

BROKEN SYSTEM, TROUBLED PROGRAM: DEFENSE ACQUISITIONS AND THE KC-X AERIAL REFUELING TANKER

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- I. Introduction..... 582
- II. Overview of the State of the DoD Acquisition System..... 583
 - A. Underperformance of the DoD Acquisition System..... 583
 - B. Obstacles to Reforming the DoD Acquisition System..... 584
 - 1. Institutional and Cultural Inertia..... 585
 - 2. The Acquisition Workforce 585
- III. The KC-X Program..... 586
 - A. Background and Importance of the KC-X..... 586
 - B. Breakdown of GAO’s Bid Protest Decision..... 589
 - 1. Procedural Errors..... 589
 - 2. Feature Evaluation Errors..... 589
 - 3. Cost Analysis Errors..... 590
- IV. Resolving the Problems in the DoD Acquisition System..... 590
 - A. Crafting Reform Proposals for the DoD Acquisition System..... 591
 - 1. Failure to Properly Plan for the Acquisition 591
 - 2. Failure to Comply with Basic Rules of Federal Acquisition 592
 - B. Proposed Solutions..... 593
 - 1. Improving the Quality of RFPs by Enhancing Planning Processes 593
 - 2. Incentivizing Adherence to the FAR by Enhancing Bid Protest Remedies 594
- V. Conclusion..... 597

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I. INTRODUCTION

In 1957, the Strategic Air Command oversaw “Operation Power Flite.”¹ In this remarkable mission, three cutting-edge B-52 bombers flew nonstop around the world.² Completing the mission required seventy-eight KC-97 aircraft, the primary aerial refueling tanker at the time.³ Based on experiences like Operation Power Flite, it was clear that the Air Force needed a new and improved tanker.⁴ A prototype by The Boeing Company satisfied this need.⁵ A half-century later, 415 reengineered Boeing KC-135R Stratotankers make up the majority of the Air Force’s fleet of large tanker aircraft.⁶ It may come as a surprise that the Air Force is still maintaining a fleet of aircraft designed long before most Air Force pilots were born, particularly at a time when the U.S. military is being called upon to confront global challenges.

The story of the aerial tanker fleet calls attention to the importance of supplying the armed forces with needed materiel in a cost-effective and timely manner. Unfortunately, there are significant indicators that the Department of Defense (DoD) acquisition system is not meeting these expectations.⁷ At the systemic level, it is clear that the DoD acquisition system struggles with inefficiencies and obstacles to reform.⁸ At the program level, the weakness in the DoD acquisition system is exemplified by cases like the troubled acquisition program for the proposed KC-X aerial refueling tanker. In the case of the KC-X, the execution of the program failed to satisfy the basic requirements of federal acquisition practice, which in turn complicated the process of addressing a serious strategic need for the U.S. military.⁹

1. RICHARD K. SMITH, SEVENTY-FIVE YEARS OF INFLIGHT REFUELING: HIGHLIGHTS, 1923–1998, at 44 (1998).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. RONALD O’ROURKE, CONG. RESEARCH SERV., RL 34398, AIR FORCE KC-X TANKER AIRCRAFT PROGRAM: BACKGROUND AND ISSUES FOR CONGRESS 2 (2009).

7. The term “defense acquisition system” refers to Department of Defense (DoD) procedures and practices related to design, engineering, procurement, production, operations, and support of defense systems. *See* DEF. ACQUISITION UNIV., INTRODUCTION TO DEFENSE ACQUISITION MANAGEMENT 1 (9th ed. 2009), available at <http://www.dau.mil/pubscats/Pages/idam.aspx>.

8. Numerous reports and articles attest to the systemic and structural weaknesses in the defense acquisition system. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-663T, DEFENSE ACQUISITION: CHARTING A COURSE FOR LASTING REFORM (2009) [hereinafter CHARTING A COURSE]; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-342, DEPARTMENT OF DEFENSE: ADDITIONAL ACTIONS AND DATA ARE NEEDED TO EFFECTIVELY MANAGE AND OVERSEE DOD’S ACQUISITION WORKFORCE (2009) [hereinafter ADDITIONAL ACTIONS AND DATA ARE NEEDED]; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-271, HIGH RISK SERIES: AN UPDATE (2009) [hereinafter HIGH RISK SERIES]; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-1159T, DEFENSE ACQUISITION: FUNDAMENTAL CHANGES ARE NEEDED TO IMPROVE WEAPON PROGRAM OUTCOMES (2008) [hereinafter FUNDAMENTAL CHANGES ARE NEEDED]; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-800T, DOD ACQUISITIONS: CONTRACTING FOR BETTER OUTCOMES (2006) [hereinafter CONTRACTING FOR BETTER OUTCOMES].

9. The United States’ fleet of aerial tanker aircraft is in serious need of replacement. *See* discussion *infra* Part III.A. However, the acquisition program for this new tanker has suffered from

This Note provides insight for crafting reform efforts to address these concerns. The Note proceeds in three parts. First, it provides a brief overview of the state of the DoD acquisition system as a whole. Next, it presents the KC-X program as an example of the poor results that might be expected given the problems in the DoD acquisition system. The Note concludes by making two recommendations to reform the DoD acquisition system. In light of the lessons learned from the crisis in the system and the KC-X program in particular, this Note recommends (1) improving acquisition planning in the DoD system to ensure that agencies adequately define the specifications for complex programs prior to the initiation of competition and (2) imbuing bid protest forums with additional remedial powers that can be exercised in cases when an acquisition program has encountered serious problems.

II. OVERVIEW OF THE STATE OF THE DOD ACQUISITION SYSTEM

It is not difficult to find evidence of the problems facing the DoD acquisition system. A review of resources on the subject reveals two overarching issues: (1) the DoD acquisition system is inefficient and underperforming and (2) the institutional culture of the DoD acquisition system as well as the weakness of its workforce undermine reform efforts.

