

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

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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.²

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)³ and other nonsystems procurements.⁴ While the trend in the general U.S. economy has been to scrutinize such business practices under antitrust laws,⁵ the DOD has only just begun a dialogue on the impact of such contractor behavior on its procurements.⁶ 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

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monopsonist DOD “systems” procurement process.⁷ Although DOD, the

2. 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 25 (Nov. 2000) [hereinafter DSB REPORT ON PRESERVING DEFENSE INDUSTRY], available at <http://www.ndia.org>. Within the context of antitrust analysis of mergers and acquisitions, one scholar has concluded that “the Department [of Defense] 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*, ANTITRUST BULL., Summer 1999, at 446. The 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 33-39 (May 1997) [hereinafter DSB REPORT ON VERTICAL INTEGRATION].

3. “Major defense suppliers” serve as prime 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).

Id. § 2302d(a). See also U.S. DEP’T OF DEFENSE, REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPs) AND MAJOR AUTOMATION INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (5 Apr. 2002) [hereinafter DOD DIR. 5000.2-R]; U.S. DEP’T OF DEFENSE, INSTR. 5000-2, OPERATION OF THE DEFENSE ACQUISITION SYSTEM encl. 2 (5 Apr. 2002) (calculating the dollar values for such expenditures at \$140,000,000 for research and development and \$660,000,000 for the total system expenditure threshold).

4. 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.

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,⁸ 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.”⁹

In a defense industry that is consolidating and changing to a new paradigm after the Cold War downsizing,¹⁰ one of the most significant DOD contractor behavioral adjustments is the use of collaborative contracting. Collaborations among competing DOD contractors, whether called “teaming arrangements,” “joint ventures,” “strategic alliances,” “subcontracts,” “associations,” licensing arrangements,” “partnering,” or “leader-follower agreements,” provide a variety of benefits to market participants in winning and keeping DOD contracts. Industry observers predicted such benefits (or arguably, business necessities) even as the post-Cold War “peace dividend” appeared.¹¹

5. *Id.*

6. See *DFARS Case 99-D028*, 64 Fed. Reg. 63,002 (Nov. 18, 1999); Note, *Industry Group Questions Proposed DFARS Rule on Exclusive Teaming Arrangements*, GOV'T CONTRACTOR, Feb. 2, 2000, para. 43 [hereinafter *Industry Questions*].

7. See, e.g., Memorandum, Deputy Under Secretary of Defense (Acquisition & Technology), DUSD (A&T), subject: Future Competition for Defense Products (7 July 2000) [hereinafter *Future Competition Memorandum*], 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).

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

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

10. See *DSB REPORT ON PRESERVING DEFENSE INDUSTRY*, *supra* note 2, at 1.

11. 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., 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).

Of course, the defense industry downsizing and related consolidation were not the exclusive causes of this behavioral trend. As DOJ and FTC have stated: “In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.”¹² Even DOD’s nonsystems markets, including base services and other commercial items, are experiencing these “forces.”¹³

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. These commentators assert that companies seeking market monopolies or groups seeking to restrain trade to an advantageous end can abuse overly restrictive collaborative arrangements.¹⁴ Because of such cautionary antitrust scholarship, the business community at large has also shown risk aversion toward collaborations.¹⁵ Therefore, “[a] perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of pro-competitive collaborations.”¹⁶

The two forces of defense procurement 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.¹⁷ These arrangements exist when one contractor with a unique asset agrees to participate in a DOD procurement

12. COLLABORATION GUIDELINES, *supra* note 9, at 1. In fact, in the 1995 hearings conducted by FTC on global and innovation-based competition, FTC and DOJ learned that “global and innovation-based competition [continues] driving firms toward ever more complex collaborative agreements.” Shepard, *supra* note 4, 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.*

13. *See, e.g.*, *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853 (11th Cir. 1998) (finding Martin Marietta’s termination of a software services support subcontractor on a Navy facilities operation and maintenance contract not to be illegal anticompetitive conduct.); *see also* Shepard, *supra* note 4, at 641.

14. *See, e.g.*, Chiericella, *supra* note 11; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11; Eger, *supra* note 11.

15. *See* Shepard, *supra* note 4, at 641.

16. COLLABORATION GUIDELINES, *supra* note 9, at 1. *See* Shepard, *supra* note 4, at 641 (noting the business community’s anxiety over unclear and inconsistent antitrust standards for collaborations).

with one or more other contractors, provided that the collaborators agree not to work with nonparticipants. Such collaborations subjugate collaborators to the unique 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 enforcement structure of antitrust law to contractor collaborations and its role in the procurement process.¹⁸

This article reviews 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.¹⁹ These agencies take into account the unique DOD regulatory and monopsony powers to inform their assessments, but so far have relied little on DOD for coordinating their enforcement efforts. The 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.²⁰ In addition, a host of exceptions may contradict or limit the application of antitrust competition standards.²¹ Finally, as a buyer (market participant or market-maker), DOD's purchasing decisions play a significant role in shaping the behavior of its contractors.²²

With the aid of realistic hypothetical collaborations, this article critiques the effectiveness of the three procedural enforcement regimes as they apply to anticompetitive collaborations. Specifically, this article

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

18. See, e.g., *Industry Questions*, *supra* note 6.

19. See, e.g., The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (2000); The Federal Trade Commission Act, 15 U.S.C. § 45. While substantial, this article does not include discussion of the role of individual states in enforcing competition laws; however, individual state's antitrust laws are not preempted by the federal laws. *California v. ARC America Corp.*, 490 U.S. 93, 100-06 (1989).

20. See The Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 1175 (codified as amended 10 U.S.C. § 2304 (2000)) (CICA); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION pt. 6, subpt. 9.4 (Sept. 2001) [hereinafter FAR] (implementing the CICA in part); U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. subpt. 209.4 (Aug. 17, 1998) [hereinafter DFARS] (same).

21. See, e.g., *Fed. Trade Comm'n v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 22 (D.D.C. 1992).

22. See Future Competition Memorandum, *supra* note 7; Kovacic, *supra* note 2.

addresses the following missing or ineffective 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 article proposes a new set of procedures that fill in the enforcement procedural gaps outlined above, and synchronize agency actions on contractor collaborations. This article evaluates 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 article outlines three distinct proposals. First, through a critique of the current system, this article discusses the unmitigated disadvantages of maintaining the existing enforcement system. Second, this article outlines a set of procedures based upon a centralized DOD analytical review model. Finally, this article 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." Defining the

“defense industry” in the twenty-first century, however, is becoming more difficult. The financial world generally views this industry as a distinct and powerful group of companies serving global aerospace and national defense “systems” (that is, vehicle, weapons, information technology, and similar) needs. Within the United States, the industry comprises manufacturing and service segments and sub-segments based on the nature of the output, variously categorized as: commercial and military;²³ defense, commercial aircraft, and space;²⁴ commercial “off-the-shelf” and specialized;²⁵ by product function;²⁶ and other services.²⁷ For antitrust purposes, DOJ and FTC define “market” as a particular product (or service) market²⁸ within a geographical market.²⁹

Since the early 1990’s, the defense budget reductions have reduced the number of defense industry companies by about half. Now one or two

23. 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).

24. Hoover’s Online, *Aerospace/Defense-Products*, at <http://www.hoovers.com/industry/description/0,2205,2310,00.html> (last visited Apr. 30, 2002).

25. See Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 517 (applying antitrust market definitions to defense procurements).

26. Kovacic, *supra* note 2, at 423.

27. See, e.g., U.S. CENSUS BUREAU, THE NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) – UNITED STATES (1997) (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”), available at <http://www.census.gov/epcd/www/naics.html>. Researchers may find it helpful to search the various aerospace and defense industry participants by Standard Industry Classification Codes. See Hoovers, Inc., *Aerospace & Defense-Products, SIC Codes*, at <http://www.hoovers.com/industry/siccodes/0,2519,2310,00.html> (last visited Apr. 30, 2002). The DOD also reports on and analyzes its contractors by “military products.” See INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 8. The DOD codes individual procurements under the Federal Supply Classification Codes according to the nature of the item procured and the three main categories of RDT&E, supplies and equipment, and services and construction. See U.S. DEP’T OF DEFENSE, WASHINGTON HEADQUARTERS SERVICES, PRIME CONTRACT AWARDS BY SERVICE CATEGORY AND FEDERAL SUPPLY CLASSIFICATION (n.d.) [hereinafter PRIME CONTRACT AWARDS] (listing DOD expenditures by federal supply classification code and description), available at <http://web1.whs.osd.mil/peidhome/prodserv/p07/fy2000/p07.htm>. The 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 or non-major systems. See *supra* note 3. “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).

large firms dominate each “systems” industry sub-segment,³⁰ despite marginal financial performance.³¹ The DOD has worked closely with DOJ, FTC, and other agencies to oversee this reduction by shaping the industry’s mergers and acquisitions in hopes of obtaining significant procurement cost savings.³² The DOD largely realized the savings from this activity,³³ but with consolidation nearly complete, the focus is changing. Thus, the defense industry is entering a new paradigm.³⁴

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.³⁵

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

28. 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, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1087. See U.S. DEP’T OF JUSTICE AND FEDERAL TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1.1 (revised Apr. 8, 1997) [hereinafter HORIZONTAL MERGER GUIDELINES], available at <http://www.usDOJ.gov/atr/public/guidelines/jointindex.htm>.

29. The relevant geographic market is “established by determining the area to which the purchasing agency can look to attract offerors for individual contracts.” Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1087. See HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 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. 1983), *cert. denied*, 464 U.S. 849 (1984).

30. See Hoovers, Inc., *Aerospace & Defense-Products, Companies in This Industry*, at <http://www.hoovers.com/industry/description/0,2205,2310,00.html> (last visited Apr. 30, 2002) (providing a list of industry participants); Kovacic, *supra* note 2, at 422-23 (listing current segment leaders).

31. See DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 6.

32. See INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 12-13; DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1.

33. INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 8.

34. See DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 6.

35. *Id.*

management, and other technological improvements caused by more competitive research and global development.³⁶ The necessary post-downsizing rationalization of the defense industry moves under these influences.³⁷ They have radically changed business models (witness the terms “old” and “new” economies) and competitive business practices.³⁸ For example, one popular idea has been competitor use of the Internet to form buying collaborations.³⁹ Even five major defense industry participants have collaborated recently to develop an Internet site, called “Exostar,” where they can purchase parts from over 8,000 worldwide suppliers.⁴⁰ The defense firms expect to dramatically reduce the number of subcontractors and supplier transaction costs.⁴¹

Defense industry observers and participants are encouraging DOD to tap into the broader marketplace for competitors to integrate commercial technologies into exclusively defense systems.⁴² Further, they suggest a

36. *Id.*; see also Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1061-62; Wendy A. Polk, *Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations*, PUB. CONT. L.J., Spring 1999, at 415-16.

37. 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 2, 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 what has been referred to as the “new economy.” INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 2; DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, 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, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1060 (providing an example of the latter theory).

38. “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 8, at 7.

39. 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). The use of buying or selling collaborations will be addressed from an antitrust perspective below.

40. See Exostar, *Introducing Exostar*, at <http://exostar.com/company.asp> (last visited Apr. 30, 2002).

41. See *id.* See generally 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) (arguing that collective buying arrangements do not reduce levels of “insider competition” among joint venture participants).

host of other strategies for leveraging the competitive business practices of the broader economy to both entice participation by nontraditional firms and improve cost and performance goals by becoming more “commercial.”⁴³ One strategy, adopted in part by DOD, and “designed to promote competition and increase access to commercial inventories,”⁴⁴ seeks to scrutinize the increasing potential for powerful, anticompetitive collaborations by competitors.⁴⁵

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.”⁴⁶ But with DOD now moving toward integration of nontraditional 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 this market.⁴⁷ Further, similar economic forces motivating collaborations among “defense industry” firms exist within the purely commercial segments of the DOD procurement market.

To that end, DOD must examine collaborative conduct among its commercial products and services contractors under similar scrutiny. Even these nonsystems procurements are affected by economic and political changes, and the volume of such procurement activity equally supports

42. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 28-29; Kovacic, *supra* note 2, at 455-62; INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 15.

43. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 28; Kovacic, *supra* note 2, at 443-67; INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 12-20. The DOD has acknowledged that its efforts to attract nontraditional defense firms face several obstacles, but in general, acquisition reform and management of industry structure can provide benefits. See DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 8-9.

44. INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 20.

45. See Kovacic, *supra* note 2, at 465-66; *Industry Questions*, *supra* note 6 (discussing the proposed rules on exclusive teaming arrangements).

46. Work, *supra* note 23, 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 noneconomic factors in procurement decisions, such as industrial capacity and socio-economic policies. *Id.* at 544-45.

47. Kovacic, *supra* note 2, at 464-66. To a degree, the DOD has recognized these obstacles. See DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 27-28.

such an approach. In particular, DOD continues to put a substantial portion of its commercial activities up for bid, having identified about 250,000 positions subject to competitive outsourcing.⁴⁸ Acquisition reform efforts over the past decade successfully persuaded the government to purchase such “commercial items”⁴⁹ and services in a manner more consistent with the broader commercial marketplace, while avoiding the abuses heaped upon the procurement system in the 1980s. In fiscal year 2000, DOD spent under contract \$55 billion on services and construction, \$65 billion in supplies and equipment, and \$20 billion in research, development, testing, and evaluation.⁵⁰ The procurements for “commercial items,” however, also experience the unique regulatory and monopsonistic influences exerted by DOD, as demonstrated by the sheer magnitude of the “acquisition reform” movement of the 1990s.⁵¹

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

48. See U.S. Dep’t of Defense, *FAIRNET*, at <http://web.lmi.org/fairnet> (last visited May 28, 2002).

49. FAR, *supra* note 20, at 2.101 (a “commercial item” is “any item other than real property, that is of a type customarily used for nongovernmental purposes”). See Kovacic, *supra* note 2, at 455-56. These efforts continue. See, e.g., National Defense Authorization Act for Fiscal Year 2000, 106 Pub. L. No. 65, 113 Stat. 512 (1999); Acquisition of Commercial Items, 66 Fed. Reg. 53,483 (Oct. 22, 2001) (amending FAR 2.101).

