October 25, 2004

VIA FACSIMILE and FIRST CLASS MAIL

Debra W. Scheider
Director, Office of Contracts
National Reconnaissance Office
14675 Lee Road
Chantilly, VA 20151-1715

Re: NRO Acquisition Manual Clause N15.215-020, Exclusive Teaming Prohibition

Dear Ms. Scheider:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above referenced matter.¹ The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section’s governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

¹ The Honorable Mary Ellen Coster Williams, Council member of the Public Contract Law Section, did not participate in the Section’s consideration of these comments, and she abstained from voting to approve this letter.
Background

On September 21, 2004, your office issued a Notice posted to the National Reconnaissance Office ("NRO") Acquisition Manual ("NAM") Website that solicits thoughts on the issue of exclusive teaming. It notes that NRO’s Exclusive Teaming Prohibition clause was published in April 2004 without seeking industry comment because the NRO intended to codify what it understood to be a practice in this area; however, comments were received, which caused the NRO to question whether the prohibition on teaming was, in fact, a widely used practice.

This NAM clause prohibits any team arrangement, whether created in writing, through understandings, or by any other means, to team together to pursue an NRO procurement program where the parties further agree not to team with any competitors for that program. The stated concern is that the exclusive team arrangement may unduly limit competition. The rule states that the dissolution of such arrangements will be directed, or the offer will be prohibited from further consideration. Exclusive arrangements discovered after award will render the contract voidable. Waivers from the NRO Director of Contracts to maintain the arrangement can be requested in a written request that explains the purpose of the arrangement and why the arrangement is not anticompetitive.

Concern over exclusive teaming has arisen before. On January 5, 1999, the then Under Secretary of Defense for Acquisition and Technology, Jacques S. Gansler, issued a new policy in order to ensure the maintenance of adequate competition. This policy was in response to consolidation in the defense industry, and mandated 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, Gansler pointed out that there are circumstances that require intervention in order to assure competition. Of concern to the Department of Defense ("DoD") was that some (but not all) exclusive teaming arrangements had the potential to limit competition if one of the team members was the sole provider of a product or service.

Pursuant to this policy, the DoD was to consider how to maintain robust competition and advise contractors that pre-established teaming arrangements, at either the prime contractor or subcontractor levels, would be examined. The DoD addressed this policy on anticompetitive exclusive teaming in Defense Federal Acquisition Regulation Supplement ("DFARS") Case 99-D028.\(^2\) This proposed rule would have added exclusive team arrangements to the list of potential antitrust

violations, and would have placed certain conditions on the reporting of team arrangements that impair competition. An earlier DFARS proposal on the same subject would have required the reporting of such arrangements under two conditions: (i) 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 (ii) efforts to eliminate the arrangements are not successful.\(^3\)

The Public Contract Law Section, along with many industry associations, individuals and companies, provided comments on those proposed rules, and questioned the need for such rules when no specific instances of anti-competitive teaming had arisen since issuance of the Gansler memorandum. A copy of the Section's comments from 2001 are attached. Moreover, the Section noted that the agencies responsible for enforcing the antitrust laws, the Federal Trade Commission and the Department of Justice, have published guidelines recognizing that such team arrangements can benefit competition. In addition, the comments highlighted that exclusive team arrangements are common in order to justify the investment that team members put into the team effort and to promote the exchange of proprietary information among teammates, and that exclusive relationships therefore can be procompetitive. As a result of consideration of these and other comments, the proposed rules were determined not to be required, and were withdrawn by the DoD.

**Comments**

The Section supports the goal of curbing practices that may unreasonably impair competition, and the Section fully supports the government’s efforts to foster robust competition. In fact, the first principle in the Principles of Competition in Public Procurements adopted by the American Bar Association urges that public acquisition use full and open competition to the maximum extent practicable. We also strongly support upholding the integrity of the acquisition process.

With these principles in mind, our review of the NAM clause has resulted in the following four comments, which are offered for your consideration.

