent the IFARA data files for the Boeing offer and the EADS offer to both contractors. After the error was identified, the Department of Defense (DOD) and the Air Force investigated the incident and determined that some IFARA data had been viewed by one of the two contractors. The Air Force then determined that comparable data should be released to the other contractor, in the effort to ensure that the competition could continue on a level playing field, and it was released.

Now, joining us today are Major General Wendy Masiello, Program Executive Officer (PEO) for Combat and Mission Support, Office of the Assistant Secretary of the Air Force for Acquisition; and Steven Shirley, Executive Director for the DOD Cyber Crime Center. These witnesses have been selected because they have a detailed knowledge of issues regarding the specific subject matter of this hearing.

I want to extend a welcome to our witnesses. Thank you both for appearing before this committee this morning. I know that it took some doing to get here, given the snow circumstances.

Over the last month, the staff has met on two occasions with DOD officials familiar with the release of information and the Air Force investigation.

Also, I made an offer to the chief executive officer (CEO) of each of the companies to submit written statements to the committee addressing these issues, should they choose to do so. We have received a submission from each of the companies, and without objection, we will make those two submissions part of the record at this time.

[The prepared statements of Mr. Muilenburg and Mr. O'Keefe follow:]

PREPARED STATEMENT BY DENNIS A. MULENBURG

Mr. Chairman, thank you for this opportunity to provide a statement to the Senate Armed Services Committee regarding the release of contractor proprietary data in the KC-X competition. I am not in a position to comment on specific actions taken by another company. I can, however, provide the facts regarding how Boeing handled the data it received. In all respects, Boeing's conduct was consistent with the highest standards of ethically responsible behavior.

- On November 1 of last year, Boeing was notified by the Air Force that a classified Integrated Fleet Aerial Refueling Assessment (IFARA) package was available for Boeing to receive from Wright Patterson Air Force Base (WPAFB). Boeing understood the package contained Boeing's interim IFARA evaluation data and score. Boeing retrieved the package and brought it to St. Louis for review and analysis, following strict protocol for the transport and handling of classified data.
- An analyst on the Boeing tanker program received the IFARA data package from Boeing Security in St. Louis that evening, and noted there were two disks and a cover letter. The analyst took the materials to a classified lab for review with another Boeing analyst. One of the analysts inserted the first disk into a Boeing classified laptop. The analyst reviewed the file structure and located the Excel file they believed would contain the Air Force Fleet Effectiveness Value (FEV) for Boeing. The analysts opened this file, confirmed it contained the Boeing KC-767 FEV score, and printed this classified table. An analyst then copied the contents of this first disk to the classified laptop hard drive, and removed the first disk from the computer.
- The analyst then inserted the second disk into the laptop, and reviewed the file structure of that disk more closely in an attempt to discern what the difference was between the first and second disks. The analyst then noticed that the parent folder name of the second started with the prefix "K-30B." At that point, the Boeing analysts became concerned that the second disk could potentially contain competitor data. The analysts immediately removed the second disk from the laptop drive, and confirmed that the titles on the first disk did indeed contain references to "K-67B" and the titles on the second disk contained references to "K-30B." At no point did the Boeing analysts open any files on the second ("K-30B") disk, nor did they make any copies or print outs of the second disk data. Our analysts did not forward the files or in any other way provide further access to the data to any other person.
- The cover letter, both disks, as well as the classified laptop used to open them, were all immediately sealed by security and locked in classified safes, and the analysts contacted the appropriate Boeing personnel to report the incident. Boeing notified the Air Force by phone and email that night, and received instructions the next day to repackage the materials and return them to WPAFB in Dayton. Boeing followed this direction, and couriered the materials back to Dayton that same day (November 2).
- On November 8, the Air Force requested that Boeing also deliver its classified laptop computer to the Defense Computer Forensics Laboratory in Maryland on November 10. Boeing complied with this direction.

Boeing's behavior in this instance is emblematic of our conduct throughout this competition. We have competed fairly and aggressively. We have not sought extensions of time, we have complied with every deadline, and we have followed the strictures and procedures established by the Air Force acquisition authority to the letter. You can be sure that Boeing will do everything in its power to ensure the integrity of this competition because of its importance to our USAF customer and our military men and women that we are honored to serve.

Mr. Chairman, Senator McCain, and members of the committee: American industry relies on the integrity of the Defense Department's acquisition processes. Your review of this matter is greatly appreciated.

 PREPARED STATEMENT BY SEAN O'KEEFE

Chairman Levin, Senator McCain, and members of the committee, I am pleased to provide a statement to the committee concerning the U.S. Air Forces' inadvertent release of Integrated Fleet Aerial Refueling Assessment (IFARA) data in the KC-X tanker procurement. The facts surrounding this incident, and the responsible actions taken by EADS North America, are straight forward and deserve to be clearly

understood with full transparency. We are pleased to contribute in any way to that full understanding.

The constitutional role of Congress as exercised by this committee is critical, given that it examines issues that affect the capabilities of our men and women in uniform. I appreciate the thoughtful and careful manner in which the committee has engaged on the issue of data disclosure on the KC-X competition. It is my hope that this statement—and the information we have provided to the committee—will add to your understanding of what transpired, as well as the care and precision with which EADS North America personnel dealt with a situation that they had no part in creating; and concurrently the professionalism of the U.S. Air Force response to make every effort to preserve the integrity of the procurement for aerial refueling tankers.

Many members of this committee have considerable awareness of EADS North America. However, some of you may not. I would like to take a moment to briefly tell you who we are. EADS North America is the American Division of a global, publicly-traded defense and aerospace company whose products contribute daily to the security of the United States. In addition, as a global aerospace company, EADS is the largest international customer of U.S. manufactured aerospace components, purchasing in excess of \$11 billion a year in U.S. manufactured components—many from your respective States—that are integrated into our final products and platforms for export around the globe.

We are proud to be a major prime contractor to the Department of the Army today, providing the Lakota Light Utility Helicopter which is produced in Columbus, MS, and today is operational in the United States, Europe, and the Pacific. Additionally, we are the largest platform provider to the Department of Homeland Security, and we have a substantial and responsible history as a supplier to other departments and agencies of the U.S. Federal Government.

As a company, EADS understands and embraces our obligations as a responsible provider of world class aerospace products to the U.S. military, as well as other government agencies and a myriad of commercial customers. We are a global corporation dedicated to bringing the best aerospace products to customers across the globe—just like our primary competitor, the Boeing Company. For the U.S. market, that means not just selling our exceptional products here for a good value, but building them here in the United States, and creating jobs across this country and participating constructively in the communities in which our employees live.

The provision of capability and value to our customers is our foundation. As a corporate partner to the U.S. Government, our guiding tenet is the operation of our business enterprise in a manner that upholds the highest ethical standards. Those standards include protecting the integrity of the procurement process. When mistakes are made, we exercise rigorous care to safeguard competition sensitive or proprietary information—whether that information concerns us or our competitors. In the particular matter under discussion today related to the data disclosure on the U.S. Air Force aerial refueling tanker aircraft competition, EADS North America acted correctly, quickly, and responsibly in addressing an incident that was not of our making.

Clearly, it would have been preferable that the data disclosure by the U.S. Air Force had not happened. However, after a full and thorough review of EADS North America's actions, I can tell you with high confidence that our actions following awareness of the disclosure were timely, responsible and appropriate.

The facts surrounding this issue are clear. EADS North America received two data discs with security documentation from the U.S. Air Force. After proper in-processing, a cleared employee inserted and opened the first disc, reviewed and verified the EADS North America data, and closed it. He then inserted the second disc, and opened the first file on the disc. On seeing that the contents of the first page of that file contained competitor markings he closed the disc, removed it from the computer, and immediately secured it under appropriate security procedures. The total time that the file was open was less than 15 seconds.

Once the data disclosure was discovered, our employee immediately followed established protocols to ensure that the disclosure was contained, that the media on which the data were contained was controlled, and that no communication of the content of the disclosed data occurred. All of this was done in line with all statutory and regulatory guidelines, and the highest standards of business conduct. Specifically, on the night of the disclosure incident, EADS North America secured the competitive data, under two-person control, using the Defense Department approved security facility at EADS North America. We immediately reported the disclosure to the U.S. Air Force Contracting Officer, and carefully followed the spirit and letter of subsequent government direction. This included the isolation of the data and recusal of the individual who discovered the disclosure, as well as the prompt return

of the data and the processing equipment to the U.S. Air Force. The employee who opened the discs was immediately instructed that he must not disclose any information regarding the content of the file he saw on the second disc (one page), and was assigned to administrative duties separate from the KC-45 program, pending the outcome of an independent investigation, and the investigation and determination by the U.S. Air Force.

Recognizing the importance of this unfortunate customer mistake in sending competitor data, I immediately initiated an independent investigation by outside counsel to review and document the events and actions taken by EADS North America to manage the situation. This investigation was thorough and comprehensive and its conclusions are the same as those reached by the U.S. Air Force's own assessment and the government's computer forensic analysis. We provided our complete and prompt cooperation with every aspect of the U.S. Air Force investigation, including providing the report of our internal investigation to the U.S. Air Force. The committee has received the same report of investigation of the events relating to the November 1, 2010 incident. We have voluntarily made our findings and reports available to the committee, as requested. We did this without making public statements that might exacerbate matters or adversely affect the course of this important procurement.

Unfortunately, it appears that some are attempting to exploit the U.S. Air Force's inadvertent error by speculating on events which are not in evidence. Most disconcerting is the false assertion that EADS North America held for a month the competitor data incorrectly sent to us. I can assure the committee that this allegation is simply untrue and is substantively contradicted by the government's investigation and detailed forensic analysis.

EADS North America has a single goal in the KC-X competition—to ensure that the information necessary to support this competitive procurement is objectively provided to the U.S. Air Force such that a fair and timely decision can be made on this critical military system. Our actions over the more than 5 years of effort in this competition have fully demonstrated our commitment to that objective. There is no place in this competition for anything other than full transparency into the process leading to a fair outcome. The hearing by the committee today can advance that objective by affirming through an examination of known facts that the unfortunate misstep of sending competitive information to both contractors was managed in good faith and full compliance by EADS North America and the U.S. Air Force. I stand by the actions taken by this company and our employees as fully compliant and responsible in accordance with the information provided as requested by the committee.

We are prepared to answer any question this committee may have regarding this data disclosure matter. We wish the committee well in your important work in support of our Nation's security and of our men and women in uniform.

Chairman LEVIN. We appreciate both companies' positive approach to this committee inquiry, and both of the companies' cooperation with us.

Senator McCain.

STATEMENT OF SENATOR JOHN MCCAIN

Senator MCCAIN. Thank you, Mr. Chairman.

I thank the witnesses for their attendance and being here this morning.

One of the primary duties of this committee is to engage in oversight of DOD spending and programs. While I'm unfailing in my support for aggressive oversight by this committee over major Defense acquisition programs, and I acknowledge that it's the right and responsibility of the Chairman to schedule hearings as he deems fit and appropriate to ensure that the committee exercise its oversight responsibilities effectively, I approach today's hearing with a fair bit of concern, and even a greater amount of skepticism, that this hearing will be beneficial to our job of oversight.

Unfortunately, this hearing appears to be designed to produce little new information about the pending award of the Air Force's KC-X tanker competition.

As we all know, the competition for the Air Force's new aerial refueling tanker has been beset by problems in acquisition irregularities for years. After considerable effort to ensure the current competition process is as error-free and clean as possible, in November the Air Force inadvertently, and incredibly, sent data related to the competition to each of the respective bidders, that they should not have had.

The natural outcome of this mistake is to ask, what difference, if any, did this mistake make to the competition? While I think the urge to dive into that question is understandable, this long, drawn-out process is nearing its end, and a final announcement of the Air Force's decision will be made soon.

To the extent that November's mistake could be argued to have an impact on the outcome, that seems to me to be an issue more appropriately addressed after the competition has run its course and a winner has been announced, not just weeks before the process draws to a conclusion.

While this committee should continue to exercise aggressive oversight into the tanker award processes, the witnesses here today have little ability to shed real light on the facts that eventually need to be examined on this matter. Indeed, the tanker program has been delayed for more than a decade and is expected to be worth approximately \$30 billion. With that much at stake, hearings on this topic should be designed to allow the Air Force to speed the delivery of the tanker, that it so badly needs, in the most efficient, cost-effective manner possible.

Everyone wants to ensure that this competition is fair and above board, and that no party gains an unwarranted advantage. We know corrective actions were taken, an effort was made to assess damage and set things right, opinions were formed about what the impact was and whether it could be overcome.

With these fundamental questions in mind and an intent to exercise restraint as we involve ourselves in this issue, I look forward to the testimony of the witnesses.

I also know that the Chairman intends to publicly release, today, documents that we received for this hearing. I think this is a bad idea. I think we could wait until just a few weeks from now, when the final decision is made, and then make all of these documents public, and I understand DOD "doesn't object to the committee's release of these documents." Given all of the controversy, all of the legal challenges, and all of the delays of over a decade, why wouldn't we want to just wait a few weeks before we would release that information, which could cause further disruption to the competition?

