HEARING TO RECEIVE TESTIMONY ON THE RESULTS OF THE INVESTIGATION BY THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF THE AIR FORCE INTO THE RELEASE OF PROPRIETARY DATA IN THE KC–X COMPETITION

THURSDAY, JANUARY 27, 2011

U.S. SENATE
COMMITTEE ON ARMED SERVICES
Washington, D.C.

The committee met, pursuant to notice, at 9:33 a.m. in room SD–G50, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, McCaskill, McCain, Inhofe, Sessions, Graham, Wicker, and Brown.

Committee staff members present: Richard D. DeBobes, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Creighton Greene, professional staff member; Peter K. Levine, general counsel; and Jason W. Maroney, counsel.

Minority staff members present: Pablo E. Carrillo, minority investigative counsel; David M. Morriss, minority counsel; and Christopher J. Paul, professional staff member.

Staff assistants present: Kathleen A. Kulenkampff, Hannah I. Lloyd, and Brian F. Sebold.

Committee members' assistants present: Tressa Steffen Guenov, assistant to Senator McCaskill; Joanne McLaughlin, assistant to Senator Manchin; Anthony J. Lazarski, assistant to Senator Inhofe; T. Finch Fulton, assistant to Senator Sessions; and Sarah Drake, assistant to Senator Wicker.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody.

The committee meets today to address the inadvertent release of proprietary data in the process of the KC–X tanker procurement.

We recognize that the Air Force is currently conducting a source selection in this procurement, and we need to avoid any action or comment or question for that reason. This hearing will focus on, first, the nature of the information released by the Air Force; second, the steps that the Air Force took to determine what happened, and to determine if there was any damage to the fairness and in-

tegrity of the source selection process; and third, any remedial actions taken by the Air Force.

I would ask both Senators and witnesses to avoid any lines of inquiry that could compromise the source selection process.

The issue that needs to be addressed is whether what was a—currently, a clerical mistake, where the Air Force released proprietary or source-selection-sensitive data to the competitors during the ongoing third tanker procurement process has damaged that process.

My understanding of the current situation is as follows: Boeing and the European Aeronautic Defense and Space Company, known as EADS or E–A–D–S, are competing for the contract to furnish the next generation strategic refueling contract called the KC–X, for the Air Force.

As part of this competition, the Air Force is evaluating the capability of the competitors' aircraft in a model referred to as the Integrated Fleet Aerial Refueling Assessment, or IFARA. In this analysis, the Air Force is evaluating potential KC–X aircraft using several postulated real-world scenarios. In deriving an IFARA score, the Air Force uses the model to compare candidate aircraft with the current tanker, the KC–135R.

As part of the official discussions, within the current competition, the Air Force intended to share with each contractor the Air Force IFARA assessment on that contractor's aircraft, to ensure that there were no substantive disagreements on the calculations on the score.

In November of 2010, personnel working for the Air Force Program Office inadvertently sent the IFARA data files for the Boeing offer and the EADS offer to both contractors. After the error was identified, the Department of Defense and the Air Force investigated the incident and determined that some IFARA data had been viewed by one of the two contractors. The Air Force then determined that comparable data should be released to the other contractor, in the effort to ensure that the competition could continue on a level playing field. And it was released.

Now, joining us today are General—Major General Wendy Masiello, program executive officer for combat and mission support, Office of the assistant Secretary of the Air Force for Acquisition; and Mr. Steven Shirley, executive director for the Department of Defense Cyber Crime Center. These witnesses have been selected because they have a detailed knowledge of issues regarding the specific subject matter of this hearing.

And I want to extend a welcome to our witnesses. Thank you both for appearing before this committee this morning. And I know that it took some doing to get here, given the snow circumstances.

Over the last month, the staff has met on two occasions with Department of Defense officials familiar with the release of information and the Air Force investigation.

Also, I made an offer to the chief executive office—officer of each of the companies to accept written statements to the committee addressing these issues, should they choose to do so. And we have received a submission from each of the companies. And, without objection, we will make those two submissions part of the record at this time.

[The information referred to follows:]

[COMMITTEE INSERT]

Chairman LEVIN. We appreciate both companies' positive approach to this committee inquiry, and both of the companies' cooperation with us.

Senator McCain.

STATEMENT OF SENATOR JOHN McCAIN

Senator MCCAIN. Thank you, Mr. Chairman.

And I thank the witnesses for their attendance and being here this morning.

One of the primary duties of this committee is to engage in oversight of Department of Defense spending and programs. And, while I'm unfailing in my support for aggressive oversight by this committee over major Defense acquisition programs, and I acknowledge that it's the right and responsibility of the Chairman to schedule hearings as he deems fit and appropriate to ensure that the committee exercise its oversight responsibilities effectively, I approach today's hearing with a fair bit of concern, and even a greater amount of skepticism, that this hearing will be beneficial to our job of oversight.

Unfortunately, this hearing appears to be designed to provide—to produce little new information about the pending award of the Air Force's KC–X tanker competition.

As we all know, the competition for the Air Force's new aerial refueling tanker has been beset by problems in acquisition irregularities for years. After considerable effort to ensure the current competition process is as error-free and clean as possible, in November the Air Force inadvertently, and incredibly, sent data related to the competition to each of the respective bidders, that they should not have had.

The natural outcome of this mistake is to ask, quote, "What difference, if any, did this mistake make to the competition?" While I think the urge to dive into that question is understandable, this long, drawn-out process is nearing its end, and a final announcement of the Air Force's decision will be made soon.

To the extent that November's mistake could be argued to have an impact on the outcome, that seems to be—me to be an issue more appropriately addressed after the competition has run its course and a winner has been announced, not just weeks before the process draws to a conclusion.

While this committee should continue to exercise aggressive oversight into the tanker award processes, the witnesses here today have little ability to shed real light on the facts that eventually need to be examined on this matter. Indeed, the tanker program has been delayed for more than a decade and is expected to be worth approximately $30 billion. With that much at stake, hearings on this topic should be designed to allow the Air Force to speed the delivery of the tanker, that it so badly needs, in the most efficient, cost-effective manner possible.

Everyone wants to ensure that this competition is fair and above board, and that no party gains an unwarranted advantage. We know corrective actions were taken, an effort was made to assess

damage and set things right, opinions were formed about what the impact was and whether it could be overcome.

With these fundamental questions in mind and an intent to exercise restraint as we involve ourselves in this issue, I look forward to the testimony of the witnesses.

I also know that the Chairman intends to release, today, documents that we received for this hearing, that they be publicly released. I think this is a bad idea. I think we could wait until just a few weeks from now, when the final decision is made, and then make all of these documents public, as—and I understand the Department of Defense, quote, "doesn't object to the committee's release of these documents." Given all of the controversy, all of the legal challenges, all of the delays of over a decade, why wouldn't we want to just wait a few weeks before we would release that information, which could cause further disruption to the competition?

So, Mr. Chairman, it is your right, as chairman, to release those documents. I don't think that it does any good at this time, and could be disruptive. And I say that as a person who has been very much an advocate of total transparency and knowledge, not only shared by Members of Congress, but by the American people.

So, I thank the witnesses for being here today.

I hope that in February we can finally have a final resolution and selection of a tanker that's badly needed by the United States Air Force, after nearly a decade of stories of corruption, abuse, mismanagement, and now this latest fiasco of releasing the documents—relevant documents to the contractors, still an—a rather incredible happenstance, in this long odyssey and saga of mismanagement and, in some cases, corruption surrounding the awarding of the contract for this tanker.

I thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator McCain.

General Masiello.

STATEMENT OF MAJOR. GEN. WENDY M. MASIELLO, USAF, PROGRAM EXECUTIVE OFFICER FOR COMBAT AND MISSION SUPPORT, OFFICE OF THE ASSISTANT SECRETARY OF THE AIR FORCE FOR ACQUISITION

General MASIELLO. Mr. Chairman, Senator McCain, and members of the committee, thank you for opportunity to discuss the events surrounding an inadvertent disclosure of information related to the KC–X program.

I should make it clear at the outset that neither I nor my fellow witness, Mr. Shirley, are affiliated with the KC–X source selection, and thus we cannot address nor speculate on matters beyond the scope of today's hearing.

As a senior Air Force military officer with contracting experience, as well as experience in numerous source selections, I've been asked to review the redacted record of the incident, and the extent of the Air Force's response, so that I could appear today to address the process that was followed and how the Air Force's actions maintained the integrity of the source selection process.

I know that committee members are aware that the Air Force is in the midst of the source selection and will appreciate that my tes-

timony today will be limited to the specifics of this event and my analysis of the actions taken.

The Air Force has been and remains committed to a fair, open, and transparent KC–X source selection. I understand the Department has provided all committee-requested documents properly redacted of proprietary and source selection sensitive information.

These are the summary statements by the procuring contracting officer and the head of Air Force contracting activity regarding the Procurement Integrity Act; the OSD Independent Review Team's report; statements from both companies, including signed CEO certification letters; and the summary statement of the classified Defense Computer Forensics Report.

