

Legal Lessons You Need To Learn

“Legal Landmines for Small Contractors”

United States Department of Energy
12th Annual Small Business Conference & Expo

11 May 2011
Kansas City, Missouri

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Legal Lessons You Need To Learn



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Federal Contracts – IP – Business Ventures

SBA Certifications
 Teaming & Joint Ventures
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Solicitations & Bids
 Cost & Labor Standards
 Contract Negotiation

ITAR & Export Control
 Inventions & Data Rights
 Inspection & Warranty

Size Determinations
 Protests & Appeals
 Contract Termination

Dispute Resolution
 False Claims & Fraud
 Suspension & Debarment

“National Reach – Personal Touch”

Legal Lessons You Need To Learn

The Four Phases of Federal Contracts – All Contractors

- Procurement (Contract Types, Bidding, Negotiation, Protests)
- Partners (Subcontracts, Joint Ventures, Teaming, Vendors)
- Performance (Compliance, Changes, Adjustments, Inspection)
- Problems (Disputes, Appeals, Judicial Proceedings, Termination)

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The Four Phases of Federal Contracts – All Contractors

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- Partners (Subcontracts, Joint Ventures, Teaming, Vendors)
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The Four Phases of Federal Contracts – Small Business

- Pleading (Spouse; Banks; Contracting Officers; Primes)
- Poverty (Money; Time; Relationships; Health; Balance)
- Punishment (Spouse; Banks; Contracting Officers; Primes)
- Prosperity (Independence; Financial Security; Legacy Impact)

Legal Lessons You Need To Learn

Veteran Ownership & Control

Horror Story

- Newly formed SDVOSB shares equity with “parent” entity principals.
- Combination of “parent” SDV + non-SDV owners constitutes quorum.
- OA requires supermajority or unanimous consent for critical decisions.
- Multiple “independent” agreements + subcontracts = 97% of revenue.

Legal Nutshell

- SBA requires unrestricted ownership & unlimited control by SDV(s)
- Own: At least 51%; direct; unencumbered; no sell limits [13 CFR 125.9]
- Control: long-term decisions & daily management [13 CFR 125.10]
- Also: VA-only rules for VetBiz in addition to and different from SBA.

Lesson Learned

- Entity filings must reflect SDV unconditional ownership & unlimited control.
- Non-SDV control, including capacity for negative control, is a non-starter.
- Active control should be recorded: signatures; minutes; written delegation.

Legal Lessons You Need To Learn

Teaming & Affiliation

Horror Story

- Recent SDB approached by large industry leader (sound familiar?).
- Newbie gets key personnel and resources; giant gets access to set-asides.
- Protest disqualifies both from the solicitation for affiliation, and...
- Entity suspended pending size recertification. Trying to survive without \$.

Legal Nutshell

- Seven unique “affiliation based on...” rules – each with multiple provisions.
- Exists when one “controls or has the power to control” the other entity.
- Regulations are designed to protect SBA participant entities from abuse.
- Failing a SBA size determination “opens the door” during recertification.

Lessons Learned

- Remember: You are David without a rock & they are Goliath on steroids.
- You have the least to gain and the most to lose as the SBA participant.
- Paper a legitimate plan! Tell the story via NDA, MOA, Teaming Agreement, etc., that passes muster with CO up front & upon appeal by a competitor.

Legal Lessons You Need To Learn

Bonding Assistance & The Ostensible Subcontractor Rule

Horror Story

- Well-established \$5M 8(a) GC & \$100M HVAC firm → large set-asides.
- HVAC firm indemnifies its surety to provide bonds in name of 8(a).
- Competitor protests award alleging affiliation between 8(a) & HVAC.
- 8(a) loses SBA protest & appeal per 13 CFR 121.103(h)(4).

Legal Nutshell

- Prime & “ostensible subcontractor” treated as JV & therefore affiliated.
- OS performs “primary & vital requirements” or prime is “unusually reliant.”
- All aspects of relationship are considered, including, but not limited to:
- Proposal terms (K mgmt; technical responsibilities; % subcontracted); bonding assistance; sub size/incumbent status; “totality of circumstances.”

