



**Northrop Grumman's Request for Dismissal of Untimely Grounds for Protest**

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## I. INTRODUCTION

Because of the KC-X tanker procurement's grand scale, international flavor, political sensitivity, and unanticipated result (at least according to conventional wisdom), there is a temptation to treat Boeing's protest as a unique semi-public spectacle that operates under its own special rules. Boeing appears to have succumbed to that temptation and ignored the fundamentals of bid protest law: if you think there is something wrong with the RFP or with how the Government has told you it will evaluate your proposal, you cannot wait until after contract award to file your protest.

Boeing's protest is peppered with complaints about the terms of the KC-X RFP and how the Air Force interpreted that document during discussions. In fact, those complaints form some of the major themes of its protest:

- Bigger tankers cannot be better tankers.
- Boeing's experience building tankers demands evaluation preference.
- The Air Force should have put more emphasis on survivability.
- Northrop Grumman's low SDD price depends on unfair foreign subsidies.
- Boeing's support for its price was unfairly criticized by the Air Force
- Boeing's SDD schedule was unfairly extended by the Air Force.

Each of these central elements of Boeing's protest narrative is built upon untimely protest claims. Each of these themes contests the terms of the RFP, or evaluation positions that the Air Force expressed firmly and repeatedly to Boeing well before Boeing submitted its Final Proposal Revision.

REDACTED VERSION: [REDACTED]

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Boeing's untimely claims fall into three categories: (1) those that challenge the RFP's recognition of the value of for greater aerial refueling and airlift capability; (2) those that seek to add new evaluation terms to the RFP; and (3) those that attack Air Force evaluations that were made clear to Boeing during discussions. Boeing's challenges to the RFP's recognition of value in greater capability include general claims about changing preferences mid-stream, claims that the RFP does not favor greater capacity for aerial refueling and airlift, and claims that the IFARA evaluation must prefer smaller tankers. Boeing also attempts to add new evaluation requirements to the RFP in the areas of experience, survivability, and government subsidies. It attacks the Air Force's evaluations of its proposals that were expressed directly to Boeing during discussions in the area of cost adjustments and schedule extensions. A list of the specific claims that Northrop Grumman seeks to have dismissed as untimely is attached as the Appendix. Each of the untimely claims is dealt with specifically in the detailed analysis below.

Overall, Boeing uses these untimely claims to buttress its rhetoric aimed at audiences beyond the GAO, that the Air Force treated it unfairly. But as one of the largest and most sophisticated government contractors in the United States, Boeing knows that an efficient and effective procurement system requires offerors to bring potential protest grounds to the Government's attention quickly. A post-award protest must be limited to grounds that the losing offeror learned after contract award. As the GAO has long emphasized, untimely protests "preclude[] the possibility that corrective action could be taken, if warranted, before the expenditure of significant time and effort and the exposure of prices." *Southern Research*, B-266360, Feb. 12, 1996, 96-1 CPD ¶ 65 at 3. In fact, protesters

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have a positive obligation to show the timeliness of each of their protest grounds within the protest document itself. 4 CFR § 21.1(c)(6) ("A protest filed with GAO shall ... Set forth all information establishing the timeliness of the protest.") Boeing failed to do so in its initial protest. Boeing particularly avoided the timeliness issue in its 19-page Introduction and Summary of Protest that apparently was prepared not for the GAO, but for Congress and the media. See [http://www.businessweek.com/bwdaily/dnflash/content/mar2008/db20080318\\_986336.htm?chan=top+news\\_top+news+index\\_businessweek+exclusives](http://www.businessweek.com/bwdaily/dnflash/content/mar2008/db20080318_986336.htm?chan=top+news_top+news+index_businessweek+exclusives) and <http://www.businessweek.com/pdfs/2008/boeingprotest.pdf>. The GAO should dismiss Boeing's untimely and inappropriate claims.

## **II. HISTORY OF THE KC-X PROCUREMENT**

The Air Force systematically communicated with both Boeing and Northrop Grumman about the development of the terms of the RFP before it was issued in final form, and about each offeror's evaluation during the discussion process. As a result of the Air Force's efforts, Boeing was aware of many of the claims that have now appeared in its post-award protest well before it submitted its Final Proposal Revision. A recitation of the Air Force's concerted efforts at openness shows that Boeing cannot honestly assert that it was subject to any unexpected changes in evaluation factors or procurement priorities over the course of the KC-X procurement.

The Air Force developed the KC-X RFP with input from both Boeing and Northrop Grumman, and then provided both offerors with three separate detailed briefings during discussions that detailed the Air Force's ongoing actual evaluations of each offeror. Both Boeing and Northrop Grumman engaged in direct exchanges with the Air Force

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throughout the process that covered specific topics of interest to each company, like government subsidies and the IFARA program. These focused communications will be detailed below in sections dealing with the untimeliness of specific Boeing protest claims. But it is also important to recognize that these exchanges took place in a broader context of a concerted effort by the Air Force to keep the offerors informed about the progress of the procurement effort. That overall effort will be described here.

### A. Market Research

The Air Force conducted extensive market research before it began to draft the RFP that included discussions with both Boeing and Northrop Grumman. It formally began the market research process on April 15, 2005, when the Air Force issued [REDACTED] [REDACTED] which documented the program plans for conducting market research efforts. This effort was described in the *KC-X Program Proposal Analysis Report*:

"[T]he Air Force collected and analyzed market data to determine whether the requirements could be met by products, modified products, or services in the commercial market. The KC-X team surveyed current market capabilities through site visits of potential suppliers and customers of like products, public information reviews (e.g., magazines, internet searches), and public forums (e.g., Aerial Refueling Systems Advisory Group)."

*KC-X Program Proposal Analysis Report*, Feb. 29, 2008 ("PAR") at 1 [AR Tab 55; NG Ex. 1]<sup>1</sup>. In the period between March and May 2005, the Air Force visited the sites of both EADS and Boeing. [REDACTED]

[REDACTED] A Market Research Report was updated following site visits to

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<sup>1</sup> Information in brackets refers to the location of the document in the Agency Record ("AR") and in the Document Appendix to Northrop Grumman's Request for Dismissal ("NG").

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industry and users of tankers and after receipt of information from them. That Report provided the foundation of the Air Force's business strategy. The results of the market research were presented in a market research report completed on December 4, 2006. [REDACTED]

[REDACTED]

[REDACTED]

### B. Development of the RFP

The Air Force strategy for preparing the KC-X RFP included systematic industry involvement. The PAR provides a good overview of the Air Force's approach:

To ensure total openness and transparency with the Department of Defense (DoD) and industry, the KC-X Program Office conducted numerous interchanges with industry for the purpose of providing information with regard to the Request for Proposal (RFP) preparations and Offeror status throughout the source selection. Prior to the formal release of the RFP, the Government team conducted face-to-face meetings with potential Offerors and an Industry Day symposium. These meetings coincided with the release of two draft RFPs. The first draft RFP was released before the Industry Day symposium and the second one afterwards. As a result of these exchanges, the Government formally tracked over 350 additional responses to Offeror inquiries. The formal RFP clearly reflects significant industry involvement."

PAR at 1-2. The Air Force thus systematically sought to allow all potential offerors the unlimited opportunity to provide input into the eventual terms of the RFP.

The development of the KC-X RFP began with the preparation of a formal Analysis of Alternatives. In March 2006, after nearly one year of market research, the RAND Corporation completed the final draft of the Analysis of Alternatives. The Analysis of Alternatives concluded that the most cost-effective re-capitalized fleet would consist of medium to large commercial derivative aircraft, and two Airbus airplanes--the A330 and the A340--and four Boeing airplanes--the 767, 787, 777, and 747--as candidates to be the most

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cost effective solution. [REDACTED]; Source Selection Decision Document, Feb. 29, 2008 ("SSDD") at 2 [REDACTED]. The Analysis of Alternatives identified medium airplanes as those with maximum gross takeoff weight of 300,000-550,000 pounds, a category within which both the A330 and the 767 fell. After passing two independent reviews, the Analysis of Alternatives was completed on April 14. [REDACTED].

