



ALASKA

REGIONAL CONFERENCE

JUNE 20-23, 2022 — ANCHORAGE

**TEAMING AGREEMENT HORROR STORIES:
HOW TO PREVENT THEM AND WHAT TO DO IF THEY HAPPEN**

**ROBERT MISULICH
CHRISTOPHER SLOTTEE**

ROBERT (ROB) MISULICH

Shareholder

Robert J. Misulich represents Alaska Native Corporations (ANCs), tribes, and small businesses in a broad range of matters, including company formation and governance, shareholder meetings and proxy solicitations, employment law, and economic development, including compliance with the regulations governing the Small Business Administration's (SBA) Section 8(a) Business Development Program.

Robert's experience includes providing advice and guidance on government contracting matters, including compliance with the Federal Acquisition Regulation (FAR), bid protests, and claims and appeals arising under the Contract Disputes Act.

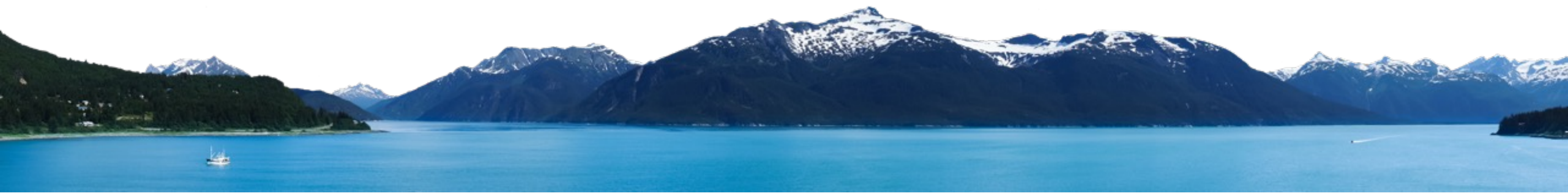


INDUSTRY FOCUS

Indian Country and Alaska Native Corporations
Natural Resources

REPRESENTING

Schwabe



CHRISTOPHER SLOTTEE

Shareholder

Chris has over 15 years of experience handling complex litigation matters, specifically working with Alaska Native Corporations, settlement trusts, and tribal governments.

Chris's previous experience as Vice President and General Counsel for an ANC gives him an invaluable understanding of the inner workings of ANCs and the unique challenges they face. He is well-versed in issues of corporate governance, legal and risk management, government contracting, corporate transactions, mergers and acquisitions, land use, and real estate matters.

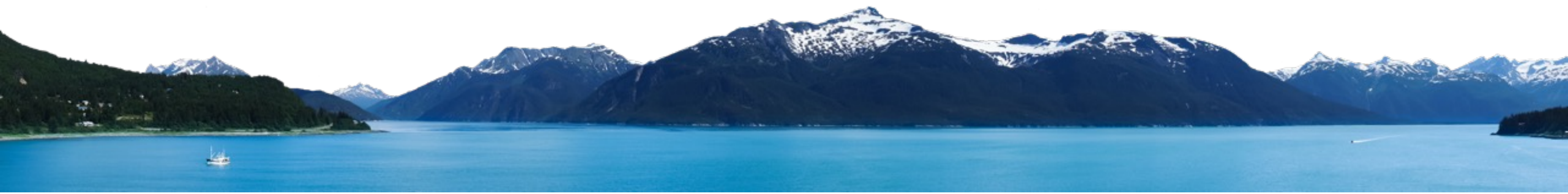


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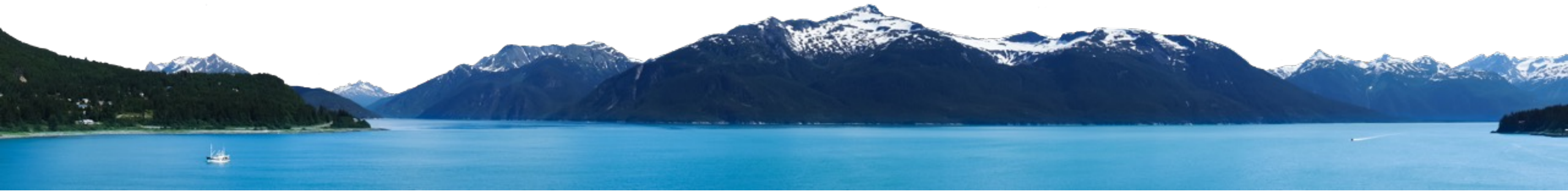
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Schwabe



