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DOD CONTRACTOR COLLABORATIONS: PROPOSED PROCEDURES FOR INTEGRATING ANTITRUST LAW, PROCUREMENT LAW, AND PURCHASING DECISIONS

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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DOD CONTRACTOR COLLABORATIONS: PROPOSED PROCEDURES FOR INTEGRATING ANTITRUST LAW, PROCUREMENT LAW, AND PURCHASING DECISIONS

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DOD CONTRACTOR COLLABORATIONS: PROPOSED PROCEDURES FOR INTEGRATING ANTITRUST LAW, PROCUREMENT LAW, AND PURCHASING DECISIONS

ABSTRACT: The current competition policy enforcement regimes of antitrust law, procurement law and DoD monopsony purchasing decisions reflect significant missing interrelationships. The new *Collaboration Guidelines* present challenging considerations of DoD contracting practices and procurement decisions when subjecting collaborations to antitrust review. The analytical framework of antitrust law takes into account procurement law and DoD decisions when assessing: efficiencies and their relationship to competition; relevant markets and concentration; industry conditions and barriers to entry. However, procurement regulations omit effective procedures for reporting, reviewing and enforcing these factors. Further, DoD lacks effective procedures to assess and incorporate antitrust considerations into particular procurements or to inform its buying decisions and practices.

These deficiencies prevent procurement officials from incorporating market and industry analysis into procurement decisions. They also inhibit the effective exercise of DoD monopsony powers to foster long-term competition goals over achieving short-term incentives. Finally, the inter- and intra-agency review and enforcement system for DoD contractor collaborations serves only a counter-productive, adversarial purpose.

Two alternative solutions to closing these procedural gaps should be explored. While a centrally managed DoD industry and market analysis function and antitrust review activity would provide the most predictable, transparent, and efficiency system, it is not feasible. A decentralized approach to market and industry analysis and a proactive collaboration review process among DoD, DoJ, and FTC will enhance DoD's ability to balance short- and long-term competition-enhancing procurement strategies.

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I. Introduction

> *Despite improvement due to acquisition reform, the* [DoD] *acquisition process continues to be overly risk averse, which inhibits innovation and access to creative, high technology solutions ... The oversight community, at the operating level, continues to function with an inadequate understanding [of] the realities and changing dynamics of the market or industry.*[1]

One of the most pervasive changes in the U.S. defense industry and procurement markets has been the rapid growth in Department of Defense (DoD) contractor collaborations in both "systems" (or major end-items)[2] and other non-systems procurements.[3] While the trend in

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[1] OFFICE OF THE SECRETARY OF DEFENSE, DEFENSE SCIENCE BOARD TASK FORCE ON PRESERVING A HEALTHY AND COMPETITIVE U.S. DEFENSE INDUSTRY TO ENSURE OUR FUTURE NATIONAL SECURITY, Final Briefing [hereinafter DSB REPORT ON PRESERVING INDUSTRY], 25 (Nov. 2000), *at* http://www.ndia.org. Within the context of antitrust analysis of mergers and acquisitions, one scholar has concluded that "the Department has not devised a common framework for its subordinate institutions to follow when analyzing the competitive impact of specific consolidation events." William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, THE ANTITRUST BULLETIN, 421, 446 (Summer 1999). DoD confronted some policy questions regarding both structural and personnel deficiencies in its decentralized approach to industrial structure and market behavior in OFFICE OF THE SECRETARY OF DEFENSE DEFENSE SCIENCE BOARD TASK FORCE ON VERTICAL INTEGRATION AND SUPPLIER DECISIONS, [hereinafter DSB REPORT ON VERTICAL INTEGRATION], 33-39 (May 1997).

[2] "Major defense suppliers" serve as primer contractors to provide DoD with "major systems" and other designated items or services. U.S. DEP'T OF DEFENSE, DIR. 5000.62, IMPACT OF MERGERS AND ACQUISITIONS OF MAJOR DOD SUPPLIERS ON DOD PROGRAMS, para. 3.2 (21 Oct. 1996) [hereinafter DOD DIR. 5000.62]. "The term 'major system' means a combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property. A system shall be considered a major system if (A) the conditions of section 2302d of this title are satisfied, or (B) the system is designated a 'major system' by the head of the agency responsible for the system." 10 U.S.C. § 2302(5) (2000). Section 2302d further provides: "For purposes of section 2302(5) of this title, a system for which the Department of Defense is responsible shall be considered a major system if - (1) the total expenditures for research, development, test, and evaluation for the system are estimated to be more than $115,000,000 (based on fiscal year 1990 constant dollars); or (2) the eventual total expenditure for procurement for the system is estimated to be more than $540,000,000 (based on fiscal year 1990 constant dollars)." 10 U.S.C. § 2302d(a) (2000). U.S. DEP'T OF DEFENSE, 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATION INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (4 Jan. 2001) [hereinafter DOD 5000.2-R] clarifies the dollar values for such expenditures at $140,000,000 for R,D&T and $660,000,000 for the total system expenditure threshold.

[3] Jon Shepard, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 ANTITRUST L.J. 641 (1998). "Announcements of joint ventures, strategic alliances, and other cooperative arrangements among competitors have occurred with increasing regularity in virtually all industry sectors over the past several years." *Id.* at 641.

the general U.S. economy has been to scrutinize such business practices under antitrust laws,[4] DoD has only just begun a dialogue on the impact of such contractor behavior on its procurements.[5] Likewise, DoD only recently began to include measurements of market and industry competitiveness, the cornerstone of antitrust policy, as significant high-level planning factors in the monopsonist DoD "systems" procurement process.[6] Although DoD, the Department of Justice (DoJ), and the Federal Trade Commission (FTC) in the last decade settled on antitrust enforcement coordination procedures for DoD contractor mergers and acquisitions,[7] the debate over the competitive effects of contractor collaborations and consequent enforcement procedures needs a concerted push. Even DoJ and FTC recently acknowledged that contractor collaborations "require antitrust scrutiny different from that required for mergers."[8]

In a defense industry that is consolidating and changing to a new paradigm after the Cold War downsizing,[9] one of the most significant DoD contractor behavioral adjustments is the

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[4] *Id.*

[5] *Note: Industry Group Questions Proposed DFARS Rule on Exclusive Teaming Arrangements*, THE GOVERNMENT CONTRACTOR, Vol. 42, No. 5, Feb. 2, 2000, at para. 43[hereinafter *Note: Industry Questions*]; *DFARS Case 99-D028*, 64 Fed. Reg. 63,002 (Nov. 18, 1999).

[6] *See, e.g.*, Memorandum, Deputy Under Secretary of Defense (Acquisition & Technology), DUSD(A&T), subject: Future Competition for Defense Products (7 Jul., 2000), *available at* http://www.acq.osd.mil/ia. A monopsony exists when a buyer controls the market. BLACK'S LAW DICTIONARY 1023 (7th Ed. 1999).

[7] OFFICE OF THE SECRETARY OF DEFENSE DEFENSE SCIENCE BOARD TASK FORCE ON ANTITRUST ASPECTS OF DEFENSE INDUSTRY CONSOLIDATION, [hereinafter DSB REPORT ON INDUSTRY CONSOLIDATION] (Apr. 1994). DoD conducted 46 formal merger or acquisition reviews in 1999. U.S. DEP'T OF DEFENSE, ANNUAL INDUSTRIAL CAPABILITIES REPORT TO CONGRESS [hereinafter INDUSTRIAL CAPABILITIES REPORT] (Feb. 2000), *available at* http://www.acq.osd.mil.

[8] FEDERAL TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS [hereinafter COLLABORATION GUIDELINES] § 1.3 (Apr. 2000), *at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm.

[9] *See* DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, *at* 1; Business.Com, *Aerospace & Defense Industry Profile: Growth and Consolidation*, (18 Jan. 2001), *at* http://www.business.com.

use of collaborative contracting. Collaborations among competing DoD contractors, whether called "teaming arrangements," "joint ventures," "strategic alliances," "subcontracts," "associations," licensing arrangements," "partnering," "leader-follower agreements," and the like, provide a variety of benefits to market participants in winning and keeping DoD contracts. Industry observers predicted such benefits (or arguably even business necessities) even as the Cold War dividend appeared.[10]

Of course, the defense industry downsizing and related consolidation were not the exclusive causes of this behavioral trend. As DoJ and FTC have said, "[i]n 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."[11] Even DoD's non-systems markets, including base services and other commercial items, are experiencing these "forces."[12]

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[10] William E. Kovacic, *The Application of the Antitrust Laws to Government Contracting Activities: Illegal Agreements with Competitors*, 57 ANTITRUST L.J. 517 (1988); John W. Chierichella, *Antitrust Considerations Affecting Teaming Arrangements*, 57 ANTITRUST L.J. 555 (1988); Charles L. Eger, *Contractor Team Arrangements Under the Antitrust Laws*, PUBLIC CONTRACT L.J., Vol. 17, No. 2, June 1988, at 595; William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, 58 ANTITRUST L.J. 1059 (1989)

[11] COLLABORATION GUIDELINES, *supra* note 8, at 1. In fact, in the 1995 hearings conducted by FTC on global and innovation-based competition, it and DoJ learned that "global and innovation-based competition [continues] driving firms toward ever more complex collaborative agreements." Shepard, *supra* note 3, at 641, n.2 (quoting Comment and Hearings on Joint Venture Project, 62 Fed. Reg. 22,045, 22946 (Apr. 28, 1997)). These agencies discovered that the business community was confused about both FTC and judicial standards for evaluating such increasingly valuable business activities. *Id.*

[12] *See, e.g.*, Colsa Corp. v. Martin Marietta Servs., Inc., 133 F.3d 853 (11th Cir. 1998) (Martin Marietta's termination of a software services support subcontractor on a Navy facilities operation and maintenance contract found not to be illegal anticompetitive conduct); *see also* Shepard, *supra* note 3 at 641.

With more strident competition, particularly in the defense systems industrial base, antitrust experts and observers over the past decade cautioned against the anticompetitive risks of collaboration.[13] Those companies seeking market monopolies or groups that seek to restrain trade to an advantageous end can abuse overly restrictive collaborative arrangements. As a result of such cautionary antitrust scholarship, here too, the business community at large has shown risk aversion toward collaborations.[14] "A perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations."[15]

The two forces of defense procurement oversight reform and sensitivity toward unclear antitrust standards for collaborations fueled a firestorm of controversy recently when DoD proposed a new set of rules prohibiting what it perceived was a particularly anticompetitive contractor collaboration – exclusive teaming arrangements.[16] These arrangements exist when one contractor with a unique asset agrees to participate in a DoD procurement with one or more other contractors, provided that the collaborators agree not to work with non-participants. Such collaborations subjugate collaborators to the asset owner and, therefore, violate antitrust law, according to the DoD position. The ensuing industry comments reveal a deep chasm in the defense community's understanding and respective interests in the

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[13] *See, e.g.*, Chiericella, *supra* note 10; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 10; Eger, *supra* note 10.

[14] *See* Shepard, *supra* note 3, at 641.

[15] COLLABORATION GUIDELINES, *supra* note 8, at 1. *See* Shepard, *supra* note 3, at 641 (noting the business community's anxiety over unclear and inconsistent antitrust standards for collaborations).

[16] *See* Douglas E. Perry and Richard C. Park, *Exclusive Teaming Arrangements: Impact of Antitrust Guidelines*, WESTGROUP BRIEFING PAPERS 2D, No. 00-6, May 2000, at 1; *Note: Industry Questions*, *supra* note 5; *DFARS Case 99-D028*, 64 Fed. Reg. 63,002 (Nov. 18, 1999).

enforcement structure of antitrust law to contractor collaborations and its role in the procurement process.[17]

This article will review the three overlapping general aspects of Government action that govern the level of collaboration among DoD contracts, and the procedural enforcement regimes used within each. First, DoJ and FTC apply antitrust laws to the private conduct of contractor collaborations.[18] These agencies take into account the unique DoD regulatory and monopsony powers to inform its assessments, but so far have relied little on DoD for coordinating its enforcement efforts. DoD defers on matters of antitrust laws to these agencies. Second, the various Federal procurement statutes provide a host of requirements for achieving competition during DoD procurements and punish contractors financially for violating antitrust laws.[19] There also is a host of exceptions that may seem to contradict or limit the application of antitrust competition standards.[20] Finally, as a buyer, DoD's purchasing decisions play a significant role in shaping the behavior of its contractors.[21]

With the aid of realistic hypothetical collaborations, this paper will critique the effectiveness of the three procedural enforcement regimes as they apply to anticompetitive collaborations. Specifically, this paper will address the following missing or ineffective

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[17] *E.g.*, *Note: Industry Questions*, *supra* note 5.

[18] *E.g.*, The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (2000); The Federal Trade Commission Act, 15 U.S.C. § 45 (2000). While substantial, this paper does not include discussion of the role of individual states in enforcing competition laws. Individual state's antitrust laws are not preempted by the federal laws. California v. ARC America Corp., 490 U.S. 93, 100-106 (1989).

[19] The Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, tit. VII, 98 Stat. 1175 [hereinafter CICA], implemented in part in GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION, Pt. 6 and Subpt. 9.4 (June 1997) [hereinafter FAR], and U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP., Subpt. 209.4 (Apr. 1, 1984) [hereinafter DFARS].

[20] *See* Fed. Trade Comm'n v. Alliant Techsystems Inc., 808 F. Supp. 9, 22 (D.D.C. 1992).

[21] Memorandum, subject: Future Competition for Defense Products, *supra* note 6; Kovacic, *supra* note 1.

interrelationships: 1) The role and effect of DoD buying behavior and its agents' representations in the application of antitrust law to contractor collaborations; 2) The procedures used by DoD under its procurement system to monitor, assess, report to, and assist DoJ and FTC with potentially illegal collaborations among DoD contractors; and, 3) The lack of effective procedures within DoD to assess and incorporate the results of an antitrust review of potential collaborations into particular procurements or buying decisions and practices.

This paper will propose a new set of procedures that fill in the enforcement procedural gaps outlined above and synchronize agency actions on contractor collaborations. This paper will evaluate the proposed procedures by: 1) their ability to assist contractors in predicting Government reactions to collaborations; 2) the efficiencies and flexibility gained through more rapid and responsive coordination of enforcement activities, including decreased transactional costs to both DoD and its contractors; 3) their relative ease of implementation and application, including training of DoD personnel; and 4) their overall effect in fostering competitive behavior and achieving other DoD industrial capability goals.

This paper outlines three distinct proposals. First, through a critique of the current system, this paper discusses the unmitigated disadvantages of maintaining the existing enforcement system. Second, this paper outlines a set of procedures based upon a centralized DoD analytical review model. Finally, this paper recommends the incorporation of antitrust concepts and review procedures into the existing decentralized and specialized purchasing and budgeting systems, or "centers of excellence." The proposed procedures focus on coordination of procurement procedures and law enforcement procedures, including

investigations, with regard to: the distinction between "per se" violations of antitrust law and those subject to reasonableness tests; the efficiencies gained in collaborations; the types of anticompetitive harm to be considered within specific industry conditions; and the balancing of anticompetitive harm and benefits in collaborations.

II. Background

A. *The Defense Industrial and Procurement Environment.*

Scholarly application of antitrust laws to DoD contractor business activity historically focused only on the "defense industry." However, defining the "defense industry" in the 21st Century has become more difficult. The financial world generally views this industry as a powerful and profitable group of companies serving global aerospace and national defense "systems" (*i.e.*, vehicle, weapons, informational, and similar) needs. Within the U.S., the industry comprises manufacturing and service segments and sub-segments based on the nature of the output, variously categorized as: commercial and military;[22] defense, commercial aircraft, and space;[23] commercial "off-the-shelf" and specialized;[24] by product function;[25] etc.[26] For antitrust purposes, DoJ and FTC define "market" as a particular

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[22] Business.Com, *Aerospace & Defense Industry Basics*, Jan. 18, 2001, *at* http://www.business.com; Peter B. Work, *Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Procuring Activities in Markets for Specialized Government Products*, 57 ANTITRUST L.J. 543, 543-44 (1988).

[23] Hoover's Online, *Aerospace & Defense Industry*, Jan. 18, 2001, *at* http://www.hoovers.com; Hoover's Online, *Industry List*, Jan. 18, 2001, *at* http://www.hoovers.com.

[24] Kovacic, *Antitrust Analysis of Jiont Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 10 (applying antitrust market definitions to defense procurements).

[25] Kovacic, *supra* note 1, at 423.

[26] *See, e.g.*, Jane's Business, Jane's.com, Jan. 18, 2001, *at* http://www.janes.com; U.S. CENSUS BUREAU, THE NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) – UNITED STATES (1997), *available at* http://www.census.gov/epcd/www/naics.html (listing various defense products among other economic outputs, including traditional vehicles and equipment in various manufacturing subcategories and various other service outputs throughout, such as national security services under "Other Services"). A useful search of various

product (or service)[27] market within a geographical market.[28] Since the early 1990's, the defense budget downsizing has reduced the number of defense industry companies by about half. Now one or two large firms dominate each "systems" industry sub-segment,[29] despite marginal financial performance.[30] DoD has worked closely with DoJ, FTC and other agencies to oversee this reduction by monitoring the industry's mergers and acquisitions in hopes of obtaining significant procurement cost savings.[31] DoD largely realized the savings from this activity,[32] but with consolidation nearly complete, the focus is changing.

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aerospace and defense industry participants by Standard Industry Classification (SIC) Codes can be found at *Industry List*, *supra* note 23. DoD also reports on and analyzes its contractors by "military products." INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 8. Pursuant to FAR 4.6 and DFARS Parts 204.6 and 235, DoD codes each procurement under the Federal Supply Classification Codes according to the nature of the item procured, within the three main categories of R,D,T&E, supplies and equipment, and services and construction. For specific listing of DoD expenditures per Federal Supply Classification Code and Description, *see* U.S. Department of Defense Washington Headquarters Service, *at* http://web1.whs.osd.mil/peidhome/prodserv/p07/fy2000/p07.htm. DoD also categorizes and manages individual procurements according to the procurement process used, either as "major systems" through "acquisition programs" and "major defense acquisition programs," depending on estimated expenditures, *supra* note 2, or non-major systems. "Major systems" acquisitions are subdivided into component milestones where various decisions are made, including whether to proceed with the procurement. U.S. DEP'T OF DEFENSE, DIR. 5000.1, THE DEFENSE ACQUISITION SYSTEM, Encl. 2 (23 Oct. 2000).

[27] The relevant product market is determined by "identifying all reasonable demand substitutes and all firms that make (or could make, without significant cost or delay) the product in question." Kovacic, *supra* note 10, at 1087. U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES, [hereinafter HORIZONTAL MERGER GUIDELINES], § 1.1 (revised Apr. 8, 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm.

[28] The relevant geographic market is "established by determining the area to which the purchasing agency can look to attract offerors for individual contracts." Kovacic, *supra* note 10, at 1087. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 27, at § 1.2. Accordingly, a firm in the "defense industry" can participate in a variety (even a web) of product and geographic markets, although the "market" for a "system" is typically a single national one. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1984).

[29] For a detailed list of industry participants, see Hoover's Online, *Industry List*, *supra* note 23. For a list of current segment leaders, see Kovacic, *supra* note 1, at 422-23.

[30] Business.Com, *Aerospace & Defense Industry Profile*, Jan. 18, 2001, *at* http://www.business.com; DSB REPORT ON PRESERVING INDUSTRY, *supra* note 1, at 6.

[31] INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 12-13; DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 1; *Aerospace & Defense Industry Profile*, *supra* note 30.

[32] *Aerospace & Defense Industry Profile*, *supra* note 30; INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 8.

The defense industry is entering a new paradigm.[33]

> ... The Defense industrial and technology base has undergone a fundamental change over the past decade. DoD traditionally relied on a largely defense-unique industrial base comprised of dozens of suppliers and technology leaders. In the future, the Department must increasingly access the commercially driven marketplace, in which the Department competes with other business segments for technology, investment, and human capital.[34]

Several additional economic and political factors have played a role in this shift, including a more informed and competitive investment community, the "revolution" in information technology, the globalization of the capital and industrial markets, streamlining reforms in government management, and other technological improvements caused by more competitive research and development globally.[35] The necessary post-downsizing rationalization of the defense industry moves under these influences.[36] They have radically changed business models (witness the terms "old" and "new" economies) and competitive business practices.[37] For example, the use of the internet by competitors to form buying

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[33] DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 6.

[34] *Id.*

[35] *Id.*; *Aerospace & Defense Industry Profile*, *supra* note 30. *See also*, Kovacic, *supra* note 10, at 1061-62; Wendy A. Polk, *Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations*, PUBLIC CONTRACT L.J., Vol. 28, No. 3, Spring 1999, at 415, 415-16.

[36] Economists refer to the process of company adjustments in capacity, structure, finance, etc., in response to the downsizing as "rationalization." *See, e.g.*, DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 2. The post-downsizing industry structure has heaped the problems of excess infrastructure and workforce capacity, outdated business processes, tighter revenue sources, and others upon an industry that is competing with the "new economy." INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 2; DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 17. A large part of the pressure to adopt more competitive commercial practices stems from the political and financial pressures to rationalize. There appears to be a debate among analysts as to whether the external economic pressures first generated the interest in adopting more commercial practices or whether the Cold War down-sizing forced the defense industry to adopt commercial solutions to these forces in their own efforts. See Kovacic, *supra* note 10, at 1060, for an example of the latter theory.

[37] "They have reduced excess infrastructure and workforce levels to better match reduced demand, streamlined processes, increased productivity, and revamped supplier relationships." INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 7.

collaborations has been a hot idea.[38] Even three major defense industry participants have collaborated recently to develop an internet site, called "Exostar," where it can purchase parts from over 37,000 worldwide suppliers.[39] The defense firms expect to dramatically reduce the number of subcontractors and supplier transaction costs.[40]

Defense industry observers and participants are encouraging DoD to tap into the broader competitive marketplace for competitors to integrate commercial technologies into exclusively defense systems.[41] Further, they suggest a host of other strategies for leveraging the competitive business practices of the broader economy to both entice participation by non-traditional firms and improve cost and performance goals by becoming more "commercial."[42] One such strategy, adopted in part by DoD and "designed to promote competition and increase access to commercial inventories,"[43] is the close scrutiny of anticompetitive competitor collaborations.[44]

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[38] The use of buying or selling collaborations will be addressed from an antitrust perspective below. *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (rejecting challenge to a purchasing cooperative of competing retailers).

[39] *Aerospace & Defense Industry Profile*, *supra* note 30.

[40] *Id. Accord* Michael S. McFalls, *Symposium: Antitrust Scrutiny of Joint Ventures: The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 ANTITRUST L.J. 651, 671 (1998) (collective buying arrangements argued not to reduce level of "insider competition" among joint venture participants).

[41] DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 28-29; Kovacic, *supra* note 1, at 455-62; INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 15.

[42] DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 28; Kovacic, *supra* note 1, at 443-67; INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 12-20. DoD has acknowledged that its efforts to attract non-traditional defense firms face several obstacles, but in general, acquisition reform and management of industry structure can provide benefits. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 8-9.

[43] INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 20.

[44] Kovacic, *supra* note 1, at 465-66. See the proposed rules on exclusive teaming arrangements, *supra* note 5.

Accordingly, the lines of distinction between the competitive business practices of traditional "defense industry" and other commercial suppliers continue to blur. In 1988, one antitrust and defense industry observer noted, "the economic forces one finds in these two discrete government marketplaces are quite different, and the types of antitrust issues that arise differ as well."[45] But with DoD moving toward integration of non-traditional defense competitors, it must be aware of the effects of anticompetitive business practices on both industrial management goals for the existing defense industry and the disincentives for new firms to enter.[46] Further, similar economic forces motivating collaborations among "defense industry" firms exist within the purely commercial segments of DoD procurement market.

To that end, DoD must examine collaborative conduct among its commercial products and services contractors under similar scrutiny. Even these non-systems procurements are affected by the economic and political changes, and the volume of such procurement activity equally supports such an approach. In particular, DoD continues to put a substantial portion of its commercial activities up for bid, having identified over 260,000 positions subject to competitive outsourcing.[47] Acquisition reform efforts over the past decade successfully persuaded the government to purchase such "commercial items"[48] and services in a manner

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[45] Work, *supra* note 22, at 544. Work outlined three unique characteristics of "specialized government products." First, the government has monopsonist powers and shapes both the existence of future markets and the requirements for participation. Second, the barriers to entry into such markets are so high that contractors on particular product segments are not easily replaceable. Third, the government considers non-economic factors in procurement decisions, such as industrial capacity and socio-economic policies. *Id.* at 544-45.

[46] Kovacic, *supra* note 1, at 464-66. To a degree, DoD has recognized these obstacles. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 27-28.

[47] U.S. DEPARTMENT OF DEFENSE FAIRNET, http://gravity.lmi.org/dodfair/Index2.cfm. (3 Feb. 2001).

[48] FAR, *supra* note 19, at 2.101 ("commercial item" is "any item other than real property, that is of a type customarily used for nongovernmental purposes"). *See* Kovacic, *supra* note 1, at 455-56. These efforts continue. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2000, 113 Stat. 512 (1999) (codified as

more consistent with the broader commercial marketplace, while avoiding the abuses heaped upon the procurement system in the 1980's. In fiscal year 2000, DoD spent under contract $55 billion on services and construction, $65 billion in supplies and equipment, and $20 billion in R,D,T&E.[49] However, the procurements for these "commercial items" also experience the unique regulatory and monopolistic influences exerted by DoD, as demonstrated by the sheer magnitude of the "acquisition reform" movement of the 1990's.[50]

The antitrust standards applicable to DoD contractors are flexible enough for all markets. DoD should adopt a consistent set of procedures across its own procurement submarkets to enhance its systems and non-systems competition goals.