The Air Force's next step, as soon as the Analysis of Alternatives was approved, was to seek industry input. On April 25, the Air Force issued a Request For Input (RFI) from industry at the FedBizOpps website. [REDACTED]; PAR at 1. "The RFI ensured early industry involvement." PAR at 1. [REDACTED] companies responded to the RFI by the June 9 deadline with information relating to "Tanker Recapitalization Capability Criteria." *Id.*; [REDACTED]. By that time responses were due, the Air Force had already conducted follow up visits with Boeing and Northrop Grumman. [REDACTED].

On the basis of the RFI responses, the Air Force decided to pursue a full and open competition, [REDACTED], and on September 25 issued the first draft RFP, [REDACTED]. There was an industry "Black Hat" review prior to release. [REDACTED]. The first draft RFP sought a performance-based commercial derivative solution to the requirements described in the Systems Requirement Document (SRD) and allowed industry to provide their comments and proposed changes. [REDACTED].

On October 16, industry provided comments on the first draft RFP. [REDACTED]. Combined with the input from government sources, the Air Force received over 1200 comments that added value to the RFP. [REDACTED]. It engaged in an adjudication process to determine how to handle all comments deemed "critical" or "substantive." [REDACTED]

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The Air Force followed up on the industry comments on the first draft RFP by holding an Industry Day from October 24-26. The event attracted over 100 attendees. [REDACTED] companies participated, including potential prime contractors Boeing, Northrop Grumman, [REDACTED]. As a result of the draft RFP comments and the Industry Day meetings, numerous industry comments were incorporated into the RFP to foster competition. [REDACTED]

The original plan was to issue the final RFP in December 2006, [REDACTED], but the Air Force decided instead to issue a revised draft RFP. The Joint Requirements Oversight Council met on November 28, and decided that the RFP should be revised to provide more evaluation credit for added capability to carry cargo and passengers. See "JROC, McCain Emphasize KC-X Requirements for Cargo, Passengers," *Inside the Air Force*, Dec. 8, 2006 (1st Supp. Protest, Ex. 17) [NG Ex. 5]. A second draft RFP was then issued on December 15. "Air Force Clarifies Draft Requirements on Airlift Missions for KC-X," *Inside the Air Force*, Dec. 22, 2006 (1st Supp. Protest, Ex. 17) [NG Ex. 5]. That draft RFP included many of the changes that Boeing now complains about in its protest. See § IV.A. below. The changes to the draft RFP were obvious enough that the reporter was able to discern that "with the additional information requested in the Dec. 15 RFP, developers of the A-330 can put the advantages of its comparatively larger cargo hold on display." *Id.* at 1.

### C. Final RFP

The Final RFP was issued on January 30, 2007, after approval of the Acquisition Strategy Report by the Under Secretary of Defense for Acquisition, Technology, and Logistics on January 17, 2007. SSDD at 2; PAR at 2. Before releasing the final RFP,

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the Air Force conducted cross-referencing and internal quality control checks. [REDACTED]

[REDACTED]. Issuance of the final RFP did not stop the Air Force's efforts to involve industry in the procurement. The Program Acquisition Strategy Report described the Air Force's continuing efforts to coordinate the development of its requirements with industry. It stated that the Air Force would continue to work with two groups: the Future Technology for Aerial Refueling Program with United States, Germany, United Kingdom, France and Italy; and the Aerial Refueling Systems Advisory Group. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The alleged shifts in acquisition strategy described in the protest occurred either before or in connection with the release of this final RFP, not later. Boeing does not cite any changes to evaluation criteria that took place after the final RFP was issued. The GAO report cited by Boeing acknowledges that the Air Force had added additional cargo and passenger capability in its procurement planning. *See GAO, Defense Acquisitions: Issues Concerning Airlift and Tanker Programs, GAO-07-566.* The protest also acknowledges that the IFARA changes favoring larger aircraft took place in connection with the final RFP. Protest ("Pr.") at 10. Those changes were included in a document contained in Attachment 18 to the RFP, the *KC-X Effectiveness Analysis Plan.*

**D. Air Force Evaluation of the Proposals**

Both offerors submitted their initial proposals on April 12. On the same day that the final RFP was issued, the Source Selection Authority signed the KC-X Source

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Selection Plan (the "SSP"). PAR at 2. The SSP allowed the Source Selection Evaluation Team ("SSET") to enter into discussions as needed after receipt of proposals. PAR at 2. The SSET would communicate directly with Boeing and Northrop Grumman through Evaluation Notices ("ENs") approved by the SSET chairperson. *Id.*

During discussions, the Air Force prepared three detailed separate presentations to Boeing and Northrop Grumman that provided each offeror with complete, detailed evaluations of its proposal. According to the Air Forces summary of the discussions in the PAR:

the Government team conducted five (5) days of face-to-face meetings with all Offerors throughout the evaluation period to provide them feedback on their proposals. Face-to-face meetings resulted in an additional 160 documented Offeror questions and answers being tracked. Also throughout source selection, the Government conducted regular telecons with all Offerors. There were approximately 40 telecons per Offeror. The SSET fully documented all face-to-face and telephone discussions with Offerors as part of the evaluation record. Formal evaluation of the proposals resulted in the generation of over 560 ENs.

PAR at 3.

The first time the offerors were provided with a comprehensive briefing of the Air Force's then current evaluation was called the Mid-Term Evaluation Briefing. Before briefing Boeing and Northrop Grumman, the SSET prepared a briefing for the Source Selection Advisory Council (SSAC) and the SSA. This briefing reflected the initial evaluation of each Offeror's proposal against RFP criteria and incorporated the results of discussions conducted up to that point in time. After the SSA approved these ratings, the SSET released the ratings to the offerors in the briefing and then continued discussions.

PAR at 2. Boeing received its briefing on August 1. [REDACTED]

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[REDACTED]. Northrop Grumman received its briefing the next day. [REDACTED]

The second comprehensive briefing to the offerors was the Most Probable Life Cycle Cost (MPLCC)/Schedule Risk Assessment (SRA) briefing conducted about one month later. Once again, the SSET first briefed the SSAC and SSA, this time incorporating its mid-term evaluation of each proposal in the area of MPLCC/SRA and the results of discussions up to that point. After the SSA approved these ratings, the SSET released them to Boeing and Northrop Grumman. PAR at 2-3. This time, Northrop Grumman received its briefing first, on August 30. [REDACTED]

[REDACTED] Boeing received a two-day briefing on September 11 and 12. [REDACTED]

The third and final comprehensive briefing was the Pre-FPR briefing provided about two months later, at the end of November. Before this briefing, the SSET reassessed the ratings of proposals and presented updated ratings to the SSAC and SSA for approval. The SSET then briefed the offerors on the updated ratings prior to the request for FPRs. Northrop Grumman received its briefing on November 27. [REDACTED]

[REDACTED]. Boeing received its briefing two days later on November 29. [REDACTED]

Release of the ENs initially ended prior to the request for final proposals. A total of [REDACTED] ENs were issued to Boeing, and a total of [REDACTED] were issued to Northrop

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Grumman. [REDACTED]

[REDACTED]. Discussions concluded with the receipt of the final proposals. PAR at 3. FPRs were received from Boeing and Northrop Grumman on January 4, 2008.

Enactment of the National Defense Authorization Act of 2008 on January 28, 2008 required the Air Force to reopen discussion, primarily to address the implementation of the law and its impacts on the offerors' proposals. The major focus of the discussions were the provisions in the NDAA regarding Specialty Metals (NDAA Section 804) and Commercial Pricing (NDAA Section 815), but the Air Force also held discussions regarding contract terms and conditions and additional ENs that had been issued. ENs were answered and contract terms and conditions discussions concluded via a post-2008 NDAA final proposal update provided by each offeror. PAR at 3.

After an independent review by the Office of the Secretary of Defense, the SSA approved the sending of clarification letters to both offerors on February 26, 2008, providing the opportunity to either confirm that their earlier FPR was their final proposal revision, or to provide any additional proposal update. PAR at 3. Both Boeing and Northrop Grumman confirmed on the same day that their February 15, 2008 submittals were their final proposals.

Award to Northrop Grumman was announced on February 29. Boeing's protest at times appears to try to overturn statements made during the press conference announcing the award, or media reports that emerged after the announcement purporting to describe the results of the evaluation, but these complaints are, of course, not grounds for protest against a procurement. Nevertheless, based on the detailed participation of the

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offerors in all phases of the procurement, and based on the multiple comprehensive briefings the offerors received on their actual ratings as they were occurring, the SSA's statement at that press conference that the offerors have known "exactly where they stood all along in all of the various factors as we were evaluating them" was no exaggeration. *See Pr.* at 1.