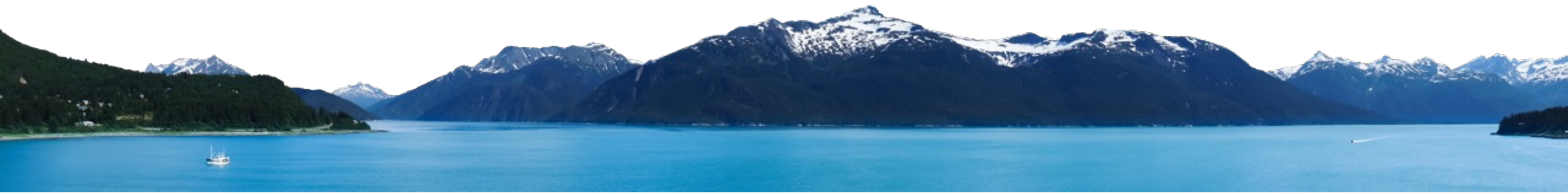
TEAMING AGREEMENTS

- What are they
- Key terms
- Pitfalls
- What happens when things go wrong



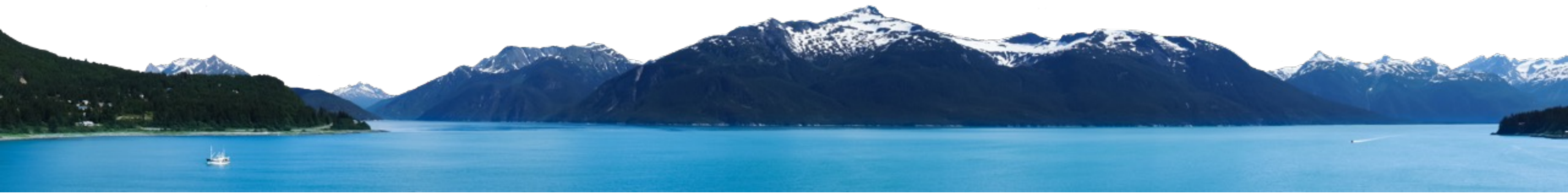
TEAMING AGREEMENTS - WHAT ARE THEY?

- Teaming agreements are used to combine resources of two or more partners to increase the opportunity to win a contract or opportunity
 - Past performance
 - Expertise
 - Capital
 - Equipment
 - Relationships
 - Pricing



TEAMING AGREEMENTS - WHAT ARE THEY?

- FAR 9.601 Definition:
- “Contractor Team Arrangement” [m]eans an arrangement in which:
- 1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
- 2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.



TEAMING AGREEMENTS - EXAMPLE

- Identify the solicitation at issue and the purpose - submit a solicitation in response to the proposal
- Identify the role of the teaming members in terms of proposal preparation or pricing submission
- Identify process for negotiating or awarding subcontract in the event the contract is awarded to the team
- Identify scope of work to be awarded to subcontract if contract is awarded
- Identify if the teaming agreement is exclusive or not
- Identify if any special terms to include in any subcontract subsequently awarded

WHEREAS; the _____ (hereinafter "Client) intends to solicit a proposal for _____, Solicitation Number _____ (hereinafter "Work"); and

WHEREAS; Prime Contractor desires to submit a proposal in response to the Solicitation (hereinafter "Proposal") or request to perform the Work as Prime Contractor; and

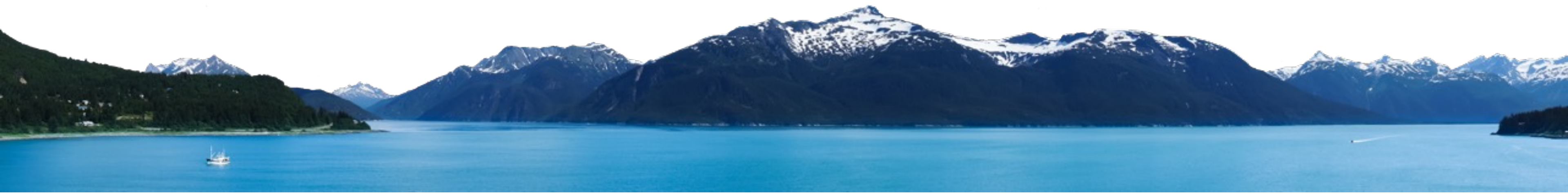
WHEREAS; Prime Contractor desires that Subcontractor (1) participate in the preparation and submission of the Proposal in response to the Solicitation and (2) in the event that Prime Contractor is awarded a contract by the Client (hereinafter "Prime Contract"), perform a portion of the Work, as set forth in Exhibit A, which is attached hereto and incorporated herein by reference (hereinafter "Subcontract Work"); and

WHEREAS; Subcontractor desires to participate in the preparation and submission of Proposal, to allow its name to be used as a team subcontractor, to have the names of certain key personnel appear in the Proposal, and to accept a subcontract from Prime Contractor to perform the Subcontract Work;

THEREFORE; in consideration of the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Prime Contractor and Subcontractor do hereby agree as follows.....

TEAMING AGREEMENTS - WHAT ARE THEY NOT?

- Not a prime/subcontractor relationship
 - FAR 9.601(2)
 - Prime/subcontractor teaming relationship exists where:
 - “[A] potential prime contractor agrees with one or more other companies to have them act as its subcontractors.”
- Not a joint venture (although teaming agreements can turn into a JV)



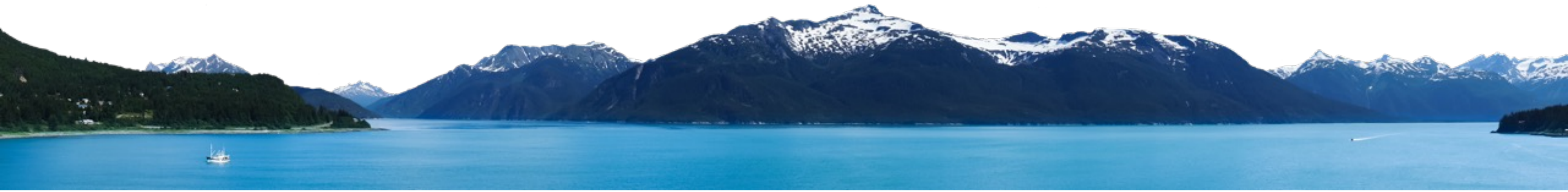
TEAMING AGREEMENTS - WHAT ARE THEY NOT?

