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# *Non-Disclosure Agreements and Teaming Agreement: Limitations and Liabilities*

National Contract Management Association  
Potomac Chapter Dinner Meeting

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## Presenters

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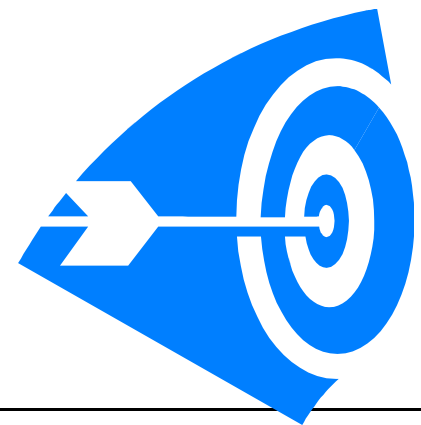
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# AGENDA

- I. Objectives**
- II. Non-Disclosure Agreements**
- III. Teaming Agreements**
- IV. Definitions**



# OBJECTIVES

## **This training will include:**

- What is a Non-Disclosure Agreement (NDA)?
- What is a Teaming Agreement (TA)?
- Purpose and Importance of NDAs and TAs
- Anti-Trust Laws Applicable to TAs
- Review and Approval of NDA and TAs

## **This training will not include:**

- Foreign or Inter-Company NDAs or TAs
- Partnerships, Joint Ventures, Strategic Alliances
- Mentor-Protégé Agreements

# NON-DISCLOSURE AGREEMENT (NDA)

Also known as:

- Proprietary Information Agreement (PIA)
- Confidential Disclosure Agreement (CDA)
- Confidentiality Agreement
- Secrecy Agreement

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"This just says you won't reveal anything about our nondisclosure agreement."

# PURPOSE OF AN NDA

- A formal, *legally binding* written agreement under which a potential prime and supplier exchange information that cannot be disclosed.
- An NDA specifies the responsibilities of both parties prior to award of the prime contract and subcontract regarding:
  - Information
  - Technical data
  - Cost or pricing data
  - Any other information submitted to the Government by a contractor and is designated as proprietary

## NDA CRITERIA FOR ENFORCEMENT (STANDARDS OF CARE)

### For the NDA to be enforceable:

1. It must be in writing
2. All documents must be clearly marked as protected
3. Must have notes or minutes of conversations made under the NDA
4. Must protect information or product which was discussed under the NDA for the term identified in the agreement

## NDA SUMMARY

- The purpose of an NDA is to create a framework under which the parties can discuss their future relationship
  - Proprietary information is to be disclosed on a need-to-know basis
  - Proprietary information must be protected from public disclosure
- Define the parties and the program explicitly
  - Our Legal Name: ABC, Incorporate
  - Our Brand Name: ABC
  - No ‘TBDs’ or ‘to follow after receipt of RFP’
  - NDA must be incorporated into the TA

# NDA SUMMARY

- Key Terms
  - Information must be reduced to writing and marked accordingly (no “residual knowledge” clauses)
  - Limitations of Liability
  - Indemnification
  - No Warranty of Data
- Do not create new liabilities for the company
- ***Understand the Realities of Your Business:*** What do they intend to do? Are they capable of living up to the terms?



# NDA SUMMARY

- Read the NDAs or request a summary from your Subcontracts or Contract Administrator
- NDAs do not give or contain export authority. Do not disclose any technical information to non-U.S. persons without first contacting Legal or Export.

## KEY POINTS

- 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



# Purpose of Presentation

Goal: Ensure quality teaming agreements, manage expectations, and limit potential liability to the company.

Three Key Points:

1. Terms must be legally acceptable and **consistent with your company's practices**
2. Statements of Work need to be written in alignment with a **capability matrix**
3. Statements of Work needs to **demonstrate value**



# Best Practice Tips

The Teaming Agreement Disclaimer Letter is:

- To be used during the search for team members
- No guarantee of teaming or work
- The purpose of the Pre-Teaming Agreement Disclaimer Letter is to **ensure** that the **only** agreement between the parties is the **final negotiated agreement**.



