

Federal Subcontracting: Non-Disclosure Agreements (NDAs), Teaming Agreements (TAs), and Subcontract Agreements: Limitations and Liabilities



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**Alexandria Small Business
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**Federal Subcontracting: *Non-Disclosure
Agreements (NDAs), Teaming Agreements
(TAs) and Subcontract Agreements:
Limitations and Liabilities***

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Agenda

- Objectives
- Purpose of an NDA
- NDA Criteria for Enforcement
- Laws, regulations, and common practice applicable to NDAs
- What is a TA
- Purpose of TAs
- Strategy Point of a TA/Exclusivity
- Key Terms and Conditions – TAs
- TA Statement of Work
- Subcontract Agreements
- Key Terms and Conditions – Subcontracts
- Some things to do and not to do



Objectives

- ❖ Provide an understanding of the purpose and value of NDAs, TAs, and Subcontracts
- ❖ Provide an overview of laws, regulations, and common practice applicable to NDAs, TAs, and Subcontracts
- ❖ Identify some of the issues and pitfalls associated with the three (3) agreements



Purpose of an NDA

- Create a framework, *legally binding written agreement*, under which the parties can discuss their “future” relationship by *exchanging information that cannot be disclosed*
 - Proprietary information is to be disclosed on a need-to-know-basis
 - Proprietary information must be protected from public disclosure
- Types of Proprietary Information that should be protected
 - Technical data, Cost or pricing data, and any other information that is designated as proprietary to either party
 - Govt. required to protect if marked
- NDAs are also known as:
 - Proprietary Information Agreement (PIA)
 - Confidential Disclosure Agreement (CDA)
 - Confidentiality Agreement



NDA Criteria for Enforcement

- For the NDA to be enforceable:
 - It must be in writing
 - All documents must be clearly marked as “protected”
 - Must have notes or minutes of conversations made under the NDA
 - Must protect information or product which was discussed under the NDA for the term identified in the agreement
 - Must define the parties and the program explicitly
 - Legal Name
 - No “TBDs” or “to follow after receipt of RFP”
 - NDA must be incorporated into the TA



Laws, regulations, and common practice applicable to NDAs

- Key Terms:
 - Information must be reduced to writing and marked accordingly
 - Limitations of Liability (reduce or eliminate the potential for direct/consequential/special, incidental and indirect damages should there be a breach of contract, if reducing be sure to include a cap in the language)
 - No Warranty of Data – “as is”
- Failure to memorialize discussions in writing and mark them appropriately negates the protections of the NDA
- If you do not intend to reduce your discussions to writing, do not disclose proprietary information

Is it common practice to execute a Non-Compete Agreement at the NDA stage? NO, and here's why.....an NDA does NOT form a business relationship.



What is a TA?

- It is a **Contract** under which a potential prime and subcontractor propose to pool resources to obtain and perform a government contract. Typically states to pursue a single business opportunity or a related group of opportunities
- It specifies the responsibilities of both parties prior to award of the prime contract and subcontract
- It describes the type of work that will be awarded to the subcontractor in the event a prime contract is awarded



Purpose of the TA

- Allows contractors to team for the benefit of the Government – to allow the contractor to build capabilities and to give the Government the best combination of cost, performance, and delivery
- A competent, smaller business may obtain access to government business that would otherwise be denied to it by teaming with the larger prime in bidding for Federal Government work
- The objective is to offer the strongest approach to satisfy the customer's requirements and winning the contract

KEY POINT: The driving force behind all TAs are Value and Capability.



Strategy Point of a TA/Exclusivity

Prime Contractor's Perspective:

- The Prime wants to obtain the best talent in all critical areas, and to develop competitive superiority by preventing its competitors from having access to the most critical suppliers.

Subcontractor's Perspective:

- The Sub wants to ensure that if they contribute their resources, learning, reputation, and proprietary information to the Prime, that they will receive a fair amount of work-share, and that they will not be overlooked in favor of a lower cost supplier or in-sourcing to the Prime.