Before responding to your questions, let me provide this summary of where the Air Force believes the record stands today:

First, the Air Force determined that the area—the error was unintentional and that the actions of the individuals, both government and offerors, did not constitute a violation of the Procurement Integrity Act.

Second, through the statements offered by the employees who handled or viewed the disks from both companies, certified in writing by both company CEOs, and other means which I'll address in a moment, the Air Force believes that the information exposed to one offeror's employee was limited to one screen of summary data related to the government's Integrated Fleet Aerial Refueling Assessment, known as IFARA, data. None of the information on that page was proprietary, and as has been previously stated publicly, there were—was no pricing data anywhere on the disks. The summary page, an Excel spreadsheet, was open on the screen for a matter of seconds before it was closed when the company employee realized the mistake. Both companies, upon realizing the error, immediately secured the disks in safes and contacted the Program Office. The Program Office immediately directed and received all of the disks the next day.

The company employee who viewed the single screen shot was reassigned to an administrative position, and did not rejoin the company's proposal preparation team until after the leveling of the playing field, which I'll address momentarily.

Third, at the direction of the source selection authority and procuring contracting officer, an independent review was conducted by personnel from the OSD Independent Review Team as to the facts and circumstances regarding the incident. The Review Team also made recommendations to help prevent future occurrences.

Fourth, as a further level of verification, the Air Force requested and both companies cooperated by providing the computers that their competitors' disks were inserted into. Using the Defense Computer Forensics Laboratory, the Air Force was able to verify that the record of the disks and files accessed was consistent with the statements provided by both companies and certified by their CEOs.

Fifth, following the investigation, in order to ensure a level playing field, both offerors were presented with the same screen shots of each other's information. Further, since the Air Force was still at a stage where offerors could continue to update their proposals, the procuring contracting officer made it clear that such updates

could continue. Consistent with the Air Force's efforts to maintain transparency, both offerors received the opportunity to review the forensic analysis of their respective computers.

Sixth, I am informed the Program Office that the—by the Program Office, that the IFARA summary scores shared with both offerors were interim scores and were not the final scores that will be used in the evaluation. Further, both offerors will have the opportunity to provide a final proposal revision, as is standard. No offeror was impaired from continuing to improve its proposal.

Seventh, the two individuals directly responsible for the packaging and mailing of the information to the companies were not only removed from the program, but no longer perform any duties on programs associated with the Aeronautical Systems Center. Two other individuals, tangentially involved, were counseled.

Eighth, all recommendations from the OSD Independent Review Team to prevent recurrence have been adopted. Transmittal of any classified material to a contract will be accompanied by a letter, not just the Air Force Form 310, signed by an appropriate official. Descriptions of the material being transferred must match both the transmittal letter and the Form 310. The transmittal letter and the Air Force Form 310 must both be reviewed by the signatory of the transmittal letter and an appropriate security official. Classified material to be transmitted must be delivered to the security office in a separate clearly marked package to identify the recipient of the material for each package, ensure individuals with knowledge of both the content of the material, and the purpose of the transfer, be involved with the preparation and packaging of the information, and personally execute the transfer. Additional measures were taken to include supervised—supervision oversight and two-person rules that involve senior program and contracting officer position to personally verify and validate contents of packages against transmittal letters and inventory forms.

And finally, while the Department regrets that the incident occurred, Department leadership is satisfied that both companies responded to the incident correctly and professionally.

After reviewing the same documents presented to the committee, it is my opinion that the actions taken by the Program Office have ensured a level playing field.

I'd like to thank the committee for your continued support of our men and women in uniform as we await the outcome of the source selection.

[The prepared statement of General Masiello follows:]

Chairman LEVIN. General, thank you so much.

Mr. Shirley.

STATEMENT OF STEVEN D. SHIRLEY, EXECUTIVE DIRECTOR, DEPARTMENT OF DEFENSE CYBER CRIME CENTER

Mr. SHIRLEY. Good morning, Senator.

I have no opening statement, But I am present, as a technical representative, to answer questions about the forensic process, if required.

Chairman LEVIN. Okay. Thank you.

Thank you, both, very much for being here and, again, for your service.

Let's try a 8-minute first round.

General, let me ask you this question first. Can you tell us, specifically, what data from each contractor has been shared with the other contractor as a result of the incident? You talked about a screen shot, for instance. Be much more precise as to what was seen and what then was shared.

General MASIELLO. Senator, from my observation and my reading the documents that are presented here, it was a screen shot of IFARA data, which was about a spreadsheet. It appeared to have 10 lines of information. And that screenshot of—and it was the IFARA data analysis, the Air Force's analysis of their individual data. And that's all I know about what the content or the details are.

Chairman LEVIN. It was one page——

General MASIELLO. One———

Chairman LEVIN.—is that all?

General MASIELLO.—one page——

Chairman LEVIN. What is a screenshot? Is that a page?

General MASIELLO. Yes, sir. It's a—when it pops up onto your computer and it has a spreadsheet of the information, it's—that instant page on the computer screen, and it's a picture of that taken.

Chairman LEVIN. All right.

General MASIELLO. So, there's nothing that deals—drills down below that——

Chairman LEVIN. All right.

General MASIELLO.—screenshot.

Chairman LEVIN. One image of——

General MASIELLO. One image.

Chairman LEVIN.—the screen for—you determined, for how long?

General MASIELLO. However long it presented. But the fact is——

Chairman LEVIN. Okay.

General MASIELLO.—a copy of that, for each offer, was swapped with the offerors.

Chairman LEVIN. That one page.

General MASIELLO. Correct.

Chairman LEVIN. And that one page alone.

General MASIELLO. Yes, sir.

Chairman LEVIN. Now, have you determined how long that screen was opened?

Mr. SHIRLEY. Sir, based on the forensics of the media provided by the company, we think it was on the order of—that it was viewed on the order of several minutes. Now, that's based on statements from the company. But, the computer was powered for a longer period.

Chairman LEVIN. Where was the 15-seconds figure? Where'd that come from?

General MASIELLO. Sir, that was the person's estimate of how much time they viewed it, that they then prepared and signed a statement certifying to that, which was subsequently certified by the CEO of the company validating that it was——

Chairman LEVIN. All right. Now, you submitted those documents that you outlined to us——

General MASIELLO. Yes, sir.

Chairman LEVIN.—and we have received assurance from the Department that there's no objection to the committee's decision to do so, if we determine that it's appropriate to do so.

General MASIELLO. That's my understanding, sir.

Chairman LEVIN. All right.

Now, is there objection to those documents being made part of the record and being released?

General MASIELLO. Not that I'm aware of, sir.

Chairman LEVIN. Hearing none, that is the action the committee will take.

[The information referred to follows:]

[COMMITTEE INSERT]

Chairman LEVIN. Now, the—you indicated that that information was nonproprietary information, is that correct?

General MASIELLO. Yes, sir.

Chairman LEVIN. Would the availability of that information to one of the competitors, but not the other, be advantageous? And, if so, is that the reason why you decided to attempt to level the playing field by swapping the information, so that both companies would have that same spreadsheet of the other company—or, excuse me, of the assessment of the other company?

General MASIELLO. Sir, I can't tell you whether it was that important or not, because I don't know—I'm not privy to the KC–N—KC–X specifics. But, whether it was or wasn't, there was, at minimum, a perception, so the government chose to provide copies to both contractors.

Chairman LEVIN. Both companies.

General MASIELLO. Yes, sir.

Chairman LEVIN. And it was the—how long did it take after the sheet was seen by—I presume it's the EADS employee that we're talking about—how long was it, after that mistake was noticed by that employee, did EADS close it up and get it back to the government?

General MASIELLO. What I read is that they immediately stopped looking at it, and, because they were in a secure environment, needed to go find someone to partner with them to close it all down.

Chairman LEVIN. Right.

General MASIELLO. It was immediate. They wasted no time shutting it down and securing the documentation and the disks in a file that was signed by security reviewers, as well.

Chairman LEVIN. All right. And the other company, Boeing——

General MASIELLO. Yes, sir.

Chairman LEVIN.—also caught the mistake. And how long did it take them to close up that—it was a disk?

General MASIELLO. It was as instantaneous as what I read about in the EADS testimony, as well.

Chairman LEVIN. All right. And those documents that you've referred to that contain that chronology and that certification—and there were four of them that you made reference to in your opening statement—are now part of the record and people can look at that chronology and——

General MASIELLO. Yes, sir.

Chairman LEVIN.—determine how many minutes and how many seconds it was, after the mistake was noticed, that each company locked up the CDs—or the disks, excuse me, and then got them back to the government——

General MASIELLO. Yes, sir.

Chairman LEVIN.—is that correct?

General MASIELLO. Yes, sir.

Chairman LEVIN. That information is in those documents, now available publicly.

General MASIELLO. Yes, it is.

Chairman LEVIN. Now, you're a forensic expert, Mr. Shirley, so—and you've told us what—well, how confident are you—let me ask you this question—of the—your conclusion, or the Department's conclusion, as to what data was viewed and for how long? Is that a high level of confidence?