Mr. Chairman, it is your right, as chairman, to release those documents. I don't think that it does any good at this time, and it could be disruptive. I say that as a person who has been very much an advocate of total transparency and knowledge, not only shared by Members of Congress, but by the American people.

So, I thank the witnesses for being here today.

I hope that in February we can finally have a final resolution and selection of a tanker that's badly needed by the U.S. Air Force, after nearly a decade of stories of corruption, abuse, mismanagement, and now this latest fiasco of releasing relevant documents to

the contractors, a rather incredible happenstance, in this long odyssey and saga of mismanagement and, in some cases, corruption surrounding the awarding of the contract for this tanker.

I thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator McCain.
General Masiello.

STATEMENT OF MAJ. GEN. WENDY M. MASIELLO, USAF, PROGRAM EXECUTIVE OFFICER FOR COMBAT AND MISSION SUPPORT, OFFICE OF THE ASSISTANT SECRETARY OF THE AIR FORCE FOR ACQUISITION

General MASIELLO. Mr. Chairman, Senator McCain, and members of the committee, thank you for opportunity to discuss the events surrounding an inadvertent disclosure of information related to the KC-X program.

I should make it clear at the outset that neither I nor my fellow witness, Mr. Shirley, are affiliated with the KC-X source selection, and thus we cannot address nor speculate on matters beyond the scope of today's hearing.

As a senior Air Force military officer with contracting experience, as well as experience in numerous source selections, I've been asked to review the redacted record of the incident, and the extent of the Air Force's response, so that I could appear today to address the process that was followed and how the Air Force's actions maintained the integrity of the source selection process.

I know that committee members are aware that the Air Force is in the midst of the source selection and will appreciate that my testimony today will be limited to the specifics of this event and my analysis of the actions taken.

The Air Force has been and remains committed to a fair, open, and transparent KC-X source selection. I understand the Air Force has provided all committee-requested documents properly redacted of proprietary and source selection sensitive information.

These are the summary statements by the procuring contracting officer and the head of Air Force contracting activity regarding the Procurement Integrity Act; the Office of the Secretary of Defense (OSD) Independent Review Team's (IRT) report; statements from both companies, including signed CEO certification letters; and the summary statement of the classified Defense Computer Forensics Report.

Before responding to your questions, let me provide this summary of where the Air Force believes the record stands today:

First, the Air Force determined that the error was unintentional and that the actions of the individuals, both government and offerors, did not constitute a violation of the Procurement Integrity Act.

Second, through the statements offered by the employees who handled or viewed the disks from both companies, certified in writing by both company CEOs, and other means which I'll address in a moment, the Air Force believes that the information exposed to one offeror's employee was limited to one screen of summary data related to the government's IFARA data. None of the information on that page was proprietary, and as has been previously stated publicly, there was no pricing data anywhere on the disks. The

summary page, an Excel spreadsheet, was open on the screen for a matter of seconds before it was closed when the company employee realized the mistake. Both companies, upon realizing the error, immediately secured the disks in safes and contacted the Program Office. The Program Office immediately directed and received all of the disks the next day.

The company employee who viewed the single screen shot was reassigned to an administrative position, and did not rejoin the company's proposal preparation team until after the leveling of the playing field, which I'll address momentarily.

Third, at the direction of the source selection authority and procuring contracting officer, an independent review was conducted by personnel from the OSD IRT as to the facts and circumstances regarding the incident. The IRT also made recommendations to help prevent future occurrences.

Fourth, as a further level of verification, the Air Force requested and both companies cooperated by providing the computers that their competitors' disks were inserted into. Using the Defense Computer Forensics Laboratory, the Air Force was able to verify that the record of the disks and files accessed was consistent with the statements provided by both companies and certified by their CEOs.

Fifth, following the investigation, in order to ensure a level playing field, both offerors were presented with the same screen shots of each other's information. Further, since the Air Force was still at a stage where offerors could continue to update their proposals, the procuring contracting officer made it clear that such updates could continue. Consistent with the Air Force's efforts to maintain transparency, both offerors received the opportunity to review the forensic analysis of their respective computers.

Sixth, I am informed by the Program Office that the IFARA summary scores shared with both offerors were interim scores and were not the final scores that will be used in the evaluation. Further, both offerors will have the opportunity to provide a final proposal revision, as is standard. No offeror was impaired from continuing to improve its proposal.

Seventh, the two individuals directly responsible for the packaging and mailing of the information to the companies were not only removed from the program, but no longer perform any duties on programs associated with the Aeronautical Systems Center. Two other individuals, tangentially involved, were counseled.

Eighth, all recommendations from the OSD IRT to prevent recurrence have been adopted. Transmittal of any classified material to a contract will be accompanied by a letter, not just the Air Force Form 310, signed by an appropriate official. Descriptions of the material being transferred must match both the transmittal letter and the Form 310. The transmittal letter and the Air Force Form 310 must both be reviewed by the signatory of the transmittal letter and an appropriate security official. Classified material to be transmitted must be delivered to the security office in a separate clearly marked package to identify the recipient of the material for each package, ensure individuals with knowledge of both the content of the material and the purpose of the transfer be involved with the preparation and packaging of the information, and personally exe-

ecute the transfer. Additional measures were taken to include supervision oversight and two-person rules that involve senior program and contracting officer positions to personally verify and validate contents of packages against transmittal letters and inventory forms.

Finally, while the Air Force regrets that the incident occurred, Air Force leadership is satisfied that both companies responded to the incident correctly and professionally.

After reviewing the same documents presented to the committee, it is my opinion that the actions taken by the Program Office have ensured a level playing field.

I'd like to thank the committee for your continued support of our men and women in uniform as we await the outcome of the source selection.

[The prepared statement of General Masiello follows:]

PREPARED STATEMENT BY MAJ. GEN. WENDY MASIELLO, USAF

Mr. Chairman, Senator McCain, and members of the committee thank you for the opportunity to discuss the events surrounding an inadvertent disclosure of information related to the KC-X Program. I should make it clear at the outset that neither I nor my fellow witness, Mr. Shirley, are affiliated with the KC-X Source Selection and thus we cannot address, nor speculate, on matters beyond the scope of today's hearing. As the senior Air Force military officer with contracting experience, as well as experience in numerous source selections, I have been asked to review the redacted record of the incident, and the extent of the Air Force's response, so that I could appear today to address the process that was followed and how the Air Force's actions maintained the integrity of the Source Selection process. I know that committee members are aware that the Air Force is in the midst of the Source Selection and will appreciate that my testimony today will be limited to the specifics of this event and my analysis of the actions taken. The Air Force has been and remains committed to a fair, open and transparent KC-X source selection. I understand the Department has provided all committee requested documents, properly redacted of proprietary and source selection sensitive information. These are:

- The summary statements by the Procuring Contracting Officer and the Head of Air Force Contracting Activity regarding the Procurement Integrity Act;
- The Office of the Secretary of Defense (OSD) Independent Review Team's report;
- Statements from both companies, including signed, Chief Executive Officer (CEO) certification letters; and,
- The summary statement of the classified, Defense Computer Forensics report.

Before responding to your questions, let me provide this summary of where the Air Force believes the record stands today.

First, the Air Force determined that the error was unintentional and that the actions of the individuals, both government and offerors, did not constitute a violation of the Procurement Integrity Act.

Second, through the statements offered by the employees who handled or viewed the disks from both companies, certified in writing by both company CEOs, and other means which I'll address in a moment, the Air Force believes that the information exposed to one offeror's employee was limited to one screen of summary data related to the government's Integrated Fleet Aerial Refueling Assessment (IFARA) data. None of the information on that page was Proprietary, and as has been previously stated, there was no pricing data anywhere on the disks. The summary page, an Excel spreadsheet, was open on the screen for a matter of seconds before it was closed when the company employee realized the mistake. Both companies, upon realizing the error, immediately secured the disks in safes and contacted the Program Office. The Program Office immediately directed and received all of the disks the next day. The company employee who viewed the single screen shot was reassigned to an administrative position, and did not rejoin the company's proposal preparation team until after the leveling of the playing field, which I'll address momentarily.

Third, at the direction of the Source Selection Authority and Procuring Contracting Officer, an Independent Review was conducted by personnel from the OSD Independent Review Team as to the facts and circumstances regarding the incident. The Review Team also made recommendations to help prevent future occurrences.

Fourth, as a further level of verification, the Air Force requested and both companies cooperated by providing the computers that their competitor's disks were inserted into. Utilizing the Defense Computer Forensics Laboratory the Air Force was able to verify that the record of the disks and files accessed was consistent with the statements provided by both companies and certified by their CEOs.

Fifth, following the investigation, in order to ensure a level playing field, both offerors were presented with the same screen shots of each others' information. Further, since the Air Force was still at a stage where offerors could continue to update their proposals, the Procuring Contracting Officer made it clear that such updates could continue. Consistent with the Air Force's efforts to maintain transparency both offerors received the opportunity to review the forensic analysis of their respective computers.

Sixth, I am informed by the Program Office that the IFARA summary scores shared with both offerors were interim scores, and were not the final scores that will be used in the evaluation. Further, both offerors will have the opportunity to provide a Final Proposal Revision, as is standard. No offeror was impaired from continuing to improve its proposal.

Seventh, the two individuals directly responsible for the packaging and mailing of the information to the companies were not only removed from the program, but no longer perform any duties on programs associated with the Aeronautical Systems Center. Two other individuals, tangentially involved, were counseled.

Eighth, all recommendations from the OSD Independent Review Team to prevent recurrence have been adopted.

- Transmittal of any classified material to a contract will be accompanied by a letter, not just the Air Force 310 "Document Receipt and Destruction Certificate", signed by an appropriate official.
- Descriptions of the material being transferred must match both the Transmittal Letter and the Form 310.
- The Transmittal Letter and the AF Form 310 must both be reviewed by the signatory of the Transmittal Letter and an appropriate security official.
- Classified material to be transmitted must be delivered to the security office in a separate clearly marked package to identify the recipient of the material for each package.
- Ensure individuals with knowledge of both the content of the material and the purpose of the transfer be involved with the preparation and packaging of the information and personally execute the transfer.

Additional measures were taken to include increased supervision oversight and two-person rules that involve senior Program and Contracting Officer personnel to personally verify and validate contents of packages against transmittal letters and inventory forms.

Finally, while the Department regrets that the incident occurred, Department leadership is satisfied that both companies responded to the incident correctly and professionally.

After reviewing the same documents presented to the committee, it is my opinion that the actions taken by the program office have ensured a level playing field. I'd like to thank the committee for your continued support of our men and women in uniform as we await the outcome of this source selection.

Chairman LEVIN. General, thank you so much.

Mr. Shirley.

**STATEMENT OF STEVEN D. SHIRLEY, EXECUTIVE DIRECTOR,
DEPARTMENT OF DEFENSE CYBER CRIME CENTER**

Mr. SHIRLEY. Good morning, Senator.

I have no opening statement, but I am present, as a technical representative, to answer questions about the forensic process, if required.

Chairman LEVIN. Okay. Thank you.

Thank you, both, very much for being here and for your service. Let's try an 8-minute first round.

General, let me ask you this question first. Can you tell us, specifically, what data from each contractor has been shared with the other contractor as a result of the incident? You talked about a screen shot, for instance. Be much more precise as to what was seen and what then was shared.

General MASIELLO. Senator, from my observation and my reading the documents that are presented here, it was a screen shot of IFARA data, which was about a spreadsheet. It appeared to have 10 lines of information. That screenshot was the IFARA data analysis, the Air Force's analysis of their individual data. That's all I know about what the content or the details are.

Chairman LEVIN. It was one page, is that all?

General MASIELLO. One page.

Chairman LEVIN. What is a screenshot? Is that a page?

General MASIELLO. Yes, sir. When it pops up onto your computer and it has a spreadsheet of the information, that instant page on the computer screen, and it's a picture of that taken.

Chairman LEVIN. All right.

General MASIELLO. So, there's nothing that drills down below that screenshot.

Chairman LEVIN. All right. One image of the screen, you determined, for how long?

General MASIELLO. However long it presented. But the fact is a copy of that, for each offer, was swapped with the offerors.

Chairman LEVIN. That one page.

General MASIELLO. Correct.

Chairman LEVIN. That one page alone.

General MASIELLO. Yes, sir.

Chairman LEVIN. Now, have you determined how long that screen was opened?

Mr. SHIRLEY. Sir, based on the forensics of the media provided by the company, we think that it was viewed on the order of several minutes. That's based on statements from the company. But, the computer was powered for a longer period.

Chairman LEVIN. Where was the 15-seconds figure? Where did that come from?

General MASIELLO. Sir, that was the person's estimate of how much time they viewed it, that they then prepared and signed a statement certifying to that, which was subsequently certified by the CEO of the company.

Chairman LEVIN. All right. You submitted those documents that you outlined to us and we have received assurance from the Air Force that there's no objection to the committee's decision to do so, if we determine that it's appropriate to do so.

General MASIELLO. That's my understanding, sir.

Chairman LEVIN. All right.