1. **This clause is similar to, but more sweeping than, the Department of Defense proposed rules, which were withdrawn. The Section is aware of no demonstrated need for the proposed blanket prohibition on all exclusive team arrangements in connection with NRO procurements.**

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\(^3\) 64 Fed. Reg. 63002 (November 18, 1999).
Contractor team arrangements are common, and have long been an accepted federal contracting practice. Many major procurements involve a prime contractor assembling a team of potential subcontractors in order to combine complementary capabilities required to address the scope of work anticipated by the Request for Proposals. These teams may collaborate on the proposal, share proprietary technical data, pricing information, and competitive strategies. The team members also invest in the pursuit effort. The Section is informed that, in order to facilitate this collaborative effort, exclusivity is a common characteristic of the team arrangement.

The government recognizes the benefits of team arrangements. A description of these benefits is found in the Federal Acquisition Regulation:

*Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to (1) complement each other’s unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.*

*Contractor team arrangements may be particularly appropriate in complex research and development acquisitions, but may be used in other appropriate acquisitions, including production.*

*The companies involved normally form a contractor team arrangement before submitting an offer. However, they may enter into an arrangement later in the acquisition process, including after award.*

This recognition of benefits is the basis of the FAR policy that the “Government will recognize the validity of contractor team arrangements” and that the “Government will not normally require or encourage the dissolution of contractor team arrangements.” Concern over the potential anticompetitive impact when team arrangements are exclusive was fully addressed in the comments submitted to the proposed DFARS rules, which would not have flatly prohibited exclusive teaming as the NRO rule would. As a result of these comments, the DFARS rules were withdrawn. Similarly, the Section is aware of no demonstrated need for a blanket prohibition at this time. Various other laws and regulations already address anticompetitive behavior.

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The premise underlying the issuance of the rule, that it was merely codifying a practice in the federal procurement area, thus is incorrect. Indeed, by imposing a prohibition, subject only to a waiver process, the rule is inconsistent with past DoD practice, where DoD withdrew a far less draconian rule that merely identified exclusive teaming as a potential anticompetitive activity. The Section respectfully submits that NRO should not ban as anticompetitive, a practice which DoD declined to identify as potentially anticompetitive.

We also note that the acting Under Secretary of Defense, Acquisition, Technology and Logistics, issued a memorandum for the secretaries of the military departments entitled “Selection of Contractors for Subsystems and Components,” dated July 12, 2004, which seeks to ensure that the DoD is realizing the best value for major program subsystems and components. This memorandum’s purpose is to increase the review and use of non-affiliated team members for subsystems and components in lieu of reliance on in-house sources.

2. Team arrangements may be procompetitive and can enhance competition.

The benefits of collaborative efforts between companies have been noted by the agencies charged with policing anticompetitive behaviors. The Federal Trade Commission (“FTC”) and the U.S. Department of Justice note that in order to compete in today’s marketplace, companies who are competitors at times might need to collaborate as teammates at other times.\(^6\) The FTC and Justice Department have also found that such teams may be procompetitive; but noted that “[n]evertheless a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.”\(^7\)

Team arrangements can be procompetitive because they can create a competitor. The NRO clause may inhibit the creation of procompetitive teams. The clause is written broadly, and prohibits any exclusive team arrangement. Such a blanket prohibition fails to recognize that team arrangements may be procompetitive and can enhance competition. For example, a company may not be able to bid on its own due to a lack of certain technological capabilities. Collaboration allows the combination of complementary skills. The frequency of


\(^7\) *Id.* at 1.
team arrangements on major programs indicates that collaboration is often required in order to combine necessary capabilities. Industry has learned that through the combination of complementary competencies, contractors, including small businesses, can form teams that create competitors for major programs. The governmental customer receives the benefit of additional resources for its contracts.

When companies collaborate as a team and prepare a proposal in response to an RFP, they typically share proprietary information, including team strategies. An arrangement that is not exclusive will tend to inhibit the free flow of information. The possible alternatives of erecting firewalls, isolating the proposal writers, or excluding certain team members from certain strategy sessions, which would be required in a situation where one or more team members are involved with other teams, may not be feasible, particularly when small businesses with limited staffs are involved. The reality is that exclusivity can facilitate candid exchanges between the team members, and a lack of exclusivity can chill such exchanges. In addition, the financial realities and resource demands when working on a proposal greatly limit the ability of a company to be involved in more than one offer for a particular program.

The ability to collaborate and form teams does not necessarily suppress competition and, in fact, may intensify the competition. As noted above, competition today 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.”\(^8\) This is a prudent policy that recognizes market and economic conditions and should be continued. The procompetitive benefits of teaming arrangements should not be ignored in the evaluation of exclusive team arrangements.

