

NDIA Small Business Conference

*The Nuts, Bolts & Screws
Of Teaming Agreements*



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509-0279



Slide 1

Outline

- I. Big Picture
- II. Why Team?
- III. The Nuts & Bolts
- IV. The Screws
- V. Sub Not Getting Paid

I. Big Picture

FAR § 9.601

Teaming agreements can be:

1. a subcontract
2. a partnership
3. a joint venture

I. Big Picture

“A survey by the Centre for Global Corporate Positioning of estimates by business analysts indicates 50% to 70% of joint alliances fail. A Columbia University study found cross-border joint ventures have similarly dismal chances: only 43% become viable.”

The Deal, January 26, 2004 at 32

I. Big Picture

The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it.

en.wikipedia.org/wiki/Privity

II. Why Team?

1. Special expertise
2. Performance risk reduction
3. Meet customer preferences
4. Geographic/political balance
5. Meet socio-economic goals
6. Convert competitor into team member

1. Special Expertise

“The Government will recognize the integrity and validity of contractor team arrangements; provided, the arrangements are identified and company relationships are fully disclosed....”

FAR § 9.603

Slide 7

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1. Special Expertise

The GAO has sustained a protest where the past experience of a subcontractor was not accredited to an offeror's proposal.

*KIC Development, LLC, B-297425.2,
January 26, 2006*

Slide 8

II. Why Team?

1. Special expertise
2. Performance risk reduction
3. Meet customer preferences
4. Geographic/political balance
5. Meet socio-economic goals
6. Convert competitor into team member

2. Performance Risk Reduction

The Comptroller General sustained a contracting officer's conclusions that a newly formed team of three companies posed a "great risk" because the three companies had never worked together before.

AIA-Todini-Lotos, B-294337, October 15, 2004

II. Why Team?

1. Special expertise
2. Performance risk reduction
3. Meet customer preferences
4. Geographic/political balance
5. Meet socio-economic goals
6. Convert competitor into team member

3. *Meet Customer Preferences*

- The Navy forced a teaming agreement between Northrop and McDonnell Douglas for the F-18.
- For the resulting litigation, *see* Northrop Corp. v. McDonnell Douglas Corp., 705 F. 2d 1030 (9th Cir.)

II. Why Team?

1. Special expertise
2. Performance risk reduction
3. Meet customer preferences
4. Geographic/political balance
5. Meet socio-economic goals
6. Convert competitor into team member

4. Geo/Political Balance

“The B-2 is the most expensive plane ever built. Estimates for the costs per plane in excess of \$1.5 billion each. The B-2 bomber has a piece of it made in every state of the United States.”

http://www.theblackvault.com/wiki/index.php/B-2_Spirit

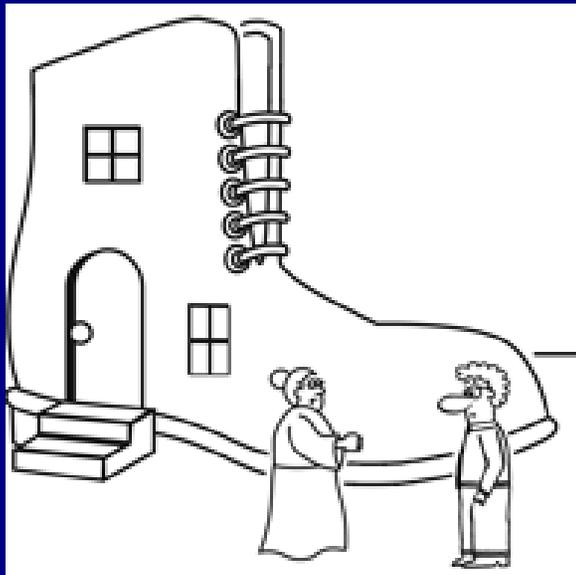
Slide 14

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II. Why team?