A. *Underperformance of the DoD Acquisition System*

The contours of the ongoing problems with the DoD acquisition system are well-documented.¹⁰ Given DoD's status as one of the largest and most complex organizations in the world, it is unsurprising that the DoD acquisition system suffers from chronic inefficiencies.¹¹ In 2008, DoD's portfolio costs were forty-two percent above original estimates, with an average delay time of twenty-two months.¹² Observers determined that these problems stem from issues at both the strategic and program levels.¹³ For example, the Government Accountability Office (GAO) reported that "[a]t the individual program level, a military service typically establishes and DOD approves . . . business case[s] containing requirements that are not fully understood and cost and schedule estimates that are based on optimistic assumptions rather than on sufficient knowledge."¹⁴ A related criticism leveled at the DoD acquisition system is that it lacks incentives for contractors to stay within costs and deliver on time.¹⁵

a number of significant errors, resulting in a successful bid protest. See discussion *infra* Parts III.A–B.

10. See *supra* note 8.

11. See CONTRACTING FOR BETTER OUTCOMES, *supra* note 8, at 2–3.

12. See CHARTING A COURSE, *supra* note 8, at 2–3.

13. See FUNDAMENTAL CHANGES ARE NEEDED, *supra* note 8, at 2.

14. CHARTING A COURSE, *supra* note 8, at 5.

15. See FUNDAMENTAL CHANGES ARE NEEDED, *supra* note 8, at 2.

Because of such problems, GAO has designated DoD Weapons Acquisition as a “High Risk Area” since 1990.¹⁶

These chronic issues with the DoD acquisition system are a source of concern and have been the impetus for a variety of reform efforts. At the agency level, DoD has taken a number of internal steps to reform its acquisition system.¹⁷ This is especially true in the area of properly defining the requirements for an acquisition.¹⁸ Congress also has stepped in to attempt to craft legislative solutions to the problems in the system.¹⁹ Congressional efforts have led to legislation that include a variety of reform measures such as appointing additional administrators to oversee costs, modifying existing positions to take on new oversight roles, and commissioning additional studies of emerging acquisition issues.²⁰

B. *Obstacles to Reforming the DoD Acquisition System*

The general underperformance of the DoD acquisition system is worrisome. Perhaps more troubling, however, is the apparent difficulty of meaningfully addressing this concern. While there have been some legislative efforts to address the problems with the DoD acquisition system, such efforts have typically addressed only specific issues and have not presented comprehensive proposals for reform.²¹ Indeed, there are two considerations that threaten any significant effort to reform the DoD acquisition system. First, there are cultural and institutional barriers to reform within the DoD that make implementing reform difficult. Second, there are serious doubts about the ability of the existing DoD acquisition workforce to meet the demands of any reform effort.

16. HIGH RISK SERIES, *supra* note 8, at 5.

17. *See, e.g.*, CONTRACTING FOR BETTER OUTCOMES, *supra* note 8, at 2. In September 2010, Undersecretary of Defense Ashton Carter issued a guidance memorandum to improve the efficiency and productivity of the DoD acquisition system. *See generally* Memorandum from Ashton B. Carter, Under-Sec’y of Def. for Acquisition, Tech., and Logistics, U.S. Dep’t of Def., to Acquisition Professionals, Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending 1 (Sept. 14, 2010), *available at* http://www.acq.osd.mil/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF.

18. *See* CHARTING A COURSE, *supra* note 8, at 9. For example, the Joint Requirements and Oversight Council has attempted to incorporate the input of combatant commands into the crafting of requirements for defense acquisition programs. *See id.* In addition, DoD is establishing review boards “to identify and mitigate technical risks and evaluate the impact of any potential requirements changes on ongoing programs.” *Id.* at 11.

19. *See* MOSHE SCHWARTZ, CONG. RESEARCH SERV., RL 34026, DEFENSE ACQUISITION: HOW DOD ACQUIRES WEAPON SYSTEMS AND RECENT EFFORTS TO REFORM THE PROCESS 17 (2009). Congressional efforts include a number of pieces of legislation such as the Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, 123 Stat. 1704; the Duncan Hunter National Defense Authorization Act for 2009, Pub. L. No. 110-417, 122 Stat. 4356; and the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). *See also* SCHWARTZ, *supra*, at 18–21.

20. *See id.*

21. *See id.* at 17.

1. Institutional and Cultural Inertia

The prior efforts at reforming the DoD acquisition system by both the agency and Congress are surely laudable. Unfortunately these efforts are at best incomplete solutions given the number of institutional and cultural factors within the DoD acquisition system that hinder reform.²² DoD's acquisition system is fragmented and led by different organizations, which makes accountability for acquisition program failures difficult.²³ As one GAO analyst has noted, the problem is not that there are individual "broken" processes within the DoD acquisition system.²⁴ Rather, the problem is that the system's inefficiencies are "implicitly accepted as the cost of doing business."²⁵ The report also questioned why "extraordinary actions are needed to force practices that should occur normally."²⁶ These findings suggest that even if a meaningful reform initiative is to be crafted, there is reason to doubt whether such an effort would be successful.

2. The Acquisition Workforce

Institutional resistance is not the only reason to be skeptical of efforts to reform the DoD acquisition system. A second reason is the notable weakness of the DoD acquisition workforce.²⁷ Within the federal acquisition community as a whole there is significant concern about the "number, skill sets, deployment, and role" of the acquisition workforce.²⁸ Generally speaking, the responsibilities placed on federal acquisition workers have increased in recent years while the size and capability of the workforce have either remained stable or decreased.²⁹ Predictably, DoD suffers from these problems as well

22. See FUNDAMENTAL CHANGES ARE NEEDED, *supra* note 8, at 14. One colorful description states that the DoD acquisition environment is a "conspiracy of hope." *Id.* There also have been substantive concerns about the adequacy of these reform efforts, as the efforts have typically addressed only specific issues and have not presented comprehensive proposals for reform. See SCHWARTZ, *supra* note 19, at 17.

23. See CHARTING A COURSE, *supra* note 8, at 5.

24. *Id.* at 12.

