

# COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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January 20, 2000

CODSIA Case No. 11-99

Defense Acquisition Regulations Council  
Attn: Ms. Melissa Rider  
PDUSD(AT&L)DP(DAR), IMD 3D139  
3062 Defense Pentagon  
Washington, D.C. 20301-3062

REF: Defense Federal Acquisition Regulation Supplement on Anticompetitive Teaming  
(DFARS Case 99-D028)

Dear Ms. Rider:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule regarding a Defense Federal Acquisition Regulation Supplement on anticompetitive teaming.

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing over 4,000 member companies across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

## **Background**

On January 5, 1999, Under Secretary of Defense for Acquisition and Technology Dr. Jacques S. Gansler issued a new policy in order to ensure the maintenance of adequate competition. This policy is in response to consolidation in the defense industry and it mandates heightened scrutiny of teaming arrangements and joint ventures. Noting that the government's preference is to allow private companies to form teams and subcontracts without government involvement, Dr. Gansler points out that there are circumstances that require intervention in order to assure competition. Of concern to the Department of Defense is the exclusive nature of teaming arrangements and the possibility that some of these may result in inadequate competition. Pursuant to this policy, the Department of Defense is to consider how to maintain robust competition and is to advise contractors that pre-established teaming arrangements, at either the prime contractor or subcontractor levels, will be examined.

On March 30, 1999, the Defense Contract Audit Agency (DCAA) issued a memorandum on the same issue. The DCAA noted that, when auditing a contractor's records, auditors may

encounter or receive "information constituting evidence or causing suspicion of an exclusive teaming arrangement." Industry was concerned that the implementation of the policy would be overly broad and treat all exclusive teaming as anticompetitive. Strong issue was taken with the statement in the DCAA memorandum that:

*If contracting officer efforts to resolve an anticompetitive exclusive teaming arrangement are not successful, the auditor should follow the guidance contained in CAM 4-705 and promptly submit a referral using the procedures set forth in CAM 4-702.4.*

The cited section of the CAM is the section that addresses the referral of fraud.

Although industry understands and fully supports the government's efforts to foster robust competition, it was concerned with what it viewed as an overly broad assertion by the DCAA that exclusive teaming arrangements were, by definition, anticompetitive. In fact, industry believes that the ability to form teams can foster competition. In summary, the March 30, 1999 DCAA memorandum appeared to be an overreaction to a potential for competition inhibition when all the sources of a product or service formed a team. In addition, industry feared that the benefits of teaming arrangements, noted in the FAR, would have been ignored in the implementation of the policy.

Because of widespread concern over implementing the March 30, 1999, DCAA memorandum, the DCAA issued a new memorandum on July 26, 1999. The July 26, 1999, DCAA memorandum supersedes the audit guidance contained in the earlier DCAA memorandum. It notes that "the existence of an exclusive teaming arrangement does not necessarily mean an anticompetitive situation exists."

On November 18, 1999, the proposed DFARS rule was published for comments. It proposes amendments that state certain exclusive teaming arrangements may evidence violations of the antitrust laws.

### **Comments**

Our fundamental position on the treatment of exclusive teaming as a violation of the antitrust laws has remained the same since the policy was first announced. We strongly support efforts to protect the integrity of government acquisition by addressing truly anticompetitive exclusive teaming arrangements; however, we fail to see how the government intends to provide necessary guidance to those who will be responsible for implementing the proposed rule. No guidance is provided to assist those charged with determining whether an exclusive teaming arrangement is anticompetitive. Nor is guidance provided to distinguish those arrangements that may be pro-competitive and may enhance competition from those that are anticompetitive. In fact, the recent guidance in DCAM 4-705c (Jan. 2000), provides inconclusive and post-agreement or after the fact guidance when it states: "*The potential for an antitrust violation is present only if one or a combination of companies participating in an exclusive teaming*

*arrangement is the sole provider of a product or service that is essential for contract performance, and the government's efforts to eliminate the exclusive teaming arrangement are unsuccessful.*" This type of guidance is of no use to the private sector. Moreover, the DCAA guidance is for auditors, not for companies.

In addition, teaming may mitigate the importance of one company being a sole provider of a product or service. Teaming may allow other competitors to be created. For example, a company may not be able to bid on its own due to a lack of financial or technological capability. In fact, teaming arrangements for major programs are often required in order to combine necessary capabilities. A decade of reengineering and reinvention has left companies focused on core competencies and, in order to satisfy the complex requirements of major RFPs, teaming arrangements between companies are common and have become the norm. By combining complementary competencies, contractors can form teams that create competitors, and therefore competition, for major programs.

