

# Contractual Documents: Smart Use of NDAs & TAs

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# Introduction

- McCandlish is a business law firm that represents clients in transactions and dispute resolution.
- Our litigation/ADR experience informs the way we draft transaction documents.

# Disclaimers

- We are not giving legal advice. Legal advice is fact driven and furnished to clients of the firm.
- We are providing general comments on the use of NDAs and Teaming Agreements, i.e. what to do and not to do, in the federal contracting environment.
- These general comments may be helpful to you in identifying specific issues that you may want to discuss with your attorney and BD professionals and incorporate into the documents your business is using.



# Trends in the Federal Contracting Marketplace

- The increasing use of Multi-Award Contracts (MACs).
  - The Government likes them because task orders are harder to protest and they give agencies a shopping list to go to in the future.
  - Contractors view them as hunting licenses to go after business.

# Trends in the Federal Contracting Marketplace

- Defense Contracting FY 2013 data by DoD Component:
  - The predictions were correct. Sequestration resulted in new contracts being cancelled or pushed back, current work delayed, and projects scaled back or not renewed.
  - Defense-funded contract obligations declined 5% between 2009 and 2010 and between 2011 and 2012. Between 2012 and 2013, the decline was 3 times that rate (-16 %).
  - Army contracts, which declined by 15% between 2011 and 2012, declined in 2013 by -21%.
  - Air Force contracts, which increased by 5% between 2011 and 2012, declined slightly faster (-22%).
  - DLA declined at the highest rate (-23%)
  - Navy contracts, which declined at -11% between 2011 and 2012, declined at only -2% between 2012 and 2013.



# Trends in the Federal Contracting Marketplace

- Defense Contracting FY 2013 data, by Product or Service Code (PSC) Area:
  - The predictions were correct that R&D would shoulder a disproportionate share of the cuts under sequestration.
  - Contracts for services declined more slowly (-14%) than overall DoD contracting between 2012 and 2013.
    - ICT services and MED services both declined more slowly than overall services; PAMS services declined at a rate comparable to overall services; ERS and FRS&C both declined more steeply than overall services.
  - Contracts for products declined at a rate (-17%) slightly faster than for overall DoD.
  - Contracting for R&D declined notably faster (-21%) than overall DoD, after declining between 2011 and 2012 at twice the rate (-10%) of overall DoD. The cuts in R&D contracts were significant, particularly in early-to-mid stage R&D.



# Trends in the Federal Contracting Marketplace

## Source:

CSIS, National Security Program On Industry And Resources, “The Impact of Sequestration on Defense Contract Obligations,” published May 2014, based on FPDS data through FY 2013, [www.csis.org/NSPIR/DoD](http://www.csis.org/NSPIR/DoD).

NSPIR plans to broaden its analysis to other contract characteristics such as level of competition, pricing mechanism, and contract vehicle.

# What do these trends mean for your business?

- Are you spending more time and money pursuing federal contract opportunities?
- Has your bidding activity declined?
- Has your bidding success rate changed?
  - ***If your bidding activity has declined and your success rate has stayed level or increased, you are bidding smarter.***
- On average, how many government contracts are you currently performing on?
- Are you between contracts at the present time?
- Has your level of reliance on federal contracts declined?





What do these trends mean for the contract tools we are discussing today?

## **NDA → Teaming Agreement → Subcontract**

- Smarter bidding means:
  - ***Smarter use of NDAs*** to protect and keep what you own
  - ***Smarter use of Teaming Agreements*** to target what you want
  - Arriving at a Subcontract that leverages your strengths

# NDA's: What to Do

- **Include the phrase “non-use,”**
  - Title your document “Non-Disclosure, Non-Use Agreement.”
  - Prohibit the receiving party’s use of disclosed information other than for a Permitted Purpose.