50. See PRIME CONTRACT AWARDS, *supra* note 27 (providing a specific breakdown of expenditures by federal supply classification code and description by fiscal year). See also U.S. GENERAL ACCOUNTING OFFICE, REPORT, CONTRACT MANAGEMENT: TAKING A STRATEGIC APPROACH TO IMPROVING SERVICE ACQUISITIONS, GAO-02-499T (Mar. 2002).

51. 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. See, e.g., FEDERAL OFFICE OF MGMT. AND BUDGET, CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983) [hereinafter OMB Cir. A-76] (now implementing the Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998)).

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 article does not attempt to 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.

The shift in emphasis from diversified conglomerate firms began seriously in the 1970s, 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.⁵² 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.⁵³

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.⁵⁴ 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.⁵⁵ Arguably, when a firm’s strategy 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.⁵⁶ For a variety of reasons, including the condition of a particular industry, many firms either avoid these competitive pressures or ignore the rationale

52. See MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* (1985).

53. CHARLES W.L. HILL & GARETH R. JONES, *STRATEGIC MANAGEMENT: AN INTEGRATED APPROACH* 120-23 (4th ed. 1998) (citing PORTER, *supra* note 52). 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 & Linda E. Swayne, *Competitive Advantage and Internal Organizational Assessment*, *ACAD. MGMT. EXECUTIVE*, No. 3, 1998, at 1.

behind this theory, continuing to operate for long periods without substantial improvements in cost or differentiation.

Based on the nature of a firm's industry, its markets, 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."⁵⁷ Companies gain a competitive advantage by executing different organizational structure or transactional strategies,⁵⁸ or both, as the circumstances dictate.⁵⁹

Where a copper-pipe manufacturing firm, for example, purchases a copper mining operation, it theoretically does so to save on "upstream"

54. 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). The DOJ and FTC established specific methods of accounting for product differentiation in the federal merger guidelines. See *HORIZONTAL MERGER GUIDELINES*, *supra* note 28, §§ 1.12, 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 article.

55. HILL & JONES, *supra* note 53, at 120. A firm that develops unique resources into "skills and capabilities [possesses] core competencies." Michael A. Hitt, Barbara W. Keats & Samuel M. DeMarie, *Navigating in the New Competitive Landscape: Building Strategic Flexibility and Competitive Advantage in the 21st Century*, *ACAD. MGMT. EXECUTIVE*, No. 4, 1998, at 22, 28.

56. 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. See *DSB REPORT ON PRESERVING DEFENSE INDUSTRY*, *supra* note 2, at 9, 13, 44; see also *INDUSTRIAL CAPABILITIES REPORT*, *supra* note 8, at 2.

57. Hitt, Keats & DeMarie, *supra* note 55, at 22, 23.

58. 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 shared efficiently among a firm's different markets). HILL & JONES, *supra* note 53, at 280-307.

costs of purchasing copper for production by reducing transactional costs and risks, including price fluctuations. But firms now must possess “strategic flexibility” in addition to a unique competitive advantage.⁶⁰ Components of such flexibility include developing outsourcing strategies, use of new manufacturing and information technologies, and application of cooperative strategies, among others.⁶¹ 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 copper itself.

2. Collaborative Behavior

Depending on the circumstances of the transaction, collaborations on primary and supporting activities with either market competitors or vertically related firms can provide benefits to the collaborating firms. Such collaborations offer a host of “efficiency enhancing integrations of economic resources,”⁶² including: “lower costs through economies of scale; increase[d] capacity, research and development (R&D), or market access;⁶³ 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.”⁶⁴ The nature and

59. “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 41, at 652.

60. Hitt, Keats, & DeMarie, *supra* note 55, 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 2, at 11. This pressure has only grown. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 9, 13.

61. Hitt, Keats & DeMarie, *supra* note 55, 26. See also Norman Ray, *Rio Grande: Transatlantic Reality – A U.S. Defense Contractor’s View*, DEF. DAILY INT’L, Sept. 22, 2000 (improving efficiencies, mastering politics, and collaborations necessary to meet financial markets’ expectations). But see DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, app. E-2 (asserting that a 1991 survey found that DOD prime contractors tend not to change “make” or “buy” decisions once capability is established).

62. Comment and Hearings on Joint Venture Project, 62 Fed. Reg. 22045, 22,946 (Apr. 28, 1997), *quoted in* Shepard, *supra* note 4, at 642.

scope of any efficiencies⁶⁵ depend upon the contractual terms and structure of the collaboration, regardless of its name.⁶⁶

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,⁶⁷ and total average costs, depend on the multiple variations in accounting rules, business estimates, and the reasons for choosing among these calculation methods.⁶⁸ The prices charged for

63. 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 nonoverlapping 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>.

64. Shepard, *supra* note 4, at 642. *See also* COLLABORATION GUIDELINES, *supra* note 9, § 2.1; MERGER GUIDELINES, *supra* note 28, § 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 article, 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 2, at 11. Defense industry participants see several reasons for Wall Street's pessimism, including: lack of growth potential 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 DEFENSE INDUSTRY, *supra* note 2, 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 9, § 3.31(a).

65. 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 (for example 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).

66. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1060; Shepard, *supra* note 4, at 642; Perry & Park, *supra* note 17, at 1; Polk, *supra* note 36, at 415-16, 422-23. *See also* COLLABORATION GUIDELINES, *supra* note 9, § 2.1.

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."⁶⁹ 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 are controlled by oligopolies,⁷⁰ others by monopolies.⁷¹ Each market structure has competing theoretical economic incentives for behavior.⁷² Much of antitrust law is based on such theories, and the schools of interpretation of antitrust laws range as broadly as do

67. Transfer pricing involves the accounting of costs among a firm's organizational components or between a collaboration and its members (that is, the amount a joint venture charges its members per unit). For example, the Cost Accounting Standards treat joint ventures as "segments" for purposes of defining subcontracts as well as allocation of general and administrative expenses and R&D/bid and proposal costs. See 48 C.F.R. subpts. 9903.201, 9904.410, 9904.420 (2001).

68. See, e.g., Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 GEO. MASON L. REV., 479, 484-85 (1998) (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).

69. See McFalls, *supra* note 41, 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.

70. 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 noncollusive conduct described as "coordinated interaction." See HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 2.

the varying schools of microeconomics.⁷³ As the opening quote of this article 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.⁷⁴

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;⁷⁵ (2) combined R&D capacity sought by DOD; (3) sharing the financial risks associated with DOD shifting 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.⁷⁶ Other company-specific benefits for defense industry participants focus on cost and risk-sharing for "systems" development, sharing unique and costly tooling, test equipment and facilities, pooling employees,⁷⁷ and occasional "free riding" on the progress of co-collaborators.⁷⁸ Firms also may seek to resolve structural and environmental concerns over cost accounting sys-

71. See e.g., U.S. DEP'T OF ENERGY, HORIZONTAL MARKET POWER IN RESTRUCTURED ELECTRICITY MARKETS (Mar. 2000) (describing monopolistic tendencies in scores of electricity markets across the United States and the United Kingdom), available at <http://www.usdoe.gov>. 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 20, pt. 41; U.S. DEP'T OF ARMY, REG. 420-41, ACQUISITION AND SALES OF UTILITY SERVICES (15 Sept. 1990).

72. Werden, *supra* note 65, at 702, 716.

73. 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 ch. 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 generally Economists, Inc., *Antitrust Policy*, at <http://www.antitrust.org> (last visited Apr. 30, 2002) ("an on-line resource linking economic research, policy and cases").

74. See *supra* note 2 and accompanying text. Again, this article 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 law, procurement law, and buying policies.

75. See, e.g., Vago Muradian & John Robinson, *Raytheon Expresses Concerns to Navy Regarding New DD-21 Team*, DEF. DAILY, Dec. 11, 1997.

76. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1061-62.

77. Polk, *supra* note 36, at 415-16, 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 20, at 9.602; Perry & Park, *supra* note 17, at 3.

78. Polk, *supra* note 36, at 423.

tems 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,⁷⁹ 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 consolidation would result in unnecessary permanent structural changes to the firm (that is, retaining “strategic flexibility”).⁸⁰

Even the DOD has adopted “teaming” and “partnering” as key management practices at the lowest level, both within departmental components and in external agency relationships.⁸¹ The DOD also actively encourages international collaborations for various industrial capability and political reasons (tempered by national security concerns).⁸² 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 structural change that affects industry conditions. Such officials are likely to receive arguments from contractors based on these factors to support their collaborations (and the final price or quality of their output).

The trend toward collaborative behavior challenges the DOD to establish a robust analytical system that fully captures the intent and bases for collaborations related to each transaction and, as later discussed, that fully weighs the benefits and risks to competition in each procurement market.⁸³ Procurement officials at DOD may encounter myriad agreements among contractors forming complicated webs of collaboration on a

79. See FAR, *supra* note 20, at 9.206 (for effects on competition of qualification requirements), 9.304 (for risks to contractors required to submit to first article testing).

80. Polk, *supra* note 36, at 416-17.

81. For an example of internal teaming, the Defense Contract Management Agency “teams” with procurement offices to provide market research and source evaluations. See U.S. DEP’T OF DEFENSE, DEFENSE LOGISTICS AGENCY, EARLY CAS TEAMING FOR ACQUISITION SUCCESS (Sept. 1996), available at <http://www.acq.osd.mil> (U.S. DEP’T OF DEFENSE ACQUISITION DESKBOOK, § 1.2.2.4.1). For an example of external teaming, see DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, app. F-5 (program offices are “teaming with contractors”).

82. Vago Muradian, *Pentagon Mulls Overseas Sale of Lockheed’s Sanders Unit; Deal May Test Limits*, DEF. DAILY, June 19, 2000; *Analysts: GD Bid for Newport News May Not Die in Antitrust Review*, AEROSPACE DAILY, Feb. 22, 1999, at 266.

83. Perry & Park, *supra* note 17, at 10. See also COLLABORATOR GUIDELINES, *supra* note 9, pmb1.

variety of primary or supporting activities.⁸⁴ Some agreements may be in the form of collaborations formally endorsed by procurement regulations, such as “teaming arrangements” and “leader-follower” agreements that are specifically contemplated under the Federal Acquisition Regulation (FAR).

The FAR contemplates “teaming arrangements” of two limited types: formal horizontal or vertical collaborations through partnerships or joint ventures (joint ventures), and vertical collaborations in which one company acts as the prime contractor and one or more of its competitors serves as subcontractor (teaming arrangements).⁸⁵ In the former, firms join economic resources and integrate them under a newly created legal entity.⁸⁶ Under *The Collaboration Guidelines*, such a joint venture may qualify as a merger if certain conditions are met, thereby requiring merger analysis.⁸⁷ In the latter, written or oral agreements serve to contractually bind economic resources to a particular activity (for example, a single government contract or types of contracts).⁸⁸ Scholars and practitioners note that these

84. Kovacic, *supra* note 2, at 440. See, e.g., Vago Muradian, *BAE Awaits Justice, CIFIUS Rulings on Planned Purchase of Lockheed Unit*, DEF. DAILY INT'L, 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 Before the Cutting Edge Antitrust Conference, New York (Feb. 17, 2000), available at <http://www.ftc.gov/speeches/pitofsky/restruct.htm>.

85. FAR, *supra* note 20, at 9.601.

86. Polk, *supra* note 36, at 422; Eger, *supra* note 11, at 599-600.

87. COLLABORATION GUIDELINES, *supra* note 9, § 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 meets joint venture notice threshold. Except as briefly noted in Section III.A, *infra*, this article assumes that all qualifying joint ventures file the appropriate notice.

88. Perry & Park, *supra* note 17, at 2-3; see also Polk, *supra* note 36, at 437; Kovacic, *supra* note 11, at 1060.

definitions are often inconsistent with broader scholarly and judicial use as well as inconsistent with other provisions of the FAR itself.⁸⁹ “Leader-follower” agreements may also be encountered in rare circumstances.⁹⁰ The FAR does not prohibit other types of collaborations, even if they fail to meet these definitions; rather, various provisions of the FAR allude to other permissible types.⁹¹

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.”⁹² 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.”⁹³ 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 from participating firms’ value chains are involved.⁹⁴ To become subject to antitrust scrutiny, they require no formal acknowledgement by DOD as FAR-sanctioned agreements, nor do they require acknowledgement by DOJ and FTC.⁹⁵

89. Polk, *supra* note 36, at 422 (citing Kovacic, *The Application of the Antitrust Laws to Government Contracting Activities: Illegal Agreements with Competitors*, *supra* note 11, at 437). A generally accepted definition of “joint venture” has yet to be established even among the business community at large. Shepard, *supra* note 4, at 642. In particular, “teaming arrangements” often refers to both horizontal and vertical collaborations not otherwise qualifying as “joint ventures.”

90. Polk, *supra* note 36, at 445; Eger, *supra* note 11, at 598-99; FAR, *supra* note 20, at 17.401. Under these arrangements, the DOD requires the prime to share resources, such as innovations, with its “follower” collaborator.

91. For a discussion of the FAR’s varying coverage on this point, see Polk, *supra* note 36, at 437 n.212.

92. COLLABORATION GUIDELINES, *supra* note 9, § 1.1.

93. *Id.* See also Perry & Park, *supra* note 17, at 10.

94. COLLABORATION GUIDELINES, *supra* note 9, § 2.3. For policy arguments over the breadth of collaborations covered by antitrust law, 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).

95. 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 nonsanctioned collaborations.

