

Appendix

Proposed Review and Coordination Procedures for DOD Contractor Collaborations

Proposed Amendment to DFARS 210.002:

1. Market Research and Industry Analysis. This requirement shall apply to all acquisitions subject to a written acquisition plan (DFARS 207.103). These procedures may be applied to all other acquisitions with a total value of \$500,000 or more, when appropriate.

a. When conducting market research, Program Managers and Contracting Officers shall define the relevant market for each contracted end-item (product) or service by:

(1) Identifying all end-items (products), services, and reasonable substitutes for each that satisfy the agency's basic requirement and any component (see FAR 10.002(b));

(2) Identifying all firms that sell or have the potential to sell the end-items (products), services, and reasonable substitutes, and whether any firm previously has sold to the government; and

(3) Identifying all firms that sell or have the potential to sell any components of each end-item (product), service, and reasonable substitute, and whether any firm previously has sold to the government.

b. Industry Analyses. If there are less than five firms identified for each basic or component end-item (product), service, and reasonable substitute, the Program Manager or Contracting Officer shall request an industry analysis report from a designated "Industry Analysis Center of Excellence." "Industry Analysis Centers of Excellence" are DOD activities that have been charged by the DUSD (IA&I) to coordinate with the U.S. antitrust agencies and other appropriate sources to gather current market and industry data and conduct industry analyses at the request of DOD procurement officials. As prescribed by the DUSD (IA&I), industry analyses will include assessments of the operating conditions of industry competitors and potential entrants, the relative buying power of industry output, and the relative selling power of suppliers to the industry. "Operating conditions of the industry" will address physical (*e.g.*, geographic), legal, and economic barriers to entry, industry cost structures, availability of necessary facilities, labor, and technology, industry profitability, distribution networks, pricing systems, target markets, and other competitive-

significant variables. Those conditions identified as restraining competition will be noted in the report as “significant competitive factors.”

Proposed Amendment to DFARS 207.103(d):

Program Managers and Contracting Officers shall consider and address in the acquisition plan the industry analysis, when such analysis is required under DFARS 210.002. The acquisition plan will address each “significant competitive factor” addressed in the industry analysis, or any other barrier to competition identified by the local, special, or agency Competition Advocate, by considering the effect on firms of the estimated value (or size) of the procurement, the contract type, basis for other than full and open competition, contract financing, technical and data rights reprocurement packages, the specifications or statements of work, performance and delivery schedules, design architecture, government-furnished property, subcontractor competition, component breakout, leader-follower contracting, cost accounting standards, and other appropriate authorities in the FAR or agency supplement.

Proposed Amendment to DFARS 203.303:

1. Program Managers and Contracting Officers shall submit a request for review to the DUSD (IA&I) of any joint venture, teaming arrangement, strategic alliance, intellectual property license, leader-follower arrangement, partnership, association, or other collaboration between competitors in markets defined under DFARS 210.002 under the following conditions and after review of the servicing legal advisor when:

a. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that evidences a violation of antitrust law (see FAR 3.103);

b. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that has the potential to cause anticompetitive harm, as set out in Section 3.31 of the *Federal Trade Commission and the U.S. Department of Justice Antitrust Guidelines for Collaborations Among Competitors* (April 2000);

c. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that restricts access to any other offeror for an end-item (product) or service at any level

when only one firm has been identified for that end-item (product) or service pursuant to DFARS 210.002;

d. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that entitles one or more parties to the collaboration to exclusive rights to the output or efforts of a single firm or other legal entity; or

e. Any such collaboration that is not yet effective is proposed by a current contractor and one of the conditions in a or b, above, exists.

2. All other DOD employees shall report any of the collaborations set out above to the cognizant Program Manager or Contracting Officer for submission of a request for review.

3. The request for review shall include, in addition to a copy of any documents establishing the collaboration or other memoranda reflecting oral collaborations, a brief discussion of any facts and the program or Contracting Officer's opinion pertaining to:

a. Any efficiencies generated by the collaboration that may benefit DOD, including relevance of any related "significant competitive factors" or barriers to entry included in the acquisition plan or solicitation (DFARS 207.103(d));

b. A copy of the market analysis and any industry analysis used in preparing the acquisition plan; and,

c. Any representations made by procurement officials to offerors or contractors regarding the proposed collaboration.

4. Contracting Officers shall not conduct discussions with offerors or proceed with negotiations (unless parties to the collaboration are found to be outside the competitive range for reasons other than those related to the existence of the collaboration) until the DUSD (IA&I) replies to the request for review. Contracting Officers shall follow any guidance provided by the DUSD (IA&I) or the Department of Justice or the Federal Trade Commission in the reply.

5. Any collaboration with provisions addressed in DFARS 203.303(3) suspected to be already in effect shall be reported pursuant to DFARS 209.406-3 or DFARS 209.407-3 and DODD 7050.5.

6. The DUSD (IA&I) shall coordinate all requests for review with the DOD Office of General Counsel, and forward such requests with appropriate comment and opinion to the Antitrust Division, Department of Justice and the Federal Trade Commission, as those two agencies direct. When the Department of Justice or the Federal Trade Commission forward any Hart-Scott-Rodino filing notices to the DOD for a collaboration that otherwise does not qualify for merger review under DODD 5000.62, the DUSD (IA&I) will notify the cognizant contracting or program offices of

such notice and direct that they submit a request for review in accordance with this section.