25. *Id.*

26. *Id.*

27. Shortly before publication of this Note, memoranda from the Federal Chief Performance Officer at the Office of Management and Budget and the Undersecretary of Defense for Acquisition, Technology, and Logistics expressed concerns about the adequacy of the acquisition workforce. See Memorandum from Jeffrey D. Zients, Fed. Chief Performance Officer & Deputy Dir. of Mgmt., Office of Mgmt. & Budget, to Senior Exec. Serv., The Accountable Government Initiative—an Update on Our Performance Management Agenda 7 (Sept. 14, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/AccountableGovernmentInitiative_09142010.pdf; Memo from Ashton Carter, *supra* note 17, at 2.

28. ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 335 (2007), available at https://www.acquisition.gov/comp/aap/24102_GSA.pdf. The Panel Report contains extensive discussion about general issues in the acquisition workforce and information about the DoD acquisition system. See generally *id.*

29. See *id.* at 334–35. At least some of the additional pressure placed on the acquisition workforce is due to the increased use of best value procedures. See *id.* While some government contracts fall within the ambit of simplified procedures, others are governed by best value procedures.

and at least one official has characterized the DoD acquisition workforce as “in crisis.”³⁰ Between 2003 and 2008, the number of major defense acquisition portfolios in DoD rose from seventy-seven to ninety-six.³¹ Yet between 2001 and 2007, the size of the total acquisition workforce dropped by 2.5%, with some parts of the workforce reporting reductions above twenty percent.³² Such concerns about the adequacy of the DoD acquisition workforce pose yet another reason to doubt the viability of reform efforts.³³

III. THE KC-X PROGRAM

Examining the problems within the DoD acquisition system provides a useful foundation for developing ideas for reforms. This section introduces the systemic problems within the DoD acquisition system regarding efficiency, resistance to reform efforts, and the significant concerns about the acquisition workforce. A case study of the KC-X acquisition program, however, will illustrate how these problems with the DoD acquisition system impact the success of particular acquisition programs.

A. Background and Importance of the KC-X

The KC-X aerial refueling tanker is an example of the high-profile program that the DoD acquisition system must be able to execute if it is to be considered successful.³⁴ The KC-X program arose in response to the pressing need for a new aerial refueling tanker platform that will serve the U.S. military into the twenty-first century. Currently the majority of the Air Force’s tanker fleet consists of 415 KC-135R Stratotankers with an average age of forty-five to forty-eight years.³⁵ Assuming a rate of replacement at fifteen per

See id. Best value procedures require the acquisition personnel to evaluate a very complex set of criteria and evaluation factors. *See id.* However, even simplified transactions have had a “more complex impact on the acquisition workforce than was initially appreciated . . .” *Id.*

30. *See id.* at 363.

31. *See* CHARTING A COURSE, *supra* note 8, at 2.

32. *See* ADDITIONAL ACTIONS AND DATA ARE NEEDED, *supra* note 8, at 4. It is important to note that these data may not adequately describe the DoD’s acquisition workforce, as the Department does not have “information on the use and skill sets of contractor personnel performing acquisition-related functions.” *Id.* at 6. This is a critical issue because the percentage of contractor personnel in acquisition-related functions is considerable, reported as thirty-seven percent in 2008. *Id.* at 8. Without more precise data, it is possible that the acquisition workforce crisis is even more serious than described here.

33. *See* Steven L. Schooner, *Management Matters: Keeping Up with Procurement*, Gov’t EXECUTIVE, July 5, 2006, available at <http://www.govexec.com/dailyfed/0706/070506mm.htm?oref=search> (quoting David Drabkin). According to the Acquisition Advisory Panel, “The federal acquisition workforce is an essential key to success in achieving the government’s missions. . . . Without a workforce that is qualitatively and quantitatively adequate and adapted to its mission, the procurement reforms of the last decade cannot achieve their potential, and successful federal procurement cannot be achieved.” ACQUISITION ADVISORY PANEL, *supra* note 28, at 330.

34. *See* DEF. ACQUISITION UNIV., *supra* note 7, at 5 (“A successful defense acquisition program places a capable and supportable system in the hands of users (the warfighter or those who support the warfighter), when and where it is needed, at an affordable price.”).

35. O’ROURKE, *supra* note 6, at 2.

year, the last KC-135R would be more than eighty years old at retirement.³⁶ Replacing the KC-135R is an explicitly high priority for the DoD, as the U.S. transportation command chief characterized the continuing reliance on the KC-135R as a “significant risk” and stated “[m]y number one recapitalization priority is replacing the fleet of 415 Eisenhower-era KC-135s.”³⁷

Faced with the pressing need to replace the aging aircraft, the Air Force began a competitive negotiation by releasing a request for proposals (RFP) for 179 KC-X tankers in early 2007.³⁸ These aircraft were selected as the first in a three-stage process to replace the KC-135R.³⁹ In response to the RFP, Boeing presented the KC-767, a variant of its 767-200 commercial airliner.⁴⁰ Boeing touted the aircraft as an efficient, “right-sized” tanker and “American made” product.⁴¹ A combined team from Northrop Grumman and the European Aeronautic Defence and Space Company (EADS) responded with the KC-30, a version of the Airbus 330-200 commercial airliner.⁴² Northrop Grumman/EADS’s proposed aircraft both was larger than Boeing’s and countered Boeing’s “American made” approach with a plan to assemble the KC-30 in Alabama.⁴³ Following completion of the competitive negotiation over the course of 2007 and 2008, the Air Force awarded the KC-X contract to the Northrop Grumman/EADS consortium for its KC-30 design in February 2009.⁴⁴ The following month, Boeing filed a protest of this award with GAO.⁴⁵

36. *See id.* at 3.

37. *See id.* at 8.

