

Section IV.B ensures that, after the merger, Northrop will make its payloads available on a non-discriminatory basis to other prime contractor competitors in those reconnaissance satellite system programs for which Northrop has not yet been selected as the prime contractor or the payload provider. It addresses immediate competitive concerns related to Northrop's post-merger conduct in the SBR program, as well as conduct in future reconnaissance satellite system programs for which Northrop is a prime contract competitor and has the opportunity to select its own radar or EO/IR payload. Section IV.F establishes firewall provisions designed to protect the confidential business information of Northrop's satellite prime competitors and radar and EO/IR payload competitors. Four final Sections of the proposed Final Judgment ensure compliance with its terms. Section V provides for the appointment of a Compliance Officer and defines his or her powers and responsibilities; Section VI reserves important investigatory and enforcement powers for the Antitrust Division of the United States Department of Justice; Section VII permits the Court to impose substantial civil penalties for violations of the Final Judgment; and Section VIII confirms the Court's continuing jurisdiction to modify and enforce the proposed Final Judgment.

Non-Discrimination

Section IV.A of the proposed Final Judgment establishes that when Northrop is the prime contractor for a reconnaissance satellite system program, is responsible for selecting the payload, and has the opportunity to select its own payload, Northrop must select the payload on a competitive and non-discriminatory basis. To ensure that it makes an impartial payload selection, Northrop must propose and obtain approval of payload source selection criteria from the Compliance Officer and communicate the criteria to all competing payload suppliers. Should the Compliance Officer not approve the criteria, the Secretary of the Air Force shall have the sole discretion to approve, alter, or set the selection criteria. Under these circumstances, Northrop shall also provide information regarding its reconnaissance satellite systems to its in-house proposal teams and bona fide payload competitors, and make all personnel, resource allocation, and satellite system design decisions on a non-discriminatory basis. If Northrop selects its own payload, it must fully explain the basis for that selection to and seek the prior approval of the Compliance Officer. Where, however, Northrop notifies the Compliance Officer that it has elected not to use or supply its payload to itself as prime contractor, it need not comply with the above requirements.

Section IV.B requires that when Northrop is either a competitor or potential competitor for a prime contractor position on a reconnaissance satellite system program in which it has the opportunity to select its own payload, it must supply its payload on a non-discriminatory basis to all prime contractors that have expressed to Northrop a potential desire to utilize it. To that end, Northrop is required to supply its payload and related information to all such prime contractors in

a manner that does not favor its in-house proposal team. For the purpose of bidding on satellite competitions and similar activities, it must also negotiate in good faith with such prime contractors to enter into commercially reasonable nonexclusive teaming agreement and contracts that do not discriminate in favor of its in-house proposal team. These teaming agreements will be subject to the approval of the Compliance Officer and the Secretary of the Air Force. Northrop also must, on a non-discriminatory basis, make all personnel, resource allocation, and design decisions concerning its payload and provide information regarding its payload to contractors with which it has teamed. If the Compliance Officer concludes that Northrop has failed to comply with these requirements, the Secretary of the Air Force has the sole discretion to decide with whom, and on what terms, Northrop enters into such teaming relationships.

The non-discrimination rules of Section IV.A and IV.B are the central provisions of this proposed Final Judgment and apply to a wide variety of conduct: the provision of information to competitors and in-house teams, payload selection criteria, payload selection, entering into contracts or teaming agreements, and numerous other decisions affecting such matters as personnel, design and investment. The term "discriminate" is defined in Section II.N. of the proposed Final Judgment as meaning "to choose or advantage Northrop or to reject or disadvantage a Northrop prime or payload competitor for any reason other than the competitive merits; provided, however, that the determination of compliance or non-compliance with the non-discrimination provisions of this Final Judgment shall take into account that different firms will take different competitive approaches that may result in differences, individually or collectively * * *" in a number of factors.

What this means in practice is that the United States will require Northrop to be equally aggressive in supporting all competing teams. While different firms will follow different competitive and technical approaches when competing for reconnaissance satellite systems and payloads, differences in treatment must be merit-driven. Northrop will not be permitted to favor its in-house approach and undermine competing teams and their innovation approaches. The proposed Final Judgment recognizes that discrimination may result from either a single event, such as a important design decision, or from a series of smaller actions.

Sections IV.A and IV.B of the Final Judgment preserve competition by providing other payload and prime contract competitors the opportunity to provide meaningful competition in their respective markets and by ensuring that Northrop makes payload selections in the best interests of the U.S. Government. Absent these requirements, Northrop could deny other payload competitors access to its reconnaissance satellite systems information or make discriminatory selections regarding its satellite systems, thereby precluding competitors from competing to provide the payload. Likewise, Northrop could deny

access to its payloads and thereby deny its prime contractor competitors the opportunity to provide meaningful competition, and deny the U.S. Government the benefits of that competition. These provisions ensure that DoD has the maximum possible number of potential teaming possibilities in response to a request for proposals and that the highest-value payload and reconnaissance satellite system are selected. Absent these provisions, foreclosure by Northrop would reduce incentives to innovate and reduce the number of innovation approaches, thus harming the U.S. Government.

Firewalls

Section IV.F of the proposed Final Judgment requires that Northrop maintain its payload business separate and apart from its satellite prime business.¹ These provisions prevent the flow of information between the two businesses by requiring Northrop to establish separate communication networks, maintain separate locations, and use reasonable efforts to avoid transferring employees between the businesses. These firewall provisions further prevent Northrop's payload business from making available to its satellite prime business any non-public information provided by a prime contract competitor to Northrop as the payload provider. This will preserve competition by assuring other prime contract competitors that their confidential reconnaissance satellite system information will not be shared with Northrop's satellite prime business, thereby encouraging them to team their satellite systems with Northrop's payloads, providing DoD with the maximum number of teaming possibilities, and preserving the greatest number of innovation paths. Similar provisions assure other payload competitors that their confidential payload information will not be shared with Northrop's payload business.

Enforcement

To assure compliance with the Final Judgment, Section V requires the Secretary of Defense to appoint a Compliance Officer who, by the terms of the Final Judgment, has all necessary investigative and enforcement powers. The Compliance Officer, an employee of the U.S. Government, is authorized to hire, at the expense of Northrop, a team of contractors and other technical personnel to assist him or her in monitoring and ensuring compliance with the proposed Final Judgment. The team is limited to ten hired consultants, absent the approval of the Secretary of the Air Force to increase that number. Northrop may not object to the Compliance Officer selected by the Secretary of Defense, must use its best efforts to assist the Compliance Officer, and may take no action to interfere with or impede his or her duties. In practice, it is expected that the Compliance Officer will be proactive and will intercede early on to address and remedy any issues informally.

¹ The proposed Final Judgment describes this business as the "current TRW Space & Electronics Satellite Systems business." This unit, which conducts TRW's satellite system prime contracting business, will conduct that business for the combined company, and the proposed Final Judgment will apply to any future reorganization.