As noted above, the DoD memorandum of July 12, 2004 implicitly seeks to increase teaming. Since exclusivity can be a characteristic of close working relationships, which is often sought or demanded by team members to guarantee the protection of proprietary and competitive information during the procurement process, there appears to be some tension between the goal of the DoD memorandum and the NRO policy prohibiting exclusivity.

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\(^8\) FAR 9.603, 48 C.F.R. § 9.603.
3. The NRO can address specific concerns that an exclusive arrangement may inhibit competition on a specific program without the NAM prohibition.

The NAM clause prohibiting exclusive teaming is concerned with the potential for such arrangements to inhibit competition. The clause prohibits all exclusive team arrangements, which could impact the procompetitive benefits of team formation. The clause is overbroad, throwing out the good with the bad. Additionally, it may be in violation of FAR 1.302, which limits agency acquisition regulations to those necessary either to implement the FAR within the agency or to satisfy the specific needs of an agency.

An option exists. Specific concerns and issues can be addressed by the NRO without a blanket prohibition. For example, if a concern exists on a specific program that a particular company must offer its product or services to all teams in order for there to be meaningful competition, the NRO can address this issue in its solicitation, and inform all competitors that exclusive teaming agreements for certain items or services are not allowed on that procurement. Such a focused response to the potential for inhibiting competition avoids the negative impact of a blanket prohibition.

Finally, even without a blanket prohibition, the existing antitrust laws do provide a strong deterrent to anticompetitive behavior. Despite the FTC's and the Justice Department's recognition of the procompetitive aspects of collaborative efforts, mentioned earlier, there remains a strong understanding that team arrangements must not be used for anticompetitive purposes. To do so would violate the antitrust laws, and subject a violator to severe penalties.

4. To be effective, a rule providing a waiver process should provide clear standards. The NAM clause does not.

Although the Section recommends that the NAM clause be withdrawn, should it not be withdrawn, the Section wants to raise a concern with the waiver provision, N15.215-020(c). Providing a waiver procedure to this prohibition makes sense, but the NAM clause should provide companies with clear standards for contractors seeking and for the NRO in granting a waiver. Without clear standards, companies are unable to determine whether a potential team arrangement would be a candidate for a waiver; and Contracting Officers will have no effective criteria against which to evaluate such a request. The current clause states that the request must explain the purpose for the arrangement and why it is not anticompetitive. Additional guidance for both Contracting Officers and contractors may be helpful. For example, the waiver provision could state that if additional suppliers for the
product or service are identified, the waiver may be granted; or it could explain whether the existence of competition for the program will increase the likelihood of a waiver being granted.

**Conclusion**

The Section strongly supports efforts to protect the integrity of the acquisition process, and seeks to foster competition. This includes the avoidance of anticompetitive behavior. We believe that the issue of exclusive team arrangements and whether such arrangements inhibit competition has been thoroughly examined in the past, and that the interests of the federal government would not be served by a blanket prohibition against exclusive team arrangements.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Patricia H. Wittie  
Chair, Section of Public Contract Law

cc: Robert L. Schaefer  
    Michael A. Hordell  
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    David Kasanow
December 28, 2001

VIA FACSIMILE AND ELECTRONIC MAIL

Defense Acquisition Regulations Council
Attn: Ms. Susan Schneider
OSD(AT&L)DFD(DAR)
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3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: DFARS Case 99-D028
Defense Federal Acquisition Regulation Supplement
Anticompetitive Teaming
66 Fed. Reg. 55157 (November 1, 2001)

Dear Ms. Schneider:

On behalf of the Section of Public Contract Law of the American Bar Association (the ‘Section”), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the American Bar Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.
Background

The Federal Acquisition Regulation ("FAR") requires agency personnel to report suspected antitrust violations to enforcement authorities. See FAR Subpart 3.3. Specifically, FAR 3.303 provides for referral to the Attorney General of various "practices or events that may evidence violations of the antitrust laws." This FAR provision identifies for referral nine practices that are typically considered per se violations of the antitrust laws, such as bid rigging, division of markets, and collusive estimating systems.