38. *See id.* In federal procurement law, issuing a request for proposals (RFP) is the first step in a competitive negotiation, an acquisition process that enables the federal agency to select a contract awardee based on the agency’s judgment as to which offer provides the best value to the agency. *See* 10 U.S.C. § 2305(b)(4)(C) (2006). The federal agency can design the procurement to give relative weight to a number of different factors, and price is not the sole determinative factor in a competitive negotiation. *See id.* It should be noted that prior to the issuance of the KC-X RFP, DoD had considered a plan to lease aerial refueling tankers. However, this plan broke down after the DoD inspector general began investigating improprieties in the leasing program. Ultimately, Darleen Druyun, a former lead Air Force negotiator, pleaded guilty to criminal conspiracy, and the inspector general also identified misconduct by other DoD officials. *See* CHRISTOPHER BOLKOM, CONG. RESEARCH SERV., RS 20941, AIR FORCE AIR REFUELING 3 (2007).

39. *See* O’ROURKE, *supra* note 6, at 4.

40. *See id.* at 8.

41. WILLIAM KNIGHT & CHRISTOPHER BOLKOM, CONG. RESEARCH SERV., RL 34398, AIR FORCE AIR REFUELING: THE KC-X AIRCRAFT ACQUISITION PROGRAM 20 (2008).

42. *See id.*

43. *See id.*

44. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-326SP, DEFENSE ACQUISITION: ASSESSMENTS OF SELECT WEAPON PROGRAMS 156 (2009) [hereinafter ASSESSMENTS OF SELECT WEAPON PROGRAMS]. Indeed, there are a number of notable characteristics of the KC-X procurement. First, it is a lucrative contract, with an estimated value of \$195 million to \$290 million per aircraft and a cumulative value of approximately \$3.5 billion per year. *See* O’ROURKE, *supra* note 6, at 4. Further, the procurement was the subject of a bureaucratic turf war, with DoD removing the Air Force as the source selection authority for the acquisition, then subsequently returning the authority to the Air Force. *See* ASSESSMENTS OF SELECT WEAPON PROGRAMS, *supra*, at 156.

45. *See* ASSESSMENTS OF SELECT WEAPON PROGRAMS, *supra* note 44, at 156. GAO’s bid protest jurisdiction allows the comptroller general, upon the proper filing of a bid protest by a disappointed offeror, to review contract awards made by federal agencies to determine whether the

In June 2009, GAO sustained Boeing's protest.⁴⁶ Finding that the Air Force made a number of prejudicial errors in making its award decision, GAO recommended that the Air Force reopen discussions with the offerors, obtain revised proposals, and make a new source selection decision.⁴⁷

This protest had immediate and significant consequences for the KC-X program. In response to the successful protest, the Air Force, in conjunction with DoD, made a series of revisions to the RFP.⁴⁸ The original solicitation included 808 requirements, thirty-seven of which were mandatory.⁴⁹ The revised RFP significantly increased the number of mandatory requirements to 373.⁵⁰ It also included ninety-three "nonmandatory" factors that the Air Force would consider if the costs of the proposals were within one percent of each other.⁵¹

Estimates shortly after GAO's ruling suggested that the new competition could take as long as four years.⁵² However, the potential for delay was not the only byproduct of the decision. Northrop Grumman was displeased by the new specifications, which it felt favored Boeing's smaller design; Northrop Grumman questioned the profitability of its design following the revisions.⁵³ Based on these concerns, Northrop Grumman withdrew from the competition completely in March 2010.⁵⁴ EADS, however, chose to reenter the competition as a prime contractor without the support of Northrop Grumman.⁵⁵

proposed award complies with acquisition statutes and regulations. See 31 U.S.C. § 3554 (2006). If GAO determines that the award violated any statute or regulation related to acquisition, then GAO can make a variety of recommendations to the purchasing agency such as issuing a new solicitation and recompeting the contract. See *id.*

46. See ASSESSMENTS OF SELECT WEAPON PROGRAMS, *supra* note 44, at 156.

47. See *id.*

48. Aubrey Cohen, *Tanker Request Has More Than 230 Changes, Keeps Basic Form*, SEATTLE POST-INTELLIGENCER AEROSPACE NEWS BLOG (Feb. 24, 2010, 9:34 AM), <http://blog.seattlepi.com/aerospace/archives/195641.asp>.

49. See News Briefing with William Lynn, Deputy Sec'y, U.S. Dep't of Def., et al., Acquisition Strategy for a Replacement Aerial Refueling Tanker (Sept. 24, 2009) (transcript), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4484>.

50. See *id.*

51. *Id.*

52. See ASSESSMENTS OF SELECT WEAPON PROGRAMS, *supra* note 44, at 156.

53. See Christopher Drew, *Northrop Won't Bid on Tanker*, N.Y. TIMES, Mar. 9, 2010, at B1, available at <http://www.nytimes.com/2010/03/09/business/09tanker.html>.

54. See *id.*

55. See Amy Butler, *EADS, Boeing Squaring Off Again over Tankers*, AVIATION WK. (Apr. 27, 2010), http://www.aviationweek.com/aw/generic/story.jsp?id=news/awst/2010/04/26/AW_04_26_2010_p27-221527.xml&channel=defense. As of fall 2010 and prior to the publication of this Note, new developments continued to affect the KC-X program. A third putative bid for the competition was presented by U.S. Aerospace, but the bid was rejected because it was submitted after the submission deadline. GAO ruled against U.S. Aerospace in the subsequent protest. See U.S. Aerospace, Inc., B-403464 et al., 2010 CPD ¶ 225, at 1 (Comp. Gen. Oct. 6, 2010). In addition to the U.S. Aerospace bid, the World Trade Organization (WTO) issued confidential findings in September 2010 that Boeing received illegal subsidies from the U.S. Government. See Dana Hedgpeth, *WTO Rules Against Subsidies to Boeing*, WASH. POST, Sept. 16, 2010, at A22, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/15/AR2010091507523.html>. It is unclear what effect this WTO ruling may have on the KC-X competition.