### **III. LEGAL STANDARD FOR SUMMARY DISMISSAL OF UNTIMELY PROTEST GROUNDS**

An intervenor that believes that specific protest allegations should be dismissed before submission of an agency report on timeliness grounds may file a request for dismissal under 4 CFR §§ 21.3(b) and 21.5(e). Timeliness is governed by 4 CFR § 21.2:

Time for filing. The relevant provisions read:

(a)(1): Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

(a)(2): Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

The GAO has interpreted these Bid Protest Rules to establish two basic timeliness rules. The first rule is that, if the protest challenges a term of the RFP, it must be filed before submission of a proposal if the ground for protest was apparent before proposals were due.

The corollary of this rule is that if the impropriety in the RFP is not revealed until after initial

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proposals are submitted, then any protest must be filed before the next round of proposals is due. The second rule is that, for all other grounds of protest, the protest must be filed within 10 days of when the offeror learns of the ground for the protest. The Bid Protest Rules create one exception that tolls this 10-day rule: when a request is made for a required debriefing, the filing time is tolled for protests that would have been timely when the request was made, and the 10 days start over when the debriefing is completed.

### **A. Bid Protest Rule 21.2(a)(1) Required Boeing to File a Protest Before Submitting a Proposal for Any Protest Claims Based Upon Alleged Improprieties in the RFP That Were Apparent Before the Proposal Was Due**

Rule 21.2(a)(1) plainly required Boeing to file any protest based upon alleged improprieties in the RFP that were apparent before the proposals were due in advance of submission of its proposal. Thus, as will be explained below, Boeing was required to file a protest before submitting its proposal in order to object to the terms of the RFP that favored tankers with greater aerial refueling and airlift capacity.

The GAO has interpreted this rule to also mean that if Boeing was aware of the Air Force's interpretation of an RFP requirement, it lost its right to challenge that interpretation when it submitted its proposal. *See A-TEK, Inc.* B- 299557, May 3, 2007, 2007 CPD ¶ 89 at 3-4. If an agency puts an offeror on notice of the method it will be using to evaluate the proposals, the offeror must protest any alleged impropriety in this approach before submission of a proposal. *Sikorsky Aircraft Company; Lockheed Martin Systems Integration-Owego*, B-299145; B-299145.2; B-299145.3, Feb. 26, 2007, 2007 CPD ¶ 155 at 7 n.2. In *Joppa Maintenance Company, Inc.*, B-281579; B-281579.2, Mar. 2, 1999, 2000 CPD ¶ 2, the GAO held that a protest based on the accuracy of estimates in an RFP was

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untimely if not filed before initial protests were due. *Id.* at 6. In the same way, to the extent that Boeing was aware that the IFARA calculation was somehow inaccurate or inconsistent with Boeing's perception of "operational realities," it had to protest that alleged impropriety before submitting a proposal to be evaluated under that formula.

The reference to "improprieties in a solicitation" in Rule 21.2(a)(1) has been broadly interpreted by GAO to include defects in the procurement process. In *Harris Corp.*, 96-2 CPD ¶ 205, the GAO held that Harris's "post-award complaint is untimely since Harris is essentially challenging a defect in the procurement process which should have been raised well before discussions were concluded and an award was made. Bid Protest Regulations, section 21.2(a)(1), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(1))." *Id.* at 7. The defect alleged by Harris was the agency's use of a series of model contract drafts during discussions to keep track of the status of terms and conditions that would be imposed upon the awardee. *Id.* at 2-4. This was not a defect in the solicitation document itself, but instead was an alleged impropriety in the solicitation process. Under *Harris*, a protest against such a process would have to be filed before the next round of proposals was due in order to be timely.

The "improprieties in a solicitation" covered by Rule 21.2(a)(1) include the failure of an RFP to include a desired term. A protest claiming that a solicitation failed to include certain evaluation criteria falls into the category of "alleged improprieties in a solicitation which are apparent prior to bid opening" and must be filed before the time when proposals are due. *Free&Ben Inc.*, B-299156, Feb. 20, 2007, 2007 CPD ¶ 39 at 3-4. Therefore, as will be explained below, Boeing's claims that the RFP should have evaluated

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experience, potential future costs of survivability approaches, and the impact of governmental subsidies had to be filed before the initial proposals were due back in April 2006.

One more category of "improprieties in a solicitation" is relevant to Boeing's protest. Patent ambiguities in an RFP are solicitation improprieties that must be protested before submission of a proposal. *Lockheed Martin Aeronautics Co.*, B-298626, Nov. 21, 2006, 2006 CPD ¶ 177 at 6 n.14. Boeing's claims about proper interpretation of the interplay of the Threshold and Objective for the SRD "Aerial Refueling Capacity versus Mission Radius" factor fall into this category.

### **B. Bid Protest Rule 21.2(a)(2) Required Boeing to File Within 10 Days of Knowledge of the Basis of the Protest for All Other Bases for Protest, With One Narrow Exception**

Rule 21.2(a)(2) plainly requires an offeror to protest within 10 days of the notice for any basis of protest other than a solicitation impropriety. *See Sikorsky Aircraft Company; Lockheed Martin Systems Integration-Owego*, B-299145; B-299145.2; B-299145.3, Feb. 26, 2007, 2007 CPD ¶ 155 at 7 n.2.

This rule also applies when an offeror learns of an agency's interpretation of an RFP provision during the discussion process after submitting a proposal. If the offeror believes that interpretation is improper, the offeror must bring its protest within 10 days of learning the agency's interpretation. In *PM Services Co.*, B-310762, Feb. 4, 2008, 2008 CPD ¶ \_\_, the protester was informed through a discussion question that the agency would be requiring it to provide a proposed escalation for Service Contract Act employees, even

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though the escalation would be automatic under Department of Labor regulations. The GAO held that

to the extent the protester may have thought that the RFP as originally issued did not contemplate offerors providing--and the agency evaluating--proposed escalation for DOL-covered employees, it knew at the point it received this discussion question what the agency was expecting from the offerors, and what it intended to evaluate. It follows that, even if the protester were not required to protest on this ground prior to the deadline for submitting proposals, it was required to protest within 10 days of receiving the agency's discussion question quoted above. 4 C.F.R. § 21.2 (a)(2).

*Id.* at 3. Application of the 10-day rule in this situation is consistent with other GAO cases addressing timeliness when an offeror discovers a solicitation impropriety after submitting its proposal.

Where an alleged solicitation impropriety is not apparent, a protest filed within 10 days of when the protester becomes aware, or should have become aware, of its protest basis is timely. See *N&N Travel Tours, Inc.*, [et al., B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶ 146] at 7; *Ocuto Blacktop & Paving Co., Inc.*, B-284165, Mar. 1, 2000, 2000 CPD ¶ 32 at 6; see also *Vitro Servs. Corp.*, B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136 n.1 (protest filed within 10 days of the date the protester learned of an agency's interpretation of a latent solicitation ambiguity is timely).

*LBM, Inc.*, B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 6-7.

### **C. The Exception to Bid Protest Rule 21.2(a)(2)'s 10-Day Rule Applies Only to Bases for Protest That Would Have Been Timely on or After the Date Boeing Requested Its Post-Award Debriefing**

The GAO has held that the exception to the 10-day rule set forth in Rule 21.2(a)(2) was not designed to allow an offeror to revive a basis for protest that had already become untimely. "The only effect a required debriefing has on our timeliness requirements is the tolling of the filing period in limited circumstances. See *Trifax Corp.*, B-279561, June 29, 1998, 98-2 CPD ¶ 24 at 4-5." *Raith Engineering and Manufacturing Company, W.L.L.*,

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B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 at 3. Rule 21.2(a)(2)'s exception merely "extends the time period for filing a protest based on information known to a protester prior to a debriefing beyond the usual 10-day period in the situation in which a debriefing is both requested and required." *Optimum Management Systems, LLC*, B-299322.3, May 23, 2007, 2007 CPD ¶ 106 at 3 n.3.