# NDA's: What to Do

- **Include the phrase “non-use”**

- Example:

Non-use and Non-disclosure. Recipient agrees not to use or otherwise rely upon any Confidential Information **for any purpose except to evaluate and engage in discussions concerning a potential business relationship between Recipient and the Disclosing Party.** Recipient agrees not to disclose any Confidential Information to employees of Recipient, except to those employees who are required to have the information in order to evaluate or engage in discussions concerning the contemplated business relationship and who are bound by this Agreement.



# NDA's: What to Do

- **Protect Trade Secrets & Intellectual Property**
  - **How does your NDA define what information is covered?**
  - The statutory definition of a trade secret is very broad:
    - Va Code § 59.1-336 defines trade secret as “information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”
  - Intellectual Property includes know how, process, and methods.



# NDA's: What to Do

- **Protect what you own** (“Proprietary Information”) *and* **what you hold or use** under an obligation of confidentiality to third parties (“Confidential Information”)

# NDA: What to Do

- Example:

“Confidential Information” shall mean any and all technical and non-technical information provided by either party to the other, including but not limited to any trade secret, idea, invention, information, process, technique, algorithm, computer program (source and object code), design, drawing, formula, model, or test data relating to the disclosing party’s research projects, work-in-process, future developments, engineering, licenses, manufacturing, marketing, servicing, financing, personnel matters, past, present or future products, sales, suppliers, clients, customers, employees, investors, inventors, or business, whether in oral, written, graphic, electronic or other form. [...]

# NDA's: What to Do

- **Protect what you own**

- Alternative: instead of laundry list, require disclosing party to mark protected information as confidential

- Example:

- Confidential Information disclosed in tangible form shall be marked with a “confidential,” “proprietary,” or other similar legend. Confidential Information disclosed orally/visually will be identified as “confidential” at the time of disclosure and will be followed-up in writing to the recipient within thirty (30) days of disclosure and will contain the appropriate confidentiality markings.



# NDA's: What to Do

- **Protect your people**
  - Prohibit “soliciting for hire, hiring or engaging” your people.
  - Consider structure of your labor force in defining who is “off limits”



# NDA's: What to Do

- **Protect your customers**

- Prohibit “soliciting, offering for sale and sale of products or services currently purchased from [the disclosing party].”
- Consider prohibiting the receiving party from inducing customers to change their level or frequency of purchasing from the disclosing party.
- Lesson learned from the ***Mona Electric*** case.

# NDA: What to Avoid

- **Not defining the term of the NDA**

- What is disclosed during the term of the NDA is what is commonly protected.
- An earlier “effective date” can protect disclosures that took place prior to signing.
- The end date needs to be coordinated with successor agreements, like Teaming Agreements and Subcontracts.
- Make sure successor agreements protect.
- Make sure there is no gap in protection.
- Certain provisions should “survive” the term.



# NDA: What to Avoid

- **Not having a termination provision**
  - a common formulation is “the term of this NDA is from \_\_\_\_\_ to \_\_\_\_\_, unless sooner terminated as provided [elsewhere].”
  - Events of earlier termination may include breach by the receiving party and either party breaking off negotiations leading to a business relationship
  - Don’t forget to have certain provisions “survive” the termination

# NDAAs: What to Avoid

- **Not having a clause that says the disclosing party is under no obligation to disclose.**

- Example:

- No Obligation of Disclosure:** Neither party has any obligation to disclose Confidential Information to the other.

- Should also include clause that requires immediate return (or certification of destruction) of Confidential Information on termination or request.

# NDA: What to Avoid

- **Not requiring the receiving party to use at least the same level of effort used by it to safeguard and protect its own Proprietary and Confidential Information.**

# NDA's: Best Practices

- **3 types of NDAs**, tailored to the specific circumstance in which the disclosure is taking place:
  1. Where your business is the disclosing party;
  2. Where your business is the receiving party;
  3. Where both parties are disclosing and receiving.