# Pre-Teaming Agreement Disclaimer Letter

Date

Company Name

Name

Address

Dear Mr./Ms.[Last name]:

ABC Corporation (ABC) has been involved in discussions with you, regarding the potential of your firm working with BAE Systems, in pursuit of the \_\_\_\_ program.

ABC Corporation and your firm will be working together in considering this opportunity, evaluating whether, or not, to enter a formal written teaming agreement.

The purpose of this letter is to confirm that these discussions and related activities are for evaluation purposes only, that there is no commitment, expressed or implied, by ABC Corporation or your firm to team, submit joint bids or award subcontracts, and that any commitment must be evidenced by a formal written agreement executed by the parties. Prior to the execution of such formal written agreement, neither party may, and is not authorized to, represent the other in any manner or for any purpose. Please be advised that you should not rely on verbal statements or representations to the contrary by an employee of ABC Corporation or its affiliates. If a formal written agreement is entered into between your company and ABC Corporation, such agreement will specify all the terms and conditions regarding any teaming obligation of the parties for this program.

If you have any questions, please contact the undersigned at [yourname@yourcompany.com](mailto:yourname@yourcompany.com)

Sincerely,

# What is a Teaming Agreement (TA)?

- It is a **Contract** under which a potential prime and subcontractor proposes to work cooperatively 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 specifies:
  1. The **duties of each party** during the proposal period.
  2. Describes the **type of work** that will be awarded to the subcontractor in the event a prime contract is awarded.
  3. **Compensation** (how will the contractor be paid?)

# Purpose of Teaming Agreements

- **FAR Subpart 9.6** 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.
- In planning a winning proposal, it may be determined that it is mutually beneficial to join forces with one or more subcontractors and offer the customer a unique capability as a team.
- 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 & Capability.

# Strategy Point

- 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!**





# Exclusive Teaming Agreements

- Exclusivity Agreements and Anti-Trust Concerns
  - a. While exclusive teaming agreements have the effect of reducing competition, they may not violate antitrust laws. (See FAR 9.604)
  - b. Anti-Trust violations can occur both “horizontally” and “vertically”
    - Horizontally – the level where prime contractors compete for sales to the government
    - Vertically – the level where subcontractors compete for sales of subsystems and components to the prime contractors.
  - c. Per Se Rules and the “Rule of Reason”
  - d. The test will be (a) whether **there still exists meaningful competition**, and (b) whether the effect of the collaboration is **enhanced product competition**.

# Exclusivity - When?

- Exclusivity is **Okay** when necessary to:
  - Induce parties to contribute their resources to the effort
  - Secure the commitment and undivided loyalty of the parties
  - Ensure recovery of the parties' investment in the “team;” or
  - Permit the exchange of confidential information with a higher degree of confidence
- Exclusivity is **Not Okay** when:
  - It is solely meant to take a subcontractor “off the street.”

# Teaming Agreement Check List

- Use a Checklist Form such as the sample handout to review the Agreement
- Do not copy & paste
- Both the checklist and the agreement are forwarded for approvals through your Legal department, if required.



# Teaming Agreements – Ts and Cs

- Identifying the parties
- The “Whereas” clauses - Describes each party’s complementary capabilities. (FAR 9.602(a)(1)).
- Purpose of the teaming agreement - program or project
- Exclusivity or limitations
- Non-Disclosure Agreement
- Expiration dates
- Statement of Work - Exhibit A
- Financial obligations and or Relationship
- Guarantee/best efforts to award Subcontracts
- Good Faith Negotiations
- Government Approval

# Teaming Agreements

- **Teaming Agreements are a Collaborative Process - Contracts needs to understand what the business is trying to do.**
  - ❑ **Expiration - A Teaming Agreement creates a temporary relationship between the parties, that will be replaced by the Subcontract Ts&Cs.**
  - ❑ **Exclusivity - Be careful not to run afoul of Anti-Trust Laws.**
  - ❑ **Financial Considerations - Who bears the costs?**
  - ❑ **Liability Concerns - Limit the liability of the company**

# Teaming Agreements (Cont.)

- You have worked hard to propose and win the contract award, do not let the subcontract terms and conditions take it away.
- Reduce risk from your subcontract negotiation - Incorporate into the Teaming Agreement terms which require that the resulting subcontract reflect **the intent** of the teaming agreement, the **negotiated modification(s)** of the Prime's (TA) Ts & Cs, and FAR/Agency flow-downs.
- This will preclude early loss of the work, except for failure to perform.