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 decisions.⁹⁶ Naturally, given the broad application of *The Collaboration Guidelines*, these hypothetical agreements cannot envision all possible forms and terms and conditions of collaborations. The purpose of this article, however, 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.⁹⁷ These factors may compliment the benefits sought by DOD in the "new" industrial paradigm.⁹⁸ The collaboration that most closely approaches a merger is a joint venture,⁹⁹ 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.¹⁰⁰ 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. The following hypothetical collaborations provide examples of the range of activities encountered in DOD procurements to give the reader some context within which they can apply

96. 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 11. *The Collaboration Guidelines* uses them extensively to illustrate various points. COLLABORATION GUIDELINES, *supra* note 9, *passim*.

97. See COLLABORATION GUIDELINES, *supra* note 9, § 1.3 (distinguishing mergers from collaborations); Kitch, *supra* note 73, at 958.

98. See *supra* note 73 and accompanying text. See also DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 8-9.

99. Unless otherwise stated, the term "joint venture" used in this article includes only those collaborations established by members through the establishment of a separate legal corporate entity (such as a partnership or corporation). Although the term "joint venture" has been used to describe other broader arrangements, Polk, *supra* note 36, at 422, the more narrow definition maintains consistency in terminology. This article identifies the appropriate definition of "teaming arrangement" as the context dictates, but it is most often used in the procurement community to cover vertical arrangements among competitors.

100. COLLABORATION GUIDELINES, *supra* note 9, § 1.3.

the subsequent legal background and analysis. These examples will then be applied to this article's proposed enforcement procedures.

1. Hypothetical A:¹⁰¹ 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 service members 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 microcomputer 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. Six global microcomputer chip manufacturers 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 nondevelopmental versions of those items at sufficient quantities, but various intellectual property rights protect all products.

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 would have exclusive access to the research laboratories of the largest manufacturer. Each manufacturer would possess equal rights to use any

101. Taken with significant modification from "Example 1" in Eger, *supra* note 11, at 599.

developed products commercially, and each would contribute \$15 million to the effort (the Agency estimates \$45 million in R&D).

2. 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*.¹⁰² 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 requirements. The performance work statement calls for all commercial items or services, 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 twelve plumbers in the surrounding 100-mile area. The base plans to reduce its plumbing employee force from ten 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 ten plumbers as employees; one regional firm plans to enter into a subcontract with all five local firms, and it would enter into a teaming arrangement to share the ten 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.

These examples should provide the reader with the general factual context within which to understand antitrust law, procurement law, and purchase decisions. This article next provides an extensive overview of

102. OMB CIR. A-76, *supra* note 51.

the antitrust, procurement, and purchasing procedures as they relate to collaborations among DOD contractors.

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.¹⁰³ As the Supreme Court noted, “the antitrust laws . . . were enacted for ‘the protection of *competition*, not *competitors*.’”¹⁰⁴ Thus, the antitrust laws focus on the economic mechanisms influencing particular markets, although there is debate over the extent to which other noneconomic factors apply.¹⁰⁵

Congress put into place the primary competition laws, the Sherman Act,¹⁰⁶ the Clayton Act,¹⁰⁷ and the Federal Trade Commission (FTC) Act,¹⁰⁸ around the turn of the twentieth century. Several provisions from these statutes potentially govern collaborative conduct between competitors.¹⁰⁹ Section 1 of the Sherman Act proscribes “every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade.”¹¹⁰ It principally focuses on the concerted action of two or more

103. *The Collaboration Guidelines* include an assessment of competitive effect in both markets. COLLABORATION GUIDELINES, *supra* note 9, §§ 3.31, 3.36.

104. *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)).

105. *See, e.g.*, DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 31-32 (acknowledging inconsistency between Supreme Court precedent and practice); Mark Schwartz, *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 (3d 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).

106. 15 U.S.C. §§ 1-7 (2000).

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

108. 15 U.S.C. § 45.

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.¹¹¹ 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 acquisition may be substantially to lessen competition, or to tend to create a monopoly.”¹¹² Finally, the FTC Act proscribes unfair methods of competition or deceptive acts or practices

109. The term “‘competitors’ encompasses both actual and potential competitors” in a particular market. COLLABORATION GUIDELINES, *supra* note 9, § 1.1. Horizontal restraints are those agreements that affect firms who participate in a market at the same level of business activity (for example, 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.* § 1.1 n.6. 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 that may affect related vertical markets.

110. 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.

111. 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.

Id. § 2.

112. *Id.* § 18. This provision applies to joint ventures. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 168 (1964).

in or affecting commerce.¹¹³ Conduct covered under the FTC Act includes conduct in violation of the Sherman and Clayton Acts.¹¹⁴

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. The DOJ and FTC structured them to allow for “judgment and discretion in antitrust law enforcement.”¹¹⁵ 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.”¹¹⁶ Several commentators and practitioners anticipated the “analytical framework,” and several proposed specific applications of it to defense procurements.¹¹⁷ Accordingly, this article provides 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.¹¹⁸ “Agreements of a type that always or almost always tend to raise price or to reduce output are per se illegal.”¹¹⁹ All other agreements are analyzed under a “rule of reason” analysis, which

113. 15 U.S.C. § 45.

114. See Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, n.31 and accompanying text (explaining pertinent case history).

115. COLLABORATION GUIDELINES, *supra* note 9, § 1.1. There is extensive debate and disagreement over the specific provisions of *The Collaboration Guidelines*. See Press Release, Fed. Trade Comm’n, FTC and DOJ Issue Antitrust Guidelines for Collaborations Among Competitors (Apr. 7, 2000) (concurring statements of Commissioners Thompson and Leary), available at <http://www.ftc.gov/opa/2000/04/collguidelines.htm>. 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 (such as the private bar). This article relies 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 U.S. DEP’T OF JUSTICE AND FEDERAL TRADE COMM’N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992) (dissenting statement of Commissioner Mary L. Azcuenaga on the issuance of horizontal merger guidelines).

116. COLLABORATION GUIDELINES, *supra* note 9, § 1.1.

117. See *supra* note 11 and accompanying text.

118. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1101; Eger, *supra* note 11, at 604.

119. COLLABORATION GUIDELINES, *supra* note 9, § 1.2.

weighs pro-competitive benefits with anti-competitive harm by considering many market and conduct factors.¹²⁰ Rule of reason inquiry traditionally is fact-specific and resource-intensive.¹²¹ While arguably any conduct that violates antitrust law can be a criminal offense,¹²² DOJ only prosecutes “hard-core cartel agreements.”¹²³ 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.’”¹²⁴

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.¹²⁵ Price-fixing and bid-rigging can take many forms and evidence themselves in many ways¹²⁶ These activities received great attention in the area of government contracts in the late 1980s and early 1990s.¹²⁷ Group boycotts

120. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, 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).

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

122. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1072.

123. COLLABORATION GUIDELINES, *supra* note 9, § 1.2.

124. *Perry & Park*, *supra* note 17, at 7 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

125. *Id.*; U.S. DEP'T OF JUSTICE, ANTITRUST RESOURCE MANUAL § 8 (Oct. 1997) [hereinafter ANTITRUST RESOURCE MANUAL], 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).

126. FAR, *supra* note 20, at 3.303(c), 3.305. See Polk, *supra* note 36, 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. See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); COLLABORATION GUIDELINES, *supra* note 9, § 3.34(e).

127. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1059.

of competitors likewise are per se illegal,¹²⁸ as are a monopolist's refusal to allow competitors access to facilities "essential" for competition.¹²⁹ Vertical restraints including resale price maintenance,¹³⁰ tying arrangements,¹³¹ and (possibly) exclusive-dealing restrictions¹³² fall under the same test.¹³³ Collaborations whose entire purpose violates the per se rule

128. Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). This activity is enforced by DOJ and FTC outside *The Collaboration Guidelines*. COLLABORATION GUIDELINES, *supra* note 9, § 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).

129. 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. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983). This activity likewise is not enforced under *The Collaboration Guidelines*, *supra* note 9, § 1.1 n.5. For an application of group boycotts and "essential facilities" doctrine to government contractors, see Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1100-04.

130. Dr. Miles Med. 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).

131. 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.

132. 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. *See* U.S. DEP'T OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES § 3.2 (rescinded) [hereinafter VERTICAL RESTRAINT GUIDELINES (rescinded)] (providing a detailed discussion of the conditions necessary for exclusive dealings to be anticompetitive), *available at* <http://www.antitrust.org/law/US/vert-guide.html>. *But see* FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.4 (Apr. 6, 1995) [hereinafter INTELLECTUAL PROPERTY GUIDELINES] (following a rule of reason approach in all vertical restraint licensing cases), *available at* <http://www.usDOJ.gov/atr/public/guidelines/jointindex.htm>. Exclusive dealing arrangements can be challenged under Section 3 of the Sherman Act, 15 U.S.C. § 3 (2000). *See also* Correia, *supra* note 94, 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 Section 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).

are deemed to be cartels. Such illegal arrangements can occur in the licensing of intellectual property,¹³⁴ in healthcare services,¹³⁵ in international operations,¹³⁶ and in all other business activity.¹³⁷ Of course, DOD procures goods and services in all of these environments. The 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.¹³⁸

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 (that is, “a set of one or more agreements”¹³⁹) generally determines the level of integration and must be reviewed independently to assess its “competitive effect.”¹⁴⁰ Therefore, the entire collaboration may serve an illegal purpose. Likewise, a particular term or condition of the underlying agreement(s) 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.¹⁴¹ Gre-

133. Under the Clinton Administration, DOJ rescinded guidelines for vertical restraints. See VERTICAL RESTRAINT GUIDELINES (rescinded), *supra* note 132. 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).

134. INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 3.4.

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

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

137. Congress afforded certain research and production collaborations limited protection from per se condemnation in certain cases. 15 U.S.C. §§ 4301-4302 (2000).

138. For specific types of conduct that may constitute per se violations, see ANTI-TRUST RESOURCE MANUAL, *supra* note 125, § 8, and U.S. DEP’T OF ARMY, REG. 27-40, ARMY LITIGATION fig. 8-1 (19 Sept. 1994).

139. COLLABORATION GUIDELINES, *supra* note 9, § 2.3.

140. *Id.* §§ 2.3, 3.3.

gory 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 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.¹⁴²

Until relatively recently, firms were subject to prosecution and many courts would enjoin or punish collaborators for per se violations.¹⁴³ 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.¹⁴⁴ This trend caused considerable consternation in the antitrust legal community.¹⁴⁵ 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-

141. Because DOD is a down-stream consumer of its contractors, this article emphasizes upstream vertical restraints. However, downstream vertical restraints are important to DOD for industrial capacity reasons (that is, 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).

142. Werden, *supra* note 65, at 705.

143. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

144. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982).

145. For a review of this trend and proposed adjustments to antitrust enforcement policy, see Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1119, Werden, *supra* note 65, and Correia, *supra* note 94.

intensive rule of reason inquiry.¹⁴⁶ Accordingly, *The Collaboration Guidelines* acknowledge a shift to a multi-level review.¹⁴⁷

b. “*Limited Factual Inquiry*” and *Efficiency Showings*

The DOJ and FTC compromised in announcing a “flexible” structured analysis.¹⁴⁸ “Sorting out the facts of actual cases under the rule of reason is apt to be difficult and subject to 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.”¹⁴⁹ 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 all software developers?¹⁵⁰ 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

146. 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 defendants’ conduct is upheld when the rule of reason is applied).

147. This approach was adopted more generally by DOJ and FTC in 1995 in the *Intellectual Property Guidelines*, *supra* note 132, § 3.4, and even earlier in their now rescinded *Vertical Restraints Guidelines*, *supra* note 132. See Eger, *supra* note 11, at 609; see also *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1 (1979) (applying a modified rule of reason approach).

148. Werden, *supra* note 65, 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 94, at 739.

149. Werden, *supra* note 65, at 735. One Chief of the DOJ Antitrust Division 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 94, at 745.

150. See INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 2.3.

conditions. Accordingly, all collaborations are subject to a new review at any future time when anticompetitive harm may occur.¹⁵¹

After identifying collaborations (or collateral terms) that are “blatant” per se violations, DOJ and FTC now will conduct a “limited factual inquiry”¹⁵² 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 pro-competitive benefits.”¹⁵³ Efficiency-enhancing integration includes collaborations to 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.”¹⁵⁴ If the concern relates to a collateral restraint, collaborators must also show that such a restraint is verifiable and potentially pro-competitive, reasonably necessary, *and* that no “practical, significantly less restrictive means” can be used.¹⁵⁵

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 were debated before issuance of *The Collaboration Guidelines*.¹⁵⁶ *The Collaboration 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.¹⁵⁷ It is clear, however, that if the collaborators provide sufficient evidence that the collaboration constitutes an efficiency-

151. COLLABORATION GUIDELINES, *supra* note 9, §§ 2.4, 3.4, 4.3.

152. *Id.* § 3.2. This technique, in various forms, has been referred to as “quick look” and many other names. See Correia, *supra* note 94, n.56.

153. COLLABORATION GUIDELINES, *supra* note 9, § 3.2. See INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 3.4; see also HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 4. Some claim that this procedure “depart[s] from familiar ways of evaluating the competitive impact of an agreement,” Perry & Park, *supra* note 17, at 10, but a review of the other published guidelines, cases, and academic literature reflects otherwise.

154. COLLABORATION GUIDELINES, *supra* note 9, § 3.2.

155. *Id.* § 3.6.

156. See, e.g., Werden, *supra* note 65; Correia, *supra* note 94; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1118 (citing others). But see Polk, *supra* note 36, at 420 (finding that FTC looks upon efficiency justifications with skepticism in defense industry mergers).