PRIME/SUB

- JV is a separate legal entity
- Both parties perform at the Prime Contractor level
- The partners share control of the team
- Risk is allocated according to the JV agreement
- JV has privity of contract with Government
- JV can only have 3 contracts over a 2 year period

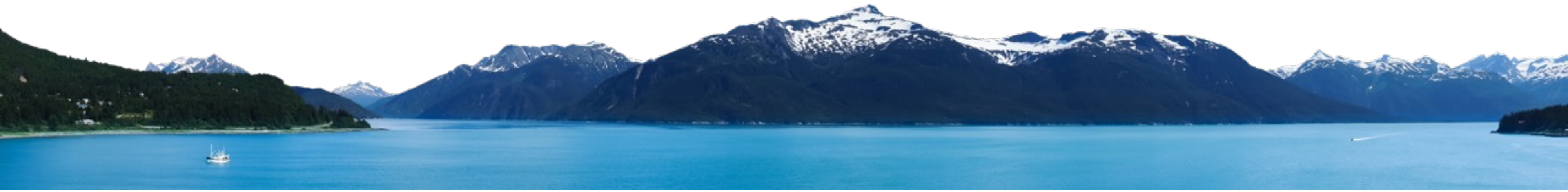
JOINT VENTURE

- No new legal entity is created
- Only one party performs at the Prime Contractor level
- Prime should be the party in control of the team
- Prime bears most of the risk (re: contract performance)
- Prime is only party that has privity of contract with Government
- No stated limit on number of opportunities team can pursue



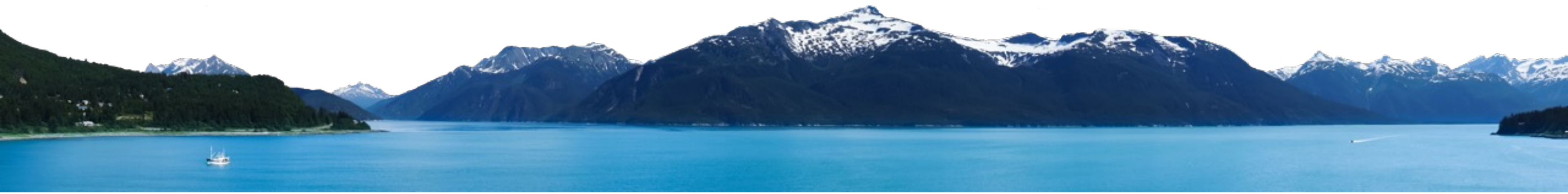
TEAMING AGREEMENTS - ADVANTAGES

- Merge capabilities, past performance, and assets to compete for larger, more complex contracts
- Offer more in terms of resources, performance, key personnel, and cost
- Facilitate market entry and also reduce risk
- Take advantage of small business contracting preferences/advantages
- Assist large businesses with meeting small business subcontracting goals



TEAMING AGREEMENTS - DISADVANTAGES

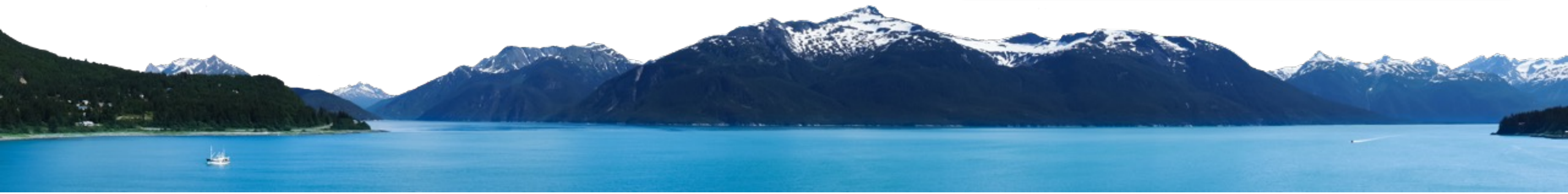
- Prime contractor is in privity of contract with the Government, and bears the entire risk of contract performance
- Subcontractors ability to seek recourse from the Government is limited
- Potential issues reaching agreement with the prime contractor on the subcontract after the contract is received
- Management issues or partner disagreements may be difficult to resolve
- Concerns/problems arising from potential affiliation



KEY TERMS

- Work share
 - Is a specific scope, percentage, or number of positions promised?
 - Is the scope subject to negotiation after award?
 - Does the proposed work share comply with limitations on subcontracting rules?

Exhibit A describes the basic responsibilities and understandings of the parties relating to the anticipated allocation of work under this Agreement, **provided that the final allocation of work contained in the executed subcontract shall control.**



KEY TERMS

- Exclusivity
 - Can you team with others for same opportunity?
 - What happens if the prime drops out – does exclusivity go away?
 - When can the proposed subcontractor drop out and team with someone else?
 - How long must the subcontractor wait for the contract to be awarded?
 - How broad is the exclusivity provision – only for this opportunity or entire MAC/IDIQ

Subcontractor will participate **exclusively with Prime Contractor** in pursuing award of the Work described herein. Subcontractor **and its affiliates and subsidiaries** will not **directly or indirectly** participate in or contribute to other proposal efforts in response to the solicitation.