B. *Corporate Structure, DoD Contractor Competitive Factors, and Collaborative Behavior*

1. *Corporate Structure and DoD contractor Competitive Factors*

The leading theoretical business management model explains the significance of collaborative behavior. While this paper cannot provide a complete review of current microeconomic and management theory on the incentives for the collaboration trend, a brief overview of the leading theoretical business management model will illustrate the way in which the myriad competitive factors motivate such corporate activity.

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41 U.S.C. § 403(12)(E) (2000)); *Acquisition of Commercial Items*, 65 Fed. Reg. 52,284 (Aug. 28, 2000) (proposing amendment to FAR 2.101).

[49] U.S. Department of Defense Washington Headquarters Service, *at* http://web1.whs.osd.mil/peidhome/prodserv/p07/fy2000/p07.htm (Feb. 15, 2001). For a specific breakdown of expenditures by Federal Supply Classification Code and Description by fiscal year, see *id.*

[50] *See, e.g.*, Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994); Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996). For example, the procurement of "commercial activities" is subject to extensive Federal regulation beyond the FAR, including FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES [hereinafter OMB CIR. A-76] (Aug. 4, 1983) (now implementing the Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998).

The shift in emphasis from diversified conglomerate firms began seriously in the 1970's, largely under the influence of the development of corporate strategic management theories. An influential scholar, Michael Porter, described companies as "value chains," wherein a company transforms inputs into outputs that customers value.[51] Such a transformation requires expert management of the primary activities of research and development, production, marketing, sales, and distribution, combined with such supporting activities as the company infrastructure, human resources, and materials management.[52]

Under Porter's model, these activities provide the best customer value if their products or services are either lowest in cost, highest in differentiation, or capture a niche ("focused") market.[53] If a firm, depending on its target market, can maximize its operating efficiencies, quality of output, customer responsiveness, and level of innovation, it will obtain some competitive advantage over other industry participants.[54] Arguendo, when a firm's strategy

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[51] MICHAEL E. PORTER, COMPETITIVE ADVANTAGE (1985). *See* CHARLES W.L. HILL & GARETH R. JONES, STRATEGIC MANAGEMENT: AN INTEGRATED APPROACH, 120, (4th ed. 1998).

[52] HILL & JONES, *supra* note 51, at 120-23 (citing PORTER, COMPETITIVE ADVANTAGE). Sophisticated techniques have since been developed to assess how well a firm's value chain provides a "competitive advantage," including enhancements to the "value chain" itself. *See* W. Jack Duncan, Peter M. Ginter, and Linda E. Swayne, *Competitive Advantage and Internal Organizational Assessment*, ACADEMY OF MANAGEMENT EXECUTIVE, Vol. 12, No. 3, 1998, at 1.

[53] MICHAEL E PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS (1980). If a product stands out in some qualitative way from its competitors, some segment of customers may be willing to pay a "premium" for the difference. The firm that satisfies a qualitative demand unique to a customer segment's desires should expect to earn that segment's business. The product or service need not be differentiated on functionality (or uses) alone. In fact, antitrust law acknowledges that products or services may form entirely legally distinct markets (or "submarkets") in a variety of ways. *See* Fed. Trade Comm'n v. Staples, Inc., 970 F.Supp. 1066, 1073-81 (D..D.C. 1997) (applying Supreme Court criteria of "submarkets" to find distribution and pricing structure of office supply superstores to be distinct market of all retailers selling office supplies). DoJ and FTC established specific methods of accounting for product differentiation in the Federal merger guidelines. HORIZONTAL MERGER GUIDELINES, *supra* note 27, §§ 1.12 and 1.22. Differentiation by sellers of commodities based solely on price is subject to the Robinson-Patman Act (Section 2 of the Clayton Act), 15 U.S.C. § 13 (2000), but is not addressed in this paper.

[54] HILL & JONES, *supra* note 51, at 120. A firm that develops unique resources into "skills and capabilities [possesses] core competencies." Michael A. Hitt, Barbara W. Keats, and Samuel M. DeMarie, *Navigating in*

to provide its products or services within a particular industrial environment results in the lowest cost or highest level of differentiation or captures a niche, it produces earnings at a level above its peers.[55] For a variety of reasons, including the condition of a particular industry, many firms either avoid these competitive pressures or ignore the rationale behind this theory and continue to operate for long periods without substantial improvements in cost or differentiation.

Based on the nature of a firm's industry, its market(s), and its unique "competitive advantages," it will form a strategy to structure and orient its primary and supporting activities to achieve its goals. This theoretical model now includes major adjustments reflecting the economic pressures mentioned above, notably the "technological revolution" and "increasing globalization."[56] Companies gain a competitive advantage by executing different organizational structure or transactional strategies,[57] or both, as the circumstances dictate.[58]

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the New Competitive Landscape: Building Strategic Flexbility and Competitive Advantage in the 21st Century, ACADEMY OF MANAGEMENT EXECUTIVE, Vol. 12, No. 4, 1998, at 22, 28.

[55] Various theories and practices of corporate finance and accounting also support this model and are, to a large extent, reflected in the concerns of the defense industry's structure. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 9, 13, 44; *see also*, INDUSTRIAL CAPABILITIES REPORT, *supra* note 7, at 2.

[56] Hitt, Keats, and DeMarie, *supra* note 54, at 22, 23.

[57] These strategies include: vertical integration of suppliers (called "backward," or "upstream integration") or distributors ("forward," or "downstream integration") via merger or acquisition; formation of strategic alliances (collaborations) with upstream or downstream firms as an alternative to permanently integrating; outsourcing activities instead of integrating; and even diversifying into other markets (where primary or supporting activities can be efficiently shared among a firm's different markets. HILL & JONES, *supra* note 51, at 280-307.

[58] "Parties may form joint ventures to set standards, research and develop new products, purchase inputs, produce inputs, integrate production, or distribute, market, or sell production. Many ventures will perform more than one (and perhaps several) of these functions." McFalls, *supra* note 40, at 652.

Where a copper pipe manufacturing firm, for example, purchases a copper mining operation, it theoretically does so to save on "upstream" costs of purchasing copper for production by, for instance, reducing transactional costs and risks, including price fluctuations. But firms now must possess "strategic flexibility" in addition to a unique competitive advantage.[59] Components of such flexibility include developing outsourcing strategies, use of new manufacturing and information technologies, and application of cooperative strategies, among others.[60] So a copper manufacturer wishing to avoid the consequences of severe fluctuation in copper prices may choose a strategic purchasing alliance with other copper buyers instead of mining itself.

2. *Collaborative Behavior*

Collaborations on primary and supporting activities with either market competitors or vertically-related firms can provide a host of benefits to the collaborating firms depending on the particular circumstances of the transaction. Such collaborations can provide a host of "efficiency enhancing integrations of economic resources,"[61] including: "lower costs through economies of scale; increase[d] capacity, research and development (R&D), or market access;

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[59] Hitt, Keats, and DeMarie, *supra* note 54, at 26. Firms that possess "dynamic core competencies" establish the strategic flexibility to shift their resources, skills and capabilities to support unique market opportunities. *Id.* at 28. More precise asset valuation and corporate financial models have subjected DoD industry to the pressures of re-shaping their core competencies. This "portfolio shaping" was presented in 1997 as one of the critical problem areas facing the industry. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 11. This pressure has only grown. DSB REPORT ON PRESERVING INDUSTRY, *supra* note 1, at 9, 13.

[60] Hitt, Keats, and DeMarie, *supra* note 54, 26. *See also*, Norman Ray, *Rio Grande: Transatlantic Reality – A U.S. Defense Contractor's View*, DEFENSE DAILY INT'L, Vol. 1, No. 25, Sept. 22, 2000 (improving efficiencies, mastering politics, and collaborations necessary to meet financial markets' expectations). *But see,* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at Appendix E-2 (A 1991 survey found that DoD prime contractors tend not to change "make" or "buy" decisions once capability is established).

[61] *Comment and Hearings on Joint Venture Project*, 62 Fed. Reg. 22045, 22,946 (Apr. 28, 1997), *quoted in* Shepard, *supra* note 3, at 642.

[62] ... entry into a new market; minimiz[ing] risk; avoid[ing] duplication; efficiently commercializ[ing] new products or technology; achiev[ing] synergies by combining complimentary capabilities; and obtain[ing] better returns on investment and innovation."[63] The nature and scope of any efficiencies[64] depend upon the contractual terms and structure of the collaboration, regardless of its name.[65]

A more detailed understanding of such incentives rests in microeconomic theories that are highly technical and undergoing constant scrutiny. The calculation of firms' costs, including fixed costs, variable costs, marginal costs, transfer prices,[66] and total average costs depend on

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[62] Joint buying and selling collaborations commonly assist small, local firms in achieving quantity discounts that lower overall prices making them more competitive with larger regional or national firms. *See, e.g.*, Business Review Letter from Joel I. Klein, U.S. Department of Justice Antitrust Division, to Garret G. Rasmussen (Mar. 8, 2000), (joint steel buying collaboration to service small non-overlapping steel drum manufacturers), *available at* http://www.usdoj.gov.atr/public/busreview; Business Review Letter from Joel I. Klein, U.S. Department of Justice Antitrust Division, to Michael P.A. Cohen, (Jan. 13, 1999) (joint purchasing association between local funeral homes), *available at* http://www.usdoj.gov/atr/public/busreview.

[63] Shepard, *supra* note 3, at 642. *See also*, COLLABORATION GUIDELINES, *supra* note 8, at § 2.1, *and* MERGER GUIDELINES, *supra* note 27, at § 4 (distinguishing measurability and likelihood of efficiencies in primary and secondary business activities generated by mergers and acquisitions). For a variety of reasons beyond the scope of this paper, the defense industry has been subject over the past decade to significant pressure from the stock market to "consolidate, trim excess capacity, and increase efficiencies." DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 11. Defense industry participants see several reasons for "Wall Street's" pessimism, including: lack of growth potentional in a growth-oriented equity market and concerns about DoD and Congress as a customer (such as lack of predictability, uncertainty about payment cash flow, low returns, and serious doubts about company management). DSB REPORT ON PRESERVING INDUSTRY, *supra* note 1, at 44. The structure of defense industry firms continues to be re-shaped, supporting the notion of "strategic flexibility." *The Collaboration Guidelines* discuss in detail the benefits and risks of collaborations in four common business activities. COLLABORATION GUIDELINES, *supra* note 8, at § 3.31(a).

[64] Companies may gain efficiencies through risk reduction by sharing such risks with co-collaborators. Naturally, joining with rivals carries many off-setting costs and risks that must be weighed from a variety of perspectives, including contractual risks, financial risk (such as operating, interest rate, foreign exchange, and other risks), economic risks (e.g., opportunity costs), asset exposure (such as losing protection of intellectual property and trade secrets), risk of foreign sovereign action (for trans-national collaborations) and, of course, antitrust scrutiny, among many others. *See* Gregory J. Werden, *Antitrust Scrutiny of Joint Ventures: Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 702 (1998).

[65] *See* Kovacic, *supra* note 10, at 1060; Shepard, *supra* note 3, at 642; Perry and Park, *supra* note 16, at 1; Polk, *supra* note 35, at 415-16 and 422-23. *See also* COLLABORATION GUIDELINES, at § 2.1.

[66] Transfer pricing involves the accounting of costs among a firm's organizational components or between a collaboration and its members (i.e., how much should a joint venture charge its members per unit?). For

the multiple variations in accounting rules, business estimates, and the reasons for choosing among these calculation methods.[67] The prices charged for goods and services, the level of investment made in various primary activities, the level of quality and post-sale services, and the degree of market penetration, among other things depend upon a firm's interpretation of its industry's structure and operating rules. For example, firms operating in fully competitive markets theoretically affect the price of goods only when they can permanently lower their marginal costs through "competitive advantage."[68] Doing so will attract customers away from competitors, thereby forcing the competitors to achieve lower marginal costs to bring the market back into competitive equilibrium. However, not all markets are fully competitive, some being controlled by oligopolies,[69] others by monopolists.[70] Each market

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example, see the treatment of joint ventures in the Cost Accounting Standards as "segments" for purposes of defining subcontracts as well as allocation of general and administrative expenses and R&D/bid and proposal costs. 99 C.F.R. subpts. 9903.201, 9904.410, 9904.420, (2000).

[67] *See, e.g.,* Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, GEO. MASON L. REV., Vol. 6:3, 1998, at 479, 484-85 (outlining different judicial use of marginal and average variable costs in antitrust predatory pricing cases and U.S. Department of Commerce use of total average cost in trade law antidumping cases).

[68] *See* McFalls, *supra* note 40, at 652 (defining "classical market power," "exclusionary market power," and "allocative efficiency" theories in antitrust law):

> The classical model of perfect competition assumes that competitive markets consist of numerous suppliers that compete to set the price of their output at marginal cost. Because each firm is too small to affect the market price by itself, a firm attempting to increase prices above the competitive level (i.e., above its marginal cost) will lose customers and either be forced to return prices to the competitive level or go out of business. Similarly, a reduction in the firm's output will not affect the market price because its output is too small to significantly reduce the market output. In other theoretical models, firms may set prices above marginal cost, yet still not earn supracompetitive prices due to high fixed costs. In the classical model of monopoly, by contrast, the monopolist affects market prices through unilateral changes in output. *Id.* at 653-54.

[69] An oligopoly exists when only a few firms dominate a market. *See, e.g.*, Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, (1954) (discussing "consciously parallel behavior" of firms in a concentrated industry). Federal merger and acquisition policy focuses extensively on the predisposition or ability of oligopolies under certain market conditions to act like monopolies through non-collusive conduct described as "coordinated interaction." *See* HORIZONTAL MERGER GUIDELINES, *supra* note 27, at § 2.

structure has competing theoretical economic incentives for behavior.[71] Much of antitrust law is based on such theories, and the schools of interpretation of antitrust laws range as broadly as do the varying schools of microeconomics.[72] As the opening quote suggested, one of the defense industry's complaints is that DoD procurement officials at the operating level fail to understand how such dynamics apply to their industry.[73]

Within the defense ("systems") industry, one scholar argues that there are several motivations to collaborate during the down-sizing period: 1) cooperating with competitors to retain a piece of the shrinking defense budget;[74] 2) combined R&D capacity sought by DoD; 3) sharing the financial risks associated with DoD shifts of developmental costs to contractors; 4) broader availability of competitive business practices fostered by acquisition reform; and, 5) alleviating political pressures on individual programs by avoiding winner-take-all contract awards.[75] Other company-specific benefits for defense industry participants focus on cost and risk-sharing for "systems" development, sharing unique and costly tooling,

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[70] *See e.g*, U.S. DEP'T OF ENERGY, HORIZONTAL MARKET POWER IN RESTRUCTURED ELECTRICITY MARKETS, (Mar. 2000), *available at* http://www.usdoe.gov (describing monopolistic tendencies in scores of electricity markets across the United States and the United Kingdom). Various DoD agencies (directly or indirectly through the General Services Agency) purchase electricity, sell it, or produce it internally in many of these markets. *See* FAR, *supra* note 19, pt. 41; U.S. DEP'T OF ARMY, REG. 420-41, ACQUISITION AND SALES OF UTILITY SERVICES (15 Sept. 1990).

[71] Werden, *supra* note 64, at 702, 716.

[72] For a succinct introductory overview of economic theories as they relate to antitrust law, *see* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL, Chapter 3 (1994). For a more specific application to collaborations, see Edmund W. Kitch, *The Antitrust Economics of Joint Ventures*, 54 ANTITRUST L.J. 957 (1986). *See also*, Antitrust.Org *at* http://www.antitrust.org.

[73] *See supra* note 1 and accompanying text. Again, this paper cannot serve to provide such a review, but concludes that DoD procurement officials, auditors and legal advisors must have a better understanding of this behavior to effectively interpret and balance antitrust, procurement and buying systems.

[74] *See, e.g.*, Vago Muradian and John Robinson, *Raytheon Expresses Concerns To Navy Regarding New DD-21 Team*, DEFENSE DAILY, Vol. 197, No. 48, Dec. 11, 1997.

[75] Kovacic, *supra* note 10, at 1061-62.

test equipment and facilities, pooling employees,[76] and occasional "free riding" on the progress of co-collaborators.[77] Firms also may seek to resolve structural and environmental concerns over cost accounting systems and DoD oversight of profit margins. They may manage projected responsibility determinations of co-collaborators, political support for a procurement, pre-qualification and first article testing requirements,[78] and agency problems (information asymmetry and conflicts of incentives between owners and managers). Finally, as the consolidation trend continues, firms may avoid mergers because of heightened antitrust scrutiny or because of unnecessary permanent structural changes to the firm (i.e., retaining "strategic flexibility").[79]

Even DoD has adopted "teaming" and "partnering" as key management practices at the lowest level, both within Departmental components and in external agency relationships (e.g., Government contracts).[80] DoD also is actively encouraging international collaborations for various industrial capability and political reasons (tempered by national security concerns).[81]

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[76] Polk, *supra* note 35, at 415-16 and 422 (citing Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 938 (1993). *See also*, FAR, *supra* note 19, at 9.602; Perry and Park, *supra* note 16, at 3.

[77] Polk, *supra* note 35, at 423.

[78] *See* FAR, *supra* note 19, at 9.206 (for effects on competition of qualification requirements); *Id.* at 9.304 (for risks to contractors required to submit to first article testing).

[79] Polk, *supra* note 35, at 416-17.

[80] For example, the Defense Contract Management Command "teams" with procurement offices to provide market research and source evaluations. *Early CAS Teaming for Acquisition Success*, U.S. DEP'T OF DEFENSE DEFENSE LOGISTICS AGENCY, Sept. 1996, *available at* http://www.acq.osd.mil (U.S. DEP'T OF DEFENSE ACQUISITION DESKBOOK, § 1.2.2.4.1). *See also*, DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at Appendix F-5 (program offices are "teaming with contractors").

[81] Vago Muradian, *Pentagon Mulls Overseas Sale of Lockheed's Sanders Unit; Deal May Test Limits*, DEFENSE DAILY, Vol. 206, No. 55, June 19, 2000; *Analysts: GD bid for Newport News May Not Die in Antitrust Review*, AEROSPACE DAILY, Vol. 189, No. 34, at 266, Feb. 22, 1999.

Whatever the particular reason, procurement officials, auditors, regulators, and legal advisors must be attuned to the specific transactional and organizational incentives involved in any individual procurement, any series of procurements, or firm structural change that affects industry conditions, since they are likely to receive arguments from contractors based on these factors to support their collaborations (and the final price or quality of their output).

In fact, the challenge posed to DoD by the trend toward collaborative behavior is to establish a robust analytical system that fully captures the intent and bases for collaborations related to each transaction and, as we shall see, that fully weighs the benefits and risks to competition in each procurement market.[82] Procurement officials at DoD may encounter myriad agreements among contractors forming complicated webs of collaboration on a variety of primary or supporting activities.[83] They may be in the form of collaborations formally endorsed by procurement regulations, such as "teaming arrangements" and "leader-follower" agreements specifically contemplated under the Federal Acquisition Regulation (FAR).

The FAR contemplates "teaming arrangements" of two limited types: formal horizontal or vertical collaborations in the form of partnerships or joint ventures (hereinafter, "joint ventures") and vertical collaborations in which one company acts as the prime contractor and one or more of its competitors serves as subcontractor (hereinafter, "teaming

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[82] Perry and Park, *supra* note 16, at 10. *See also*, COLLABORATOR GUIDELINES, *supra* note 8, at Preamble.

[83] Kovacic, *supra* note 1, at 440. *E.g.*, Vago Muradian, *BAE Awaits Justice, CIFIUS Rulings on Planned Purchase of Lockheed Unit*, DEFENSE DAILY INT'L, Vol. 1, No. 32, Nov. 10, 2000 (BAE Systems' purchase of a Lockheed Martin electronics business AES complicated by BAE teaming arrangement with Northrop Grumman on infrared countermeasure system competing directly with AES effort.) Government oversight of mergers and acquisitions is becoming increasingly complex, due in part to contractual restraints on buyers of assets divested as part of the Government review. Robert Pitofsky, *The Nature and Limits of Restructuring, Remarks at the Cutting Edge Antitrust Conference*, Law Seminars International, New York, at 5, Feb. 17, 2000, *available at* http://www.ftc.gov/speeches/pitofsky/restruct.htm.

arrangements").[84] In the former, firms join economic resources and integrate them under a newly created legal entity.[85] Under *The Collaboration Guidelines*, such a joint venture may qualify as a merger if certain conditions are met, thereby requiring merger analysis.[86] In the latter, written or oral agreements serve to contractually bind economic resources to a particular activity (e.g., a single government contract or types of contracts).[87] Scholars and practitioners note that these definitions are often inconsistent with broader scholarly and judicial use as well as inconsistent with other provisions of the FAR itself.[88] "Leader-follower" agreements also may be encountered in rare circumstances.[89] The FAR does not

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[84] FAR, *supra* note 19, at 9.601.

[85] Polk, *supra* note 35, at 422; Eger, *supra* note 10, at 599-600.

[86] COLLABORATION GUIDELINES, *supra* note 8, at § 1.3. Merger analysis will be conducted

> "when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms." *Id.*

In addition, collaborators may be required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2000), to provide notice to DoJ and FTC before forming a joint venture, whether it qualifies as a merger or in its own right. DoJ and FTC published guidebooks to assist firms in complying with the implementing regulations at 28 C.F.R. Part 16. Except as briefly noted in Section III.A, *infra*, this paper assumes that all qualifying joint ventures file the appropriate notice.

[87] Perry and Park, *supra* note 16, at 2-3. *See also*, Polk, *supra* note 35, at 437; Kovacic, *supra* note 10, at 1060.

[88] Polk, *supra* note 35, at 422 (also citing to Kovacic, *supra* note 10), 437. A generally accepted definition of "joint venture" has yet to be established even among the business community at large. Shepard, *supra* note 3, at 642. In particular, "teaming arrangements" often refers to both horizontal and vertical collaborations not otherwise qualifying as "joint ventures."

[89] Polk, *supra* note 35, at 445; Eger, *supra* note 10, at 598-99; FAR, *supra* note 19, at 17.401. Under these arrangements, DoD requires the prime to share resources, such as innovations, with its "follower" collaborator.

prohibit other types of collaborations, even if they fail to meet these definitions; rather, various provisions of the FAR allude to other such types.[90]

Collaborations encountered by procurement officials more likely will include the broad range of "one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom."[91] These "agreements," regardless of the form, involve "one or more business activities, such as research and development, production, marketing, distribution, sales, or purchasing ... as well as information sharing and various trade association activities."[92] All of these collaborations are subject to antitrust scrutiny by DoJ and FTC, whether during a "systems" procurement or not, and regardless of what components of participating firms' value chains are involved.[93] They require no formal acknowledgement by DoD as FAR-sanctioned agreements, nor do they require acknowledgement by DoJ and FTC to become scrutinized.[94]

C. *Hypothetical Collaborations*

Examples of the various types of collaborations provide a method of critiquing DoD's procedures for integrating antitrust enforcement activities, procurement policies, and buying

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[90] Polk, *supra* note 35, at 437, n.212.

[91] COLLABORATION GUIDELINES, *supra* note 8, at § 1.1.

[92] *Id.*; Perry and Park, *supra* note 16, at 10.

[93] COLLABORATION GUIDELINES, *supra* note 8, at § 2.3. For policy arguments over the breadth of this definition, see Werden, *supra* note 64, and Edward Correia, *Antitrust Scrutiny of Joint Ventures: Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737, 738 (1998).

[94] To the extent that such ambiguities and inconsistencies in definitions exist between the FAR and *The Collaboration Guidelines* (and within the FAR), the Federal Acquisition Council should consider regulatory modifications. Procurement officials not trained in antitrust laws (in particular, in *The Collaboration Guidelines*) likely will overlook the legal and economic impact of carrying out procurements involving such non-sanctioned collaborations.

decisions.[95] Naturally, given the broad application of *The Collaboration Guidelines*, these hypothetical agreements cannot envision all possible forms and terms and conditions of collaborations. However, the purpose of this paper is not to elaborate or refine substantive antitrust law as it applies to DoD procurements, but rather, to propose robust procedures through which such a broad range of activities can be effectively reviewed and acted upon.

Collaborations are viewed under antitrust laws primarily by their level of integration of economic resources among the participants and the consequent effect they have on the level of competition in the relevant market.[96] These factors may compliment the benefits sought by DoD in the "new" industrial paradigm.[97] The collaboration that most closely approaches a merger is a joint venture[98] where competitors in a market integrate an economic activity in that market such that the integration eliminates all competition among them, and the collaboration does not terminate in a limited period.[99] On the other end of the continuum, the least significant collaboration may be the purchase of a repair part from a competitor under a commercial contract.

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[95] At least one other author has used this technique to propose a methodology for antitrust review of FAR-sanctioned collaborations by private practitioners. Eger, *supra* note 10. *The Collaboration Guidelines* use them extensively to illustrate various points.

[96] *See* COLLABORATION GUIDELINES, *supra* note 8, at § 1.3 (distinguishing mergers from collaborations); Kitch, *supra* note 71, at 958.

[97] *See supra,* note 72 and accompanying text. *See also*, DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 8-9.