Mr. SHIRLEY. Yes, sir, Senator. If I might describe a little bit about the process——

Chairman LEVIN. Sure.

Mr. SHIRLEY.—to give you the context.

DOD Cyber Crime Center has, as part of it, the Defense Computer Forensics Lab. It's manned with about 110 people, today. A—it operates as an accredited lab, certified by an external entity; in this case, the American Society for Crime Lab Directors and their lab accreditation board. And what that process does is validate that we have a reliable, valid, repeatable process, that we have people who are certified and professionally qualified to perform the duties in question. And they're subject to periodic review and testing in that regard as a condition of the lab retaining its accreditation.

When we receive this data, we essentially treated it in the same manner as we would treat an inadvertent disclosure of classified information in a sensitive program. And so, we assigned, as a forensic examiner, one of our most capable subject-matter experts. And he is the—really, the forensic expert that processed this data. He's been qualified in court about 13 times. And so, we have a very high level of confidence that the representations asserted by each company—well, let me say it this way—the forensic findings validated the representations by each company.

Chairman LEVIN. And, very specifically, the representations, in the case of Boeing, were that they saw the mistake and did not open the page or read the page. And, in the case of EADS, the representation was that the page—same page was inadvertently opened, the person who saw it, saw that one page. You indicated this morning, apparently, by—because of personal conversations with that person, that it may have been a matter of minutes, but according to the documents, which are now part of the record, that was for 15 seconds. In either event, you've concluded it was a matter of some minutes?

Mr. SHIRLEY. Yes, sir. A very short time.

Chairman LEVIN. Okay. And that then that person immediately closed that page and got that material back to the Air Force, is that correct?

Mr. SHIRLEY. That's correct, sir.

Chairman LEVIN. And you're confident that that—the facts are that that was the only page which was opened up by that person?

Mr. SHIRLEY. Yes, sir.

Chairman LEVIN. Based on your forensic capabilities.

Mr. SHIRLEY. That's correct, Senator.

Chairman LEVIN. Okay.

Thank you very much.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

I won't need my full 8 minutes; I had a chance to talk to both witnesses beforehand.

And let me just—on the IFARA, just how significant is it—and I think maybe, for the record, if we could determine—in your position, are you able to say what percentage of the bid or the weight of the bid would this represent?

General MASIELLO. Sir, I have no insight to what percentage that the IFARA data represents for the whole KC–X decision process.

Senator INHOFE. Now, the final bid, I think, is sometime just in the next few weeks. It's coming up. Would this—in your opinion, from what you do know, would this impact the final bid?

General MASIELLO. Sir, I don't have a sense for how much it does or if it does affect the final bid. All I know is that the contractors have the opportunity to adjust their proposals any way they see fit over the next remaining period, whatever that might be, before their final proposal revisions are made.

Senator INHOFE. But, since this information, however important or unimportant it is, since I don't know and you're not in a position to know, has any thought been given to eliminate this IFARA element in the final bid process?

General MASIELLO. Sir, I couldn't confirm whether or not that would be the case. It would probably be something that a PCO would consider when they made the decision whether or not to—or how to address the inadvertent release.

Senator INHOFE. Well, I think it—as a member of this committee, I would like to get, from the person who would be in a position, if it's appropriate to know, as to whether or not this should—it bothers me that when there's—something is disclosed like this, and I don't know how significant it is relevant to the whole bid, I feel that we should know. And so, what I'd like to ask you, just for the record, is, if you determine, after talking to the appropriate people, that—how significant it is, maybe try to get an answer to the question I just asked. Would that be all right?

General MASIELLO. Yes, sir.

Senator INHOFE. All right.

Thank you. I don't have anything else, Mr. Chairman.

Chairman LEVIN. That's—thank you very much, Senator Inhofe.

Senator McCaskill.

Senator MCCASKILL. And let me just say, first, for the record, that this is a case study of incompetence at contract competition, this whole debacle from beginning to this very moment. And contract competition for something like this has to be a core competency.

And so, I want to know, in this instance, what punitive actions have been taken. We can call it an accident, but it's incompetent. So, what punitive actions have been taken against the person who made the mistake?

General MASIELLO. Ma'am, from what I read in the documents, the two people who were involved in making the mistake are no longer employed at Aeronautical Systems Center.

Senator MCCASKILL. So, they were fired?

General MASIELLO. Yes, ma'am—well, from that particular—from the program, and they have been moved to another——

Senator MCCASKILL. Where have they been moved?

General MASIELLO. Ma'am, I don't know.

Senator MCCASKILL. I would like to know that.

General MASIELLO. Yes, ma'am.

Senator MCCASKILL. I would like to know where they are. I would like to know if they're still making the same amount of money. And I would like to know if they're going to resurface later in another position of responsibility.

General MASIELLO. Yes, ma'am.

Senator MCCASKILL. I mean, there is a—sometimes—I mean, I have complimented Secretary Gates, because he has provided accountability at the top level in many instances where we have had problems. But, I just think this is beyond the pale.

There are so many things about this that are unusual. Let me start with this. If you can state for the record—and if you can't, I would like this answer from someone else within the military—it is very—isn't it correct that it is very unusual for Boeing to file a protest after a competition?

General MASIELLO. Ma'am, I couldn't answer that. I've had different experiences.

Senator MCCASKILL. Well, I would like—that's a question I would like for the record——

General MASIELLO. Ma'am.

Senator MCCASKILL. —that—I would like to know, from the Defense Department's perspective, whether or not it is unusual for Boeing to file a complaint——

General MASIELLO. Okay.

Senator MCCASKILL. —and whether or not it is unusual that all nine bases on which they filed the complaint were all sustained at the GAO.

[The information referred to follows:]

[INFORMATION]

Senator MCCASKILL. And I'm confused about the screen. EADS said, originally, that they didn't look at the data. Is that correct?

General MASIELLO. No, ma'am, they did not say that. The——

Senator MCCASKILL. They said they looked at it for a very brief period of time.

General MASIELLO. They looked at the screen shot of the spreadsheet. They admitted to that.

Senator MCCASKILL. Okay.

General MASIELLO. And that's what made them nervous. They realized that they shouldn't be looking at that.

Senator MCCASKILL. Okay. I'm confused, though. It appears to me, from looking at the information, that they originally said they looked at it a very short period of time. And the forensics indicated that that may not be true, that they might have looked at it longer than they originally said they looked at it. Is that correct, Mr. Shirley?

Mr. SHIRLEY. Senator, they—what we were able to determine is that the file was opened for a fairly short period of time. The computer was powered a bit longer. And so, in essence, the statement by the employee, we thought, was consistent with what we saw in the digital media.

Senator MCCASKILL. Well, why is it relevant that the computer was on longer? Can you pin down, with the forensics, that—how long—why do you even mention the computer was powered longer?

Mr. SHIRLEY. Well, it goes toward just a—when we perform an exam, we look at the media at a number of different levels. One of the things that's associated with the computer being in a powered state is that it's—there's a feature called "clock time" that tells you how long the computer's in operation and what files may be manipulated while it's in operation. So, it was part of the context of trying to validate the employee's statement against what we saw in the—on the computer.

Senator MCCASKILL. So, you are testifying today that you believe that the screen was only viewed for the same amount of time that EADS had represented that it had been viewed.

Mr. SHIRLEY. Roughly. Yes, ma'am.

Senator MCCASKILL. I am—I'm curious if you believe—and I'm—my sense is that we—these are not, maybe, the right witnesses to answer this question. To follow up on what Senator Inhofe said: Given this controversy, should IFARA be used and retained in the final evaluation process now?

General MASIELLO. Ma'am, it's not for me to judge. The PCO on the head of contracting activity determined that it was still appropriate to leave in the competition.

Senator MCCASKILL. We will compose another question for the record to get to those individuals, to get other rationale for that.

[The information referred to follows:]

[COMMITTEE INSERT]

Senator MCCASKILL. And finally, I know that, once again, these are probably not the right witnesses, but it's my understanding that the Department has taken the position that the WTO rulings are not relevant to their decision. And I would like to know where in the FAR that is prohibited. If it's not a level playing field, due to subsidies by other countries—it—you know, common sense tells me, from the Midwest, that if somebody's got their finger on the scale, in terms of subsidies they get from their government, that it's not a level playing field. And I am trying to get my arms around the notion that that's not relevant. And if either of you can speak to that, that would be terrific; if not, we'll try to track down the right person to get the answer from. Because I don't believe there's anything in the FAR that prohibits that from being considered.

General MASIELLO. I'll defer to the Department on that, ma'am.

Senator MCCASKILL. Okay.

I'm—I understand the limitations we have, Mr. Chairman, in terms of what we can ask, since this is an ongoing process. But, some of these are writ large policy discussions that I really think the Senate has to come to grips with.

I mean, we've got a farm field in Alabama and a company that's receiving tens upon billions of dollars of subsidies from foreign gov-

ernments, and we have had—and I'm not saying there—you know, obviously, this process began with bad acting on the part of the company that I think, you know, from where I sit, is better equipped to handle this.