Prime Contractor reserves the right to **enter into teaming agreements with additional subcontractors**. Nothing contained herein shall be deemed to restrict Subcontractor from quoting, offering to sell, or selling to others, including directly to any government agency, **standard commercial products or services regularly offered to the public**.

KEY TERMS

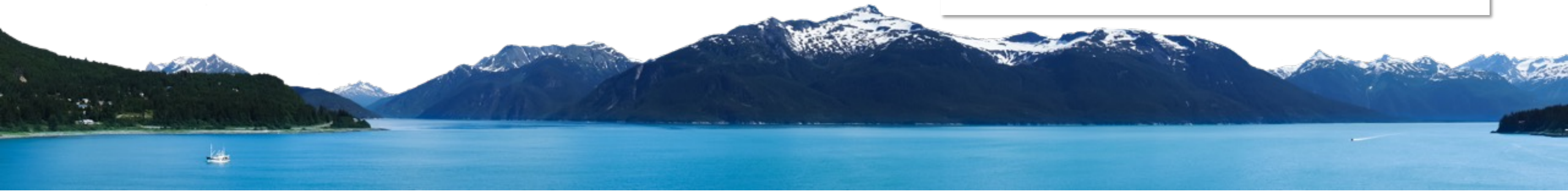
- Pricing
 - Do you control your final pricing?
 - Does the prime get to adjust your pricing based on the prime's view of what is needed to win

Prime shall have sole responsibility and authority for the content of the proposal submitted in response to the RFP, and for the work performed under the resultant Prime Contract., however, the Subcontractor shall have the opportunity to review its portion of the proposal prior to its submittal to the Government. **Prime shall not in any way alter or modify those costs and/or prices contained in the Subcontractor's proposal without the written authorization of the Subcontractor.**

KEY TERMS

- Costs incurred in proposal preparation
- Who takes the lead in what areas on the proposal preparation
- Who talks with the Customer
 - Are you included in discussions or meetings with the customer?

Prime Contractor will prepare the Proposal, integrate the information provided by Subcontractor and submit the Proposal to the Client. Prime Contractor shall have the sole right to determine the technical contents of the proposal; however, Subcontractor may review and offer comments regarding its portion of the Proposal prior to its submittal to the Client, provided that, at all times, **Prime Contractor retains final authority over the contents of the proposal.**



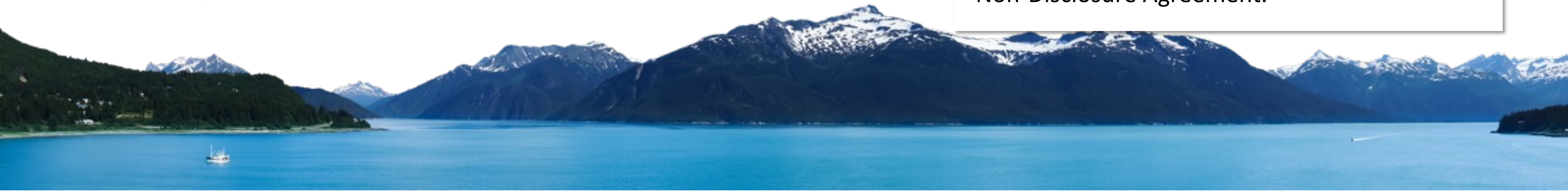
KEY TERMS

- When does the teaming agreement terminate?
- What happens to the exclusivity provision if the teaming agreement terminates?

One (1) year after the effective date of this Agreement, provided, however, that if the Proposal has been submitted and is under evaluation by the Client at the expiration of such period, this Agreement shall remain in effect unless otherwise terminated pursuant to one of the other conditions set forth in this Section....

Prime Contractor's notification to Subcontractor of a good faith decision by Prime Contractor not to submit or to withdraw a proposal under the Solicitation.

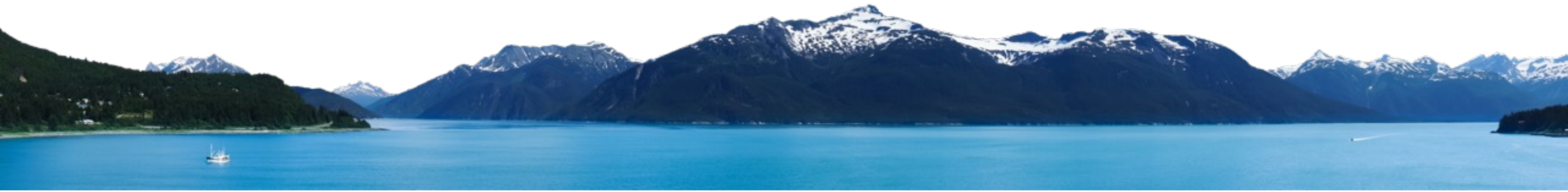
Should this Prime Contractor not win the contract or terminate its agreement with the Subcontractor, the Subcontractor may team with another Prime, provided all information disclosed remains subject to the terms of the Non-Disclosure Agreement.



KEY TERMS

- Negotiation/Award of the Subcontract
 - Is a subcontract guaranteed or not?
 - “will negotiate a subcontract”
 - “will award a subcontract”
 - “Agreements to agree” = non-enforceable
 - How long do you have to negotiate the subcontract?

