



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

January 27, 2003

The Honorable Howard L. Berman
House of Representatives

Subject: Missile Defense: Events Related to Contractor Selection
for the Exoatmospheric Kill Vehicle

Dear Mr. Berman:

In February 2002, we issued a report regarding early tests of the sensors being developed for the exoatmospheric kill vehicle¹ (EKV) planned for use in missile defense programs.² As described in that report, the Department of the Army, acting on behalf of the Ballistic Missile Defense Organization (BMDO)³ was administering two parallel research and development contracts for EKVs, one with Raytheon and one with Boeing. BMDO's plan was to conduct a competition between the two teams developing an EKV to select one for further development and flight testing.

By 1997, BMDO had decided to use a Lead Systems Integrator (LSI) contractor to manage the National Missile Defense program, rather than using the Army for this purpose. Boeing was awarded the LSI contract in April 1998, and was directed to complete the competition to select an EKV contractor by February 1999. Thus, in its capacity as LSI, Boeing was tasked to select either Raytheon or another Boeing unit to build the EKV. For this report, we will refer to the Boeing unit serving as the LSI contractor as "Boeing LSI," and to the Boeing unit competing for the EKV subcontract as "Boeing EKV."

¹ The EKV is the intercept component of the former National Missile Defense program. The EKV is mounted on a defensive missile, is delivered by that missile to the midcourse (or exoatmospheric) phase of an incoming missile's trajectory, and uses a seeker in a separate flight package to guide and propel itself into an incoming enemy warhead, thus destroying the warhead above the earth's atmosphere. During our preparation of this report, the Missile Defense Agency announced, in September 2002, that it was pursuing concepts for a new-generation EKV.

² See Missile Defense: Review of Allegations about an Early National Missile Defense Flight Test, GAO-02-125 (Washington, D.C.: Feb. 28, 2002).

³ On January 2, 2002, BMDO was renamed the Missile Defense Agency. In addition, National Missile Defense and several other programs have recently been renamed. National Missile Defense is now referred to as the Ground-Based Midcourse System, which, together with Sea-Based Midcourse Systems, comprise the Midcourse Defense Segment. For this report, we will use the names in place at the time of these events.

You asked us, as a follow-on to our recent review of the early sensor tests, to look into the circumstances surrounding Boeing LSI's selection of Raytheon's EKV device for further testing. Specifically, you asked us to

- determine whether there was a misuse of Raytheon's proprietary information by the Boeing EKV team, as had been reported in the media, and whether these events affected the planned competition for an EKV contractor;
- determine whether a request for proposals (RFP) was ever prepared, whether proposals were submitted, whether formal criteria were used to evaluate the two systems, and whether a formal technical comparison or analysis of the two systems was used to select between them;
- describe the basis for the selection of Raytheon;
- identify whether the decision was made by BMDO or Boeing LSI, and, if the decision was made by Boeing LSI, determine the extent to which BMDO was aware of the circumstances surrounding the decision; and
- identify the amount of money the U.S. government spent to develop the two EKV systems that were to be competed against each other and, if one of the contractors was excluded from the competition, determine whether any effort was made to recoup the money paid to that contractor.

During the months of July through September 2002, we developed the facts reflected in the narrative that follows using contemporaneous documents to the extent possible. In some instances, we contacted by telephone officials who could clarify contemporaneous documents. Finally, we conducted interviews with the key individuals involved in these matters. Our interviews included government officials and the contractor decisionmaker charged with making the EKV selection decision.

Results in Brief

In late 1998—after 8 years of funding and administering parallel research and development contracts for an EKV for National Missile Defense and 2 months prior to the scheduled completion of the competition—BMDO abandoned its planned competition to select the most promising EKV for use in follow-on missile defense programs. This decision was made by Boeing LSI, with BMDO's concurrence. This decision was made shortly after Boeing disclosed to the government that employees of its EKV team had obtained and misused proprietary information developed by the other EKV competitor, Raytheon.