But, having said that, you know, the notion that we are not going to take into account, in light of everything that's going on in this country, that we've got foreign nations that are subsidizing companies and that's not relevant to our competition, just doesn't make sense to me. And I would like us to get to that policy question in these hearings if at all possible.

And I thank you, Mr. Chairman.

Chairman LEVIN. Well, Senator McCaskill, I think, as you know, the purpose of this hearing is set forth, which is to see what happened here, specifically, and what was done to attempt to remedy it. The broader questions which you raise are appropriate in a different forum for that to be argued, or a different time. But, these witnesses, in all fairness to them, are not called for that purpose.

Senator MCCASKILL. I—and I certainly understand. And I don't mean to be in any way critical of these witnesses, because they're not prepared to handle these questions. But, they're on my mind and I needed to express them.

Chairman LEVIN. Which is your right. Thank you very——

Senator MCCASKILL. Thank you.

Chairman LEVIN. Thank you very much.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

And I would just like to say, first, that the Air Force did start off with this process in a very, very unfortunate way. People from both the Boeing Company and the Air Force went to jail. Senator McCain smelled a rat early on. This committee was the one committee that wasn't really consulted in how that original sole-source contract was awarded. And Senator McCain, supported by Senator Levin and Senator John Warner, challenged the situation.

And what we decided to do was to have a competition. It was the right decision to do, and it saved $7 billion. I remember declaring Senator McCain to be the $7 billion man; saved the taxpayers $7 billion as a result of having a competition in this process.

And a fair, objective competition is what we need and what we have committed to as a committee, as a Congress. Now, on the eve of this final decision, we've got people with political interest and local interest trying to destabilize the process. And I just am not happy about that. I wish it had not happened.

I understand how important it is, because it would mean a lot for my State, just like it would mean a lot for other States if it would go another way. But, we have to be sure that we're not doing anything that says that we expect the Air Force to do anything other than what we have directed them to do. And the question of subsidies and all of those matters have been discussed for a decade as we've gone forward with this. We've decided how we need to proceed with the competition, and we need to proceed in that way.

I suppose it's appropriate to ask about whether or not this possible information error infected the process. I'm not comfortable that it is. I asked General Schwartz, here, the Chief of Staff for the

Air Force, earlier about it. And he assured us all that there had been no unfair advantage gained through this process.

Mr. Chairman, thank you for your leadership. I really believe that, all in all—I know you've got members on your side and others that want you to do this, that, and the other—all in all, it's a thankless task you've got, and I think you've conducted it in a fair way.

I just would like to say, I think producing these documents is a bad idea. Just because they've been redacted to exclude source-selection-sensitive and proprietary information doesn't mean that releasing them might not cause disruption to the competition, which is taking place right now and coming to its conclusion. So, in my view, our disrupting in any way, politically, the competition would reflect poorly on our committee.

Now, I understand the Department of Defense doesn't object to the committee's release of the documents. While that fact is relevant, it still doesn't mean that, in the exercise of its discretion, that SASC should release them before the contract is awarded. So, I do object to that.

Chairman LEVIN. Well, they've already been made part of the record, Senator Sessions.

Senator SESSIONS. Mr. Chairman, General Masiello, the—I asked General Schwartz, in this room, last fall, last year, about the documents, and he responded, quote, "that both offerors reacted in a responsible manner and returned the disks that were mistakenly forwarded to them, to the Air Force. And we have confirmed that by forensic evidence." So, I'd just like to ask you today whether or not you or any—you have any information that would indicate that either competitor has acted inappropriately when they received the data that should not have been sent to them.

General?

General MASIELLO. Senator, by reading the statements that came from both companies, I was really quite impressed by the responses, on both companies' part, when they realized they had data that they shouldn't have had. So, my assessment is, they all acted very appropriately and have certified to that effect.

Senator SESSIONS. Now, Mr. Shirley, you've examined, forensically, the disk and the information. And have you been able to conclude that both offerors responded appropriately?

Mr. SHIRLEY. Senator, yes, sir. What we found in the—on their computers was consistent with what they said that they did, in each case.

Senator SESSIONS. General Masiello, with—did the Air Force—what action did you take once you realized this error had occurred?

General MASIELLO. Sir, what I read the PCO did when she heard was, she told them to package things up immediately and get the disks right back to the Air Force. And then they instituted an Independent Review Team. They went over to look and see what happened and what went on in the Air Force distribution process so they could correct that as—immediately. They pulled in the Defense service to examine the computers and got the CEOs to certify to the details that came from each incident on the companies' side.

It was very thorough.

Senator SESSIONS. And do you think that the process, as a result of this disclosure, was injured in anyway? Was fairness, in the process, damaged in any way?

General MASIELLO. From what I read here and from the decision that the PCO has validated by the head of contracting activity, there—and the fairness in sharing the same snapshot with the companies—I would come to the conclusion that it would not affect the source selection process.

Senator SESSIONS. Now, if either one of the companies—and they were told about this—if either one of the companies felt they had been unfairly affected by it, what action, if any, could they have taken?

General MASIELLO. Sir, a company can protest at any point, either pre-award or post-award. So, the companies still have the opportunity to protest if they think that anything is being inappropriately managed at this point.

Senator SESSIONS. And how long did the companies have—the offerors have to lodge a formal complaint as a result of this event?

General MASIELLO. They could even—it could still be a part of a post-award protest, should they choose to do that.

Senator SESSIONS. But—and have either one protested?

General MASIELLO. Not at this time, sir.

Senator SESSIONS. Then—throughout this whole process, there have been opportunities to protest, and neither company has.

General MASIELLO. That's correct.

Senator SESSIONS. And no formal complaint has been lodged.

General MASIELLO. That's correct, as far as I'm aware.

Senator SESSIONS. I suppose, then, that we have to conclude that both companies feel that this inadvertent disclosure did not affect them adversely to the degree that they should ask for it. Would you agree with that?

General MASIELLO. At this point, sir, I would.

Senator SESSIONS. On November 30th, a New York Times article indicated that a Air Force forensic specialist inspected both companies' computers and found that one of the firms had mistakenly opened a computer file containing information about its rival's airplane, while the other had not. The redacted forensic report presented to the committee yesterday asserts that both companies inspected their own and their competitors' disk, and opened them. General and Mr. Shirley, tell me which statement is correct, the New York Times report of the matter or the statement by the Air Force spokesman forensic report by the Defense Cyber Crime Center.

General MASIELLO. Sir, both disks opened—both companies put the other companies' disk in the computer. One of the companies realized the disk—what they saw on the disk right away was probably something they shouldn't look at. The second company opened one of the files on the disk, and that's the 10-line, approximately, as described in here, spreadsheet snapshot that was then swapped between the companies. So, both companies did put the disks in their computer, based on what I read. One opened a single file, and that's the snapshot of the IFARA data that's in question.

Senator SESSIONS. Mr. Shirley, you agree with that?

Mr. SHIRLEY. Yes, Senator, I do.

Senator SESSIONS. And you've explained the fact that, you know—so, we've heard the fact that nothing significant was disclosed, not unfair, it did not affect the competition, and that neither company have protested.

Mr. Chairman, there's a lot more we could talk about, but I would just say it's very important—I know it's important to every area of the country that has an interest in the outcome of the contract—but it's really important for us, on this committee, not to politicize this process. Every one of these issues, the trade issues and all, we've discussed for almost a decade, and we've made the decision to go forward. And we shouldn't, on the eve of this competition, take any action that would suggest we want the Air Force to do anything other than try to select the best aircraft at the best price for the men and women who defend our country.

And thank both of you for the effort you've take to get to the bottom of the error and establishing, I think conclusively, that there was no unfairness arising from it.

Thank you.

Chairman LEVIN. Thank you, Senator Sessions.

Senator Graham.

Senator GRAHAM. Thank you.

I have a completely different take than Senator Sessions on this. I think this is something we should be looking at; this is something we should be talking about. And, quite frankly, this is—Senator McCaskill said—is not the finest moment for the Air Force. And I happen to be member of it.

Bottom line, the sheet of information we're talking about, did it—was it the price proposal that the companies were making?

General MASIELLO. No, sir. The disk and the information that was presented and viewed was not proprietary and it included no pricing data.

Senator GRAHAM. Well, why do we even care about this?

[Laughter.]

General MASIELLO. Sir, it's an element of the decision process, as I understand it. It's a—it's information that was——

Senator GRAHAM. Was it important—was it an important event in the whole process? Did the information that was disclosed and viewed by one company, not the other, does it matter at all?

General MASIELLO. Sir, it matters from a fairness perspective. Whether it's important or not, the important thing is that we're fair to these companies.

Senator GRAHAM. Do you know if it's important?

General MASIELLO. Sir, I——

Senator GRAHAM. You've said you didn't know. Do you know?

General MASIELLO. I don't know.

Senator GRAHAM. Well, okay.

So, what's this whole hearing about? I mean, you can't tell us whether it was important or not. And, at the end of the day, the whole process has a conclusion to it. We're about to spend $35 billion of taxpayer money, here. And, quite frankly, I think it is important—and it's not your job to answer this question—as to whether or not we want to award a contract to a company that receives subsidies from a foreign government.