157. COLLABORATION GUIDELINES, *supra* note 9, § 2.3.

enhancing integration, then the focus of initial scrutiny on collateral restraints shifts to reasonableness.¹⁵⁸

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 (for example, criminal prosecution¹⁵⁹) and a DOD purchasing agency (for example, 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.¹⁶⁰ Determining whether an independent legal entity or a contractually created teaming arrangement serves as a “naked agreement on price or output among competitors”¹⁶¹ 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,

158. The restraint must reasonably relate both to the efficiency of the integration and the necessity of the restraint to achieve pro-competitive benefits beyond those to be enjoyed solely by the collaborators. *See Los Angeles Mem. Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1395 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). *The Collaboration Guidelines*, *supra* note 2, § 3.2, discuss “reasonable necessity” and “intertwined” collateral restraints, *id.* ex. 2. Scholars have been advising firms’ legal counsel to not only document efficiencies in collaborative agreements, but also to integrate them into the structure of the legal documents themselves in order to qualify for rule of reason inquiry. *See Kitch*, *supra* note 73, at 964; Eger, *supra* note 11, at 628-30 (proposing a checklist).

159. 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 20, at 31.205-33(f).

160. *See generally* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11; Polk, *supra* note 36. Even these authors focus more on providing guidance to private practitioners and antitrust officials at DOJ and FTC than to DOD.

161. *See* Correia, *supra* note 94, at 741-45 (comparing different analytical techniques for conducting the review).

including submission of a Certificate of Independent Price Determination¹⁶² 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.¹⁶³ It also requires knowledge of each of the numerous markets in which procurements may take place. Disagreements over the significance of efficiencies in contractor administrative costs (or their verifiability) may also complicate the review.¹⁶⁴ Finally, procurement officials may not be inclined to examine the overall competitive effect of collaborations where the market is broad and procurement competition rules (for example, “full and open competition”¹⁶⁵) 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 may be a host of plausible efficiencies gained through resource integrations. The “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.”¹⁶⁶ *The Collaboration Guidelines* require that the restraint “benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation.”¹⁶⁷ The integration may or may not 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

162. FAR, *supra* note 20, at 3.103-1, 52.203-2. *But see* discussion Section III.B, *infra*.

163. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 4-5.

164. *Id.* at 30.

165. The Competition in Contracting Act, 10 U.S.C. § 2304 (2000).

166. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 30 (commenting on merger-related efficiencies).

167. COLLABORATION GUIDELINES, *supra* note 9, § 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 73, at 963. Economists consider “externalities” (“when an investment confers benefits that cannot be captured by the firm making the investment”), economies of scale, and “transactional efficiencies.” *Id.* at 963-64.

endorsed the agreement.¹⁶⁸ Review, negotiation, and approval of teaming arrangements by contracting officers is authorized and, in some instances, required by DOD policy.¹⁶⁹ In *Northrop Corp. v. McDonnell Douglas Corp.*,¹⁷⁰ two competing fighter aircraft manufacturers teamed at the direction of DOD to design and produce the F-18 for the Navy and foreign customers. This was done because McDonnell Douglas could help 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.¹⁷¹ 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.¹⁷² *The Collaboration Guidelines* treat favorably the special benefits derived from combining unique design and production competencies and from sharing between competitors who otherwise lack access to such innovations. Moreover, in DOD procurements, meeting "national security" needs may be considered as efficiencies.¹⁷³

Firms may argue additional justifications when seeking to hedge quantity¹⁷⁴ or address time uncertainty in government procurements, as are found in contracts with options to extend, requirements (and indefinite delivery and indefinite quantity) contracts,¹⁷⁵ "systems" acquisition mile-

168. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1085 (citing Eger and Chierichella in support). *Cf.* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 9-14 (critiquing four merger cases and the unofficial testimony of DOD officials and its impact on the case).

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

170. 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983) (the court assessed the venture under Sections 1 & 2 of the Sherman Act).

171. *Id.* at 1037-38.

172. *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 135, para. 3 (noting that some services or products may not exist without collaborations due to high barriers).

173. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 28-32.

174. *See* FAR, *supra* note 20, at 7.202 (requiring agencies to evaluate appropriate quantities for per-unit savings), 7.107; 13 C.F.R. § 125.2(d) (2002) (criteria for contract bundling).

175. *See generally* FAR, *supra* note 20, pt. 11 (requiring market research regarding quantities, delivery/performance, and specifications).

stones, or Federal Supply Schedule contracts.¹⁷⁶ In *Colsa Corp. v. Martin Marietta Servs., Inc.*,¹⁷⁷ for example, 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 they re-negotiated after the Navy exercised each annual option. Collaborating with competitors on a broader or more responsive distribution system (for example, using the Internet) could also permit reductions in contingency pricing from scaling or work rotations.

Contractors may argue efficiencies by attempting to hedge the risks inherent in the contract type offered by the government,¹⁷⁸ the size and scope of the contract effort,¹⁷⁹ specification requirements,¹⁸⁰ and other factors reflected in the level of competition sought by DOD at the prime and subcontract levels.¹⁸¹ Arrangements to accommodate foreign firm participation in a procurement involving classified information can permit a U.S.

176. *Id.* 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), attachment, para. 2.b(3) (1 May 1998) (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.

177. 133 F.3d 853 (11th Cir. 1998). After Martin Marietta 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. *Id.*

178. Authorized contract types are discussed in FAR, *supra* note 20, pt. 16. 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 Chierichella, *supra* note 11, at 559 (discussing disincentives for subcontractors when certain contract types and data rights packages are elected by the government). But see Polk, *supra* note 36, at 421 (asserting that short contract periods and lowest bidding techniques may decrease barriers).

179. 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) (2002); FAR, *supra* note 20, at 1.107.

180. CHE Consulting, Inc.; Digital Tech., 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 offerors to have original equipment manufacturers support at least sixty-five percent of equipment and where the winning offeror had such support under exclusive agreements).

firm to control access to the information with the overseas firm conducting key portions of the work.¹⁸² 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.¹⁸³ Collaborations may permit or restrict information exchanges between competitors (when otherwise unlawful when not acting as a single legal unit)¹⁸⁴ or protect intellectual property brought to the contract or developed under the contract.¹⁸⁵ 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.¹⁸⁶ Finally, with civil-military integration, collaborations may accommodate the restrictive accounting rules required of contracts qualifying for accounting under the Cost Accounting Standards.¹⁸⁷

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 (that is, ancillary), *The Collaboration Guidelines* next subject the relevant agreement to a slightly more detailed review. Review begins at this point for all collaborations or agreements that lack facially per se illegal provisions. This next

181. 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.

182. See Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1068-71.

183. *Id.* at 1097 (citing to earlier version of the *International Operations Guidelines*, *supra* note 136, which accounted for political considerations); FAR, *supra* note 20, pt. 25.

184. See Eger, *supra* note 11, at 602-03 (discussing the application of the “Certificate of Independent Price Determination”).

185. See Chierichella, *supra* note 11, at 559 (discussing motivations for prime and subcontractors to contribute to innovations under government data rights rules).

186. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1097.

187. See 48 C.F.R. § 9901.305(a)(1) (2001) (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.* § 9903.201-1.

inquiry focuses on the “nature of the relevant agreement [because] the nature of the agreement determines the types of anticompetitive harms that may be of concern.”¹⁸⁸ Characteristics of certain types of agreements may cause anticompetitive harm. This level of inquiry examines “the ability or incentive to compete independently [or] . . . the likelihood of an exercise of market power by facilitating explicit or tacit collusion.”¹⁸⁹

The DOJ and FTC examine the extent to which independent decision-making is limited by the agreement.¹⁹⁰ They also examine whether the agreement requires collaborators “to combine control or financial interests [that] may reduce the ability or incentive to compete independently”¹⁹¹ or to reduce control over “decisions about key competitive variables that otherwise would be controlled independently.”¹⁹² *The Collaboration Guidelines* discuss specific types of concerns common in production, marketing, buying, and R&D collaborations (as reflected in caselaw).¹⁹³ Finally, the agencies examine factors related to oligopolistic behavior.¹⁹⁴ 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.¹⁹⁵ 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 may already have caused harm.¹⁹⁶ In those cases, DOJ or FTC will either

188. COLLABORATION GUIDELINES, *supra* note 9, § 3.3.

189. *Id.* § 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, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1092-94, and Casey R. Triggs & 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).

190. COLLABORATION GUIDELINES, *supra* note 9, § 3.31. In doing so, the agencies consider the business purpose for the agreement, as determined from “objective facts” and inferences drawn therefrom. *Id.*

191. *Id.*

192. *Id.* § 3.31(a). For a discussion of the three types of competition among participants relative to control, see McFalls, *supra* note 41, at 660-61 (discussing 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 65, at 718.

challenge the agreement (if the collaboration falls outside one of the two limited “safety zones”¹⁹⁷) or weigh the competitive benefits against the identified harm (discussed *infra* Section III.A.1.g). In other cases, “a determination of anticompetitive harm may be informed by consideration of market power.”¹⁹⁸ The review then shifts to a detailed market analysis (although some monopolistic or weak market positions of collaborators

193. COLLABORATION GUIDELINES, *supra* note 9, § 3.31(a). Production collaborations involve “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.” *Id.* For example, participants’ lack of control over per-unit (marginal) production costs transferred to them (that is, 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.* § 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 R&D collaborations, agreements that “create or increase market power or facilitate 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.*

194. 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.* § 3.31(b).

195. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, apps. D-5, D-6.

196. COLLABORATION GUIDELINES, *supra* note 9, § 3.3. “Anticompetitive harm may be observed, for example, if a competitor collaboration successfully mandates new, anticompetitive conduct or successfully eliminates pro-competitive, pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market.” *Id.* § 3.31(b).

197. *Id.* § 4. The “safety zones” are discussed at Section III.A.1.h, *infra*.

198. *Id.* § 3.31(b).

may be obvious, as where only two producers of a specialized weapons system exist).

d. Market Power and Facilitating Its Exercise

i. 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*.¹⁹⁹ Determining the market power of collaborators requires a two-step process. First, DOJ or FTC defines the relevant affected markets.²⁰⁰ 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.²⁰¹ The 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.²⁰² Scholarly application of antitrust law applicable to DOD focuses almost exclusively on these “specialized markets.”²⁰³ Decisions

199. HORIZONTAL MERGER GUIDELINES, *supra* note 28.

200. COLLABORATION GUIDELINES, *supra* note 9, §§ 3.32, 3.34.

201. *Id.* § 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 the Court 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.* *The Horizontal Merger Guidelines* test product and geographical boundaries by determining the buyers’ reactions to a theoretical nontemporary price increase of at least five percent. 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).

by procurement officials to seek competition on DOD purchases, however, include factors very similar to the criteria that define specific markets.²⁰⁴

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."²⁰⁵ Market power tends to encourage anticompetitive behavior because of the assumption of economic incentives in a competitive market.²⁰⁶ 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.²⁰⁷ *The Horizontal Merger Guidelines* use the Herfind-

202. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1056-57 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). *See also In re 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 a "defense market"); DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, 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).

203. Chierichella, *supra* note 11, at 557-58 (citing examples of reported cases within the Supreme Court's "submarket" criteria); Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, 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 & Heydenreich, *supra* note 189 (reviewing judicial distinctions between product market definitions of scheduled and unscheduled future weapons systems purchases).

204. *See infra* Section IIIB; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, 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 2, at 475-86 (proposing analytical methodology for weapons industry structural management).

205. COLLABORATION GUIDELINES, *supra* note 9, § 3.33.

206. *Id.*

207. *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.

ahl-Hirschman Index (HHI) to calculate market concentration in the affected markets.²⁰⁸

ii. 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,²⁰⁹ the agencies make adjustments for the assumption of full competition.²¹⁰ The DOD acknowledged that it “may be able to play a valuable role in assisting the antitrust agencies in defining relevant product markets.”²¹¹ 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-outs,” and many other techniques to determine if DOD possesses “buyer power.”²¹² The 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.²¹³ If the collaboration lacks

208. This index combines the total output (in prices, production, or capacity, depending on the industry conditions and available information) and assigns a percentage of that output to each firm relative to its own output. Each firm’s percentage of output is squared, and then all are summed. HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.4. In the case of a collaboration (unlike mergers), DOJ or FTC calculates a range of possible market shares. 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 (an infinite number of firms). COLLABORATION GUIDELINES, *supra* note 9, § 3.33.

209. See HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.4.

210. See *id.* §§ 1.52, 2.1, 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). The 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. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1090. See also DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 16-17.

211. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 18.

212. See *infra* note 349 and accompanying text.

213. *Id.* As civil-military integration efforts proceed, DOD’s understanding of the markets will be critical. See Triggs & Heydenreich, *supra* note 189.

sufficient market power to “reveal a likelihood of anticompetitive harm,” the review ends.²¹⁴

e. Mitigating Factors Related to Collaborators’ Ability to Independently Compete

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.²¹⁵ 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; [and]
- (f) the duration of the collaboration.²¹⁶

f. Mitigating Factors Related to Entry Barriers and Industry Conditions

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

214. COLLABORATION GUIDELINES, *supra* note 9, § 3.33. This level presumably is at twenty percent of the market output, the same level used to identify an enforcement “safety zone,” discussed in Section III.A.1.h, *infra*.

215. *Id.* § 3.34.

216. *Id.* § 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* Exclusive Teaming Arrangements Memorandum, *supra* note 169.

or counteract the anticompetitive harm of concern.”²¹⁷ Due to the secretive nature of collaborations and their complexity, the incentives for potential competitors (committed entrants²¹⁸) to react with additional competition vary. Accordingly, *The Collaboration Guidelines* adjust this inquiry depending upon the nature of the collaboration and the industry conditions. The 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.²¹⁹ Likewise, the ability of DOD to perform the work as a noncommercial competitor, as in the case of the “commercial activities” contracting out process²²⁰ and depots, may restrict anticompetitive behavior. The “power buyer” defense to anticompetitive collaborations, however, has been very narrowly applied by the courts and

217. *Id.* § 3.35. The ability of firms to enter, those that are “waiting in the wings,” may prevent existing firms from raising prices. Polk, *supra* note 36, at 421.