Our review has not located any document memorializing the selection of Raytheon to build the EKV, and both BMDO and Boeing have advised us that no such document was created or exists. As a result, we have reviewed contemporaneous e-mails and correspondence exchanged between Boeing and BMDO discussing these events, and near-contemporaneous descriptions of the selection decision prepared by

government officials involved in the subsequent discussions about whether the component of Boeing responsible for its EKV effort should be debarred from federal government contracting,⁴ and about the pursuit of a financial settlement. We have supplemented these contemporaneous materials with interviews of the decisionmakers. This review has led us to the following findings:

- The planned competition was abandoned after BMDO, Boeing LSI, and Raytheon learned of the Boeing EKV team’s misuse of Raytheon proprietary information, specifically a plan for testing Raytheon’s EKV’s software that was submitted by Raytheon to the Army and later discovered in the offices of the Boeing EKV team.
- The final RFP was not issued, proposals were not submitted, no formal criteria were used to evaluate the two systems, and there was no formal technical comparison or analysis used by the decisionmaker to select the EKV.
- Raytheon received the award
 - after Boeing LSI and BMDO were unable to mitigate, to Raytheon’s satisfaction—which BMDO made a condition of moving forward—the possible competitive harm arising from the Boeing EKV team’s misuse of Raytheon’s proprietary information;
 - after Boeing LSI and BMDO concluded that failing to obtain Raytheon’s concurrence might hamper BMDO’s ability to complete the testing of National Missile Defense in time for a planned presidential deployment decision in June 2000; and
 - after Boeing LSI and BMDO concluded that any risk in selecting Raytheon without a technical comparison with Boeing’s EKV could be mitigated by continuing to fund Boeing’s EKV, at a lower amount as a “hot back-up.”⁵
- Both the decision to abandon the planned competition and the decision to award to Raytheon by default were made by Boeing LSI, with BMDO’s concurrence.

⁴ Debarment and suspension are discretionary sanctions available to government agencies, under policies set forth at Federal Acquisition Regulation (FAR) Subpart 9.4, which permit a finding that a government contractor should be deemed ineligible for the award of future contracts as a means to protect the government’s interest in awarding contracts to responsible contractors only. FAR § 9.402. The debarment and suspension process anticipates “prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official’s consideration.” FAR § 9.406-3. The process also anticipates providing contractors an opportunity to respond to proposed debarments. *Id.*

⁵ This back-up funding of Boeing’s EKV continued at a rate of approximately \$4 million per month until 3 months after the fourth EKV flight test, which took place in January 2000.

- At the point when the competition was abandoned, the U.S. government had spent approximately \$400 million each, or a total of \$800 million, to develop and test the Raytheon and Boeing EKV. Although several government officials recommended debarring a component of Boeing from federal government contracting, or pursuing a financial settlement from the company, all such recommendations were ultimately withdrawn.

With respect to the decision to award the EKV subcontract to Raytheon, both Boeing LSI and BMDO decisionmakers told us, during interviews conducted during the summer of 2002, that the decision was made after they concluded that either system was sufficiently advanced to permit its selection for further flight testing. In addition, although not reflected in any contemporaneous documents we have seen, the Boeing LSI decisionmaker told us that his decision was also based on his concern that software development and testing for the Boeing EKV was lagging behind schedule. He explained that this caused him to be concerned that selection of Boeing's EKV might delay the program's ability to complete sufficient testing in time to permit a presidential deployment decision planned for June 2000.

Regarding the efforts to recoup the monies paid to Boeing to develop an EKV for the abandoned competition, we learned that the Department of the Army and BMDO explored the potential for a financial recovery from Boeing, but the effort was ultimately abandoned. Consideration was also given to a civil or criminal prosecution of Boeing, which was declined by a U.S. Attorney, and to debarment of a component of the company, which was also abandoned. Boeing terminated, or otherwise reprimanded, several of the EKV team employees involved in the misuse of Raytheon's proprietary information, and three of the Boeing employees were subsequently debarred by the Air Force from participating in government contracts—one for 2 years, and two for 1 year.