1. Special expertise
2. Performance risk reduction
3. Meet customer preferences
4. Geographic/political balance
5. Meet socio-economic goals
6. Convert competitor into team member

5. Social-Economic Goals



- The “Rule of Two”
FAR § 19.202-2(b)
- “At least 50% of the cost of contract performance”
FAR § 52.219-14
- Affiliation
13 CFR § 121.103
- Ostensible subcontractor
13 CFR § 121.103(f)

II. Why Team?

1. Special expertise
2. Performance risk reduction
3. Meet customer preferences
4. Geographic/political balance
5. Meet socio-economic goals
6. Convert a competitor into a team member

6. *Eliminating A Competitor?*

U.S. v. Alliant Techsystems, Inc.

- Alliant and Aerojet-General competed against each other in the Combined Effects Munition (CEM) market
- In 1990, the Air Force “downsized” to one vendor—Alliant
- After the Gulf War, Air Force issued RFP seeking competition

II. Eliminating A Competitor?

- Alliant and Aerojet entered into a teaming agreement and submitted a single bid for the CEM contract with Alliant acting as the prime
- The price submitted by the Alliant/Aerojet team was higher than previous contracts
- DOJ brought an action based on Sherman Act, Section 1.

Slide 19

II. Eliminating A Competitor?

Alliant and Aerojet subsequently entered into a consent decree with DOJ.

- Agreed to pay \$2,047,500
- Agreed to implement an antitrust compliance program
- Agreed not to entering into future teaming agreements for production of CEM systems

III. Nuts & Bolts

“The Contractor is responsible for the unexcused performance failures of its subcontractors.”

Johnson Management Group CFC v. Martinez, 308 F.3d 1245
(Fed. Cir 2002)

Slide 21

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III. Nuts & Bolts

A prime contractor can be held liable to the government for a third tier subcontractor not providing accurate cost or pricing data.

McDonnell Aircraft, ASBCA No. 44504, 03-1 BCA ¶ 32,154

III. Nuts & Bolts

If a subcontractor fails to make appropriate payments under labor laws such as DB, SCA, or FLSA, prime can be held financially liable.

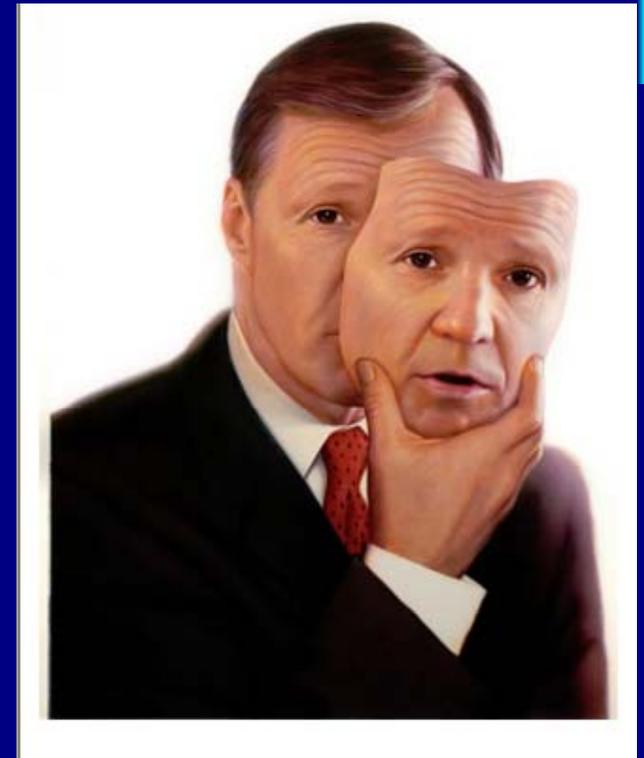
Mohr v. J. Pease Constr. Co., 1994 WL 171512 (N.D.Ill. May 2, 1994)

III. Nuts & Bolts

- Little authority to support argument that key FAR clauses are binding on subcontractors based on Christian doctrine.
- Prime who does not correctly “flow down” appropriate FAR clauses is at risk of subcontractor not being bound.

III. Nuts & Bolts

An organizational conflict of interest (OCI) of a subcontractor can be imputed to the prime contract



Slide 25

A Hard Look Into Aetna

The underlying procurement was for managed health care in California for CHAMPUS beneficiaries who included military members and their dependents. The estimated value of the contract was > \$2.5 billion.

