

Signing a non-disclosure agreement (NDA) -

Very often a non-federal party (Submitter) submits an item to an Army facility for test or evaluation of the item. At times the Submitter initiates the submittal, and on other occasions, the facility requests the item from the Submitter. The Submitter generally include an NDA which requires a signature by Army. Should the Submitter's NDA be signed? If yes, who should sign on behalf of Army? If no, should any other document be used? If yes, what other document? Should that other document be signed by Army? If yes, by whom? If no, what is the significance of the other document?

A memorandum dated 16 November 1992 entitled, "Nondisclosure Agreement Policy", signed by Anthony Lane, JALS-IP, outlines guidance, which appears to confirm existing Army procedures, for situations described above. The memorandum includes an enclosure #1 which is a model "Nondisclosure Policy Statement". The Statement assures a Submitter of the conditions of the submittal. The Submitter should sign the Statement as an acknowledgment of the conditions. Army does not sign the Statement.

The memorandum also includes an enclosure #2 for cases where a Submitter wants a signed Agreement with Army and the item to be tested/evaluated is extremely important to Army. The memorandum states that the Agreement should only be signed by a contracting officer. In fact the Agreement includes similar information to that delineated on the Statement, except that the format is an agreement rather than a statement.

Thus, the memorandum includes a Statement for signature by only the Submitter, and an Agreement for signature by the Submitter and an Army contracting officer.

Addressing the above issues:

Should the Submitter's NDA be signed? Army's Policy suggests that the answer is no, but that the Army's Statement be used and signed by only the Submitter. However, the Policy also suggests that if the test/evaluation of an item is very important to Army, and the Submitter insists on an agreement, the Agreement enclosed with the Policy should be used and signed by the Submitter and, on behalf of the Army, by only by a contracting officer. However, if the Submitter insists on using its own agreement, the Policy is silent. However, it seems reasonable that if the test/evaluation is important enough to Army, the Submitter's agreement could be negotiated, if necessary to satisfy Army, and signed by the Submitter and an Army contracting officer. A Submitter's NDA or the Agreement suggested by Army's Policy should not be signed by an Army employee who is not a contracting officer. Only a contracting officer can bind the Army which, of course, is what the Submitter wants. Anyone, who is not a contracting officer, and who signs an NDA, generally binds him/herself and not

Army. Although 18 USC 1905 provides sanctions, such as a fine, imprisonment, or loss of job, for unauthorized disclosure by Government employees, such sanctions may not satisfy a Submitter who alleges significant damages for an unauthorized disclosure by an Army employee. Contracting Officers, prior to signing an NDA, should carefully consider whether they are creating an unfunded obligation, and a potential Anti-Deficiency Act violation.

Preferably, according to Army's Policy, neither the Submitter's nor Army's NDA should be used and signed at all. It is preferred that Army's Statement be used, and that it be signed by only the Submitter. In fact, Army employees who are not contracting officers are encouraged to not sign any NDA under any circumstances. Such employee must weigh the risk of personal liability versus the importance of testing/evaluating the item. At times, an Army employee may be scheduled to tour a party's facilities, but the employee is told to sign the party's NDA before taking the tour. The employee should not sign. However, the employee may decide that taking the tour is worth the risk of signing. It is recommended that prior to attending a party's facility, an employee resolve any requirement for signing an NDA. If necessary, an AMC attorney can discuss this issue with the party's representative, and resolve the issue prior to the employee's trip.