

Lockheed. "Good faith" necessarily requires that negotiations take place in a timely manner. Northrop could not be considered to have acted in good faith if it unreasonably delayed negotiations in order to give its own team an advantage in a particular competition. I also note that your proposal does not state whether negotiations must be started, or finished, within the requisite 30-day period; if it is the former, that would not protect Lockheed from delays during the negotiations themselves, and if it is the latter there will always still be questions as to which party was responsible for there being no final agreement in the allotted time. In either case, Lockheed's protection will come from the broad duties imposed on Northrop and the enforcement provisions already endorsed by Lockheed.

Your letter next requests that Section IV.B(3) be stricken or modified. That section limits Northrop's obligation to provide payloads to all satellite system primes in the event that the number of primes seeking the payload, or the burden of working with each of them, becomes unreasonably large. This section recognizes that Northrop's resources, including facilities and human capital, are not unlimited. Given the scarcity of human capital in highly demanding technical fields, as well as budgetary constraints at the Department of Defense (DoD), forcing Northrop to form teams with every company that seeks its services, under any and all circumstances, could result in inferior products, and may not be in the best interests of DoD. In such an event, the decree provides that the Secretary of the Air Force shall determine Northrop's teaming arrangements. You propose that the circumstances in which the provision may be invoked be listed in the decree. We believe, however, that it would be unwise to attempt to predict all of the circumstances that could arise in future competitions. The decree provides the Compliance Officer with the necessary flexibility to make this determination when and if it becomes necessary. You also propose that prime contractors be notified if the provision is being invoked. We see no reason to selectively create a separate notice requirement for this particular provision, since prime contractors should know if Northrop is refusing to enter into teaming negotiations with them and will have the opportunity to bring that fact to the attention of the Compliance Officer, who will be reviewing Northrop's actions, and interacting with industry, on a continuing basis.

The next concern in your letter relates to the term "discriminate." Definition N of the Final Judgment provides in part that "[d]iscriminate' means to choose or advantage Northrop, or to reject or disadvantage a Northrop Prime or Payload competitor, in the procurement process for any reason other than the competitive merits." You state that the use of the phrase "other than the competitive merits" creates a loophole that will permit Northrop to evade its responsibility not to discriminate. This claim misunderstands the purpose and effect of this provision. The purpose of the clause is to permit Northrop to continue to choose its teammates in an efficient and procompetitive manner, while preventing it from engaging in anticompetitive conduct. Prior to the acquisition, Northrop and TRW chose their teammates based in part on considerations such as which teammates offered the best terms and provided the greatest likelihood of ultimately winning the contract. The Final Judgment is not intended to radically change the manner in which such teaming decisions have been made in the past, but to preserve the existing teaming dynamics, by preventing Northrop from basing its decisions on the opportunity to