

110TH CONGRESS
2D SESSION

S. 3203

To prohibit the use of funds by the Department of Defense on the KC–X tanker contract, and for other purposes related to that contract.

IN THE SENATE OF THE UNITED STATES

JUNE 26, 2008

Mr. ROBERTS (for himself and Mr. BROWNBACK) introduced the following bill;
which was read twice and referred to the Committee on Armed Services

A BILL

To prohibit the use of funds by the Department of Defense
on the KC–X tanker contract, and for other purposes
related to that contract.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “KC–Tanker Recompete Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. KC–X Tanker contract.

Sec. 3. Independent cost estimate.

Sec. 4. Requirement to offset illegal subsidization to foreign persons partici-
pating in KC–135 replacement competition.

Sec. 5. Ensuring fair competition.
 Sec. 6. National security considerations.
 Sec. 7. Industrial base considerations.
 Sec. 8. Loss of employee tax revenue.
 Sec. 9. Loss of corporate tax revenue.
 Sec. 10. Regulatory burden.
 Sec. 11. Foreign Corrupt Practices Act.
 Sec. 12. Covered contractor definition.
 Sec. 13. Report.

1 **SEC. 2. KC-X TANKER CONTRACT.**

2 (a) PROHIBITION.—No funds may be used by the De-
 3 partment of Defense on the KC-X tanker contract. In this
 4 subsection, the term “KC-X tanker contract” means the
 5 contract awarded by the Department of the Air Force on
 6 February 29, 2008, for the next generation air-refueling
 7 tanker aircraft.

8 (b) REPLACEMENT.—If the Department of the Air
 9 Force chooses not to exercise its authority to award a new
 10 contract for the KC-X tanker to the bidder whose protest
 11 of the February 29, 2008, award was sustained by the
 12 Government Accountability Office on June 18, 2008, the
 13 Secretary of Defense, using competitive procedures, shall
 14 award a contract for a replacement for the KC-135 tank-
 15 er. Such funds as may be necessary are authorized to con-
 16 duct the competition for such contract.

17 **SEC. 3. INDEPENDENT COST ESTIMATE.**

18 As part of the acquisition process for the award of
 19 a contract for a replacement for the KC-135 tanker, as
 20 required by section 2(b), the Secretary of Defense and the
 21 source selection authority shall ensure that an inde-

1 pendent cost estimate is completed. The cost estimate
2 shall include an estimate of—

3 (1) all costs borne by the suppliers;

4 (2) all costs borne by foreign governments;

5 (3) all costs borne by domestic suppliers (if the
6 proposal involves any domestic suppliers); and

7 (4) all costs covered by cost accounting stand-
8 ards under the Federal Acquisition Regulation.

9 **SEC. 4. REQUIREMENT TO OFFSET ILLEGAL SUBSIDIZA-**
10 **TION TO FOREIGN PERSONS PARTICIPATING**
11 **IN KC-135 REPLACEMENT COMPETITION.**

12 (a) **REQUIREMENT.**—As part of the acquisition proc-
13 ess for the award of a contract for a replacement of the
14 KC-135 tanker, as required by section 2(b), the Secretary
15 of Defense shall, in conducting the cost or price evaluation
16 of any proposal submitted by a subsidized person, increase
17 the cost or price of the proposal by the amount of illegal
18 subsidization.

19 (b) **ILLEGAL SUBSIDIZATION.**—For purposes of sub-
20 section (a), the amount of illegal subsidization with re-
21 spect to a proposal submitted by a subsidized person is
22 the amount of the illegal subsidy referred to in subsection
23 (c), as determined jointly by the Secretary of Commerce
24 and the United States Trade Representative after receipt

1 of a request from the Secretary of Defense for such a de-
2 termination.

3 (c) SUBSIDIZED PERSONS.—With respect to any pro-
4 posal submitted to the Department of Defense for a con-
5 tract for a replacement of the KC-135 tanker, a sub-
6 sidized person is any of the following:

7 (1) FOREIGN PERSON.—A foreign person to
8 which the government of a foreign country that is a
9 member of the World Trade Organization has pro-
10 vided a subsidy for the tanker if—

11 (A) the United States has requested con-
12 sultations with that foreign country under the
13 Agreement on Subsidies and Countervailing
14 Measures on the basis that the subsidy is an il-
15 legal subsidy under that Agreement; and

16 (B) the World Trade Organization has
17 ruled that the subsidy provided by the foreign
18 country is an illegal subsidy under the Agree-
19 ment on Subsidies and Countervailing Meas-
20 ures.

21 (2) JOINT VENTURES.—Any joint venture, co-
22 operative organization, partnership, or contracting
23 team of which a foreign person described in para-
24 graph (1) is a member.

1 (3) SUBCONTRACTS.—Any person proposing to
2 use a foreign person described in paragraph (1) or
3 an entity described in paragraph (2) as a subcon-
4 tractor in performing the contract for which the pro-
5 posal is submitted.