218. Committed entrants are firms that lack the ability (due to capacity or entry barriers) to respond within a relatively short time to nontransient increases in prices. HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.32. Uncommitted entrants are firms that can provide a supply response within one year to competitors’ nontransitory price increases without committing significant sunk costs. *Id.*

219. See DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 23 (listing techniques used by DOD to fund or otherwise support competitors); Triggs & Heydenreich, *supra* note 189, at 442-44, 448-50; Kovacic, *supra* note 2 (arguing for better DOD management of its purchasing decisions to encourage competition). A variety of provisions in the FAR, *supra* note 20, permit contracting officers to make competitively significant adjustments, including the provision of government-furnished equipment, contract financing, and data rights. See also DEP’T OF DEFENSE SYSTEMS MANAGEMENT COLLEGE PROGRAM MANAGER’S DESKBOOK § 1.8 (June 1992) (Planning Competition for Major Systems) (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) (requiring acquisition officials to ensure competition for systems components between the prime contractor’s divisions and other subcontractors and to consider purchasing systems components to provide to the prime as Government Furnished Equipment), available at <http://www.acq.osd.mil/ia>; Polk, *supra* note 36, 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).

220. OMB CIR. A-76, *supra* note 51. See also DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, 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.

is of limited value as an affirmative defense, but the underlying facts may indicate mitigation of potential harm.²²¹

g. Weighing Pro-Competitive Benefits and Anticompetitive Harm

Next DOJ or FTC identify and examine pro-competitive benefits of the collaboration in more detail than when first assessed for “plausibility” during the “limited factual inquiry.”²²² 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 judgment” to determine whether the benefits offset the potential anticompetitive harm.²²³ Depending upon the “likelihood and magnitude of anticompetitive harms,” DOJ and FTC may require the collaborators to provide more substantial evidence that the pro-competitive benefits are commensurate.²²⁴ Opinions from DOD may be decisive at this juncture. If DOJ and FTC are 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.²²⁵ The first provides that if a collaboration and its participants possess less than twenty percent market share, then a non-per se illegal collaboration will stand unchallenged. The second informs research collaborators that their collaboration will not be challenged when it is one of at least three independently controlled efforts, as defined by various criteria.²²⁶

The Collaboration Guidelines omit reference to a number of judicially created “immunities.” First, the Supreme Court reviews some boy-

221. See *infra* note 352 and accompanying text.

222. COLLABORATION GUIDELINES, *supra* note 9, § 3.36.

223. *Id.* § 3.37.

224. *Id.*

225. *Id.* § 4.

cotts 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.²²⁷ Second, the Supreme Court also established that federal regulation (when implementing a congressional mandate)²²⁸ and “state action” can immunize or mitigate a firm’s anticompetitive behavior. The Supreme Court also recognizes immunity in various situations within the context of labor laws.²²⁹ Application of these immunity doctrines involves complex application of governmental policies and fact scenarios. Thus, by necessity their application should involve DOD headquarters.²³⁰

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

226. 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 36, at 426. *See also* INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 4.3 (including nonfacially illegal restraints within “safety zone” for intellectual property licenses).

227. *See* Fed. Trade Comm’n v. Superior Court Trial Lawyers’ Ass’n, 493 U.S. 411 (1990) (public defenders’ boycott of cases to seek higher fees not immune); *City of Columbia v. Omni Outdoor Adver., 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).

228. *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. 1983), *cert. denied*, 464 U.S. 849 (1983); Fed. Trade Comm’n v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (state action). *See also* Kovacic, *supra* note 2, at 466 (arguing for DOD regulatory oversight of competition policies); Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1076-80 (discussing four methods contractors can consider in seeking immunity or assurances from DOJ or FTC that they will not take action).

229. *See, e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (discussing “statutory” and applying “non-statutory” labor law immunity).

230. 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-victims of vertical, maximum price fixing scheme); *Matsushita Elec. Indus. 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).

the appropriate level of review, but they will not be discussed further in this article.

2. Antitrust Enforcement Regime

The variety of methods for resolving antitrust concerns plays an important role in the DOD procurement process. The DOJ prosecutes anti-trust violations in federal district court as criminal (for per se violations)²³¹ or civil complaints (seeking injunctive or equitable relief), and it has a variety of civil investigative techniques to assist it in identifying alleged violations.²³² The FTC prosecutes civil complaints either in federal district court or through the FTC administrative hearing process.²³³ Private parties or a state attorney general acting in *parens patriae* alleging injury from an antitrust violation may sue in federal district court,²³⁴ or join or comment on DOJ or FTC complaints under certain circumstances.²³⁵

The DOJ or the FTC may provide business reviews to participants of proposed collaborations,²³⁶ or state objections to collaborations qualifying as mergers.²³⁷ Within DOD, collaborators may find themselves defending administrative suspension or debarment actions based on an antitrust violation.²³⁸ They may also confront overlapping investigative interests, including DOJ, FTC, auditors, contracting officers, and procurement fraud officials (such as military investigative services, inspectors general, and legal advisors). Moreover, violations of the Sherman Act or the Clayton

231. The *Antitrust Resource Manual*, *supra* note 125, outlines procedures under which U.S. Attorneys may investigate and prosecute per se criminal violations, but all prosecutions are subject to review and approval procedures within the 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.

232. 15 U.S.C. §§ 4, 25 (2000) (federal district court jurisdiction); The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Section 7A of the Clayton Act), 15 U.S.C. § 18a; The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (DOJ civil enforcement procedures).

233. 15 U.S.C. § 45.

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

235. See The Tunney Act (Section 5 of the Clayton Act). 15 U.S.C. § 16.

236. 28 C.F.R. § 50.6 (2001) (outlining DOJ authority).

237. 15 U.S.C. § 18a.

238. FAR, *supra* note 20, at 9.406-1 (causes for suspension), 9.406-2 (causes for debarment).

Act evidence themselves in many ways and may be detected by a number of personnel related to the procurement. Thus, this article considers enforcement procedures according to the various sources from which violations may be detected.

a. Contractor Notice

Only the Hart-Scott-Rodino Antitrust Improvements Act of 1976²³⁹ requires contractors to file notice with the government of its intent to form joint ventures qualifying as covered “mergers” or “acquisitions.”²⁴⁰ However, relatively few joint ventures qualify for this notice requirement.²⁴¹ Commonly, DOD may learn of a proposed qualifying joint venture informally from a contractor before filing notice.²⁴² Therefore, 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.²⁴³ As a result, DOD promulgated *Department of Defense Directive 5000.62*.²⁴⁴ The DOD 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.”²⁴⁵ “Major defense suppliers” generally are those DOD contractors servicing “major systems” or

239. 15 U.S.C. § 18a.

240. *Id.*

241. 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 where the acquisition involves more than fifteen percent of such value.

242. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 41.

243. *Id.* at 6.

244. DOD DIR. 5000.62, *supra* note 3. This Directive does not alter the 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 the *DSB Report on Vertical Integration*, *supra* note 2, app. D-2.

245. DOD DIR. 5000.62, *supra* note 3, para. 2. See also U.S. DEP’T OF THE ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 3.304 (Oct. 2001) [hereinafter AFARS] (requiring all communication related to mergers or acquisitions to travel through Army headquarters and DOD).

other specially designated procurements.²⁴⁶ While this Directive does not specifically address joint ventures qualifying for Hart-Scott-Rodino notice, the value threshold of “major defense suppliers” exceeds the filing notice threshold.²⁴⁷ 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 (that is, corporate restructuring) instead of collaborative behavior.²⁴⁸

The DOD review of horizontal or vertical²⁴⁹ 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.²⁵⁰ Second, it requires identification and assessment of interlocking webs of collaborations among all firms in a particular market affected by mergers or acquisitions.²⁵¹ 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 interest.²⁵² The trend in the past five years has been for field acquisition personnel to minimize involve-

246. *See supra* note 3 and accompanying text.

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

248. *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 7 (“The Task Force’s review is oriented toward the particular circumstances at play in the current period of industry downsizing.”).

249. In 1997, the DOD determined that *DOD Directive 5000.62*, *supra* note 3, adequately provided for review of vertical mergers and acquisitions. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 29-33.

250. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 29. The 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 2, at 32.

251. *See supra* note 84 and accompanying text.

252. *See, e.g.*, Vago Muradian, *GD-NNS Raises ‘Concerns’ Within DOD; Decision Expected Soon*, DEF. DAILY, Feb. 26, 1999 (outlining political pressure, loss of competition, and efficiencies gained through one nuclear shipyard’s purchase of the only other such shipyard); Vago Muradian & John Robinson, *Raytheon Expresses Concerns to Navy Regarding New DD-21 Team*, DEF. DAILY, Dec. 11, 1997 (outlining competitive concerns with teaming arrangement involving both destroyer builders). The DOD directed that certain exclusivity provisions be eliminated in the offers. *See* Kovacic, *supra* note 2, at 465.

ment or review of prime contractors' structural or collaborative activities ("hands-off" or "performance-based management").²⁵³

b. Internal DOD Reporting

Collaborations not involving major defense suppliers or those that do not require Hart-Scott-Rodino filing notice are subject to review at the DOD field operating level. Little to no guidance exists, however, 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.²⁵⁴ 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.²⁵⁵ Evidence of antitrust violations may be resolved through three different channels within DOD: suspension and debarment officials, a centralized procurement fraud system, and defense auditors. Each channel 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.²⁵⁶ 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 agreements."²⁵⁷ 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]."²⁵⁸ These provisions do not permit considerations of efficiencies or require specific analyses for a determination of anticompetitive harm prior to referral. For DOD con-

253. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 33-39.

254. See Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 519.

255. 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.

256. FAR, *supra* note 20, at 3.301(b), 3.303(a) (citing 10 U.S.C. § 2305(b)(9)).

257. Exclusive Teaming Arrangements Memorandum, *supra* note 169; U.S. DEP'T OF DEFENSE, DEFENSE CONTRACT AUDIT AGENCY AUDIT MANUAL para. 4.705 (Jan. 2000) [hereinafter DCAA AUDIT MANUAL].

258. FAR, *supra* note 20, at 3.303(b), (c).

tracting personnel, Defense Federal Acquisition Regulation Supplement [DFARS] 203.301 directs contracting officers to “[r]eport suspected anti-trust violations in accordance with [DFARS] 209.406-3 or 209.407-3, and DODD 7050.5.”²⁵⁹

i. 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 debarment official (SDO), as designated in DFARS 209.403. The SDOs may initiate suspension of contractors for alleged violations of antitrust laws automatically when based on an indictment, or otherwise when based on “adequate evidence.”²⁶⁰ They may initiate debarment for the same conduct, however, only when based on a conviction or civil judgment.²⁶¹ The DFARS provides no guidance to SDO’s regarding further referral to DOJ, but authorizes referral to “the appropriate Government entity,”²⁶² which most likely means DOJ when read consistent with the FAR’s mandatory notification provision.²⁶³ The FAR permits the SDO to initiate suspension and to conduct fact-finding through notice and opportunity to present matters.²⁶⁴ To find “adequate evidence” of a violation, a concept 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*. This process appears to create an investigative dilemma for both DOD and its contractors. Therefore, while SDOs and DOJ may

259. DFARS, *supra* note 20, at 203.301. See 4th Dimension Software, Inc.; Computer Assocs. Int’l, Inc., B-251936, B-251936.2, 1993 U.S. Comp. Gen. LEXIS 529, May 13, 1993 (holding that contracting officers are required to report violations of Certificate of Independent Price Determination and related antitrust violations to DOJ).

260. FAR, *supra* note 20, at 9.407-2(a), (b). See *Coleman Am. Moving Servs., 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).

261. FAR, *supra* note 20, at 9.406-2(a).

262. DFARS, *supra* note 20, at 209.406-3(a)(iv), 209.407-3(a)(iii) (authorizing referral or investigation, “as appropriate”).

263. FAR, *supra* note 20, at 3.301(b), 3.303(a). The SDOs may prefer to submit such matters to the DOJ Antitrust Division directly or to their local U.S. Attorney’s Office. See *supra* note 231 and accompanying text. In this process, the FTC is virtually omitted.

264. FAR, *supra* note 20, at 9.407-3.

legitimately reach independent conclusions, at least for charging and suspension purposes, SDOs 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.²⁶⁵ This SDO process also removes discretionary application of *The Collaboration Guidelines'* analytical framework from procurement 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.

ii. Procurement Fraud System Reporting

Related to the SDO referral report is procurement fraud coordination directed by *DOD Directive 7050.5*.²⁶⁶ This directive centralizes processing of "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 implementing regulations of DOD components may.²⁶⁷ Second, it relies heavily upon defense criminal investigative services for investigations and coordination with other law enforcement officials.²⁶⁸ Presumably, these officials are familiar with the congressional mandate to refer

265. 28 C.F.R. § 0.40 (2001) requires DOJ Antitrust Division supervision of all antitrust investigations and cases. The FAR, however, appears to authorize conflicting investigations. See FAR, *supra* note 20, at 9.407-2, 9.407-3. The two distinct investigative processes also create the possibility of different findings of pro-competitive benefits or other benefits to DOD. Because SDOs serve mostly as conduits for referral, they might defer to DOJ for such determinations.

266. 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].

267. *Id.* para. 4.3, enclosure 1. Cf. U.S. DEP'T OF ARMY, REG. 27-40, ARMY LITIGATION, para. 8-9b(3) (19 Sept. 1994) [hereinafter AR 27-40] (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 for civil recovery or equitable relief. *Id.* para. 8-7c.

