

# Team APG Advance Planning for Industry (APBI) and Small Business Forum 2012

## Q&As

**Q 1:** *During the Advanced Planning Briefing to Industry (APBI), a concern was raised that Government agencies could, and at times have, appropriated ideas gleaned after an industry presentation on new technology. Industry questioned whether it was possible for Government personnel to sign Non-Disclosure Agreements (NDA) prior to presentations or briefings, to mitigate this concern?*

**A 1:** Despite this legitimate concern, federal employees do not have the authority to sign NDAs presented by non-Government entities. Even without such NDAs, however, several federal laws and policies ensure the protection of proprietary information presented to the Government.

Federal employees generally cannot enter into NDAs with non-Government entities for three reasons: (1) the employees' inability to make binding commitments on behalf of Government; (2) the practicality of complying with specified non-disclosure provisions; and (3) the unnecessary redundancy of such agreements.

First, federal employees in general do not have the authority to bind the United States Government. Such official commitments can only be made by contracting officers in the context of federal procurement or agreements executed by the Department of the Army or the head of the specific Army organization or command. Federal employees simply do not have the signatory authority with regard to NDAs to effectively bind an organization.

Second, NDAs frequently contain provisions that are impossible or impractical for the Agency to comply with. Agreements may contain provisions requiring the resolution of legal disputes in state or international courts, for example, or require the Agency to indemnify the non-Government entity and pay attorneys' fees. Provisions of this type violate federal law.

Finally, even without signed NDAs, federal law already provides similar protections. Any federal employee who receives material (other than deliverable data under a contract subject to the Federal Acquisition Regulation) which might contain material information that is presented as proprietary, confidential, financial, or trade secret is responsible for and obligated to protect such information from disclosure to the extent required by 5 USC § 552(b)(4), Freedom of Information Act; 18 USC § 1905, Trade Secrets Act; and 18 USC § 1831 et seq., Economic Espionage Act. Collectively, these laws provide penalties for unauthorized disclosures, to include imprisonment, fines, and loss of employment.

For these reasons, federal employees do not sign NDAs purporting to bind the Agency under any circumstances. The Government does take the safeguarding of

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proprietary information very seriously and reminds its workforce of its obligations as appropriate. Of course, any complaints alleging violations of federal law or other regulations should be immediately reported to the Agency and such allegations will be properly investigated.

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**Q 2:** *During the Advanced Planning Briefing to Industry (APBI), one of the speakers was requested to provide an opinion as to whether the Army encourages the use of Open Source Software.*

**A 2:** DOD CIO has encouraged the use of open source software within the DOD.

Accordingly, ACC-APG/requiring activities also encourage the use of open source software in software acquisitions. However, in reviewing any commercial software license agreement, the Government should not accept terms and conditions of open source license agreements that conflict with Federal procurement law or do not meet user's needs, in accordance with policy guidance set forth in DFARS 227.7202-1(a).

Thus, the Government is careful to consider the aforementioned benefits of open source software, in view of restrictions set forth in the terms and conditions of open source software license agreements. Sometimes it is difficult to change or negotiate such restrictions because of the collaborative nature of open source software and the difficulty in identifying authors of the license.

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