# NDA: Best Practices

- **Consider the standard exceptions to the definition of Protected Information:**
  - Example — Information which:
    - Is or becomes public knowledge
    - Made available to receiving party by 3<sup>rd</sup> party not under obligation to maintain confidentiality
    - Is in the receiving party's possession prior to execution of NDA. (Possession should be otherwise lawful/ permitted)
    - Is or was independently developed by receiving party
    - Required by law to be disclosed



# NDA: Best Practices

- **Consider the standard exceptions to the definition of Protected Information:**
  - From the standpoint of the disclosing party, the objective is to keep the exceptions narrow, thereby broadening the definition of what is protected.
  - So, a disclosing party NDA will exclude from the definition of what is protected “disclosed information that is in the public domain.”



# NDA: Best Practices

- **Consider the standard exceptions to the definition of Protected Information:**
  - From the standpoint of the receiving party, the objective is to widen the exceptions, thereby narrowing the definition of what is protected.
  - So, a receiving party NDA will exclude from the definition of what is protected “disclosed information known to or in the possession of a third party who is under no obligation of confidentiality with respect to such information.”



# NDA: Best Practices

- **Consider the standard exceptions to the definition of Protected Information:**
  - A mutual NDA will be negotiated and balanced.

# Teaming Agreements: What to Do

- **Get something for being part of a winning team. Leverage what your business brings to the team.**
  - On a service contract, think of positions and people, aggregating to a percentage of work or revenue.
  - On a product contract, think of added value leading to delivery on the PO.
  - As your bargaining position allows, lock in subcontracting tier and go for profit margin participation. Billing rates differ by labor category. Added value contributes differently to the end price of product.

# Teaming Agreements: What to Do

- **Resist the temptation to be vague about, or to defer the decision concerning, how your business will participate in a Task Order or Purchase Order that may arise from a MAC.**
  - With the popularity of MAC vehicles, and not knowing what business will be captured, there is a tendency at all levels of contracting to wait and see what comes in the door and then agree on how you will participate in performing the work.



# Teaming Agreements: What to Do

- **Consider the lessons of *W.J. Schafer Associates, Inc. v. Cordant, Inc. (1997)*.**
  - Teaming Agreement was unenforceable as a contract for sale of a product because no price was established and the parties knew that the product might not be available for use if the government contract were to be awarded to Cordant.
  - Virginia does not recognize the cause of action for promissory estoppel, so Cordant was unable to recover damages arising from its action or forbearance induced by reasonable reliance on Schafer's promise.

# Teaming Agreements: What to Do

- The **BEST** position to be in:
  - Attach a copy of the Subcontract to be executed by the parties upon award of a prime contract.
  - Address all material terms. (Be as specific as possible under circumstances.)
  - Agreements to agree in the future or to negotiate in the future are not enforceable contracts in Virginia.

# Teaming Agreement: What to Avoid

- In ***Cyberlock Consulting, Inc. v. Information Experts, Inc. (2013)*** the Court found a Teaming Agreement unenforceable because the agreement:
  - Stated that IE “agrees to execute a subcontract agreement” if IE received a prime contract and later provision stated that the parties were to exert “reasonable efforts to negotiate a subcontract.” (CONTRADICTION)
  - Provided that it would terminate if the parties failed to reach agreement on a subcontract “after a reasonable period of good faith negotiations.”
  - Stated that any subcontract entered into after award of the prime contract “may be subject to the approval of the Client [OPM FIS] regardless of the provisions of this Agreement.”



# Teaming Agreement: What to Avoid

- The *Cyberlock* case provides guidance on language to avoid in a Teaming Agreement.
- The factors cited by the court in concluding the agreement was unenforceable despite “seemingly mandatory” language to award Cyberlock with a portion of the prime contract were:
  - the award of such work would require the negotiation and execution of a future subcontract;
  - the award of such work was dependent on the success of such future negotiations;
  - any future executed subcontract was subject to approval or disapproval of OPM FIS [the customer]; and
  - suggesting the framework set out for the work allocation in a future subcontract potentially could change as it merely was based on the work anticipated to be performed by Cyberlock as then-presently understood by the parties.



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