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 efficiency justifications or other factors when initially referring cases to DOJ. Moreover, because “significant cases” include only those alleging losses of \$100,000 or more,²⁶⁹ procurement fraud teams unable to conduct economic analyses may omit any detailed review of even *per se* violations where amounts of loss cannot be established.

iii. 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 “anti-competitive procurement practices,” for example, while evaluating a cost estimate or pricing proposal,²⁷⁰ it must refer to different offices depending on activity type:²⁷¹ exclusive teaming arrangements and all other anticompetitive practices.

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.”²⁷² If so, the auditor must notify promptly the pertinent contracting officer and the auditor must report any unsuccessful efforts by the contracting officer to eliminate the exclusivity provision to the DCAA General Counsel.²⁷³

This procedure reflects a directive from DOD Under Secretary of Defense for Acquisition, Technology, and Logistics²⁷⁴ and a proposed

268. DOD DIR. 7050.5, *supra* note 266, para. 5.1.3. Centralized reports of “significant cases” are also submitted from the field to designated military service headquarters. *Id.* 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). AR 27-40, *supra* note 267, paras. 8-7, 8-8. However, the Army’s SDOs serve outside this Office. DFARS, *supra* note 20, at 209.403.

269. DOD DIR. 7050.5, *supra* note 266, para. 3.2. The definition includes product substitution and “corruption,” with the latter limited to bribery, gratuities, or conflicts of interest. *Id.*

270. DCAA AUDIT MANUAL, *supra* note 257, para. 9.002h.

271. *Id.* para. 4.705b.

272. *Id.* para. 4-705c.

273. *Id.*

revision to *DFARS 203.303*.²⁷⁵ The proposed DFARS change would also require reports to SDOs 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 a segment of DOD contractors.²⁷⁶ 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, the CODSIA asserts that referral to SDOs is automatic and fails to require a determination (after an opportunity to comment) of actual anti-competitive impact. Such a referral would prevent the teaming firms from being awarded the work and would be an unfair economic loss if no anti-competitive harm would have occurred. The 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, but only narrowly under the “exclusive dealings” doctrine. 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.²⁷⁷ Further, DOD guidance on exclusive teaming arrangements does not distinguish between horizontal or vertical collaborations.²⁷⁸ 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 a DOD contracting officer should make that determination, *DOD Directive 7050.5* and the proposed change to the

274. Exclusive Teaming Arrangements Memorandum, *supra* note 169.

275. DFARS Case 99-D028, 64 Fed. Reg. 63,002 (Nov. 18, 1999).

276. See generally *Industry Questions*, *supra* note 6.

277. See *supra* note 129 and accompanying text. Recall that these restraints are excluded from coverage under *The Collaboration Guidelines*, *supra* note 9.

278. Recall that the FAR definition of a teaming agreement includes both joint ventures and subcontract relationships.

DFARS appear to defer to DOJ for that function. In that case, DOJ's Anti-trust Division²⁷⁹ 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, for the teaming arrangement to be rejected, such a process would require either an indictment or injunction filed by DOJ or a non-responsibility determination by the cognizant contracting officer.²⁸⁰ 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.²⁸¹

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.²⁸² 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 may also detect, report and challenge antitrust violations involving DOD contracts. Contractor employees or members of the public at large may report violations.²⁸³ Interested competitors may also

279. This assumes full intra-DOJ coordination required by the *U.S. Attorneys Manual*, *supra* note 231, when SDOs report violations to local U.S. Attorneys.

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

281. ANTITRUST RESOURCE MANUAL, *supra* note 125, § 8.

282. DCAA AUDIT MANUAL, *supra* note 257, para. 4-705 (referring auditors to para. 4-702.4). Government sole-source awards, CICA violations, and contractor buy-ins are excluded. *See id.*

283. They also may be eligible to file qui tam lawsuits if the violation falls under the False Claims Amendments Act of 1986, 31 U.S.C. §§ 3729-3731 (2000).

sue under the Sherman and Clayton Acts when injured or challenge a contract award in federal court.²⁸⁴ These sources and remedies may not be as fruitful or effective as DOD enforcement because of the likelihood of conflicting interests. 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 because 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, Congress imposes on DOD the responsibility of seeking, “to the maximum extent practicable,” competition in its procurements. FAR Part 6, Competition Requirements, implements the basic statutory charge of The Competition in Contracting Act of 1984 (CICA).²⁸⁵ Contracting officers must seek full and open competition on DOD procurements by using competitive procedures unless certain sources are properly excluded or statutory exceptions for other than full and open competition are invoked.²⁸⁶ Government procurement personnel document these deci-

284. The General Accounting Office lacks jurisdiction to resolve bid protests based on alleged violations of antitrust law. *4th Dimension Software, Inc.; Computer Assocs. Int'l, 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 Servs., Inc.*, B-246236.4, 1993 U.S. Comp. Gen. LEXIS 4, Jan. 5, 1993; *CHE Consulting, Inc.; Digital Techs., 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 for rationality of agency actions under the Administrative Procedures Act, 5 U.S.C. § 706 (via the “Scanwell Doctrine”). Del Stiltner & Robert J. Sherry, *Son of Scanwell: Antitrust Challenges to Government Contracts Awards and Related Actions*, 17 PUB. CONT. L.J., 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 gave federal district courts and the Court of Federal Claims jurisdiction until 31 December 2000, 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 (that is, application of the Administrative Procedures Act), such challenges may have been of equally limited value to competitors.

285. 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 relating to procurements.

286. FAR, *supra* note 20, at 6.101.

sions daily, and are well equipped with legal advisors to defend against protests at the General Accounting Office or in the federal courts. The 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

The DOD's use of the CICA exclusion and exception authorities *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, DOD may award a contract under CICA to the smaller one of only two capable weapons producers on the basis of maintaining an industrial mobilization base.²⁸⁷ But, DOD's basis for award 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.²⁸⁸ Likewise, restrictions on foreign firm participation, such as those found in the Exon-Florio Amendment to the Defense Production Act of 1950²⁸⁹ do not exempt otherwise qualifying firms from competition,²⁹⁰ nor do security clearance restrictions.²⁹¹

On the other hand, the FAR contains other specific provisions that assist DOD in obtaining procurement-specific competition among both

287. Award pursuant to 10 U.S.C. § 2304(c)(3), as implemented in FAR, *supra* note 20, at 6.302-3.

288. Fed. Trade Comm'n v. Alliant Techsystems Inc., 808 F. Supp. 9, 22 (D.D.C. 1992). *See also* ALM, Inc., 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).

289. 50 U.S.C. App. § 2170 (Supp. V 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 (2001). The Committee on Foreign Investment in the United States (CFIUS) investigates each transaction.

290. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1069-72.

291. *Id.*

prime and subcontractors, including the Certificate of Independent Price Determination, and the component break-out and leader-follower provisions.²⁹² Also, a prime contractor, such as one in a teaming arrangement, cannot restrict competition among subcontractors when subcontractor competition is mandated by CICA and the FAR.²⁹³

Even the substance of contract packages may be litigated for its competitive effects on potential bidders.²⁹⁴ The procedural and substantive decisions on a procurement establish part of the competitive framework for contractors.²⁹⁵ 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.²⁹⁶ The foreign firm participation restrictions²⁹⁷ also inform the definition of the relevant market. These restrictions may appear to restrict the relevant geographic market to the United States, but the proposed collaboration expands that market worldwide.²⁹⁸

292. *See id.*; Chierichella, *supra* note 11, at 560 (listing several provisions available to DOD to enhance competition).

293. *See* Chierichella, *supra* note 11, at 558 (discussing relationship of antitrust laws to CICA-mandated competition in subcontracting).

294. *E.g.*, 10 U.S.C. § 2305 (2000); CHE Consulting, Inc.; Digital Techs., Inc., B-284110, B-284110.2, B-284110.3, 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 ¶ 351 (specifications containing geographical restrictions); DFARS, *supra* note 20, at 211.270-1 (restricting use of "brand name or equal" provisions); FAR, *supra* note 20, at 37.601, 37.501 (encouraging performance-based service contracting and using "best practices" in the contract management process).

295. *See, e.g.*, FAR, *supra* note 20, subpts. 15.1, 15.3 (cost, quality, and performance trade-offs, and evaluation criteria requirements), 32.105 (considerations for contract financing), 45.105 (Government Policy and competitive advantages).

296. COLLABORATION GUIDELINES, *supra* note 9, §§ 3.2, 3.3.

297. *See* DFARS, *supra* note 20, at 209.104-1(g).

298. *See* Kovacic, *supra* note 2, at 485-86 (discussing factors that may assist DOD in deciding to expand the geographical markets through foreign firm participation).

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 either incentives or obstacles to collaborative behavior. The DOD procurement officials do not make decisions to limit competition to achieve a specific goal 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 arrangements²⁹⁹ and encourages their use in “appropriate” circumstances (that is, when they do not violate antitrust laws and if they present advantages to the government).³⁰⁰ 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, conducting market research, and evaluating offers should include assessments of incentives to collaborate and the competitive effects therefrom. Competition advocates must better articulate this process. Finally, this process must also be effective and efficient when the application of antitrust laws fails to reach the specific conduct.

a. *Market Research*

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. Market research under the FAR 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

299. FAR, *supra* note 20, at 9.601.

300. See ALM, Inc., B-221230.3, B-221249, B-221250, 65 Comp. Gen. 405, Mar. 11, 1986; see also Kovacic, *supra* note 2, at 442, 465-66 (discussing DOD’s rejection of teaming arrangements when competitive industrial structure is implicated).

procedures shows that procurement officials should gather information traditionally pertinent to antitrust analysis during this process.

Before developing any new requirements documents 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.³⁰¹ The results are used to determine whether commercial or nondevelopmental sources exist from which the goods or services will be sought³⁰² and, if not, to consider re-defining the agency’s requirements to accommodate such sources.³⁰³ The 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 competition (and industrial structure, in general).³⁰⁴ The Office of the Deputy Under Secretary of Defense (Industrial Affairs) intends to provide nonproprietary market information on its Web site and publishes an “informational Market Analysis Handbook.”³⁰⁵ 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.³⁰⁶

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.³⁰⁷ No specific techniques that consider the use of collaborations or the specific market

301. FAR, *supra* note 20, at 2.101, 10.001(a)(2). Part 10 of the FAR 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 DIR. 5000.2-R, *supra* note 3, 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).

302. FAR, *supra* note 20, at 10.002(b).

303. *Id.* at 10.002(c).

304. Future Competition Memorandum, *supra* note 7. It is not clear that this effort extends beyond projected major systems (that is, to “commercial activities”).

305. *Id.*

306. FAR, *supra* note 20, at 10.001(a)(3).

307. *Id.* at 10.002.

influences that would induce or discourage collaborative behavior have been endorsed.³⁰⁸ Market research in acquisition planning traditionally focuses on the capabilities of firms to satisfy the functional, performance, or physical characteristics needed by DOD.³⁰⁹ The 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.³¹⁰

Market research must be conducted continually during the acquisition planning stage of a procurement, whether the acquisition is on a contract or systems basis.³¹¹ 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.³¹² 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.³¹³ For major defense acquisition programs and major automated information systems,³¹⁴ the acquisition plans must specifically include discussion of open systems architecture, incorporation of commercial/nondevelopmental items, dual-use technologies, industrial capabilities and preparedness, technical data rights, "critical product and technology competition,"³¹⁵ and foreign entity cooperation.³¹⁶ To address "critical product or technology competition," program managers must consider the

308. The FAR requires the agency to re-evaluate needs to determine if commercial items can be used, *id.* at 10.002(c), (d), and to use commercial items procedures if it can, *id.* pt. 12; otherwise, it must announce that those procedures will not be used. There are no procedures requiring research or examination of collaborative behavior.

309. *Id.* 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>.

310. FAR, *supra* note 20, at 10.002(e).

311. *Id.* at 7.105(b).

312. *Id.* at 7.105(c).

313. *Id.* at 7.105(c)(2)(i)-(iv). The 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 20, at 207.103(c)(1).

314. These systems acquisitions are a subcategory of major systems with higher projected dollar expenditures, or as otherwise designated by Congress or DOD. DOD DIR. 5000.2-R, *supra* note 3, definitions.

315. *Id.* para. 3.3.2; DFARS, *supra* note 20, at 207.103(b), 207.106.

316. DOD 5000.2-R, *supra* note 3, para. 3.3.6.2.

degree of vertical integration (including proposed exclusive teaming) of competing firms and whether sub-system competition or collaborations are most effective.³¹⁷

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.³¹⁸ 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.”³¹⁹ 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.”³²⁰ These participants should include current contractors, commercial firms, and foreign firms, all of which may enter the market through direct participation, mergers, or collaborations.³²¹ These steps will gather information that can aid antitrust tribunals in defining the relevant markets, their participants, and the competitive effects of transactions.³²²

Such a methodology would require development of substantial internal DOD economic and legal analytical capabilities,³²³ in addition to information systems needed to track the process and coordinate with DOJ and FTC.³²⁴ 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

317. *Id.* para. 3.3.2.4.

318. Kovacic, *supra* note 2, at 475-80.

319. *Id.* at 476-78.

320. *Id.* at 479.

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

322. *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 439-43.

323. Professor Kovacic likewise addresses these factors. *Id.* at 481-84.

324. The DOD addressed issues related to confidentiality and exchanges of information between the three agencies in the *DSB Report on Industry Consolidation*, *supra* note 8, at 40-43.

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,³²⁵ 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 homogeneous products. Likewise, where a collaboration of firms that produce similar services or products (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 substantial new commercial demand within the geographical area of a base with limited suppliers.

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 (for example, through the draft Request for Proposals process) and the source-selection and negotiations process often serve as the focal point for trade-offs

325. The FAR requires appointment of a competition advocate within each agency. FAR, *supra* note 20, 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 245, 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 20, at 6.501. They do not receive training or participate in antitrust oversight activities to any significant degree.