In other words: Primes want exclusivity and Subs want a guarantee of work.

****Exclusivity is OK** when necessary to induce parties to contribute their resources to the effort AND secure the commitment and undivided loyalty of the parties.

****Exclusivity is NOT OK** when it is solely meant to take a subcontractor “off the street” – Anti-Trust Laws (See FAR 9.604)

The “test” will be (a) whether there still exists meaningful competition, and “b) whether the effect of the collaboration is enhanced product competition.



Key Terms and Conditions – TAs

- Identifying the parties
- The ‘Whereas’ clauses – Describes each party’s complementary capabilities
- Purpose of the teaming agreement – Program or Project
- Non-Disclosure Agreement (Exhibit)
- The duration of the teaming agreement
- Statement of Work – Exhibit A
- Financial Obligations and or Relationship
- Good Faith Negotiations to award a Subcontract – A clear statement that, pursuant to the teaming agreement, the prime contractor “shall” subcontract with the prospective subcontractor
- Government Approval of the Subcontractor
- A modified termination for convenience clause – Extent that government terminates prime contract for convenience



TA Statement of Work (SOW)

- Purpose of the SOW
 - What will be the working relationship of the parties during the proposal phase and after contract award, what are the expectations?
 - Describe the Work/Opportunity (i.e., Hunt and Kill – IDIQ, Reference SOW paragraphs, Percentage of Hours, Labor Categories)
 - Leverage your capabilities into REAL work (plan in advance what you are looking for and then negotiate for it...during the TA phase you have significant leverage)



TA Statement of Work (SOW) cont.

- Typical Clauses for SOW (Exhibit A)
 - It is understood that ABC Corporation's ability to allocate work to XYZ Inc. (sub) is dependent on (1) the amount of work that is actually ordered by the Government under the prime contract, and (2) the amount of work ordered by the Government that falls within the task area(s) designated above as XYZ, Inc. support
 - It is further understood that allocation of work to XYZ, Inc. by ABC Corporation will also be dependent on continuing satisfactory performance of the subcontracted work by XYZ, Inc. pursuant to the terms of any resultant subcontract and the ability of XYZ, Inc. to offer a competitive cost structure in their proposal, as well as during subcontract execution.



TA Statement of Work (SOW) cont. – Definitive Tasks

What Do You Think????

Exhibit A

Statement of Work for XYZ, Inc.

It is expected that the scope of work for XYZ, Inc. on the DoL follow on Program Management and Engineering Support contract for the “OFCO Cyber Security Task” and the system development team at “DoL” will include software engineering support. **The actual level of effort and detailed SOW cannot be determined at this point and will be negotiated following release of the Government Request For Proposal (RFP).**

NO NO NO NO!!!!

It is not clear as to what XYZ (as a Subcontractor) is going to provide under the TA.

If the large prime insists on this statement, at a minimum the following statement should be added: “A bi-lateral modification to this SOW will be issued upon release of the Final RFP.”



TA Statement of Work (SOW) cont. – Definitive Tasks

What Do You Think????

Exhibit A

Statement of Work for XYZ, Inc.

The Subcontractor **shall** provide technical services as described in the following tasks:

- Under sub-task 2, Perform independent validation of OCFO information systems following generally accepted audit protocols to ensure full compliance to the Federal Information Security Management Act of 2002 (FISMA), the Government Accounting Office Federal Information System Controls Audit Manual (FISCAM), and OMB Circular A-123 requirements.
- Under sub-task 3, Provide system administration for predominately Microsoft Windows server operating systems within a VMware virtual hosted environment as well as provide network services as needed on Cisco Systems switches (infrequent task).
- Provide a Agency Integration Center Technical Director, and an Agency Liaison (AL) and an Agency Maintenance Expert (AME) each with the following specific tasking:
 - XXXXX
 - XXXXX

CORRECT!!!