We're setting precedent here, and I think the committee should be looking at this. It's hard enough for American companies to compete, already. The Chinese Yuan is 40-percent undervalued. Now, if we're going to start awarding public contracts, where one side gets government aid and the other doesn't, from a foreign government, that's something we need to think about. So, that's not the purpose of this hearing, but we need to have some discussion about that.

Now, Mr. Shirley, the person at EADS said that they looked at it for 15 seconds. Is that correct?

Mr. SHIRLEY. Yes, sir. They——

Senator GRAHAM. How long was the computer on?

Mr. SHIRLEY. Roughly 20 minutes, sir.

Senator GRAHAM. Now, how can you say that a 15-second statement in a 20-minute gap in the computer is roughly consistent?

Mr. SHIRLEY. Well, sir——

Senator GRAHAM. What I'll do is, I'll ask us to sit in recess for 20 minutes versus 15 seconds, and you'll see, very clearly, there's a long gap in time between 15 seconds and 20 minutes.

Mr. SHIRLEY. Well, what we're—we're judging, sir, based on their—the statement presented by the employee——

Senator GRAHAM. Yes, no. But, do you know what was——

Mr. SHIRLEY.—that——

Senator GRAHAM.—the computer was on for 20 minutes; do you know what was on the screen for 20 minutes?

Mr. SHIRLEY. Yes, sir, I believe we do. And you're right, sir, we can't assert what that employee did or didn't do. All we know is what the company represented——

Senator GRAHAM. I just——

Mr. SHIRLEY.—in their statement.

Senator GRAHAM. The point is—you know, I'm no forensic expert, but the difference between 15 seconds and 20 minutes is a lot.

Mr. SHIRLEY. We know—we can tell, sir, how——

Senator GRAHAM. Thank you. I have no——

Mr. SHIRLEY.—how long a file is open, sir.

Senator SESSIONS. Mr. Chairman, if the witness could finish his answer.

Chairman LEVIN. Yes, I think——

Senator GRAHAM. Do you know what they looked at for 20 minutes?

Chairman LEVIN. Are you asking—who are you asking?

Senator GRAHAM. I'm asking anybody that can answer the question.

General MASIELLO. Sir, if——

Mr. SHIRLEY. Sir, can I——

Senator GRAHAM. Sure.

Mr. SHIRLEY.—finish this?

Let me say it this way, sir. Our lab found no evidence in conflict with the offer—either offeror's written statement. The only files opened were the files identified in the written——

Senator GRAHAM. I know your findings. I'm just asking a factual question. Can you tell us—the computer was on for 20 minutes, the person said they looked at it for 15 seconds. I guess the point I'm

trying to conclude here is—this whole idea that it doesn't matter, we can't really get to, because you all don't know.

Mr. SHIRLEY. Sir, the——

Senator GRAHAM. And I'm not complaining about the fact that you don't know. That's not your problem, that's my problem.

Mr. SHIRLEY. Well, sir, if I can clarify, here. The files were open—our examiner concluded that the files were open only for the time suggested by either offeror. Now——

Senator GRAHAM. I understand.

Mr. SHIRLEY.—now, they can——

Senator GRAHAM. I——

Mr. SHIRLEY.—he——

Senator GRAHAM.—I just wonder how you got to that conclusion.

Mr. SHIRLEY. Well, he can judge, from examination of the media, whether a file was open and when it——

Senator GRAHAM. Okay.

Mr. SHIRLEY.—opened and when——

Senator GRAHAM. All right.

Mr. SHIRLEY.—it was closed.

Senator GRAHAM. So, are you saying it was only opened for 15 seconds, forensically?

Mr. SHIRLEY. Yes, sir. It was open a brief time, and I'd have to——

Senator GRAHAM. But, can you say that this file was open for 15 seconds?

Mr. SHIRLEY. Sir, I'd take that one for the record and we will send you the precise times on that one——

Senator GRAHAM. Okay.

Mr. SHIRLEY.—if we may.

[The information referred to follows:]

[INFORMATION]

Senator GRAHAM. Thank you.

General MASIELLO. Senator, if I could add something to this. While the individual looked at the data, that individual was moved off of the program team into an administrative holding tank and was not allowed to participate in the program until the PCO released them to——

Senator GRAHAM. I'm going to submit questions for the record about why Boeing couldn't use landing sites that EADS could.

[The information referred to follows:]

[COMMITTEE INSERT]

Senator GRAHAM. This is not your—you don't know anything about this, but there's a bunch of problems of how this contract has been changed. Some people went to jail; they should have gone to jail.

Before we award this contract, I want to make sure that what we're doing here, Mr. Chairman, doesn't set a precedent for the future. Because if this is going to be the way we do contracting, where one company gets subsidies from a foreign government and the others doesn't, with public money, we need to think about that. And the process here, of what information was shared and what outcome it had, is precedent for the future. So, I am glad you had

this hearing, and I hope we'll think more about what we're about to do, not less.

So, thank you, Mr. Chairman.

Senator MCCAIN. Let me just clarify the one point, because we've had three different statements, it seems to me, Mr. Shirley, from you.

One, we know from the record that the person who opened up that file said that they looked at it for about 15 seconds. When I talked to you this—earlier today, when I asked you the question, you said you determined, forensically, that it was opened for a few minutes—a few minutes. Now you're saying that the computer was opened—not necessarily the file, but the computer was opened for about 20 minutes.

Mr. SHIRLEY. Yes, sir. The——

Chairman LEVIN. Do I have it straight? If not, straighten it out right now.

Mr. SHIRLEY. Yes, sir. The computer was powered—in a powered state for about 20 minutes.

Chairman LEVIN. How long was the file open?

Mr. SHIRLEY. The——

Chairman LEVIN. That page. How long was that page visible?

Mr. SHIRLEY. My recollection, from the briefing from my examiner, was roughly 3 minutes, sir.

Chairman LEVIN. Okay. I just was——

Senator MCCASKILL. Three minutes.

Chairman LEVIN. I think it's important that we get our terms straight, okay? Now——

General MASIELLO. Chairman, could I add to that——

Chairman LEVIN. Of course.

General MASIELLO.—to this, as well?

From what I read in the documentation, the person who was responsible for opening the file and seeing it realized that they shouldn't be looking at it. And their procedures are that, when they see something they shouldn't, from what I'm seeing here, is a two-person rule comes into play. And they saw it, and they were in a skiff, they couldn't use their phone to get the other person there to come help them close it and follow the procedures. So, they went outside of their classified area to use the phone to get hold of this person to let them know that they had discovered something that, boy, they were all going to get in trouble for, and they didn't want to get in trouble for.

So, the screen might have been open, but he was the only person in the room. He left the room to get the other person to come help them follow their procedures to close the data.

Chairman LEVIN. That's the statement of the person who opened the file. But, in terms of how long the——

General MASIELLO. Right.

Chairman LEVIN.—file was open, to get it straight, forensically, 3 minutes. Is that correct?

Mr. SHIRLEY. Yes.

Senator GRAHAM. And, Mr. Chairman, the Air Force obviously is trying to make sure this is not a big deal.

Chairman LEVIN. Yes. I——

Senator GRAHAM. And quite——

Chairman LEVIN. I'm not trying, Senator Graham, to say——

Senator GRAHAM. No.

Chairman LEVIN.—whether it's big or small——

Senator WICKER. Yes.

Chairman LEVIN.—because, obviously, it's—it raises some significant questions here, or——

Senator GRAHAM. Yes, it does.

Chairman LEVIN.—we wouldn't be here.

Senator GRAHAM. Yes, it does.

Chairman LEVIN. That's why we're here.

Senator GRAHAM. And you're——

Chairman LEVIN. And, I just want——

Senator GRAHAM.—and Mr.——

Chairman LEVIN. Excuse me, Senator.

Senator GRAHAM. I'm sorry.

Chairman LEVIN. I just want to get it—I'm not trying to defend, attack—I'm not trying—I'm just trying to straighten out facts——

Senator GRAHAM. Right.

Chairman LEVIN.—because we've had a statement, here, that it seems to me we've got to be very clear on, from Mr. Shirley.

The computer was powered for perhaps 20 minutes; file was opened for 3 minutes; the person who opened the file said they looked at it for 15 seconds. That's the statement which the person gives. Those are the times that we're talking about.

Now, the significance—whether or not it is significant that EADS had that information for some period of time, longer than—or that the person—excuse me, that that—whatever that information was that was seen by that person was—existed for some period of time before the two files were exchanged, right? And the significance, or lack thereof, is, it seems to me, an important issue, which we'll get to a little bit later. But, for the time being, that's the time, okay? I just think we——

And thank you, Senator Graham.

Now, forgive me, Senator Wicker, I've intervened before I called on you; I wanted to straighten that out. Thank you.

Senator Wicker.

Senator WICKER. Well, I thank you for straightening that out. I think that was very helpful. And I appreciate the Chair actually giving Mr. Shirley an opportunity to answer the question. This is not a jury trial, where we're trying to play "got you." You know, we're able to leave the record open and get a full explanation.