Is there objection to those documents being made part of the record and being released?

General MASIELLO. Not that I'm aware of, sir.

Chairman LEVIN. Hearing none, that is the action the committee will take.

[The information referred to follows:]

[REDACTED]
SOURCE SELECTION INFORMATION
DEFENSE CYBER CRIME CENTER
DEFENSE COMPUTER FORENSICS LABORATORY

DCFL-2011-1000140
Requestor's Case Number:
DCFL-2011-1000140

LABORATORY
REPORT (For Boeing)

[REDACTED]
19 Nov 10



*AN ASCLD/LAB DIGITAL EVIDENCE
ACCREDITED LABORATORY*

SPECIAL HANDLING REQUIRED

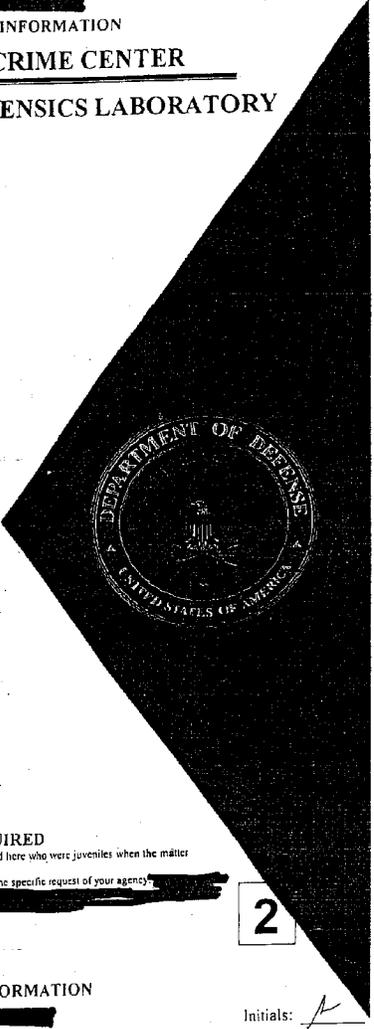
NOTICE - Handle this report with utmost care to protect the reputations of persons named here who were juveniles when the matter disclosed occurred
NOTICE - The Defense Computer Forensics Laboratory (DCFL) prepared this report at the specific request of your agency [REDACTED]

2

SOURCE SELECTION INFORMATION
[REDACTED]

DCFL Form 4C-2 v1.3
Approved by Laboratory Director

Initials: *AK*



DCFL Laboratory Report		
SUBMITTER'S NAME/RANK	SUBJECT NAME	REQUESTOR'S CASE/CONTACT NUMBER
[REDACTED]	COMMAND INQUIRY BY	DCFL-2011-1000140
DATE OF REPORT	LEAD EXAMINER	DCFL FILE NUMBER
19 Nov 10	[REDACTED]	DCFL-2011-1000140

1. Summary

On 10 Nov 10, [REDACTED], Department of the Air Force Civilian (DAFC), ASG/WK, submitted a request to the Defense Computer Forensics Laboratory (DCFL) to analyze one Windows-based laptop computer belonging to THE BOEING COMPANY (BOEING) in support of a command inquiry that was initiated by [REDACTED] to investigate events surrounding the release of sensitive, proprietary information between two companies competing for a US Government (USG) contract. BOEING came into possession of sensitive data belonging to their competitor EADS NORTH AMERICA (EADS-NA). The competitor data was received by BOEING from the USG at the same time it received its own data which they had been expecting. The EADS-NA data was identified with the prefix K30B. BOEING provided the USG with written statements concerning the events surrounding the discovery of the competitor data and the events that followed. DCFL was provided a copy of those statements. [REDACTED] requested that DCFL examine the computer and compare the results with the contents of the BOEING statements. Questions to be answered included:

- What files if any were copied to the hard drives during the time BOEING was in possession of competitor data, from late evening 1 Nov 10 to midday 2 Nov 10?
- Was the server connected to a network? If so, were any files transferred during the time period in question?
- Were any files transferred to other media during the time period in question?

The results of the examination are as follows:

- Examination discovered no real discrepancy between the statements provided by BOEING personnel regarding the events of 1-2 Nov 10 and the examination results.
- No signs of K30B data being copied to the hard drive of the laptop. File activity involving K30B files was limited to two entries in the system registry file NTUSER.DAT file that belongs to the user profile [REDACTED]. The entry in question indicates that the folder K30B IFARA Results Release 10110 was displayed in the Windows explorer. The lack of other entries in that system registry key indicates that this was the only access to files pertaining to K30B.
- No signs of network connections were discovered.
- Signs of unidentified USB devices having been attached to the computer in the past were found. However, the most recent entries in the registry and setup files were from April of 2010 or earlier. There was a drive letter of EA. No connection between EA and any K30B information was found.
- No sign of any documents being printed were found.
- No trace of K30B data was found on the laptop hard drive.

Questions concerning this report should be directed to Director of the DCFL, Special Agent [REDACTED]

[REDACTED]
*SOURCE SELECTION INFORMATION

DEFENSE CYBER CRIME CENTER

DEFENSE COMPUTER FORENSICS LABORATORY

DCFL-2011-1000136
Requestor's Case Number:
DCFL-2011-1000136

**LABORATORY
REPORT (For EADs-NA)**

[REDACTED]
19 Nov 10



**AN ASCLD/LAB DIGITAL EVIDENCE
ACCREDITED LABORATORY**

SPECIAL HANDLING REQUIRED

NOTICE - Handle this report with utmost care to protect the reputations of persons named here who were juveniles when the matter disclosed occurred

NOTICE - The Defense Computer Forensics Laboratory (DCFL) prepared this report at the specific request of your agency.
[REDACTED]

2

SOURCE SELECTION INFORMATION

Form 472-2-1-1
Approved by Laboratory Director
[REDACTED]

Initials:

DCFL Laboratory Report		
SUBMITTER'S NAME	SUBJECT'S NAME	REQUESTER'S CASE CONTROL NUMBER
DAFC	COMMAND INQUIRY BY	DCFL-2011-1000136
19 Nov 10	DATE OF REPORT	DCFL-2011-1000136
	LEAD EXAMINER	
	DCFL FILE NUMBER	

I. Summary

On 10 Nov 10, [REDACTED], Department of the Air Force (DAFC), ASC/WK, submitted a request to the Defense Computer Forensics Laboratory (DCFL) to analyze one Windows-based server belonging to EADS-NA in support of a command inquiry that was initiated by [REDACTED] to investigate events surrounding the release of sensitive proprietary information between two companies competing for a US Government (USG) contract. EADS-NA came into possession of sensitive data belonging to their competitor BOEING. The competitor data was received by EADS-NA from the USG at the same time it received its own data which they had been expecting. The BOEING data was identified with the name K76B. EADS-NA provided the USG with written statements concerning the events surrounding the discovery of the competitor data and the events that followed. DCFL was provided a copy of those statements. [REDACTED] requested that DCFL examine the computer and compare the results with the contents of the EADS-NA statements. Questions to be answered included:

- What files if any were copied to the hard drives during the time EADS-NA was in possession of competitor data, from late evening 1 Nov 10 to midday 2 Nov 10?
- Was the server connected to a network? If so, were any files transferred during the time period in question?
- Were any files transferred to other media during the time period in question?

The results of the examination are as follows:

- Examination disclosed no real discrepancy between the statements provided by EADS-NA personnel regarding the events of 1-2 Nov 10 and the examination results.
- No signs of K76B data being copied to the hard drives on the server. File activity involving K76B files was limited to artifacts created when the folder K76B (FARA Results Release 101101) was accessed and when the file K76B (FARA Results Release 101101(U) K76B Tanker Fleet Effectiveness Table 101101.xls) was accessed. The artifacts were in the form of Windows and Microsoft Office link files, or "shortcuts". This are created automatically when a file or folder is opened. These link files point to the file location as being the D: drive which, on this system, would be the Compact Disk (CD) drive.
- No signs of network connections were discovered and no signs of attached storage devices were found.
- No sign of any documents being printed were found.
- No trace of K76B data, other than file names, was found on the server hard drives.

Questions concerning this report should be directed to Director of the DCFL, Special Agent [REDACTED]

Chairman LEVIN. You indicated that that information was non-proprietary information, is that correct?

General MASIELLO. Yes, sir.

Chairman LEVIN. Would the availability of that information to one of the competitors, but not the other, be advantageous? If so, is that the reason why you decided to attempt to level the playing field by swapping the information, so that both companies would have the assessment of the other company?

General MASIELLO. Sir, I can't tell you whether it was that important or not, because I don't know. I'm not privy to the KC-X specifics. But, whether it was or wasn't, there was, at minimum,

a perception, so the government chose to provide copies to both contractors.

Chairman LEVIN. Both companies.

General MASIELLO. Yes, sir.

Chairman LEVIN. I presume it's the EADS employee that we're talking about; how long was it, after that mistake was noticed by that employee, did EADS close it up and get it back to the government?

General MASIELLO. What I read is that they immediately stopped looking at it, and, because they were in a secure environment, needed to go find someone to partner with them to close it all down.

Chairman LEVIN. Right.

General MASIELLO. It was immediate. They wasted no time shutting it down and securing the documentation and the disks in a file that was signed by security reviewers, as well.

Chairman LEVIN. All right. The other company, Boeing, also caught the mistake. How long did it take them to close up?

General MASIELLO. It was as instantaneous as what I read about in the EADS testimony.

Chairman LEVIN. All right. Those documents that you've referred to that contain that chronology and that certification—there were four of them that you made reference to in your opening statement—are now part of the record and people can look at that chronology and determine how many minutes and how many seconds it was, after the mistake was noticed, that each company locked up the disks, and then got them back to the government, is that correct?

General MASIELLO. Yes, sir.

Chairman LEVIN. That information is in those documents, now available publicly.

General MASIELLO. Yes, it is.

Chairman LEVIN. You're a forensic expert, Mr. Shirley, and you've told us how confident you are. Let me ask you this question, your conclusion, or the Department's conclusion, as to what data was viewed and for how long, is that a high level of confidence?

Mr. SHIRLEY. Yes, sir, Senator. If I might describe a little bit about the process to give you the context.

DOD Cyber Crime Center has, as part of it, the Defense Computer Forensics Lab. It's manned with about 110 people, today. It operates as an accredited lab, certified by an external entity; in this case, the American Society for Crime Lab Directors and their lab accreditation board. What that process does is validate that we have a reliable, valid, repeatable process, that we have people who are certified and professionally qualified to perform the duties in question. They're subject to periodic review and testing in that regard as a condition of the lab retaining its accreditation.

When we receive this data, we essentially treated it in the same manner as we would treat an inadvertent disclosure of classified information in a sensitive program. So, we assigned, as a forensic examiner, one of our most capable subject matter experts. He is the forensic expert that processed this data. He's been qualified in court about 13 times. So, we have a very high level of confidence

that the forensic findings validated the representations by each company.

Chairman LEVIN. Very specifically, the representations, in the case of Boeing, were that they saw the mistake and did not open the page or read the page. In the case of EADS, the representation was that the same page was inadvertently opened, the person who saw it, saw that one page. You indicated this morning, apparently, because of personal conversations with that person, that it may have been a matter of minutes, but according to the documents, which are now part of the record, that was for 15 seconds. In either event, you've concluded it was a matter of some minutes?

Mr. SHIRLEY. Yes, sir. A very short time.

Chairman LEVIN. Okay. That person immediately closed that page and got that material back to the Air Force, is that correct?

Mr. SHIRLEY. That's correct, sir.

Chairman LEVIN. You're confident that the facts are that was the only page which was opened up by that person?

Mr. SHIRLEY. Yes, sir.

Chairman LEVIN. Based on your forensic capabilities.

Mr. SHIRLEY. That's correct, Senator.

Chairman LEVIN. Okay.

Thank you very much.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

I won't need my full 8 minutes; I had a chance to talk to both witnesses beforehand.

In your position, are you able to say what percentage of the bid would this represent?

General MASIELLO. Sir, I have no insight into what percentage that the IFARA data represents for the whole KC-X decision process.

Senator INHOFE. The final bid, I think, is sometime just in the next few weeks. It's coming up. In your opinion, from what you do know, would this impact the final bid?

General MASIELLO. Sir, I don't have a sense for how much it does or if it does affect the final bid. All I know is that the contractors have the opportunity to adjust their proposals any way they see fit over the next remaining period, whatever that might be, before their final proposal revisions are made.

Senator INHOFE. But, however important or unimportant this information is, since I don't know and you're not in a position to know, has any thought been given to eliminate this IFARA element in the final bid process?

General MASIELLO. Sir, I couldn't confirm whether or not that would be the case. It would probably be something that a procuring contracting officer (PCO) would consider when they made the decision how to address the inadvertent release.

Senator INHOFE. As a member of this committee, I would like to know, if it's appropriate to know, whether or not this should be included. It bothers me when something is disclosed like this, and I don't know how significant it is to the whole bid, but I feel that we should know.

General MASIELLO. Yes, sir.

Senator INHOFE. All right.

Thank you. I don't have anything else, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Inhofe.

Senator McCaskill.