The parties shall exert **good faith efforts to negotiate and execute a subcontract** within a reasonable period of time, not to exceed sixty (60) calendar days after award of the Prime Contract unless extended by mutual agreement of the parties. If the parties are not able to reach a final agreement on the terms of the subcontract within those sixty (60) calendar days, **this Agreement shall terminate.**

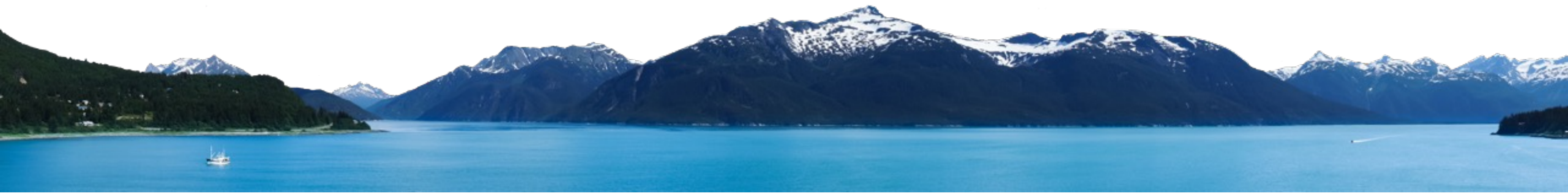


KEY TERMS

- Terms no less restrictive than prime contract
- Can the prime terminate for convenience at their discretion or only when the owner terminates for convenience?
- Will the subcontract automatically extend to option years in the prime contract when the owner exercises them or does the prime have to agree to exercise option years in the subcontract?

The terms and conditions of the subcontract shall not be **any more restrictive than those of the Prime Contract.**

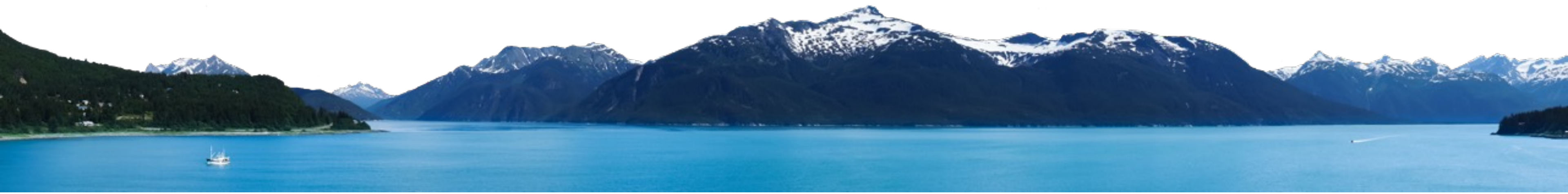
The subcontract shall not contain provisions that allow the Prime to unilaterally terminate the subcontract or any work being performed under the subcontract solely for the convenience of the Prime or to make deductive changes to the subcontract work **unless such termination or change is reasonably required as a result of Government action affecting performance of the Subcontractor's work under the Prime Contract.**



KEY TERMS

- Non-solicitation of employees
- Does your partner represent that they are not bound by non-disclosure agreements or non-competition agreements that could prevent them from participating?
- Does your partner represent that there participation will not raise any organizational conflict of interest issues?

Each party represents and warrants that **their participation in the preparation and submittal of a Proposal and/or performance of the Work does not and will not** (i) conflict with or result in a violation of, a breach of, or a default under any contract, agreement, or understanding to which it is a party or is otherwise bound; or (ii) **violate any non-solicitation, non-competition, or other similar covenant or agreement to which that party or any of its employees, owners, or agents are bound.**



KEY TERMS

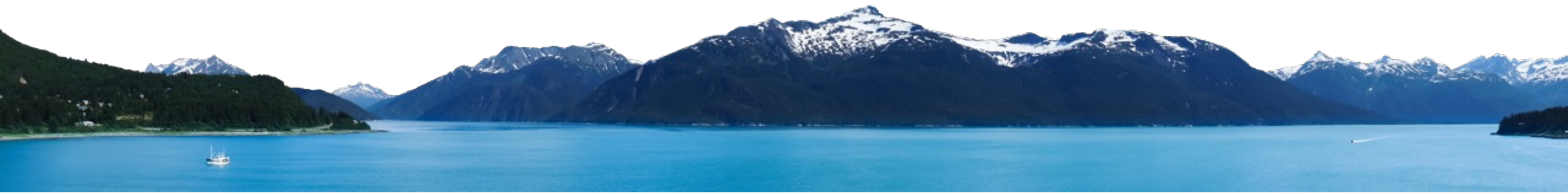
- Limitation of liability clause
- Exclude liability for lost profits in the event of a breach
- Indemnity obligations to protect against costs incurred if responding to a breach of an NDA/non-competition agreement by teaming partner
- Incorporate prior NDA or establish NDA obligations
- Choice of law/forum for disputes
- Provide for equitable relief - injunctions to enforce NDA and similar terms

In no event shall a party or its members, shareholders, affiliates, employees, officers, or directors, **be liable for any consequential, incidental, special, punitive, exemplary, or indirect damages**, including but not limited to any damages for **lost profits** or diminution in value.