But, I think I see what's going on here, Mr. Chairman.

There are some people in this town who believe that the company that they favor may be about to lose a bid again, as they did in 2008. And a foundation is being laid for howls of protest. Now, I don't know—I don't have any idea who's going to win the award. I do know who won it in 2008. And I regret that the Department of Defense didn't go forward with that contract then. We would be very, very close to having a tanker that we could rely on.

But, I see what is happening with this hearing. And, of course, there—it's no wonder that General Masiello and Mr. Shirley can't answer these questions, because they're not involved in the actual award.

I thought this was going to be a hearing about how the information was inadvertently released and how that has been corrected.

But, let me see if I can get to this procedure, with regard to the computer being on for 20 minutes, the file being open for about 3 minutes, and the statement of the individual, that he viewed it for some 15 seconds.

Do I understand, General, that the EADS procedure is that, once an individual realizes he has opened a file, then he must go and get a second person to come in and verify that before it can be closed? Was that your statement?

General MASIELLO. Sir, I'm not sure what the procedures are. What I read was, they had to have another person to—they instituted a two-person rule that, together, they close the data, they sealed the data, and they took the disk and put it in a safe, separate from any working documents, isolating it completely from the rest of the—their specific bid information.

Senator WICKER. Mr. Shirley, is that consistent with the file being open for approximately 3 minutes?

Mr. SHIRLEY. Well, sir, part of what General Masiello talked about, we were given to understand, at the lab, that when the employee opened the question—they were very nervous about what had occurred, realized that they shouldn't be looking at the—that particular piece of data. And they went through some sort of internal process to see, "Geez, how should we walk back from this," and essentially find another witness or a second party to sort of instruct them, "Okay, what do we do next? We've—we're into something that's awkward." And so, that was why the computer, we were given to understand, was left on, while they figured out that internal process. And, as they did, then they shut the computer down and went through the process that General Masiello just described, Senator.

Senator WICKER. Okay.

And then, General, the Air Force, after looking at this and after understanding what had happened, decided to level the playing field. Now, once again, tell the committee what information has been shared to both of these competitors—to each of these competitors, to level the playing field.

General MASIELLO. As I understand it, it was the snapshot screen of the spreadsheet, that the contractor saw. And they took a picture of the screen from the computer that had that information, and took that same picture of the screen from the other competitor, and swapped that information. It's just a single piece of paper that had the spreadsheet from each offeror. And it's the——

Senator WICKER. Okay, so——

General MASIELLO.—IFARA data.

Senator WICKER.—it really wouldn't matter if the person from the EADS had looked at that file for 20 minutes, would it? Because, now both competitors can look at each other's snapshot of that spreadsheet for an infinitely long time, is that not correct?

General MASIELLO. That's correct, Senator.

Senator WICKER. You know, I really don't think there's anything more to ask about. I'm—did either competitor change their proposal significantly after this information was shared?

General MASIELLO. Sir, I have no way of knowing that. But, right now they still have the opportunity to change it, should they choose to.

Senator WICKER. Okay.

Now—and my friend from Missouri mentioned a protest.

With regard to this release of information, is it a fact that neither Boeing nor EADS has protested this?

General MASIELLO. That is correct.

Senator WICKER. And, as a matter of fact, I would observe, Mr. Chairman, that the statements from both of the companies that are before us, both relatively straightforward and relatively relaxed about this, and that neither has an—having had an opportunity to file a protest, has done so.

Do either of you have—can either of you answer this question—and I suspect you can't, because you're not involved in the contract—but, to be—this is not—the testimony is that this is not proprietary information, but in previous competitions, hasn't this exact data been provided in 2008? And isn't it already sort of part of the public record?

General MASIELLO. Sir, I'm sorry, I can't answer that.

Senator WICKER. Okay. I expected that was the answer.

Well, Mr. Chairman, you had no choice but to call the hearing. Until I see a protest from either company, I'm going to conclude that the Air Force saw an example of human error, and that they responded correctly, professionally, and properly, and have now leveled the playing field, and we should go forward and, hopefully, not see further delay in this very important program.

Thank you.

Chairman LEVIN. Thank you, Senator Wicker.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

All I can say is, thank goodness it wasn't highly classified information, you know, like we've had in other circumstances. And I—being in the military, I understand the scenario that—the followup, the checks and balances, where you try to identify the problems, where they were, and you move forward to make sure it doesn't happen again. And I appreciate that.

I guess, are you able to guarantee to the committee that the unauthorized release of this information, then, did not give one contractor an unfair advantage?

General MASIELLO. Sir, I can't guarantee anything like that. I don't know enough about it, whether to judge or not.

Senator BROWN. Right.

General MASIELLO. But, what we have done has provided the same type of information to both contractors now, so the—from what I can see, and based on the Air Force having taken that action, it appears that they have leveled the playing field——

Senator BROWN. Right. Well——

General MASIELLO.—and would not——

Senator BROWN.—and——

General MASIELLO.—give either one more advantage.

Senator BROWN.—and you're right, you can't answer that. And I'm quite—I'm not quite sure why we're actually here. And I under-

stand there may be other things happening behind the scenes that are forcing us to be here.

But, I don't think—I mean, we—I appreciate—your statement could have been given to me offline as to what you've done, and I would have—if I had any other questions—I understand sometimes we need to kind of politicize things a little bit more.

But, the one thing that I'm kind of surprised at is, it takes 10 years for the Federal Government to issue a contract. I mean, it's—only in the Federal Government does it take 10 years to issue a contract. It's amazing to me.

You know, being not as new as I once was, but I'm just amazed when I learn about these breakdowns. Not only is it not cost effective, we're wasting taxpayer money, we're losing the confidence of the people that we deal with, not only the average citizen, but the individual businesses that we deal with, you know, to the point where, like, you know, "Why bother? It's going to take 10 years. We're going to have to file a bunch of protests. It's going to go on and on and on and on." It just makes no sense to me.

But, I want to thank you for braving the elements, even though this is—I'm from Massachusetts, this is kind of a late snow—and taking the time to come in. And we thank you for the preparation.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Brown.

I think the question was raised as to what was available during the last protest, which the previous contract award, which—where the protest, I think, succeeded. The—do you know whether or not this data was made accessible—was—let me start over.

Was one contractor's IFARA data made available to the other contractor as a result of the protest process during the previous competition?

General MASIELLO. Sir, I can't answer that question. I don't know.

Chairman LEVIN. We'll ask that——

General MASIELLO. Yes, sir.

Chairman LEVIN.—for the record. That is a question which is factual and it's not in any way, it seems to me, inappropriate to know, because that gets to the question as to whether this data is relevant. It may not be proprietary, but it could be relevant. It could be relevant—could be; I'm not saying it is, but——

General MASIELLO. Right. I——

Chairman LEVIN.—it could be relevant that, assuming that this data was known to the person or understood by the person or remembered by person who saw it for somewhere between 15 seconds minimum and a few minutes maximum, according to the experts here, whether that data gave an advantage because it was available to the one contractor for the month, or whatever it took, before the switch took place. I don't—I'll ask you the question, whether or not that would give any advantage to have that data, assuming it was remembered, to have that in one's possession for that period of time before—between November 1 and the time that the data was exchanged. Do you know the date of that exchange?

General MASIELLO. Sir, I—it's in here, and I don't recall exactly what the date is. He can help me find that date. But, the other——

Chairman LEVIN. But it——

General MASIELLO.—if I could add another point——

Chairman LEVIN. Yes. But for——

General MASIELLO. Here it is.

Chairman LEVIN. Yes.

General MASIELLO. November 22nd. So——

Chairman LEVIN. Okay, so whether or not that gives an advantage or not, to have the data, assuming it was remembered, et cetera, for that 21-day period or not, is not, as I understand it, for you to say. Is that correct?

General MASIELLO. That's correct. But, if I were just looking at a snapshot of the information, and all I did was have a snapshot of the information, so they wouldn't have known what was going on behind the data to get to that point. And the person who did have that information, who had seen that screenshot, was removed from the program, so they were not allowed to talk to anybody associated with program. And they have not, according to their certification—that was also certified by the CEO—talked or told anyone in the company what they saw on that data.

But, now that it's been exchanged——

Chairman LEVIN. That is an attempt——

General MASIELLO.—it's level.

Chairman LEVIN. Well, when you say, "it's level," I think you, frankly, should be a little more cautious. I think it's an attempt to level the playing field.

General MASIELLO. Fair enough.

Chairman LEVIN. And it may be a successful attempt.

General MASIELLO. Fair enough. Fair enough.

Chairman LEVIN. Okay? I mean——

General MASIELLO. Yes, sir.

Chairman LEVIN.—unless there's some advantage to having that data for 21 days, in the possession of somebody who has said they didn't share that data with anybody else, then that is an attempt to level the playing field, which may have succeeded. Okay?

General MASIELLO. Correct.

Chairman LEVIN. Okay.

General MASIELLO. Fair.

Chairman LEVIN. General, let me—I just have a couple more questions. The remedy here or the attempt to level the playing field, which, again, may or may not succeeded—someone—people may want to argue that—but, what other options were considered by the Air Force to remedy this mistake?