[98] Unless otherwise stated, the term "joint venture" used in this paper includes only those collaborations established by members through the establishment of a separate legal corporate entity (partnership, corporation, etc.). Although the term "joint venture" has been used to describe other broader arrangements, see Polk, *supra* note 35, at 422, the more narrow definition maintains consistency in terminology. This paper will identify the appropriate definition of "teaming arrangement" as the context dictates, but is most often used in the procurement community to cover vertical arrangements among competitors.

[99] COLLABORATION GUIDELINES, *supra* note 8, at § 1.3.

1. *Hypothetical A:*[100] *Joint venture and licensing arrangements for laundering machines*

The U.S. Military Personnel Agency (a fictitious DoD activity) validated an operational need for personal hand-held laundering machines for servicemembers to carry in their individual gear on deployments. The machine will clean by applying cleansing agents to dirty laundry while spinning it on a small hanging spinner device. The agency anticipates an annual need of 400,000 units for the first five years, and 50,000 per year thereafter. A micro-computer chip will control the engine and the application of the cleansing agents. A small and powerful commercial fuel cell will power the machine. A technical board determined that the requirement is technologically feasible and proposes contracting for a firm to integrate computer chips, user interface panels, the fuel cell, cleansing agent dispensing controllers and dispensers, engines, and a miniature hanging clothes spinner.

The program manager identified three national laundry machine manufacturers that can design, develop and produce the hanging clothes spinner and engines, as well as integrate the other components. There are six global micro-computer chip manufacturers that can produce the requisite number and volume of computer chips in economic quantities. Four national firms in each of the user interface, fuel cell, cleansing agent and dispenser markets can produce non-development versions of those items at sufficient quantities, but all products are protected by various intellectual property rights.

The three national laundry machine manufacturers propose to enter into an R&D joint venture to design and develop the hanging clothes spinner and engines. The joint venture would comprise a separate legal entity with a board of directors representing two officers of each manufacturing firm and managed by executives hired by the board. The joint venture

[100] Taken with significant modification from "Example 1" in Eger, *supra* note 10, at 599.

would have exclusive access to the research laboratories of the largest manufacturer. Each manufacturer would possess equal rights to use any developed products commercially, and each would contribute $15 million to the effort (the Agency estimates $45 million in R&D).

Hypothetical B: Prime-Subcontract Teaming Arrangement for Base Services

Fort Anywhere recently received a directive to conduct a "commercial activities" cost comparison pursuant to Office of Management and Budget Circular A-76.[101] Fort Anywhere sits 270 miles from the nearest metropolitan area, and receives some of its base supplies via rail or truck from regional suppliers as no local firm could handle the base's capacity. The performance work statement calls for all commercial items and performance-based statements of work, and four national base services firms and two regional firms are expected to submit offers.

There are five small plumbing firms in the local town, with a total workforce of 12 plumbers in the surrounding 100 mile area. The base plans to reduce its plumbing employee force from 10 to none, and these employees will be entitled to a right of first refusal under any contract awarded. The contracting officer prepared an acquisition plan for the estimated $40 million procurement (over one year and four option periods), and plans to use a best value negotiated acquisition. She and the installation commander view price equal to the combined sub-factors of past performance, quality, and management experience.

The contracting officer received written questions from the offerors at the pre-solicitation conference indicating that: one national firm may hire the 10 plumbers as employees; one regional firm plans to enter into a subcontract with all five local firms which would enter into

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[101] OMB CIR. A-76, *supra* note 50.

a teaming arrangement to share the 10 employee positions and share pro-rata in the subcontracted work; and a national and regional firm may team for a variety of services, including plumbing, which would be performed by the regional firm under subcontract from the national firm.

III. Legal and Procedural Framework of Competition Policy: A Critique

A. *Antitrust Standards and Enforcement Procedures*

1. *Legal Framework of Antitrust Standards for Collaborations*

While collaborations among businesses can lead to a variety of benefits to individual firms, some collaborations may harm the competitive ability of others, including horizontal rivals and vertically-related firms.[102] As the Supreme Court noted, "the antitrust laws ... were enacted for 'the protection of *competition*, not *competitors.*'"[103] Thus, the antitrust laws focus on the economic mechanisms influencing particular markets, although there is debate over the extent to which other non-economic factors apply.[104] Specifically, Congress put into place the primary competition laws, the Sherman Act[105], the Clayton Act,[106] and the Federal Trade Commission (FTC) Act,[107] around the turn of the 20th Century.

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[102] *The Collaboration Guidelines* include an assessment of competitive effect in both markets. COLLABORATION GUIDELINES, *supra* note 8, at §§ 3.31, 3.36.

[103] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

[104] *See, e.g.*, DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 31-32 (acknowledging inconsistency between Supreme Court precedent and practice); Mark Schwartz, *Note: The Not-So-New Antitrust Environment for Consolidation in the Defense Industry: The Martin Marietta-Lockheed Merger*, 1996 COLUM. BUS. L. REV. 329, 331-33 (1996) (discussing unique national security and procurement regulatory effects on application of antitrust laws to defense industry mergers). *See also* United States v. Brown University, 5 F.3d 658 (3rd Cir. 1993) (discussing joint financial aid determinations and socio-economic factors); In the Matter of The Boeing Company/McDonnell Douglas Corporation, Fed. Trade Comm'n File No. 971-0051, July 1, 1997 (discussing "national champion" defense in mergers).

[105] 15 U.S.C. §§ 1-7 (2000).

Several provisions from among these statutes potentially govern collaborative conduct between competitors.[108] Section 1 of the Sherman Act proscribes "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade."[109] It principally focuses on concerted action of two or more firms, as in the formation of a collaboration that unreasonably restrains competition. Section 2 of the Sherman Act prohibits firms from monopolizing or attempting to monopolize the markets.[110] A distinct entity, such as a joint venture, may illegally acquire, maintain, or attempt to acquire or maintain a monopoly. Section 7 of the Clayton Act prohibits the acquisition (through direct purchase, merger, or otherwise) of stock or assets in another firm when "the effect of such

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[106] 15 U.S.C. §§ 12-27 (2000); 29 U.S.C. §§ 52-53 (2000). The Robinson-Patman Act also proscribes price discrimination by sellers of commodities. 15 U.S.C. § 13 (2000).

[107] 15 U.S.C. §§ 45 (2000).

[108] The term "'competitors' encompasses both actual and potential competitors" in a particular market. COLLABORATION GUIDELINES, *supra* note 8, at § 1.1. Horizontal restraints are those agreements that affect firms who participate in a market at the same level of business activity (e.g., two distributors). As *The Collaboration Guidelines* state, "[f]irms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present." *Id.* at § 1.1, n.6. The issue of vertical restraints are important in the context of teaming arrangements as used by the FAR, but are assessed under *The Collaboration Guidelines* only when they exist between competitors or as a collaboration may affect related vertical markets.

[109] Section 1 of the Sherman Act provides:

> Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 1 (2000).

[110] Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 2 (2000).

acquisition may be substantially to lessen competition, or to tend to create a monopoly."[111] Finally, FTC Act proscribes unfair methods of competition or deceptive acts or practices in or affecting commerce.[112] Conduct covered under FTC Act includes conduct in violation of the Sherman and Clayton Acts.[113]

The Collaboration Guidelines synthesize judicial interpretations of these different provisions (and incorporate various underlying economic theories) to establish a single methodology for assessing legality of restraints imposed on collaborating competitors. DoJ and FTC structured them to allow for "judgment and discretion in antitrust law enforcement."[114] As discussed above, both these agencies and other affected parties must "evaluate each case in light of its own facts and apply the analytical framework set forth in the Guidelines reasonably and flexibly."[115] Several commentators and practitioners anticipated the "analytical framework," and several proposed specific applications of it to

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[111] 15 U.S.C. § 18 (2000). This provision applies to joint ventures. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 168 (1964).

[112] 15 U.S.C. § 45 (2000).

[113] *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 10, at n.31 and accompanying text (explaining pertinent case history).

[114] COLLABORATION GUIDELINES, *supra* note 8, at § 1.1. There is extensive debate and disagreement over the specific provisions of *The Collaboration Guidelines*. *See Press Release: FTC and DoJ Issue Antitrust Guidelines for Collaborations among Competitors*, Fed. Trade Comm'n, 7 Apr. 2000, *at* http://www.ftc.gov/opa/2000/04/collguidelines.htm (concurring statements of Commissioners Thompson and Leary). Further, *The Collaboration Guidelines* represent only DoJ's and FTC's compromises on federal government enforcement policies based upon their interpretations of the antitrust laws. They do not purport to settle all interpretive disputes in antitrust law among the federal courts, FTC Commissioners, the states, or other pertinent entities (e.g., the private bar). This paper will rely on *The Collaboration Guidelines* as reflective of the federal antitrust regime and enforcement system. The proposed procedures may be modified, if needed, to accommodate more subtle antitrust law interpretative issues. *See also*, *Dissenting Statement of Commissioner Mary L. Azcuenaga On the Issuance of Horizontal Merger Guidelines*, U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992).

[115] COLLABORATION GUIDELINES, *supra* note 8, at § 1.1.

defense procurements.[116] Accordingly, this paper will provide only an overview of the methodology adopted by DoJ and FTC, focusing on coordination and enforcement procedures related to DoD procurement decisions.

Early antitrust caselaw attempted to draw a bright line between conduct of collaborators.[117] "Agreements of a type that always or almost always tend[] to raise price or to reduce output are per se illegal."[118] All other agreements are analyzed under a "rule of reason" analysis which weighs pro-competitive benefits with anti-competitive harm by considering many market and conduct factors.[119] Rule of reason inquiry traditionally is fact-specific and resource-intensive.[120] While arguably any conduct that violates antitrust law can be a criminal offense,[121] DoJ only prosecutes "hard-core cartel agreements."[122] As set out in Section III.B, below, government contract practitioners are familiar with the FAR and DoD procurement fraud system that provides extensive provisions for detecting and assisting DoJ in prosecuting such blatant conduct. Likewise, the courts will only invoke the per se rule "where judicial experience demonstrates that the particular conduct is a 'naked restraint of trade with no purpose except stifling of competition.'"[123]

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[116] *See supra* note 10 and accompanying text.

[117] Kovacic, *supra* note 10, at 1101; Eger, *supra* note 10, at 604.

[118] COLLABORATION GUIDELINES, *supra* note 8, at § 1.2.

[119] Kovacic, *supra* note 10, at 1101. The rule of reason factors are attributed to Justice Brandeis in Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[120] Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050-51 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983).

[121] Kovacic, *supra* note 10, at 1072.

[122] COLLABORATION GUIDELINES, *supra* note 8, at § 1.2.

[123] Perry and Park, *supra* note 16, at 7 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

a. *Per Se Illegal Agreements*

The per se rule applies to all horizontal and vertical restraints in all operating environments. These include restraints that fix prices, rig bids, or allocate customers, suppliers, territories, or lines of commerce.[124] Price-fixing and bid-rigging can take many forms and evidence themselves in many ways[125] These activities received great attention in the area of government contracts in the late 1980's and early 1990's.[126] Group boycotts of competitors likewise are per se illegal,[127] as are a monopolist's refusal of access by competitors to facilities "essential" for competition.[128] Vertical restraints including resale price maintenance,[129] tying arrangements,[130] and (possibly) exclusive-dealing restrictions[131]

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[124] *Id.*; U.S. DEP'T OF JUSTICE U.S. ATTORNEYS MANUAL, ANTITRUST RESOURCE MANUAL [hereinafter ANTITRUST RESOURCE MANUAL] § 8 (Oct. 1997), *available at* http://www.usdoj.gov/atr/public. For specific examples of cases, see the Supreme Court's discussion of the per se rule in Nynex Corp., v. Discon, Inc., 525 U.S. 128, 133-34 (1998).

[125] FAR, *supra* note 19, at 3.303(c); *Id.* at 3.305. *See* Polk, *supra* note35 , at 428-29, 434-35 (discussing various forms and definitions of these proscribed activities within the context of government contracts). Drawing the line between the exchange of competitive information and violating these standards poses significant challenges. United States v. United States Gypsum Co., 438 U.S. 422 (1978); COLLABORATION GUIDELINES, *supra* note 8, at § 3.34(e).

[126] Kovacic, *supra* note 10, at 1059.

[127] Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); Fed. Trade Comm'n v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990). This activity is enforced by DoJ and FTC outside *The Collaboration Guidelines*. COLLABORATION GUIDELINES, *supra* note 8, at § 1.1, n.5. In vertical relationships, allegations of "boycotting" one supplier in preference to another fall under the rule of reason analysis. Nynex Corp., v. Discon, Inc., 525 U.S. 128, 135 (1998).

[128] Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). This basis is limited to control of essential facilities by monopolists where competitors cannot reasonably duplicate the facility and the monopolist denies use to competitors when otherwise feasible to do so. MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied* American Tel. & Tel. Co., v. MCI Communications Corp., 464 U.S. 891 (1983). This activity likewise is not enforced under *The Collaboration Guidelines*. COLLABORATION GUIDELINES, *supra* note 8, at § 1.1, n. 5. For an application of group boycotts and "essential facilities" doctrine to government contractors, see Kovacic, *supra* note 10, at 1100-04.

[129] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). This conduct includes agreements to restrict distributors to certain resale prices. *But see* State Oil Co. v. Khan, 522 U.S. 3 (1997) (vertical *maximum* price fixing no longer to be presumed per se illegal).

fall under the same test.[132] Collaborations whose entire purpose violates the per se rule are deemed to be cartels. Such illegal arrangements can occur in the licensing of intellectual property,[133] in healthcare services,[134] in international operations,[135] and in all other business activity.[136] Of course, DoD procures goods and services in all of these environments. The

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[130] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). This conduct involves abuse of monopoly power in one product by requiring buyers to purchase a second product together with the first.

[131] Standard Oil Co. of California v. United States, 337 U.S. 293 (1949). Similar in nature to horizontal refusals of access or group boycotts, this conduct involves an agreement among firms at different stages of the "value chain" where one agrees to limit its input or output solely to the other. Courts review the impact of these cases in the market at the level of the exclusion. For example, if an oil company has distribution contracts with retail gas stations where those gas stations cannot sell competitors' gas, the courts examine the size of the foreclosure and its impact on the retail gas market. For a more detailed discussion of the conditions necessary for exclusive dealings to be anticompetitive, see the rescinded U.S. DEP'T OF JUSTICE VERTICAL RESTRAINTS GUIDELINES (rescinded), § 3.2, *at* http://www.antitrust.org/law/vertical.htm. *But see,* FEDERAL TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY [hereinafter INTELLECTUAL PROPERTY GUIDELINES], § 5.4,(Apr. 6, 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm (following a rule of reason approach in all vertical restraint licensing cases). Exclusive dealing arrangements can be challenged under Section 3 of the Sherman Act, 15 U.S.C. § 3 (2000). *See also*, Correia, *supra* note 92, at n.107 and accompanying text. *Cf.* Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316 (1966) (no examination of market foreclosure impact required when challenged under Sectoin 5 of FTC Act); Northwest Wholesale, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (refusal to access "essential facilities" per se illegal when involving horizontal competitors).

[132] Under the Clinton Administration, DoJ rescinded guidelines for vertical restraints. A copy of the rescinded U.S. DEP'T OF JUSTICE VERTICAL RESTRAINTS GUIDELINES, is available at http://www.antitrust.org/law/vertical.htm. With the exception of tying arrangements and exclusive-dealings, the courts assess all non-price vertical restraints under the rule of reason. Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977).

[133] INTELLECTUAL PROPERTY GUIDELINES, *supra* note 131, at § 3.4.

[134] U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE [hereinafter HEALTH CARE GUIDELINES] (Aug. 1996), *available at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm.

[135] FEDERAL TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS [hereinafter INTERNATIONAL OPERATIONS GUIDELINES], § 2 (Apr. 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm (allowing only for "jurisdictional requirements, comity, and doctrines of foreign governmental involvement").

[136] Congress afforded certain research and production collaborations limited protection from per se condemnation in certain cases. 15 U.S.C. §§ 4301-02 (2000).

first step in reviewing any collaboration, then, is to identify a per se illegal collaboration or any terms or conditions contained within a collaboration that would be per se illegal.[137]

The nature of contractual terms and conditions governing collaborations most significantly complicates the screening for per se violations. Each term or condition of a collaboration (i.e., "a set of one or more agreements"[138]) generally determines the level of integration and must be reviewed independently to assess its "competitive effect."[139] Therefore, either the entire collaboration may serve an illegal purpose or a particular term or condition of the underlying agreements may do so either independently or within the context of the overall collaboration. For example, if three firms collaborate to establish a distribution joint venture (to warehouse and sell products to retailers), the overall purpose of the joint venture may not be per se illegal, but a related condition that allocates down-stream retailers among the participants' products may be.[140] Gregory Werden, Director of Research at DoJ Antitrust Division's Economic Analysis Group describes this aspect of analysis as follows:

> The distinction between the two types of restraints has been usefully framed in terms of "ancillarity." An ancillary restraint is one that is reasonably necessary to the accomplishment of a venture's efficiency-enhancing purposes. The agreement forming the joint venture and all ancillary restraints should be analyzed together under the rubric of the legality of the joint venture itself. Nonancillary restraints should be analyzed separately. Nonancillary restraints are not necessarily unlawful, but any

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[137] For specific types of conduct that may constitute per se violations see, e.g., ANTITRUST RESOURCE MANUAL, *supra* note 124, at § 8, and U.S. DEP'T OF ARMY, REG. 27-40, ARMY LITIGATION, Figure 8-1 (19 Sept. 1994).

[138] COLLABORATION GUIDELINES, *supra* note, at § 2.3.

[139] *Id* at §§ 2.3, 3.3.

[140] Because DoD is a down-stream consumer of its contractors, this paper emphasizes upstream vertical restraints. However, downstream vertical restraints are important to DoD for industrial capacity reasons (i.e., the increasing tendency towards multiple interlocking webs of collaborations among its prime and subcontractors that can significantly influence the effects of industry structural changes and create oligopolistic behavior).

competitive benefits of a joint venture are irrelevant to the analysis of its nonancillary restraints, so those restraints may fall within the scope of the per se rule.[141]

Until relatively recently, firms were subject to prosecution and many courts would enjoin or punish collaborators for per se violations.[142] However, various judicial decisions raised questions about the dichotomy between automatic condemnation and detailed analysis, and conducted more focused inquiries into the purpose of collaborations or their collateral restraints as well as their competitive effects.[143] This trend caused considerable consternation in the antitrust legal community.[144] If a provision in an agreement appeared to have anticompetitive effects, but was ancillary to the collaboration, the courts and litigants would engage in a resource-intensive rule of reason inquiry.[145] Accordingly, *The Collaboration Guidelines* acknowledge a shift to a multi-level review.[146]

b. *"Limited Factual Inquiry" and Efficiency Showings*

DoJ and FTC compromised in announcing a "flexible" structured analysis.[147] "Sorting out the facts of actual cases under the rule of reason is apt to be difficult and subject to

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[141] Werden, *supra* note 64, at 705.

[142] United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

[143] Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

[144] For a review of this trend and proposed adjustments to antitrust enforcement policy, see Kovacic, *supra* note 10, at 1119, Werden, *supra* note 64, and Correia, *supra* note 93.

[145] Of particular concern, as discussed below, are the expertise and resources required to define the relevant markets and measure the market power of the collaboration (in addition to the likelihood that most defendant's conduct is upheld when the rule of reason is applied).

[146] This approach was adopted more generally by DoJ and FTC in 1995 in INTELLECTUAL PROPERTY GUIDELINES, *supra* note 131, at § 3.4, and even earlier in their now rescinded VERTICAL RESTRAINTS GUIDELINES. *See* Eger, supra note 10, at 609. *See also,* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (applying a modified rule of reason approach).

[147] Werden, *supra* note 64, at 735. "Despite years of debate, there is not a clear consensus on the application of the per se rule and the rule of reason. The Supreme Court has stated various formulations of both." Correia, *supra* note 93, at 739.

significant error. Antitrust enforcement with respect to joint ventures, therefore, is made more efficient through the use of a structured analysis employing presumptions and burden shifting."[148] For example, why engage in a detailed analysis of a software license that restricts computer manufacturers from reselling an application program when the license is commonly used by software developers?[149] On the other hand, as *The Collaboration Guidelines* take into account, industry conditions may change after entering into the license such that it would then become anticompetitive considering those new conditions. Accordingly, all collaborations are subject to a new review at any future time when anticompetitive harm may occur.[150]

After identifying collaborations (or collateral terms) that are "blatant" per se violations, DoJ and FTC now will conduct a "limited factual inquiry"[151] to examine a rebuttal showing that "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits."[152] Efficiency-enhancing integration includes collaborations to

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[148] Werden, *supra* note 64, at 735. One Chief of DoJ Antitrust Division has said, "We reject the notion that there should be two methods of analysis – per se or full-blown rule of reason market analysis. As a matter of both sound and efficient antitrust analysis, we think this dichotomy is too stark and, frankly, that it leads to far too much of a front-end emphasis on which approach to apply, a choice that can sometimes be outcome determinative." Correia, *supra* note 93, at 745.

[149] *See* INTELLECTUAL PROPERTY GUIDELINES, *supra* note 131, at § 2.3.

[150] COLLABORATION GUIDELINES, *supra* note 8, at §§ 2.4, 3.4, 4.3.

[151] *Id.* at § 3.2. This technique, in various forms, has been referred to as "quick look" and many other names. *See* Correia, *supra* note 93, at n.56.

[152] COLLABORATION GUIDELINES, *supra* note 8, at § 3.2; INTELLECTUAL PROPERTY GUIDELINES, *supra* note 131, at § 3.4. *See also*, HORIZONTAL MERGER GUIDELINES, *supra* note 27, at § 4. Some claim that this procedure "depart[s] from familiar ways of evaluating the competitive impact of an agreement." Perry and Park, *supra* note 16, at 10. A review of the other published guidelines, cases and academic literature reflects otherwise.

combine some portion of one or more business functions (such as production, distribution, marketing, purchasing, or R&D), "by contract or otherwise, significant capital, technology, or other complimentary assets."[153] If the concern relates to a collateral restraint, collaborators must also show that such a restraint is verifiable and potentially procompetitive, reasonably necessary, *and* that no "practical, significantly less restrictive means" can be used.[154]

Notably, under *The Collaboration Guidelines*, the burden falls upon the collaborators to meet this low standard to justify the overall collaboration and to establish collateral restraints as ancillary to it. Several models for the "limited factual inquiry" and its relationship to assessments of collateral restraints have been debated before issuance of *The Collaborator Guidelines*.[155] *The Collaborator Guidelines* do not clearly settle the issue from a judicial perspective, and provide DoJ and FTC flexibility in analyzing collateral restraints either independently or within the context of the overall collaboration.[156] It is clear, however, that if the collaborators provide sufficient evidence that the collaboration constitutes an efficiency-enhancing integration, then the focus of initial scrutiny on collateral restraints falls on reasonableness (both relationship to the efficiency of the integration and the necessity of the restraint to achieve pro-competitive benefits, that is benefits beyond those just to the collaborators).[157]

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[153] COLLABORATION GUIDELINES, *supra* note 8, at § 3.2.

[154] *Id.* at § 3.6.

[155] *See, e.g.*, Werden, *supra* note 64, Correia, *supra* note 93, *and* Kovacic, *supra* note 10, at 1118 (citing others). *But see*, Polk, *supra* note 35, at 420 (finding that efficiency justifications are looked upon by FTC with skepticism in defense industry mergers).

[156] COLLABORATION GUIDELINES, *supra* note 8, at § 2.3.

[157] Caselaw supports this. *See* Los Angeles Mem. Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1395 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). *The Collaboration Guidelines* discuss "reasonable

Three principal issues arise at this stage for DoD procurement officials and antitrust officials at DoJ or FTC. First, are there any unique DoD-related efficiency rationales or types of collateral restraints that could justify otherwise per se violations? Second, what role does DoD, and the negotiations process in particular, play in determining "reasonable necessity" and the plausibility of alternatives. Third, how are initial reports of suspected per se violations and relevant information to be effectively exchanged between the agencies? The latter question pertains equally to the rule of reason analysis and, therefore, will be addressed later.

While the consequences for DoD contractors (e.g., criminal prosecution[158]) and DoD purchasing agency (e.g., program delays and litigation costs) can be substantial, little literature and no DoD guidance have been published regarding this initial screening of the collaboration as it applies to DoD contracts.[159] Determining whether an independent legal entity or a contractually-created teaming arrangement serves as a "naked agreement on price or output among competitors"[160] can be a daunting task for a contracting officer or program manager reviewing a Quote or contract Proposal. It may seem unlikely that such conduct would occur, particularly given the FAR's distinct competition requirements, including

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necessity" at § 3.2 and discuss "intertwined" collateral restraints in Example 2. Scholars have been advising legal counsel to firms not only to document efficiencies in collaborative agreements, but to integrate them into the structure of the legal documents themselves in order to qualify for rule of reason inquiry. *See* Kitch, *supra* note 71, at 964; Eger, *supra* note 10, at 628-30 (proposing a checklist).

[158] Further, the costs of defending against criminal or civil antitrust prosecutions are not reimbursable from the government under a government contract, even if the collaboration was formed exclusively for the government contract and encouraged by the government. FAR, *supra* note 19, at 31.205-33(f).

[159] *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 10; Polk, *supra* note 35. Even these authors focus more on providing guidance to private practitioners and antitrust officials at DoJ and FTC than to DoD.