EVENTS RELATED TO CONTRACTOR SELECTION FOR THE EKV

In October 1990, the Department of the Army's Space and Missile Defense Command (acting as an agent for BMDO) awarded three parallel contracts for the design, development, and demonstration testing of sensor designs for an EKV to be used in National Missile Defense. These contracts contemplated one or more "downselects" to eventually choose one contractor to build an EKV using the successful design. The original awardees were Martin Marietta (eliminated in an initial "downselect" in 1995), Hughes Missile Systems Company (now Raytheon), and Rockwell International (now Boeing).⁶

By 1997, BMDO had decided to choose an LSI contractor to integrate and manage the various components being developed for the National Missile Defense system. These components included an Upgraded Early Warning Radar, an X-Band Radar, the

⁶ As illustrated above, none of the entities originally selected to design EKV sensors for National Missile Defense exist in the same form today due to consolidations in the defense industry during the 1990s.

Ground-Based Interceptor, and Battle Management/Command, Control and Communications capability. The Ground-Based Interceptor is the “weapon” of the National Missile Defense system; it consists of the EKV discussed above, a booster rocket to deliver the EKV to the approximate intercept location, and ground command and launch equipment. Upon award of this integration and management contract (the LSI contract described above), BMDO planned to consolidate the management of each component of National Missile Defense under its control using its LSI contractor.

BMDO completed the competition for an LSI contractor on April 30, 1998, with an award to Boeing.⁷ One of Boeing’s first, and most pressing, tasks was to develop a plan for, and to complete, the competition for a single EKV contractor. Since one of the EKV development contractors was also a component of Boeing, award by BMDO of the LSI contract to Boeing created an inherent organizational conflict of interest. BMDO’s contract with Boeing LSI directed the company to take steps to address this conflict of interest, and to do so as part of its planning to complete the EKV competition.⁸

On July 9, 1998, just over 2 months after winning the LSI contract, Boeing submitted to BMDO a draft plan for the EKV competition. This plan outlined a formal competition between the EKV contractors, addressed the evaluation of technical and cost proposals, and identified certain safeguards to ameliorate the conflict of interest inherent in permitting Boeing LSI to select between the Boeing and Raytheon EKV teams. Although Boeing LSI revised and resubmitted this plan for the EKV competition based on input from BMDO officials, the plan was never used, proposals were neither requested nor received, and the anticipated evaluation of the competing EKV systems was never made. Instead, because of the developments set forth below, BMDO directed Boeing LSI not to request proposals.

The Disclosure and Misuse of Raytheon’s Proprietary Information

As Boeing LSI and BMDO were working through the details of a formal source selection plan, the Raytheon and Boeing EKV teams were continuing their research under the contracts administered by the Army’s Space and Missile Defense Command. Both teams were also actively preparing for the upcoming competition.

On July 8, 1998, in support of ongoing EKV testing, Raytheon provided to Army representatives a document titled “Software Test Plan for the Hover Test of the Exoatmospheric Kill Vehicle Subsystem.” This 68-page document was provided during a meeting between Raytheon and Army officials in Tucson, Arizona. The face of the document indicated that it was prepared by Raytheon for the Army, and every page of the document contained the legend, “Unclassified/Competition Sensitive.”

⁷ Boeing’s competitor for the LSI contract was a joint venture of Lockheed-Martin, Raytheon, and TRW.

⁸ In addition, both competitors for the LSI contract were required to address in their proposals their plans for handling the organizational conflicts of interest that would arise while serving as the LSI contractor. BMDO’s Director told us that Boeing was selected for the LSI role, in part, based on the strength of its response in this area.