# Things to Remember

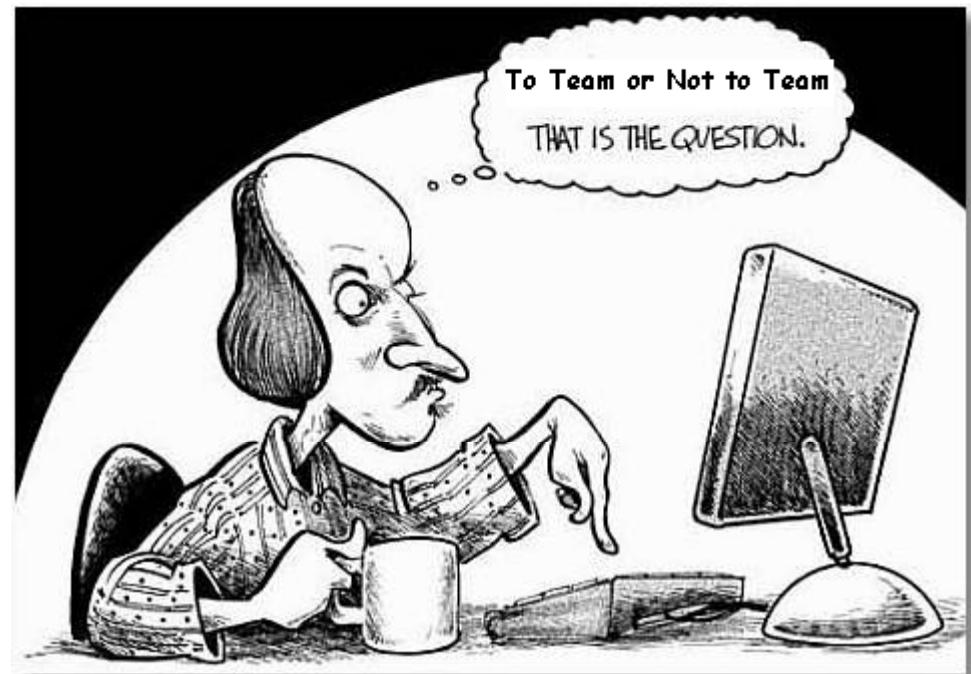
- 🧠 Look out for **“to the extent deemed necessary and appropriate”** and other wishy-washy wording
- 🧠 One part of a company cannot bind or limit the business of other company entities.
- 🧠 Even though TAs are short term contracts, negotiation of the terms will set the foundation for future subcontract negotiations. Contract Administrators must not tie their hands for the purpose of a **“quick teaming agreement.”**
- 🧠 A Teaming Agreement creates a temporary relationship between the parties, that will be replaced by the Subcontract Ts and Cs.

**“If you don’t have time to do it right, when will you have time to do it over?”**

Quote from John Wooden, Coach, UCLA

# To Team or Not to Team – That is the Question!

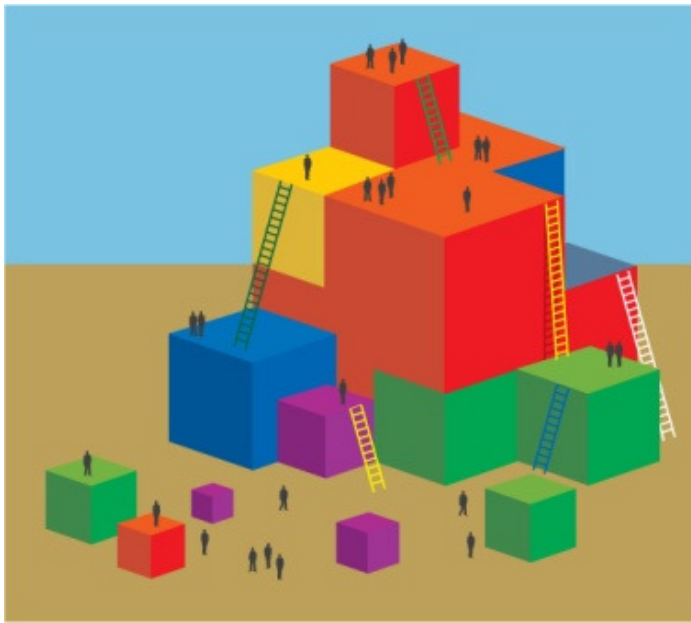
- The determination to be **teammates** or to be **exclusive** will depend on the **statement of work**.
- The SOW must create value and be driven by the **capabilities matrix**.
- It is a waste of company resources to team when there is no value added.