The rationale for this exception was explained shortly after it was issued: "This rule is designed to encourage early and meaningful debriefings and to preclude strategic or defensive protests, i.e., protests filed before actual knowledge that a basis for protest exists or in anticipation of improper actions by the contracting agency. 61 Fed. Reg. 39040." *Real Estate Center*, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74 at 2. "Offerors thus preserve the right to raise a protest issue, the basis of which they may have known prior to the debriefing, without disrupting the procurement or unduly delaying the bid protest process in our Office." *Minotaur Engineering*, B-276843, May 22, 1997, 97-1 CDP ¶ 194 at 3.

When the GAO enacted the exception to align its timeliness rules with the statutory stay requirements, it gave no indication that it intended to change the fundamental rationale for its timeliness rules. This rationale was expressed in an opinion issued at around the time the GAO was contemplating the issuance of the rule change in 1996. "We do not think a vendor can learn of what it clearly views as improper agency action, and continue to compete on that basis without objection, and then complain when it is not selected for award." *Southern Research*, B-266360, Feb. 12, 1996, 96-1 CPD ¶ 65 at 3. In that case, the GAO explained its reason for requiring protests before submission of proposals. "Southern's failure to protest prior to that date precluded the possibility that corrective action could be

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taken, if warranted, before the expenditure of significant time and effort and the exposure of prices." *Id.* This reasoning continued to be cited positively after the rule change. *Novavax, Inc.*, B-286167; B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202 at 9.

In any event, the GAO has at least three times determined that a protester may not avoid filing a protest claim that it learns it has during discussions based on the possibility of later being able to file a request for a required debrief. That was the outcome of the *PM Services Co.* case described above. The same result was reached recently in *Engineered Electric Co.*, B-295126.5; B-295126.6, Dec. 7, 2007, 2007 CPD ¶ 234. In that case, the protester attempted to bring a protest claim based on misleading discussions, but the GAO rejected its protest ground as untimely. The GAO held that as soon as the protester had all of the information that supported its claim, the 10-day clock began to run. *Id.* at 7-9. The *Engineered Electric Co.* protest qualified for the exception allowing a protester to bring its claim 10 days after a debriefing, because it was conducted on the basis of competitive proposals. *See MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 6. Nevertheless, the GAO held that the 10-day limitation period applied to a protest ground that the protester learned about during discussions, i.e., before award had been made and a request for debriefing had been submitted. In *Learjet, Inc.*, B-274385; B-274385.2; B-274385.3, Dec. 6, 1996, 96-2 CPD ¶ 215, the protestor knew its interpretation of how a fuel reserve was to be computed differed from the agency's interpretation before final proposals were due, and the 10-day clock started upon knowledge, not upon debriefing. *Id.* at 4-5. This case involved a competitive proposal, a debriefing was timely requested, and the protest was filed only 1 day after debriefing. These cases show that the GAO does not interpret "any

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protest basis which is known or should have been known ... before ... the debriefing" to revive already expired protest grounds, but instead interprets that language to merely toll the clock on protests that would have been timely if filed when the debriefing was requested.

### **IV. BOEING'S UNTIMELY CLAIMS SHOULD BE SUMMARILY DISMISSED**

#### **A. Boeing's Challenges to the SSA's Recognition of the KC-30's Superior Aerial Refueling and Airlift Capacity Are Untimely and Should Be Dismissed**

##### **1. Boeing's protest is based on the faulty premise that the Air Force misled it as to the capabilities of the tankers it required**

A central tenet of the Boeing protest is that it had no reason to believe from the terms of the RFP that the Air Force would provide more credit for greater capacity for aerial refueling and airlift capacity. Rather, Boeing argues, the Air Force had made a commitment to purchase a "medium" tanker in this procurement, *see e.g.*, Pr. at 2, 38 and 41, and it abandoned that commitment by making "mid-course corrections" to the RFP. The result was what Boeing describes as "a wholesale shift in acquisition strategy in the midst of this procurement" Pr. at 8.

Boeing is wrong as to these building blocks of its protest. From the beginning of this procurement the Department of Defense publicly identified both the A-330 and 767 as "medium" airplanes and they were, therefore, candidates for the first phase of the KC-135R recapitalization. An award to the KC-30 was not an about face by the Air Force. To the extent that there were adjustments made to the RFP to ensure it reflected the capabilities desired by the Air Force and to guarantee fair competition, those changes were formally made to the terms of the Final RFP months before the proposals were due. Boeing's failure to file a protest before submitting its proposal on a myriad of those explicit solicitation

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requirements about which it now complains means that large portions of its protest in this area are untimely under Bid Protest Rule 21.2(a)(1).

- a. Boeing's claim that the Air Force selection of the KC-30 is a violation of its commitment to purchase a medium tanker is both wrong and untimely

Boeing's protest identifies as one of the "three major flaws in Air Force's evaluation process" its "conduct of this procurement" so as to result "in a substantial gulf between the aircraft the Air Force set out to procure—a medium size air refueling tanker to replace the venerable KC-135—and the Airbus A330 based tanker that it selected." Pr. at 6. That claim is squarely at odds with the history of this procurement. As Boeing recognizes in its protest, an important step in developing the requirements for the Air Force's Tanker procurement was the Secretary of the Air Force's commission of the RAND Corporation in late 2005 to prepare an Analysis of Alternatives on behalf of the Air Force. Pr. at 20. That Report, referred to as the AoA, was completed in March 2006 and its Executive Summary was publicly available. See RAND Project Air Force, *Analysis of Alternatives (AoA) for KC-135 Recapitalization Executive Summary* (2006) ("AoA") [NG Ex. 13]. The Under Secretary of Defense for Acquisition and Technology relied on this AoA authorizing the Air Force to proceed with developing the requirements for this procurement and with the acquisition process. [REDACTED] Pr. at 20.

The AoA found that "the most cost-effective tanker replacement alternative fleet consisting of commercial-derivative tankers in the medium to large size range (300,000 to 1,000,000 pounds maximum gross take off weight)." AoA at 12. The AoA made a clear distinction between medium and large aircraft as follows:

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- Medium aircraft - 300,000 to 550,000 pounds maximum takeoff weight
- Large aircraft - 550,000 to 1,000,000 pounds maximum takeoff weight.

AoA at 8. The results of the AoA were the subject of a Congressional Hearing, widely reported at the time and well known to those in the industry. *See e.g.* "Krieg Clears Way for Air Force to Start KC-135 Tanker Recapitalization," *Defense Daily*, Apr. 17, 2006 [NG Ex. 14].

As disclosed at Figure 2.1-2 of the Northrop Grumman April 12, 2007 proposal, Vol. II at II-F1-4 [REDACTED] the maximum takeoff weight of the KC-30 is [REDACTED], well within the medium airplane category on which the first step of the recapitalization effort proceeded. Similar information about the A330 itself is, and has regularly been available on a wide variety of web sites, all reflecting similar weights. *See, e.g.*, <http://www.airliners.net/info/> [NG Ex. 16]. The simple fact is that, contrary to Boeing's basic premise, award to the KC-30 is fully consistent with procurement of a "medium" tanker.

Examination of the AoA discloses that Boeing's argument that the Air Force's selection of the KC-30 deviated from a commitment to purchase a medium tanker is yet another attempt to ensure that it has no competition for the award. The AoA identified two Airbus planes (the A330 and the A340) and four Boeing planes (the 767, 787, 777, and 747) as candidates to be commercial-derivative tankers in the medium to large size range. AoA at 12. The A330 is the smaller of the two possible Airbus planes. If Boeing were successful in its claim that the A330 is too large to qualify in a competition for a medium tanker, then only Boeing would be eligible for award of a medium tanker contract. After the experience with

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the lease contract, no one could reasonably have believed that it was the Air Force's intent to turn this into a sole source procurement.

Boeing understood throughout this procurement that it was competing with the KC-30, an aircraft squarely within the AoA's definition of a medium airplane. It is far too late now for Boeing to argue that the KC-30 was a large tanker, ineligible for award under this solicitation. As discussed below, many of Boeing's specific grounds of protest particularly as to Mission Capability, are premised in large part on its claim that Air Force made a "decision to select a Large aircraft," Pr. at 40, in violation of its "repeated commitment to 'replace' the 'KC-135 fleet' using 'medium' sized aircraft," Pr. at 41. Not surprisingly, given the base on which those claims are built, they are untimely challenges to terms of this procurement which were well established in the final RFP itself.