B. Breakdown of GAO's Bid Protest Decision

The dramatic effect that GAO's decision had on the outcome of the KC-X program suggests that the decision merits close review. However, this is not the only reason to carefully examine the protest. Indeed, understanding the errors committed by the Air Force serves the additional purpose of guiding future efforts to reform the DoD acquisition system. GAO identified eight bases for sustaining Boeing's protest.⁵⁶ The errors that GAO identified can be grouped into three general categories: (1) procedural errors committed during the competitive negotiation, (2) substantive errors related to the evaluation of the features of the two proposals, and (3) errors related to cost analysis conducted during the course of the negotiation.

1. Procedural Errors

GAO identified a single but highly significant procedural error that the Air Force committed during the course of the KC-X competitive negotiation.⁵⁷ This error related to the Air Force's evaluation of the "operational utility" of the aircraft.⁵⁸ Boeing asserted that the Air Force conducted misleading discussions with the company as to the capability of its aircraft.⁵⁹ At one point in the negotiation, the Air Force informed Boeing that its proposal to satisfy the operational utility factor met the requirements outlined in the RFP.⁶⁰ However, the Air Force later changed its evaluation of Boeing's design to having "partially met" the operational utility requirements without informing Boeing of this change, depriving the company of an opportunity to correct the deficiency.⁶¹ Further, GAO noted that the Air Force responded to a similar deficiency in Northrop Grumman/EADS's design but allowed that company to address the Air Force's concerns.⁶²

2. Feature Evaluation Errors

Another basis for GAO's decision was a series of errors that the Air Force committed while evaluating the features of the two proposed aircraft. One error involved the failure of the Air Force to provide adequate documentation in support of its conclusions.⁶³ GAO found that the Air Force erred in its evaluation of the proposed aircrafts' ability to successfully perform "overrun"

56. See *The Boeing Co., B-311344 et al.*, 2008 CPD ¶ 114, at 1–2 (Comp. Gen. June 18, 2008).

57. See *id.* at 2.

58. *Id.* at 47. This factor includes characteristics of the aircraft, such as maneuverability, range, and communications systems. See *id.*

59. See *id.* at 48.

60. See *id.*

61. *Id.* at 48–49.

62. See *id.* at 49.

63. Arguably, the error examined could be categorized as a procedural error. However, because feature evaluation is primarily a substantive matter, and because GAO's objection to unfair discussions is more clearly procedural, it is introduced in this section.

and “breakaway” procedures during aerial refueling.⁶⁴ In making the award, the Air Force had concluded that Northrop Grumman/EADS’s aircraft would be able to comply with these procedures.⁶⁵ Boeing objected to this determination.⁶⁶ In reviewing Boeing’s objection, GAO found the Air Force’s determination, that Northrop Grumman/EADS’s aircraft could satisfy the RFP requirement, to be conclusory in several respects and not adequately supported by the record.⁶⁷

In addition to this error, GAO identified three further errors in the Air Force’s evaluation of the aircraft features that prejudiced Boeing’s proposal. Namely, GAO found that the Air Force (1) failed to credit Boeing for satisfying the requirements of the proposal in the manner specified by the solicitation; (2) impermissibly credited Northrop Grumman/EADS’s aircraft for exceeding the requirements of the solicitation, when the solicitation made clear that companies would not receive credit for exceeding the requirements; and (3) characterized Northrop Grumman/EADS’s failure to satisfy one of the solicitation’s requirements as an “administrative oversight” when in fact it was a material failure to satisfy the requirements of the solicitation.⁶⁸

3. Cost Analysis Errors

The final error that GAO identified was the number of flaws in the agency’s cost analysis of the proposals.⁶⁹ In short, the Air Force’s cost analyses were flawed because the agency failed to gather and consider all of the necessary data to determine the life-cycle costs of the aircraft, modified their calculations to consider risks inherent to Boeing’s design without cause to do so, and used an unreliable simulation model for engineering costs.⁷⁰

IV. RESOLVING THE PROBLEMS IN THE DOD ACQUISITION SYSTEM

Given the scope of the problems with the DoD acquisition system, perhaps the most difficult aspect of proposing reforms is deciding where to begin. At first glance, the KC-X program anecdote aggravates this frustration. However, analyzing these system and program level concerns together proves instructive for future reform efforts.

64. *Boeing*, 2008 CPD ¶ 114, at 38. The terms “overrun” and “breakaway” are procedures where the tanker aircraft must quickly change speed during the refueling procedure. *Id.*

65. *See id.* at 39.

66. *See id.* at 40.

67. *See id.* at 41.

68. *Id.* at 1–2.

69. The term “cost analysis” refers to the review and evaluation of the offeror’s proposal to determine whether the proposed costs are realistic and reasonable. *See FAR 15.404-1(a)(3)–(4).*

70. *See Boeing*, 2008 CPD ¶ 114, at 2. The details of these analyses are complex and are outside the scope of this Note.

A. Crafting Reform Proposals for the DoD Acquisition System

Reform efforts must respond to the unique set of challenges faced by the DoD acquisition system. Cultural and institutional inertia have inhibited previous reform efforts.⁷¹ In addition, there are serious concerns about the ability of the DoD acquisition workforce to implement reform measures.⁷² Further, as might be inferred from the discussion of the KC-X protest, the DoD acquisition system is already heavily regulated.⁷³

These factors indicate the kind of measures that are necessary to reform the DoD acquisition system. While it may be ideal to overhaul the system, devote more resources to it, and undertake ambitious initiatives to improve the quality of the workforce, the constraints on reform suggested here indicate that a more limited and targeted approach to reform would be a better course of action. As a result, the KC-X anecdote proves valuable because it exposes a number of discrete problems within the DoD acquisition system that serve as the targets for reform.