Less than 2 weeks later, on Monday, July 20, a member of the Boeing EKV proposal team telephoned an attorney in Boeing's Law Department to report that he had just found the above-described Raytheon Software Test Plan on the floor of the Boeing EKV team's conference room, within Boeing's Downey, California, facility. After securing the document and conducting a preliminary review, the Boeing attorney notified Raytheon of the discovery, in a July 28 letter, advising that the document had been found in an unmarked envelope, appeared to have been slipped under the conference room door, and that the company had been unable to determine how it arrived.⁹ In addition, the Law Department began a more detailed in-house review of the discovery of the document.

In response to Boeing's notification to Raytheon that Raytheon's Software Test Plan had been discovered in the offices of Boeing's EKV proposal team:

- Raytheon complained to Army officials, in an August 3 letter, about the disclosure and requested an investigation;

- the Army's Procurement Fraud Division requested a review by the Army's Criminal Investigation Command regarding how a Raytheon document provided to the Army less than 2 weeks earlier ended up in a Boeing conference room; and

- BMDO attempted to address, in a September 29 letter, Raytheon's "heightened" concerns that discovery of its proprietary materials in Boeing's EKV offices highlighted the problematic conflict of interest caused by using Boeing LSI to select between the Boeing and Raytheon EKV teams.

The full extent to which Boeing's EKV team's employees had misused Raytheon's data, however, was apparently unknown to any of the parties until late October 1998. During follow-up interviews conducted at Boeing's Downey, California, facility, during the week of October 19, the company's in-house attorneys learned—apparently for the first time—that a small group of its EKV proposal team members had actually discovered the Raytheon software test plan on Friday, July 17—not Monday, July 20, as previously disclosed. In addition, the in-house attorneys determined from their interviews that Boeing EKV team employees had misled the company's Law Department about when the document was found, how it was handled, and whether the employees had surrendered all copies.

⁹ The source of the Raytheon document found in the offices of the Boeing EKV team has not been established, even though the matter was investigated by several entities, including the Army Criminal Investigation Command. The contracting officer's debarment report, as well as other materials reviewed (including the Army Criminal Investigation Command report), states that Army personnel, and independent contractor personnel, visited Boeing's Downey facility from July 14 to 16, 1998, for a software readiness review in the offices of the Boeing EKV team. Since the document at issue involved Raytheon's software testing plans, and since the Army team was meeting with the Boeing EKV team about Boeing's plans for testing its software, Army officials opined that the document may have been inadvertently left behind by a member of this team.

Specifically, the in-house review revealed that:

- certain Boeing EKV team employees had prepared an analysis of Raytheon's software test plan over the weekend prior to advising Boeing attorneys of its discovery on Monday;
- these employees had not turned over all of the copies of the test plan to the Law Department, but had retained a copy of the test plan and of their analysis; and
- these employees had used these materials surreptitiously for several weeks after Boeing's disclosure of the discovery of the document to Raytheon, and after Boeing had represented to Raytheon that the document had been secured.

In Boeing's own words, "[t]he assumptions about Raytheon's avionics design reflected in the analysis were thereafter reflected in several program-wide briefings addressing, among other things, Raytheon's anticipated Avionics design."¹⁰

During the last week of October 1998, the President of Boeing's Space and Communications Group telephoned the Director of BMDO to advise him of the misuse of Raytheon's proprietary data by Boeing's EKV proposal team that had been uncovered during the in-house review.

Efforts to Preserve the Competition

Once the Director of BMDO was notified in late October that the Boeing EKV team had misused Raytheon's proprietary data, the fact that Boeing LSI was poised to release the RFP to implement the competition triggered a need for near-immediate resolution of the controversy. Both contemporaneous materials and our interviews indicate that BMDO needed to quickly complete the selection of an EKV contractor and proceed to flight tests of the device to have any hope of complying with the "3+3" acquisition strategy that had been adopted for National Missile Defense. This strategy called for 3 years of development and demonstration of the feasibility of the system to permit a presidential deployment decision planned for June 2000. If the President decided to deploy the system in June 2000, the program allowed 3 years for deployment (which was later extended to 5 years).