- b. The so-called mid course corrections were RFP and IFARA ground rule changes made months before proposals were due

Boeing's repeated complaints about mid-course corrections in the Air Force's approach are equally misplaced as grounds for a bid protest at this late date. It is striking in going through Boeing's protest that the changes to which Boeing objects occurred in the Final RFP of January 30, 2007. Months of consultation with users and industry, and extensive comments received on two draft RFPs did result in some clarification of the Air Force's requirements.<sup>2</sup> But those clarifications were clearly stated either in the Final RFP issued in January 2007, including it updated IFARA guidelines at Section L, Attachment 18.

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<sup>2</sup> Boeing's insinuation that these changes were part of some nefarious scheme to favor Northrop Grumman is entirely unsupported. There is every indication that the Air Force considered requests from both bidders, and others, and then made those changes which it found in its best interest. But, in any case, the motivation for those changes is not an issue for

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The adjustments in the Final RFP certainly took important steps to convey the message that obtaining maximum capability in critical KPP and KSA areas was a factor of real interest to the Air Force. The point was made in the very first sentence of text in Section M. Section 1.1, Basis for Contract Award, was changed to add the words "capability based" to the description of the procurement as a "best value source selection." *Compare* 2nd Draft RFP § M.1.1 *with* Final RFP § M.1.1 [NG Ex. 18]. That same provision describing the basis for award already included in its second paragraph the statement the "[t]he Government seeks to award to the offeror who gives the Air Force the greatest confidence that it will best meet, **or exceed**, the requirements" (emphasis added). *Id.* Emphasizing the same message, the Final RFP also changed language in Section M.2.2.1.1.a, describing the way that Key System Requirements would be evaluated, to say that positive consideration "will be" rather than "may be" provided for performance above the stated KPP thresholds. *Compare* 2nd Draft RFP § M.2.2.1.1.a *with* Final RFP § M.2.2.1.1.a. [NG Ex. 19].

In these instances and elsewhere the Air Force sought to be sure that the offerors clearly understood that cost effective capability would be valued in the source selection. Boeing's failure to comprehend, or decision to ignore, that point is not a basis of protest. And because that message was delivered in the actual solicitation document long before proposals were due, Boeing's numerous protests about areas in which the source selection took such capability into account are untimely under 4 CFR § 21.2(a)(1).

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a bid protest now. If Boeing believed that those changes were an improper skewing of the requirements, they had an obligation to raise that matter as a protest before submitting a proposal in this competition. 4 CFR § 21.2(a)(1).

REDACTED VERSION: [REDACTED]

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### **2. It is too late to complain that the SSA rewarded greater fuel capacity**

As part of its overall claim that the RFP did not inform offerors that more capability would be rewarded, Boeing attacks the SSA's identification of the KC-30's superior aerial refueling capability as a major discriminator. In particular, Boeing complains that the Air Force improperly applied the "Fuel Offload at Radius" requirement in the RFP to reward increased capacity by considering that the KC-30 far outstripped the KC-767 in the amount of fuel it could deliver at every applicable mission radius. Pr. § IV.A.1.e at 45-47.

Boeing's argument is untimely and should be dismissed. Boeing was on notice long before the final proposals were due on January 4, 2008, both from the RFP itself and from ongoing discussions, that the Air Force considered greater air refueling capacity to be a benefit which it would take into account in its evaluation. That message was present not only in the Fuel Offload at Radius SRD requirement, both as stated and as applied, but in other portions of the RFP's treatment of Aerial Refueling capability as well. The SSA's reliance on greater fuel offload capacity at radius and the complementary greater aerial refueling efficiency, also tied in large part to refueling capacity, was squarely provided for under RFP terms which Boeing had chosen not to protest. The time for Boeing to have protested against the Air Force's consideration of refueling capacity as an element of its evaluation of aerial refueling capability has long since passed.

- a. Boeing had clear notice that the Air Force would reward greater air refueling capacity

Boeing's claim that the Air Force misapplied the Aerial Refueling at Radius evaluation factor is wrong. Boeing's claim is based on an illogical reading of the RFP, and,

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in any case, is inconsistent with the Air Force's repeated notices to Boeing during interim evaluation sessions of the benefit it was assessing for the percentage by which the threshold refueling capacity was exceeded. Moreover, other RFP provisions concerning refueling clearly signaled that the Air Force would consider and reward additional refueling capacity.

- (1) Boeing's argument depends on an illogical reading of the RFP

Boeing claims that the SRD did not permit the Air Force to take into account the superior refueling capacity at range of the KC-30. This argument is based initially on an illogical reading of the RFP. The SRD established Fuel Offload and Radius Range as a requirement for a KPP, i.e., one of the key performance parameters for the new air tanker. *See* SRD 3.2.1.1.1 [NG Ex. 20]. It established the Threshold for that KPP as the capability for fuel offload versus radius at the levels specified in Figure 3-1, which roughly matched the capability of the KC-135R. SRD 3.2.1.1.1.1. Figure 3-1 designated a minimum number of pounds of fuel which had to be available for offload at each of five specified radii, *e.g.* 117,000 pounds of fuel at 500 nautical miles and 20,000 pounds of fuel at 2500 nautical miles. The SRD then established the Objective for that KPP as the capability "of exceeding the fuel offload versus unrefueled radius range as depicted in figure 3-1." SRD 3.2.1.1.1.2.

Boeing claims that it understood this provision to mean that the objective was met as soon as the threshold was exceeded and that the degree by which it was exceeded would not be considered. It then invokes M.2.2.1.1.a which explains that for Key Systems Requirements like Mission Capability, positive consideration will be provided for exceeding threshold requirements, but that where there is an objective also associated with the KPP, no consideration will be given for going beyond the objective. Boeing claims that as a result it

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is irrelevant that the KC-30 had much greater refueling capacity than the KC-767, and that greater capacity, although clearly considered of benefit to the Air Force, could not be considered by the SSA.

The timeliness of Boeing's argument depends entirely on its position that until its post-award debriefing on March 7, 2008, it reasonably understood that the Air Force would not reward the extent to which the threshold fueling capacity was exceeded. Yet to make that claim, Boeing must establish that it was a reasonable reading of the RFP that the Air Force intended essentially to conflate a Threshold and Objective in an area it had identified as a Key Performance Parameter. Boeing's position would mean that the Air Force intended that providing a single pound more of fuel offload at each of the radius ranges was its only interest and that the Air Force did not intend to provide any additional credit if a competing tanker was able to exceed the Threshold by far more. That is simply not a plausible reading of the RFP. There would be no reason to have a separate Threshold and Objective if the two were essentially identical.

Boeing's reading is also belied by the detailed information concerning this factor which the RFP required the offerors to provide to the Air Force for its evaluation. Section L.4.2.2.3.3, "Aerial refueling offload versus mission radius", directed offerors to provide analyses of the offload capacities which could be achieved at each of the ranges under detailed ground rules, along with documentation of the data used and a statement of the assumptions in these calculations. [NG Ex. 21] It also required two additional pieces of information from the offerors:

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- "identify any modifications to the basic airframe or system components required to extend the mission radius versus offload performance beyond the threshold value shown in the SRD."
- "describe any impacts to other mission areas (cargo, passenger, medical, etc) if the aircraft is configured to maximize the offload versus radius performance."

The requirement for this detailed information--concerning the basis on which the offeror calculated its maximum offload capability and the effect of any steps it took to achieve these maximums--is a compelling indicator of the Air Force's interest in the maximum fuel offloads at radius which each plane could achieve. Requiring this information would make no sense if the Air Force's only interest in this area was whether the threshold was exceeded even by a thimbleful of additional capacity, as Boeing claims it believed.

In short, Boeing's asserted interpretation of the RFP requirement is illogical and cannot save it from an obligation to have filed any challenge to the Air Force's intent to consider maximum offload capacity as a timely protest of the RFP itself. At an absolute minimum, if Boeing did believe that this provision could be read to say that the Air Force was essentially uninterested in any capacity beyond the Threshold, it should have recognized the possibility of another interpretation. In that case it had an obligation to raise a question with the Air Force rather than to continue clinging to its belief that the Air Force was not interested greater refueling capacity. *Dix Corp.*, B-293964, July 13, 2004, 2004 CPD ¶ 143; *Lockheed Martin Aeronautics Co.*, B-298626, Nov. 21, 2006, 2006 CPD ¶ 177 at 6 n.14.