Senator MCCASKILL. Let me just say for the record that this is a case study of incompetence at contract competition, this whole debacle from beginning to this very moment. Contract competition for something like this has to be a core competency.

I want to know, in this instance, what punitive actions have been taken. We can call it an accident, but it's incompetence. So, what punitive actions have been taken against the person who made the mistake?

General MASIELLO. Ma'am, from what I read in the documents, the two people who were involved in making the mistake are no longer employed at Aeronautical Systems Center.

Senator MCCASKILL. So, they were fired?

General MASIELLO. Yes, ma'am, from that particular program, and they have been moved to another program.

Senator MCCASKILL. Where have they been moved?

General MASIELLO. Ma'am, I don't know.

Senator MCCASKILL. I would like to know that.

General MASIELLO. Yes, ma'am.

Senator MCCASKILL. I would like to know where they are. I would like to know if they're still making the same amount of money. I would like to know if they're going to resurface later in another position of responsibility.

General MASIELLO. Yes, ma'am.

[The information referred to follows:]

The two individuals were removed from the KC-X program after an independent inquiry into the circumstances of the unauthorized disclosure. These individuals, both of whom were then support contractor employees, were immediately moved to their employer's administrative overhead. At the time of the disclosure, one of the individuals was a Senior Level Security Specialist and the other was a Contract Support Specialist. The security specialist subsequently was reassigned to a staff position, not supporting any Aeronautical Systems Center acquisition program of record, as a Journeyman Level Security Specialist with a substantial pay cut (believed to be roughly 30 percent). The contract support specialist subsequently accepted a Civil Service position as a GS-12 Acquisition Program Manager at the Air Force Security Assistance Center at a substantial pay cut (believed to be roughly 30 percent).

Senator MCCASKILL. I have complimented Secretary Gates because he has provided accountability at the top level in many instances where we have had problems. But, I just think this is beyond the pale.

There are so many things about this that are unusual. Let me start with this. If you can state for the record—and if you can't, I would like this answer from someone else within the military—isn't it correct that it is very unusual for Boeing to file a protest after a competition?

General MASIELLO. Ma'am, I couldn't answer that. I've had different experiences.

Senator MCCASKILL. That's a question I would like for the record. I would like to know, from DOD's perspective, whether or not it is unusual for Boeing to file a complaint and whether or not it is unusual that all nine bases on which they filed the complaint were all sustained at the Government Accountability Office (GAO).

[The information referred to follows:]

Like most major defense contractors, Boeing does not have a history of being a frequent protester to the Government Accountability Office (GAO) or to the Court of Federal Claims. With regard to Boeing's protest of the 2008 KC-X source selection, while GAO did sustain the protest on eight separate grounds, there were other issues in contention on which GAO either found for the government or did not reach a final decision.

Senator MCCASKILL. I'm confused about the screen. EADS said, originally, that they didn't look at the data. Is that correct?

General MASIELLO. No, ma'am, they did not say that.

Senator MCCASKILL. They said they looked at it for a very brief period of time.

General MASIELLO. They looked at the screen shot of the spreadsheet. They admitted to that.

Senator MCCASKILL. Okay.

General MASIELLO. That's what made them nervous. They realized that they shouldn't be looking at that.

Senator MCCASKILL. Okay. I'm confused, though. It appears to me, from looking at the information, that they originally said they looked at it a very short period of time. The forensics indicated that may not be true, that they might have looked at it longer than they originally said they looked at it. Is that correct, Mr. Shirley?

Mr. SHIRLEY. Senator, what we were able to determine is that the file was opened for a fairly short period of time. The computer was powered a bit longer. So, in essence, the statement by the employee, we thought, was consistent with what we saw in the digital media.

Senator MCCASKILL. Why is it relevant that the computer was on longer? Why do you even mention the computer was powered longer?

Mr. SHIRLEY. When we perform an exam, we look at the media at a number of different levels. One of the things that's associated with the computer being in a powered state is there's a feature called clock time that tells you how long the computer's in operation and what files may be manipulated while it's in operation. So, it was part of the context of trying to validate the employee's statement against what we saw on the computer.

Senator MCCASKILL. So, you are testifying today that you believe that the screen was only viewed for the same amount of time that EADS had represented that it had been viewed.

Mr. SHIRLEY. Roughly. Yes, ma'am.

Senator MCCASKILL. My sense is that these are not the right witnesses to answer this question. To follow up on what Senator Inhofe said, given this controversy, should IFARA be used and retained in the final evaluation process now?

General MASIELLO. Ma'am, it's not for me to judge. The PCO on the head of contracting activity determined that it was still appropriate to leave in the competition.

Senator MCCASKILL. We will compose another question for the record to get to those individuals, to get other rationale for that.

[The information referred to follows:]

Yes. The Integrated Fleet Aerial Refueling Assessment (IFARA) uniquely measures the integrated capability of a fleet of tankers in wartime scenarios. Elimination of IFARA could result in significant operational capability being eliminated by all offerors. The Air Force believes the actions taken level the playing field. Further, all offerors equally had several opportunities to update any part of their proposal after the playing field was leveled.

Senator MCCASKILL. Finally, I know that these are probably not the right witnesses, but it's my understanding that DOD has taken the position that the World Trade Organization (WTO) rulings are not relevant to their decision. I would like to know where in the Federal Acquisition Regulation (FAR) that is prohibited. If it's not a level playing field, due to subsidies by other countries, common sense tells me, from the Midwest, that if somebody has their finger on the scale, in terms of subsidies they get from their government, that it's not a level playing field. I am trying to get my arms around the notion that that's not relevant. If either of you can speak to that, that would be terrific; if not, we'll try to track down the right person to get the answer from. Because I don't believe there's anything in the FAR that prohibits that from being considered.

General MASIELLO. I'll defer to DOD on that, ma'am.
[The information referred to follows:]

The Department of Defense has taken the necessary steps to protect the interests of the taxpayer and the warfighter. The World Trade Organization (WTO) matters in the large civil aircraft disputes are issues between the United States and the European Union. It would be inappropriate for DOD to take any action that could impair the U.S. Trade Representative's ability to appropriately represent the interest of the United States before the WTO. The Government Accountability Office (GAO) has consistently held that there is no requirement that an agency consider foreign government subsidies in evaluation of proposals. According to these GAO decisions, the Buy American Act is the proper method for taking these sorts of concerns into consideration in a source selection. The KC-X evaluation will consider, as appropriate, the Buy American Act.

Senator MCCASKILL. Okay.

I understand the limitations we have, Mr. Chairman, in terms of what we can ask, since this is an ongoing process. But, some of these are writ large policy discussions that I really think the Senate has to come to grips with.

I mean, we have a farm field in Alabama and a company that's receiving tens upon billions of dollars of subsidies from foreign governments. Obviously, this process began with bad acting on the part of the company that I think, from where I sit, is better equipped to handle this.

But, having said that the notion that we are not going to take into account, in light of everything that's going on in this country, that we have foreign nations that are subsidizing companies and that's not relevant to our competition, just doesn't make sense to me. I would like us to get to that policy question in these hearings, if at all possible.

I thank you, Mr. Chairman.

Chairman LEVIN. Senator McCaskill, I think the purpose of this hearing is set forth, which is to see what happened here, specifically, and what was done to attempt to remedy it. The broader questions which you raise are appropriate in a different forum for that to be argued or for a different time. But, these witnesses, in all fairness to them, are not called for that purpose.

Senator MCCASKILL. I certainly understand. I don't mean to be in any way critical of these witnesses, because they're not prepared to handle these questions. But, they're on my mind and I needed to express them.

Chairman LEVIN. Which is your right.

Senator McCASKILL. Thank you.
Chairman LEVIN. Thank you very much.
Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

I would just like to say, first, that the Air Force did start off with this process in a very, very unfortunate way. People from both the Boeing Company and the Air Force went to jail. Senator McCain smelled a rat early on. This committee was the one committee that wasn't really consulted in how that original sole-source contract was awarded. Senator McCain, supported by Senator Levin and Senator John Warner, challenged the situation.

What we decided to do was to have a competition. It was the right decision to do, and it saved \$7 billion. I remember declaring Senator McCain to be the \$7 billion man; he saved the taxpayers \$7 billion as a result of having a competition in this process.

A fair, objective competition is what we need and what we have committed to as a committee, and as a Congress. Now, on the eve of this final decision, we have people with political interest and local interest trying to destabilize the process. I just am not happy about that. I wish it had not happened.

I understand how important it is, because it would mean a lot for my State, just like it would mean a lot for other States if it would go another way. But, we have to be sure that we're not doing anything that says that we expect the Air Force to do anything other than what we have directed them to do. The question of subsidies and all of those matters have been discussed for a decade as we've gone forward with this. We've decided how we need to proceed with the competition, and we need to proceed in that way.

I suppose it's appropriate to ask about whether or not this possible information error infected the process. I'm not comfortable that it is. I asked General Schwartz, the Chief of Staff for the Air Force, earlier about it. He assured us all that there had been no unfair advantage gained through this process.

Mr. Chairman, thank you for your leadership. I know you have members on your side and others that want you to do this, that, and the other, all in all, it's a thankless task you have, and I think you've conducted it in a fair way.

I just would like to say, I think producing these documents is a bad idea. Just because they've been redacted to exclude source selection sensitive and proprietary information doesn't mean that releasing them might not cause disruption to the competition, which is taking place right now and coming to its conclusion. So, in my view, our disrupting in any way, politically, the competition would reflect poorly on our committee.

I understand DOD doesn't object to the committee's release of the documents. While that fact is relevant, it still doesn't mean that, in the exercise of its discretion, the committee should release them before the contract is awarded. So, I do object to that.

Chairman LEVIN. They've already been made part of the record, Senator Sessions.

Senator SESSIONS. Mr. Chairman, General Masiello, I asked General Schwartz in this room last fall about the documents, and he responded that "both offerors reacted in a responsible manner and returned the disks that were mistakenly forwarded to them, to the

Air Force. We have confirmed that by forensic evidence.” I’d just like to ask you today whether or not you have any information that would indicate that either competitor has acted inappropriately when they received the data that should not have been sent to them.

General?

General MASIELLO. Senator, by reading the statements that came from both companies, I was really quite impressed by the responses, on both companies’ part, when they realized they had data that they shouldn’t have had. My assessment is they all acted very appropriately and have certified to that effect.

Senator SESSIONS. Mr. Shirley, you’ve examined forensically the disk and the information. Have you been able to conclude that both offerors responded appropriately?

Mr. SHIRLEY. Yes, sir. What we found on their computers was consistent with what they said that they did, in each case.

Senator SESSIONS. General Masiello, what action did you take once you realized this error had occurred?

General MASIELLO. Sir, what I read the PCO did when she heard was, she told them to package things up immediately and get the disks right back to the Air Force. Then they instituted an IRT. They went over to look and see what happened and what went on in the Air Force distribution process so they could correct that immediately. They pulled in the Defense service to examine the computers and got the CEOs to certify to the details that came from each incident on the companies’ side. It was very thorough.

Senator SESSIONS. Do you think that the process as a result of this disclosure was injured in anyway? Was fairness in the process damaged in any way?

General MASIELLO. From what I read here and from the decision that the PCO has validated by the head of contracting activity, and the fairness in sharing the same snapshot with the companies, I would come to the conclusion that it would not affect the source selection process.

Senator SESSIONS. If either one of the companies—and they were told about this—felt they had been unfairly affected by it, what action, if any, could they have taken?

General MASIELLO. Sir, a company can protest at any point, either pre-award or post-award. The companies still have the opportunity to protest if they think that anything is being inappropriately managed at this point.

Senator SESSIONS. How long did the offerors have to lodge a formal complaint as a result of this event?

General MASIELLO. It could still be a part of a post-award protest, should they choose to do that.

Senator SESSIONS. Have either one protested?

General MASIELLO. Not at this time, sir.

Senator SESSIONS. Throughout this whole process there have been opportunities to protest and neither company has.

General MASIELLO. That’s correct.

Senator SESSIONS. No formal complaint has been lodged.

General MASIELLO. That’s correct, as far as I’m aware.

Senator SESSIONS. I suppose, then, that we have to conclude that both companies feel that this inadvertent disclosure did not affect

them adversely to the degree that they should ask for it. Would you agree with that?

General MASIELLO. At this point, sir, I would.

Senator SESSIONS. On November 30, a New York Times article indicated that an Air Force forensic specialist inspected both companies' computers and found that one of the firms had mistakenly opened a computer file containing information about its rival's airplane, while the other had not. The redacted forensic report presented to the committee yesterday asserts that both companies inspected their own and their competitors' disk and opened them. General and Mr. Shirley, tell me which statement is correct, the New York Times report of the matter or the statement by the Air Force spokesman forensic report by the Defense Cyber Crime Center.

General MASIELLO. Sir, both companies put the other companies' disk in the computer. One of the companies realized what they saw on the disk right away was probably something they shouldn't look at. The second company opened one of the files on the disk, and that's the 10-line spreadsheet snapshot that was then swapped between the companies. So, both companies did put the disks in their computer, based on what I read. One opened a single file, and that's the snapshot of the IFARA data that's in question.