Qualmed proposed Lewin-VHI as a subcontractor for mental health

A Hard Look Into Aetna

“QualMed asked the agency for guidance about resolution of the potential organizational conflict of interest. QualMed indicated that it could submit a proposal without VBH's participation, if the Lewin-VHI affiliate's involvement posed a problem for OCHAMPUS.”

Slide 27

A Hard Look Into Aetna

“Agency counsel and the contracting officer responded that the agency had experience in this area, and that, so long as QualMed submitted an acceptable plan for mitigation of the conflict, the agency would approve it and VBH could serve as QualMed's subcontractor.”

A Hard Look Into Aetna

The approved mitigation plan stated that CHAMPUS “employees will subject Lewin-VHI's work to close scrutiny in a manner determined by the agency....

A Hard Look Into Aetna

The GAO stated: "The protests here reflect the third type of organizational conflict of interest, involving potentially impaired objectivity ... whether its affiliate would receive a \$183 million subcontract."

A Hard Look Into Aetna

GAO's reason for sustaining protest:

“the agency failed to take reasonable steps to learn the relevant facts about the organizational conflict of interest.”

A Hard Look Into Aetna

QualMed challenged the GAO decision in USDC. The court held that, notwithstanding that QualMed arguably was not to “blame” for the OCI, blame was not relevant to a finding that an OCI existed.

QualMed, Inc. v. OCHAMPUS, 934 F. Supp. 1227
(D. Col. 1996).

IV. The Screws



Slide 33

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Government Executive 9/22/09

“Even after spending many hours and thousands of dollars working with large businesses to win federal contracts, small firms are not receiving a fair share of the work.... Large businesses generally need -- and accept -- many proposals from small, minority-owned companies but end up re-competing the work after award.”

Government Executive 9/22/09

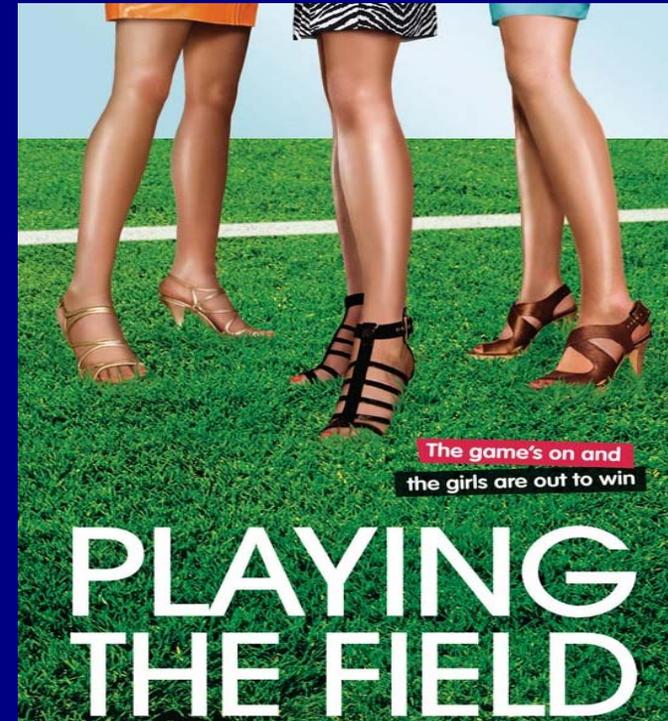
Ronald Newlan, chairman of the HUBzone Contractors National Council, testified before the Senate Small Business Committee that the problem is epidemic. "It's almost a bait-and-switch sometimes."

IV. Screws -- Pre-award

Exclusive?



Nonexclusive?



Slide 36

IV. Screws -- Pre-award

Northrop Grumman Terms & Conditions

- Clause 3
- Clause 4
- Contrast Clauses 6 & 7
- Clause 13
- Clause 20
- Clause 27
- Clause 28



Slide 37

IV. Screws -- Pre-award

“Restrictions On Subcontractor Sales
to the Government”

FAR § 52.203-6

“The Contractor shall not enter into any agreement with ... which may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor....”

Slide 38

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IV. Screws -- Pre-award

“Patent Rights—Retention by The Contractor”

FAR § 52.227-11

“The subcontractor will retain all rights provided for the Contractor in this clause, and the Contractor will not, a part of the consideration for awarding the subcontract, obtain rights in the subcontractor’ subject inventions.”