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- (2) The Air Force's interim briefings informed Boeing that the Air Force valued the extent to which the fuel capacity thresholds were being exceeded

Any possible question as to the Air Force's intent to value the extent to which refueling capacity Threshold was exceeded as part of its evaluation should have been eliminated by the Air Force's interim briefings. On both August 1, 2007, and November 29, 2007, the Air Force briefed Boeing as to the status of its proposal. [REDACTED]

[REDACTED]

[REDACTED]. In each instance it used the slides concerning Boeing's proposal which it intended to present in providing an interim briefing to the SSA. And in each case the slide concerning the Air Force's evaluation of the "Aerial refueling capacity versus mission radius" SRD requirement should have put Boeing on clear alert that it was wrong if it believed that the Air Force was not interested in the extent to which an offered tanker exceeded the threshold capacity. [REDACTED]

[REDACTED]

[REDACTED]. The chart shows that the "Benefit" to the Air Force of Boeing's offering in this area was expressed in terms of the percentage by which the Threshold was exceeded:

[REDACTED]

Faced with this assessment of the strength of its proposal in terms of the maximum capability compared to the Threshold, it should have been impossible for Boeing to continue to believe that the Air Force was not considering the extent to which the Threshold was exceeded in evaluating the proposals. If, as Boeing asserts in its protest, once it was established that

**REDACTED VERSION:** [REDACTED]

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Northrop Grumman and Boeing had achieved the Objective "there should have been no further discussion about how or to what extent they achieved that level", Pr. at 51, it should have filed that protest no later than promptly after this explicit demonstration that the Air Force was doing otherwise. If there was any doubt about the meaning of the RFP when Boeing filed its original proposal, the November 29, 2007 briefing made certain the Air Force's interpretation of the RFP. It thus either: (1) set the 10-day protest clock running under 4 CFR § 21.2(a)(2), *see PM Services Co.*, B-310762, Feb. 4, 2008, 2008 CPD ¶ 157; *LBM, Inc.*, B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 6-7; or (2) obliged Boeing to protest before submitting its next proposal under 4 CFR § 21.2(a)(1).

- (3) Addition of the Aerial Refueling Efficiency Factor to the final RFP was further indication of the Air Force's interest in refueling capacity

Boeing's contention that until the post-award debriefing it could reasonably have believed that the Air Force would not evaluate relative refueling capacity is further belied by an addition made to the Aerial Refueling evaluation criteria in the Final RFP. Between the December 15, 2006 2nd Draft RFP and the January 30, 2008 Final RFP, the Air Force added "aircraft fueling efficiency" as a new evaluation standard for the Aerial Refueling subfactor in the Key System Requirements factor of Mission Capability. M.2.2.1.2.a. *Compare* 2nd Draft RFP § M.2.2.1.2.a *with* Final RFP § M.2.2.1.2.a [NG Ex. 22].

Section L was also revised to define Aircraft Fuel Efficiency as "(fuel offloaded)/ (fuel burned + fuel offloaded)" and describe the information that offerors were to provide as part of their proposals so that this factor could be evaluated. *Compare* 2nd Draft

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RFP ending with L.4.2.2.3.6 *with* Final RFP containing § L.4.2.2.3.7 [NG Ex. 23]. The information was to be provided for the same 5 nautical mile radius points and calculated using the same ground rules as for "Aerial refueling offload versus mission radius." *Id.*

The most cursory review of this formula shows that it is tied directly to fuel offload capacity. More fuel capacity achieved with even a marginally efficient combination of aircraft and engine will result in a higher aircraft fuel efficiency rating.<sup>3</sup> And that fuel efficiency rating was to be an evaluation factor in judging aerial refueling so that a higher rating would be a competitive advantage. Boeing certainly had to recognize that in the Final RFP the Air Force was adding a new factor in which greater capacity at the same specified mission radii offered the possibility of significant advantage. This fact alone undermines the reasonableness of its claim that it had no reason to believe that the Air Force was interested in greater refueling capability.

Moreover, since its claim that it understood that relative refueling capability was not of interest to the Air Force is part of its overall "bigger is not better" claim (See, Pr. at 42), it is further undermined by the Air Force's manifest interest in the extent of the planes' relative airlift capacity discussed in the next section. The RFP's evaluation of relative airlift capability is yet another indication that Boeing's could not reasonably have clung to its illogical reading of the "Aerial refueling capacity versus mission radius" subfactor as meaning that the Air Force would not reward increased capacity in refueling.

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<sup>3</sup> Not surprisingly the KC-30 had a significantly higher fuel efficiency rating than the KC-767, a fact which the SSA took into account in concluding that Northrop Grumman provided a superior solution to the air refueling requirement. SSDD at 6-7 [REDACTED]

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Boeing knew or should have known that the RFP required the Air Force to value and evaluate additional aerial refueling capacity long before its initial proposal was due on April 14, 2007. To the extent that its protest objects to the SSA's reliance on the KC-30's superior fuel offload capability, it is untimely. The RFP itself, and the Air Force's interim briefings, had informed Boeing that aerial refueling capacity was of value to the Air Force and being evaluated as such. Still Boeing failed to protest until after it had competed and lost. As a result protest grounds IV.A.1.e, Pr. at 45-47, should be dismissed in its entirety.

### **3. It is too late to protest that the Air Force improperly rewarded airlift capability**

Boeing claims that the SSA improperly considered the KC-30's superior airlift capability in making her award decision. The protest ground in section IV.A.1.g presents an elaborate argument that that Air Force "fundamentally skewed the evaluation in favor of carrying more payload, passengers, or AE evacuation – even though none of the evaluation criteria established these metrics as measures of merit." Pr. at 52.

Boeing apparently believes that because the SRD identified airlift as a secondary mission, the KC-30's indisputable superiority in this area could not be a significant discriminator in the award decision. In making that argument Boeing again ignores explicit language in the RFP which spells out that airlift capability, including capacity, was an important to the Air Force and would be an evaluated factor. Boeing's protest in this area is an attack on the RFP which is untimely and should be dismissed.

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- a. Changes to the final RFP emphasized the Air Force's interest in the air tanker's airlift capability

Boeing's attempt to attack the SSA's reliance on airlift capability, including capacity, as a discriminator is directly at odds with the RFP. From the outset "Airlift Capability" was one of the 9 KPPs. *See* SRD 3.2.1.6.1 [REDACTED]. In the Final RFP the Air Force reinforced the message as to the importance that it placed on the airlift capabilities of the airplane. Most importantly, it added "Airlift" as a new, separate subfactor for evaluation of Key System Requirements within Mission Capability. Thus, in earlier drafts offerors had been informed in M.2.2.1.2 that the Government would evaluate offerors' performance in Key System Requirement against the following four subfactors:

- a. Aerial Refueling
- b. Operational Utility
- c. Survivability
- d. Other System Requirements

Dec. 14, 2006 2nd Draft RFP § M.2.2.1.2. [NG Ex. 22 at 1] But in the final RFP those factors were supplemented to read:

- a. Aerial Refueling
- b. **Airlift**
- c. Operational Utility
- d. Survivability
- e. Other System Requirements

Final RFP § M.2.2.1.2 (emphasis added) [NG Ex. 22 at 2]

Further indication of the Air Force's intent to measure Airlift Capability came from the evaluation elements set out in the new Airlift subfactor and the parallel provisions in section L detailing the information which needed to be provided in the proposal for each

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such element. The new Airlift Key System Requirements Subfactor explained that evaluation under that subfactor

will include: airlift efficiency, cargo, passengers, aero-medical evacuation, ground turn time, and cargo bay re-configuration. The offeror's airlift efficiency will be normalized against the KC-135R airlift efficiency calculated with the same ground rules. An offeror's airlift efficiency value greater than 1.0 will be viewed as advantageous to the Government.