General MASIELLO. Again, Senator, I don't know.

Chairman LEVIN. If you don't know, that's fine.

General MASIELLO. I don't know.

Chairman LEVIN. No, you've been called here for a specific purpose, and you have given us the information to the best of your ability.

Same thing with you, Mr. Shirley.

You're not—you know, I think we've got to be fair to you as to why you were called.

It's important that we get this information on the record, although it may be—I emphasize "may be"—of limited value. It is part of an overall picture on this contract, which took 10 years, by the way, because there was fraud and corruption involved at—in

one point during this process, where someone landed in jail. And there are a number of reasons why it's extended. And the last thing I want to do is inappropriately extend the period. And this hearing is not doing that.

We're simply getting information. Whether this information is usable—whatever the value of it is, in advance or afterwards, you can debate that, too. I happen to think it's useful to get this out in advance, for a number of reasons. I think the clearer the air is, going into that decision, the better off we are. And this is intended to get factual information to—whichever way one wants to argue it—to get that on the record, prior to a decision. I shouldn't say it clears the air; we don't know if it clears the air. Some may argue that it gives weight to one side or the other. I'm not arguing that.

But, it is important, it seems to me, that all of the appropriate facts that can be made public are made public before the decision. There may be a lot of argument after the decision, but at least before the decision, it seems to me we ought to get as much out there on the record as we can.

So, you don't know what other options were considered by the Air Force. And, can you—I will ask, for the record, the question about whether, in the previous protest, this information was made available to the competitors. Will you take that for the record?

General MASIELLO. Yes, sir.

[The information referred to follows:]

[INFORMATION]

Chairman LEVIN. In the previous protest process?

Okay. Senator Sessions.

Senator SESSIONS. Let me just say, in defense of the Air Force, thousands of decisions and interactions and communications, I'm sure, have been undertaken in this effort. After the last incident, in which fraud was discovered and Boeing officials went to jail, the effort redoubled to do this in the most fair way possible, to the extent to which the greater capabilities of the airplane to be built in Alabama were really not considered in the bid. It's basically a low-bid contract to make sure that whoever can—comes in with the lowest price gets the contract, no matter if one plane is more capable in every single area of evaluation; they get very little credit for that.

So, I'm just saying, I know the Air Force has gone—bent over backwards to be fair about this. And an error—human error occurs, and I just don't think it should besmirch the reputation of the Air Force. And I do believe that you took appropriate action.

General Masiello, didn't the Secretary of Defense send an Independent Review Team, from the Secretary of Defense team, to come and evaluate the accident independently of the people who were supervising the contract?

General MASIELLO. Yes, sir.

Senator SESSIONS. I just think that—the Air Force tried to do what they could. They notified everybody, they did everything they could do. And, fortunately, it appears that nothing serious happened that jeopardized the fairness of this contract. I think that's pretty plain.

Mr. Smalley——

Chairman LEVIN. Shirley.

Senator SESSIONS.—Shirley, excuse me—the examination report from the Defense Cyber Crime Center, Defense Computer Forensics Laboratory, that's a unit that takes pride in its independence and integrity, does it not?

Mr. SHIRLEY. Yes, sir, it does.

Senator SESSIONS. And you were brought in to independently evaluate what happened.

Mr. SHIRLEY. That's correct, sir.

Senator SESSIONS. And you concluded there were no signs of network connections—"No signs of network connections were disclosed, and no signs of attached storage devices were found." That was one of the findings.

Mr. SHIRLEY. That's correct, Senator.

Senator SESSIONS. No sign of any documents being printed were found, is that correct?

Mr. SHIRLEY. That is correct, sir. Yes, sir.

Senator SESSIONS. And no trace of K76–B data, other than file names, was found on the server hard drive.

Mr. SHIRLEY. That's correct, Senator.

Senator SESSIONS. And that would indicate that nobody downloaded, copied, or stored this information——

Mr. SHIRLEY. We saw——

Senator SESSIONS.—would it not?

Mr. SHIRLEY.—no evidence of that, sir.

Senator SESSIONS. That's pretty conclusive, actually, your ability to determine that. It—so, I think that's important.

And I think, General Masiello, Senator Wicker asked you an important question. The document that was revealed in—when he was opening that file, did that include dramatic, important evidence? Or, fortunately, was it something that was—did not impact the fairness of the competition?

General MASIELLO. I don't know the relative importance, but whether it did affect or establish or create an—at minimum, an appearance of unfairness, by swapping the same snapshot between the companies, the same type of information between the companies, that established—from the Air Force perspective, reestablished fairness in the competition.

Senator SESSIONS. And with regard to the parties who are aggressively competing for this—and, I hope, submitting the lowest possible bids, for the benefit of America and the taxpayers, they can possibly submit, because that's what it's going to take to win this contract—they had—I understand there was a 10-day formal complaint period. Maybe I'm wrong about that. But, at any rate, neither competitor has filed any kind of formal complaint——

General MASIELLO. That's correct.

Senator SESSIONS.—about this matter.

General MASIELLO. That's correct.

Senator SESSIONS. And the individual, as you noted, that was—saw that, was removed from the process.

Mr. Chairman, I think it's fine that we had the hearing. I—we were briefed on it by the Air Force immediately. General Schwartz has testified to it, I guess, in December of last year. And I believe they responded well. I think both parties understand what happened and are prepared to accept the Air Force's decision, or else

they would have protested. And this critically important contract is on the road until final decision. And I just hope and pray and expect that the Air Force will do so fairly and objectively, and award the contract to the competitor that deserve to win.

And I would repeat one more time, when we directed, explicitly, as part of the Defense bill, that this award of the tanker contract would be competed, we knew there were only two competitors in the whole world that could provide this. And at that time, people raised some of these issues. Now, there are arguments on both sides, but we made that decision. We're moving forward to the final decision, going forward with the two competitors in the world aggressively submitting bids to produce an aircraft, hopefully, that will meet the standards of the Air Force at the lowest possible price.

And our committee certainly has not been shy about it, Mr. Chairman. We've done, I think, our duty without politicizing the process, to date. And I hope that we can continue at that rate.

Chairman LEVIN. Thank you very much, Senator Sessions.

Senator McCaskill.

Senator MCCASKILL. Mr. Chairman, I want to take a moment here to—after my friend from Mississippi said that he could see what's going on here. I want to explain, very clearly on the record, what's going here—on here, from my perspective as a Senator.

Am I unhappy about the notion that a subsidized company from another country is going to compete on a level playing field with a company that's not subsidized? Yes, I'm very unhappy about that. I've heard a lot of lectures over the last year about socialization and the notion that government should not be subsidizing private companies. And the idea—the idea that all of a sudden we can ignore that—completely ignore that and decide, "Well, socialization's okay if it's being done in another nation," and then a company that's being subsidized by the government of another nation is going to compete on a level playing field with a company that's a free-market company, I think is absolutely wrong, especially in the Department of Defense.

What if this company was owned by China? Would we take that into consideration? Okay, so they're our allies, and they're only subsidized to the tune of 10 or 20 billion. We don't take that into consideration? I don't want to hear any more lectures about the government's socialization or subsidization of American companies, because if this is not relevant, then we shouldn't be complaining about it—if it's not relevant.

That's what's going on. These jobs aren't going to Missouri. This tanker wouldn't be built in Missouri. This tanker's going to be built in another State. So, I—and what happened here, there was fraud. There were criminals. And then the process was not fair, with all due respect, Senator Sessions. It wasn't.

They didn't bend over backwards to make the process fair after the fraud was found, because, in a very unusual move, one of our major Defense contractor filed a protest. And an independent auditing agency said, "You know what? It was very unfair." And that's what happened in 2008. They stacked the deck.

And I'll tell you, from my standpoint, what I think happened is, they were embarrassed. The Air Force was embarrassed that they

had allowed fraud to go on in this kind of competition, and they overcompensated and said, "Okay, Boeing, we're going to make sure you don't get it." And they put out a proposal that the GAO said every single basis was unfair.

So, that's how we got here. It wasn't that the Air Force bent over backwards to make it fair after the fraud. We have an independent evaluation of that.

So, I—and I just want to make sure the record's clear about that, because I would be this way—I don't care where the jobs were going to be—I don't think the Department of Defense should treat companies equally if one is subsidized by a foreign government. I think it's a bad precedent. I don't think we should be doing it. I think most Americans don't think we should be doing it.

And I know there are jobs that are going to be had here in various States. And we all do this around here. We're competing for jobs, just like American companies are competing for jobs. And I think, at the end of the day, we should be doing everything we can to at least take that into consideration, because the lowest and best price is relevant to whether or not they're subsidized. It's relevant.

And so, I want to make sure, after—said, "I see what's going on here″—I wanted to explain what's going on here from my perspective, because these aren't Missouri jobs. These are not Missouri jobs. And so, I think this is a process that has been terribly flawed.

Let me ask—and a lot of what you've testified today, I think is fair. And this really isn't a trial, because, frankly, if this was a trial, I could ask a series of leading questions that would highlight what I think is the case. A lot of what you've testified is that you couldn't prove that EADS didn't do what they said they did.