Each party further agrees to defend, indemnify, and hold harmless the other party, its members, shareholders, affiliates, employees, officers, and directors from and against any and all claims, demands, causes of action, fines, penalties, costs and expenses (including attorneys' fees), losses or damages of any kind or character, including the cost of defense thereof and all costs of investigation in connection therewith, **suffered by any of the foregoing arising out of any violation or breach of any term, representation, covenant, or warranty in this Agreement**

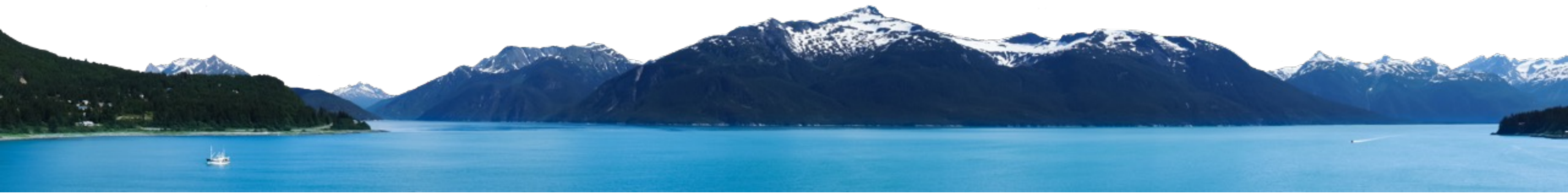
PITFALLS - NON-DISCLOSURE/NON-COMPETITION AGREEMENT

- Find a good teaming partner - former project manager, SMEs, or former employee of incumbent with knowledge of the project and its operations
- Sign teaming agreement and work on proposal and pricing using their information
- Receive a cease and desist letter from former employer alleging that the former employee is subject to/breaching an NDA or non-competition agreement



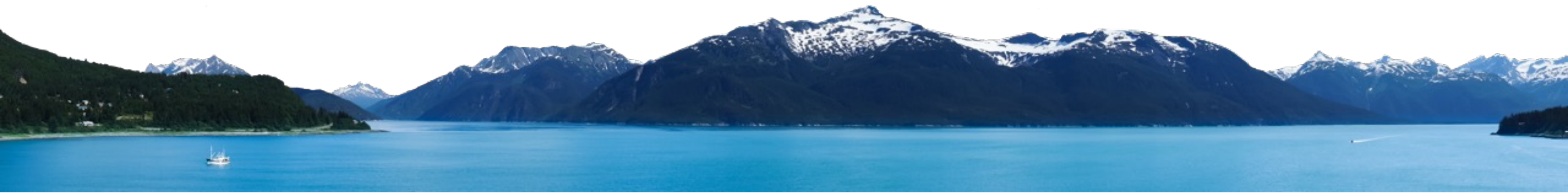
PITFALLS - INABILITY TO AGREE ON TERMS OF SUBCONTRACT

- Teaming agreement specifies 51/49 split of the work
- Teaming agreement states that if contract was awarded to prime, the parties would have 60 days to negotiate a subcontract.
- Prime is awarded the contract but did not reach agreement with subcontractor within 60 days
- Prime awarded subcontractor's scope of work to third party
- Subcontractor sues for breach of teaming agreement
- Teaming agreement found to be an unenforceable agreement to agree and subcontractor loses



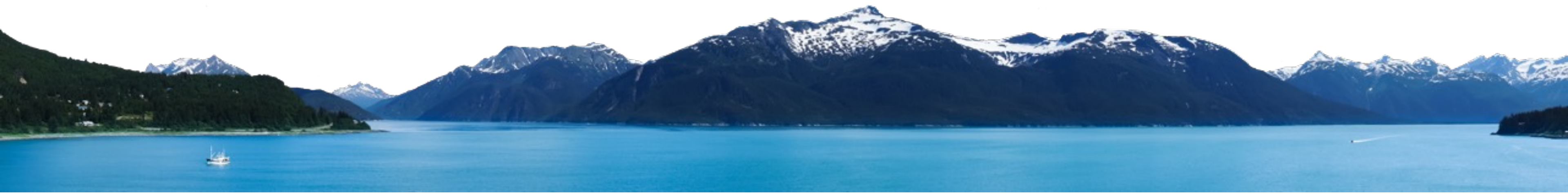
PITFALLS - OVERLY EXPANSIVE SCOPE OF TEAMING AGREEMENT

- Sign teaming agreement with partner under IDIQ/MAC contract
- Original intent is to go after one task order but teaming agreement refers to opportunities under IDIQ/MAC contract generally and is exclusive
- Initial contract does not go great, and you want to use a different partner for new task order opportunity
- Demand letter from existing partner alleging exclusivity in terms of all opportunities under IDIQ/MAC
- Prime is forced to either (1) not seek any new work under the IDIQ, (2) engage in litigation with former partner, or (3) contract with someone that they do not have confidence in



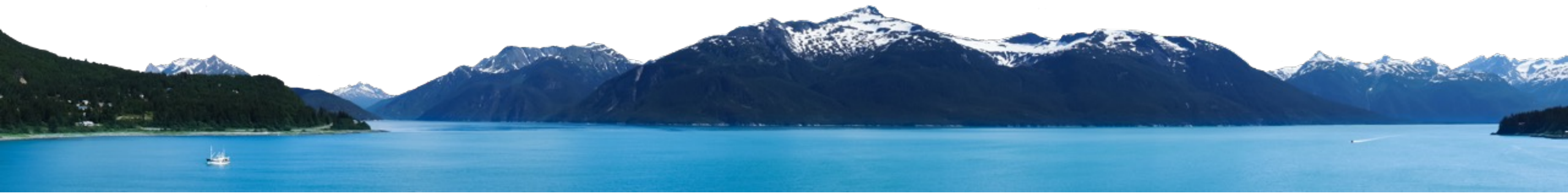
PITFALLS - SCOPE OF WORK

- Teaming agreement refers to scope of work but contains no guarantees
- Prime contractor wins the contract and when negotiating awards you the stated portion of work
- As contract expands, prime contractor takes all of the new work for their own
- Your total percentage of the contract revenue decreases even as your number of positions remains the same