**A TA that does not create “value” opens all parties to liabilities!**



# The Mechanics of Building a Good Statement of Work for a TA



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# The Capability Matrix

- Primary vs Secondary Sample Chart

New IDIQ Programs						
	<b>P=Primary</b>					
	<b>S=Secondary</b>					
[contract or proposal Number]	Prime	Sub A (SDB)	Sub B (SDVO SB)	Sub C (WOSB)	Sub D (Hubz/SDB/ WO)	Sub E (LB)
Functional Area						
Systems Engineering	P	S				
Integration and Operational Support	S	P				
Software Applications and Databases	S		P		S	
Test and Evaluation	P	S				
Help Desk	S	S		P		
Software Support	S		S		P	
QA	P	S		S		S
Security	S					P

- What do you want and what you can give away - Small Business Goal?
- Can be used to help with work distribution
- Color-coded Capability Analysis

# Statement of Work

- **Purpose of the SOW**

- What will be the working relationship of the parties after contract award?
- Justify the investment that contractors are making in the competition.
- Avoid Anti-Trust Concerns

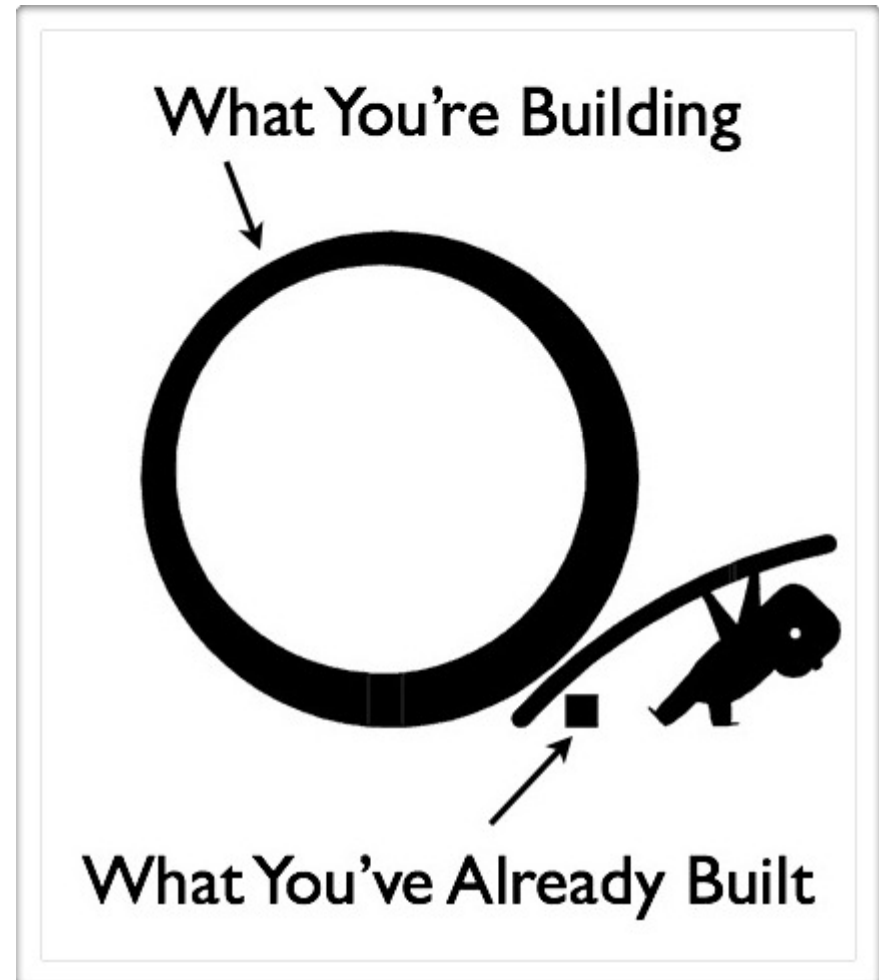
- **Describe the Work/Opportunity**

- Hunt and Kill
- Primary vs Secondary
- Reference SOW Paragraphs
- Functional
- Deliverables
- Percentage of Hours
- Labor Categories

# Leverage Your Capabilities into Real Work

A challenge for this business is to turn all of these IDIQ awards into task order awards. To do that where we are on a team requires that you **plan in advance** what work we are looking for and then **negotiate** for it.

During the teaming agreement phase we have significant leverage.



# Statement of Work Content Checklist

1.0 Introduction and Scope Statement

2.0 Requirements

3.0 Deliverables

4.0 References

5.0 Progress and Compliance

6.0 Additional Information

Don't repeat TA or Subcontract terms and conditions

SOW CHECKLIST			
DESCRIPTION	YES	NO	IF NO, PROVIDE AN EXPLANATION
1. Does the scope statement accurately reflect the requirements?			
2. Does the background information explain the rationale for the project?			
3. Will the background information help a potential contractor prepare a sound technical proposal?			
4. Does the objective emphasize what is most important to the agency?			
5. Is the breakdown of the objectives accurate and logical?			
6. Will the contractor understand the agency's needs?			
7. Have the facts been checked?			
8. Are the requirements realistic, definite, and nonrestrictive?			