1. Failure to Properly Plan for the Acquisition

One specific concern the KC-X program highlights is the adequacy of the planning process used by the DoD acquisition system to craft RFPs. Prior to Boeing's protest, the Air Force believed that Northrop Grumman/EADS's proposed aircraft would satisfy the Air Force's need for a new aerial tanker platform.⁷⁴ Despite this belief, however, the revisions incorporated in the post-protest RFP in March 2010 had the opposite result, with Northrop Grumman entirely withdrawing from the competition.⁷⁵

While EADS's decision to reenter the competition as the prime contractor prevented the competition from reverting to sole-source procurement, the disruption and delay caused by the successful protest are more than adequate cause for concern.⁷⁶ Importantly, even the Air Force and DoD implicitly acknowledged that the revisions to the RFP in preparation for the second competition were intended to avoid problems with the source selection process.⁷⁷ The Air Force and DoD wanted to make sure that the selection

71. See discussion *supra* Part II.B.1.

72. See discussion *supra* Part II.B.2.

73. See discussion *supra* Part III.

74. This conclusion follows from the fact that the Air Force at all times had discretion to decline both Boeing's and Northrop Grumman/EADS's proposals. See 10 U.S.C. § 2305(b)(2) (2006) ("All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest."). If the Air Force believed that Northrop Grumman/EADS's design did not have merit, it would not have selected the aircraft.

75. See discussion *supra* Part III.A.

76. See *id.*

77. William Lynn, Deputy Sec'y, U.S. Dep't of Def., et al., Slides for DOD News Briefing entitled "Moving Forward," at slides 3, 7 (Sept. 24, 2009), <http://www.defense.gov/news/briefingslide.aspx?briefingslideid=340>.

criteria for competition were “more precise, less subjective”⁷⁸ in an effort to “ensure measurability.”⁷⁹ The Air Force and DoD also gave assurances that the source selection authority would evaluate bids “exactly according” to the specifications.⁸⁰ These admissions identify the planning process as a target for reform.

2. Failure to Comply with Basic Rules of Federal Acquisition

In addition to concerns about the relationship between the pre-competition deliberation and the outcome of the competition, the examination of the KC-X program raises questions about the DoD acquisition system’s ability to comply with the basic tenets of federal acquisition. While it might be possible to attribute the errors committed by the Air Force to the technical complexity or scope of a major acquisition program like the KC-X, a review of the errors identified by GAO in the bid protest decision suggests otherwise. As described above, the errors identified in the KC-X bid protest can be categorized and grouped as follows: procedural, feature evaluation, and cost analysis errors.⁸¹ However, despite whatever technical complexity may have existed in these different categories, it appears that the errors committed by the Air Force were actually conceptually simple.⁸² For example, procedural errors such as holding unequal discussions violate notions of fairness in government contracting processes. Further, substantive errors such as failing to document decision making and making decisions not in conformance with the RFP criteria specified violate notions of predictability and accountability.

The simplicity of these errors is all the more problematic because the Air Force could have avoided these mistakes with a proper application of Federal Acquisition Regulation (FAR) provisions. For example, FAR 15.306(e)(1) proscribes agencies from engaging in conduct that favors one offeror over another.⁸³ Had the Air Force fully complied with the regulation, the Air Force could have avoided the problem of unequal discussions during the competition. Similarly, the Air Force could have prevented problems regarding the inconsistency in crediting the different specifications of the two designs by applying FAR 15.305, which states that “[a]n agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation.”⁸⁴ Whatever the technical complexity of a given program, the basic provisions of the FAR provide clear directives to DoD Contracting Officers.

78. *Id.* at slide 3.

79. *Id.* at slide 7.

80. *Id.* at slide 9.

81. See discussion *supra* Part III.B.1–3.

82. For a more in-depth discussion of the values of government contracting, see generally Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

83. See FAR 15.306(e)(1).

84. FAR 15.305(a).

B. Proposed Solutions

Viewing the analysis of the KC-X program and the broader concerns about the DoD acquisition system, it is apparent that both the weaknesses in the pre-RFP deliberation process and compliance with the basic concepts of federal acquisition practice are targets for reform efforts. Based on this analysis, this Note makes two proposals: (1) enhancing procedural measures within the DoD acquisition system to ensure that agencies adequately define the specifications for complex acquisition programs prior to releasing an RFP and (2) imbuing bid protest forums with additional remedial powers that could incentivize compliance with the basic concepts of federal acquisition practice.

1. Improving the Quality of RFPs by Enhancing Planning Processes

The need to significantly alter the KC-X RFP following Boeing's successful protest suggests that one way to improve the outcomes of the DoD acquisition system would be to introduce measures that improve the quality of RFPs so that such corrections are not needed in future complex acquisition programs.⁸⁵ The key to improving the quality of the specifications in an RFP is to improve the deliberative process within the DoD acquisition system, as well as to increase oversight of this critical stage in program development.

There is already a robust procedure within the DoD acquisition system for DoD decision makers to follow prior to the release of a RFP.⁸⁶ Using the KC-X example, the KC-X RFP was for the "engineering and manufacturing development" ("EMD") phase of the KC-X acquisition program.⁸⁷ Prior to the EMD phase, decision makers within DoD approve a set of "key performance parameters" ("KPPs") that describe the required characteristics for the system.⁸⁸ Following the definition of the KPPs, the EMD phase begins with the completion of "Milestone B" in the defense acquisition management system.⁸⁹ Milestone B is a congressionally imposed procedural step in a defense acquisition program where a decisional authority is required to certify and submit to Congress that DoD is prepared to initiate a major defense

85. See Ralph C. Nash Jr. & Vernon J. Edwards, *Acquisition Planning: The Missing Link*, 21 NASH & CIBINIC REP. ¶ 3, Mar. 2007; discussion *supra* Part III.C.

86. See generally FAR 7.000–7.503; U.S. DEP'T OF DEF., INSTRU. NO. 5000.02, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (2008) [hereinafter INSTRU. 5000.02].

87. U.S. Dep't of Def., Solicitation No. FA8625-10-R-6600, KC-X Tanker Modernization Program (Feb. 23, 2010), available at <https://www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=9de4b125c05a27ec24db1e0f7dd0f1eb>. EMD is the stage of a defense acquisition program where a contractor will, among other tasks, develop a system, complete system integration, design for "producibility," and ensure affordability. INSTRU. 5000.02, *supra* note 86, enclosure 2, ¶ 6(a).