6 (d) DEFINITIONS.—In this section:

7 (1) The term “Agreement on Subsidies and
8 Countervailing Measures” means the agreement de-
9 scribed in section 101(d)(12) of the Uruguay Round
10 Agreements Act (19 U.S.C. 3501(d)(12)).

11 (2) The term “illegal subsidy” means a prohib-
12 ited subsidy or an actionable subsidy under the
13 Agreement on Subsidies and Countervailing Meas-
14 ures.

15 (3) The term “foreign person” means—

16 (A) an individual who is not a United
17 States person or an alien lawfully admitted for
18 permanent residence into the United States; or

19 (B) a corporation, partnership, or other
20 nongovernmental entity which is not a United
21 States person.

22 (4) The term “United States person” means—

23 (A) a natural person who is a citizen of the
24 United States or who owes permanent alle-
25 giance to the United States; and

1 (B) a corporation or other legal entity
2 which is organized under the laws of the United
3 States, any State or territory thereof, or the
4 District of Columbia, if natural persons de-
5 scribed in subparagraph (A) own, directly or in-
6 directly, more than 50 percent of the out-
7 standing capital stock or other beneficial inter-
8 est in such legal entity.

9 (5) The term “cost or price evaluation” means
10 an evaluation conducted by a source selection au-
11 thority pursuant to subpart 15.305(a)(1) of the Fed-
12 eral Acquisition Regulation.

13 **SEC. 5. ENSURING FAIR COMPETITION.**

14 As part of the acquisition process for the award of
15 a contract for a replacement for the KC-135 tanker, as
16 required by section 2(b), the Secretary of Defense and the
17 source selection authority shall ensure that any covered
18 contractor, foreign or domestic, for the contract, as part
19 of the cost criteria, is evaluated both on the cost borne
20 by the supplier and any cost borne by a foreign govern-
21 ment that is not borne by a government (local, State, or
22 Federal) in the United States. The costs considered in the
23 evaluation shall be consistent with the costs estimated in
24 the independent cost estimate completed pursuant to sec-
25 tion 3.

1 **SEC. 6. NATIONAL SECURITY CONSIDERATIONS.**

2 As part of the acquisition process for the award of
3 a contract for a replacement for the KC-135 tanker, as
4 required by section 2(b), it is the responsibility of the De-
5 partment of Defense to take into consideration the na-
6 tional security impacts, the industrial base impacts, and
7 the economic impact to the United States of awarding con-
8 tracts for critical capabilities to foreign entities.

9 **SEC. 7. INDUSTRIAL BASE CONSIDERATIONS.**

10 As part of the acquisition process for the award of
11 a contract for a replacement for the KC-135 tanker, as
12 required by section 2(b), it is the responsibility of the De-
13 partment of Defense to take into consideration the indus-
14 trial base impacts and the economic impact to the United
15 States of awarding contracts involving critical jobs to for-
16 eign entities.

17 **SEC. 8. LOSS OF EMPLOYEE TAX REVENUE.**

18 As part of the acquisition process for the award of
19 a contract for a replacement for the KC-135 tanker, as
20 required by section 2(b), it is the responsibility of the De-
21 partment of Defense to take into consideration the impact
22 of lost personal income tax revenues to the United States,
23 as a result of awarding defense contracts to foreign enti-
24 ties.

1 **SEC. 9. LOSS OF CORPORATE TAX REVENUE.**

2 As part of the acquisition process for the award of
3 a contract for a replacement for the KC-135 tanker, as
4 required by section 2(b), it is the responsibility of the De-
5 partment of Defense to take into consideration the impact
6 of lost corporate tax revenues to the United States, as a
7 result of awarding defense contracts to foreign entities.

8 **SEC. 10. REGULATORY BURDEN.**

9 As part of the acquisition process for the award of
10 a contract for a replacement for the KC-135 tanker, as
11 required by section 2(b), it is the responsibility of the De-
12 partment of Defense to take into consideration the impact
13 of all regulations waived or that are not applicable with
14 respect to foreign entities. These regulations include cost
15 accounting standards, Buy America provisions, specialty
16 metal provisions, the Foreign Corrupt Practices Acts, and
17 compliance with the International Traffic in Arms Regula-
18 tion.

19 **SEC. 11. FOREIGN CORRUPT PRACTICES ACT.**

20 (a) CONDITION FOR PROSPECTIVE AWARD OF CON-
21 TRACT.—

22 (1) IN GENERAL.—As part of the acquisition
23 process for the award of a contract for a replace-
24 ment for the KC-135 tanker, as required by section
25 2(b), the Secretary of Defense and the source selec-
26 tion authority shall require that any contractor or

1 subcontractor described in paragraph (2) that is not
2 already covered by the Foreign Corrupt Practices
3 Act shall be required, as a condition of the contract,
4 to comply with the requirements of such Act.