Letters and e-mails generated among the government, Boeing, and Raytheon during November 1998 show two major efforts. First, Boeing attempted to persuade BMDO that its EKV team had a sufficient record of integrity and business ethics to be considered a responsible prospective contractor appropriately eligible for the award of future contracts. Second, both BMDO and Boeing attempted to convince representatives of Raytheon that Boeing LSI could appropriately address the conflict of interest raised by using Boeing LSI to select between the Boeing and Raytheon

¹⁰ "Report Re Raytheon Document Incident," Office of the General Counsel Memorandum, The Boeing Company, at 3.

EKV teams, as well as take steps to mitigate the harm to the competition caused by the misuse of Raytheon's proprietary information.

With respect to whether the Boeing EKV team could be considered a responsible government contractor, the Director of BMDO delegated the decision to Boeing LSI. In a November 2 letter, BMDO's Director asked Boeing LSI to provide a written assessment of the Boeing EKV team's responsibility, identify what measures might be taken to mitigate the harm to the competition, and identify what alternatives remained if the competition could not be restored.

One of the first of many responses to BMDO's November 2 letter was described in a November 6 letter from a Boeing vice president to the Air Force's Debarment Authority.¹¹ This letter advised that Boeing was terminating 3 employees for their involvement in the misuse of Raytheon's software test plan and that a fourth employee was being suspended for 30 days without pay.¹² Based on these actions and others—including an advisory review of the Boeing EKV team's responsibility by an outside law firm—Boeing LSI's project manager eventually provided BMDO, in a December 7 letter, a written finding that its EKV team should be considered a "presently responsible offeror." By December 7, however, it appears the "downselect" decision had already been made; thus, the responsibility of the EKV team was relevant to the continuation of Boeing as a back-up source, not as the provider of the EKV for future flight tests.

With respect to the second major effort during November 1998—that of convincing Raytheon that the misuse of its data could be remedied and the competition should proceed—BMDO's and Boeing's efforts reached an impasse. By November 11, Boeing LSI's Project Manager represented to the Army Major General serving as BMDO's National Missile Defense Program Executive, via e-mail, that Raytheon was no longer willing to discuss Boeing's approach to implementing a "firewall" between Boeing LSI and the Boeing EKV team. In this e-mail, Boeing LSI's Project Manager also advised the National Missile Defense Program Executive that Boeing had decided to resolve any remaining firewall issues in Raytheon's favor; to proceed with release of the RFP to the two EKV competitors, despite Raytheon's objections; and to do so at 3 p.m. on November 12, "unless we receive a request from the government not to do so."

Both Boeing LSI's Project Manager and BMDO's National Missile Defense Program Executive confirmed during interviews that BMDO directed Boeing not to release the RFP, pending the outcome of Boeing's efforts to resolve the impasse with Raytheon. In fact, our review shows that, from this point forward, BMDO made Raytheon's

¹¹ The Air Force's Debarment Authority was involved in this matter in his capacity as the Department of Defense official charged with monitoring Boeing's compliance with government ethics requirements. The Air Force's role as a monitor of Boeing had been established by an administrative agreement between the Air Force and Boeing, which was designed to address the company's ongoing responsibility as a government contractor given earlier ethical issues unrelated to this matter that involved companies subsequently acquired by Boeing.

¹² Three of these employees were subsequently debarred by the Air Force from participating in government contracts.

concurrence with Boeing's attempts to mitigate the harm to the competition a condition for resuming the competition.¹³

During our interviews, both decisionmakers stated that after halting the RFP and attempting again to persuade Raytheon to acquiesce to plans to move forward with the competition, their last-ditch efforts failed and it became increasingly clear that there was no other choice but to abandon the competition. Thus, the RFP was never released.¹⁴

The “Downselect” Decision

With respect to the selection decision itself, we have not located a contemporaneous document memorializing the downselect decision, and both Boeing and BMDO have advised us that none exists. Instead, both Boeing and BMDO advised that the selection decision is evidenced by the subcontract that was eventually negotiated between Boeing LSI and Raytheon.

