COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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January 7, 2002
CODSIA Case No. 13-O 1

Ms. Susan Schneider
Defense Acquisition Regulations Council
OUSD (AT&L) DP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 99-D028

Dear Ms. Schneider:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule adding policy addressing exclusive teaming arrangements which was published in the *Federal Register* November 1, 2001 (66 Fed. Reg. 55 157). For the reasons outlined below, it is recommended that this proposed rule not be adopted.

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently comprised of seven associations representing over 4000 member companies across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

As you know, CODSIA members provided comments on January 20, 2000, on the previous proposed rule. At that time we took issue with the broad statement that exclusive teaming is a practice or event "that may evidence violations of antitrust law." While this statement may be technically correct, we objected then to the lack of implementing guidance and pointed out that this would create implementation problems and less competition due to a hesitancy by companies to form teaming arrangements. As contrasted with the classic inherently anti-competitive, "per se," antitrust violations addressed in FAR 3.303(c), we appreciate that this proposed rule cautions that the policy "should not be misconstrued to imply that all exclusive teaming arrangements evidence violations of antitrust laws." However, we continue to have concerns that the rule's limited criteria for identifying exclusive teaming arrangements that may violate antitrust laws are too vague to provide sufficient or meaningful guidance to contracting officials and contractors to ensure a consistent application of the rule. Furthermore, the proposed DFARS change provides no guidance to contracting officers in determining when an

exclusive teaming arrangement "'impairs competition." As the FAR Council just noted in its analysis and conclusions properly repealing the so-called "contractor responsibility" rules: "Contracting officers are not experts in antitrust laws.. , This lack of expertise would create a problem rather than solving a problem."

Adopting this proposed rule will result in the routine contracting officer referral of all exclusive teaming arrangements to the Department of Justice, even when those arrangements may actually promote competition. Such unnecessary referrals will delay awards during the period of investigation, cause companies to incur substantial legal costs explaining these arrangements, and have a chilling effect on companies interested in establishing proper teaming arrangements.

In preparation for performing a contract, contractor teams may be formed for numerous reasons: to share financial risk; strengthen an area of perceived weakness; or capitalize on a member's background in a particular area. As a matter of practice, prudent companies entering such an arrangement are careful to weigh the benefits of exclusive teaming arrangements against keeping several suppliers in competition in order not to become dependent on a single source for a vital component. Proper due diligence is also conducted to avoid any antitrust violations. Benefits to both the contractor and the government are carefully evaluated.

On the other hand, the government's solicitation cycle offers opportunities for early identification of any contractor-disclosed exclusive teaming relationships that the contracting officer might be concerned about as "anticompetitive." By the time of final proposal submission, the contracting officer should have ample opportunity to perform due diligence to resolve these concerns. If there is doubt, present procurement regulations, and the "Antitrust Guidelines for Collaboration Among Competitors" issued jointly by the Federal Trade Commission and the Department of Justice in April 2000, adequately cover the situations envisioned by the proposed DFARS change. Separately, the joint Antitrust Guidelines could be further revised to address these rare "anti-competitive" situations without tbe need for any further DFARS changes.

This proposal will add delay to the already over-regulated process and will deter contractors from entering into proper teaming arrangements that produce efficiencies and lower costs. It is therefore recommended that the proposed rule not be adopted.

Thank you for this opportunity to provide our comments. If there are any questions, or if we can be of assistance, please contact Patrick Sullivan, the CODSIA Project Officer for this case, at (202) 37 l-8522.

Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)

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Vice President, Government Division
Aerospace Industries Association

Lorraine M. Lavet
Chief Operating Officer
American Electronics Association

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