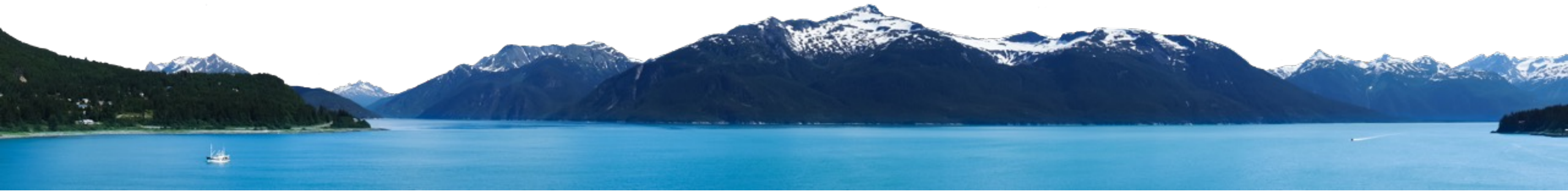
PITFALLS - TOO MUCH WORK

- Teaming agreement provides that you are to award 49% of scope of work to teaming agreement
- But you need to subcontract out other portions of the work to third parties
- Result is complying with the teaming agreement would violate the limits on subcontracting
- Prime must either drop out of the competition for the work and risk lawsuit from proposed subcontractor or proceed and risk size protest/contracting officer action



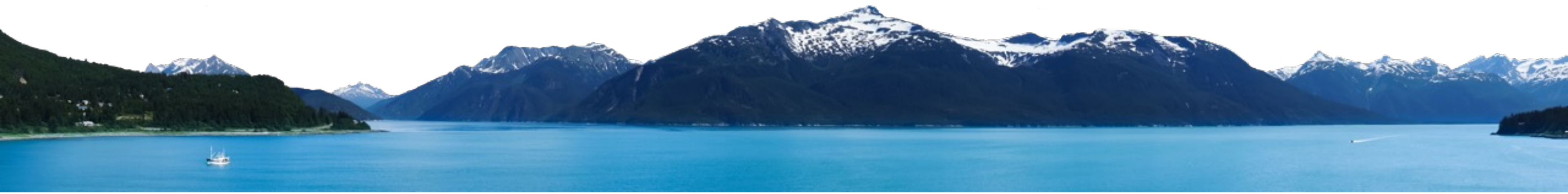
PITFALLS - TEAMING PARTNER CANNOT PERFORM

- Teaming agreement allocates scope of work to your teaming partner, including obligation to identify and retain SMEs
- Teaming partner cannot do so
- Discover that teaming partner's claimed capacities are wildly overstated
- Prime contractor is on the hook for replacing subcontractor and incurring additional costs



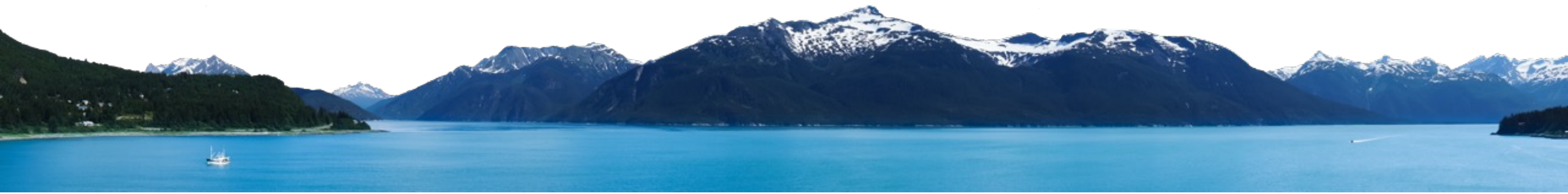
PITFALLS - TEAMING AGREEMENT RESULTS IN AFFILIATION - JOINT VENTURE AGREEMENT IN DISGUISE

- Teaming agreement between small business and large business is broad based and intended to cover opportunities in an entire field (i.e. base operations work)
- Prime contractor wins award
- Losing bidder files size protest
- SBA finds affiliation because teaming agreement was in reality a joint venture and prime loses contract
- Teaming agreements should cover only a single, specific acquisition. If an agreement encompasses a continuing relationship, then the parties may be considered as affiliated for size determination purposes. Team Contracting, Inc., SBA No. 3890, Mar. 9, 1994.