The proposed revision to the DFARS would add "exclusive teaming arrangements" to the list of potential antitrust violations. An earlier DFARS proposal on the same subject (64 Fed. Reg. 63002, November 18, 1999) would have required reporting of such arrangements under two conditions: (i) 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 (ii) efforts to eliminate the arrangements are not successful.

The current proposed rule adds a further condition to reporting ("The teaming arrangement impairs competition . . ."), and makes it clear that all three conditions must be met for the arrangement to be reportable. Finally, the proposed rule cautions that the policy "should not be misconstrued to imply that all exclusive teaming arrangements evidence violations of the antitrust laws."

Comments

The Section supports the goal of curbing practices that may unreasonably impair competition. The Section is concerned, however, that there is no demonstrated need for the proposed DFARS provision. In addition, the Section believes that the provision is ripe for misapplication, which would result in unwarranted referrals to the Attorney General, as well as unnecessary delays and costs in the acquisition process. Ultimately, such risk and disruption may deter contractors from entering into teaming arrangements that would otherwise benefit the Department of Defense ("DoD"). These concerns and risks are addressed in detail below.

1. No Demonstrated Need for the Proposed Rule

Contractor teaming arrangements have long been an accepted practice in federal contracting, and the need for such arrangements has remained strong over the past ten years as companies have increasingly focused on their own core competencies. Non-exclusive teaming arrangements are generally used when one team member or both are unwilling to make substantial investments of time or resources in the joint effort. By contrast, exclusive teaming arrangements are common where, in order to
justify each team member's investment in the joint effort, it is necessary that all members be assured that the effort will benefit only that team. Exclusive teaming arrangements are particularly common in major systems acquisitions.

The FAR currently recognizes -- and would continue to do so even if the DFARS revision were adopted -- that teaming agreements:

may be desirable from both the Government and industry standpoint in order to enable the companies involved to --

(1) Complement each other's unique capabilities; and

(2) Offer the Government the best combination of performance, cost and delivery for the system or product being acquired.

FAR 9.602(a).

In addition, the agencies responsible for enforcing the antitrust laws -- the Department of Justice ("DoJ") and the Federal Trade Commission ("FTC") -- also have recognized the benefits of teaming agreements and strategic alliances. In "Antitrust Guidelines for Collaborations Among Competitors," published in April 2000, the agencies stated:

Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. For example, one participant may have special technical expertise that usefully complements another participant's manufacturing process, allowing the latter participant to lower its production costs or to improve the quality of its product. In other instances, collaboration may facilitate the attainment of scale or scope of economies beyond the reach of any single participant.

DOJ/FTC Guidelines, § 2.1.

Indeed, in certain circumstances, teaming can be the source of competition in a procurement. In large systems procurements and in large bundled-services acquisitions, for example, the agency's requirements often dictate the alliance of companies with complementary capabilities to satisfy all contract requirements. Thus, the ability to team exclusively in an environment that facilitates the free exchange of
proprietary technical and cost data allows companies to come together and "create" a competitor, thereby enhancing competition.

Given the widely acknowledged advantages of teaming, and the regular use of exclusive arrangements in federal contracting, the rationale for DoD's departure from existing practice is not clear. It is not in the interest of the DoD, or the defense industry on which it depends, to discourage the formation of teaming agreements that allow firms to combine their complementary technological know-how and manufacturing capabilities to best meet the Government's needs.

The initial impetus for regulations addressing anti-competitive teaming arrangements was the Memorandum of Under Secretary of Defense Jacques Gansler, dated January 5, 1999. The memorandum arose in part out of concern about a teaming arrangement for the DD-21 Destroyer acquisition that DoD perceived as restricting competition. Notably, that concern was subsequently resolved under the existing regulations.

The commentary accompanying the proposed rule cites no example of any other major acquisition during the past three years in which concerns about restricted competition have arisen from a teaming agreement, nor is the Section aware of any analysis that indicates a systemic problem in the area. Thus, it appears that, to the extent there may have been problems within DoD regarding exclusive teaming arrangements in the past, Dr. Gansler's Memorandum may have accomplished its purpose without the need for additional regulation.

Accordingly, because no clear need for the proposed rule has been articulated, and because its potential for misapplication and disruption of the acquisition process are great (see part 2 infra), the Section recommends that the proposed rule be withdrawn.