Both the Boeing LSI Project Manager and BMDO's National Missile Defense Program Executive advised us that the selection decision was ultimately made by Boeing LSI's Project Manager; that the decision was conveyed to BMDO's National Missile Defense Program Executive, by telephone, on or about December 1, 1998; and that BMDO concurred with the decision. In addition, both decisionmakers defended the decision to select the Raytheon EKV for flight testing, and to fund at a lesser-level the Boeing EKV as a “hot back-up” until 3 months after the fourth flight test.¹⁵ Both decisionmakers expressed the view that either device was sufficiently advanced to permit its selection for further flight testing, that the decision was a reasonable resolution of the matter given the time pressures associated with the need to complete testing of the system to permit the June 2000 presidential deployment decision, and that the decision represented a sound attempt to mitigate the risk associated with selecting the Raytheon device without the benefit of a formal competition.

Although not reflected in any contemporaneous documents, Boeing LSI's Project Manager stated during our interview that the selection decision was also based on his concern that software development and testing of the Boeing EKV was lagging behind schedule. He explained that this led him to have concerns that selection of Boeing to

¹³ As early as November 12, an e-mail from the Boeing Vice President mentioned above, to the Air Force Debarment Authority, advised that Boeing had indicated its willingness to withdraw but was still trying to implement BMDO's stated desire to preserve the competition if possible.

¹⁴ Draft RFPs were released and discussed with the parties on August 21 and October 21, 1998. A bidder's conference was held on September 16. The discussion above involves the release of the final RFP, which would have triggered the requirement to submit proposals.

¹⁵ As indicated above, the fourth flight test took place in January 2000. BMDO's National Missile Defense Program Executive advised that he agreed to fund the Boeing EKV as a “hot back-up” to the Raytheon device; the funding was at the level of approximately \$4 million per month, until 3 months after the fourth flight test. In addition, the selection plan prepared for BMDO by Boeing LSI anticipated funding the unsuccessful EKV contractor as a back-up prior to the disclosure of the Boeing EKV team's misuse of Raytheon's proprietary information.

build the EKV might delay the program's ability to complete sufficient testing in time for the June 2000 presidential deployment decision.

Finally, while it appears, as indicated above, that there was no written documentation of the selection decision, other contemporaneous documents support the timeframe and events that were recounted in our interviews with the decisionmakers. No letter or e-mail we have seen, created prior to November 30, 1998, suggests that the situation had been resolved, while several items generated after this date indicate that the decision had been made. In fact, in a handwritten annotation on the face of a December 9 letter from the Director of BMDO to the President of Boeing's Space and Communications Group, BMDO's Director thanks Boeing for resolving this issue.

Thus, we find, based on our review of the record, that the decision to select Raytheon to build the EKV for National Missile Defense

- was made on or about December 1, 1998;
- was made after the competition was abandoned;
- was made without soliciting or reviewing proposals from the EKV competitors;
- was not based on any formal comparison of the relative technical merit or proposed cost of the two EKVs;
- was driven primarily by the inability to mitigate the competitive harm caused by the misuse of Raytheon's proprietary data and concerns that failure to either select—or satisfy—Raytheon would cause significant slippage in the planned schedule designed to permit a presidential deployment decision in June 2000; and
- was made after Boeing LSI and BMDO concluded that either system was sufficiently advanced to permit its selection for further flight testing and that any risk in selecting Raytheon without a technical comparison with Boeing's EKV could be mitigated by continuing to fund the Boeing system, at a lower amount, as a "hot back-up."

Efforts to Recover Funds

Between January 1999 and July 2002, the Department of the Army and BMDO explored the potential for a financial recovery from Boeing, but the effort was ultimately abandoned. In addition, consideration was given to a civil or criminal prosecution of Boeing, and to the possibility of debarring the business unit of Boeing responsible for the EKV effort. Each of these considerations are set forth in greater detail below.