Final RFP § M.2.2.1.2.b. [NG Ex. 22 at 2] "Airlift Efficiency" was a new specific evaluation element clearly linked to SRD 3.2.1.6.1.1: "The KC-X shall be capable of efficiently transporting equipment and personnel (Threshold KPP #4)". "Airlift Efficiency" adopted the same ground rules as the new Aerial Refueling efficiency factor, which had also been added in the Final RFP. It required offerors to develop a measure of the (pounds of payload) x (nautical miles) / (pounds of fuel burned). [NG Ex. 21 at 16-17] Again it was clear that greater capacity would be a significant advantage so long as a reasonably efficient engine and aircraft combination were proposed.<sup>4</sup> In fact, in its recent Second Supplemental Protest Boeing specifically recognizes that "[t]he airlift efficiency score is highly dependent on the cargo payload the aircraft can carry . . . ." 2nd Supp. Pr. at 36. That obvious point was as apparent at the time the RFP was issued as it was when Boeing filed its protest. Thus Boeing was on clear notice not only that airlift would be an important factor in the evaluation, but that payload capacity could be a significant advantage in the evaluation of that capability.

The next three evaluation elements of the new Airlift Key System Requirements subfactor had related Section L requirements which also demonstrated the Air

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<sup>4</sup> Again, not surprisingly, the KC-30 did better than the KC-767 in this factor and the SSA took this into account in the SSDD. See SSDD at 7 [REDACTED]

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Force's interest in the capacity which the proposed air tanker was providing. As to cargo, Final RFP § L.4.2.2.4.2 required offerors to "describe the aircraft's ability to meet **or exceed** the cargo requirements stated in the SRD" (emphasis added). [NG Ex. 21 at 17] Sections L.4.2.2.4.3 and L.4.2.2.4.4 directed offerors to provide "maximum number of passengers" and the "maximum number of aeromedical evacuation patients (litter, ambulatory, and mixes of the two) which can be carried and Supported," respectively. *Id.*

Boeing 's protest attempts to minimize these explicit provisions of Sections L and M by arguing that there were not SRD requirements associated with them. *See Pr.* at 51-52. But the SRD required all cargo, all passenger and all Aeromedical Evacuation configurations in Sections 3.2.1.6.1.1.1 through 3.2.1.6.1.1.3. [NG Ex. 20 at 16-17] And the Air Force's interest in the maximum capabilities in each of those areas, so clearly required by Section L, directly linked to the requirement that the aircraft "fully and efficiently utilize" all available space for a "full range of palletized cargo, passengers and/or AE configurations" in SRD § 3.2.1.6.1.1.4. [NG Ex. 20 at 17] Boeing, therefore, is wrong to claim that there are no SRD requirements associated with airlift capacity. In any case, if Boeing truly believed that the SRD was uninterested in airlift capacity, then it should have filed a **pre-proposal** protest challenging the supposed disconnect in the RFP between the SRD and information concerning Airlift required by Section L for evaluation in the new Key System Requirements subfactor for Airlift established by Section M. At page 52 of its March 11, 2008 Protest, Boeing relies on that claimed inconsistency as the basis for a post-award protest. But that challenge to the Solicitation is untimely under 4 CFR § 21.2(a)(1).

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No one examining the RFP with an open mind could have failed to get the message that airlift capacity was a factor of importance to the Air Force. It should have been no surprise to Boeing that the Air Force compared the cargo payloads, the maximum number of passengers and the maximum number of aeromedical evacuation patients which each plane offered in determining which plane provided superior airlift capability. Yet Boeing begins its protest complaining that the Air Force's recognition of the KC-30's capability to carry more passengers, more cargo and more fuel was "contrary to the requirements stated in the RFP." Pr. at 2. Boeing makes the related objection that "by focusing on passenger, cargo and aeromedical benefits ... the Air Force sacrificed real-world operational tanker needs ... in favor of extraneous considerations." Pr. at 9.

Once the RFP is examined, it is clear that these objections are untimely. Either Boeing simply ignored the RFP's clear message that capacity was an evaluation factor or it seeks to substitute its judgment for the Air Force's as to what is the Air Force's requirements should be. In either case, the protest is untimely as the Air Force's own determinations both that airlift capacity was a valued mission capability for the KC-X and that the ability to provide more capacity would be evaluated favorably were apparent in the RFP itself.

- b. Boeing's attempts to convert its untimely attack on the RFP's weighting of airlift requirements into evaluation issues are unavailing

Beyond its general complaint of an unfair consideration of airlift capacity, Boeing also raises two specific protest grounds related to Airlift. In each it attempts to identify a misevaluation issue. But in each case the premise of the specific complaint is

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incorrect and, therefore, does not affect the conclusion that the challenge to the SSDD's consideration of airlift capacity as a whole is untimely.

First, Boeing argues that the Air Force gave improper additional consideration for exceeding the Objective for Aeromedical Evacuation evaluation. Pr. at 52. That argument misreads both the RFP and the Air Force's evaluation. Boeing claims that the Air Force gave Northrop Grumman additional consideration for exceeding the objective of KSA # 2 at SRD 3.2.1.6.7.2 when it recognized as a benefit the ability of the KC-30 to handle nearly [REDACTED] times the number of aeromedical evacuation liters or ambulatory patients. But the SRD section to which Boeing refers deals with a different and more limited subsection of aeromedical evacuation capability: the ability to provide care in the air using existing patient support pallets (PSPs) for 14 hours (Threshold) and 16 hours (Objective) respectively. As Boeing asserts, the evaluation recognized that neither offeror provided a significant advantage in this specific area [REDACTED] as both met the objective. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The discriminator which the SSAC recognized related to a broader measure of Aeromedical Evacuation capability. [REDACTED]

[REDACTED] the KC-30's clear superiority in Aeromedical capacity in general as relevant to KPP #4 "efficiently transporting equipment and personnel" (SRD 3.2.1.6.1.1) and the specific SRD subfactor within that KPP for AE configuration at

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3.2.1.6.1.1.3 [REDACTED]. Nothing in the evaluation structure precluded the SSAC from recognizing the KC-30's far greater capacity for Aeromedical Evacuation in general, outside of the specific and limited scenario associated with KSA #2 requiring care in the air for patients using PSPs. For all of the reasons set out above, it should have come as no surprise to Boeing in aeromedical evacuation, as in other areas of Airlift, that the Air Force would evaluate the relative maximum capability of the two airplanes which it specifically required offerors to provide it.

Second, Boeing is wrong that airlift efficiency "has nothing to do with how much cargo an aircraft can carry or how far it can carry it." Pr. at 53. The size of the payload and the distance that it can be carried are two of the three elements of this rating. Clearly the capacity and range of a larger plane could have an effect and not surprisingly the KC-30 had an airlift efficiency factor more than [REDACTED] the KC-767's. That Boeing erroneously believed that the aircraft efficiency metrics would be "very similar", Pr. at 53, did not mean that it was excused from protesting before submitting a proposal if it believed that capacity should not be an evaluation factor as it so clearly was here.

For these reasons, all of Section IV.A.1.g, Airlift Capacity, Pr. at 51-54, should be stricken as untimely.

**4. Sections of Boeing's protest that do nothing more than complain about the Air Force's determination of its requirements for aerial refueling and airlift capacity are both untimely and outside the GAO's jurisdiction**

Sections IV.A.1.a. and .c are in their entirety expressions of Boeing's view as to what the Air Force's requirements should have been. Section IV.A.1.a, (Pr. At 42-43) entitled "Maximum fuel Offload and Airlift Capability Are Not Absolute Measures of Merit"

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lectures the Air Force as to why Boeing believes it should not be interested in either fuel or airlift capacity. The related section IV.A.1.c "Airlift Capability Limits Operational Capacity," (Pr. At 44) is a Boeing dissertations on its position that more airlift capability is not only of no use but actually a disadvantage.

This protest is not an opportunity for Boeing to substitute its views as to the Air Force's needs for those of the Air Force itself. These sections of its protest contain no protest grounds themselves and are subject to dismissal on that ground alone. In any case, however, to the extent that they have any place in the protest, it is as part of Boeing's complaint that the SSA improperly considered the KC-30's greater aerial refueling and airlift capacity as a benefit of the Northrop Grumman proposal. Since as demonstrated above, Boeing's challenge in those areas is untimely, these Boeing policy lectures are untimely as well as irrelevant.