9. Do the requirements satisfy the minimum needs of the agency?			
10. Is each requirement capable of being inspected or verified?			
11. Are the references necessary, available, and timely?			
12. Are the modes of transmittal or delivery realistic?			
13. Will the intended inspections, reports, and tests provide an accurate gauge of quality?			
14. Are all report, inspection, and test procedures clearly defined?			
15. Are the deliverables and their acceptance criteria clearly defined?			
16. Have all service levels been clearly defined and quantified (if applicable)?			

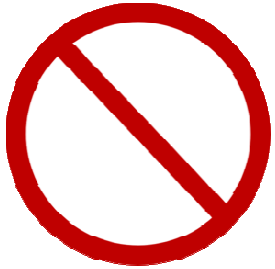
# Teaming Agreements – Typical Clauses for Exhibit A

- It is understood that ABC Corporation ability to allocate work to XYZ Inc. 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 Corp 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 the XYZ, Inc to offer a competitive cost structure in their proposal, as well as during subcontract execution.

*Statements of Work should identify with particularity the items or services being procured for which each party will be responsible during each step of the procurement process.*

***From proposal development and submission through contract execution.***

# What Do You Think????



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

## EXHIBIT A STATEMENT OF WORK FOR ABC Corporation

It is expected that the scope of work for XYZ, Inc. on the XXXX follow on Program Management and Engineering Support contract for the Program Name/Project Name and the systems development team at Agency location of work 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).**

# What Do You Think???



It lists specific tasks or areas of work to be performed by the subcontractor

## EXHIBIT A STATEMENT OF WORK FOR XYZ, Corp.

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

- This task will provide concept development and requirements analysis support through development and analysis of
- ship cargo flow operations profiles over full Assault Ship mission life-cycles. It will analyze cargo flow operations from Agency perspectives.
- This task follows the overall objective and scope of sub-task 9 above but from an Agency perspective. The contractor shall provide a Agency Integration Center Technical Director, and an Agency Liaison (AL),
- and an Agency Maintenance Expert (AME) each with the following specific tasking.