[160] *See* Correia, *supra* note 93, at 741-45 (comparing different analytical techniques for conducting the review).

submission of a Certificate of Independent Price Determination"[161] with an offer (where applicable). Further, verifying the claim of efficiencies and reasonableness involves specialized skills and knowledge that DoD previously declined to establish in-house.[162] It also requires knowledge of each of the numerous particular markets in which a procurement may take place. Disagreements over the significance of efficiencies in contractor administrative costs (or their verifiability) may also complicate the review.[163] Finally, procurement officials may not be inclined to examine the overall competitive effect of collaborations where the market is broad and procurement competition rules (e.g., "full and open competition") appear to be satisfied in a particular case. Any collaboration review procedures under the current division of responsibility between DoD, DoJ and FTC seem to require either straight-forward and administrable tests on one hand or elaborate intra-agency review and investigative support mechanisms on the other.

There is a host of plausible efficiency-enhancing integration of resources. "DoD may be in a position to evaluate and explain claims of efficiency because of its experience as a long-term purchaser and its resultant knowledge base."[164] *The Collaboration Guidelines* require that the restraint "benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation."[165] The integration may or may not

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[161] FAR, *supra* note 19, at 3.103-1; *Id.* at 52.203-2. *But see*, Section III.B, *infra*.

[162] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 4-5.

[163] *Id.* at 30.

[164] *Id.* at 30 (commenting on merger-related efficiencies).

[165] COLLABORATION GUIDELINES, *supra* note 8, at § 3.2. *The Collaboration Guidelines* provide that theoretically implausible efficiencies or arguments that competition itself is unreasonable are insufficient as a matter of law. *Id.* From an economics perspective, efficiencies are ways "to overcome the so-called imperfections in the marketplace." Kitch, *supra* note 71, at 963. Economists consider "externalities" ("when an

require a financial contribution or actual performance of a function by one, any, or even all collaborators. Within the context of DoD procurements, the most likely unique justification may be that a DoD procurement official either required or endorsed the agreement.[166] Review, negotiation, and approval of teaming arrangements by contracting officers is authorized and, in some instances, required by DoD policy.[167] In *Northrop Corp. v. McDonnell Douglas Corp.*,[168] two competing fighter aircraft manufacturers teamed at the direction of DoD to design and produce the F-18 for the Navy and foreign customers because McDonnell Douglass could help to adapt Northrop's land-based YF-17 prototype for carrier use. Their teaming agreement allocated sales to different customers between carrier-based and land-based aircraft.[169] The court found the agreement not to be a per se illegal market allocation, in part, because it provided benefits in a special market that otherwise would not have existed.[170] The special benefits of combining unique design and production competencies and the sharing between competitors who otherwise lacked access to such

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investment confers benefits that cannot be captured by the firm making the investment"), economies of scale, and "transactional efficiencies." *Id.* at 963-64.

[166] Kovacic, *supra* note 10, at 1085 (citing Eger and Chierichella in support). *Cf.* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 9-14 (critiquing four merger cases and the unofficial testimony of DoD officials and its impact on the case).

[167] Memorandum, Deputy Under Secretary of Defense (Acquisition & Technology), DUSD(A&T), subject: Exclusive Teaming Arrangements (Jan. 5, 1999), *available at* http://www.acq.osd.mil/ia.

[168] Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983) (the venture was assessed under Sections 1 & 2 of the Sherman Act).

[169] *Id.* at 1037-38.

[170] *Id.* at 1053. The court also added that parties fashioned the collateral market-allocating restraint to prevent the "fiasco" of conflicts between military service aircraft specifications in an earlier procurement. *Id. But cf.* United States v. Alliant Techsystems, Inc., 808 F. Supp. 9 (D.D.C. 1992) (the only two producers of Combined Effects Munitions teamed at higher than competitive prices without DoD endorsement). *See also*, HEALTH CARE GUIDELINES, *supra* note 134, at para. 3 (noting that some services or products may not exist without collaborations due to high barriers).

innovations are treated favorably by *The Collaboration Guidelines*. On DoD procurements, meeting "national security" needs may be considered as efficiencies.[171]

Firms may argue additional justifications when seeking to hedge quantity[172] or time uncertainty in government procurements, as is found in contracts with options to extend, requirements (and indefinite delivery/indefinite quantity) contracts,[173] "systems" acquisition milestones, or Federal Supply Schedule contracts.[174] In *Colsa Corp. v. Martin Marietta Servs., Inc.*,[175] the Navy awarded Martin Marietta a facility operation and maintenance contract, with Colsa acting under a teaming agreement as a subcontractor for software support services. Martin Marietta and Colsa negotiated the subcontract after contract award and re-negotiated after the Navy exercised each annual option. Collaborating with competitors on a broader or more responsive distribution system (e.g., using the internet) also could permit reductions in contingency pricing from scaling or work rotations.

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[171] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 28-32.

[172] FAR, *supra* note 19, at 7.202 (requiring agencies to evaluate appropriate quantities for per-unit savings). *See also, Id.* at 7.107; 13 C.F.R. § 125.2(d) (2000) (criteria for contract bundling).

[173] *See generally* FAR, *supra* note 19, pt. 11 (requiring market research regarding quantities, delivery/performance, and specifications).

[174] FAR, *supra* note 19, at 8.404. *See, e.g.*, Department of the Air Force, Contracting Policy Memorandum 98-C-07, subject: Use of Blanket Purchase Agreements (BPAs) with Federal Supply Schedules (FSS) (1 May 1998), Attachment, paragraph 2.b(3) (discussing teaming among GSA Schedule contractors and Blanket Purchase Agreements). Further, the General Accounting Office investigated DoD's selective use of multiple-award schedule IDIQ contracts and found that contractors often lose significant amounts due to the favorable treatment of some contractors.

[175] Colsa Corp. v. Martin Marietta Servs., Inc., 133 F.3d 853 (11th Cir 1998). After Martin Marrietta terminated Colsa's subcontract during the third option period, Colsa sued under Section 2 of the Sherman Act alleging that Martin Marietta engaged in anticompetitive monopoly behavior. The 11th Circuit rejected Colsa's allegation.

Other efficiencies could be argued where contractors attempt to accommodate the risks inherent in the contract type offered by the government,[176] the size and scope of the contract effort,[177] specification requirements,[178] and other factors reflected in the level of competition sought by DoD at the prime and subcontract levels.[179] Arrangements to accommodate foreign firm participation in a procurement involving classified information can permit a U.S. firm to control access to the information with the overseas firm conducting key portions of the work.[180] Likewise, collaborating with foreign firms on overseas contracts can serve to accommodate foreign customs, labor, capital commitment, and other laws, as well as restrictions imposed by politics and geography, including transportation costs, resource availability, and trade laws or treaties.[181] Collaborations may permit or restrict information exchanges between competitors (when otherwise unlawful when not acting as a single legal

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[176] FAR Part 16 discusses authorized contract types. Due to the variability in assignment of risk (and consequently, price), FAR 16.103(a) requires contracting officers to consider a pertinent laundry list of factors in deciding which type of contract to award. *See also*, Chierichella, *supra* note 10, at 559 (discussing disincentives for subcontractors when certain contract types and data rights packages are elected by the government). *But see*, Polk, *supra* note 35, at 421 (short contract periods and lowest bidding techniques may decrease barriers).

[177] Contract bundling and A-76 competition permit the agency to decide the appropriate number and size of goods and services under a particular contract. Recent efforts have been made to limit this discretion. *See* Federal Acquisition Circular 97-19, 65 Fed. Reg. 46,052 (July 26, 2000); 13 C.F.R. § 125.2(d) (2000); FAR, *supra* note 19, at 1.107.

[178] CHE Consulting, Inc.; Digital Technologies, Inc., B-284110, B-284110.2, B-284110.3, 2000 U.S. Comp. Gen. LEXIS 35, Feb. 18, 2000 (finding no unfair competitive advantage or unduly restrictive specification where government required for offerors to have original equipment manufacturers support at least 65% of equipment and where the winning offeror had such support under exclusive agreements).

[179] The CICA lists three general levels of competition and criteria for contracting officers to apply when restricting competition. Of particular import is the "industrial mobilization base" exception that permits DoD to award contracts to particular firms necessary to retain a sufficient source for national defense.

[180] *See* Kovacic, *supra* note 10, at 1068-71.

[181] *Id.* at 1097 (citing to earlier version of INTERNATIONAL OPERATIONS GUIDELINES which account for political considerations); FAR, *supra* note 19, pt. 25.

unit)[182] or protect intellectual property brought to the contract or developed under the contract.[183] Additionally, collaborations to market products to the government (in particular, to gain exposure to local commanders and other procurement officials) can often inform or persuade contracting officers to shift choices based on functionality, price or quality, or provide other political leverage.[184] Finally, with civil-military integration, collaborations may accommodate the restrictive accounting rules required of contracts qualifying for accounting under the FAR's Cost Accounting Standards.[185]

c. *The Nature of the Agreement and Anticompetitive Harm*

If DoJ or FTC find an efficiency-enhancing integration of resources plausible and find collateral restraints to be reasonable (i.e., ancillary), *The Collaboration Guidelines* next subject the relevant agreement to a slightly more detailed review. Review of all collaborations or agreements which lack facially per se illegal provisions begins at this point. This next inquiry focuses on the "nature of the relevant agreement, since the nature of the agreement determines the types of anticompetitive harms that may be of concern."[186] Characteristics of certain types of agreements may cause or, if already entered into, have caused, anticompetitive harm. This level of inquiry examines "the ability or incentive to

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[182] *See* Eger, *supra* note 10, at 602-03 (discussing the application of the "Certificate of Independent Price Determination").

[183] *See* Chierichella, *supra* note 10, at 559 (discussing motivations for prime and subcontractors to contribute to innovations under government data rights rules).

[184] Kovacic, *supra* note 10, at 1097.

[185] *See* 48 C.F.R. § 9901.305(a)(1) (2000) (requiring the Cost Accounting Standards Board to consider "the probable costs of implementations, including inflationary effects, if any, compared to the probable benefits"). These standards apply to most negotiated contracts exceeding $500,000. *Id.* at § 9903.201-1.

[186] COLLABORATION GUIDELINES, *supra* note 8, at § 3.3.

compete independently [or] ... the likelihood of an exercise of market power by facilitating explicit or tacit collusion."[187]

DoJ and FTC examine the extent to which independent decision-making is limited by the agreement.[188] They also examine whether the agreement requires collaborators "to combine control or financial interests [that] may reduce the ability or incentive to compete independently"[189] or to reduce control over "decisions about key competitive variables that otherwise would be controlled independently."[190] *The Collaboration Guidelines* discuss specific types of concerns common in production, marketing, buying, and R&D collaborations (as reflected in caselaw).[191] Finally, the agencies examine factors related to

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[187] COLLABORATION GUIDELINES, *supra* note 8, at § 3.31. Antitrust law examines both the ability of a single firm to take anticompetitive action ("unilateral effects") or that of a group of firms ("coordinated interaction"). For an analysis of these theories as they apply to defense industry collaborations, see Kovacic, *supra* note 10, at 1092-94, and Casey R. Triggs and Melissa K. Heydenreich, *The Judicial Evaluation of Mergers Where the Department of Defense is the Primary Customer*, 62 ANTITRUST L.J. 435, 445-48 (1994) (for merger cases).

[188] COLLABORATION GUIDELINES, *supra* note, at § 3.31. In doing so, the agencies consider the business purpose for the agreement, as determined from "objective facts" and inferences drawn therefrom. *Id.*

[189] *Id.*

[190] *Id.* at § 3.31(a). For a discussion of the three types of competition among participants relative to control, see McFalls, *supra* note 40, at 660-61 (elimination of competition among participants in the relevant market outside the joint venture; elimination of price or output competition among participants within the joint venture; and elimination of competition against the joint venture through other joint ventures). Another view of this component assesses the degree of restraint on independent decision-making of each participant regarding activities related to the venture. Werden, *supra* note 64, at 718.

[191] COLLABORATION GUIDELINES, *supra* note 8, at § 3.31(a). In production collaborations, "agreements on the level of [production] output or the use of key assets, or on the price at which the product will be marketed by the collaboration, or on other competitively significant variables, such as quality, service, or promotional strategies" are of concern. *Id.* For example, participants' lack of control over per-unit (marginal) production costs transferred to them (i.e., transfer pricing) may result in inflated prices among some collaborators. *Id.* at n.38. In marketing collaborations, agreements involving price, output or "other competitively sensitive variables" are of concern. *Id.* at § 3.31(a). For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables." *Id.* In buying collaborations, the ability of collaborators to gain and exercise monopsony power "or facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement" is of concern. *Id.* Such collaborations may also "facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases." *Id.* In research and development (R&D) collaborations, agreements that "create or increase market power or facilitate

oligopolistic behavior.[192] In defense industry mergers, DoJ and FTC have been particularly concerned with the ability of merging firms to share proprietary information about their competitors that could be used to harm competitors.[193] On the other hand, ancillary restraints that would constitute per se illegal agreements if they were standing alone may be so common, necessary or sufficiently regulated that they cannot be expected to cause harm.

Some anticompetitive concerns may be obvious to DoJ or FTC, or already may have caused harm.[194] In those cases, DoJ or FTC will either challenge the agreement (if the collaboration falls outside one of the two limited "safety zones"[195]) or weigh the procompetitive benefits against the identified harm, see *infra* Section III.A.1.g. In other cases, "a determination of anticompetitive harm may be informed by consideration of market power."[196] The review then shifts to a detailed market analysis (although some monopolistic or weak market positions of collaborators may be obvious, as where only two producers of a specialized weapons system exist).

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its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts" are of concern. *Id.* Of particular concern in R&D collaborations is the likelihood that an exercise of market power would eliminate or slow the competitive pace of innovation, and anticompetitive harm is most likely where a participant already possesses market power or "when R&D competition is confined to firms with specialized assets, such as intellectual property, or when a regulatory approval process limits the ability of late-comers to catch up with competitors already engaged in the R&D." *Id.*

[192] The sharing of competitively sensitive information (prices, output, costs, or strategic planning; current and future operating or business plans; other company-specific data) can lead to collusion on price, output, customers, territories, or "other competitively sensitive variables." *Id.* at § 3.31(b).

[193] DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at App. D-5, D-6.

[194] COLLABORATION GUIDELINES, *supra* note 8, at § 3.3. "Anticompetitive harm may be observed, for example, if a competitor collaboration successfully mandates new, anticompetitive conduct or successfully eliminates procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market." *Id.* at § 3.31(b).

[195] *Id.* at § 4.

[196] *Id.* at § 3.31(b).

d. *Market Power and Facilitating Its Exercise*

(1) Market Concentration

Assessments of the market power of the collaborators (or collaboration) mirror the techniques used in merger and acquisition analysis under *The Horizontal Merger Guidelines*. Determining the market power of collaborators requires a two-step process. First, DoJ or FTC defines the relevant affected markets.[197] Two component factors comprise a relevant market: the product market and the geographic market in which the product market exists. While the *Horizontal Merger Guidelines* provisions for geographical markets are adopted in whole, *The Collaboration Guidelines* provide specific examples and criteria for defining categories of product markets, including goods and services markets, technology markets, and research and development ("innovation") markets.[198] DoD participates in possibly thousands of different relevant markets in these areas and can even create "specialized markets" itself, primarily due to the high barriers to entry.[199] Scholarly application of

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[197] *Id.* at §§ 3.32, 3.34.

[198] *Id.* at § 3.32(a)-(c). In Brown Shoe v. United States, 370 U.S. 294 (1962), the Court stated that "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 325. It went further to state that, even where a product may be functionally interchangeable, there may exist an "economically significant submarket" for antitrust purposes, and provided a "practical indicia" test for determining whether such a submarket exists. *Id.* These indicia include: "industry or public recognition of the submarket as a separate entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id. Horizontal Merger Guidelines* test product and geographical boundaries by determining the buyers' reactions to a theoretical non-temporary price increase of at least 5%. The narrowest point where buyers fail to shift to another product, group of sellers of the product, or location generally will be the boundary of the relevant market. For a developing application of the product market criterion and Supreme Court criteria for determining "submarkets," see Fed. Trade Comm'n v. Staples, Inc., 970 F.Supp. 1066, 1073-81 (D..D.C. 1997) (finding distribution and pricing structure of office supply superstores to be distinct market of all retailers selling office supplies; the parties agreed that metropolitan areas were the geographical market).

[199] Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1056-57 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983). *See also*, In the Matter of The Boeing Company/McDonnell Douglas Corporation, Fed. Trade Comm'n File No. 971-0051, July 1, 1997 (discussing lack of future defense procurement of fighter aircraft as lack of

antitrust law applicable to DoD focuses almost exclusively on these "specialized markets."[200] However, decisions by procurement officials to seek competition on DoD purchases includes factors very similar to the criteria that define specific markets.[201]

The second step in assessing market power requires identification of participating firms and measurement of their concentration and relative percentage of sales or capacity. "Market share and market concentration affect the likelihood that the relevant agreement will create or increase market power or facilitate its exercise."[202] Market power tends to encourage anticompetitive behavior because of the assumption of economic incentives in a competitive market.[203] If a firm controls a large percentage of the output in a competitive market, it needs to restrict its own output less to drive prices up.[204] *The Horizontal Merger Guidelines* use the Herfindahl-Hirschman Index (HHI) to calculate market concentration in the affected markets. This index combines the total output (in prices, production, or capacity, depending on the

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"defense market"); DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 17 (distinguishing market of possible future new or proposed weapon system from future purchases within an existing weapon system market that may have been subject to competition in design or production stages).

[200] Chierichella, *supra* note 10, at 557-58 (citing examples of reported cases within the Supreme Court's "submarket" criteria); Kovacic, *supra* note 10, at 1086-89 (discussing the differences between commercial and off-the-shelf markets, and arguing that enforcement agencies should avoid applying restrictive sourcing laws to find an overly narrow market). *See also*, Triggs and Heydenreich, *supra* note 187 (reviewing judicial distinctions between product market definitions of scheduled and unscheduled future weapons systems purchases).

[201] *See infra* Section IIIB; Kovacic, *supra* note 10, at 1088 (summarizing various cases suggesting that DoD procurements of commercial items should not be distinguished merely because they are sold to the government, unless procurement or other regulations establish significant barriers to entry); Kovacic, *supra* note 1, at 475-486 (proposing analytical methodology for weapons industry structural management).

[202] COLLABORATION GUIDELINES, *supra* note 8, at § 3.33.

[203] *Id.*

[204] *Id.* As noted previously, this assumes a fully competitive environment where the ability of one firm to affect the supply and demand curves within a market is little. In such a market, when a firm restricts its output, it will have negligible effects on the market price, and the firm will sustain losses because its marginal costs increase relative to that stable price.

industry conditions and available information) and assigns a percentage of that output to each firm relative to its own output. Each firms' percentage of output is squared, then all are summed. In the case of a collaboration (unlike mergers), DoJ or FTC calculate a range of possible market shares.[205] At the "high end," all of the participating firms' shares are combined, then squared, reflecting the power of the collaboration as if it were a single firm. At the "low end," the collaboration's shares are calculated in isolation." The total reflects the market concentration, theoretically ranging from 10,000 (a true monopoly) to zero (infinite number of firms).

(2) Adjustments to Market Concentration Measurements of Market Power

The Horizontal Merger Guidelines identify markets as unconcentrated, moderately concentrated, or concentrated depending on the HHI total. They set presumptions of market power for the participants based on their scores. After assessing the relative power of the collaboration,[206] the agencies make adjustments for the assumption of full competition.[207] DoD acknowledged that it "may be able to play a valuable role in assisting the antitrust agencies in defining relevant product markets."[208] The regulatory authorities granted to DoD for procurements can also serve to diminish market power. The courts, FTC, and scholars have analyzed DoD's ability to conduct audits and profit analysis, subcontractor "break-

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[205] *Id.*

[206] *See* HORIZONTAL MERGER GUIDELINES, *supra* note 27, at § 1.4.

[207] *See Id.*, at §§ 1.52, 2.1, and 2.2; Grumman Corp. v. LTV Corp., 527 F. Supp. 86, 94-95 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2nd Cir. 1981) (adjusting market shares based on historical sales and adding a potential competitor to historical competitors). DoD's "specialized markets" are not fully competitive, but the ability of firms to restrict output or to raise prices is somewhat controlled by procurement regulations, primarily those that allow DoD to determine which qualifying firms are responsible. Kovacic, *supra* note 10, at 1090. *See also* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 16-17.

[208] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 18.

outs," and many other techniques to determine if DoD possesses "buyer power."[209] DoD should also work to help DoJ and FTC identify "likely future competitors" on new weapons systems so that the proper number of market participants is identified.[210] If the collaboration lacks sufficient market power to "reveal a likelihood of anticompetitive harm," the review ends.[211]

e. *Mitigating Factors Related to Collaborators' Ability to Independently Compete*

However, where a collaboration possesses market power, *The Collaboration Guidelines* examine whether the likelihood of anticompetitive harm is mitigated by six additional factors related to the level of competition remaining among its participants.[212] These include:

> (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates;
> (b) the extent to which participants retain independent control of assets necessary to compete;
> (c) the nature and extent of participants' financial interests in the collaboration or in each other;
> (d) the control of the collaboration's competitively significant decision making;
> (e) the likelihood of anticompetitive information sharing;
> (f) the duration of the collaboration.[213]

f. *Mitigating Factors Related to Entry Barriers and Industry Conditions*

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[209] *See infra* note 348 and accompanying text.

[210] *Id.* As civil-military integration efforts proceed, DoD's understanding of the markets will be critical. *See* Triggs and Heydenreich, *supra* note 187.

[211] COLLABORATION GUIDELINES, *supra* note 8, at § 3.33. This level presumably is at 20% of the market output, the same level used to identify an enforcement "safety zone," discussed in Section III.A.1.h, *infra*.

[212] *Id.* at § 3.34.

[213] *Id.* at § 3.34. The exclusivity factor does not distinguish between horizontal exclusivity or vertical exclusivity, the former being more significant under antitrust review. Compare this factor to DoD's policy of treating exclusive teaming agreements (which also fails to distinguish between their horizontal or vertical nature) as per se violations. *See* Memorandum, subject: Exclusive Teaming Arrangements, *supra* note 167.

If competition among participants does not mitigate market power, DoJ or FTC next will assess whether additional firm "entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the anticompetitive harm of concern."[214] Due to the secretive nature of collaborations and their complexity, the incentives for potential competitors (committed entrants[215]) to react with additional competition vary. Accordingly, *the Collaboration Guidelines* adjust this inquiry depending upon the nature of the collaboration and the industry conditions. DoD's efforts at civil-military integration should be of particular import in this analysis. If traditional capital requirements, technological compatibility, accounting rules, data rights, other procurement regulatory barriers, milestone and budgeting uncertainty, and DoD's purchasing decisions can be altered or clarified to lower traditional entry barriers, the market power of traditional defense industry firms may be overstated under the HHI technique.[216] Likewise, the ability of DoD to perform the work as a

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[214] *Id.* at § 3.35. The ability of firms to enter ("waiting in the wings") may prevent existing firms from raising prices. Polk, *supra* note 35, at 421.

[215] Committed entrants are firms that lack the ability (due to capacity or entry barriers) to respond within a relatively short time to non-transient increases in prices. HORIZONTAL MERGER GUIDELINES, *supra* note 27, at § 1.32. Uncommitted entrants are firms that can provide a supply response within one year to competitors' non-transitory price increases without committing significant sunk costs. *Id.*

[216] *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 23 (listing techniques used by DoD to fund or otherwise support competitors);Triggs and Heydenrich, *supra* note 187, at 442-44, 448-50; Kovacic, *supra* note 1 (arguing for better DoD management of its purchasing decisions to encourage competition). A variety of provisions in the FAR permit contracting officers to make competitively significant adjustments, including the provision of government-furnished equipment, contract financing, and data rights. *See also, Planning Competition for Major Systems*, DEP'T OF DEFENSE SYSTEMS MANAGEMENT COLLEGE PROGRAM MANAGER'S DESKBOOK, § 1.8, June 1992 (outlining alternative methods of fostering competition during systems design and production stages); Memorandum, Principal Deputy Under Secretary of Defense (Acquisition & Technology), DUSD(A&T), subject: Subcontractor Competition (May 5, 1999), *available at* http://www.acq.osd.mil/ia (requiring acquisition officials to ensure competition for systems components between the prime contractors' divisions and other subcontractors and to consider purchasing systems components to provide to the prime as Government Furnished Equipment); Polk, *supra* note 35, at 420-21 (discussing various ways in which barriers to DoD markets are reduced, including repetitive bidding, provision of data and technical packages for lower design, development and testing costs, progress payments, government-furnished equipment, and others).

non-commercial competitor, as in the case of the "commercial activities" contracting out process[217] and depots, may restrict anticompetitive behavior. The "power buyer" defense to anticompetitive collaborations, however, has been very narrowly applied by the courts and is of limited value as an affirmative defense, but the underlying facts may evidence mitigation of potential harm.[218]

g. *Weighing Pro-Competitive Benefits and Anticompetitive Harm*

Next DoJ or FTC identify and examine procompetitive benefits of the collaboration in more detail than when first assessed for "plausibility" during the "limited factual inquiry."[219] Again, these benefits include lowering competitive prices and quality or delivery improvements arising from efficiencies to firm structure or transaction costs. The same criteria are used as earlier, but the agencies attempt to verify or even quantify the benefits to be weighed against potential harms. Finally, DoJ or FTC make an "approximate judgement" to determine whether the benefits offset the potential anticompetitive harm.[220] Depending upon the "likelihood and magnitude of anticompetitive harms," DoJ or FTC require the collaborators to provide more substantial evidence that the procompetitive benefits are commensurate.[221] Opinions from DoD may be decisive at this juncture. If DoJ and FTC are

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[217] OMB Cir. A-76, *supra* note 50. *See also* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 23-24 (discussing DoD's role in curbing anticompetitive conduct through its own production of goods). Various DoD laboratories and depots can compete for R&D and production work.