Slide 39

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IV. Screws -- Pre-award

“Rights In Technical Data— Noncommercial Items”

DFARS § 252.227-7013

“The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.”

IV. Screws -- Post-award

- Prime not awarding work to sub
- Non-government initiated T4C
- Obtaining access to subcontractor proprietary technical data
- Hiring away subcontractor's best employees

IV. Screws -- Post-award

General Capture Rule:

"You eat what
you kill"

Teaming Capture Rule:

"The alpha male
eats first"



Slide 42

IV. No Teaming Agreement?

General Rule Is Sub Bound To Quotes:

A subcontractor's quote to a prime forms is enforceable against the sub even if revoked prior to formal acceptance by the prime.

See also, UCC § 2-205 firm offer by merchant rule.

Slide 43

IV. No Teaming Agreement?

General Rule Does Not Work In Reverse:

Generally, once a prime's proposal is accepted, the prime contractor can "shop" for new subcontractors (unless bound by a teaming agreement).

IV. Prime Can “Shop” Bids

A Typical Case

- In Dual, Inc. v. Symvionics, Inc., 122 F.3d 1060, (4th Cir. 1997), the court ruled a prime contractor did not breach its duty to negotiate in good faith by not awarding a subcontract.
- Key factors:
 - (1) the Teaming Agreement, by its terms, required only that the parties negotiate in good faith and did not impose an absolute duty to place the subcontract;

IV. Prime Can “Shop” Bids

(2) allowing the teaming partner to begin work while still negotiating the subcontract was evidence of good faith; and

(3) under state law, the Teaming Agreement was simply an agreement to agree and did not impose additional obligations on the prime contractor

IV. Potential Sub Tactics

- If a small business, seek agency small business advocate to contact C.O. to determine if prime contractor is meeting Small Business goals
- Try to get Contracting Officer to remind Prime of potential liability for failure to meeting subcontracting goals (*i.e.*, FAR § 52.219-16 "Liquidated Damages - Subcontracting Plan")

IV. Potential Sub Tactics

Make-Or-Buy Programs

FAR § 15.407-2

"[T]he Government may reserve the right to review and agree on the contractor's make-or-buy program when necessary to ensure negotiation of reasonable contract prices, satisfactory performance, or implementation of socioeconomic policies."

Slide 48

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IV. Prime Can “Shop” Bids

An Usual Case

- Cube, a small business, needed additional expertise to be competitive for award
- Cube and EG&G teamed. Proposal had EG&G performing 49% of the work
- Small business set aside
- After award, CCT insisted on capping G&A for EG&G as well as complete right to T4C

IV. Prime Can “Shop” Bids

- Declaring impasse, Cube dismisses EG&G
- EG&G obtained injunction requiring Cube to keep EG&G as a sub
- Cube has to keep EG&G as sub entire contract
- Court concluded that capped G&A and broad T4C right “were problems that Cube created in an attempt to renegotiate.”
- Previously, Virginia law generally regarded teaming agreements as “agreements to agree.”

IV. Anti-Bid Shopping Laws

- Arkansas, California, Connecticut, Delaware, Florida, Massachusetts and New Mexico.
- Once the prime contractor's bid is accepted, the prime can not substitute subcontractors except for good cause.

IV. Screws -- Post-award

- Prime not awarding work to sub
- Non-government initiated Termination for Convenience
- Obtaining access to subcontractor proprietary technical data
- Hiring away subcontractor's best employees

IV. Termination For Convenience

- Grumman prime on Joint STARS contract; Aydin was sub
- Subcontract incorporates by reference FAR T4C clause
- Grumman T4Cs subcontract
- Aydin argues Grumman could only T4C if Gov't initiated T4C

Slide 53

IV. Termination For Convenience

- Court saw no limitation in the “flowdown” FAR clause
- “There is a reasonable probability that Grumman can establish that it terminated Aydin in good faith for a perceived inability to perform.”

Aydin v. Grumman, Civ. A. No. 86-5244, 1986 WL 12947 (E.D. Pa. Nov. 14, 1986).