Senator SESSIONS. Mr. Shirley, do you agree with that?

Mr. SHIRLEY. Yes, Senator, I do.

Senator SESSIONS. We've heard the fact that nothing significant was disclosed, not unfair, it did not affect the competition, and that neither company has protested.

Mr. Chairman, there's a lot more we could talk about, I know it's important to every area of the country that has an interest in the outcome of the contract, but it's really important for us, on this committee, not to politicize this process. Every one of these issues, the trade issues and all, we've discussed for almost a decade and we've made the decision to go forward. We shouldn't on the eve of this competition take any action that would suggest we want the Air Force to do anything other than try to select the best aircraft at the best price for the men and women who defend our country.

Thank both of you for the effort you've taken to get to the bottom of the error and establishing, I think conclusively, that there was no unfairness arising from it.

Thank you.

Chairman LEVIN. Thank you, Senator Sessions.

Senator Graham.

Senator GRAHAM. Thank you.

I have a completely different take than Senator Sessions on this. I think this is something we should be looking at; this is something we should be talking about. Quite frankly, as Senator McCaskill said, this is not the finest moment for the Air Force. I happen to be a member of it.

The sheet of information we're talking about, was it the price proposal that the companies were making?

General MASIELLO. No, sir. The disk and the information that was presented and viewed was not proprietary and it included no pricing data.

Senator GRAHAM. Well, then why do we even care about this?
[Laughter.]

General MASIELLO. Sir, it's an element of the decision process, as I understand it.

Senator GRAHAM. Was it an important event in the whole process? Did the information that was disclosed and viewed by one company, not the other, matter at all?

General MASIELLO. Sir, it matters from a fairness perspective. Whether it's important or not, the important thing is that we're fair to these companies.

Senator GRAHAM. Do you know if it's important?

General MASIELLO. I don't know.

Senator GRAHAM. Okay.

So, what's this whole hearing about? You can't tell us whether it was important or not. At the end of the day, the whole process has a conclusion to it. We're about to spend \$35 billion of taxpayers' money here and quite frankly, I think it is important. It's not your job to answer this question as to whether or not we want to award a contract to a company that receives subsidies from a foreign government.

We're setting precedent here, and I think the committee should be looking at this. It's hard enough for American companies to compete already. The Chinese Yuan is 40 percent undervalued. If we're going to start awarding public contracts, where one side gets government aid and the other doesn't from a foreign government, that's something we need to think about. That's not the purpose of this hearing, but we need to have some discussion about that.

Mr. Shirley, the person at EADS said that they looked at it for 15 seconds. Is that correct?

Mr. SHIRLEY. Yes, sir.

Senator GRAHAM. How long was the computer on?

Mr. SHIRLEY. Roughly 20 minutes, sir.

Senator GRAHAM. Now, how can you say that a 15-second statement in a 20-minute gap in the computer is roughly consistent?

Mr. SHIRLEY. Well, sir—

Senator GRAHAM. What I'll do is, I'll ask us to sit in recess for 20 minutes versus 15 seconds, and you'll see, very clearly, there's a long gap in time between 15 seconds and 20 minutes.

Mr. SHIRLEY. What we're judging, sir, based on the statement presented by the employee—

Senator GRAHAM. But, the computer was on for 20 minutes; do you know what was on the screen for 20 minutes?

Mr. SHIRLEY. Yes, sir, I believe we do. You're right, sir, we can't assert what that employee did or didn't do. All we know is what the company represented in their statement.

Senator GRAHAM. I'm no forensic expert, but the difference between 15 seconds and 20 minutes is a lot.

Mr. SHIRLEY. We can tell how long a file is open, sir.

Senator GRAHAM. Thank you. I have no further questions.

Senator SESSIONS. Mr. Chairman, if the witness could finish his answer.

Senator GRAHAM. Do you know what they looked at for 20 minutes?

Chairman LEVIN. Who are you asking?

Senator GRAHAM. I'm asking anybody that can answer the question.

Mr. SHIRLEY. Sir, can I finish this?

Senator GRAHAM. Sure.

Mr. SHIRLEY. Let me say it this way, sir. Our lab found no evidence in conflict with either offeror's written statement. The only files opened were the files identified in the written statement.

Senator GRAHAM. I know your findings. I'm just asking a factual question. The computer was on for 20 minutes, the person said they looked at it for 15 seconds. I guess the point I'm trying to conclude here is: this whole idea that it doesn't matter, we can't really get to because you all don't know.

I'm not complaining about the fact that you don't know. That's not your problem, that's my problem.

Mr. SHIRLEY. Sir, if I can clarify here. Our examiner concluded that the files were open only for the time suggested by either offeror.

Senator GRAHAM. I understand. I just wonder how you got to that conclusion.

Mr. SHIRLEY. He can judge from examination of the media whether a file was open and when it was closed.

Senator GRAHAM. All right. So, are you saying it was only opened for 15 seconds, forensically?

Mr. SHIRLEY. Yes, sir. It was open a brief time.

Senator GRAHAM. But, can you say that this file was open for 15 seconds?

Mr. SHIRLEY. Sir, I'd take that one for the record and we will send you the precise times on that if we may.

Senator GRAHAM. Okay.

[The information referred to follows:]

I answered to the committee during testimony that the EADS computer was in a powered mode for approximately 20 minutes after a competitor file was opened (i.e. a Boeing spreadsheet) and that file was opened for approximately 3 minutes. Those responses were predicated on DC3's forensics findings as of the date of the hearing. In the forensic process, DC3's analyst made technical observations of computer data and correlated those against affidavits provided by EADS.

The following is the deeper detail behind the response, some of which was not technically determined as of the hearing date:

DC3's forensics examination determined that the EADS computer indicated the Boeing spreadsheet was opened at 9:21.14 (Eastern Standard time as displayed in the computer on 1 Nov 2010). It was the analyst's opinion there was no relevant, discernible file activity for approximately 20 minutes at which time the computer was shut down. This was the basis for my comment that the EADS computer was in a powered mode for approximately 20 minutes. My testimony that the spreadsheet was open for roughly 3 minutes was framed on three available data points: one employee's estimate that he opened the file for 15 seconds, the arrival of a second employee within an estimated 3 minutes, and no contradictory forensic evidence; hence the analyst's worst case conclusion of 3 minutes of access.

However, in making this determination the analyst did note what he considered to be two superfluous file artifacts, an icon cache file and a .pip file. Subsequent to the testimony the .pip file was more accurately identified as Excel12.pip, a file Microsoft Excel uses to store menu preferences. The .pip file becomes more probative in further ascertaining the specific length of time the spreadsheet file was open. This is because the .pip file is only modified when the Excel program itself is closed. DC3's analyst was only able to draw this specific conclusion based on post-testimony technical consultation with Microsoft Corporation experts who developed the software. As previously indicated, the analyst confirmed the spreadsheet file was opened at 9:21.14. He was able to confirm the .pip file was simultaneously created, modified, and accessed at 9:21.40. According to the Microsoft consultation, the .pip file is only updated when the Excel program is closed and the time of 9:21.40

becomes definitive for file closure. As a result, the analyst was able to further narrow the 3-minute window, described in testimony, to 26 seconds. This finding is clearly consistent with the statement by the EADS employee who estimated he opened the spreadsheet for approximately 15 seconds. However, this specific data was not available by the date of the hearing, hence the reference to the 3-minute window.

Senator GRAHAM. Thank you.

General MASIELLO. Senator, if I could add something to this. While the individual looked at the data, that individual was moved off of the program team into an administrative holding tank and was not allowed to participate in the program until the PCO allowed them to.

Senator GRAHAM. You don't know anything about this, but there's a bunch of problems of how this contract has been changed. Some people went to jail; they should have gone to jail.

Before we award this contract, I want to make sure that what we're doing here, Mr. Chairman, doesn't set a precedent for the future. Because if this is going to be the way we do contracting, where one company gets subsidies from a foreign government and the other doesn't, with public money, we need to think about that. The process here of what information was shared and what outcome it had is precedent for the future. So, I am glad you had this hearing, and I hope we'll think more about what we're about to do, not less.

So, thank you, Mr. Chairman.

Chairman LEVIN. Let me just clarify the one point, because we've had three different statements, it seems to me, Mr. Shirley, from you.

One, we know from the record that the person who opened up that file said that they looked at it for about 15 seconds. When I talked to you earlier today, you said you determined, forensically, that it was opened for a few minutes. Now you're saying that the computer was opened, not necessarily the file, but the computer was opened for about 20 minutes.

Mr. SHIRLEY. Yes, sir.

Chairman LEVIN. Do I have it straight? If not, straighten it out right now.

Mr. SHIRLEY. Yes, sir. The computer was in a powered state for about 20 minutes.

Chairman LEVIN. How long was the file open? How long was that page visible?

Mr. SHIRLEY. My recollection, from the briefing from my examiner, was roughly 3 minutes, sir.

Chairman LEVIN. Okay.

Senator MCCASKILL. Three minutes.

Chairman LEVIN. I think it's important that we get our terms straight, okay?

General MASIELLO. Mr. Chairman, could I add to this, as well?

Chairman LEVIN. Of course.

General MASIELLO. From what I read in the documentation, the person who was responsible for opening the file and seeing it realized that they shouldn't be looking at it. Their procedures are that when they see something they shouldn't, from what I'm seeing here, a two-person rule comes into play. They saw it, and they were in a sensitive compartmented information facility (SCIF), they

couldn't use their phone to get the other person there to come help them close it and follow the procedures. So, they went outside of their classified area to use the phone to get hold of this person to let them know that they had discovered something that they were all going to get in trouble for, and they didn't want to get in trouble for.

So, the screen might have been open, but he was the only person in the room. He left the room to get the other person to come help them follow their procedures to close the data.

Chairman LEVIN. That's the statement of the person who opened the file. But, in terms of how long the file was open, to get it straight, forensically, 3 minutes. Is that correct?

Mr. SHIRLEY. Yes.

Senator GRAHAM. Mr. Chairman, the Air Force obviously is trying to make sure this is not a big deal.

Chairman LEVIN. I'm not trying, Senator Graham, to say whether it's big or small because, obviously, it raises some significant questions or we wouldn't be here.

Senator GRAHAM. Yes, it does.

Chairman LEVIN. I'm not trying to defend or attack, I'm just trying to straighten out facts because we've had a statement here that it seems to me we have to be very clear on from Mr. Shirley.

The computer was powered for perhaps 20 minutes; the file was opened for 3 minutes; the person who opened the file said they looked at it for 15 seconds. That's the statement which the person gives. Those are the times that we're talking about.

Whether or not it is significant that EADS had that information for some period of time, whatever that information was that was seen by that person existed for some period of time before the two files were exchanged, right? The significance, or lack thereof, is, it seems to me, an important issue which we'll get to a little bit later. But for the time being that's the time, okay?

Thank you, Senator Graham.

Forgive me, Senator Wicker, I've intervened before I called on you; I wanted to straighten that out. Thank you.

Senator Wicker.

Senator WICKER. I thank you for straightening that out. I think that was very helpful. I appreciate the Chair actually giving Mr. Shirley an opportunity to answer the question. This is not a jury trial, where we're trying to play "got you." We're able to leave the record open and get a full explanation.

I think I see what's going on here, Mr. Chairman.

There are some people in this town who believe that the company that they favor may be about to lose a bid again, as they did in 2008. A foundation is being laid for howls of protest. I don't have any idea who's going to win the award. I do know who won it in 2008. I regret that DOD didn't go forward with that contract then. We would be very, very close to having a tanker that we could rely on.

But, I see what is happening with this hearing. It's no wonder that General Masiello and Mr. Shirley can't answer these questions, because they're not involved in the actual award.

I thought this was going to be a hearing about how the information was inadvertently released and how that has been corrected.

Let me see if I can get to this procedure, with regard to the computer being on for 20 minutes, the file being open for about 3 minutes, and the statement of the individual, that he viewed it for some 15 seconds.

Do I understand, General, that the EADS procedure is that, once an individual realizes he has opened a file, then he must go and get a second person to come in and verify that before it can be closed? Was that your statement?

General MASIELLO. Sir, I'm not sure what the procedures are. What I read was, they instituted a two-person rule that, together, they closed the data, they sealed the data, and they took the disk and put it in a safe, separate from any working documents, isolating it completely from the rest of their specific bid information.

Senator WICKER. Mr. Shirley, is that consistent with the file being open for approximately 3 minutes?

Mr. SHIRLEY. We were given to understand at the lab that when the employee opened the file, they were very nervous about what had occurred, they realized that they shouldn't be looking at that particular piece of data. They went through some sort of internal process to see, "Geez, how should we walk back from this," and essentially find another witness or a second party to sort of instruct them, "Okay, what do we do next? We're into something that's awkward." So, that was why the computer, we were given to understand, was left on while they figured out that internal process. As they did, then they shut the computer down and went through the process that General Masiello just described, Senator.

Senator WICKER. Okay.

Then, General, the Air Force, after looking at this and after understanding what had happened, decided to level the playing field. Now, once again, tell the committee what information has been shared to each of these competitors to level the playing field.

