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Viewpoint

Failure To Conduct A Real Tanker Competition Would Set A Terrible Precedent

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Printed headline: Tanker Contract: Follow the Law

The Pentagon's new year begins with a crashing hangover from yet another round in the aerial refueling tanker procurement fight. Each bidder seems determined to put the other under the table, even as U.S. taxpayers and war-fighters are getting left out in the cold.

Before Christmas, Northrop Grumman offered the Pentagon a lump of coal if it refused to rewrite its draft bid documents. Meanwhile, Boeing boosters in Congress threatened to freeze the Northrop/Airbus team out of the \$40-billion contest if the World Trade Organization decides that subsidies from European governments gave Airbus a leg up.

Boeing partisans want to kick the Airbus tanker out, if the WTO issues a final, adverse determination on a complaint the U.S. filed in 2004. Boeing claims European loans to Airbus in the 1970s constituted prohibited subsidies that justify the imposition of tariffs on sales to U.S. airlines.

Congressmen from Seattle and Wichita spent December arguing that if the WTO issues a final decision that "governments or companies" violated trade agreements, the offenders should be barred from bidding on the tanker or tariffs should be imposed on their bids.

Before Congress, in effect, hands Switzerland-based bureaucrats veto power over America's defense industry, we might consider the law of unintended consequences. At this point, Boeing is the only tanker competitor that the WTO has found to have benefited from illegal subsidies that made it easier for it to undercut competitors' prices. Regardless of the outcome in the present WTO case, barring competitors who have enjoyed unfair advantages in commercial airplanes would be a shot in the taxpayers' own foot, potentially leaving the Air Force with no one to bid on tanker replacements. If the idea catches on overseas, the Europeans might freeze U.S. defense contractors out of their procurements.

Europe successfully brought two cases against billions of dollars worth of U.S. tax subsidies to Boeing. While Germany, France and others were lending Airbus seed money, Congress gave U.S. aircraft manufacturers big tax breaks on revenue from their overseas sales. Tax breaks for so-called Foreign Sales Corporations (FSCs) helped Boeing offer lower prices to foreign airlines.



Jerry W. Cox, a founder of the Forerunner Foundation, a Washington think tank, was procurement counsel for the U.S. Senate.

That dust-up started in 1999, when the European Union filed suit. In 2000, the WTO found the U.S. guilty of using FSCs to funnel illegal export subsidies to Boeing. Congress tried again with a law passed in 2000 that still allowed Boeing to exclude from taxation its “extra-territorial income.” Europe sued again. WTO promptly agreed that the U.S. still was illegally subsidizing Boeing and allowed the EU to impose \$4 billion in retaliatory tariffs. Boeing avoided punishment only because Congress repealed the tax breaks in 2006.

Team Northrop’s recent actions also offer little New Year’s cheer. It is hard to blame Northrop for the “Dear John” letter to the Pentagon in which the team threatened not to compete, given the likely need to spend millions of dollars more to re-bid a procurement they believe is “wired” for the other team. Nevertheless, Northrop could shape the integrity of defense procurement for decades to come.

Like Boeing, Northrop could take its case directly to Capitol Hill. The better alternative would be: Stand up for U.S. procurement laws. Anyone unafraid of competition should argue for enforcement of the unanimously approved Weapons Systems Acquisition Reform Act (WSARA). It established statutory grounds to expect the Pentagon to adhere to the results of an honest, robust analysis of requirements.

If Northrop has a good case that the draft bid documents do not properly reflect tradeoffs among cost, schedule and performance, the company should launch a legal challenge. If such an effort is unlikely to succeed, Congress would better serve the nation by closing loopholes instead of treating the tanker as a public works project.

Boeing, too, has a stake in WSARA enforcement. If the tanker buy is not resolved through real competition and under U.S. procurement laws, a terrible precedent will be set. Weapons systems will reflect political tradeoffs, not the tradeoffs in capabilities that mean life or death to U.S. warfighters. The Pentagon’s failure to conduct a real tanker competition would establish a new and ultimately self-defeating way of doing public business.

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