88. INSTRU. 5000.02, *supra* note 86, enclosure 2, ¶ 6(c)(2); DEF. ACQUISITION UNIV., GLOSSARY OF DEFENSE ACQUISITION ACRONYMS AND TERMS (13th ed. 2009), available at <https://dap.dau.mil/aphome/das/Pages/DAUOnlineGlossary.aspx>.

89. INSTRU. 5000.02, *supra* note 86, enclosure 2, ¶ 6(c)(3).

acquisition program.⁹⁰ Typically the decisional authority for major acquisition programs like the KC-X program is the Undersecretary of Defense for Acquisition, Technology, and Logistics (“USD(AT&L)”).⁹¹ In making her Milestone B certification, the USD(AT&L) is advised by the Defense Acquisition Board, chaired by the USD(AT&L) but composed of other senior policymakers including senior officials from the Joint Chiefs of Staff, different branches of the military, and staff offices within the Office of the Secretary of Defense.⁹²

This brief overview provides only a general sense of the complex deliberative process that must be completed to define the requirements for a major acquisition program. Given this complexity, policymakers will face a difficult task in modifying the system, but creative solutions are still possible. Congress could pass legislation that would place additional “Milestones” in the acquisition process where there would need to be strict review of requirements in a RFP to ensure that they are the best expression of DoD needs and preferences. Within the agency itself, DoD could enhance the procedures for reviewing these requirements. For instance, the Defense Acquisition Board could hold an expedited hearing for interested bidders to voice their opinions regarding DoD specifications for major procurement programs like the KC-X.⁹³ Regardless of whatever particular policy choice would be appropriate, any efforts to improve the process of crafting RFP requirements could prevent problems like those that arose during the KC-X program.

2. Incentivizing Adherence to the FAR by Enhancing Bid Protest Remedies

In addition to carefully drafting RFPs to correctly reflect the needs of the procuring agency, the second lesson to learn from the KC-X case study is that the DoD acquisition system at least occasionally struggles to comply with the basic concepts of federal acquisition practice as codified by the FAR. One way to address such variance would be to incentivize adherence to the FAR by enhancing the power of bid protest forums.

90. See 10 U.S.C. § 2366b(a) (2006). Section 2366b includes a number of criteria that the decisional authority must evaluate. The program must be affordable in light of alternative systems available and in light of future defense expenditures. See *id.* § 2366b(a)(1)(A)–(B). The agency must have developed reasonable cost and schedule estimates. See *id.* § 2366b(a)(1)(C). In addition, the decisional authority must certify that the technology for the program is well developed and that the program complies with all DoD polices. See *id.* § 2366b(a)(2)(A)–(F). This description is not comprehensive. See *id.*

91. See INSTRUC. 5000.02, *supra* note 86, enclosure 3, tbl.1. Because of the multibillion-dollar value of the KC-X program, it is classified as an “Acquisition Category I” program. See *id.*; Advance Questions for the Hon. John Young, Nominee for Under-Sec’y of Def. for Acquisition, Tech., & Logistics, at 17 (Oct. 2007), available at <http://armed-services.senate.gov/statemnt/2007/October/Young%2010-04-07.pdf>.

92. DEF. ACQUISITION UNIV., DEFENSE ACQUISITION GUIDEBOOK ch. 1.4 (2009), available at <https://acc.dau.mil/CommunityBrowser.aspx?id=289207&lang=en-US>.

93. “Expedited” is key, as major complications could arise if these hearings receive the scrutiny given to administrative proceedings.

Aside from the agency itself, there are two bid protest forums available to disappointed offerors in a competitive negotiation: GAO and the Court of Federal Claims (COFC).⁹⁴ These forums differ in a variety of ways and therefore appeal to disappointed bidders for different reasons. However, for the purposes of this Note, the key characteristics of the two forums are their remedial powers and their potential for expansion. GAO has the authority to recommend complete recompetition or resolicitation of a contract, or any other measures “necessary in order to promote compliance with procurement statutes and regulations.”⁹⁵ GAO cannot compel an agency to make a particular decision and is instead limited to making recommendations.⁹⁶ On the other hand, the COFC has the authority to “award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.”⁹⁷ In contrast with GAO, the COFC is not limited to making recommendations and its decisions are binding like those issued by federal district courts.⁹⁸

Looking at the statutory underpinnings of these two forums, both forums possess reasonably broad remedial powers. While exercising these powers would depart from current practice, the bid protest forums could craft more extensive remedies.⁹⁹ Surveying the landscape of potential judicial remedies, one analogue from traditional judicial practice stands out: a receivership. When it uses a receivership, a court appoints a neutral party to take possession of the property at issue and preserve its value.¹⁰⁰ Employing a receivership is an equitable remedy that courts occasionally employ to preserve the rights of parties.¹⁰¹ Albeit rare, a receivership is an extraordinary remedy for a court to utilize.¹⁰² During its tenure, a receiver is an arm and officer of

94. See 28 U.S.C. § 1491(b)(1) (2006) (providing the Court of Federal Claims (COFC) bid protest jurisdiction); 31 U.S.C. § 3552 (2006) (providing GAO’s bid protest jurisdiction). Some observers continue to speculate that federal district courts retain bid protest jurisdiction under the Administrative Procedure Act. See generally Peter Verchinski, *Are District Courts Still a Viable Forum for Bid Protests?*, 32 PUB. CONT. L.J. 393 (2003).

95. 31 U.S.C. § 3554(b)(1)(G).

96. See *id.* § 3554(b)(1).

97. 28 U.S.C. § 1491(b)(2).

98. See *id.* The COFC will not direct the award of a contract to a protestor. See *Mangi Envtl. Grp., Inc. v. United States*, 47 Fed. Cl. 10, 20 (2000).

