Via Email to sec809@dau.mil

Section 809 Panel
Ms. Diedre Lee, Chair
Mr. David Drabkin, Commissioner, Team 4
1400 Key Blvd.
Suite 210
Rosslyn, VA 22209

Re: Comments to Section 809 Panel; Teaming Arrangements

Dear Ms. Lee and Mr. Drabkin:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments to assist the Section 809 Panel in reviewing acquisition regulations applicable to the Department of Defense (“DoD”) with a view towards streamlining and improving the efficiency and effectiveness of defense acquisition and defense technology advantage, along with achieving related goals.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include 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 are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

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1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Subcontracting and Teaming.”
I. INTRODUCTION

The Section’s comments for the Section 809 Panel focus in this letter on the implementation of Federal Acquisition Regulation (“FAR”) Part 9.6 provisions addressing contractor team arrangements. Collaboration by contractor teams through exclusive team arrangements should not be discouraged or worse, prohibited—except when it would be inappropriate for the particular procurement or violate antitrust laws.

In the Section’s experience, exclusive team arrangements can be procompetitive and can facilitate the creation of a viable competitor when the collaborating companies could not compete if acting individually. Exclusive team arrangements facilitate collaboration and enable development and sharing of competitive strategies among team members, which is important in a competition. Flexibility in the rules to permit the market to determine the best combination of skills, products, and costs can improve the result of an acquisition and maintain the Government’s technological advantage.

Despite that determination, the Section has seen prohibitions on team arrangements as well as heavy burdens applied broadly to exclusive team arrangements. These prohibitions limit contractors’ flexibility to offer DoD their best possible solutions; risk imposing barriers to entry or participation in procurements by contractors with innovative products or solutions; and result in procurements inconsistent with FAR and Defense Federal Acquisition Regulation Supplement (“DFARS”) provisions on team arrangements.

II. EXCLUSIVE TEAM ARRANGEMENTS

A. Exclusive team arrangements under the FAR and antitrust laws.

There is an unjustified concern that exclusive team arrangements are anti-competitive. Because team arrangements are not exempt from antitrust laws; as noted in FAR Part 9.604, they are subject to antitrust guidelines, which provide the factors to evaluate whether a team arrangement, exclusive or otherwise, violates federal antitrust law.

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Offerors who propose teaming arrangements on an exclusive basis will be evaluated to determine whether such teaming agreements inhibit competition. In order for the Government to evaluate whether the proposed agreements inhibit competition, offerors are required to (1) provide a copy of all teaming arrangements, and (2) explain why the teaming arrangements do not inhibit competition. The documentation must include, but is not limited to: structure of the teaming arrangement, responsibilities, and liabilities; financial responsibility; managerial responsibility and accountability; and applicable legal documents. The burden of proving that any exclusive teaming arrangement proposed does not restrict competition shall rest with the offeror. Offerors are advised that should the Government determine that any such proposed, exclusive teaming arrangement inhibits competition, (1) that determination may render the offeror’s proposal ineligible for award, and (2) the Contracting Officer shall forward the matter to the appropriate authorities as prescribed by Federal Acquisition Regulation Part 3.3.
The Federal Trade Commission and the Department of Justice issued Antitrust Guidelines for Collaborations Among Competitors (“Guidelines”) that notes in its preamble:

In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.4

These antitrust-enforcement agencies have recognized the benefits of teaming agreements and strategic alliances:

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. . . .5

In the same vein, FAR Part 9.6 recognizes that team arrangements can yield benefits to the Government. 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.”6 The FAR provides for treating teams like other offerors. FAR 9.6 does not limit the Government’s rights to require consent to subcontract, pursue competitive subcontracting policies such as component breakout, or hold the prime contractor fully responsible for contract performance, regardless of any team agreement.7 And of course, FAR 9.6 does not authorize team arrangements that violate antitrust statutes.

B. Encouraging use of exclusive team arrangements.

The Section encourages the panel to recommend that DoD let market forces determine whether and to what extent exclusivity in a particular arrangement makes commercial as well as competitive sense. A contractor forms a team arrangement with other contractors that have complementary capabilities to collaborate on a proposal, share proprietary technical data, share pricing information, and develop competitive strategies. Exclusivity is commonly desired to facilitate collaboration. Lack of exclusivity could mean that a teammate is working with a competitor, which tends to inhibit a team’s free flow of information, including competitive strategies.

By drawing on the Guidelines, agencies can address specific concerns with an exclusive arrangement without a blanket prohibition. This approach would facilitate arrangements that do

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5 Id. § 2.1.
6 FAR 9.603
7 FAR 9.604.
not improperly fix prices, restrict output, or allocate market share. Antitrust laws impose a rule of reason in assessing the propriety of a collaborative venture. The rule should provide for flexibility in teaming to ensure that the best solutions are proposed based on appropriate market forces that spur competition and innovation. If there is a particular need to use a particular company’s products or services such that the products or services should be made available for use by all competitors, the agency can address this need in the solicitation. It need not prohibit exclusive teaming agreements across the board to do so for any particular procurement.8

III. CONCLUSION

Given the widely acknowledged advantages of teaming, the regular use of appropriate exclusive arrangements in federal contracting, the need to balance access to technologies with competitive concerns of the market, and the existing practice under the FAR and DFARS to allow flexibility, contracting agencies should not prohibit or place heavy burdens on team arrangements. It is not in the interest of DoD, or the defense industry on which it depends, to discourage the formation of team arrangements that allow firms to combine their complementary technological know-how and manufacturing capabilities to best meet the Government’s needs.

The Section appreciates the opportunity to provide feedback to the Section 809 Panel to further its efforts to streamline the commercial item contracting process. The Section recognizes that, because these regulations are required by statute, these suggested changes will require engagement with Congress. The Section is available to provide additional information or assistance as you may require.

Sincerely,

Aaron Silberman
Chair, Section of Public Contract Law

cc:
Kara M. Sacilotto
Linda Maramba
Susan Warshaw Ebner
Annejanette Pickens
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Acquisition Reform and Emerging Issues Committee
Chairs and Vice Chairs, Subcontracting, Teaming and Strategic Alliances Committee
Craig Smith
Samantha S. Lee

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8 For example, the agency could include specific requirements, specifications, or provision to provide government-furnished property or services. See, e.g., FAR Part 7 (acquisition planning); FAR Part 11 (requirements development); FAR Part 45 (government-furnished property).