Lesson Learned

- Bonding assistance is NOT expressly proscribed by SBA rules, however...
- Document relationship (NDA, TA, Sub-K agreement & proposal, etc.).
- Demonstrate arms-length relationship & roles that pass 7 factor test.

Legal Lessons You Need To Learn

Limits on Subcontracting – Labor “Parts” & 1099 Staff

Horror Story

- HUBZone bids set-aside K for equipment & services from mfr's schedule.
- Services listed as “part numbers” & provided by non-SBA manufacturer.
- Entity staff are all 1099 “independent contractors” vs. “real” employees.
- SBA finds 100% contract value is subcontracted; company is a mailbox.

Legal Nutshell

- 13 CFR 125.6 places limits on subcontracting labor costs of set-asides.
- Primes may sub 50% – 85% depending (services, products, construction).
- Services are not materials even if defined with part number by the source.
- Personnel only count if they are your employees. What would the IRS say?

Lesson Learned

- Know and follow the rules – the SBA, BCA, GAO, & Courts are not stupid.
- SDVOSB JVs & multiple HUBZones may perform applicable % of work.

Legal Lessons You Need To Learn

The Labor Law Labyrinth

Horror Story

- 8(a) GC operates “independent field offices” in multiple jurisdictions.
- Office manager keeps track of overtime hours via desktop Post-It Notes.
- Project manager exchanges OT for comp time vs. reported and paid.
- Fired laborer files complaint. US Dept of Labor investigates. \$300K fine.

Legal Nutshell

- All K: Fair Labor Standards Act (FLSA) – Exempt vs. Non; Min Wage; OT.
- Service: Service Contract Act (SCA) – Classification; Wage Determinations.
- Construction: Davis-Bacon Act (DBA) & Others – Class; Wage; Fringe.
- >100K: K Work Hours & Safety Standards Act (CWHSSA) – OT; Safety.
- Manf/Supply: Walsh-Healey Act (PCA) – Min Wage; OT; Health/Safety.
- Depends: Equal Employment Opportunity (Exec Order 11246) – EEO; AA.

Lesson Learned

- Know the rules & train your people. It’s not rocket science but it matters.
- If you’re not sure, you’re probably doing it wrong... and it adds up fast.

Legal Lessons You Need To Learn

Cost Accounting & DCAA Audits

Horror Story

- Field supervisor negotiates & certifies costs to CO on FFP contract.
- Home office using QuickBooks, but entering USG payments as expenses.
- DCAA audit = \$500K civil claim + suspended by SBA during litigation.

Legal Nutshell

- Cost Principles, TINA, & USG audit rights are not optional for small KTRs.
- The language of federal cost accounting is not MBA or CPA material.
- FAR Part 30 – Cost Accounting Standards (CAS): Full / modified /exempt.
- FAR Part 31 – Contract Cost Principles & Procedures (per contract type).

Lesson Learned

- DCAA-qualified experts can modify S/W, train employees, & advise you.
- Get them on board up-front, not to clean-up after an actual DCAA audit.
- Using them as your Controller saves money on CPA at year-end.
- Hire them through your law firm & benefit from attorney-client privilege.

Legal Lessons You Need To Learn

False Claims & Fraudulent Acts

Horror Story

- SDVOSB payroll clerk transfers labor hours from unsigned timesheets.
- Office manager suspects falsities from field office, certifies forms anyway.
- Entity suspended and heavily fined; owner & staff facing criminal counts.

Legal Nutshell

- False Claims Acts, Program Fraud Civil Remedies Act, False Statements Act, Anti-Kickback Act, etc. contain civil sanctions & criminal penalties.
- Agency investigators & DOJ attorneys are dead serious about KTR fraud.
- Rules are ignorance intolerant: You represent & warrant ethical conduct.

Lesson Learned

- Lead! In or out of uniform, you remain a steward of the public trust.
- Listen to your gut. If it feels wrong, it probably is. Stay off "the slope."
- Know the boundaries & make sure your employees stay away from them.
- Bottom line: It's a lot easier to stay out of trouble than to get out of it.