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 needs³²⁶ rather than considering long-term competition, particularly where DOD is not the sole customer.³²⁷ The challenge, then, is to provide the appropriate response when a collaboration facially contains a feature that restricts price, output, customers, or participants.

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.³²⁸ The government normally will recognize the "integrity and validity" of such arrangements and will not require or encourage their dissolution.³²⁹ In the evaluation process, source selection personnel may address the cost, quality, or performance aspects of the collaboration as it relates to the procurement.³³⁰ However, the FAR does not excuse teaming arrangements that violate antitrust laws.³³¹ If the proposal containing the collaboration provides the "best value" to the government, may the contracting officer award the contract where the collaboration contains a provision evidencing a per se illegal restraint? More

326. See Kovacic, *supra* note 2, at 469.

327. This conflict is most acute, however, where the relevant product market comprises only the current DOD procurement (for example, during "commercial activities" competitions) because the resulting contract may permanently shape future competition on similar procurements.

328. FAR, *supra* note 20, at 9.603.

329. *Id.*

330. The 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 20, at 215.304(c)(i).

331. FAR, *supra* note 20, at 9.604(a).

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 how DOD will approach this. 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 SDOs 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.³³² Under the 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 the DOJ under the DOD procurement fraud reporting system. This system requires DOJ (or FTC) to apply *The Collaboration Guidelines*, not contracting officers or their legal advisors. The DOJ will inform the contracting officer of its concerns and the contracting officer may attempt additional negotiations, as in teaming arrangements under the Navy’s DD-21 destroyer solicitation cited above,³³³ or DOJ may intervene.³³⁴ 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).³³⁵ In other cases, DOJ may use the procuring agency’s data and opinions to inform its analysis and find that the collaboration is legal. The DOD procurement officials, therefore, serve as information coordinator and negotiator on behalf

332. *Id.* at 9.604.

333. *See supra* note 252.

334. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 31 (DOD reviews horizontal and vertical mergers and acquisitions “from a customer perspective,” while only assisting DOJ and FTC with antitrust enforcement decisions).

335. FAR, *supra* note 20, at 9.104-3(c)(i).

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 frame their reports and cooperate 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 quickly and persuasively inform DOJ or FTC about DOD's needs. Under such a cooperative system, reporting and coordinating through adversarial SDO and 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 critiqued 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. The 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 con-

sumer. 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 market³³⁶ 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 systems³³⁷ and in its ability to compete against potential firms in various specialized and commercial markets.³³⁸ 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.³³⁹ These factors correlate to the additional industry-related mitigation factors outlined previously in Section III.A.

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.³⁴⁰ 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 suppliers, intervening to prevent anti-competitive conduct, and preserving interservice and interprogram rivalries within DOD.³⁴¹

All major defense systems purchases require assessments of industrial capability (including foreign cooperation) in the acquisition strat-

336. As noted above, the DOD possesses the exclusive power to create or terminate a market.

337. Future Competition Memorandum, *supra* note 7.

338. DOD DIR. 5000.2-R, *supra* note 3; OMB CIR. A-76, *supra* note 51, para. 5.

339. See Triggs & Heydenreich, *supra* note 189, at 447-48 (reviewing three factors assessed by the courts).

340. Kovacic, *supra* note 2, at 443-67.

341. *Id.*

egy.³⁴² Where commercial markets and capabilities exist and can be expected to remain for nonweapons 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, in Hypothetical A, 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 intragovernmental support agreement, the local five-firm private market remains relatively unaffected.³⁴³

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 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 regulation through "withhold[ing] 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."³⁴⁴ 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

342. DOD DIR. 5000.2-R, *supra* note 3, para. 3.3.

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

344. Chierichella, *supra* note 11, at 560. For a specific analysis of leader-follower arrangements under antitrust law, see Polk, *supra* note 36, at 446.

to make these choices and the conditions under which they may be made. But that authority does not establish the analytical methods found in anti-trust law for monitoring the competitive conditions and incentives within particular markets and industries.³⁴⁵ Moreover, as discussed above, DOD has significant latitude in defining its needs, ranging from types of specifications, to performance and delivery schedules, to design choices.³⁴⁶

Second, procurement officials can adjust the competitive framework in a solicitation package with a number of techniques. As noted earlier, contracting officers may provide for contract financing, government-furnished equipment and property, technical 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 include audit and profit analysis rights, cost accounting standards for reasonableness of transfer prices within the collaboration or competing firm segments, and requirements for contractors to certify the accuracy of their prices and costs, to limit profits under cost contracts, and to terminate contracts for convenience.³⁴⁷ The DOD also 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.³⁴⁸ Contracting officers can inject a degree of prospective management oversight of the collaboration through assessments of the present responsibility of collaboration participants,³⁴⁹ and

345. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1090.

346. *See* DOD DIR. 5000.2-R, *supra* note 3, para. 4.4.10 (requiring consideration of system design in relation to contractors’ vertical integration).

347. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1087-91.

348. Kovacic, *supra* note 2, at 461-63.

349. FAR, *supra* note 20, at 9.104-2, 9.104-4. This authority may be limited in overseas (international) procurements by treaties and host-nation laws. *Id.* at 1.102(a).

may establish pre-qualification requirements for the acquisition.³⁵⁰ Even the specific contract type and performance periods can have an effect on the ability of firms to compete.³⁵¹

All three groups of techniques have limited value in restraining anti-competitive conduct. Courts, the FTC, and scholars have rejected the notion that these tools give DOD “buyer power” status.³⁵² Rather, actual or potential competition serves as the best method for achieving cost savings and enhanced levels of quality or innovation.³⁵³ 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 bureaucratically cumbersome and adversarial, making it counter-productive. This section examines the two hypothetical collaborations to support these contentions.

350. *Id.* subpt. 9.2. *See also id.* at 9.206-3 (regarding effects on competition).

351. Polk, *supra* note 36, at 421.

352. Triggs & Heydenreich, *supra* note 189, at 447-48 (judicial analysis of DOD “buyer power” in merger cases); Polk, *supra* note 36, at 422; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1091 (these “seemingly formidable powers sometimes may supply a relatively feeble check”) (citing P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW* (Supp. 1989)).

353. Kovacic, *supra* note 2, at 424-25.

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. The 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. The DOD's plan to implement a centrally managed market research function³⁵⁴ acknowledges this shortcoming implicitly.

Market specific forces can be assessed from a variety of economic perspectives.³⁵⁵ 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" details³⁵⁶ important to DOD's role in influencing collaborative behavior and sustaining long-term 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.

Federal Acquisition Regulation 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 nondevelopmental sources.³⁵⁷ The DOD's field guidance likewise fails to address antitrust

354. See *supra* note 301 and accompanying text.

355. See Kitch, *supra* note 73.

356. This refers to the economic condition of pertinent industries and markets and the viability of participating firms' structures, strategies, and competitive positions (for example, value chains).

357. FAR, *supra* note 20, at 10.002(b).

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 operating conditions of firms that offer, or have the potential to offer, close substitutes for those products and services.

A popular method of industrial analysis for managers is Michael Porter's "Five Forces" model. In this model, Porter 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 relative selling power of suppliers to the competitors.³⁵⁸ Within DOD, only the Defense Industrial Capabilities Assessments Program includes an industrial assessment model that indirectly reflects some of these factors.³⁵⁹ When defining relevant markets, courts consider such factors as "unique production facilities" and "specialized vendors" that would be identified under this analysis.³⁶⁰ Firms with different cost structures, profit margins, production facilities, distribution networks, pricing systems, target markets, and other variables are said to form "strategic groups."³⁶¹ These factors also inform the assessment of efficiency justifications and

358. PORTER, *supra* note 52.

359. The 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 2. 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 2, at 37.

360. *See supra* note 201. 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).

361. *See* K.R. Harrigan, *An Application of Clustering for Strategic Group Analysis*, 6 STRATEGIC MGMT. J. 1 (1985).

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 (such as demographics, purchasing systems, and regulatory requirements). Many government contractors develop elaborate government marketing plans.³⁶² While competitors' marketing plans may not be particularly relevant to a particular DOD procurement official, 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.³⁶³

In Hypothetical A, detailing a 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. The miniature hanging clothes spinner and related engines, however, 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 ninety-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 the procurement, the market research provides no information about the specific relevant component markets and participants. Nor does the market research inform one 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 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

362. See, e.g., Don Hill, *Who Says Uncle Sam's a Tough Sell?*, SALES & MARKETING MGMT., July 1988, at 56-60.

363. See *supra* note 201.

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 is available from nonproprietary sources, including the volume of sales to the government,³⁶⁴ 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.”³⁶⁵ 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 noncommercial items, as well as the integration function of combining all the components into the final product. Under *The Collaboration Guidelines* framework, this information provides key insight into the ability of any likely collaboration to exercise market power both on the 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 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 rel-

364. See FAR, *supra* note 20, at 4.602; PRIME CONTRACT AWARDS, *supra* note 27.

365. Kitch, *supra* note 73, at 4.

evant 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.³⁶⁶ Further, DOD does not track coordination among acquisition managers purchasing from similar markets, 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.”³⁶⁷

For example, the micro engines and hanging spinners may qualify as “critical product and technology” under the DOD’s recent exclusive teaming guidance. Further, DOD investment in R&D of such components may give a significant 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. The extent of this benefit and the potential effects of possible exclusion of the two larger firms are unclear, however, without more detailed information and industry analysis. The DOD would feel the consequence of these effects in follow-on procurements where the industry conditions may have been changed as a result of the procurement. The 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 of 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.³⁶⁸ 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.”³⁶⁹ This is

366. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 33.

367. *Id.* at 37. The 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 2, at 25.

368. Kovacic, *supra* note 2, at 469.

369. *Id.*

not to say, however, that DOJ and FTC lack vital information that may assist DOD on industry or market conditions.

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

The 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's Industrial Affairs management team in the weapons systems industrial segment. As discussed above, the team concluded that short-term procurements and their competitive framework in weapons research and development must be made within a strategy 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."³⁷⁰ 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."³⁷¹ 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."³⁷²

In Hypothetical *B*, concerning a teaming arrangement for base services at Fort Anywhere, the contracting officer learns that there are firms

370. FAR, *supra* note 20, at 7.105.

371. *Id.* at 7.101.

372. Kovacic, *supra* note 2, 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 2, app. F-4. See also U.S. GENERAL ACCOUNTING OFFICE, REPORT, CONTRACT MANAGEMENT: RULES AND RESPONSIBILITIES OF THE FEDERAL SUPPLY SERVICE AND FEDERAL TECHNOLOGY SERVICE, GAO-02-560T (Apr. 2002); U.S. GENERAL ACCOUNTING OFFICE, REPORT, DEFENSE ACQUISITION: DOD FACES CHALLENGES IN IMPLEMENTING THE BEST PRACTICES, GAO-02-469T (Feb. 2002); U.S. GENERAL ACCOUNTING OFFICE, REPORT, BEST PRACTICES: TAKING A STRATEGIC APPROACH COULD IMPROVE DOD'S ACQUISITION OF SERVICES, GAO-02-030 (Jan. 2002).

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 supply requirements exceed the capacity of local distribution networks (as the installation provides for its own intake and warehousing of supplies). 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 contract value 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, “considerations” of contract terms, management information systems required for contractor oversight, government-furnished property, logistics concerns, and other variables.³⁷³ 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 nondevelopmental 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,³⁷⁴ the local plumbing market will dramatically change with the additional demand of plumbing service equivalent to ten 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 ten plumbers leaving the installation’s employment will be privileged with the 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-

373. FAR, *supra* note 20, at 7.105(b).

374. For simplicity, this scenario ignores requirements to maximize small business participation and assessments of bundling required by FAR 7.105(b)(1) and 7.107.

rata basis. In yet another scenario, 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 because they shape industry operating structure.

The installation contracting officer may or may not emphasize long-term 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 the 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 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 its removal 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 pro-competitive collaborations by DOD contractors. Firms and government officials acknowledge that firms avoid collaborations 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.³⁷⁵ Second, conflicting representations among DOD, DOJ, and FTC officials causes additional uncertainty for firms in predicting the government's reaction to proposed collaborations.³⁷⁶ 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.³⁷⁷

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 Hypothetical *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 Hypothetical *B*, the teaming arrangement among the five small plumbing firms constitutes a per se illegal market allocation of services in the local markets.³⁷⁸ Further, both hypotheticals appear to contain provisions that are questionable in nature even though not per se illegal. In Hypothetical *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 Hypothetical *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

375. COLLABORATION GUIDELINES, *supra* note 9, pmb1. See also U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992) (dissenting statement of Commissioner Mary L. Azcuenaga on the issuance of horizontal merger guidelines).

376. Kovacic, *supra* note 2, at 484-85.

377. See Chierichella, *supra* note 11, at 560.

378. 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 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).

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 complaints about the recent DOD guidance (and proposed DFARS change) on exclusive teaming arrangements concerns this very point. The 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. The 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 make a determination that the offerors whose proposals contain these provisions are not responsible. This would delay both procurements while the reports are evaluated by the various military and DOJ channels. The 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.³⁷⁹ Moreover, 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 adverse to potentially beneficial collaborations. Procurement officials lack the expertise to make competitive effects assessments and, as a consequence, inaccurate reports (or a 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.

379. This assumes sufficient facts and that a competitive effects analysis was done initially by DOD for that purpose.

B. Proposed Review and Coordination Procedures

The 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, however, to implementing any meaningful change across all DOD procurement markets.³⁸⁰ 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 its economic and legal expertise. To avoid impinging upon the enforcement authority of DOJ and FTC, DOD has declined to do either since the 1994 Defense Science Board Report.³⁸¹ In addition, DOD must recognize that its interest in many relevant nonweapons 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.³⁸² 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

Any proposed solutions must account for the procedural gaps and the obstacles preventing effective use of collaborative contractor activity. Accordingly, the solutions 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 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

380. Professor Kovacic has framed the first two. Kovacic, *supra* note 2, at 475-84.

381. *See supra* note 8.