General MASIELLO. As I understand it, it was the snapshot screen of the spreadsheet that the contractor saw. They took a picture of the screen from the computer that had that information, and took that same picture of the screen from the other competitor, and swapped that information. It's just a single piece of paper that had the spreadsheet from each offeror. It's the IFARA data.

Senator WICKER. Okay, so it really wouldn't matter if the person from EADS had looked at that file for 20 minutes, would it? Because, now both competitors can look at each other's snapshot of that spreadsheet for an infinitely long time, is that not correct?

General MASIELLO. That's correct, Senator.

Senator WICKER. I really don't think there's anything more to ask about. Did either competitor change their proposal significantly after this information was shared?

General MASIELLO. Sir, I have no way of knowing that. But, right now they still have the opportunity to change it, should they choose to.

Senator WICKER. Okay.

My friend from Missouri mentioned a protest.

With regard to this release of information, is it a fact that neither Boeing nor EADS has protested this?

General MASIELLO. That is correct.

Senator WICKER. As a matter of fact, I would observe, Mr. Chairman, that the statements from both of the companies that are before us, are both relatively straightforward and relatively relaxed about this, and that neither, having had an opportunity to file a protest, has done so.

Can either of you answer this question—and I suspect you can't, because you're not involved in the contract—the testimony is that this is not proprietary information, but in previous competitions, hasn't this exact data been provided in 2008? Isn't it already part of the public record?

General MASIELLO. Sir, I'm sorry, I can't answer that.

Senator WICKER. Okay. I expected that was the answer.

Mr. Chairman, you had no choice but to call the hearing. Until I see a protest from either company, I'm going to conclude that the Air Force saw an example of human error, and that they responded correctly, professionally, and properly, and have now leveled the playing field, and we should go forward and, hopefully, not see further delay in this very important program.

Thank you.

Chairman LEVIN. Thank you, Senator Wicker.

Senator BROWN.

General BROWN. Thank you, Mr. Chairman.

All I can say is, thank goodness it wasn't highly classified information like we've had in other circumstances. Being in the military, I understand the followup, the checks and balances where you try to identify the problems, where they were, and you move forward to make sure it doesn't happen again. I appreciate that.

Are you able to guarantee to the committee that the unauthorized release of this information did not give one contractor an unfair advantage?

General MASIELLO. Sir, I can't guarantee anything like that. I don't know enough about it, whether to judge or not.

Senator BROWN. Right.

General MASIELLO. But, what we have done has provided the same type of information to both contractors now. From what I can see, and based on the Air Force having taken that action, it appears that they have leveled the playing field.

Senator BROWN. You're right, you can't answer that. I'm not quite sure why we're actually here. I understand there may be other things happening behind the scenes that are forcing us to be here.

Your statement could have been given to me offline as to what you've done. I understand sometimes we need to politicize things a little bit more.

The one thing that I'm surprised at is, it takes 10 years for the Federal Government to issue a contract. Only in the Federal Government does it take 10 years to issue a contract. It's amazing to me.

I'm not as new as I once was, but I'm just amazed when I learn about these breakdowns. Not only is it not cost effective, we're wasting taxpayers' money, we're losing the confidence of the people that we deal with, not only the average citizen, but the individual businesses that we deal with to the point where they think, "Why bother? It's going to take 10 years. We're going to have to file a

bunch of protests. It's going to go on and on and on and on." It just makes no sense to me.

I want to thank you for braving the elements and taking the time to come in. We thank you for the preparation.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Brown.

I think the question was raised as to what was available during the last protest. Was one contractor's IFARA data made available to the other contractor as a result of the protest process during the previous competition?

General MASIELLO. Sir, I can't answer that question. I don't know.

Chairman LEVIN. We'll ask that for the record. That is a question which is factual and it's not in any way, it seems to me, inappropriate to know, because that gets to the question as to whether this data is relevant.

General MASIELLO. Right.

Chairman LEVIN. It could be relevant that, assuming that this data was known to the person or understood by the person or remembered by the person who saw it for somewhere between 15 seconds minimum and a few minutes maximum, according to the experts here, whether that data gave an advantage because it was available to the one contractor for the month, or whatever it took, before the switch took place. I'll ask you the question, whether or not that would give any advantage to have that data, assuming it was remembered, to have that in one's possession for that period of time between November 1 and the time that the data was exchanged. Do you know the date of that exchange?

General MASIELLO. November 22.

Chairman LEVIN. Okay, so whether or not that gives an advantage or not to have the data, assuming it was remembered for that 21-day period or not, is not, as I understand it, for you to say. Is that correct?

General MASIELLO. That's correct. But, if I were just looking at a snapshot of the information, and all I did was have a snapshot of the information, I wouldn't have known what was going on behind the data to get to that point. The person who did have that information, who had seen that screenshot, was removed from the program, so they were not allowed to talk to anybody associated with the program. They have not, according to their certification—that was also certified by the CEO—talked or told anyone in the company what they saw on that data.

But, now that it's been exchanged it's level.

Chairman LEVIN. When you say, "it's level," I think you, frankly, should be a little more cautious. I think it's an attempt to level the playing field.

General MASIELLO. Fair enough.

Chairman LEVIN. It may be a successful attempt.

General MASIELLO. Fair enough.

Chairman LEVIN. Unless there's some advantage to having that data for 21 days, in the possession of somebody who has said they didn't share that data with anybody else, then that is an attempt to level the playing field, which may have succeeded. Okay?

General MASIELLO. Correct.

Chairman LEVIN. Okay.

General MASIELLO. Fair.

Chairman LEVIN. General, I just have a couple more questions. The remedy here or the attempt to level the playing field, which, again, may or may not succeeded—people may want to argue that—but, what other options were considered by the Air Force to remedy this mistake?

General MASIELLO. Again, Senator, I don't know.

Chairman LEVIN. If you don't know, that's fine.

General MASIELLO. I don't know.

Chairman LEVIN. You've been called here for a specific purpose, and you have given us the information to the best of your ability.

Same thing with you, Mr. Shirley.

I think we have to be fair to you as to why you were called.

It's important that we get this information on the record, although it may be of limited value. It is part of an overall picture on this contract, which took 10 years by the way, because there was fraud and corruption involved in one point during this process where someone landed in jail. There are a number of reasons why it's extended. The last thing I want to do is inappropriately extend the period. This hearing is not doing that.

We're simply getting information. Whatever the value of that information is, in advance or afterwards, you can debate that too. I happen to think it's useful to get this out in advance for a number of reasons. I think the clearer the air is going into that decision, the better off we are. This is intended to get factual information whichever way one wants to argue it, on the record, prior to a decision. I shouldn't say it clears the air; we don't know if it clears the air. Some may argue that it gives weight to one side or the other. I'm not arguing that.

It is important, it seems to me, that all of the appropriate facts that can be made public are made public before the decision. There may be a lot of arguments after the decision, but at least before the decision, it seems to me we ought to get as much out there on the record as we can.

So, you don't know what other options were considered by the Air Force. I will ask for the record the question about whether, in the previous protest, this information was made available to the competitors. Will you take that for the record?

General MASIELLO. Yes, sir.

[The information referred to follows:]

As part of the post award debriefing at the end of the February 2008 Source Selection, each offeror was provided the other offeror's IFARA Fleet Effectiveness Value (FEV). The FEV is the bottom line information that was part of the information inadvertently disclosed and subsequently provided to each offeror to level the playing field in the current KC-X Source Selection.

Chairman LEVIN. Okay. Senator Sessions.

Senator SESSIONS. Let me just say, in defense of the Air Force, thousands of decisions and interactions and communications, I'm sure, have been undertaken in this effort. After the last incident in which fraud was discovered and Boeing officials went to jail, the effort redoubled to do this in the most fair way possible, to the extent to which the greater capabilities of the airplane to be built in Alabama were really not considered in the bid. It's basically a low-

bid contract to make sure that whoever comes in with the lowest price gets the contract, no matter if one plane is more capable in every single area of evaluation; they get very little credit for that.

I know the Air Force has bent over backwards to be fair about this. Human errors occur, and I just don't think it should besmirch the reputation of the Air Force. I do believe that you took appropriate action.

General Masiello, didn't the Secretary of Defense send an IRT to come and evaluate the accident independently of the people who were supervising the contract?

General MASIELLO. Yes, sir.

Senator SESSIONS. I just think the Air Force tried to do what they could. They notified everybody, they did everything they could do. Fortunately, it appears that nothing serious happened that jeopardized the fairness of this contract. I think that's pretty plain.

Mr. Shirley, the examination report from the Defense Cyber Crime Center, Defense Computer Forensics Laboratory, that's a unit that takes pride in its independence and integrity, does it not?

Mr. SHIRLEY. Yes, sir, it does.

Senator SESSIONS. You were brought in to independently evaluate what happened.

Mr. SHIRLEY. That's correct, sir.

Senator SESSIONS. You concluded that "no signs of network connections were disclosed, and no signs of attached storage devices were found." That was one of the findings.

Mr. SHIRLEY. That's correct, Senator.

Senator SESSIONS. No sign of any documents being printed were found, is that correct?

Mr. SHIRLEY. That is correct, sir.

Senator SESSIONS. No trace of K-76B data, other than file names, was found on the server's hard drive.

Mr. SHIRLEY. That's correct, Senator.

Senator SESSIONS. That would indicate that nobody downloaded, copied, or stored this information, would it not?

Mr. SHIRLEY. We saw no evidence of that, sir.

Senator SESSIONS. That's pretty conclusive, actually, your ability to determine that. I think that's important.

I think, General Masiello, Senator Wicker asked you an important question. The document that was revealed when he was opening that file, did that include dramatic, important evidence? Or, fortunately, was it something that did not impact the fairness of the competition?

General MASIELLO. I don't know the relative importance, but whether it did affect or establish or create, at minimum, an appearance of unfairness by swapping the same snapshot between the companies, the same type of information between the companies, that reestablished from the Air Force perspective fairness in the competition.

Senator SESSIONS. With regard to the parties who are aggressively competing for this, and, I hope, submitting the lowest possible bids, for the benefit of America and the taxpayers, they can possibly submit, because that's what it's going to take to win this contract—I understand there was a 10-day formal complaint pe-

riod. Maybe I'm wrong about that. But, at any rate, neither competitor has filed any kind of formal complaint about this matter.

General MASIELLO. That's correct.

Senator SESSIONS. The individual, as you noted, that saw that was removed from the process.

Mr. Chairman, I think it's fine that we had the hearing. We were briefed on it by the Air Force immediately. General Schwartz testified to it in December of last year. I believe they responded well. I think both parties understand what happened and are prepared to accept the Air Force's decision, or else they would have protested. This critically important contract is on the road to final decision. I just hope and pray and expect that the Air Force will do so fairly and objectively, and award the contract to the competitor that deserves to win.

I would repeat one more time, when we directed, explicitly, as part of the National Defense Authorization Act, that this award of the tanker contract would be competed, we knew there were only two competitors in the whole world that could provide this. At that time, people raised some of these issues. Now, there are arguments on both sides, but we made that decision. We're moving forward to the final decision, going forward with the two competitors in the world aggressively submitting bids to produce an aircraft, hopefully, that will meet the standards of the Air Force at the lowest possible price.

Our committee certainly has not been shy about it, Mr. Chairman. We've done, I think, our duty without politicizing the process, to date. I hope that we can continue at that rate.

Chairman LEVIN. Thank you very much, Senator Sessions.

Senator McCaskill.

Senator MCCASKILL. Mr. Chairman, I want to take a moment after my friend from Mississippi said that he could see what's going on here. I want to explain, very clearly on the record, what's going on here, from my perspective as a Senator.

Am I unhappy about the notion that a subsidized company from another country is going to compete on a level playing field with a company that's not subsidized? Yes, I'm very unhappy about that. I've heard a lot of lectures over the last year about socialization and the notion that government should not be subsidizing private companies. The idea that all of a sudden we can completely ignore that and decide, "Well, socialization's okay if it's being done in another nation," and then a company that's being subsidized by the government of another nation is going to compete on a level playing field with a company that's a free-market company, I think, is absolutely wrong, especially in DOD.

What if this company was owned by China? Would we take that into consideration? Okay, so they're our allies, and they're only subsidized to the tune of \$10 or \$20 billion. We don't take that into consideration? I don't want to hear any more lectures about the government's socialization or subsidization of American companies, because if this is not relevant, then we shouldn't be complaining about it.

That's what's going on. These jobs aren't going to Missouri. This tanker wouldn't be built in Missouri. This tanker's going to be built in another State. What happened here is there was fraud. There

were criminals. Then the process was not fair, with all due respect, Senator Sessions. It wasn't.

They didn't bend over backwards to make the process fair after the fraud was found, because, in a very unusual move, one of our major defense contractors filed a protest. An independent auditing agency said, "You know what? It was very unfair." That's what happened in 2008. They stacked the deck.

I'll tell you, from my standpoint, what I think happened is, they were embarrassed. The Air Force was embarrassed that they had allowed fraud to go on in this kind of competition, and they over-compensated and said, "Okay, Boeing, we're going to make sure you don't get it." They put out a proposal that GAO said every single basis was unfair.