Legal Lessons You Need To Learn

Dispute Resolution

Horror Story

- AFOSI investigates SDB fraud that subsequently refuses to cooperate.
- DOJ notifies SBA; SDB suspended pending outcome & final resolution.
- AUSA suspects tax fraud & refers to IRS. Entity and owner nearly DOA.

Legal Nutshell

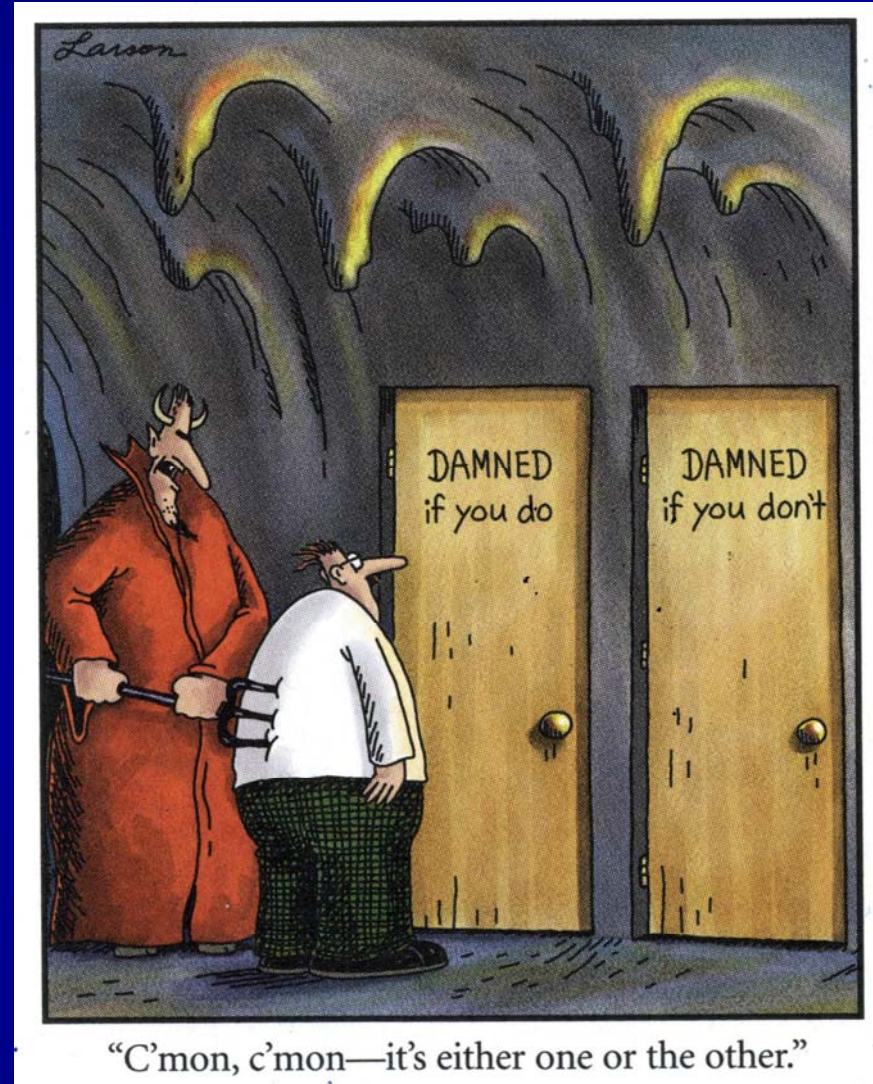
- Contract Disputes Act (41 USC 601-613) + FAR Subpart 33.2 governs.
- Policy is to resolve controversies by mutual agreement at CO's level.
- ADR: Increase opportunity for inexpensive & expeditious resolution.
- USG can mandate continued performance pending final resolution.
- Most legal fees are an allowable cost (FAR 31.205-33/47). What a deal!

Lesson Learned

- Get in front of the problem – disputes do not get better with age.
- Cooperate & graduate – always perform... don't add to your problems.
- Help us help you – “mea culpa” is painful, but we must know the truth.
- Litigation = Lose. Retain lawyers who “get it,” not commercial litigators.

Legal Lessons You Need To Learn

A SMALL BUSINESS FEDERAL CONTRACTOR'S PERSPECTIVE ON WHETHER TO HIRE A LAWYER



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