382. The impact of DOD procurement and employment decisions on local markets became apparent during the Base Realignment and Closure process, resulting in enactment of The Base Closure and Community Assistance Act of 1994, Pub. L. 103-160, div. B, tit. XXIX, subtit. A, § 2901, 107 Stat. 1907, and The Base Closure Community Redevelopment and Homeless Assistance Act of 1994, Pub. L. 103-160, div. B, tit. XXIX, subtit. A, § 2903(c), 107 Stat. 1915. *See generally* 10 U.S.C. § 2687 note (2000); U.S. Department of Defense, *Office of Economic Adjustment*, at <http://emissary.acq.osd.mil/oea/home.nsf> (last visited Apr. 30, 2002).

policies. And 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

First, DOD could simply maintain the status quo to include, perhaps, implementing Professor Kovacic's or similar proposals for management of the weapons system industrial base.

b. Option 2: Comprehensive DOD Economic and Antitrust Program

Second, the 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 (for example, \$500,000) would require procurement officials to obtain a detailed industry analysis from DOD headquarters as part of their 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 in the solicitation (for example, whether to require subcontract competition). The central office would review any proposed or executed collaborations among contractors to assist procurement officials in negotiating or exchanging information with offerors. The central office would approve efficiency justifications to suspected per se illegal agreements and determine 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.³⁸³

c. Option 3: Decentralized “Centers of Excellence”³⁸⁴ and Proactive Cooperation

Third, the 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.³⁸⁵ All such analyses would be subject to market participant input.³⁸⁶ 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 above a presumptive threshold, they would obtain such analyses for the relevant markets and prepare the acquisition plan.

As in Option 2, procurement officials would screen the various monopsony powers against competitive conditions in those relevant markets. To assist procurement officials in assessing the competitive effects of various types of collaborations during the information exchange and negotiation phases, DOD would not conduct conclusive antitrust analyses

383. The DOJ or FTC would determine whether a case fell within a “safety zone” or qualified for some other immunity. The 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 8, at 1; see also Kovacic, *supra* note 2, at 484.

384. The author did not coin this phrase and cannot locate its origin. It has been used within DOD for several years. See, e.g., U.S. Army Corps of Engineers, *Services for the Military/Centers of Expertise*, at www.usace.army.mil/military.html#Expertise (last visited Apr. 30, 2002). The author adopted the term from U.S. Army Reserve organizational management proposals.

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

386. 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 2, at 37.

internally. Rather, DOD would establish more responsive and nonadversarial collaboration review procedures with DOJ and FTC. Review requests would be routed through DOD headquarters to the appropriate DOJ and FTC review offices (to decide whether DOJ or FTC will review the collaboration).

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*. The 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 DFARS directives. This article recommends Option 3, and it proposes corresponding collaboration review and coordination procedures in the Appendix.

2. Evaluation Criteria

Any proposed structural or procedural change must be evaluated by an objective measure. Four discrete measures are appropriate for evaluating DOD Contractor Collaborations.

a. Transparency & Predictability

The DOD's procedures for conducting market and industry analysis and for its review of collaborations must be both transparent and predictable. Transparent procedures permit input from interested parties and hold decision-makers accountable for demonstrating consistently applied principles and articulating the rationale of their decisions. Because firms react to actual and signaling behavior of market participants, DOD's procedural and substantive procurement use of thorough industry and market analyses must be transparent.³⁸⁷ Such reactions can be reflected by formal input to DOJ or FTC antitrust reviews or by 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 should lend predictability to those most affected.³⁸⁸

b. Efficiency and Flexibility of the Procurement Process

Administrative processing, reviews, and procedures for procurements should be designed to be efficient³⁸⁹ and flexible for the DOD purchasing agency.³⁹⁰ 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 provide the best time for exercising monopsony powers to achieve the best competitive conditions for DOD. Prompt review and coordination would preserve competitive conditions and protect DOD when competitor conduct occurs outside the solicitation and award timeframe. Review of incentives to collaborate and resulting collaborations also must serve both a planning function and an enforcement function. Therefore, 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.

387. Kovacic, *supra* note 2, at 484-85; FAR, *supra* note 20, at 1.102-2(c).

388. See U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992) (dissenting statement of Commissioner Mary L. Azcuenaga on the issuance of horizontal merger guidelines) (criticizing the lack of "simplicity, feasibility, and predictability" in the guidelines and stating, "To have a predictive value, enforcement guidelines must accurately reflect how the agencies analyze mergers and how they respond to different sets of facts"). See also DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 44 (Wall Street's concerns with defense industry includes "too many surprises—they want predictability.").

389. FAR, *supra* note 20, at 1.102-2(b), (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 8, at 41.

390. FAR, *supra* note 20, at 1.102-2(a).

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.

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. Assessing 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,³⁹¹ there has been no reported study estimating the number of false positive or nonreported 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 preferences for use of “commercial items” eliminates some government contract-

391. See Kovacic, *supra* note 2.

unique barriers to entry by nontraditional 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 (that is, short-term) competition goals, for example, 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

The DOD recognizes its significant role in monitoring national security and ensuring that adequate national resources exist to satisfy its needs.³⁹² 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. The DOD remains under pressure, however, to assume more responsibility for the competition monitoring function for monopsonist defense markets.³⁹³

Given the trends noted in this article, such a function carries with it a broader mission than weapons systems. The DOD may possess near-monopsonist or oligopsonist powers in many nonweapon system commer-

392. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1.

393. Professor Kovacic's scholarship and CODSIA's recommendations evidence this trend.

cial or nondevelopmental 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, to review acquisition plans designed to incorporate those analyses, and to 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 would reduce the number of internal DOD participants and provide predictability to users and contractors.

To be fully transparent and predictable, however, the three agencies must reconcile their positions on information laws as they pertain to application of antitrust and industrial base analyses to procurement decisions. The DOD may be constrained specifically by interpretations of the Freedom of Information Act,³⁹⁴ the Trade Secrets Act,³⁹⁵ the source selection and evaluation provisions of CICA,³⁹⁶ and the Hart-Scott-Rodino Antitrust Improvements Act.³⁹⁷ Moreover, it may need to re-examine its information management procedures to properly integrate proprietary and nonproprietary information into usable analyses.³⁹⁸

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 would significantly reduce sequential and potentially contradictory reviews from within DOD and from either DOJ or FTC. Contracting officers may also receive more prompt and consistent

394. 5 U.S.C. § 552 (2000).

395. *Id.* §§ 552(b)(4), 1905.

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

397. 15 U.S.C. § 18a (2000).

398. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 42.

economic and antitrust advice during the pre-award phase of a procurement.

What is gained through central analyses and technical review, however, may be diminished through inflexibility and loss of intra-DOD innovation.³⁹⁹ The current decentralized DOD procurement structure permits business decisions at the lowest level necessary⁴⁰⁰ and competition for work among various DOD activities. Centralized conduct of 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. Thus, this approach necessitates expanding the function beyond a few additional personnel.⁴⁰¹ 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.⁴⁰² Second, it would require a dramatic change from decentralized management practices that might have unanticipated management or technical spillover effects. The DOD currently recognizes the problems inherent in the decentralized system, chiefly the lack of technical expertise of the acquisition workforce in this area.⁴⁰³ 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.⁴⁰⁴

On the other hand, this point illustrates that a centralized approach provides the most direct benefits to both short-term and long-term compe-

399. Professor Kovacic argues for continued interservice and interprogram rivalries. Kovacic, *supra* note 2, at 466-67.

400. By the Heads of Contracting Activities for certain acquisition plans.

401. Professor Kovacic recommends such a support structure. Kovacic, *supra* note 2, 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.

402. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1; DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 30-31; Schwartz, *supra* note 105.

403. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 33-36.

404. Kovacic, *supra* note 2, at 466-67 (arguing for decentralized acquisition workforce to promote innovation).

tion. The incentives for a field 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

The final 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 levels, a review and enforcement system must reflect this fact by necessity.

A decentralized approach presents different efficiencies for market and industry analyses than for collaboration review and enforcement. It requires an elaborate web of “centers of excellence” to conduct or maintain market and industry analyses. 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 or not DOD adopts a “Five Forces” model⁴⁰⁵ into DOD-wide industry analytical standards and incorporates all of the Supreme Court’s sub-market definition “indicia” into market analysis, some standards would be required. In addition, the Office of the Deputy Under Secretary of Defense (Industrial Affairs & Installations) (DUSD (IA&I))⁴⁰⁶ or military service designates would have to provide DOD-wide visibility of offices capable of conduct-

405. See *supra* note 358 and accompanying text.

406. For the mission statement and charter of this DOD Office, see their Web site at <http://www.acq.osd.mil/ia>.

ing 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 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 could add significant negotiating leverage to enhance competition. Further, clear reporting and enforcement standards throughout the DOD procurement process would enable contractors to accurately predict the three agencies' responses. Compared to a centralized approach, however, the sequential review process at DOD headquarters and DOJ or FTC would add an additional procedural hurdle, but one that is more controlled than the many alternative and adversarial variations that presently exist. Although the DUSD (IA&I) and DOD General Counsel provide a bottlenecked conduit to DOJ or FTC, they add value to the process with substantive counsel and 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. While assessing industries and tracking collaborations, DOD procurement personnel would also have the opportunity to conduct these analyses and interact with both DOD headquarters and DOJ or FTC.

While the predictive value of collaboration reviews under such a system may be slightly less than a centralized model, established standards and review procedures would make those decisions sufficiently transparent for contractors, end users, and other stakeholders (such as politicians). The flexibility to make acquisition planning and monopsony decisions at the operating level would also compensate for any loss in predictive value.

Implementing this approach would be challenging. Again, the industry and market analyses can be distinguished from the collaboration review and reporting components. To be effective, procurement officials must be trained in established industry and market analyses techniques. These training and monitoring costs could be substantial, but DOD already has committed itself to these investments. As previously noted, DOD recently announced plans to develop market analysis handbooks to be posted on the DUSD (IA&I) Web site. It also directed the addition of industry-compet-

itive factors at DOD educational institutions, including the Defense Acquisition University. Just as workforce training and re-training always constitute a management imperative, procurement personnel would require training in use of market and industry analyses conducted under the centralized approach.

Implementing collaboration review and reporting procedures would require much less effort. The pro-competitive benefits and deterrent effects of clear standards and procedures significantly outweigh the cost of a regulatory change to the 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 one person 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 explain why government contracts attorneys receive little to no formal training on anti-trust law at military service schools, save infrequent instruction at procurement fraud courses. This deficiency should be addressed, and horizontal and vertical restraints doctrine should be incorporated into basic contract law and procurement fraud courses.

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 could also provide a significant tool for informing 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, allowing these agencies to maintain autonomy in their areas of expertise and statutory function, in addition to monitoring information related to their decisions. Together, the three agencies could enhance national competition goals at a modest cost, a cost which must be lower than that caused by the government’s current lack of long-term competition management. One challenge to such a system may be that neither DOJ nor FTC possesses 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. Yet two factors refute such challenges. First, DOJ and FTC provide legal counsel and litigation service to federal agencies and are proscribed only from pro-

viding advisory opinions to private parties.⁴⁰⁷ 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.⁴⁰⁸ As set out in this article's Appendix, similar information can be obtained by and coordinated through DOD procurement officials.

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 (Option 1). Option 2, however, is not politically feasible, it encourages inflexibility, and it detracts from the business expertise and innovative potential now developing in the decentralized acquisition structure. While Option 3 suffers from administrative burdens that require detailed assessment by DOD leaders, it also provides the most realistic and workable solution.

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

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

407. 16 C.F.R. pt. 803 (2002); 28 C.F.R. § 50.6 (2001).

408. 16 C.F.R. pt. 803.

between Options 2 and 3 are the concentration of analytical personnel and the costs of 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 extensions and savings from resulting competition while 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 fifteen to thirty days.⁴⁰⁹ Thus, review and coordination of proposed collaborations during contracting officers’ exchanges of information or proposal evaluations would not add substantial time to the process.

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. Option 2 favors consistency in DOD antitrust policy over consistency in national competition policy, and it may also foster internal conflicts between budget officials, procurement officials, and law enforcement officials because an SDO might disagree with a central collaboration review official. In contrast, Option 3’s “centers of excellence” approach disseminates market research skills, specialized industry knowledge, and improved business judgment 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 consis-

409. 15 U.S.C. § 18a (2000); 16 C.F.R. §§ 803.3, 803.10. This constraint includes DOD review of a merger or acquisition when it involves a major defense system contractor. It excludes, however, up to twenty additional days when DOJ or FTC file a “second request” for additional information. 15 U.S.C. § 18a(e).

tent and meaningful signals to DOD contractors whose protests remain 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 challenges to DOD contracting practices and procurement decisions when antitrust review is applied to collaborations. The analytical framework used to evaluate collaborations takes these factors into account in assessing efficiency justifications and their relationship to a collaboration's pro-competitive benefits, the relevant markets and market concentration, the industry conditions, and the barriers to market entry. The FAR and the DFARS, however, fail to provide effective procedures for reporting, reviewing, and enforcing these factors. Further, given the results of an antitrust review of potential collaborations, DOD lacks effective procedures to assess and incorporate those results into particular procurements or to use the results to better inform its buying decisions and practices.

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

The option of retaining the current regime aside, DOD should explore two alternative solutions to close these procedural gaps. While a centrally managed, DOD industry and market analysis function and antitrust review activity would provide the most predictable, transparent, and efficient system, this approach is not feasible. Instead, DOD should follow a decentralized "centers of excellence" approach to market and industry analyses and a modified, proactive collaboration review process among DOD, DOJ, and FTC to effectively improve DOD's ability to balance its short- and long-term, competition-enhancing procurement strategies.