In other words, the computer was on; you can't prove how—whether they looked at it. There's no proof whether—other than the man's testimony, whether he looked at it at 15 seconds or 3 minutes, correct? You just can't disprove what they said, correct?

Mr. SHIRLEY. Ma'am, I think it would be wise for us to send you the specific technical findings, in a question for the record, to clarify that.

[The information referred to follows:]

[INFORMATION]

Mr. SHIRLEY. What we believe that we saw on that computer media—now, I did not read that employee's statement. I did not see that material. The aspect that he looked at it fairly briefly, 15 seconds, is something that I understand from the conversations that—relating to preparing for this. We did see—we had the media in question—or, let me phrase it this way.

We had each company's computer that was forwarded to us, based on the agreement of the companies and the Program Office, and it delivered to our lab. And then we subjected each of those company's computers to a detailed forensic examination that's outlined in a very exhaustive technical report.

I did not review the specific details of the entirety of that report, because it had source selection—I don't—I can't say this specifically—but out of a concern that it had source selection or other proprietary material. I wanted to understand that, in directing the assets of our lab and our process, that we received that—those computers in the right fashion, that we looked at those with the right

subject-matter experts, that could deliver a technical report consistent with our processes and procedures; and then, under the specific direction of our lab director, that process was conducted and we generated or rendered the—as I mentioned, the technical report in process—or in—as a result of that process.

As I—I believe I mentioned earlier that the only files—from that technical report, the only files opened were the files that were identified in each of the respective written statements, that the files were only opened for the time suggested by each of the respective companies——

Senator MCCASKILL. Well, wait just a minute there. I understand that they were opened for that period of time. But, the only knowledge we have about how long the screen was looked at is what the individual said.

Mr. SHIRLEY. Yes.

Senator MCCASKILL. We have no way of knowing whether they looked at that screen for 15 seconds——

Mr. SHIRLEY. Senator——

Senator MCCASKILL. —or whether they looked at it for 3 minutes.

Mr. SHIRLEY. Senator, you're precisely correct.

Senator MCCASKILL. Right. Okay. That's what I wanted to establish.

Mr. SHIRLEY. Yes, ma'am.

Senator MCCASKILL. And could have EADS adjusted their final and best offer—this is my question, it's a yes-or-no question—could EADS have adjusted their final and best offer based on the IFARA data, General?

General MASIELLO. Ma'am, both offerors can—now that they have an exchange of the information, both offerors have the opportunity to adjust their proposals. That's——

Senator MCCASKILL. Well, I understand now.

General MASIELLO.—still in——

Senator MCCASKILL. But, let's assume that after they—someone looked at the screen, could they have adjusted their data? Or could they have adjusted their final and best offer?

General MASIELLO. Well, I don't know, because I know how much information is revealed in the quick amount of time that they looked at the information.

Senator MCCASKILL. And do you believe that, based on the data—the IFARA data that was on the page—that 3 minutes would be enough time to memorize that data?

General MASIELLO. I can't speak for the individual.

Senator MCCASKILL. And I don't want to ascribe nefarious motives to this company.

I just am frustrated, because I'm embarrassed at how this process has happened from the beginning to this moment. And I am very exercised about the notion that we are not going to have a policy in this country that doesn't take into account, when we are having a competition, that it is a company that is subsidized, to a very large extent. I mean, if we were subsidizing Boeing to this extent, there'd be press conferences going on around here about how this is a subsidization bailout of a—we shouldn't—government shouldn't be in private companies' businesses. But, somehow it's okay now.

And I just don't get that inconsistency. And that's why I'm as exercised as I am.

Thank you very much, Mr. Chairman.

And thank you all. I understand you're here and—and my passion about this has very little to do with the fine work you've done preparing for this hearing and the efforts you've made after this unfortunate incident. But, nonetheless, I think it's very important that I explain what's going on with this Senator.

Thank you very much, Senator Levin.

Chairman LEVIN. Thank you, Senator McCaskill.

Senator SESSIONS. Mr. Chairman, just—could I offer, for the record, the GAO report on the protest previously? It found eight violations out of 111 complaints. And it was very close questions, in my view, whether that should have—protest should have been upheld. And I don't think the Air Force deserves as much criticism as my colleague suggests.

And also, when I was referring, Senator McCaskill, to "bending over backwards," I really thought I meant that post-protest this final competition——

Senator MCCASKILL. And I would agree with you on that.

Chairman LEVIN. That will be made part of the record.

Senator Wicker.

Senator WICKER. Well, I appreciate Senator Sessions making that a part of the record, or offering to make that a part of the record, and for the committee accepting it without objection.

I have information—and someone should correct me if I'm mistaken—but the information provided to me by my staff is that, in September, the WTO ruled that, in fact, Boeing received illegal aid from the United States Government, and that it—as a matter of fact, WTO has made findings against both of these competitors with regard to improper aid from their governments. I stand to be corrected, but that's the information I have.

The information that I also have is that the Secretary of Defense has determined that these WTO rulings against both competitors will not be a factor in the competition.

A determination was made in 2008, by the independent analysts at the Acquisition Office, that, in fact, EADS and their partner at the time had a bid for the "best aircraft." And I thought the criteria should be what's best for the United States Air Force, what's best for the fighting men and women who are going to depend on this, what's best for national security. And, in my judgment, that decision was made independently and correctly.

I think the—by kicking the can down the road, now, to 2011, there is a real risk, Mr. Chairman, that the acquisition for major projects, such as this, will always be called into question. And I fear that we've done great damage to the future of acquisition in the Pentagon.

Let me make a final point about the 3 minutes versus the 20 minutes versus the 15 seconds. That information has now been shared with both companies. Is that correct, General?

General MASIELLO. Yes, Senator. That's correct.

Senator WICKER. And so, it wouldn't matter if the EADS employee had looked at the data for 3 hours or for 3 days. Each company now has that one little bit of information for—from the other

company. And they've had it, and they could analyze it til the wee hours of the morning. Is that correct?

General MASIELLO. That's correct, sir.

Senator WICKER. Well, I appreciate what the Air Force has done. Clearly, human error is going to—you know, unfortunately, going to happen. Anytime an organization is shot through with people, you're going to have human error occur.

And I appreciate what the Air Force has done. They're my branch, too. I love them all, but I'm—as Senator Graham, I'm an Air Force veteran and an Air Force Reserve veteran, and I think that the Air Force acted very professionally and has corrected this inadvertent mistake.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Wicker.

Let me just, for the record, put in a chronology here, because this committee has been following the tanker modernization program closely for a number of years, obviously.

In 2002 and 2003, we directed a series of reviews. We held hearings that identified serious problems with the sole-source lease originally proposed by the Air Force. This ultimately led, or helped to lead, to the cancellation of the contract. That was the time when the corruption was discovered. And that was described earlier today, that this committee played an important role in uncovering that; and Senator McCain, particularly, took the lead on that, but a number of us very much supported that effort.

2007 and 2008, we closely followed the Air Force's unsuccessful second attempt to award a tanker contract. It was unsuccessful because the General Accounting Office upheld the protest to that award.

And so, now we're trying to do what we can to get the—on the record for consideration the facts that surrounded this release of information that obviously never should have taken place. There was some significant incompetence that led to this release of information. Everybody acknowledges it shouldn't have been.

Now, whether or not the effort of the Air Force to level the playing field, in fact, succeeded or not is not a matter for this deliberation. We're not looking at that aspect of it. That may or may not be debated by one or more of the parties later on. But, that would be the issue, it seems to me, as to whether or not that playing field, in fact, has been leveled. There clearly is an attempt to level it. And I give—commend the Air Force for trying to do that. But, whether or not, in fact, it has been leveled, or whether there was some either advantage during that 21-day period that existed, assuming that the information was made available beyond that one person's mind, but also the question as to whether or not this information, in the possession of one party or the other, even though it's in the possession of both, that it advantages one party more than the other party.

Now, I don't know if I said clearly there what I meant, but you can give somebody who is—and this analogy, I think, probably doesn't work at all—but, you can give somebody who is wealthy a dollar, and you can give somebody who is broke a dollar; the fact that you gave them both a dollar clearly advantages the person

who's broke more than the person who's wealthy. But, you gave them both a dollar.

In this case, and I sure—I have no opinion on this question—but, it seems to me it could be an issue as to whether or not the exchange of the same information advantages one party more than the other, for whatever reasons could exist.

The intent to level the playing field is clear. That's clear. The attempt to do that is the right thing to do. But, whether it succeeds or not is a different issue, one that I'm not able to expound upon, because I'd have to know exactly what those arguments are. But, I think we have to at least leave open that possibility.

My colleagues, thank you all.

I want to thank our witnesses for their presence here today, for coming during this weather challenge. I know, particularly for one of you, you came a long distance, maybe had no sleep. I won't identify which of the two of you it is, because both of you deserve credit for your testimony. I very much appreciate it.

And we will stand adjourned.

[Whereupon, at 11:11 a.m., the committee adjourned.]