[218] *See infra* note 348 and accompanying text.

[219] COLLABORATION GUIDELINES, *supra* note 8, at § 3.36.

[220] *Id.* at § 3.37.

[221] *Id.*

convinced, the collaboration will not be challenged; otherwise, it will be challenged if it falls outside a "safety zone."

h. *"Safety Zones" and Immunity*

There are two "safety zones" where a collaboration will not be challenged.[222] The first provides that if a collaboration and its participants possess less than 20% market share, a non-per se illegal collaboration will stand unchallenged. The second informs research collaborators that a research collaboration will not be challenged when it is one of at least three independently controlled efforts, as defined by various criteria.[223] *The Collaboration Guidelines* omit reference to a number of judicially-created "immunities." First, the Supreme Court reviews some boycotts or refusals to deal under its formulation of the complex *Noerr-Pennington Doctrine*, through which it recognizes that such activities may constitute expressive speech or "political action" rather than business activity governed under the Sherman Act.[224] Second, the Supreme Court also established that federal regulation (when implementing a Congressional mandate)[225] and "state action" can immunize or mitigate a

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[222] *Id.* at § 4.

[223] The Small Business Innovation Research Program, 15 U.S.C. § 638 (2000), and The National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301-05 (2000) provide limited R&D immunity from per se challenges in certain situations. *See* Polk, *supra* note 35, at 426. *See also*, INTELLECTUAL PROPERTY GUIDELINES, *supra* note 131, at § 4.3 (including non-facially illegal restraints within "safety zone" for intellectual property licenses).

[224] *See* Fed. Trade Comm'n v. Superior Court Trial Lawyers' Association, 493 U.S. 411 (1990) (public defenders' boycott of cases to seek higher fees not immune); City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) (upholding immunity of government officials from allegations of antitrust conspiracies under Parker v. Brown, 317 U.S. 341 (1943), and clarifying the "sham" exception to *Noerr* immunity).

[225] Otter Tail Power Co. v. United States, 419 U.S. 366 (1973) (federal regulation); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1056-57 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983); Fed. Trade Comm'n v. Ticor Title Insurance Co., 504 U.S. 621 (1992) (state action). *See also* Kovacic, *supra* note 1, at 466 (arguing for DoD regulatory oversight of competition policies); Kovacic, *supra* note 10, at 1076-80 (discussing four methods contractors can consider in seeking immunity or assurances from DoJ or FTC that they will not take action).

firm's anticompetitive behavior. The Supreme Court also recognizes immunity in various situations within the context of labor laws.[226] However, application of these immunity doctrines involves complex application of governmental policies and fact scenarios and, thus, necessarily should involve DoD headquarters.[227]

Finally, the same general analytical framework for assessing contractor collaborations applies to international operations, healthcare services, intellectual property development and agreements. Due to the specific nature of those environments, various additional factors are considered at the appropriate level of review, but will not be discussed further in this paper.

2. *Antitrust Enforcement Regime*

The number and manner of ways antitrust concerns are resolved plays an important role in DoD procurement process. DoJ prosecutes antitrust violations in federal district court as criminal (for per se violations)[228] or civil complaints (seeking injunctive or equitable relief), and it has a variety of civil investigative techniques to assist it in identifying alleged violations.[229] FTC prosecutes civil complaints either in federal district court or through FTC

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[226] *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (discussing "statutory" and applying "non-statutory" labor law immunity).

[227] In addition to suspecting an antitrust violation and satisfying "safety zone" and immunity criteria, the Supreme Court has established significant procedural and evidentiary burdens for plaintiffs to bring *ex-post* suits for civil recovery. *See, e.g.*, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (applying the "antitrust injury" standing requirement to competitor-victim of vertical, maximum price fixing scheme); Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) (articulating plaintiff's evidentiary requirement for direct or circumstantial evidence of motive to engage in economically plausible predatory pricing conspiracy).

[228] ANTITRUST RESOURCE MANUAL, *supra* note 123, outlines procedures where local U.S. Attorneys may investigate and prosecute per se criminal violations, but all prosecutions are subject to review and approval procedures within DoJ Antitrust Division or its Field Offices. U.S. DEP'T OF JUSTICE U.S. ATTORNEYS MANUAL, Chs. 7-1, 7-2 (Oct. 1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam.

[229] 15 U.S.C. §§ 4, 25 (2000) (federal district court jurisdicition); The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Section 7A of the Clayton Act), 15 U.S.C. § 18a (2000); The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (2000) (civil enforcement procedures of DoJ).

administrative hearing process.[230] Private parties or a state attorney general acting in *parens patriae* alleging injury from an antitrust violation may sue in federal district court[231] (or join or comment on DoJ or FTC complaints under certain circumstances[232]). DoJ or FTC may provide business reviews to participants of proposed collaborations[233] (or state objections to collaborations qualifying as mergers[234]). Within DoD, collaborators may find themselves defending administrative suspension or debarment based on an antitrust violation.[235] They may also confront overlapping investigative interest, including DoJ, FTC, auditors, contracting officers, and procurement fraud officials (such as military investigative services, inspectors general, legal advisors, etc.). Violations of the Sherman Act or the Clayton Act evidence themselves in many ways and may be detected by a number of personnel related to the procurement. Accordingly, this review considers the enforcement procedures from the various sources from which violations may appear.

a. *Contractor Notice*

Only the Hart-Scott-Rodino Antitrust Improvements Act of 1976[236] requires contractors to file notice with the government of its intent to form joint ventures qualifying as covered

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[230] 15 U.S.C. § 45 (2000).

[231] Sections 4 and 4C of the Clayton Act, 15 U.S.C. §§ 4, 15c (2000), and 15 U.S.C. § 26 (2000). *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (articulating the additional element for injured parties to establish "antitrust injury" under Section 4 of the Clayton Act).

[232] *See* The Tunney Act (Section 5 of the Clayton Act), 15 U.S.C. § 16 (2000).

[233] 28 C.F.R. § 50.6 (2000) (outlining DoJ authority);

[234] 15 U.S.C. § 18a (2000).

[235] FAR, *supra* note 19, at 9.406-1 (causes for suspension); *Id.* at 9.406-2 (causes for debarment).

[236] 15 U.S.C. § 18a (2000).

"mergers" or "acquisitions."[237] However, relatively few joint ventures qualify for this notice requirement.[238] Commonly, DoD may learn of a proposed qualifying joint venture informally from a contractor before filing notice.[239] Accordingly, qualifying joint ventures may come to the attention of DoD directly or via DoJ or FTC after they receive formal notice.

In response to concerns over industry consolidation in the early 1990's, DoD established a Defense Science Board Task Force on Industry Consolidation to examine the deficiencies in its merger review procedures.[240] As a result, DoD promulgated Department of Defense Directive 5000.62.[241] The General Counsel and the Under Secretary of Defense for Acquisition and Technology coordinate DoD's position (and, if necessary, evidence) with DoJ or FTC regarding qualifying "mergers or acquisitions involving a major defense supplier."[242] "Major defense suppliers" generally are those DoD contractors servicing "major systems" or other specially designated procurements.[243] While this Directive does not specifically address joint ventures qualifying for Hart-Scott-Rodino notice, the value

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[237] *Id.*

[238] Pursuant to 15 U.S.C. § 18a(a), filing of notice applies to any direct or indirect acquisition, by voting securities or assets, of any other person if the acquisition meets specific criteria. Generally, the acquisition (or joint venture involving acquisition of assets) involves one organization with assets or sales valued at over $100,000,000 and another with assets or sales valued at over $10,000,000 and the acquisition involves more than 15% of such value.

[239] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 41.

[240] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 6.

[241] DOD DIR. 5000.62, *supra* note 2. This Directive does not alter DoJ and FTC Hart-Scott-Rodino review process. Rather, it addresses DoD's role within that process. For a flowchart of the Hart-Scott-Rodino review process, see DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at App. D-2.

[242] DOD DIR. 5000.62, *supra* note 2, at para. 2. *See also*, U.S. DEP'T OF THE ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 3.304 (Dec. 1, 1984) [hereinafter AFARS] ((requiring all communication related to mergers or acquisitions to travel through Army headquarters and DoD).

[243] *See supra,* note 2 and accompanying text.

threshold of "major defense suppliers" exceeds the filing notice threshold.[244] More importantly, though, these procedures do not cover those joint ventures not involving "major defense suppliers" which otherwise qualify for Hart-Scott-Rodino notice. This gap exists because the underlying focus of the Directive targets traditional defense industry consolidation (i.e., corporate restructuring) instead of collaborative behavior.[245]

DoD review of horizontal or vertical[246] mergers or acquisitions covered by Hart-Scott-Rodino filings generally cover two interrelated facets of antitrust law. First, it applies merger analysis to joint ventures and examines the potential alternative collaborations to minimize competitive harm caused by permanent industry structural changes.[247] The second requires identification and assessment of interlocking webs of collaborations among all firms in a particular market affected by mergers or acquisitions.[248] It is not clear that DoD can track or desires to track these collaborations at the headquarters level, except for the most significant transactions involving significant political pressure.[249] The trend in the past five years has

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[244] The value of the firm or interest in a firm to be acquired is likewise not addressed.

[245] *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 7 ("The Task Force's review is oriented toward the particular circumstances at play in the current period of industry downsizing.")

[246] In 1997, DoD determined that DoD Directive 5000.62 adequately provides for review of vertical mergers and acquisitions. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 29-33.

[247] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 29. DoD, DoJ, and FTC appear to have been particularly active in negotiating mitigating revisions to proposed mergers or acquisitions. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 32.

[248] *See supra* note 83 and accompanying text.

[249] *See, e.g.,* Vago Muradian, *GD-NNS Raises 'Concerns' Within DoD; Decision Expected Soon*, DEFENSE DAILY, Vol. 201., No. 37, Feb. 26, 1999 (outlining political pressure, loss of competition, and efficiencies gained through one nuclear shipyard's purchase of the only other); Vago Muradian and John Robinson, *Raytheon Expresses Concerns to Navy Regarding New DD-21 Team*, DEFENSE DAILY, Vol. 197, No. 48, Dec. 11, 1997 (outlining competitive concerns with teaming arrangement involving both destroyer builders). DoD directed that certain exclusivity provisions be eliminated in the offers. *See* Kovacic, *supra* note 1, at 465.

been for field acquisition personnel to minimize involvement or review of prime contractors' structural or collaborative activities ("hands-off" or "performance-based management").[250]

b. *Internal DoD Reporting*

Collaborations involving major defense suppliers or those that do not require Hart-Scott-Rodino filing notice are subject to review at DoD field operating level. However, little to no guidance exists on review procedures or for deciding which collaborations to review. Current regulatory guidance and other directives focus on reporting and investigating per se violations of antitrust law.[251] Contracting Officers may encounter formal written collaborations when reviewing quote packages or proposals, but pursuant to FAR Subparts 3.3 and 9.6, need not endorse or reject such collaborations unless they evidence violations of antitrust law.[252] Evidence of antitrust violations may be resolved through three different channels within DoD: suspension and debarment officials, centralized procurement fraud system, and defense auditors. Each method hinders application of the analytical framework of *The Collaboration Guidelines.*

First, most federal contracting personnel are required to report evidence of violations through the suspension and debarment process and to DoJ.[253] Government personnel may encounter or receive such evidence through a variety of sources, including (within DoD) from auditors when they determine the presence of "anticompetitive exclusive teaming

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[250] DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 33-39.

[251] *See* Kovacic, *supra* note 10, at 519.

[252] In the absence of individual interest or a strong local procurement fraud program, Contracting Officers lack institutional training in or emphasis on antitrust law, and may take little notice of collaborations in this light unless they otherwise fail to satisfy subcontracting competition or cost or pricing requirements.

[253] FAR, *supra* note 19, at 3.301(b); *Id.* at 3.303(a) (citing 10 U.S.C. § 2305(b)(9)).

agreements."[254] The FAR provides a list of specific indicators of per se illegal behavior the detection of which warrants referral to DoJ of practices "sufficiently questionable to warrant notif[ication]."[255] These provisions do not permit considerations of efficiencies or require specific analyses for a determination of anticompetitive harm prior to referral. For DoD contracting personnel, DFARS 203.301 directs contracting officers to "[r]eport suspected antitrust violations in accordance with [DFARS] 209.406-3 or 209.407-3, and DoDD 7050.5."[256]

(1) *Suspension and Debarment Officials*

DFARS 209.406-3 and 209.407-3 require submission of detailed reports of suspected antitrust violations to the agency suspending and debarring official (SDO) (as designated in DFARS 209.403). SDO's may initiate suspension of contractors for alleged violations of antitrust laws automatically when based on an indictment, or otherwise when based on "adequate evidence."[257] However, they may initiate debarment for the same conduct only when based on a conviction or civil judgment.[258] The DFARS provides no guidance to SDO's regarding further referral to DoJ, but authorizes referral to "the appropriate

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[254] Memorandum, subject: Exclusive Teaming Arrangements, *supra* note 167; U.S. DEP'T OF DEFENSE DEFENSE CONTRACT AUDIT AGENCY AUDIT MANUAL [hereinafter DCAA AUDIT MANUAL], para. 4.705 (Jan. 2000).

[255] FAR, *supra* note 19, at 3.303(b) and (c).

[256] *Accord* 4th Dimension Software, Inc.; Computer Associates International, Inc., B-251936, B-251936.2, 1993 U.S. Comp. Gen. LEXIS 529, May 13, 1993 (contracting officers required to report violations of Certificate of Independent Price Determination and related antitrust violations to DoJ).

[257] FAR, *supra* note 19, at 9.407-2(a) and (b). *See* Coleman American Moving Services, Inc., v. Casper Weinberger, 716 F. Supp. 1405 (M.D. Ala. 1989) (upholding automatic suspension of moving contractors based on indictment even though they were eventually acquitted of all antitrust charges).

[258] FAR, *supra* note 19, at 9.406-2(a).

Government entity,"[259] which most likely means DoJ when read consistent with the FAR's mandatory notification.[260] This process appears to create an investigatory dilemma for both DoD and its contractors. The FAR permits the SDO to initiate suspension and to conduct fact-finding (through notice and opportunity to present matters).[261] To find "adequate evidence" of a violation (tantamount to probable cause), the SDO must apply *The Collaboration Guidelines* framework.

With mandatory referral to DoJ Antitrust Division, that agency will likewise initiate the burden-shifting analysis prescribed by *The Collaboration Guidelines*. Therefore, while SDO's and DoJ may legitimately reach independent conclusions (at least for charging and suspension purposes), SDO's likely will take action only based on indictments or where DoJ files a civil action. This approach avoids duplicative dedication of resources and criminal due process implications. Because DoJ's policy is to prosecute criminally only "hard-core cartels," the ability of the suspension and debarment process to address anticompetitive conduct appears to be limited to per se violations that are significant enough to warrant action in the judgment of the Antitrust Division.[262] This SDO process also removes discretionary application of *The Collaboration Guidelines'* analytical framework from procurement

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[259] DFARS, *supra* note 19, at 209.406-3(a)(iv); *Id.* at 209.407-3(a)(iii) (authorizing referral or investigation, "as appropriate").

[260] FAR, *supra* note 19, at 3.301(b); *Id.* at 3.303(a). SDO's may prefer to submit such matters to DoJ Antitrust Division directly or to their local U.S. Attorney's Office. *See supra* note 228. In this process, FTC is virtually omitted.

[261] FAR, *supra* note 19, at 9.407-3.

[262] 28 C.F.R. § 0.40 (2000) requires Antitrust Division supervision of all antitrust investigations and cases. FAR 9.407-2 and 9.407-3 appear to authorize conflicting investigations. The prosecuting office (whether a local U.S. Attorney or Antitrust Division personnel) must be willing to dedicate resources to a particular case, depending upon a variety of factors. The two distinct investigative processes also create the possibility of different findings of pro-competitive benefits or other benefits to DoD. Because SDO's serve mostly as conduits for referral, they will defer to DoJ for such determinations.

personnel when any collaboration contains provisions that evidence agreement on pricing, bidding, output allocations, other per se illegal conduct or even non-per se illegal agreements that may be anticompetitive by their "nature."

(2) *Procurement Fraud System Reporting*

Related to the SDO referral report is procurement fraud coordination directed by DoD Directive 7050.5.[263] This directive centralizes "significant cases" of procurement fraud within each DoD Component and requires tracking of investigations and coordination of all criminal, civil and administrative remedies, including suspension or debarment. The program contains three notable features pertinent to collaborations. First, it does not specifically address antitrust violations, although DoD Component implementing regulations may.[264] Second, it relies heavily upon defense criminal investigative services for investigations and coordination with other law enforcement officials.[265] Presumably, these officials are familiar with the Congressional mandate to refer alleged violations to DoJ (although no guidance clarifies whether military investigative service notice or SDO notice takes precedence). The procurement fraud system likewise does not permit procurement personnel to consider

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[263] U.S. DEP'T OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989) [hereinafter DOD DIR. 7050.5].

[264] *Id.* at para. 4.3 and Enclosure 1. *Cf.*, U.S. DEP'T OF ARMY, REG. 27-40, ARMY LITIGATION, para. 8-9b(3) (19 Sep. 1994) (requiring Army Procurement Fraud Advisors to consider civil remedies for violations of the Sherman Act). This Army Regulation does not address non-per se illegal antitrust violations. It does, however, otherwise authorize Army personnel to coordinate with DoJ to coordinate civil recovery or equitable relief. *Id.* at para. 8-7c.

[265] DOD DIR. 7050.5, *supra* note 259, at para. 5.1.3. Centralized reports of "significant cases" are also submitted from the field to designated military service headquarters. *Id.* at para. 5.1.1. For example, the Army requires submission of "procurement fraud reports" by field attorneys to the Procurement Fraud Division, Office of the Judge Advocate General (which coordinates with DoJ). U.S. DEP'T OF ARMY, REG. 27-40, ARMY LITIGATION, paras. 8-7, 8-8 (19 Sept. 1994). However, the Army's SDO's serve outside this Office. DFARS, *supra* note 19, at 209.403.

efficiency justifications or other factors when initially referring cases (ultimately) to DoJ. Moreover, because "significant cases" include only those alleging losses of $100,000 or more,[266] procurement fraud teams unable to conduct economic analyses may pass detailed review of even per se violations where amounts of loss cannot be established.

(3) *Auditor Reports*

Finally, the Defense Contract Audit Agency (DCAA) establishes its own procedures for detecting and reporting suspected antitrust violations. After an auditor verifies the existence of "sufficient evidence" of "anticompetitive procurement practices," (e.g., while evaluating a cost estimate or pricing proposal[267]) it must refer one of two different activities to different offices.[268] First, if the auditors discover an exclusive teaming arrangement, they must determine whether "one or a combination of the companies participating in an exclusive teaming arrangement is the sole provider of a product or service that is essential for contract performance."[269] If so, the pertinent contracting officer must be notified promptly and the auditor must report any unsuccessful efforts by the contracting officer to eliminate the exclusivity provision to the DCAA General Counsel.[270]

This procedure reflects a directive from DoD Under Secretary of Defense of Acquisition, Logistics, and Technology,[271] and a proposed revision to DFARS 203.303.[272] The proposed

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[266] DOD DIR. 7050.5, *supra* note 259, at para. 3.2. The definition includes product substitution and "corruption," with the latter limited to bribery, gratuities, or conflicts of interest.

[267] DCAA AUDIT MANUAL, *supra* note 250, at para. 9.002h.

[268] *Id.* at para. 4.705b.

[269] *Id.* at para. 4-705c.

[270] *Id.*

[271] Memorandum, subject: Exclusive Teaming Arrangements, *supra* note 167.

DFARS change also would require reports to SDO's of unsuccessful efforts to eliminate exclusivity provisions involving "essential" products or services.

This proposal generated three significant objections from the Council of Defense and Space Industry Associations (CODSIA) which represents DoD contractors.[273] First, the term "essential" is not defined for contracting officers. Second, exclusivity can generate benefits (such as protecting licensing rights) and should not be treated as per se illegal. Third, CODSIA claims that referral to SDO's is automatic and fails to require a determination (after an opportunity to comment) of actual anticompetitive impact. Such a referral would prevent the teaming firms from being awarded the work and would be an unfair economic loss if no anticompetitive harm would have occurred. CODSIA's proposed analytical process conflicts with the ambiguous regulatory referral process outlined above.

These objections, however, reflect the flexible analytical framework adopted by *The Collaboration Guidelines* where competing firms are involved. Indeed, exclusivity provisions are scrutinized only in vertical restraints cases (and even narrowly under the "exclusive dealings" doctrine in those cases). In horizontal restraints between competitors, courts must find that *a monopolist* restricted access to an "essential facility" where it would have been feasible for an otherwise incapable competitor to duplicate the facility.[274] Further, DoD guidance on exclusive teaming arrangements does not distinguish between horizontal or vertical collaborations (recall that the FAR definition of a teaming agreement includes both

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[272] *DFARS Case 99-D028*, 64 Fed. Reg. 63,002 (Nov. 18, 1999).

[273] *Note: Industry Questions*, *supra* note 5.

[274] See *supra* note 128 and accompanying text. Recall that these restraints are excluded from coverage under *The Collaboration Guidelines*.

joint ventures *and* subcontract relationships). Even if such an exclusive arrangement were not per se illegal, DoJ or FTC must assess the "nature" of the agreement for anticompetitive harm, a task CODSIA believes should be conducted by a contracting officer. Finally, under the analytical framework, if a firm can present an efficiency justification even for per se violations, DoJ will examine the arrangement for actual or potential anticompetitive effects.

While CODSIA argues that DoD contracting officer should make that determination, DoD directive and proposed change to the DFARS appear to defer to DoJ for that function. In that case, DoJ Antitrust Division[275] would coordinate with contracting officers directly (or through litigation channels) for information and evidence regarding the analysis of every such exclusive teaming arrangement. As CODSIA points out, such a process would require either an indictment or injunction filed by DoJ or a non-responsibility determination by the cognizant contracting officer for the teaming arrangement to be rejected.[276] This procedure provides the only hint at how DoD would treat all other collaborations that require assessment of efficiency claims in otherwise per se illegal collaborations. It would appear that contracting officers attempting to make such assessments would interfere with the investigative function of DoJ (or FTC, when otherwise informed) in these matters. In fact, even analyzing procurement bid information to verify bid-rigging, price fixing and other per se illegal conduct can require technical DoJ assistance.[277]

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[275] This assumes full intra-DoJ coordination required by the *U.S. Attorneys Manual* when SDO's report violations to local U.S. Attorneys.

[276] This assumes that the cognizant SDO does not take action on an independent investigation, as discussed above. (This also assumes all other award factors are held equal.)

[277] ANTITRUST RESOURCE MANUAL, *supra* note 124, at § 8.

All other suspected and verifiable anticompetitive practices discovered by DCAA auditors must be referred by DCAA Form 2000.0, DCAA Suspected Irregularity Referral Form, to the Department of Defense Hotline in Washington, D.C.[278] No other referral or coordination with contracting officers or other procurement fraud personnel is required (or indicated in the manual). Local contracting officers and other procurement fraud team members then must rely on notice of such cases after subsequent referral to DoJ.

c. *Third-Party Reports*

Other entities also may detect, report and challenge antitrust violations involving DoD contracts. Contractor employees or members of the public at large may report violations (and may be eligible to file qui tam lawsuits if the violation falls under the False Claims Act[279]). Interested competitors may also sue under the Sherman and Clayton Acts when injured or challenge a contract award in federal court.[280] These sources and remedies may not be as fruitful or effective as DoD enforcement because of the likelihood of incongruent interests.

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[278] DCAA AUDIT MANUAL, *supra* note 250, at para. 4-705 (referring auditors to para. 4-702.4). Government sole-source awards, CICA violations, and contractor buy-ins are excluded.

[279] False Claims Amendments Act of 1986, 31 U.S.C. §§ 3729-31 (2000).

[280] The General Accounting Office lacks jurisdiction to resolve bid protests based on alleged violations of antitrust law. 4th Dimension Software, Inc.; Computer Associates International, Inc., B-251936, B-251936.2, 1993 U.S. Comp. Gen. LEXIS 529, May 13, 1993. However, competitors may refer such matters to DoJ themselves. *Id. See also*, Halifax Technical Services, Inc., B-246236.4, 1993 U.S. Comp. Gen. LEXIS 4, Jan. 5, 1993; CHE Consulting, Inc.; Digital Technologies, Inc., B-284110, B-284110.2, B-284110.3, 2000 U.S. Comp. Gen. LEXIS 35, Feb. 18, 2000, n.8. Prior to 1996, some contractors challenged procurements that involved allegations of antitrust violations in the Court of Federal Claims and in the federal district courts. At least one published assessment of this practice indicates that it was not an especially successful technique because challenges were reviewed as irrational agency actions under the Administrative Procedures Act, 5 U.S.C. § 706 (via the "Scanwell Doctrine"). Del Stiltner and Robert J. Sherry, *Son of Scanwell: Antitrust Challenges to Government Contracts Awards and Related Actions*, PUBLIC CONTRACT L.J., Vol. 17, No. 2, June 1988, at 514. In 1996, Congress enacted The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870 (1996) (amending 28 U.S.C. § 1491). This Act gives federal district courts and the Court of Federal Claims jurisdiction to hear pre-award and post-award bid protests based on violations of statutes or regulations. Because the standards of review are similar to "Scanwell" cases (i.e., application of the Administrative Procedures Act), such challenges may be of equally limited value to competitors, but DoD should be aware of such litigation risks.