# Hunt-to-Kill

- Hunt to Kill

- Here is a “hunt-to-kill” clause that has been used in the past. As you can see, it does actually promise a company something. They don’t have to identify it in monetary of LOE value, but it is a right. Make sure by verifying if this is inconsistent with the capture strategy:

*“Efforts marketed by Subcontractor which are subsequently awarded to Prime will be flowed down to Subcontractor with reasonable add-on fee.”*

OR

- PRIME’s ability to apply any profit to subcontracted costs will be determined subsequent to review of the final RFP. In any event the total pass-through costs including program management, subcontract overhead and profit will not exceed 10%

- **Get or Set a Limit!**

*Also, keep in mind – Excessive Pass Through – Report anything more than 70%  
(both Prime and Subcontractor)*

# Indefinite Delivery/Indefinite Quantity (ID/IQ)

- **Reference RFP's SOW Paragraphs:**
  - *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.*
- **Cutting** and **Pasting** or **inserting** the whole SOW from the RFP can be confusing and risky.
- Do not use **identical** statements of work across multiple subcontract teammates.

# Definitive Tasks

- **Subcontractor shall:**
  - Develop and verify QA processes
  - Perform off-site installation, integration and implementation
  - In accordance with (IAW) established or prescribed CM/CMMI procedures, ensure quality control checkout and inventory of all software, documentation and hardware items have been performed on the system scheduled for delivery.
  - Provide Program Management and Scheduling support
  - Test and Certify new software build.



# Level of Effort

- **Percentage of the Hours**

- In support of the overall objectives of the Government, as identified in the Government SOW contained in the Solicitation referenced above, Prime will be requested to perform a variety of task assignment, based upon delivery order requirements
- It is the intended goals of the parties for PRIME to subcontract approximately XX% of the total level of effort to Subcontractor.
  - Task Order Contracts - exact levels of effort cannot be predetermined nor can a specific minimal level of effort be established.



# Things to Think About

- Ensure that the Teaming Agreement **T&Cs** are in consort with the **RFP** and subsequent **Award**.
- Reason for Teaming -- is **NOT** to take the other company **off-the-street** during a proposal
- **Drafting** and **Reviewing** SOWs -- is a **collaborative** process between Contracts/Subcontracts and Program/Operations and BD



Remember – you are the first line protection for the Company



# How To Get the NDA or TA Through the Internal Process Faster?

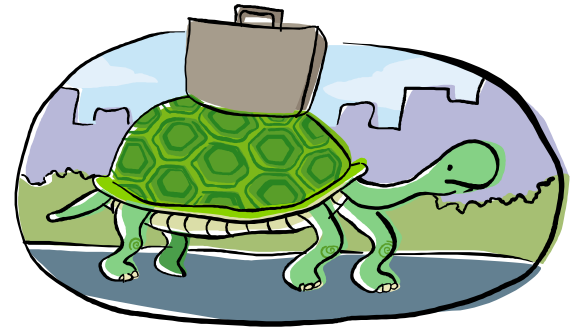
- Use **One Company's** documents
  - If they are a very small business
    - Suggest your paper even if they are the Prime
  - Less negotiations
  - No Changes
- Exhibit A
  - Be **clear**
  - Be **concise**
  - Add **value**
  - Do not **give away** all the business
  - Say what you mean
  - TBD's or To be determine is **not acceptable**



**Eliminate unnecessary/unenforceable agreements**

# Common Causes of Delays

- ❑ Choice of Law - **avoid** - LA, West Coast, Texas
  - Use States/Commonwealths where your company has business
- ❑ Not using your company's Proper Names - Give us some examples
- ❑ Not reviewing for grammar and other typo errors - show professionalism in your writing
- ❑ Verifying if the "Whereas" describe complementing capabilities
- ❑ If exclusive, SOW must add value





# Questions & Answers





# References & Documentation

- Federal Acquisition Regulation (FAR) Part 9, Subpart 9.6
- Your Company's Policies and Procedures which your company should include:
  - Definitions
  - Non-Disclosure Agreements
  - Notification of Oral or Visual Disclosure of Proprietary Information
  - Non-disclosure Agreement
  - Source Selection
  - Statement of Work Template
  - Memorandum to File, Teammate Source Selection
  - Non-Competitive Award Justification
  - Teaming Agreements
- Sample of Exhibit A - good one
- Sample of Exhibit A - Not good one
- Samples of Check Lists - NDA, TA, SOW