PITFALLS - TEAMING AGREEMENT RESULTS IN AFFILIATION - OSTENSIBLE SUBCONTRACTOR

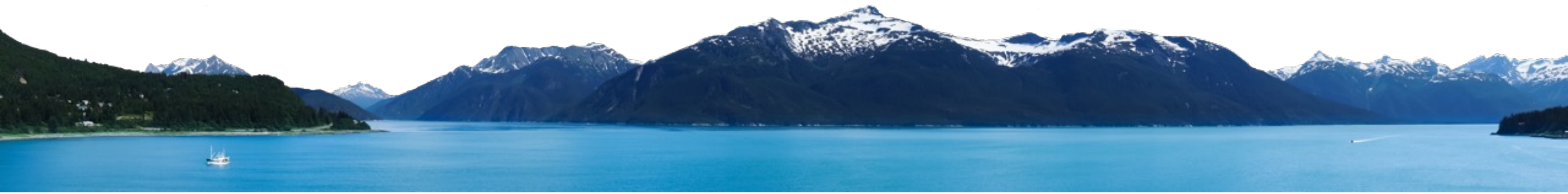
- Teaming agreement between small business and large business states that the small business is to be the prime, but the scope of work states that the subcontractor will be charge of day to day management of the contract
- Large business was the incumbent
- Prime contractor wins award
- Losing bidder files size protest
- SBA finds affiliation because large business was as “ostensible subcontractor” and prime loses contract
- Washington-Structural Venture, B-235270, Aug. 11, 1989, 89-2 CPD ¶ 130, at 9, suggests that a proper teaming agreement must vest control and daily management in the proposed prime contractor, and that the proposed prime contractor must be solely responsible for performance.



HOW TO PREVENT THINGS FROM GOING WRONG AND WHAT TO DO IF THEY DO GO WRONG

Due diligence into your teaming partner

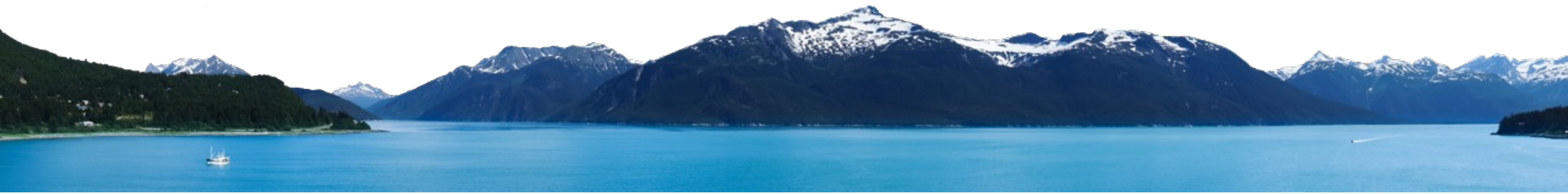
- Review SAM.gov certifications
- Debarment list
- Litigation search
- Reputation
- Prior experience
- Financial capabilities
- No actual or potential organizational conflict of interest that could prevent the team from receiving the contract award



HOW TO PREVENT THINGS FROM GOING WRONG AND WHAT TO DO IF THEY DO GO WRONG

Clear terms in teaming agreement

- Scope of work
- Exclusivity or not
- Guarantee subcontract award or not
- Pricing
- Terms of subcontract
- Termination of teaming agreement
- OCI/Non-Compete/NDA representations
- Indemnity obligations/Limitations on Liability



HOW TO PREVENT THINGS FROM GOING WRONG AND WHAT TO DO IF THEY DO GO WRONG

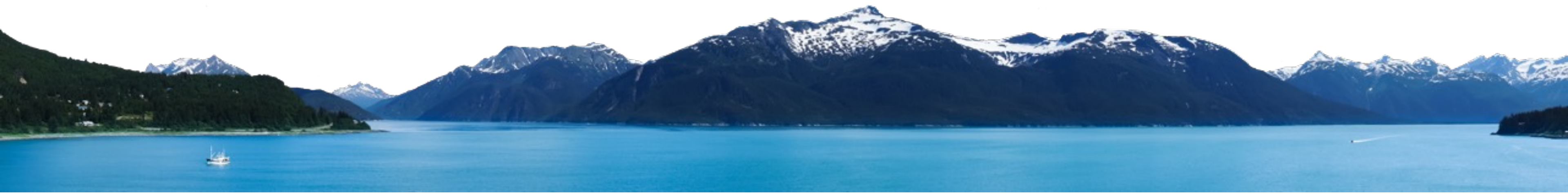
- Disclaim any joint venture in teaming agreement
- If small business is the prime contractor, insure that small business has final control over proposal and takes lead in proposal development
- Naming project manager who is a current employee of proposed subcontractor raises ostensible subcontract affiliation considerations

This Agreement is not intended to and does not create a joint venture, partnership or other formal business organization of any kind. Each party will act as an independent contractor and not as an agent for the other for any purpose, and neither party shall have authority to bind the other except to the extent specifically authorized herein.

Prime Contractor will prepare the Proposal, integrate the information provided by Subcontractor and submit the Proposal to the Client. Prime Contractor shall have the sole right to determine the technical contents of the proposal; however, Subcontractor may review and offer comments regarding its portion of the Proposal prior to its submittal to the Client, provided that, at all times, **Prime Contractor retains final authority over the contents of the proposal.**

HOW TO PREVENT THINGS FROM GOING WRONG AND WHAT TO DO IF THEY DO GO WRONG

- Identify the issue and take deliberate action
 - Identify breaches and terminate the teaming agreement in writing
- Identify potential alternative subcontractors
- Identify potential alternative structures - joint venture?
- Preserve records and demand that teaming partner do the same
- Do not proceed with opportunity if risk is too great



THANK YOU



ROB MISULICH
rmisulich@schwabe.com
907-339-7133



CHRISTOPHER SLOTTEE
cslottee@schwabe.com
907-339-7130

REPRESENTING
Schwabe