The ability to collaborate and form teams does not necessarily suppress competition and may intensify the competition. Today, competition frequently occurs not between individual companies but between teams of companies. The FAR currently states that the government "will recognize the integrity and validity of contractor team relationships" if they are fully disclosed in the offer or, if entered into after submission of the offer, "before the team arrangement becomes effective." This is a prudent policy that recognizes market and economic conditions and should be continued. The pro-competitive benefits of teaming arrangements should not be ignored in the evaluation of teaming arrangements.

We also want to address the purpose of exclusivity. Companies forming a teaming arrangement seek exclusivity simply to protect vital information. While working together to win a program, companies will exchange, pursuant only after execution of a non-disclosure agreement, sensitive competitive strategies and highly proprietary financial and technical information. Without exclusivity, fears will exist over the transmittal of this information to others. Some companies may refuse to form teaming arrangements if the arrangement will not be exclusive.

Another key concern that we have is with the way in which this proposed rule has been written. Specifically, the proposal includes the following language:

***203.303 Reporting suspected antitrust violations***

*(c) Practices or events that may evidence violations of the antitrust laws also include exclusive teaming arrangements, if one or a combination of the companies participating on the team is the sole provider of a product or service that is essential for contract performance, and efforts to eliminate the arrangements are not successful.*

This language is ambiguous because it leaves a number of issues open to varying interpretations, including who makes the determination as to whether a product or service is considered essential. The proposed DFARS rule is to be added to Subpart 3.3, entitled "Reports of Suspected Antitrust Violations," and will be incorporated into a section that requires agencies to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. A requirement to report an exclusive teaming arrangement as a potential violation of law to the Attorney General, should only be made after a formal determination of actual anticompetitive impact and an opportunity to comment or challenge the determination should be provided to the affected company or companies. The inability to compete on a major program would have significant economic impact on companies. No such formal determination is required, nor even available until after formation of the teaming agreement. The inability to compete on a major program or the perception that a company or companies cannot compete, will have significant economic impact on companies or groups of companies. The sole explanation provided in the proposed rule for referral is "if one or a combination of the companies participating on the team is the sole provider of a product or service that is essential for contract performance, and efforts to eliminate the arrangements are not successful." If competitive market forces are present, for example, if other companies believe that they can provide the product or service, the fact that there is currently a sole provider should not be dispositive of the matter.

We suggest that the Defense Acquisition Regulations Council consider both the implementation issues and economic ramifications of a disqualification from bidding that are raised by this proposed DFARS rule. The broad statement that exclusive teaming is a practice or event "that may evidence violations of the antitrust law" may be technically correct, but lacking implementation guidance, the result may be implementation problems and a lessening of competition due to a hesitancy to form teaming arrangements. It may be that criteria are needed to assist in the formal determination of anticompetitive impact. We would note, however, that this may not be a problem requiring regulatory treatment since the government already has ample weapons and resources to challenge anticompetitive behavior that violates the antitrust laws.

We appreciate the opportunity to provide these comments. If you have any questions, please contact CODSIA Project Officer Charles Cantus at (703) 875-8059.

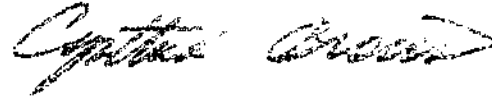
Sincerely,

SEE ATTACHED CODSIA SIGNATORIES



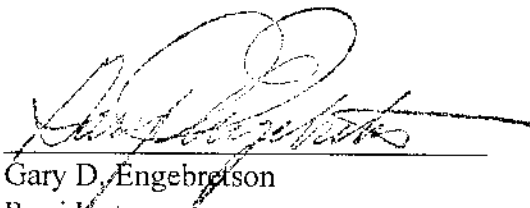
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Lorraine M. Lavet  
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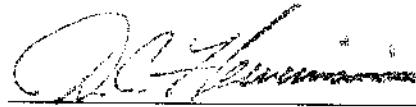
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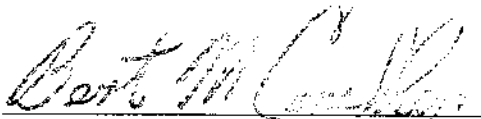
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