99. Another positive byproduct of modifying the remedial powers of bid protest forums would be that it might mitigate the self-defeating dynamics of the current bid protest system. Given the systemic issues in the defense acquisition system, and because the KC-X program suggests that the Air Force is not immune to these issues, the prospect of returning the KC-X procurement to the same organization is paradoxical. When a process is as unsuccessful as the KC-X procurement, the organization that oversaw such efforts is generally regarded to be performing well below expectations. Attempts to reform the organization face significant obstacles, and a question arises about the suitability of a remedy that essentially asks the organization to carry out precisely the same responsibilities again. Enhanced remedial powers could make the bid protest process more productive.

100. See 75 C.J.S. *Receivers* § 1 (2010).

101. See *id.* § 3.

102. See *id.*

the court.¹⁰³ Receivers can also, in the appropriate circumstances, continue or conduct a business.¹⁰⁴

An acquisition receiver would not need to have executive or managerial authority, as some typical receivers might. Instead, an acquisition receiver appointed by a bid protest forum could serve as a neutral, third-party observer or consultant to answer questions or conflicts that might arise during the course of an acquisition program. Indeed, the scope of its role could be quite narrow, in keeping with the generally case-based approach of current bid protest remedies. Following an unsuccessful procurement, should the bid protest forum determine that the errors in the high-priority procurement were particularly egregious, it could, along with requiring a resolicitation, appoint an acquisition receiver to serve until the resolicitation is complete.

Further, there are also models for the substance of the powers that an acquisition receiver might hold. One model comes from the position, outlined in FAR Subpart 6.5, of the competition advocate. Competition advocates are designated officials within federal agencies who are responsible for promoting competition in an agency's acquisitions process.¹⁰⁵

In practice, the FAR allows agencies significant discretion as to the role of competition advocates in an agency's acquisition system.¹⁰⁶ In many cases, competition advocates review justifications for sole-source procurements.¹⁰⁷ In DoD, the agency-level competition advocate holds quarterly meetings to review the agency's progress towards facilitating greater competition.¹⁰⁸

A second model for an acquisition receiver comes from the many different ombudsman positions that exist in federal agencies. For example, the DoD Office of the Inspector General ("DoD OIG") contains an Office of the Ombudsman.¹⁰⁹ The DoD OIG ombudsman serves a number of roles for

103. See *id.* § 139.

104. See *id.* § 186.

105. See FAR 6.502(a). Competition advocates' duties include "promoting acquisition of commercial items, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses." *Id.*

106. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-833, FEDERAL CONTRACTING: OPPORTUNITIES EXIST TO INCREASE COMPETITION AND ASSESS REASONS WHEN ONLY ONE OFFER IS RECEIVED 38 (2010).

107. See *id.* at 41.

108. See *id.* at 42.

109. See *Office of the Ombudsman*, U.S. DEP'T OF DEF., <http://www.dodig.mil/Ombudsman/index.html> (last visited Oct. 18, 2010). There are many other offices of ombudsmen, such as Office of the National Ombudsman at the Small Business Administration, the Office of the Ombudsman for the Department of Education's Federal Student Aid Programs, and the Office of the Ombudsman for the Federal Deposit Insurance Corporation (FDIC). See *About the Office of the National Ombudsman*, U.S. SMALL BUS. ADMIN., http://www.sba.gov/aboutsba/sbaprograms/ombudsman/aboutus/OMBUD_ABOUTUS.html (last visited Oct. 18, 2010); *Office of the Ombudsman*, DEP'T OF EDUC., <http://www.ombudsman.ed.gov> (last visited Oct. 18, 2010); *Office*

the DoD OIG, including hearing concerns within the office and facilitating the resolution of conflicts.¹¹⁰

An acquisition receiver could serve a role similar to that of a competition advocate or an agency ombudsman, yet remain dedicated to a single acquisition program that has already produced one sustained bid protest. By reviewing an agency's planning and evaluation process, facilitating open communication in the program, and providing suggestions where appropriate, the ombudsman could reduce the likelihood of problems arising during the course of a resolicitation.

The concept of an acquisition receiver would be a new one for bid protest forums and for acquisition law generally. The examples taken from existing practices of utilizing receivers and the duties of the ombudsman would improve the problems inherent in the DoD system, but there would be significant challenges in developing the criteria for the appointment of an acquisition receiver and defining the scope of its powers in the DoD context. However, considering the challenges that currently beset the DoD acquisition system, the addition of such a remedy to the existing powers of bid protest forums might add a valuable dimension to their existing oversight role, one that might help in isolated incidents like the KC-X program.

V. CONCLUSION

By now, it is clear that reforming the DoD acquisition system should be a top priority. As it stands today, the DoD acquisition system faces systemic challenges that not only undermine its performance, but also hinder reform efforts. The outcomes of individual acquisition programs like KC-X demonstrate the inefficiency and controversy that naturally arise under such conditions. These problems present policymakers seeking to reform the DoD acquisition system with a significant challenge. However, the obstacles are not insurmountable. Individual case studies reveal opportunities for targeted reform efforts with the capacity to benefit the DoD acquisition system as a

of the Ombudsman, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/regulations/resources/ombudsman/index.html> (last visited Oct. 18, 2010).

110. See *Office of the Ombudsman*, U.S. DEP'T OF DEF, *supra* note 109. The Office of the Ombudsman for the FDIC provides a number of particularly useful examples that could be analogized to the potential role of the acquisition receiver. See *Examples of Ways in Which the Office of the Ombudsman Can Help Insured Financial Institutions*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/regulations/resources/ombudsman/examples.html> (last visited Oct. 18, 2010). For example, the FDIC ombudsman provides "feedback at the appropriate levels in FDIC." *Id.* If the ombudsman receives confidential comments from bankers such that there needs to be a correction in regulatory scheme, the ombudsman can then report the issue for "consideration and possible action." *Id.* An acquisition receiver could serve in a similar role but limited to a single acquisition program. Thus, if there were many concerns expressed to the receiver about the specifications in an RFP, the receiver could communicate those concerns to the agency directly.

whole. As the KC-X program suggests, the opportunities include improving the deliberative process used to craft RFPs and incentivizing agency compliance with basic FAR requirements. With narrow reform proposals like those in this Note, gradual improvement in the performance of the DoD acquisition system is possible.