5 (2) CONTRACTOR AND SUBCONTRACTORS DE-
6 SCRIBED.—A contractor or subcontractor described
7 in this paragraph is any of the following:

8 (A) A prospective defense contractor that
9 is part of an internationally controlled group of
10 entities.

11 (B) A prospective subcontractor that is
12 part of an internationally controlled group of
13 entities, provided that the subcontractor is at
14 the second tier or higher and is to be used by
15 the prospective defense contractor (as described
16 in subparagraph (A)) to perform the contract.

17 (b) COMPLIANCE PROGRAM.—

18 (1) IN GENERAL.—With respect to compliance
19 with the Foreign Corrupt Practices Act, the Sec-
20 retary of Defense shall require that all contractors
21 and subcontractors described in subsection (a)(2)
22 have a compliance program and certify in writing
23 that they have completed an audit of that compli-
24 ance program.

25 (2) DEBARMENT.—

1 (A) IN GENERAL.—Any contractor de-
2 scribed in subsection (a)(2) that engages in
3 conduct that violates the requirements of the
4 Foreign Corrupt Practices Act or any similar
5 applicable laws in foreign countries shall be
6 debarred from contracting with the Department
7 of Defense.

8 (B) PERIOD OF DEBARMENT.—The period
9 of debarment under subparagraph (A) shall be
10 at least 3 years.

11 (c) NATIONAL SECURITY WAIVER AUTHORITY.—

12 (1) IN GENERAL.—The Secretary of Defense
13 may waive the applicability of subsections (a) and
14 (b) in specific instances if the Secretary determines
15 that the waiver is necessary in the national security
16 interests of the United States.

17 (2) NON-DELEGATION.—The Secretary of De-
18 fense may not delegate the waiver authority under
19 paragraph (1).

20 (3) NOTIFICATION.—Upon issuing a waiver
21 under paragraph (1), the Secretary of Defense shall
22 notify the appropriate Congressional committees in
23 writing not later than 30 days after issuing such
24 waiver.

25 (d) DEFINITIONS.—In this section:

1 (1) FOREIGN CORRUPT PRACTICES ACT.—The
2 term “Foreign Corrupt Practices Act” means—

3 (A) section 30A of the Securities Exchange
4 Act of 1934 (15 U.S.C. 78dd–1); and

5 (B) sections 104 and 104A of the Foreign
6 Corrupt Practices Act of 1977 (15 U.S.C.
7 78dd–2).

8 (2) INTERNATIONALLY CONTROLLED GROUP OF
9 ENTITIES.—The term “internationally controlled
10 group of entities” means a controlled group of enti-
11 ties the common parent of which is a company orga-
12 nized under the laws of a foreign government and to
13 which the Foreign Corrupt Practices Act does not,
14 by its jurisdictional terms, apply.

15 (3) APPROPRIATE CONGRESSIONAL COMMIT-
16 TEES.—In this subsection, the term “appropriate
17 congressional committees” means—

18 (A) the Committee on Armed Services, the
19 Committee on Appropriations, and the Perma-
20 nent Select Committee on Intelligence of the
21 House of Representatives; and

22 (B) the Committee on Armed Services, the
23 Committee on Appropriations, and the Select
24 Committee on Intelligence of the Senate.

1 **SEC. 12. COVERED CONTRACTOR DEFINITION.**

2 In this Act, the term “covered contractor”, with re-
3 spect to a prime contract of the Department of Defense,
4 means any of the following:

5 (1) CONTRACTOR AND SUBSIDIARIES AND AF-
6 FILIATES.—

7 (A) Any prospective contractor making an
8 offer for the contract.

9 (B) The contractor awarded the contract.

10 (C) Any subsidiary or affiliate of the con-
11 tractor awarded the contract.

12 (2) SUBCONTRACTORS AND SUBSIDIARIES AND
13 AFFILIATES.—

14 (A) Any subcontractor of a contractor de-
15 scribed in paragraph (1)(B) that is at the sec-
16 ond tier or higher and is to be used by the con-
17 tractor in the performance of the contract.

18 (B) Any subsidiary or affiliate of any such
19 subcontractor.

20 **SEC. 13. REPORT.**

21 (a) REPORT REQUIREMENT.—The Secretary of De-
22 fense shall submit to the congressional defense committees
23 a report on compliance by the Department of Defense with
24 the provisions of this Act during the acquisition process
25 for the award of a contract for a replacement for the KC-
26 135 tanker, as required by section 2(b).

1 (b) DEADLINE.—The report shall be submitted no
2 later than the date of award of such contract.

3 (c) CONGRESSIONAL DEFENSE COMMITTEES.—In
4 this section, the term “congressional defense committees”
5 means—

6 (1) the Committee on Armed Services and the
7 Committee on Appropriations of the Senate; and

8 (2) the Committee on Armed Services and the
9 Committee on Appropriations of the House of Rep-
10 resentatives.

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