IV. Termination For Convenience

Advice

- *Structure teaming agreement and contract to only allow T4C if Government terminates prime contract for convenience*
- *Also structure agreement so prime must exercise options if Government exercises options*

IV. Screws -- Post-award

- Prime not awarding work to sub
- Non-government initiated Termination for Convenience
- Potential sub tactics
- Obtaining access to subcontractor proprietary technical data
- Hiring away subcontractor's best employees

IV. Accessing Tech Data

“Rights In Technical Data— Noncommercial Items”

DFARS § 252.227-7013

“[W]hen there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government.”

Slide 57

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IV. Screws -- Post-award

- Prime not awarding work to sub
- Non-government initiated Termination for Convenience
- Potential sub tactics
- Obtaining access to subcontractor proprietary technical data
- Hiring away subcontractor's best employees

IV. Hiring Sub's Employees

- The general rule is that, unless contractually prohibited, either party may recruit the other party's employees.
- Place in the agreement that neither party will recruit the other's employees



Slide 59

V. Sub Not Getting Paid



Slide 60

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V. Subs Not Getting Paid

Subs Are At Special Disadvantage When
Prime's Customer Is Federal Govt

*Equitable liens against federal property
or federal funds are not available to
subcontractors on government contracts
because of the doctrine of sovereign
immunity.*

Department of the Army v. Blue Fox, Inc., U.S. Supreme Court
(1999)

Slide 61

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V. Subs Not Getting Paid

GAO Report -- DOD Contracting: Techniques to Ensure Timely Payment to Subcontractors (NSIAD-93-136)

- “Subcontractor payment problems were prevalent”
- “The identified payment problems ... adversely affected the firms’ cash flow and financial health.”

V. Sub Not Getting Paid

Subcontractor Requests for Information

FAR § 32.112-2

Upon the request of a subcontractor or supplier ... the contracting officer shall promptly advise the subcontractor or supplier as to --

- (1) Whether the prime contractor has submitted requests for progress payments or other payments to the Federal Government; and
- (2) Whether final payment under the contract has been made

V. Sub Not Getting Paid

Subcontractor Assertion Of Nonpayment

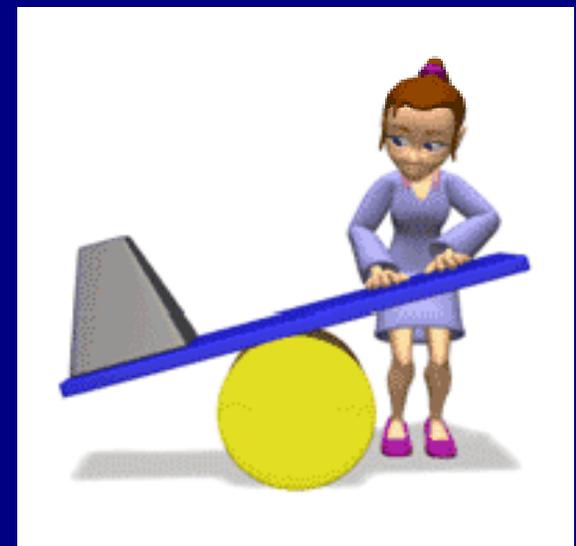
FAR § 32.112-1

If the contracting officer finds the prime contractor is not in compliance, the contracting officer may --

- (1) Encourage the contractor to make timely payment, or
- (2) Reduce or suspend progress payments to the contractor

V. Sub Not Getting Paid

If Subcontractor has serious concerns about not getting paid, prior to entering into any agreement, consider requiring that Government payment be made to a Joint Payee Account



Slide 65

Final Advice



Thoroughly
think
through the
relationship!

Slide 66

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Example: Think Through ...

- In 1992, Lockheed Martin (LM) and Raytheon entered into a joint venture agreement to develop and manufacture TOW missiles for the Army.
- In 1994, the joint venture agreement was amended to include follow-on projects to the TOW missile procurements.

Example: Think Through ...

- Raytheon informed LM that Raytheon wanted to pursue some of the TOW follow-on projects alone.
- LM sued Raytheon requesting an injunction
- The court ruled in favor of Raytheon