It lists specific tasks or areas of work to be performed by you, the subcontractor. May also list labor categories identified in the RFP.



TA Statement of Work (SOW) cont. – Indefinite Delivery/Indefinite Quantity (ID/IQ)

- Always reference RFP's SOW Paragraphs

Example:

Subcontractor shall provide the following:

- Engineering to define, implement and maintain the software and test tools (Reference SOW paragraph 3.1)
- Support the Government IV&V as needed (Reference SOW paragraph 5.5)
- Support for establishing the software support activity (Reference SOW paragraph 11.0)
- Support as needed in the area of training and training documentation (Reference SOW paragraph 12.0)
- General Systems engineering support and software development support as needed.
- Accepting a **“Cut and Paste”** job or allowing the Prime Contractor to simply **“insert”** the whole SOW from the RFP can be confusing and risky.



Pitfalls in teaming with large primes

- Prime may not always be acting in good faith
 - Be sure that the SOW is clear, concise and adds value for your company
 - TBDs or “To Be Determined” is NOT ACCPETABLE
 - Ensure that NON-SOLICITATION clause are included in your TA terms....Large primes will try and steal your employees
- Look out for **“to the extent deemed necessary and appropriate”** and other “wishy washy” wording

Case law supports the proposition that an agreement to negotiate in good faith does *not* require that a final agreement actually be achieved but only that the parties work to reach an agreement “actively and in good faith?” To reinforce the intent, the agreement should contain a detailed SOW to be completed by the subcontractor in event of award AND have attached a formal subcontract agreement. The teaming agreement should clearly state that, if Prime is awarded the prime contract, then Prime would, “within five (5) business days from date of award...enter into the subcontract attached to this Agreement.



Subcontract Agreements (Subk)

- If you've negotiated a solid TA, then the subsequent Subk will be easily negotiated because most of the critical terms have already been addressed
- The Subk will supersede the TA so be sure that all of the important terms of the TA are included in the Subk, such as the SOW, period of performance and level of effort, etc.
- Regardless of any teaming disclosure, the government will hold the prime contractor fully responsible for performance under the prime contract



Key Terms and Conditions – Subcontracts

- Compensation
 - Will have been addressed in your cost proposal but should be spelled out in the subcontract to avoid confusion
- Invoicing and Payment
- Project Management and Personnel Supervision
- Prime – Subcontractor Dispute Resolution
- Responsibility for Govt. Shut-Downs (heightened focus), Inclement Weather
- Inspection and Acceptance of work (products)
- Responsibility for Performance Delays
- Term, Termination, Stop Work Order
- Non-Solicitation of Employees/ Non-Compete Clauses
- Flow down Clauses
- Statement of Work



Some things small businesses should do

- Be sure that NDA is negotiated and fully executed prior to sharing proprietary information
- Bring something unique to the table
- Negotiate up Front AND with the Decision Maker
 - A potential subcontractor loses negotiating leverage once the Prime Contract is awarded
- View the value of the TA as CRITICAL. It is the 1st opportunity to define the prime/sub relationship
- Shoot for tangible work-share that is clearly identified in the TA SOW
- Insist on a TA that requires you to be awarded a Subcontract
- Subcontract supersedes the TA so make sure that all important terms of the TA are included in the Subk (i.e., SOW, PoP, LOE)
- Be careful that new and materially different terms imposing additional obligations and restrictions on your company don't creep into the subk



Some things small businesses should not do

- Details are KEY to enforceable agreements. DON'T forget the DETAILS
- Do NOT accept one-sided NDAs, always demand that the terms are equally binding on both parties
- Do NOT accept prime contractor language in the TA that talks in terms of "Targets" and "Goals"
- Do NOT accept TBD language in TA SOW unless it is prior to RFP release
- Do NOT let the subcontract terms and conditions take all that you've worked for away. EXAMINE the subcontract carefully, compare to the TA.

START  MANAGE  GROW 

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