That's how we got here. It wasn't that the Air Force bent over backwards to make it fair after the fraud. We have an independent evaluation of that.

I just want to make sure the record's clear about that, because I don't care where the jobs were going. I don't think DOD should treat companies equally if one is subsidized by a foreign government. I think it's a bad precedent. I don't think we should be doing it. I think most Americans don't think we should be doing it.

I know there are jobs that are going to be had here in various States. We all do this around here. We're competing for jobs, just like American companies are competing for jobs. I think, at the end of the day, we should be doing everything we can to at least take that into consideration, because the lowest and best price is relevant to whether or not they're subsidized. It's relevant.

I wanted to explain what's going on here from my perspective, because these aren't Missouri jobs. These are not Missouri jobs. I think this is a process that has been terribly flawed.

A lot of what you've testified today, I think, is fair. This really isn't a trial, because, frankly, if this were a trial, I could ask a series of leading questions that would highlight what I think is the case. A lot of what you've testified is that you couldn't prove that EADS didn't do what they said they did.

In other words, the computer was on; you can't prove whether they looked at it. There's no proof, other than the man's testimony, whether he looked at it for 15 seconds or 3 minutes, correct? You just can't disprove what they said, correct?

Mr. SHIRLEY. Ma'am, I think it would be wise for us to send you the specific technical findings, in a question for the record, to clarify that.

[The information referred to follows:]

I answered to the committee during testimony that the EADS computer was in a powered mode for approximately 20 minutes after a competitor file was opened (i.e. a Boeing spreadsheet) and that file was opened for approximately 3 minutes. Those responses were predicated on DC3's forensics findings as of the date of the hearing. In the forensic process, DC3's analyst made technical observations of computer data and correlated those against affidavits provided by EADS.

The following is the deeper detail behind the response, some of which was not technically determined as of the hearing date:

DC3's forensics examination determined that the EADS computer indicated the Boeing spreadsheet was opened at 9:21.14 (Eastern Standard time as displayed in the computer on 1 Nov 2010). It was the analyst's opinion there was no relevant, discernible file activity for approximately 20 minutes at which time the computer was shut down. This was the basis for my comment that the EADS computer was

in a powered mode for approximately 20 minutes. My testimony that the spreadsheet was open for roughly 3 minutes was framed on three available data points: one employee's estimate that he opened the file for 15 seconds, the arrival of a second employee within an estimated 3 minutes, and no contradictory forensic evidence; hence the analyst's worst case conclusion of 3 minutes of access.

However, in making this determination the analyst did note what he considered to be two superfluous file artifacts, an icon cache file and a .pip file. Subsequent to the testimony the .pip file was more accurately identified as Excel12.pip, a file Microsoft Excel uses to store menu preferences. The .pip file becomes more probative in further ascertaining the specific length of time the spreadsheet file was open. This is because the .pip file is only modified when the Excel program itself is closed. DC3's analyst was only able to draw this specific conclusion based on post-testimony technical consultation with Microsoft Corporation experts who developed the software. As previously indicated, the analyst confirmed the spreadsheet file was opened at 9:21.14. He was able to confirm the .pip file was simultaneously created, modified, and accessed at 9:21.40. According to the Microsoft consultation, the .pip file is only updated when the Excel program is closed and the time of 9:21.40 becomes definitive for file closure. As a result, the analyst was able to further narrow the 3-minute window, described in testimony, to 26 seconds. This finding is clearly consistent with the statement by the EADS employee who estimated he opened the spreadsheet for approximately 15 seconds. However, this specific data was not available by the date of the hearing, hence the reference to the 3-minute window.

Mr. SHIRLEY. I did not read that employee's statement. I did not see that material. The aspect that he looked at it fairly briefly, 15 seconds, is something that I understand from the conversations relating to preparing for this.

We had each company's computer that was forwarded to us, based on the agreement of the companies and the Program Office, and delivered to our lab. Then we subjected each of those company's computers to a detailed forensic examination that's outlined in a very exhaustive technical report.

I did not review the specific details of the entirety of that report out of a concern that it had source selection or other proprietary material. I wanted to understand that, in directing the assets of our lab and our process, that we received those computers in the right fashion, that we looked at those with the right subject matter experts, that could deliver a technical report consistent with our processes and procedures; and then, under the specific direction of our lab director, that process was conducted and we rendered the technical report as a result of that process.

I believe I mentioned earlier that, from that technical report, the only files opened were the files that were identified in each of the respective written statements, and that the files were only opened for the time suggested by each of the respective companies.

Senator MCCASKILL. Wait just a minute there. I understand that they were opened for that period of time. But the only knowledge we have about how long the screen was looked at is what the individual said.

Mr. SHIRLEY. Yes.

Senator MCCASKILL. We have no way of knowing whether they looked at that screen for 15 seconds or whether they looked at it for 3 minutes.

Mr. SHIRLEY. Senator, you're precisely correct.

Senator MCCASKILL. Right. Okay. That's what I wanted to establish.

Mr. SHIRLEY. Yes, ma'am.

Senator MCCASKILL. Could EADS have adjusted their final and best offer? This is my question; it's a yes-or-no question. Could EADS have adjusted their final and best offer based on the IFARA data, General?

General MASIELLO. Ma'am, now that they have an exchange of the information, both offerors have the opportunity to adjust their proposals.

Senator MCCASKILL. I understand now.

But let's assume that after someone looked at the screen, could they have adjusted their data? Or could they have adjusted their final and best offer?

General MASIELLO. I don't know, because I don't know how much information was revealed in the quick amount of time that they looked at the information.

Senator MCCASKILL. Do you believe, based on the IFARA data that was on the page, that 3 minutes would be enough time to memorize that data?

General MASIELLO. I can't speak for the individual.

Senator MCCASKILL. I don't want to ascribe nefarious motives to this company.

I am just frustrated, because I'm embarrassed at how this process has happened from the beginning to this moment. I am very exercised about the notion that we are not going to have a policy in this country that doesn't take into account, when we are having a competition, that one company is subsidized to a very large extent. If we were subsidizing Boeing to this extent, there'd be press conferences going on around here about how this is a subsidization bailout and the government shouldn't be in private companies' businesses. But somehow it's okay now. I just don't get that inconsistency. That's why I'm as exercised as I am.

Thank you very much, Mr. Chairman.

Thank you all. I understand you're here and my passion about this has very little to do with the fine work you've done preparing for this hearing and the efforts you've made after this unfortunate incident. But, nonetheless, I think it's very important that I explain what's going on with this Senator.

Thank you very much, Senator Levin.

Chairman LEVIN. Thank you, Senator McCaskill.

Senator SESSIONS. Mr. Chairman, could I offer for the record the GAO report on the protest previously? It found 8 violations out of 111 complaints. They were very close questions, in my view, whether that protest should have been upheld. I don't think the Air Force deserves as much criticism as my colleague suggests.

Also, when I was referring, Senator McCaskill, to bending over backwards, I really thought I meant post-protest.

Senator MCCASKILL. I would agree with you on that.

Chairman LEVIN. That will be made part of the record.

[The information referred to follows:]

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

July 10, 2008



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, goldenn@gao.gov.

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 be 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*	Dismissals*	Merit Results*	
			(Sustain + Deny)	Protests Sustained*
2004	1354	989	365	75
2005	1262	956	306	71
2006	1223	974	249	72
2007	1277	942	335	91
2008*	1071	845	226	49

*These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

*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*	Dismissals*	Merit Results* (Sustain + Deny)	Protests Sustained*
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*	Dismissals*	Merit Results* (Sustain + Deny)	Protests Sustained*
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*	Dismissals*	Merit Results* (Sustain + Deny)	Protests Sustained*
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

*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*	Dismissals*	Merit Results*	
			(Sustain + Deny)	Protests Sustained*
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

*These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

2008 DOD Component Statistics*				
Component	Total Cases*	Dismissals*	Merit Results*	
			(Sustain + Deny)	Protests Sustained*
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

*These figures represent the number of protests. Often there are multiple protests filed for a single procurement action.

*These figures cover the period between October 1, 2007 to June 27, 2008.

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Chairman LEVIN. Senator Wicker.

Senator WICKER. I appreciate Senator Sessions making that a part of the record, and for the committee accepting it without objection.

Someone should correct me if I'm mistaken, but the information provided to me by my staff is that in September WTO ruled that, in fact, Boeing received illegal aid from the U.S. Government, and that, as a matter of fact, WTO has made findings against both of these competitors with regard to improper aid from their governments. I stand to be corrected, but that's the information I have.

The information that I also have is that the Secretary of Defense has determined that these WTO rulings against both competitors will not be a factor in the competition.

A determination was made in 2008, by the independent analysts at the Acquisition Office, that, in fact, EADS and their partner at the time had a bid for the best aircraft. I thought the criteria should be what's best for the U.S. Air Force, what's best for the fighting men and women who are going to depend on this, and what's best for national security. In my judgment, that decision was made independently and correctly.

By kicking the can down the road now to 2011 there is a real risk, Mr. Chairman, that the acquisition for major projects such as this, will always be called into question. I fear that we've done great damage to the future of acquisition in DOD.

Let me make a final point about the 3 minutes versus the 20 minutes versus the 15 seconds. That information has now been shared with both companies. Is that correct, General?

General MASIELLO. Yes, Senator. That's correct.

Senator WICKER. So, it wouldn't matter if the EADS employee had looked at the data for 3 hours or for 3 days. Each company now has that one little bit of information from the other company. They've had it, and they could analyze it until the wee hours of the morning. Is that correct?

General MASIELLO. That's correct, sir.

Senator WICKER. I appreciate what the Air Force has done. Clearly, human error is, unfortunately, going to happen. Anytime an organization is shot through with people, you're going to have human error occur.

I appreciate what the Air Force has done. They're my branch too. I love them all, but as Senator Graham said, I'm an Air Force veteran and an Air Force Reserve veteran, and I think that the Air Force acted very professionally and has corrected this inadvertent mistake.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Wicker.

For the record, let me just put in a chronology here, because this committee has been following the tanker modernization program closely for a number of years, obviously.

In 2002 and 2003, we directed a series of reviews. We held hearings that identified serious problems with the sole-source lease originally proposed by the Air Force. This ultimately led, or helped to lead, to the cancellation of the contract. That was the time when the corruption was discovered. That was described earlier today, that this committee played an important role in uncovering that; and Senator McCain, particularly, took the lead on that, but a number of us very much supported that effort.

In 2007 and 2008, we closely followed the Air Force's unsuccessful second attempt to award a tanker contract. It was unsuccessful because GAO upheld the protest to that award.

Now we're trying to do what we can to get on the record for consideration the facts that surrounded this release of information that obviously never should have taken place. There was some significant incompetence that led to this release of information. Everybody acknowledges it shouldn't have been.

Whether or not the effort of the Air Force to level the playing field, in fact, succeeded or not is not a matter for deliberation. We're not looking at that aspect of it. That may or may not be debated by one or more of the parties later on. But, that would be the issue, it seems to me, as to whether or not that playing field, in fact, has been leveled. There clearly is an attempt to level it. I commend the Air Force for trying to do that. But, whether or not, in fact, it has been leveled, or whether there was some either advantage during that 21-day period that existed is another issue.

This analogy probably doesn't work at all, but you can give somebody who is wealthy a dollar, and you can give somebody who is broke a dollar; the fact that you gave them both a dollar clearly advantages the person who's broke more than the person who's wealthy. But, you gave them both a dollar.

In this case, I have no opinion on this question, but it seems to me it could be an issue as to whether or not the exchange of the same information advantages one party more than the other, for whatever reasons could exist.

The intent to level the playing field is clear. That's clear. The attempt to do that is the right thing to do. But, whether it succeeds or not is a different issue, one that I'm not able to expound upon, because I'd have to know exactly what those arguments are. I think we have to at least leave open that possibility.

My colleagues, I thank you all.

I want to thank our witnesses for their presence here today, for coming during this weather challenge. I know, particularly for one of you, you came a long distance, and maybe had no sleep. I won't identify which of the two of you it is, because both of you deserve credit for your testimony. I very much appreciate it.

We will stand adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

INTEGRATED FLEET AIR REFUELING ASSESSMENT

1. Senator INHOFE. Major General Masiello, are all proposed tankers considered using the Integrated Fleet Air Refueling Assessment (IFARA) model held to the same criteria running the wartime scenarios? If not, what are the differences?

General MASIELLO. The ground rules for the IFARA assessment are published in the Request for Proposal (RFP). The ground rules are applied consistently to all offerors. It is only the offerors' unique proposed aircraft that drive different IFARA Fleet Effectiveness scores.

2. Senator INHOFE. Major General Masiello, during the competition for the KC-X, has the IFARA model and guidelines ever been modified? If so, what was modified and why?

General MASIELLO. There were three RFP amendments that affected the IFARA assessment. In Amendment 2, the Air Force corrected transposed base information on two bases. Amendment 3 more clearly defined the configuration, with regards to Large Aircraft Infrared Countermeasures defensive systems, to use in the IFARA analysis. Finally, Amendment 4 corrected a spreadsheet that had a note, which referenced four priority bases, when in fact, the RFP scenario contained five bases; only the note was in error.