Further, private efforts to enjoin the award of a contract based on a violation of antitrust law can place DoD at risk of procurement delays or inadvertent awards where it may not otherwise be aware of the litigation.

B. *DoD Procurement Law Competition Standards*

Consistent with the U.S. policy of upholding competition among private industry, the Congress imposes on DoD the responsibility of seeking, "to the maximum extent practicable," competition on its procurements. FAR Part 6, Competition Requirements, implements the basic statutory charge of The Competition in Contracting Act of 1984 (CICA).[281] Contracting officers must seek full and open competition on DoD procurements through the use of competitive procedures unless certain sources are properly excluded or statutory exceptions for other than full and open competition are invoked.[282] Government procurement personnel document these decisions daily and are well equipped with legal advisors to defend against protests at the General Accounting Office or in the federal courts. DoD's decision to contract with a particular source or to impose its purchasing preferences in a particular manner, however, can appear to conflict with the underlying intent of antitrust law and the CICA. Accordingly, this section reviews those procurement procedures that directly relate to decisions affecting market and participant definitions and the ability of procurement personnel to influence or review collaborative behavior.

1. *Antitrust-CICA Relationship*

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[281] 10 U.S.C. § 2304 (2000). Other provisions contained within Title 10, Chapter 23, U.S. Code, and annual appropriations and authorization acts also address specific requirements on procurements.

[282] FAR, *supra* note 19, at 6.101.

Use of the CICA exclusion and exception authorities by DoD *as a consumer* may conflict with the purposes of antitrust laws. It also does not establish antitrust immunity. These authorities allow DoD to permit collaborations between limited suppliers or rejection of existing suppliers in order to satisfy the purpose of the exclusion or exception. For example, award of a contract to the smaller one of only two capable weapons producers on the basis of maintaining an industrial mobilization base,[283] does not permit the two firms to engage in per se illegal practices or exempt them from the prohibitions of the antitrust laws. The CICA does not mandate the circumvention of competition, nor does it entitle contractors to the right to deny DoD the benefits of competition.[284] Likewise, restrictions on foreign firm participation, such as those found in the Exon-Florio Amendment to the Defense Production Act of 1950[285] do not exempt otherwise qualifying firms from competition,[286] nor do security clearance restrictions.[287]

On the other hand, the FAR contains other specific provisions that assist DoD in obtaining procurement-specific competition among both prime and subcontractors, including the Certificate of Independent Price Determination, and the component break-out, and leader-

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[283] Award pursuant to 10 U.S.C. § 2304(c)(3) (2000), as implemented in FAR, *supra* note 19, at 6.302-3.

[284] Fed. Trade Comm'n v. Alliant Techsystems Inc., 808 F. Supp. 9, 22 (D.D.C. 1992). *See also*, ALM, Incorporated, B-221230.3, B-221249, B-221250, 65 Comp. Gen. 405, Mar. 11, 1986, (finding that encouragement of teaming arrangements is consistent with CICA and there is no absolute limit on the number of teaming members).

[285] 50 U.S.C. App. § 2170 (2000). The Department of the Treasury implements the Act at 31 C.F.R. Part 800 and covers qualifying joint ventures. 31 C.F.R. § 800.301 (2000). The Committee on Foreign Investment in the United States (CFIUS) investigates each transaction.

[286] Kovacic, *supra* note 10, at 1069-72.

[287] *Id.*

follower provisions.[288] Nor can a prime contractor, such as one in a teaming arrangement, restrict competition among subcontractors when subcontractor competition is mandated by CICA and the FAR.[289] Even the substance of contract packages is litigated for its competitive effects on potential bidders.[290] The procedural and substantive decisions on a procurement establish part of the competitive framework for contractors.[291] For example, if a domestic firm deems it necessary to collaborate with a foreign firm to bid on a DoD weapons system contract, its collaboration necessarily will include provisions assigning control over classified information and control of assets to the domestic firm. Under antitrust analysis, such provisions would be reviewed (after a proper showing of justification from the collaborators) for ancillarity and anticompetitive effects.[292] The foreign firm participation restrictions[293] also inform the definition of the relevant market. These restrictions may

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[288] *See Id.*; Chierichella, *supra* note 10, at 560 (listing several provisions available to DoD to enhance competition).

[289] *See* Chierichella, *supra* note 10, at 558 (discussing relationship of antitrust laws to CICA-mandated competition in subcontracting).

[290] *E.g.*, 10 U.S.C. § 2305 (2000); CHE Consulting, Inc; Digital Technologies, Inc., B-284110 et al., 2000 U.S. Comp. Gen. LEXIS 35, Feb. 18, 2000 (specifications requiring original equipment manufacturers' support agreements); Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD para. 351 (specifications containing geographical restrictions); DFARS, *supra* note 19, at 211.270-1 (restricting use of "brand name or equal" provisions); FAR, *supra* note 19, at 37.601; *Id.* at 37.501 (encouraging performance-based service contracting and using "best practices" in the contract management process).

[291] *See, e.g.*, FAR, *supra* note 19, subpts. 15.1, 15.3 (cost, quality, and performance trade-offs, and evaluation criteria requirements); *Id.* at 32.105 (considerations for contract financing); *Id.* at 45.105 (Government Policy and competitive advantages).

[292] COLLABORATION GUIDELINES, *supra* note 8, at §§ 3.2, 3.3.

[293] *See* DFARS, *supra* note 19, at 209.104-1(g).

appear to restrict the relevant geographic market to the U.S., but the proposed collaboration expands that market worldwide.[294]

2. *Considering Collaborative Behavior and Incentives in Procurement Planning*

Put another way, contractors may not unreasonably restrain their competitors when bidding on DoD contracts, but DoD (through the CICA and its procurement choices) may provide an incentive or obstacle that warrants collaborative behavior. DoD procurement officials do not make decisions to limit competition to achieve a specific goal (e.g., expand the industrial base by awarding to a new, second contractor) or to encourage collaborations to achieve broader competition in a vacuum. Rather, they make them through the FAR procurement process. The FAR recognizes the advantages of teaming arrangements[295] and encourages their use in "appropriate" circumstances (i.e., when they do not violate antitrust laws and if they present advantages to the government).[296] Given the vast variety of collaborations and advantages to DoD, what are effective methods that procurement officials use to evaluate "appropriateness?" This section argues that the process of identifying DoD's needs and conducting market research and evaluation of offers should include assessments of incentives to collaborate and the competitive effects therefrom. This process must be better informed by competition advocates. Finally, this process also must be effective and efficient when the application of antitrust laws fails to reach the specific conduct.

a. *Market Research*

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[294] *See* Kovacic, *supra* note 1, at 485-86 (discussing factors that may assist DoD in deciding to expand the geographical markets through foreign firm participation).

[295] FAR, *supra* note 19, at 9.601.

[296] *See* ALM, Incorporated, *supra* note 279. *See also* Kovacic, *supra* note 1, at 442, 465-66 (discussing DoD's rejection of teaming arrangements when competitive industrial structure is implicated).

The process of gathering information about industry conditions within a particular market for antitrust law analysis varies in detail from that under the FAR procurement process. The FAR's aim of market research focuses on the procuring agency's needs and whether an industry can satisfy those needs in a competitive manner. As outlined above, antitrust law examines the competitive conditions of the market and the industry structure. There is little guidance in the FAR, however, to aid procurement officials in assessing the competitive conditions of the markets to predict or manage collaborative behavior. A critical review of the market research procedures shows that procurement officials should gather information traditionally pertinent to antitrust analysis during this process.

Before developing any new requirement and before soliciting offers, procurement officials collect and analyze information "appropriate to the circumstances" about the ability of the market to satisfy the agency's needs.[297] The results are used to determine whether commercial or non-developmental sources exist from which the goods or services will be sought[298] and, if none, to consider re-defining the agency's requirements to accommodate such sources.[299] DoD recently announced that it will oversee the market analysis process to weigh the effects that DoD Component budgeting and acquisition plans have on future

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[297] FAR, *supra* note 19, at 10.001(a)(2); *Id.* at 2.101. FAR Part 10 implements 10 U.S.C. §§ 2305 and 2377. For Major Defense Acquisition Programs and Major Automated Information Systems, market research is conducted at the initial stages of program definition. DoD 5000.2-R, *supra* note 2, at para. 2.3.1. For "commercial activities" conversion studies, market research is conducted during the "commercial activities" inventory phase. U.S. DEP'T OF DEFENSE, INSTR. 4100.33, COMMERCIAL ACTIVITIES PROGRAM PROCEDURES, para. 9 (Sept. 1985).

[298] FAR, *supra* note 19, at 10.002(b).

[299] Id. at 10.002(c).

competition (and industrial structure, in general).[300] The Office of the Deputy Under Secretary of Defense (Industrial Affairs) intends to provide non-proprietary market information on its website and publish an "informational Market Analysis Handbook."[301] The FAR mandates that the results of market research should be used to determine: if existing sources can satisfy DoD's needs; if commercial items can meet DoD's needs; the extent to which commercial items can be integrated into components; if recovered materials and energy efficiencies can be achieved; if bundling is necessary; and the practice(s) of firms engaged in producing, distributing and supporting commercial items, such as warranties, financing, maintenance, packing, and marking.[302]

Any number or manner of techniques are available to procurement officials to gather market data, from contacting industry or government representatives directly and obtaining source lists to conducting interchange meetings and holding pre-solicitation conferences.[303] No specific techniques that consider the use of collaborations or the specific market influences that would induce or discourage collaborative behavior have been endorsed.[304] Market research in acquisition planning traditionally focuses on the capabilities of firms to satisfy the functional, performance, or physical characteristics needed by DoD.[305] The

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[300] Memorandum, subject: Future Competition for Defense Products, *supra* note 6. It is not clear that this effort extends beyond projected major systems (e.g., "commercial activities").

[301] *Id.*

[302] FAR, *supra* note 19, at 10.001(a)(3).

[303] *Id.* at 10.002.

[304] FAR 10.002(c) and (d) require the agency to re-evaluate needs to determine if commercial items can be used and use commercial items procedures (FAR Part 12) if it can; otherwise, announce that those procedures will not be used.

[305] FAR, *supra* note 19, at 6.502(a); U.S. DEP'T OF DEFENSE DEFENSE ACQUISITION DESKBOOK, § 1.2.2.4.131 (Jan. 2001), *available at* http://www.acq.osd.mil.

particular contract or subcontract is coded for identification of function by service or product as discussed in Section II, above. Finally, the FAR encourages the release of limited amounts of agency information for firms to decide if they can meet a need and requires documentation of market research consistent with the size and nature of the procurement.[306]

Market research must be conducted continually during the acquisition planning stage of a procurement, whether the acquisition is on a contract or systems basis.[307] Among other things, the market research will result in an assessment of the level of competition among the prime and major component/subcontractor levels, the product or service descriptions, the contracting methods, and preferred sources.[308] Procurement personnel must account for how competition will be sought and sustained at the subcontract level, including assessment of barriers to competition and other industry factors.[309] For major defense acquisition programs and major automated information systems,[310] the acquisition plans must specifically include discussion of open systems architecture, incorporation of commercial/non-developmental items, dual-use technologies, industrial capabilities and preparedness, technical data rights, "critical product and technology competition,"[311] and foreign entity cooperation.[312] To

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[306] FAR, *supra* note 19, at 10.002(e).

[307] *Id.* at 7.105(b).

[308] *Id.* at 7.105(c).

[309] *Id.* at 7.105(c)(2)(i)-(iv). DoD requires *written* acquisition plans for development acquisitions with a total estimated cost of at least $5,000,000, production and service acquisitions estimated to be at least $15,000,000 or more per fiscal year or $30,000,000 total, or otherwise when appropriate. DFARS, *supra* note 19, at 207.103(c)(1).

[310] These systems acquisitions are a subcategory of major systems with higher projected dollar expenditures, or as otherwise designated by Congress or DoD. DoD 5000.2-R, *supra* note 2, at Definitions.

[311] DoD 5000.2-R, *supra* note 2, at para. 3.3.2; DFARS, *supra* note 19, at 207.103(b), 207.106.

address "critical product or technology competition," program managers must consider the degree of vertical integration (including proposed exclusive teaming) of competing firms and whether sub-system competition or collaborations are most effective.[313]

Within the weapons systems segment of the defense industry, one scholar proposes a methodology for DoD to apply to market research and its industrial capability program.[314] Professor William Kovacic argues that DoD must identify the research and development competencies in firms specific to each current or future weapons system need, as subdivided into contracting functions of "systems integration," "design, production, and assembly of components," and "modifications and upgrades."[315] Next, he proposes that, through market research, DoD should identify and rank industry participants "according to the volume and quality of previous work related to specific competencies."[316] These participants should include current contractors, commercial firms, and foreign firms, all of which may enter the market through direct participation, mergers, or collaborations.[317] These steps will gather information that can aid antitrust tribunals in defining the relevant markets, their participants, and the competitive effects of transactions.[318]

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[312] DoD 5000.2-R, *supra* note 2, at para. 3.3.6.2.

[313] *Id.* at para. 3.3.2.4.

[314] Kovacic, *supra* note 1, at 475-80.

[315] *Id.* at 476-78.

[316] *Id.* at 479.

[317] *Id.* at 480. The third step in his methodology seeks to identify "activities that sustain [the identified] capability." *Id.*

[318] *Id.* at 481. They will also help to monitor the interlocking webs of collaborations and other agreements related to merger review consent decrees. *Id.* at 439-443.

Such a methodology would require substantial internal DoD economic and legal analytical capabilities,[319] in addition to information systems needed to track the process and coordinate with DoJ and FTC.[320] Whether DoD incorporates this specific methodology into a centrally managed budgeting and acquisition planning cell for its monopsonistic weapons systems markets, it simply is unworkable for all other procurements across DoD due to their sheer number and variety of markets. This holds true particularly where procurements fall within isolated product and geographical markets, such as fuel refinement, office supplies, facilities maintenance and repairs, information systems design and operation, or other specialized and non-specialized products at DoD locations around the globe, as defined by the Supreme Court's "submarkets" criteria. Procurement officials also must assess the necessity for licensing arrangements when intellectual property rights are acquired and assess geographical and legal restrictions when procuring overseas or from overseas firms.

Procurement officials should evaluate the acquisition strategy in terms of adequate competition when one of several situations occurs. They, and Competition Advocates,[321] should examine the causes for potential economic or contract-related barriers when less than five firms have been identified in any given market, particularly one comprising homogenous products. Likewise, where a collaboration of firms that produce similar services or products

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[319] Professor Kovacic likewise addresses these factors. *Id.* at 481-84.

[320] DoD addressed issues related to confidentiality and exchanges of information between the three agencies in DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 40-43.

[321] The FAR requires appointment of a Competition Advocate within each agency. FAR, *supra* note 19, at 6.501. There is no DoD-wide Competition Advocacy program. Individual military services provide for various levels of competition advocacy. For example, the Army provides for an Army-wide Competition Advocate, major command Special Competition Advocates, and installation-level Local Competition Advocates. AFARS, *supra* note 242, at 6.502; U.S. DEP'T OF ARMY, REG. 715-31, ARMY COMPETITION ADVOCACY PROGRAM, paras. 1.13, 1.14 (9 June 1989). Competition Advocates establish periodic competition goals and identify barriers impeding achievement of those goals. FAR, *supra* note 19, at 6.501.

(in any quantity) represent at least one in five potential offerors at the initial market research stage or where interested firms express the need for collaborations in order to participate, procurement officials must re-evaluate the strategy. Finally, procurement officials must be cautious where DoD's procurement need for any identifiable product or service substantially increases the demand within the market because of the impact it may have on coordinated supplier responses. For example, competing a military base's building maintenance and repair function under the "A-76 commercial activities" process may create a new and dramatic demand within the geographical area of the base with limited suppliers (such as small plumbing firms, HVAC engineering firms, etc., that may be flooded with former military employees).

b. *Information Exchanges, Negotiations and Evaluation*

The procurement official's choice of needs description, level of competition (under the CICA), and competitive contract framework at the pre-solicitation stage does not end DoD's ability to influence and review collaborations. Indeed, pre-solicitation information exchanges (e.g., through the draft Request for Proposals process) and the source-selection and negotiations process often serve as the focal point for trade-offs between DoD's program needs, industrial capability needs, and competition policies. Contracting Officers and other source selection personnel will find that offerors have structured their proposals based on their unique competencies and structure and their interpretations of the requirement. Combined with these factors, the choices made by the procuring agency to enhance or restrict competition through the CICA and through other competitive framework factors provide additional incentives or barriers that may be resolved through collaborations.

Accordingly, when proposals reflect the use of collaborations between actual or potential competitors in the particular product or service market, procurement officials traditionally consider the evaluation criteria they established in the pre-solicitation process. Procurement officials also may be under pressure to adopt short-term cost, quality or delivery needs[322] rather than considering long-term competition (particularly where DoD is not the sole customer).[323] The challenge, then, is to provide the appropriate response when a collaboration facially contains a feature that restricts price, output, customers, or participants (e.g., exclusivity).

Contracting officers possess little regulatory guidance for determining whether such collaborations are "appropriate." The FAR requires offerors to disclose teaming arrangements in their offers, or if formed after award, before they become effective.[324] The government normally will recognize the "integrity and validity" of such arrangements and will not require or encourage their dissolution.[325] In the evaluation process, source selection personnel may address the cost, quality, or performance aspects of the collaboration as it relates to the procurement.[326] However, the FAR does not excuse teaming arrangements that violate antitrust laws.[327] If the proposal containing the collaboration provides the "best

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[322] *See* Kovacic, *supra* note 1, at 469.

[323] This conflict is most acute, however, where the relevant product market comprises only the current DoD procurement (e.g., during "commercial activities" competitions) because the resulting contract may permanently shape future competition on similar procurements.

[324] FAR, *supra* note 19, at 9.603.

[325] *Id.*

[326] DoD procurement officials must also consider the inclusion of small and disadvantaged businesses as competitors, including through joint ventures, teaming arrangements and subcontracts. DFARS, *supra* note 19, at 215.304(c)(i).

[327] FAR, *supra* note 19, at 9.604(a).

value" to the government, then may the contracting officer award the contract where the collaboration contains a provision evidencing a per se illegal restraint? More importantly, if the collaboration includes efficiency justifications obvious to the procurement officials, what procedure should be used to resolve its legality?

The recent DoD directive on exclusive teaming arrangements where one participant possesses a "product or service that is essential for contract performance" suggests the DoD approach. Contracting officers first must negotiate with the offeror to eliminate the exclusivity provisions related to the essential product or service. Where unsuccessful, the matter should be reported to DoJ (through SDO's and the procurement fraud system) because DoD deems such teaming arrangements to be evidence of per se illegality. As noted by CODSIA, implementation of this particular procedure requires contracting officers to apply antitrust laws to a particular teaming arrangement.

The FAR authorizes contracting officers to negotiate with offerors to eliminate teaming provisions that conflict with subcontract competition requirements or other competition-enhancing rights.[328] Under DoD interpretation of this authorization, contracting officers should also negotiate to eliminate other per se illegal arrangements before they take effect. If they cannot be eliminated or if they have already been formed, they should be reported to DoJ under DoD system. This system requires DoJ (or FTC) to apply *The Collaboration Guidelines*, not contracting officers or their legal advisors. DoJ will inform the contracting officer of its concerns and the contracting officer may attempt additional negotiations, as in

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[328] *Id.* at 9.604.

teaming arrangements under the Navy's DD-21 destroyer solicitation cited above,[329] or DoJ may intervene.[330] If DoJ succeeds in obtaining a conviction or civil judgment based on the collaboration, the contracting officer must consider that fact in determining the present responsibility of the offeror(s).[331] In other cases, DoJ may use the procuring agency's data and opinions to inform its analysis and find that the collaboration is legal. DoD procurement officials, therefore, serve as information coordinator and negotiator on behalf of DoJ, but lack decision-making authority on matters that relate to competitive industry conduct because it falls under the rubric of antitrust law.

Accordingly, the success of this process depends upon two factors. First, procurement officials must thoroughly screen collaborations in proposals for per se illegal terms, identify them, and raise them with offerors or potential offerors during the appropriate negotiation phase or report them promptly. Current players in this process are the contracting officers, auditors, source selection officials, and designated legal advisors. If both the offerors and the contracting officer find the restraint beneficial, they may be prone to framing their reports and cooperation with DoJ accordingly.

Second, procurement officials' market research and understanding of market practices will enable solicitation packages to be structured in ways that foster only acceptable collaborations and that can quickly and persuasively inform DoJ or FTC about DoD's needs. Under such a cooperative system, reporting and coordinating through adversarial SDO and

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[329] *Supra*, note 249.

[330] *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 31 (DoD reviews horizontal and vertical mergers and acquisitions "from a customer perspective," while only assisting DoJ and FTC with antitrust enforcement decisions).

[331] FAR, *supra* note 19, at 9.104-3(c)(i).

procurement fraud systems may be counterproductive. To treat antitrust assessments automatically as suspect encourages risk aversion and adversarial relationships. As currently structured, the process also contains numerous bureaucratic gaps and redundancies that cause delay, particularly where inter-agency disputes arise out of conflicting interests. Further, where collaborations affect multiple procurements (or even non-DoD markets), they may be permissible in one setting and not in another. This case-by-case factor again necessitates some tracking mechanism.

C. *Buying Power: DoD as a Monopsonist*

Within the framework for analyzing collaborations and within the procurement process, DoD procuring offices make choices that enhance its position as a customer. In many markets, DoD enjoys a monopsonist position or, together with other major buyers, an oligopsonist position. The analyses and discussion above sought to critique DoD's process of reviewing collaborations under antitrust law and how it accounts for that review in its procurement process. In particular, aspects unique to DoD purchases under the FAR shed light on efficiency justifications, market definitions, anticompetitive effects, and barriers to entry under antitrust analysis. Procurement officials must also evaluate DoD's immediate procurement needs when structuring solicitations and evaluating proposals. DoD's needs in a particular transaction may be unique vis-à-vis particular market conditions or it may seek to enhance capabilities or competition as a consumer. This section presents a brief overview of the buying practices available to DoD to achieve those sometimes contradictory objectives.

The monopsony powers of DoD can be categorized into two parts. First, the mere purchasing power of DoD as a consumer in a relevant market[332] dramatically shapes the behavior of all market participants and committed entrants. This aspect of monopsony power has been recognized in DoD policies in terms of its future budgeting and acquisition strategies for major systems[333] and in its ability to compete against potential firms in various specialized and commercial markets.[334] The second part of monopsony power stems from the sovereign statutory and regulatory choices afforded DoD in its purchasing. In merger cases, DoD's sovereign "buying power" has served to inform the courts about potential mitigating factors to potential anticompetitive effects.[335] These factors correlate to the additional industry-related mitigation factors outlined in Section III.A, above.

1. *Budgeting and Acquisition Choices*

At least one scholar has proposed sophisticated budgeting and acquisition strategies for DoD to meet its need for future competitive weapons systems research and development.[336] Based on the premise that competition is the best driver for low costs and high quality, this process attempts to balance DoD's industrial capability needs with strategies to sustain competition by: allocating R&D resources more effectively; expanding use of foreign firms; fostering participation by commercial firms; providing better incentives for sole-source

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[332] As noted above, DoD possesses the exclusive power to create or terminate a market.

[333] Memorandum, subject: Future Competition for Defense Products, *supra* note 6.

[334] DoD 5000.2-R, *supra* note 2; OMB Cir. A-76, supra note 50, at para. 5.

[335] *E.g.*, Triggs and Heyndereich, *supra* note 187, at 447-48 (reviewing three factors assessed by the courts).

[336] Kovacic, *supra* note 1, at 443-67.

suppliers; intervening to prevent anticompetitive conduct; and preserving interservice and interprogram rivalries within DoD.[337]

All major defense systems purchases require assessments of industrial capability (including foreign cooperation) in the acquisition strategy.[338] Where commercial markets and capabilities exist and can be expected to remain for non-weapons procurements, DoD need not be so concerned with industrial capability assessments in its procurements. It should, however, be cautious of dramatically changing the market landscape if it possesses substantial purchasing power within a relevant market. For example, the conversion of plumbing services for a base to a private partnership comprising two of the five small plumbing companies in a neighboring town may significantly alter the market power of the three remaining companies. (Consider also in this scenario the ability to seek adequate competition on future contract renewals.) On the other hand, if a nearby military installation can provide plumbing services under a more competitive intra-governmental support agreement, the local five-firm private market remains relatively unaffected.[339]

2. *Statutory and Regulatory Powers*

A variety of procurement process and substantive choices permit DoD to establish or eliminate barriers to competition, such as procurement procedures or contract terms. As discussed above, contracting officers and Competition Advocates are trained in and experienced at recognizing and dealing with these factors related to each procurement and

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[337] *Id.*

[338] DoD 5000.2-R, *supra* note 2, at para. 3.3.

[339] The possibility of additional consumer demand or of additional competition may influence the behavior of the current market participants.

each procuring agency. The FAR's discussion of teaming arrangements at FAR 9.604 reserves rights to the government to exercise some of these powers. Accordingly, this section seeks only to critique various techniques available to procurement officials as they consider the incentives and disincentives for collaborations.