2. Potential Misapplication and Disruption of the Acquisition Process

In evaluating the potential impact of the proposed rule, it is important to start with the understanding that (i) there is nothing presumptively wrong with exclusive arrangements under antitrust law and (ii) the determination of whether an exclusive arrangement is "anti-competitive" requires a fairly complex, nuanced analysis of antitrust law.

The potential antitrust violations that are currently identified in FAR 3.303(c), including bid rigging and division of markets, usually are the product of conspiracies of the type considered by the antitrust laws to be per se violations—that is, they are unlawful regardless of any economic justifications the conspirators may offer. By contrast, exclusive teaming arrangements are a form of exclusive dealing that the
courts judge by a much more lenient “rule of reason,” which balances anti-competitive harm against pro-competitive benefits.

In determining whether a collaboration is “anti-competitive” and thus subject to enforcement action, the enforcement agencies engage in a multi-factor analysis that includes: (i) defining the relevant market affected by the collaboration; and (ii) carefully balancing the pro-competitive benefits of the collaboration against the anti-competitive effects. In defining the relevant market, the enforcement agencies consider not only firms that are presently providing the product or service in question, but also firms that could potentially enter the market in response to a price increase or restriction of output.

Thus, the fact that one of the firms in an exclusive teaming arrangement is presently “the sole provider of a product or service that is essential for contract performance” – the threshold criterion in the proposed rule -- does not mean that the arrangement will be found to restrain competition if, in fact, there are other potential suppliers or service providers that have the facilities and technical capability to compete.

Exclusive teaming arrangements also may promote pro-competitive efficiencies that outweigh any anti-competitive harm that could result. The most obvious benefit of exclusive teaming is that the team members will strive to promote their combined effort to the utmost, and thus provide the best option their combined competencies represent, both because they are assured that other teams will not benefit from their joint efforts and because their hope of success lies solely in the team’s success. Thus, exclusivity may be important to prevent one teammate from gaining access to the other teammate’s technical data or approach, and then utilizing that knowledge in support of a competing contractor’s proposal in response to the solicitation. Such “free riding” can actually have anti-competitive effects by providing a cost-free technical “windfall” to a competing contractor. Exclusivity in a teaming arrangement can prevent such “free riding” and thereby promote, rather than impair, competition.

Unfortunately, the broad terms of the proposed rule provide no guidance for determining when an offeror is a “sole provider” of an essential item or when an exclusive arrangement “impairs competition,” and contracting officials cannot be expected to perform the subtle legal analysis that enforcement agencies perform. For example, the rule provides little basis to distinguish between a contractor team with a legitimate – and perhaps dispositive – competitive advantage and one who, as the “sole provider” of an “essential item,” may “impair competition.”
Defense Acquisition Regulations Council  
December 28, 2001  
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The likely result will be unwarranted suspicion of exclusive teaming arrangements and frequent reporting to the DoJ of arrangements that actually meet antitrust laws and promote competition. Such unnecessary referrals to DoJ could significantly delay acquisitions while the allegedly offending arrangement is investigated, as well as impose substantial costs on the teaming companies to defend their arrangement.

Moreover, without clear regulatory criteria, companies will be unable to determine whether or not their contemplated teaming arrangements will be deemed potentially “anti-competitive” by contracting officials and, therefore, whether they risk referral to the DoJ by entering into such arrangements. This lack of clarity can only lead to a chilling of many arrangements that would actually enhance competition in defense acquisitions. If our prognosis is correct that contracting officers will err on the side of referring agreements that arguably meet the broad criteria in the proposed rule, the use of exclusive teaming arrangements could decline precipitously, to everyone’s detriment.

**Conclusion**

In sum, the Section believes that there is no demonstrated need for the proposed DFAR provision and that its implementation would result in unwarranted referrals to the DoJ. Such referrals would disrupt the contracting process and ultimately may deter contractors from teaming arrangements that produce efficiencies, increase quality and innovation, and lower acquisition costs. Therefore, the Section recommends that the proposed DFAR provision be withdrawn and that the DoD continue to operate under existing law.

In the alternative, if the DoD goes forward with the rule, the Section suggests that more precise criteria be developed that contracting officials and the contracting community can easily apply and that will not unduly inhibit legitimate teaming arrangements.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

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Chair, Section of Public Contract Law
cc: Mary Ellen Coster Williams
    Hubert J. Bell, Jr.
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