### **B. It Is Too Late to Attack the RFP'S IFARA Evaluation Structure or the Model and Groundrules on Which It Was Based**

In both the public relations sections and the substantive sections of its protest Boeing attacks the Air Force's evaluation of the proposal under the IFARA criteria. (As to the former, *see* Pr. at 2 & 10-12; as to the latter, *see* Pr. at 29-33 & 112-15.) It adds further criticism of the IFARA evaluation in its First Supplemental Protest. 1st Supp. Pr. at 22-24. Those criticisms can be broken into three broad categories: 1) criticism of the use of the CMARPS computer modeling and simulation tool specified by the RFP; 2) criticism of changes made to the scenarios under against which the CMARPS model was run and 3) the claim that the Air Force should have abandoned use of the Fleet Effectiveness Value derived from the CMARPS modeling for the respective airplanes in favor of unspecified sensitivity

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and trend analyses. All of these grounds present untimely challenges to an RFP evaluation factor. Boeing's protest insofar as it relates to IFARA should be dismissed in its entirety.

**1. It is too late to complain that the CMARPS model produces unreliable, inconsistent or unfair results**

- a. RFP Section M spelled out the central role of CMARPS in the IFARA evaluation

Section M of the RFP established Integrated Fleet Aerial Refueling Assessment" (IFARA) as one of the five factors which would be used by the Air Force to evaluate proposals. RFP § M.2.1 [REDACTED]. The five paragraph description of this factor in section M.2.6 [NG Ex. 17 at 14-15] clearly disclosed the central role of the Combined Mating and Ranging Planning System (CMARPS) computer modeling and simulation tool in the IFARA evaluation. It advised offerors:

- that the Air Force would make its IFARA analysis "primarily using" CMARPS
- that "[t]he results of the CMARPS evaluation will provide the Government with the quantity (based on offeror-proposed KC-X aircraft) to meet the mission requirements of the evaluation. Scenario."
- that the required number of KC-135R aircraft generated by the CMARPS would be divided by the number of the proposed KC-X aircraft which CMARPS determined were required to meet the same scenario in order to come up with the "fleet effectiveness value" ("FEV") of the proposed aircraft
- that the Government would report the FEV as a stand alone value to the SSA
- that in assessing the Measure of Merit for this factor a FEV greater than 1.0 "will be viewed as more advantageous to the Government."

In short, Section M of the RFP explicitly spelled out the central role that the CMARPS model would play in the evaluation of the IFARA Factor.

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- b. If Boeing objected to the fact and manner of CMARPS's use in the IFARA evaluation, it had to bring a pre-award protest.

Now, having participated in the competition and lost, Boeing attacks CMARPS on a variety of grounds. First, it complains that CMARPS is a "vintage" and "extremely complex program that even the most experienced operators have difficulty using." Pr. at 29. In its First Supplemental Protest it also complains that CMARPS requires making manual adjustments (so-called "hand jamming") which are subjective in nature, and that because the analysis was complex and subjective determinations had to be made, "there is simply no way to duplicate any particular score." 1st Supp. Pr. at 24.

Boeing was well aware of the strengths and limitations of CMARPS long before the post-award debriefing on March 10, 2008. The Air Force made CMARPS and its operating instructions available to offerors. RFP § L.7.5 [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED].<sup>5</sup> And its First Supplemental Protest concedes that it was aware of the variation in the results being obtained by the Air Force and Boeing as a result of the Air Force's evaluation briefings to it during the last half of 2007. 1st Supp. Pr. at 24. As a result, these complaints about the CMARPS model, and the Air Force's decision to employ it, are attacks on the RFP that are untimely under Bid Protest Rule 4 CFR § 21.2(a)(1).

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<sup>5</sup> Significantly, given its current attack on CMARPS, [REDACTED]  
[REDACTED]

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Boeing also complains repeatedly that CMARPS is a Northrop Grumman developed and maintained model and suggests that as a result the Air Force's reliance on CMARPS creates an organizational conflict of interest. *See, e.g.*, Pr. at 2, 10 & 29. In fact, CMARPS was developed by Logicon, which was subsequently purchased by Northrop Grumman, and is maintained by a group in a different sector of Northrop Grumman, entirely unrelated to the Air Tanker proposal. But in any case any protest on this ground is untimely. The first paragraph of Boeing's of March 7, 2007, letter to the Contracting Officer, which is included in its First Supplemental Protest as Boeing Exhibit 13, complains that the CMARPS model "used to perform the [IFARA] Assessment was created by, and continues to be maintained by Northrop Grumman." [NG Ex. 26 at 1] Having chosen not to protest on this grounds before submitting its initial proposal, it may not do so now.

Finally, in its First Supplemental Protest Boeing makes two further untimely complaints about the nature of the IFARA evaluation. First, Boeing contends that the SSA was wrong to rely on "the IFARA score," i.e. the Fleet Effectiveness Value determined applying CMARPS, to determine that [REDACTED] fewer KC-30s than KC-767s would be required to accomplish the IFARA specified missions. 1st Supp. Pr. at 24. But Section M was explicit that "[t]he results of the CMARPS evaluation will provide the Government with the quantity (based on the offeror-proposed KC-X aircraft) required to meet the mission requirements o the evaluation scenario." RFP § M.2.6 [REDACTED]. If Boeing objected to the RFP's stipulation that CMARPS would be used to determine the number of each of the offeror's aircraft which would be required to meet the mission requirements, it needed to bring a pre-proposal protest, which it did not do.

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Second, Boeing contends that the IFARA evaluation was defective because the Air Force did not conduct "any sort of 'cross walk' between the result of its IFARA analysis and the results of its evaluation of other Factors such as Mission Capability ..., Proposal Risk or Cost/Price." 1st Supp. Pr. at 23. Boeing does not and cannot point to anything in Section M, either as to IFARA or any other Factor, which suggests that such a cross walk should or will be done. If Boeing believed that such a cross walk was necessary to a proper Integrated Fleet Effectiveness Evaluation, then it was obligated to raise that objection to the solicitation as a protest before submitting its proposal. A protest claiming that a solicitation failed to include certain evaluation criteria falls into the category of "alleged improprieties in a solicitation which are apparent prior to bid opening" and must be filed before the time when proposals are due. *Free&Ben Inc.*, B-299156, Feb. 20, 2007, 2007 CPD ¶ 39 at 3-4.

### **2. It is too late to attack the adjustments that the Air Force made to the IFARA scenarios and groundrules**

As early as page 2 of its Protest Boeing complains about changes which the Air Force made to the operational scenarios used as part the IFARA evaluation. Boeing claims those changes resulted in a set of "fictional assumptions" favoring the "oversized KC-30." That allegation, linked to a claim that the changes were the result of political pressure to keep Northrop Grumman in the competition, is repeated again and again. *See e.g.*, Pr. at 10-12 & 31-32.

When Boeing finally gets to stating specific protest grounds, the same allegations make yet another appearance both in the initial and in the First Supplemental protests. *See* Pr. at 112-13; 1st Supp. Pr. at 22. In the end Boeing argues that these changes resulted in "a fictional score generated by its model [CMARPS]", a score which it describes

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as "the byproduct of inputs to the model specifically manipulated to favor a larger aircraft." Pr. at 115. This entire line of attack objects to the explicit terms of the RFP, and is thus untimely and must be dismissed.

Boeing's Protest lists the changes to the mission scenarios in the 2005 Mission Capability Study ("MCS") that meant that, according to Boeing, "the Air Force [had] relaxed key mission scenarios so that they no longer reflected the study's real-world constraints." Pr. at 10-11. Each of the five bullets in that list is a streamlined version of the comparable bullet in a list in Boeing's letter to the Air Force on March 7, 2007, more than a year before, complaining about those very same scenario changes. Pr. Ex. 13 at 2 [NG Ex. 26]. The bullets in the letter listed the five recent changes which "appear to ignore or discount, with no rationale given, many of the operational constraints identified in the 2005 MCS." *Id.* According to Boeing's March 2007 letter, these changes meant that the CMARPS model does not conform with the real-world requirements of the MCS. Boeing's letter went on to claim that these same five changes were inconsistent with the SRD and Section L of the RFP.

The scenario changes that Boeing complains of now are the very same ones objected to in its March 2007 letter. Not only is the bullet listing at pages 10 to 11 of the Protest the same as in the letter, but the source of the revised modeling instructions referenced at page 31 of the Protest is given as "KC-X Effectiveness Analysis Plan (**Jan. 30, 2007**)." (emphasis added.)<sup>6</sup> The simple fact is that nowhere in its Protest does Boeing identify changes to the mission scenarios other than the same ones set out in its letter of complaint a year earlier. In other words the very same changes to the mission scenarios

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<sup>6</sup> This Plan was included in the RFP at Section L, Attachment 18.