In February 1999, representatives of the Army's Procurement Fraud Division and its Criminal Investigation Command met with representatives of the U.S. Attorney's

Office of Public Corruption and Government Fraud, Central District of California, in Los Angeles, to request review of the case for possible civil or criminal action. According to the Army's Criminal Investigative Command report, the U.S. Attorney declined to pursue a civil action, and in a May 11, 1999, letter, the U.S. Attorney declined to pursue a criminal prosecution "based on insufficient evidence of criminal wrongdoing."

Concurrently, the Army recommended debarment proceedings against the Boeing employees involved in the wrongdoing, and against Boeing's Electronics Systems and Missile Defense Group. The Army also considered the alternative recommendation of a monetary settlement commensurate with the damages suffered by the government.

The Army's assessment of damages focused on: the loss of the integrity of a planned competition that had been carefully maintained for 8 years at great administrative expense; the loss of the benefit of a head-to-head "best value" comparison of two technical approaches developed at the cost of approximately \$400 million each; and the loss of the potential savings that might have been achieved by the abandoned competition, which the Army suggested should be valued at approximately 25 percent of the cost of Raytheon's EKV. However, given the difficulty of computing damages, the Army never assigned a precise quantum to the monetary recovery objective.

In concurrence with long-standing Department of Defense policy to place responsibility for debarment decisions in the hands of the agency with the greatest financial interest in the outcome, this matter was referred first to BMDO, with responsibility for action ultimately assigned to the Air Force debarment official. BMDO recommended against debarring any division of Boeing—noting that the employees involved had been terminated and were the subjects of individual debarment actions by the Air Force. In contrast to the Army, BMDO assigned a precise quantity to its proposed financial settlement, although all agreed that the BMDO-recommended settlement was lower than that wanted by the Army. Specifically, BMDO argued for recoupment of \$6.6 million to \$13.5 million. BMDO's proposed recoupment was described as an estimate of the additional potential award fee payable to Boeing LSI as a result of paying higher costs for the Raytheon EKV subcontract than would have been paid had Raytheon's costs been subjected to the downward pressure of competition.

In July 2002, BMDO (now the Missile Defense Agency) abandoned recovery efforts because of litigation risks associated with proving damages, as well as significant anticipated litigation costs, and the belief that litigation was inconsistent with its partnership with Boeing as the LSI contractor.¹⁶ In addition, BMDO determined that the termination and debarment of the employees involved had largely resolved the matter.

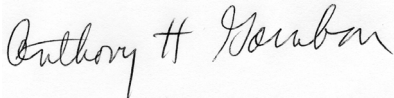
¹⁶ For the record, we note that BMDO's decision to abandon pursuit of monetary damages was based, in part, on advice received from the Army that the resources required to prevail in any litigation against Boeing, together with the "very difficult evidentiary issues," created "the risk of unsuccessful litigation." Earlier, the Army had endorsed the recommendation to pursue either debarment of a component of Boeing, or alternatively, a financial settlement.

A draft of this report was given to representatives of the Department of Defense. The Department did not elect to provide formal comments. Instead, the Department's official representative provided, via e-mail, informal technical comments, portions of which were accepted where their inclusion would improve the accuracy of the report.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. We will then send copies to other appropriate congressional committees; the Secretary of Defense; and the Director, Missile Defense Agency. We will make copies available to others upon request. In addition, the report will be available on GAO's webpage at [http:// www.gao.gov](http://www.gao.gov).

If you, or your staff, have any questions about this report, please contact me at (202) 512-5400, or Ralph White, Deputy Assistant General Counsel, at (202) 512-8278. In addition, Adam Vodraska, Senior Attorney, and David Hand, Senior Analyst, made key contributions to this report.

Sincerely yours,

A handwritten signature in cursive script that reads "Anthony H. Gamboa". The signature is written in black ink on a light-colored background.

Anthony H. Gamboa
General Counsel