First, DoD can regulate the structure of its contractors to a large degree to achieve its goals. The FAR permits DoD to "withhold consent to unreasonably priced subcontracts; the replacement, with other suppliers, of government-owned tooling and test equipment; dual sourcing; direct purchases of subsystems under a 'component breakout program;' and leader-follower programs."[340] As noted by Professor Kovacic, DoD may structure its R&D purchases to maintain competitive levels of industrial capability. The authority under the CICA to restrict competition on individual procurements provides DoD the ability to make these choices and the conditions under which they may be made. But that authority does not establish the analytical methods found in antitrust law for monitoring the competitive conditions and incentives within particular markets and industries.[341] Moreover, as discussed above, DoD has significant latitude in defining its needs, ranging from types of specifications, performance and delivery schedules, and design choices.[342]

Second, procurement officials can adjust the competitive framework in a solicitation package through the use of a number of techniques. As noted earlier, contracting officers may provide for contract financing, government furnished equipment and property, technical

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[340] Chierichella, *supra* note 10, at 560. For a specific analysis of leader-follower arrangements under antitrust law, see Polk, *supra* note 35, at 446.

[341] Kovacic, *supra* note 10, at 1090.

[342] *See* DoD 5000.2-R, *supra* note 2, at para. 4.4.10 (requiring consideration of system design in relation to contractors' vertical integration).

and data rights re-procurement packages, tailored specifications, and maximum use of commercial items. From a procedural point of view, the identification of barriers to competition in particular markets is hampered by the post-facto nature of the Competition Advocacy program. This program generally requires setting of competition goals, measurement of goal achievement and analyses of failure. While these post-award analyses may aid decision-making in future repetitive procurements, better market research and communication with industry would enhance the choices made by the procurement official.

Finally, the FAR provides DoD with methods of challenging the benefits of anticompetitive contractor behavior and reducing obstacles to competition. These methods, therefore, may diminish incentives to collaborate. These methods stem from audit and profit analysis rights, cost accounting standards for reasonableness of transfer prices within the collaboration or competing firm segments, requirements for contractors to certify the accuracy of their prices and costs, to limit profits under cost contracts, and to terminate contracts for convenience.[343] DoD possesses a wide range of "regulatory commands" and "tools for monitoring compliance," including expanded coverage of the False Claims Act and *ex post* review of prices.[344] Contracting officers can inject a degree of prospective management oversight of the collaboration through assessments of the present responsibility of collaboration participants[345] and may establish pre-qualification requirements for the

[343] *See* Kovacic, *supra* note 10, at 1087-91.

[344] Kovacic, *supra* note 1, at 461-63.

[345] FAR, *supra* note 19, at 9.104-2; *Id.* at 9.104-4. This authority may be limited in overseas (international) procurements by treaties and host-nation laws. *Id.* at 1.102(a).

acquisition.[346] Even the specific contract type and performance periods can have an effect on the ability of firms to compete.[347]

All three groups of techniques have limited value in restraining anticompetitive conduct. Courts, FTC, and scholars have rejected the notion that these tools give DoD "buyer power" status.[348] Rather, actual or potential competition serves as the best method of achieving cost savings and enhanced levels of quality or innovation.[349] In relation to antitrust law, these powers narrow the identifiable markets, market participants, entry barriers and mitigating factors to potential anticompetitive harm. In relation to specific procurement choices, procurement officials must balance the specific program needs with the method of achieving competition under the existing market conditions.

IV. Analysis: Closing the Gaps

A. *Defining the Procedural Gaps*

The interrelationship between antitrust law analysis, the procurement process, and DoD's exercise of monopsony powers has three primary shortfalls as it relates to contractor collaborations. First, the procurement process fails to consider market conditions for both short-term and long-term competition goals. Second, DoD procurement officials lack a useful methodology for applying DoD's monopsony powers to relevant market conditions on procurements to achieve both goals. Finally, DoD's collaboration review process is

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[346] *Id.* at subpt. 9.2. See FAR 9.206-3 regarding effects on competition.

[347] Polk, *supra* note 35, at 421.

[348] Triggs & Heyndreich, *supra* note 187, at 447-48 (judicial analysis of DoD "buyer power" in merger cases); Polk, *supra* note 35, at 422; Kovacic, *supra* note 10, at 1091 (these "seemingly formidable powers sometimes may supply a relatively feeble check ...", and citing to P. AREEDA & H. HOVENKAMP, ANTITRUST LAW (Supp. 1989)).

[349] Kovacic, *supra* note 1, at 424-25.

bureaucratically cumbersome and adversarial, making it counter-productive. This section provides an application of the two hypothetical collaborations to support these contentions.

1. *The Procurement Process and Incorporating Market Conditions*

The procurement process, and its market research and acquisition planning components in particular, fail to fully account for market-specific forces that influence collaborative behavior. Defense contractors and the business community at large routinely assess their relevant markets and make transactional, structural and strategic choices based upon the best available information. DoD's procurement process is designed to seek only short-term competitive goals with minimal *ex post* analyses of the barriers to that competition through each services' Competition Advocacy program. DoD's plan to implement a centrally managed market research function[350] acknowledges this shortcoming implicitly.

Market specific forces can be assessed from a variety of economic perspectives.[351] From DoD's (customer) point of view, however, two components to this process must be confronted. First, what technique should be used for surveying markets and gathering information? Second, what analytical model(s) should be applied to the information to create the most accurate and useful picture of its industries' competitive factors and conditions?

This is not to say that the FAR procurement system lacks any meaningful market research function. Rather, the FAR's guidance overlooks industry antitrust "due diligence" details[352] important to DoD's role in influencing collaborative behavior and sustaining long-term

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[350] *See supra* note 300 and accompanying text.

[351] *See* Kitch, *supra* note 71.

[352] This refers to the economic condition of pertinent industries and markets and the viability of participating firms' structures, strategies and competitive positions (e.g., value chains).

competition. These objectives may be addressed only through assessments of key industry competitive factors within the particular market subject to DoD procurement. Part of this omission rests in the distinction that the FAR fails to make between market research and industry research.

FAR 2.101 defines market research as "collecting and analyzing information about capabilities within the market to satisfy agency needs." As noted above, the FAR's market research criteria then serve only to gather information about whether the item to be acquired can be purchased from existing commercial and non-developmental sources.[353] DoD's field guidance that encourages procurement officials to examine the functional, performance or physical characteristics of its need and of potential offerings likewise fails to address antitrust law's market characteristics. Such characteristics are based in both market (relevant product and geographical markets) and industrial (market participants and the nature of agreements) analyses. A basic definitional difference between industry analysis and market analysis can be stated in terms of the focus of the inquiry. Market analysis examines the demand factors of products and services where industrial analysis examines the conditions under which firms that offer, or have the potential to offer, close substitutes for those products and services operate.

A popular method of industrial analysis for managers is Michael Porter's "Five Forces" model. In this model, he suggests assessing the relationship between and operating conditions of industry competitors, potential competitors (entrants), actual and potential product substitutes (the FAR's emphasis), the relative buying power of customers, and the

[353] FAR, *supra* note 19, at 10.002(b).

relative selling power of suppliers to the competitors.[354] Within DoD, only the Defense Industrial Capabilities Assessments Program includes an industrial assessment model that indirectly reflects some of these factors.[355] When defining relevant markets, courts consider such factors as "unique production facilities" and "specialized vendors" that would be identified under this analysis.[356] Firms with different cost structures, profit margins, production facilities, distribution networks, pricing systems, target markets, and other variables are said to form "strategic groups."[357] These factors also inform the assessment of efficiency justifications and entry barriers or other industry conditions that may mitigate anticompetitive harm.

Traditional corporate market analysis focuses on satisfying the particular needs of customers, as differentiated in a variety of ways. These firms research and gather intelligence on customers' buying behaviors, anticipated needs (in terms of tastes, quality, price, safety, and other preferences), and segmentation variables (demographics, purchasing systems, regulatory requirements, etc.). Many government contractors develop elaborate government

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[354] PORTER, *supra* note 51.

[355] DoD considers these factors when identifying the potential loss of product markets directly related to national security. U.S. DEP'T OF DEFENSE, DIR. 5000.60, DEFENSE INDUSTRIAL CAPABILITIES ASSESSMENTS (25 Apr. 1996) [hereinafter DoD DIR. 5000.60] . Under this centrally managed program, written assessments are conducted and provided to DoD headquarters to justify decisions to make private or public investments to sustain a critical capability. *Id.* A similar method of analysis appears to be the central feature of Professor Kovacic's proposals regarding budget and acquisition strategies for DoD's weapons systems. *See* Kovacic, *supra* note 1. Some studies of major weapons product sectors "of concern" have been conducted by DoD, with support from DoD components and industry groups, but have focused on industry health and future DoD spending. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 37.

[356] *See supra* note 198. Note that the factor of "distinctive prices" may also reflect industrial factors, such as distribution systems and other cost structural elements. *See* Fed. Trade Comm'n v. Staples, Inc., 970 F.Supp. 1066, 1073-81 (D..D.C. 1997) (finding distribution and pricing structure of office supply superstores to be distinct market of all retailers selling office supplies).

[357] *See*, K.R. Harrigan, *An Application of Clustering for Strategic Group Analysis*, STRATEGIC MANAGEMENT JOURNAL 6 (1985).

marketing plans.[358] While competitors' marketing plans may not be particularly relevant to a particular DoD procurement official,[359] a firm's marketing and bidding strategy will reflect its strategic plan and the competitive advantages it possesses vis-à-vis its "strategic group" and its overall industry. Finally, the competitive factors that drive a marketing plan assist courts in defining, *inter alia*, relevant markets.[360]

In our Hypothetical A, the design and production contract for hand-held laundry machines, the program manager and contracting officer would conduct research to determine that computer chips, user interface panels, and cleanser dispensing controllers are available commercially, but previously have not been integrated. However, the miniature hanging clothes spinner and related engines do not exist in the commercial markets, nor can the requirement be re-stated to accommodate commercial or non-developmental items. All of the commercial components (subsystems) can be procured in economic quantities within a relatively short period of time, and each have at least a 90-day commercial warranty. All three commercial devices require patent or copyright licenses to modify and resell.

While it is clear in this hypothetical that some form of collaboration may be required for our procurement, the market research provides no information about the specific relevant component markets and participants. Nor does the market research inform us about industry conditions among the various components' competitors or about that of the firms that have the potential to produce the hanging clothes spinner and related engines. The traditional

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[358] *See, e.g.*, Don Hill, *Who Says Uncle Sam's a Tough Sell?*, SALES AND MARKETING MANAGEMENT, July 1988, at 56-60.

[359] They are very important evidence in antitrust analysis.

[360] See *supra* note 198.

market research process leaves to the procurement official's discretion whether to inquire about the number of competitors within each component category, the definition and concentration of their relevant markets, the cost and pricing structure within those markets, licensing practices for participants, and the effect of a large DoD purchase on the participants.

Some of this information exists from non-proprietary sources, including the volume of sales to the government,[361] on-line or subscriber industry profiles and the U.S. Census Bureau. Moreover, "concentration measures have traditionally been used as a proxy for the relevant variables."[362] Accordingly, the procurement officials could identify the quantity of items sold by the component competitors (or their capacity or sales values), then conduct the relevant market concentration analysis outlined above. The same could be conducted for the design and production aspects for the non-commercial items, as well as the integration function of combining all the components into the final product. Under *The Collaboration Guidelines* framework, this information provides a key insight into the ability of any likely collaboration to exercise market power both on DoD procurement or as a consequence of it.

Likewise, market research at this point in the procurement process leaves the procurement official with little information about the long-term effect of DoD-funded design of a small, hand-held laundry device on the laundry machine and supply industry. If the three small laundry machine manufacturers created a joint venture to design the device and integrate the components at prices and quality competitive with the two large companies, what cognizable anticompetitive advantages would all five firms have in the immediate acquisition and in

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[361] FAR, *supra* note 19, at 4.602; U.S. Department of Defense Washington Headquarters Service *at* http://www.dtic.osd.mil.

[362] Kitch, *supra* note 71, at 4.

future DoD and non-DoD sales? What solicitation provisions and monopsony powers could enhance or eliminate variables that could be expected to influence a likely collaboration?

The DoD market research criteria for major systems expand the list of factors to include assessments of open systems architecture, dual-use technologies, industrial capabilities and preparedness, technical data rights, "critical product and technology competition," and foreign entity cooperation. But here, too, (to the extent that the procurement official adopts an effective technique for gathering this information) these data in isolation provide no insights into the competitive effects of the hypothetical procurement *on the relevant markets.* Unlike the defense weapons industry, where DoD as a monopsonist has immediate access to most relevant industry information, relevant information about industries affected by large procurements involving commercial products and services may be difficult to accumulate. Even in systems markets, DoD acknowledges that its acquisition managers are losing visibility of relevant component markets due to hands-off management approaches.[363] Further, coordination among acquisition managers purchasing from similar markets is untracked and "DoD does not have good mechanisms to share its industry knowledge across DoD in important supplier areas to help compensate for the limited insight being gained in individual weapon system acquisition programs."[364]

For example, the micro engines and hanging spinners may qualify as "critical product and technology." Further, DoD investment in R&D of such components may give a significant

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[363] DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 33.

[364] *Id.* at 37. DoD instituted "several new mechanisms to elevate DoD's internal attention to industry matters," but these efforts were limited to the nature of technical assistance (although it established a new position to assess industrial capability and conditions). *Id.* Yet, the DSB recommended that DoD "strengthen business- and industry-related skills of DoD's acquisition personnel." *Id.* at 40. This recommendation mirrors the findings in the recent DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 1, at 25.

commercial advantage to the three laundry machine and supply firms (depending upon the terms of the R&D collaboration) because it could be used in those markets as a dual-purpose technology. However, the extent of this benefit and the potential effects of possible exclusion of the two larger firms are unclear without more detailed information and industry analysis. The consequence of these effects would be felt by DoD in follow-on procurements where the industry conditions may have been changed as a result of the procurement. DoD has taken the position since 1994 that such matters are beyond its jurisdiction, and must be considered by DoJ or FTC.

Because neither DoJ nor FTC receive formal notice or review every significant collaboration that may affect DoD, and because they lack the expertise and industrial management requirements of DoD, this position is misplaced.[365] As Professor Kovacic argues, "[b]uilding a strong internal analytical capacity is essential if DoD is to make intelligent trade-offs between cost-reduction and competition-preserving goals."[366] This is not to say, however, that DoJ and FTC lack vital information that may assist DoD.

2. *Exercise of Monopsony Powers Only for Short-Term Goals*

DoD procurement officials lack a structured approach to utilizing DoD's monopsony powers in their acquisition planning to achieve both short-term and long-term competition goals across its procurement markets. This point is most vividly made through the recent changes made by DoD Industrial Affairs management team in the weapons systems industrial segment. As discussed above, they conclude that short-term procurements and their competitive framework in weapons research and development must be made within a strategy

[365] Kovacic, *supra* note 1, at 469.

[366] *Id.* at 469.

for achieving long-term weapons needs through a competitive and well-managed industrial base. More importantly, procurement officials lack a systematic methodology for reviewing the competitive forces in the relevant markets affected by each procurement.

Acquisition planning at both the contract or systems level includes a complex range of considerations "that will control the acquisition."[367] Written from the perspective of the customer, the acquisition plan seeks to identify the appropriate method of satisfying the agency's current needs "in a timely manner and at a reasonable cost."[368] This process currently does not serve as "a rigorous competitive effects methodology [that] can assist DoD in assessing the merits of each potential business arrangement and selecting an optimal strategy."[369]

In our Hypothetical B, a teaming arrangement for base services at Fort Anywhere, the contracting officer learned that there are firms in the local area with the capability of providing most of the services to be contracted and many of the supplies. Some of the installation supplies exceed the capacity of local distribution networks (as the installation provided for its own intake and warehousing of supplies). However, none in the local geographical area possess the capability to provide all services and products. There are four major national and two regional firms that have the capacity and experience to integrate these local firms into an aggregate base services contract. Because the expected contract value for

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[367] FAR, *supra* note 19, at 7.105.

[368] *Id.* at 7.101.

[369] Kovacic, *supra* note 1, at 482. For example, the 1997 DSB vertical integration study found that "the Department's success in saving money or enhancing development by managing products known as [Government Furnished Equipment], or serving as system integrator, has been inconsistent." DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at App. F-4.

the contract is expected to exceed $40 million over five years, the contracting officer is preparing a written acquisition plan. The contracting officer and installation commander have decided to utilize a best value approach to the contract evaluation.

While the performance work statement has been prepared to include all commercial items and performance-based statements of work, the contracting officer must address: potential sources, competition at prime and subcontract levels, contracting "considerations," management information systems required for contractor oversight, government-furnished property, logistics concerns, and other variables.[370] As noted above, the contracting officer must consult the respective provisions of the FAR (or agency supplements) to address each factor on this list. While this list contains some considerations pertinent to industry conditions among the affected relevant markets, it does not specifically require or assist the contracting officer in an assessment of each relevant market and the industry conditions affecting the competitive status among the participants. Rather, it presumes that the use of commercial or non-developmental items, with minor contract adjustments, will satisfy short-term competition needs.

The solicitation requirement for plumbing services illustrates this point. With five small plumbing firms in the area,[371] the local plumbing market will dramatically change with the additional demand of plumbing service equivalent to 10 full-time plumbers as a consequence of the installation turning over its operations to contract support. A winning offer from one of the six base service firms necessarily must include this new portion of the local market. Further, the 10 plumbers leaving the installation's employment will be privileged with the

[370] FAR, *supra* note 19, at 7.105(b).

first right of refusal for employment at these positions. One national offeror may choose to establish its own plumbing services branch and hire these employees directly. Another may choose to subcontract with one or more of the local plumbing firms under a collaboration and let those firms hire the plumbers on some pro-rata basis. In yet another, a national firm may team with a regional firm for the regional's performance of portions of the base services, including plumbing. These various arrangements each have a unique effect on the existing local market for plumbing. In the long term, they each affect both the civilian consumers and the installation when contract renewal occurs.

The installation contracting officer may or may not emphasize competition at the plumbing service or any other subcontract level by identifying these or similar concerns. In this type of negotiated contract, the level of short-term competition or long-term competitive impact typically will not affect the evaluation due to the breadth and variety of other functional areas under consideration and evaluation criteria to apply. The challenge for the contracting officer, therefore, is to make the appropriate response when one of the offers contains a teaming arrangement. The response, from both an antitrust and a customer perspective, depends upon the variables relevant to determining the "appropriateness" of a teaming arrangement as outlined above.

Suppose that the offer containing a teaming arrangement among the five small firms to act as subcontractors to a national prime provides lower projected costs and better management plans than the in-house plumbing proposal. Should the contracting officer consider antitrust concerns related to an apparent market allocation of services among the small businesses and require elimination of that provision? How will the work be

[371] For simplicity, this scenario ignores requirements to maximize small business participation and assessments

apportioned among the plumbing firms? Should government-furnished supplies, services, or facilities or other terms be included in the solicitation to compensate for any advantages or induce the offeror to change its approach? The contracting officer must review the teaming arrangement and report it properly to the SDO if such a provision is not removed (even if it increases DoD's expected costs). Successful review of the arrangement depends upon an efficient procedure for coordinated review within the government.

3. *A Counter-Productive, Adversarial Review Process*

The inter-agency process for assessing questionable collaborations inhibits a productive proactive review that could increase the use of only of pro-competitive collaborations by DoD contractors. Firms and government officials acknowledge that collaborations have been avoided for three specific reasons. First, because of the potential liability for and cost of defending against alleged antitrust violations, firms hedge against uncertain results by avoiding the risk.[372] Second, conflicting representations among DoD, DoJ, and FTC officials causes additional uncertainty for firms in predicting the government's reaction to proposed collaborations.[373] Third, the choices made by contracting officers in the procurement process and the ability to exercise monopsony powers prevent an accurate calculation by contractors of the possible efficiencies on a particular offer that will benefit both DoD and the contractor.[374]

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of bundling required by FAR 7.105(b)(1) and FAR 7.107.

[372] COLLABORATION GUIDELINES, *supra* note 8, at Preamble. *See also, Dissenting Statement of Commissioner Mary L. Azcuenaga On the Issuance of Horizontal Merger Guidelines*, *supra* note 114.

[373] Kovacic, *supra* note 1, at 484-85.

[374] *See* Chierichella, *supra* note 10, at 560.

Under both Hypotheticals A and B, the contracting officer is confronted with various offers containing a joint venture (in A) and teaming arrangements (in B). Each contains at least one provision that is suspect under the per se standard. In A, the production arrangement that limits prices to be charged participants when the product is developed and sold commercially constitutes a per se illegal collateral price fixing agreement. In B, the teaming arrangement among the five small plumbing firms constitutes a per se illegal market allocation of services in the local markets.[375] Further, both A and B appear to contain provisions that are questionable in nature even though not per se illegal. In A, the provision allowing the prime contractor to determine the prices to be charged and its access to participants' sales information increases the likelihood that it could exercise its market power through collusion. In B, the teaming arrangement between the national and regional firm which requires exclusive use of the regional firms' plumbing contractor (in order to accommodate former government employees) appears to limit competition among plumbing subcontractors.

Under the current procedures, the contracting officer must attempt to eliminate the per se illegal restraints in each of the offers. This requirement conflicts with the basic charge of *The Collaboration Guidelines* to consider efficiency-enhancing integration of resources that reasonably relate to the pro-competitive benefits of the collaboration. Nonetheless, the contracting officer must report the per se illegal violations once such justifications are offered and the proposals are not modified. Moreover, the contracting officer must report the other non-per se illegal restraints as evidence of "antitrust violations." One of CODSIA's

[375] The prime contractor and plumbing firms' agreement to allocate plumbing services horizontally (among plumbers) constitutes the per se illegal provision. Any vertically-related decisions by the prime to contract with

complaints about the recent DoD guidance (and proposed DFARS change) on exclusive teaming arrangements concerns this very point. CODSIA's opinion that the contracting officer must find actual or potential anticompetitive harm before referring the suspected violation to DoJ has merit from an antitrust law perspective, but is inconsistent with both the FAR and the current DoD analytical capability. CODSIA's complaint, however, is more noteworthy when considering the uncertainty and bureaucracy inherent in the existence of the various other sources of referral, such as those through the DCAA or DoD Hotline (both from auditors) or through the procurement fraud system.

The contracting officer must either suspend evaluations or determine the offerors whose proposals contain these provisions to be not responsible. This would delay both procurements while various military and DoJ channels evaluated the reports. DoJ (or perhaps FTC) would conduct an analysis of the collaborations by gathering information from the offerors and from DoD. Because such a review falls outside the purview of the Mergers and Acquisitions review Directive, it is not clear which DoD officials would represent the final DoD position to DoJ.[376] If the contracting officer submits a report pursuant to the DFARS, the military service SDO may find "adequate evidence" of an antitrust violation even before DoJ review is complete.

As structured, the enforcement coordination procedures within DoD are inadequate as to likely violations and adversarial as to potentially beneficial collaborations. Procurement officials lack the expertise to make competitive effects assessments and, as a consequence,

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certain subcontractors falls under a rule of reason analysis, as firms are generally free to choose from among their own suppliers and distributors. *See* Nynex Corp., v. Discon, Inc., 525 U.S. 128, 135 (1998).

[376] This assumes that sufficient facts and competitive effects analysis was done initially by DoD for that purpose.

inaccurate reports (or lack of reported) antitrust violations may delay and deter pro-competitive conduct (or fail to discourage anticompetitive conduct). This warrants change in the review and coordination procedures.

B. *Proposed Review and Coordination Procedures*

DoD recognizes that change is necessary in its weapons system acquisition management policies to account for the interrelationship between antitrust law, procurement procedures, and monopsony powers. There are four structural obstacles to implementing any meaningful change, however, across all DoD procurement markets.[377] First, DoD must adopt a competitive effects methodology for assessing individual transactions. Second, it must significantly add to its analytical capability to do so, most notably by increasing the economic and legal expertise. It has declined to do either since 1994 to avoid impinging upon the enforcement authority of DoJ and FTC. In addition, DoD must recognize that its interest in many relevant non-weapons markets is, while not that of a near-absolute monopsonist, sizable and may approach oligopsonist or monopsonist levels, depending on how those markets are defined under antitrust analysis.[378] Finally, the decentralized nature of DoD procurements prevents a centrally managed industrial and marketing analysis function that informs procurement officials and coordinates with DoJ and FTC in their behavior-monitoring functions.

1. *Review and Coordination Procedures*

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[377] The first two have been framed by Professor Kovacic. Kovacic, *supra* note 1, at 475-84.

[378] The impact of DoD procurement and employment decisions on local markets became strikingly apparent during the Base Realignment and Closure process, resulting in enactment of The Base Closure and Community Assistance Act of 1994, P.L. 103-160, Div B, Title XXIX, Subtitle A, § 2901, 107 Stat. 1907, and The Base Closure Community Redevelopment and Homeless Assistance Act of 1994, P.L. 103-160, Div B, Title XXIX, Subtitle A, § 2903(c), 107 Stat. 1915. *See generally* 10 U.S.C. § 2687 *Note* (2000); U.S. Department of Defense Defense Economic Adjustment Program *at* http://emissary.acq.osd.mil/oea/home.htm (5 Feb. 2001).