3. Senator INHOFE. Major General Masiello, does IFARA determine how many tankers it takes to accomplish the mission?

General MASIELLO. Yes. IFARA computes how many tankers are required to accomplish a classified scenario made up of four theaters. The scenarios and ground rules were established as part of DOD's 2005 Mission Capability Study and remain valid today. The IFARA process generates a Fleet Effectiveness Value by dividing

the number of KC-135R tankers to accomplish the four scenarios by the number of offeror-proposed tankers to accomplish all four scenarios.

4. Senator INHOFE. Major General Masiello, does the number of tankers required impact the total evaluated price which the source selection is based on?

General MASIELLO. Yes. Per Section M of the RFP, the offeror with the lower number of tankers will receive a credit equal to the difference in tankers required multiplied by the average price of each tanker proposed.

FEDERAL ACQUISITION RULE

5. Senator INHOFE. Major General Masiello, I believe Federal Acquisition Rule (FAR) 3.104-4 covers disclosure, protection, and marking of contractor bid or proposal information and source selection information. It states, "Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by agency head or the contracting officer to receive such information." Was the FAR violated by the unintentional disclosure of the IFARA? If so, what is the consequence of violating this FAR?

General MASIELLO. The inadvertent disclosure did not comply with the FAR. Therefore, the Air Force took numerous actions, including asking for an outside Office of Secretary of Defense (OSD)-led investigation, obtaining written statements and certifications from the offerors, and obtaining computer forensic analysis by the Defense Computer Forensics Laboratory. In the end, the Air Force Contracting Officer determined, and the Head of Air Force Contracting concurred, there was no intentional Procurement Integrity Act violation and that the procurement could continue, because there was no impact to the integrity of the source selection. However, to eliminate even the appearance of an unlevel playing field, the Air Force provided each offeror the same IFARA information about the other offeror. Each offeror was also afforded the opportunity to update any aspect of its proposal.

RELEASE OF IFARA DATA

6. Senator INHOFE. Major General Masiello, I remain concerned about the release of the IFARA data and any impact it could have on the overall award of the KC-X contract. It could directly impact a bidder's strategy for establishing its final price which is due this month. Given the unfortunate circumstances surrounding the release of the IFARA information, would it not be best to eliminate the IFARA from the evaluation process?

General MASIELLO. No. IFARA uniquely measures the integrated capability of a fleet of tankers in wartime scenarios. Elimination of IFARA could result in significant operational capability being eliminated by all offerors. The Air Force believes the actions taken level the playing field. Further, all offerors equally had several opportunities to update any part of their proposal after the playing field was leveled.

7. Senator INHOFE. Major General Masiello, can someone guarantee that the inappropriate and unauthorized release of the proprietary data did not give one contractor an unfair advantage in preparing its bid for the tanker contract or insight into the other competitor's bid strategy?

General MASIELLO. Because no price, technical, military construction, or fuel efficiency information was disclosed, because the IFARA information is similar to what was disclosed in the previous source selection, and because all offerors were allowed to update any aspect of their proposal, the Air Force does not believe there is a competitive advantage to any offeror.

8. Senator INHOFE. Major General Masiello, after the incident, according to your written testimony, the Air Force purposefully released each competitor's proprietary IFARA data to the other competitor to level the playing field—the summary page which was an Excel spreadsheet. Given the sensitivity of the data, did you inform the contractors ahead of time that you were going to do this and give them an opportunity to respond?

General MASIELLO. No. The offerors were not given advance notice nor provided an opportunity to respond. The Government's decision as to how to proceed to level the playing field was determined to be appropriate and advance notice and opportunity to respond were not required by any law or regulation and could have re-

sulted in an offeror essentially vetoing the way ahead, thereby precluding the Government from proceeding as necessary.

INVESTIGATION

9. Senator INHOFE. Major General Masiello, I understand an investigation was conducted after the inadvertent release of the IFARA data. Who conducted the investigation?

General MASIELLO. OSD/Defense Procurement and Acquisition Policy led an independent assessment in response to a request by the Air Force. The KC-X Contracting Officer and Air Force Head of Contracting reviewed the results of this assessment and its recommendations. No intentional Procurement Integrity Act violations were found and all OSD recommendations were adopted.

10. Senator INHOFE. Major General Masiello, when was the investigation started and completed?

General MASIELLO. The OSD independent review of potential Procurement Integrity Act violations was requested on 9 November 2010. This investigation concluded 18 November 2010.

11. Senator INHOFE. Major General Masiello, who has been provided a full copy of the investigation report on the inadvertent disclosure, including company statements, statements from individual employees, forensic analysis of computers, and analyses and conclusions?

General MASIELLO. The OSD investigative report, including all attachments and statements, were reviewed by the Contracting Officer, the Air Force Head of Contracting, Air Force and OSD Legal Counsel, and the KC-X Source Selection Authority. Subsequent to the 27 January 2011 hearing, this document was reviewed by the OSD Office of the Inspector General. Officials from both offerors were afforded the opportunity to review Defense Criminal Analysis Reports on their computers. Redacted versions (to remove source selection sensitive and classified information) of the OSD report were also provided to the Senate Armed Services Committee.

DATA FILES ACCESSED

12. Senator INHOFE. Mr. Shirley, during your testimony you stated that one file was accessed for 15 seconds and then you clarified that statement and said 3 minutes. What was the length of time the file was accessed?

Mr. SHIRLEY. I answered to the committee during testimony that the European Aeronautic Defence and Space (EADS) company computer was in a powered mode for approximately 20 minutes after a competitor file was opened (i.e. a Boeing spreadsheet) and that file was opened for approximately 3 minutes. Those responses were predicated on DC3's forensics findings as of the date of the hearing. In the forensic process, DC3's analyst made technical observations of computer data and correlated those against affidavits provided by EADS.

The following is the deeper detail behind the response, some of which was not technically determined as of the hearing date:

DC3's forensics examination determined that the EADS computer indicated the Boeing spreadsheet was opened at 9:21.14 (Eastern Standard time as displayed in the computer on 1 Nov 2010). It was the analyst's opinion there was no relevant, discernible file activity for approximately 20 minutes at which time the computer was shut down. This was the basis for my comment that the EADS computer was in a powered mode for approximately 20 minutes. My testimony that the spreadsheet was open for roughly 3 minutes was framed on three available data points: one employee's estimate that he opened the file for 15 seconds, the arrival of a second employee within an estimated 3 minutes, and no contradictory forensic evidence; hence the analyst's worst case conclusion of 3 minutes of access.

However, in making this determination the analyst did note what he considered to be two superfluous file artifacts, an icon cache file and a .pip file. Subsequent to the testimony the .pip file was more accurately identified as Excel12.pip, a file Microsoft Excel uses to store menu preferences. The .pip file becomes more probative in further ascertaining the specific length of time the spreadsheet file was open. This is because the .pip file is only modified when the Excel program itself is closed. DC3's analyst was only able to draw this specific conclusion based on post-testimony technical consultation with Microsoft Corporation experts who developed the software. As previously indicated, the analyst confirmed the spreadsheet file was opened at 9:21.14. He was able to confirm the .pip file was simultaneously cre-

ated, modified, and accessed at 9:21.40. According to the Microsoft consultation, the .pip file is only updated when the Excel program is closed and the time of 9:21.40 becomes definitive for file closure. As a result, the analyst was able to further narrow the 3-minute window, described in testimony, to 26 seconds. This finding is clearly consistent with the statement by the EADS employee who estimated he opened the spreadsheet for approximately 15 seconds. However, this specific data was not available by the date of the hearing, hence the reference to the 3-minute window.

13. Senator INHOFE. Mr. Shirley, what was the name of the file and extension?
Mr. SHIRLEY. K-76B Tanker Fleet Effectiveness Table 101101.xls

14. Senator INHOFE. Mr. Shirley, was that file located in a folder/subfolder or was it readily accessible once the disk was open?

Mr. SHIRLEY. When the disk was opened, one folder was visible titled K-76B IFARA Results Release 101101. The Tanker Fleet Effectiveness Table 10/101.xls.

15. Senator INHOFE. Mr. Shirley, how many folders and files were on the disks provided to Boeing and EADS?

Mr. SHIRLEY. EADS and Boeing copies of the K76 disk contained 378 files in 6 folders. Their copies of the K-30 disk contained 355 files in 6 folders. However, there is no forensic evidence that Boeing accessed any of the files or folders other than they got to a point they could see the K-30B IFARA Results Release 101101 folder being listed. In addition, there is no forensic evidence that EADS accessed any files or folders other than the K-76B Tanker Fleet Effectiveness Table 101101.xls spreadsheet that was located within the K-76B IFARA Results Release 101101 folder.

16. Senator INHOFE. Mr. Shirley, what did the overall directory of the disk look like?

Mr. SHIRLEY. When opened by a user using Windows Explorer, the disk provided to EADS had one folder titled: "K-76B IFARA Results Release 101101." Within that folder, there were two folders—"Depot" and "CMARPS analysis. There were also two files—"K-76B IFARA Results Read Me 101101.doc" and "K76 Tanker Fleet Effectiveness Table 101101.xls" The latter is a Boeing spreadsheet. There is one file within the Depot folder and 3 folders and 375 files within the CMARPS analysis folder. Forensic analysis showed that only the folder "K-76B IFARA Results Release 101101" and the file "K76 Tanker Fleet Effectiveness Table 101101.xls" were accessed.

QUESTIONS SUBMITTED BY SENATOR JEFF SESSIONS

17. Senator SESSIONS. Mr. Shirley, how long was each company's computer that was analyzed by the lab powered up and operating?

Mr. SHIRLEY. The EADS computer was in a power mode for approximately 20 minutes after a competitor file was opened. Prior to that file being opened, however, the computer was powered on for approximately 27 minutes on the night in question during which time it was used to view EADS tanker procurement material. It was also powered up the next day for approximately 5 hours and 9 minutes but there is no forensic evidence that Boeing material was accessed.

The Boeing computer was powered on for 26 minutes and was not used again before it was sent to DC3/DCFL.

18. Senator SESSIONS. Mr. Shirley, since both companies acknowledge inserting their competitor's disk into their respective computers, how long was each disk inserted into their respective computer before being removed?

Mr. SHIRLEY. There is no way to tell forensically when a disk is inserted or removed. All we were able to see is the activity with the files themselves. If a disk was inserted but there was not activity with the files, there would be no record of the disk ever being inserted.

19. Senator SESSIONS. Mr. Shirley, do you have forensics-based information which would appear to be inconsistent with the EADS North America statement that the Boeing IFARA data file was opened and then closed within 15 seconds?

Mr. SHIRLEY. No, Senator, there is no inconsistent forensic evidence to the EADS statement. I answered to the committee during testimony that the EADS computer was in a powered mode for approximately 20 minutes after a competitor file was

opened (i.e. a Boeing spreadsheet) and that file was opened for approximately 3 minutes. Those responses were predicated on DC3's forensics findings as of the date of the hearing. In the forensic process, DC3's analyst made technical observations of computer data and correlated those against affidavits provided by EADS.

The following is the deeper detail behind the response, some of which was not technically determined as of the hearing date:

DC3's forensics examination determined that the EADS computer indicated the Boeing spreadsheet was opened at 9:21.14 (Eastern Standard time as displayed in the computer on 1 Nov 2010). It was the analyst's opinion there was no relevant, discernible file activity for approximately 20 minutes at which time the computer was shut down. This was the basis for my comment that the EADS computer was in a powered mode for approximately 20 minutes. My testimony that the spreadsheet was open for roughly 3 minutes was framed on three available data points: one employee's estimate that he opened the file for 15 seconds, the arrival of a second employee within an estimated 3 minutes, and no contradictory forensic evidence; hence the analyst's worst case conclusion of 3 minutes of access.

However, in making this determination the analyst did note what he considered to be two superfluous file artifacts, an icon cache file and a .pip file. Subsequent to the testimony the .pip file was more accurately identified as Excel12.pip, a file Microsoft Excel uses to store menu preferences. The .pip file becomes more probative in further ascertaining the specific length of time the spreadsheet file was open. This is because the .pip file is only modified when the Excel program itself is closed. DC3's analyst was only able to draw this specific conclusion based on post-testimony technical consultation with Microsoft Corporation experts who developed the software. As previously indicated, the analyst confirmed the spreadsheet file was opened at 9:21.14. He was able to confirm the .pip file was simultaneously created, modified, and accessed at 9:21.40. According to the Microsoft consultation, the .pip file is only updated when the Excel program is closed and the time of 9:21.40 becomes definitive for file closure. As a result, the analyst was able to further narrow the 3-minute window, described in testimony, to 26 seconds. This finding is clearly consistent with the statement by the EADS employee who estimated he opened the spreadsheet for approximately 15 seconds. However, this specific data was not available by the date of the hearing, hence the reference to the 3-minute window.

[Whereupon, at 11:11 a.m., the committee adjourned.]

