

SEP. 8. 2006 3:41AM

NO. 3440 P. 2/4

JOHN McCAIN  
ARIZONA

241 RUSSELL SENATE OFFICE BUILDING  
WASHINGTON, DC 20510-0343  
(202) 224-2236

CHAIRMAN  
COMMITTEE ON INDIAN AFFAIRS  
COMMITTEE ON ARMED SERVICES  
COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION

# United States Senate

5353 NORTH 16TH STREET  
SUITE 105  
PHOENIX, AZ 85018  
(602) 852-2410

September 8, 2006

4703 SOUTH LAKESHORE DRIVE  
SUITE 1  
TEMPE, AZ 85282  
(480) 887-6289

407 WEST CONGRESS STREET  
SUITE 103  
TUCSON, AZ 85701  
(520) 670-8334

TELEPHONE FOR HEARING IMPAIRED  
(602) 952-0170

## VIA FACSIMILE ONLY

The Honorable Gordon England  
Deputy Secretary  
Department of Defense  
The Pentagon, Room 3E944  
Washington, D.C. 20301-3010

### **Re: Tanker Recapitalization Program; Request for Proposals**

Dear Mr. Secretary:

As you of course know, currently before the World Trade Organization (WTO) are suits between the United States and the European Union Trade Commission on the issue of acceptable government supports for the development of commercial aircraft. When those WTO proceedings, which are complex and contentious, will be resolved is far from clear. However, from reliable sources, I understand that the Air Force intends to include a WTO element in the Request for Proposals (RFP) supporting the tanker recapitalization program. With the Air Force apparently planning to actually issue the RFP within the next few days, it is unfortunate that I had to learn about this development through third-parties. In any case, I write to convey my serious concern about this development.

As you of course know, I have long been committed to providing our military with the best possible capabilities at a fair price. And, given the regrettable history of the Air Force's plan to update its aerial refueling fleet, it is important that tanker recapitalization proceed on a traditional budget, procurement and authorization track. That history plainly demonstrates that tanker recapitalization will only succeed if it is supported by full and open competition, based on all applicable Air Force requirements, using objective, verifiable metrics. Based on those axiomatic principles, I am very concerned about the Air Force's decision to include a WTO element in this RFP.

Unlike all of the other evaluation criteria likely to be included in the RFP, the WTO provision is inherently beyond the Air Force ability to judge or measure. As such, it needlessly and, in my view, improperly injects into what should be a full and open competition an element of arbitrariness and capriciousness. Probably for this very reason, there apparently is no foundation for including such an element in procurement evaluations, in either the Federal Acquisition Regulations (FARS) or Defense Acquisition Regulations (DFARS). In fact, it is questionable if any legal authority exists to support the inclusion of a WTO provision as an evaluation factor.

In addition, I can find no precedent for consideration of such a factor in any previous defense acquisition. In fact, in four recent major defense acquisitions involving international platform providers, namely the Aerial Common Sensor (ACS), VX-1 Presidential Helicopter, Light Utility Helicopter and Joint Cargo Aircraft (JCA), there was no consideration of similar factors in the supporting requests for information. The ACS procurement is particularly relevant because, at the time, Embraer (which provided aircraft) was involved in extensive WTO negotiations with Canada over export financing. It is also notable that, only last year, Congress rejected including such an element in procurement evaluations as a matter of acquisitions policy, in the National Defense Authorization Conference Report for Fiscal Year 2006.

Given the foregoing, I ask that you provide in writing answers to the following questions by September 15, 2006, or 10 days before issuing the RFP, whichever is sooner.

1. Exactly what is the legal or regulatory basis for the inclusion of the WTO provision in the RFP?
2. The pending WTO proceeding relates to commercial aircraft. How does that case apply to this military acquisition?
3. Won't the Air Force require all bidders to be compliant with existing laws? If so why is the WTO provision in the RFI relevant?
4. How will the Air Force selection authority determine or evaluate an issue between countries?
5. Who in the Air Force is capable of such an evaluation?
6. How will information provided as responsive to the WTO provision be evaluated? What is metric to be used? How will this metric be evaluated? Exactly how will the WTO provision be scored for purposes of evaluating procurement proposals submitted in response to the RFP?
7. Isn't this language precedent setting? Has this type of language ever been included in other acquisitions? If so, explain the need for its inclusion in this RFI? If not, why not?
8. Will all similar future acquisitions have such provisions? If not, and it is necessary this time, why not?
9. Is the purpose of this language to institute a new precedent for "Buy America"?
10. Does inclusion of this provision in the RFP indicate an intent to include "Buy America" criteria in procurement evaluations involving possible international

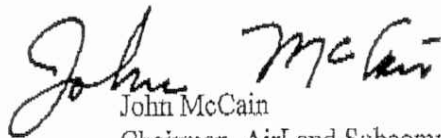
platform providers? If not, why here?

11. How does this action to be taken by the Air Force affect the Government's position in the pending WTO proceedings?
12. Why does the Air Force's inclusion of the WTO provision in the RFP not violate the United States' obligation under the Dispute Settlement Understanding with the WTO? I understand that Article 23 of that instrument stipulates that no Member will make "a determination to the effect that a violation has occurred" outside of WTO dispute settlement processes.
13. Exactly why was the decision made to include this language in the RFI in the first place?

I am concerned that if the Air Force proceeds down its chosen path regarding the WTO issue, the Air Force will risk eliminating competition before bids are submitted. In my view, this is not in the best interests of either the taxpayer or the warfighter. Therefore, I respectfully suggest that Air Force follow an acquisition process based on extant legal and regulatory guidelines and remove any WTO element from its procurement evaluation supporting its tanker recapitalization program.

If you have any questions, please feel free to contact me anytime. Your staff may contact my Military Legislative Assistant, Chris Paul, at (202) 224-7138.

Sincerely,



John McCain  
Chairman, AirLand Subcommittee  
Senate Armed Service Committee

cc: The Honorable Kenneth Krieg, Undersecretary of Defense, Acquisition, Technology & Logistics  
The Honorable Michael W. Wynne, Secretary of the Air Force  
The Honorable John Warner, Chairman, Senate Armed Services Committee  
The Honorable Carl Levin, Ranking Member, Senate Armed Services Committee  
The Honorable Joseph I. Lieberman, Ranking Member, AirLand Subcommittee, Senate Armed Services Committee