Any proposed solutions must account for the procedural gaps and the obstacles preventing effective use of collaborative contractor activity. Accordingly, they must permit the gathering of useful data to analyze markets and industries under both antitrust law and procurement law standards. They must provide a mechanism to incorporate the results of industry and market analysis into the procurement planning and negotiations process. They must incorporate into the procurement planning and negotiations processes long-term competitive effects analyses for each industry in each affected relevant market. They must provide a general framework for assessing the range of monopsony powers to achieve a balance between short-term and long-term competition while satisfying all other federal socio-economic policies. They must capitalize on DoD's, DoJ's, and FTC's respective capabilities to inform each other in an effective manner in accomplishing these tasks. There are at least three alternative solutions.

a. *Option 1: The Status Quo*

Quite simply, DoD could maintain the status quo (including, perhaps, implementation of Professor Kovacic's or similar proposals for management of the weapons system industrial base).

b. *Option 2: Comprehensive DoD economic and antitrust program*

DoD could expand its current effort to establish centralized industry and antitrust analytical capability to assess all of its procurement markets and the antitrust concerns incident to procurement activity within them. Under this approach, procurements of certain presumptive sizes would require procurement officials to obtain a detailed industry analysis from DoD headquarters as part of its market research and acquisition planning. Procurement officials would develop an acquisition plan that addresses factors related to industry cost

structures, profit margins, production facilities, distribution networks, pricing systems, target markets, and other variables as well as relevant market analyses.

Procurement officials would review each factor against all relevant monopsony powers for inclusion into the solicitation (e.g., whether to require subcontract competition). Any proposed or executed collaborations among contractors would be reviewed by the central office in order to assist procurement officials in information exchanges with offerors or in negotiating. The central office approves of efficiency justifications to suspected per se illegal agreements and determines whether actual or potential anticompetitive harm exists or is otherwise mitigated or outweighed by pro-competitive benefits, pursuant to *The Collaboration Guidelines*. If not mitigated, this office would refer conclusions of antitrust violations to DoJ or FTC for legal action.[379]

c. *Option 3: Decentralized "centers of excellence"*[380] *and Proactive Cooperation*

DoD could improve upon its decentralized structure and call upon its vast technical and information resources to build "centers" of industrial and market expertise for procurement officials' use. Under this approach, the DoD *policy office* with the most direct involvement in a procurement market would conduct and maintain (with DoJ and FTC coordination) market and industry profiles and analyses.[381] All such analyses are subject to market

[379] DoJ or FTC would determine whether a case fell within a "safety zone" or qualified for some other immunity. DoD rejected approaches similar to Option 2 in 1994 when many in industry and within DoD recommended that DoD perform its own merger and acquisition antitrust review analysis. *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 1. *See also*, Kovacic, *supra* note 1, at 484.

[380] The author did not coin this phrase and cannot locate its origin. It has been used within DoD for several years. The author adopted it from U.S. Army Reserve organizational management proposals.

[381] Some DoD procurement offices, such as the Defense Contracts Management Command, currently provide market research to other DoD activities on a reimbursable basis. But as assessed in Section IV.A.1 above, the current level of market and industry analysis necessary under antitrust (long-term competition) needs is

participant input.[382] For example, military service Surgeon's General would conduct market research and industry analyses for health care related markets. When military services procure health care services or supplies, they would obtain such analyses for the relevant markets and prepare the acquisition plan.

As in Option 2, the procurement officials screen the various monopsony powers against competitive conditions in those relevant markets. To assist procurement officials during the information exchange and negotiation phases in assessing the competitive effects of various types of collaborations, DoD would not conduct conclusive antitrust analyses internally. Rather, DoD would establish more responsive and non-adversarial collaboration review procedures with DoJ and FTC. Review requests would be routed through DoD headquarters to the appropriate DoJ and FTC review offices (for their decision on which will review).

The procurement official would submit for review, with comments, any proposed or actual collaborations with suspected per se illegal provisions or agreements otherwise anticompetitive in nature, as defined by *The Collaboration Guidelines*. DoJ and FTC, with any DoD headquarters input, would provide comments or concerns to guide the procurement official in completing negotiations. This review process, for traditional defense industry firms in particular, would include an assessment of existing collaborations and outstanding merger or other consent decree provisions. If insufficient efficiency justifications are not revised by offeror(s) or otherwise anticompetitive terms are not eliminated, the procurement official would submit such evidence of suspected violations to DoJ pursuant to existing

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inadequate. Where the military services possess duplicate policy offices, DoD may designate one of them as the "center" or establish procedures for shared responsibility among them.

DFARS directives. The author recommends the third approach and presents a suggested program at the Appendix.

2. *Evaluation Criteria*

Any proposed structural or procedural change must be evaluated by an objective measure. Three discrete measures are appropriate.

a. *Transparency & Predictabilit*

DoD's procedures for conducting market and industry analysis and for its review of collaborations must be both transparent and predictable. Transparent procedures are those that permit input of the interested parties and accountability of the decision-makers for the consistency in principle and the rationale of their choices. Because firms act actual behavior of market participants and react to a large degree on the signalling behavior of others, DoD's procedural and substantive procurement use of thorough industry and market analyses must be transparent.[383] Such reactions can be reflected in the form of formal input to DoJ or FTC antitrust reviews or in the form of actual buying behavior and practices. Further, these reactions must be relatively predictable to market participants. Predictable procedures are those where interested parties can rely upon their clear and consistent application when making economic or legal assumptions. While the procurement process generally preserves flexibility in individual DoD business and legal decision-making, its procedures and standards for activity should lend predictability to those most affected.[384]

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[382] This technique has been used by the Office of the Deputy Under Secretary (Industrial Affairs & Installations) recently for particular weapons systems segments. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 37.

[383] Kovacic, *supra* note 1, 484-85; FAR, *supra* note 19, at 1.102-2(c).

[384] *See Dissenting Statement of Commissioner Mary L. Azcuenaga On the Issuance of Horizontal Merger Guidelines*, *supra* note 114, at 1, 3 (criticizing the lack of "simplicity, feasibility, and predictability" in the 1992 HORIZONTAL MERGER GUIDELINES. "To have a predictive value, enforcement guidelines must accurately reflect

b. *Efficiency and Flexibility of the Procurement Process*

Administrative processing, reviews, and procedures for procurements should be designed to be efficient[385] and flexible for the DoD purchasing agency.[386] Accordingly, incorporation of antitrust law competition standards into the procurement process and the exercise of DoD monopsony powers must occur at the most effective time. The initial stages in the procurement and budgeting cycle is the best time for exercising monopsony powers to achieve the best competitive conditions for DoD. But prompt review and coordination preserves competitive conditions and protects DoD when competitor conduct occurs outside the solicitation and award timeframe. Review of incentives to collaborate and resulting collaborations must serve both a planning function and an enforcement function. A collaboration review and enforcement procedural system should provide both advice and sovereign powers to procurement officials in planning and in execution phases of procurements with minor administrative costs.

c. *Feasibility of Implementation*

Any new process or modifications to existing processes must account for realistic implementation. This has two components. First, the procedures considered must align with the agency structure and existing systems. Second, the relevant employees must possess the knowledge, skills and abilities to undertake the process.

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how the agencies analyze mergers and how they respond to different sets of facts"). *See also*, DSB REPORT ON PRESERVING INDUSTRY, *supra* note 1, at 44 (Wall Street's concerns with defense industry includes "too many surprises - they want predictability.")

[385] FAR, *supra* note 19, at 1.102-2(b) and (d). "The time consumed by investigation and analysis of complex mergers may complicate legitimate business planning, create a cloud of uncertainty over a particular transaction, and, in extreme cases, make it impossible for the parties to proceed even if a transaction offers considerable benefits." DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 41.

[386] FAR, *supra* note 19, at 1.102-2(a).

d. *Accountability for Competition Goals*

An evaluation of competition enforcement procedures should consider the relationship between the proposal and the goals to be achieved. Specifically, which proposal provides a more direct relationship between the goal of enhanced competition and the intended procedural tool? Which proposal best balances the multitude of factors relevant to individual market and industry conditions?

3. *Assessment of the Options*

a. *Option 1: The Status Quo*

The shortcomings of the current system have been diagnosed above and illustrated through Hypotheticals A and B. There remain, however, three additional issues. First, the current system provides little to no transparency or predictability in the formal antitrust review process of DoD contractor collaborations. Except through the examples cited by Professor Kovacic in his arguments relative to the weapons industry,[387] there has been no reported study estimating the number of false positive or non-reported antitrust violations submitted to DoJ or FTC. With the increasingly greater skill and ability of DoJ and FTC to assess markets and competitive effects to the level of precision of small submarkets, the ability of DoD to leverage this system to more accurately foster national competition policies is equally enhanced.

Second, neither the Competition Advocacy program, nor the trend toward broader use of "commercial items" captures DoD's impact on competitive factors in relevant markets and industries. While presumptions for use of "commercial items" eliminates some government contract-unique barriers to entry by non-traditional defense firms, the FAR's commercial

items provisions do not provide a framework for ensuring that such commercial items meet DoD's long-term competitive needs in a given market. As for the Competition Advocacy program, it likewise focuses on barriers to competition, but frames the focus on *ex post* assessments of subjective local and annual (i.e., short-term) competition goals (e.g., number of offers per solicitation). Such assessments fail to inform all procurement officials about conditions on a market or industry basis.

Finally, DoD's collaboration review and enforcement coordination procedures lack any meaningful planning value. As critiqued above, they are designed to eliminate considerations of efficiencies, as in recent directives to contracting officers to mandate elimination of exclusivity provisions or other per se illegal agreements. Such efficiencies could benefit DoD in both the procurement at hand or in the long-term competitive conditions of a particular industry. With the exception of very high-level and politically sensitive teaming arrangements, or those otherwise subject to mandatory review under a merger consent decree, DoD lacks procedures to obtain expert advice from DoJ or FTC on a given transaction.

b. *Option 2: Comprehensive DoD economic and antitrust program*

DoD recognizes its significant role in monitoring national security and ensuring that adequate national resources exist to satisfy its needs.[388] On the other hand, it recognizes both the expertise and statutory mission of DoJ and FTC to monitor business practices and national competition policies. In recent years, the three agencies have collaborated to provide a more synergistic approach to monitoring consolidation events that affect the competitiveness of the national security industrial base. However, DoD remains under

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[387] Kovacic, *supra* note 1.

[388] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 1.

pressure to assume more responsibility for the competition monitoring function for monopsonist defense markets.[389]

Given the trends noted in this paper, such a function carries with it a broader mission than weapons systems. DoD may possess near-monopsonist or oligopsonist powers in many non-weapon system commercial or non-developmental markets, upon which it depends. Further, to the extent that DoD relies upon such markets for its industrial needs, it must exercise some form of purchasing or sovereign power to preserve long-term competitive capabilities in those markets. Option 2 seeks to provide a full-time and centrally-managed antitrust and industrial base enforcement function at DoD headquarters level.

This approach has the advantage of permitting the most predictable and transparent standards and reviews for collaborative activities in markets affected by DoD procurements. As a central control point for validating the military services' requirements definitions (once military operational needs have been properly screened and approved) and for applying the antitrust analytical framework for collaborations, such a program can offer immediate and decisive review on procurements. With an in-house capability to perform market and industry analyses, review acquisition plans designed to incorporate those analyses, and review offered collaborations or other industry structural changes, such an office can direct DoD's actions and reactions within each market. The adoption of such a formal system reduces the number of internal DoD participants and provides predictability to users and contractors.

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[389] Professor Kovacic's scholarship and CODSIA's recommendations evidence this trend.

To be fully transparent and predictable, the three agencies must reconcile their positions on information laws as they pertain to application of antitrust and industrial base analyses to procurement decisions. DoD may be constrained by interpretations of the Freedom of Information Act,[390] the Trade Secrets Act,[391] source selection and evaluation provisions of CICA,[392] and the Hart-Scott-Rodino Antitrust Improvements Act (when applicable). It may need to re-examine its information management procedures in order to properly integrate proprietary and non-proprietary information into usable analysis.[393]

A centralized system also affords a large degree of efficiency in the procurement process. Centralized industry analysis and review of collaborations within current procurement acquisition lead time and program milestone requirements provides significant reduction in sequential and potentially contradictory reviews both within DoD and with DoJ or FTC. Contracting officers may receive more prompt and consistent economic and antitrust advice during the pre-award phase of a procurement.

However, what is gained through central analyses and technical review may be diminished through inflexibility and loss of intra-DoD innovation.[394] The current decentralized DoD procurement structure permits both business decisions at the lowest level necessary[395] and competition among various DoD activities for work. Centralized conduct of

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[390] 5 U.S.C. § 552 (2000).

[391] 5 U.S.C. § 1905 (2000). *See also* 5 U.S.C. § 552(b)(4) (2000).

[392] *See* 10 U.S.C. § 2305 (2000); 41 U.S.C. § 253b (2000).

[393] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 42.

[394] Professor Kovacic argues for continued interservice and interprogram rivalries. Kovacic, *supra* note 1, at 466-67.

[395] *E.g.*, by the Heads of Contracting Activities for certain acquisition plans.

market and industry analyses, review of acquisition plans, and both economic and legal judgments on collaborations substantially taxes DoD headquarters requiring manpower adjustments away from field offices. This necessitates expanding the function beyond a few additional personnel.[396] It also subjects these decisions to a single business approach that could impinge upon intra-DoD competition.

This approach is the least feasible to implement for two reasons. First, legal and political barriers prevent DoD's assumption of economic and antitrust functions traditionally controlled by DoJ and FTC.[397] Second, it would require a dramatic change from decentralized management practices that might have unanticipated management or technical spill-over effects. DoD currently recognizes the problems inherent in the decentralized system, chiefly the technical expertise of the acquisition workforce.[398] Withdrawing business judgments from field procurement officials, while theoretically efficiency-enhancing, argues for an *isolated and less qualified*, more administration-oriented workforce. Where ultimate responsibility for sound business decisions, economic judgments, and proper planning is removed to DoD headquarters, accountability cannot rest with the field procurement official.[399]

On the other hand, this point illustrates that a centralized approach provides the most direct benefits to both short-term and long-term competition. The incentives on a field

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[396] Professor Kovacic recommends such a support structure. Kovacic, *supra* note 1, at 481-84. One technique he failed to address could rely upon interagency details of personnel for this purpose, a decision to be made on proper cost and budget analyses.

[397] DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 7, at 1; DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 30-31; Schwartz, *supra* note 104.

[398] DSB REPORT ON VERTICAL INTEGRATION, *supra* note 1, at 33-36.

procurement office to achieve short-term program or contract goals can be placed in proper perspective when weighed objectively by a less interested headquarters function. The central function also possesses the ability to negotiate political landmines by balancing competing interests in short-term and long-term projects. But the overall decentralized DoD management philosophy encourages resolution of political and community relations issues at the lowest appropriate level, subject only to anti-lobbying restrictions and limitations on Congressional or Executive delegations of authority.

c. *Option 3: Decentralized "centers of excellence" and Proactive Cooperation*

Another approach to competition analyses and collaboration review focuses on the current DoD structure as a decentralized procuring agency. Much like DoD's merger and acquisition review program, this "teaming" approach seeks to integrate the unique technical, business, and legal capabilities of DoD, DoJ, and FTC. Because DoD contractor collaborations and the competitive factors influencing them become visible most often at DoD operating level, a review and enforcement system necessarily must reflect that.

A decentralized approach presents different efficiencies for market and industry analyses than for collaboration review and enforcement. Such an approach requires an elaborate web of "centers of excellence" to conduct or maintain market and industry analysis. From the viewpoint of a contractor engaged in multiple markets, it may be difficult to participate in and monitor DoD's assessment of its markets and industry conditions. Further, such a system is workable only if DoD carries through with its intention to establish standardized market and industry analysis criteria. Whether DoD adopts a "Five Forces" model[400] into DoD-wide

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[399] Kovacic, *supra* note 1, at 466-67 (arguing for decentralized acquisition workforce to promote innovation).
[400] *See supra* note 354 and accompanying text.

industry analytical standards and incorporates all of the Supreme Court's sub-market definition "indicia" into market analysis, some standards would be required. Finally, the Office of the Deputy Under Secretary of Defense (Industryial Affairs & Installations) (DUSD(IA&I))[401] or military service designates must provide DoD-wide visibility of offices capable of conducting these analyses as well as the latest reports, most effectively through electronic means.

Any structured system for reporting collaborations and involving DoJ and FTC in a proactive and an effective enforcement mode would be an improvement over the current system. By requesting responsive technical and legal support from these agencies on proposed or executed collaborations related to a procurement before offers or contract funds expire, a contracting officer can add significant negotiating leverage to enhance competition. Further, by establishing clear reporting and enforcement standards throughout DoD procurement process, contractors can more accurately predict the three agencies' responses. Compared to a centralized approach, however, the sequential review process at DoD headquarters and DoJ or FTC adds an additional procedural hurdle, but is more controlled than the many alternative and adversarial variations that presently exist. Although the DUSD(IA&I) and General Counsel provide a bottlenecked conduit to DoJ or FTC, they add value to the process with substantive counsel or by flagging industry-wide concerns.

Finally, contrary to the centralized approach, assignment of market and industry assessment functions throughout DoD will ultimately improve DoD's relations with industry, enhance acquisition workforce skills, and provide for better business and programmatic decisions. DoD procurement personnel would receive an opportunity to conduct these

[401] For the mission statement and charter of this DoD Office, see http://www.acq.osd.mil/ia.

analyses and interact with both DoD headquarters and DoJ and FTC while assessing industries and tracking collaborations.

While the predictive value of collaboration reviews under such a system must be slightly less than a centralized model, established standards and review procedures make those decisions sufficiently transparent for contractors, end users and other stakeholders (e.g., politicians). The flexibility to make acquisition planning and monopsony decisions at the operating level, save those subject to existing oversight controls which already have some centralized competitive effects visibility, compensates for any loss in predictive value.

Another weakness in this approach stems from the challenges to implementation. Again, the industry and market analysis and collaboration review and reporting components can be distinguished. Establishing industry analysis and market analysis techniques for application by procurement officials demands training and use by those personnel to be effective. The training and monitoring costs can be substantial, but DoD already has committed itself to these investments. Again, as noted above, DoD recently announced plans to develop market analysis handbooks to be posted on the DUSD(IA&I) website and directed the addition of industry competitive factors at DoD educational institutions, including the Defense Acquisition University. Workforce training and re-training constitutes a management imperative regardless of the subject. Likewise, procurement personnel would require training in use of market and industry analyses conducted under a centralized approach.

Implementing collaboration review and reporting procedures requires much less effort. The pro-competitive benefits and deterrent effects of clear standards and procedures significantly outweighs the cost of a regulatory change to DFARS to allow for more detailed

pre-award DoD "business reviews" and more accurate reporting of suspected violations. Existing acquisition legal advisors and procurement fraud advisors (commonly serving both functions) assist procurement officials in executing this system. Under the current system, little legal assistance can be offered to these officials due to the adversarial mandatory reporting structure and lack of enforcement coordination. This may help to explain why government contracts attorneys receive little to no formal training on antitrust law at military service schools, save infrequent instruction at procurement fraud courses, a deficiency that should be addressed.

This approach likewise directly fosters both short-term and long-term competition. By subjecting procurements subject to acquisition plans to formal consideration of both aspects of competition, Option 3 provides a counter-balance to short-term goal achievement by procurement officials under intense pressure. It also can provide a significant tool to informing the end-users of the environmental impact of their decisions.

The most significant benefit of this approach, however, is that it precludes usurpation by DoD of DoJ and FTC's antitrust review roles. The agencies can maintain autonomy in their areas of expertise and statutory function, in addition to monitoring information related to their decisions. Together, the three agencies can enhance national competition goals at a modest cost, a cost which must be lower than that caused by current lack of long-term competition management. One challenge to such a system may be that neither DoJ nor FTC possess clear authority to provide advisory opinions on collaborations. This challenge may focus on the unreliability of factual bases for antitrust reviews or on the lack of binding or precedential value of such reviews. Two reasons refute such challenges. First, DoJ and FTC provide legal counsel and litigation service to federal agencies and are proscribed only from

providing advisory opinions to private parties.[402] Second, these agencies routinely rely upon regulatorily prescribed types of information submitted by private parties when conducting business reviews under the Hart-Scott-Rodino notice filings or other requests for a statement of the agencies' enforcement intentions.[403] Similar information can be obtained by and coordinated through DoD procurement officials as set out in the Appendix.

d. *Recommendation*

Option 3 provides the most benefits in relation to the identified costs. Both Options 2 and 3 present solutions to the procedural gaps of the existing system under Option 1. However, Option 2 is not politically feasible, encourages inflexibility, and detracts from the business expertise and innovative potential now developing in the decentralized acquisition structure. Option 3 suffers from administrative burdens which require detailed assessment by DoD leaders, but provides the most realistic and workable solution.

The administrative burdens of Option 3 comprise three types. First, DoD must process regulatory changes outlining the proposed procedures. Second, DoD must designate the "centers of excellence" and establish a programmatic model and consistent analytical tools for them to use, in addition to training relevant personnel. Finally, DoD must train its procurement officials to use the system, monitor their use, and estimate any delays such use will add to procurement acquisition lead time (PALT).

Before comparing these costs of Option 3 to its efficiencies, one should weigh these costs relative to those of Option 2. Indeed, Option 2 also requires the same costs of regulatory changes. Likewise, it requires similar identification and dedication of additional resources to

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[402] 16 C.F.R. Pt. 803 (2000); 28 C.F.R. § 50.6 (2000).

[403] 16 C.F.R. Pt. 803 (2000).

a central office as well as training of procurement personnel in the use of its output. Further, DoD similarly must provide training to procurement personnel in the appropriate reports and application of research to procurements in addition to monitoring their use of the procedures. Finally, to the extent that procurement officials report more collaborations for prospective review or for enforcement than currently occurs, there will be additional delays. The major differences between Options 2 and 3 are the concentration of analytical personnel and the costs to processing reviews and enforcement in terms of time delays and control. Option 2 seeks to minimize time delays while retaining control within policy-makers at DoD headquarters. Option 3 emphasizes a balance between PALT extentions and savings from resulting competition in addition to accommodating the widest dispersion of competition policy oversight consistent with current laws.

Accordingly, the efficiencies inherent in the decentralized "centers of excellence" approach at first may be overshadowed by the perception that pass-through layers of internal DoD review and external DoJ or FTC determinations would substantially add to PALTs. This perception would be misplaced for two reasons. First, acquisitions subject to the proposal typically require months or years of PALT, including substantial contingencies for reviews, milestone decisions, protests, budget shortfalls and the like. Second, DoJ and FTC provide relatively prompt review turnaround times for existing reviews under Hart-Scott-Rodino notice filings, ranging from 15 to 30 days.[404] Review and coordination of proposed collaborations during contracting officers' exchanges of information or proposal evaluations would not add substantial time.

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[404] 15 U.S.C. § 18a (2000); 16 C.F.R. §§ 803.3, 803.10 (2000). This constraint includes DoD review of a merger or acquisition when it involves a major defense system contractor. It excludes, however, up to 20 additional days when DoJ or FTC file a "second request" for additional information. 15 U.S.C. § 18a(e) (2000).

The efficiencies in Option 3 lay not in centralized processing, but in readily available expertise in numerous market and industry environments. Unlike Option 2, it does not seek to establish a DoD antitrust policy function by carving it out of DoJ or FTC statutory authority, as the defense contractor community has sought. Such an approach prefers consistency in DoD antitrust policy over consistency in national competition policy. It also may foster internal conflicts between budget officials and ethics officials, as where an SDO might disagree with a central collaboration review official. Instead, the "centers of excellence" approach disseminates market research skills, specialized industry knowledge, and improved business judgement about competitive decision-making to the field. Individual business decisions remain within the discretion of the procurement officials with sound antitrust legal advice from the enforcement agencies. This arrangement provides more consistent and meaningful signals to DoD contractors, whose protests remains unanswered.

V. Conclusion

The current competition policy enforcement regimes of antitrust law, procurement law and DoD monopsony purchasing decisions reflect significant missing interrelationships. The new *Collaboration Guidelines* present challenging considerations of DoD contracting practices and procurement decisions when applying collaborations to antitrust review. The collaboration analytical framework takes into account these factors in assessing efficiency justifications and their relationship to pro-competitive benefits of a collaboration, relevant markets and market concentration, industry conditions, and barriers to entry. However, the FAR and the DFARS fail to provide effective procedures for reporting, reviewing and enforcing these factors. Further, DoD lacks effective procedures to assess and incorporate

the results of an antitrust review of potential collaborations into particular procurements or to inform its buying decisions and practices.

These interrelationships prevent procurement officials from incorporating market and industry analysis into procurement decisions. They also inhibit the effective exercise of DoD monopsony powers to foster long-term competition goals over achieving short-term incentives. Finally, the inter- and intra-agency review and enforcement system for DoD contractor collaborations serves only a counter-productive, adversarial purpose.

Aside from retaining the current competition regimes, two alternative solutions to closing these procedural gaps should be explored. While a centrally managed DoD industry and market analysis function and antitrust review activity would provide the most predictable, transparent, and efficiency system, it cannot feasibly be implemented. A decentralized "centers of excellence" approach to market and industry analysis and a modified proactive collaboration review process among DoD, DoJ, and FTC will enhance DoD's ability to balance short- and long-term competition-enhancing procurement strategies.

Appendix

DoD Contractor Collaborations: Proposed Review and Coordination Procedures

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 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, where required under DFARS 210.002. The acquisition plan will address each industry "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 re-procurement 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 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 contains a provision that has the potential to cause anticompetitive harm, as set out by § 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 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 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 and/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 discuss 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 or consider, as appropriate, 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 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 agencies deem appropriate. When the Department of Justice or the Federal Trade Commission forward any Hart-Scott-Rodino filing notices with 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.