

Small Business Federal Contractor Legal Lessons

Hawk's Top Ten List: How to Stay in the Black & Stay out of Jail



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Small Business Federal Contractor Legal Lessons



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“National Reach – Personal Touch”

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TOPIC ABSTRACT

Reconciliation by the Court of Appeals for the Federal Circuit of facially conflicting interpretations by various Boards of Contract Appeals and the Court of Federal Claims with regard to the term “knowingly” as provided for in the civil and criminal provisions of the False Claims Act, 31 USC § 3729 et al.

Small Business Federal Contractor Legal Lessons

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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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)

Small Business Federal Contractor Legal Lessons

"Be a Control Freak. Better Yet, Be a Control Genius"

Horror Story

- Newly formed SDVOSB shares equity with "parent" entity principals.
- Combination of SDV + non-SDV "parent" 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]
- Non-SDV control, including capacity for negative control, is a non-starter.

Lesson Learned

- Entity documents are probably wrong. Need a transmutation agreement?
- Memorialize active control: signatures; minutes; email; written delegation.
- VA-only rules for VetBiz; CVE verification struggle; S633 fait accompli?

Small Business Federal Contractor Legal Lessons

“Unless You’re Lead Dog, the View Doesn’t Change Much”

Horror Story

- Recent SDB approached by large industry leader (sound familiar?).
- Newbie gets key personnel and resources; giant gets _____ 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: (Stock; Options; Mgmt; ID of Interest; Newly Organized; JV; Franchise)
- Exists when one “controls or has the power to control” the other entity.
- Failing a SBA size determination “opens the door” during recertification.
- Limited Exceptions: Certain JVs & 8(a) M-P but maybe for “other reasons.”

Lessons Learned

- Rules are to protect you, but you have burden upon size challenge.
- You have the least to gain and the most to lose: It’s your name at risk.
- Paper a legitimate plan that passes muster with CO and competitors!

Small Business Federal Contractor Legal Lessons

“You Need a Big Stick to Sleep with an 800 pound Gorilla”

Horror Story

- Well-established \$5M 8(a) GC & \$100M HVAC firm → large 8(a) IDIQs.
- 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.).
- Traits: Arms-length; commercially reasonable; mutually beneficial; etc.

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"Many A Good Hanging Prevents A Bad Marriage"

Horror Story

- Large business forms JV with 8(a) to pursue "targeted opportunities"
- Substantial resources invested to secure \$5M sole-source drains 8(a)
- JV Mgmt (guess who?) subcontracts 75%+ of work to subsidiaries
- Other priorities + shrinking profits = 8(a) stuck self-performing & can't

Legal Nutshell

- JV is teaming arrangement: partnership is the prime contractor. FAR 9.601
- Key concepts: combined resources; limited purpose; 3-in-2 years max.
- Affiliation unless 8(a) competitive; M-P; or all small & K is >50% NAICS
- Special rules for SDV / 8(a) / M-P JVs. 13 CFR 124.513; 124.520; 125.15

Lesson Learned

- Likely affiliated as JV in absence of other memorialized relationship
- Viewed as one entity in determining "power to control its management"
- Lots of "entity alliance" tools: JV is high maintenance with limited utility
- Good fits? Locality requirement; entity equity, liability, self-perform %

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"You Can't Kill A Kraken With A Can Of Mace"

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.

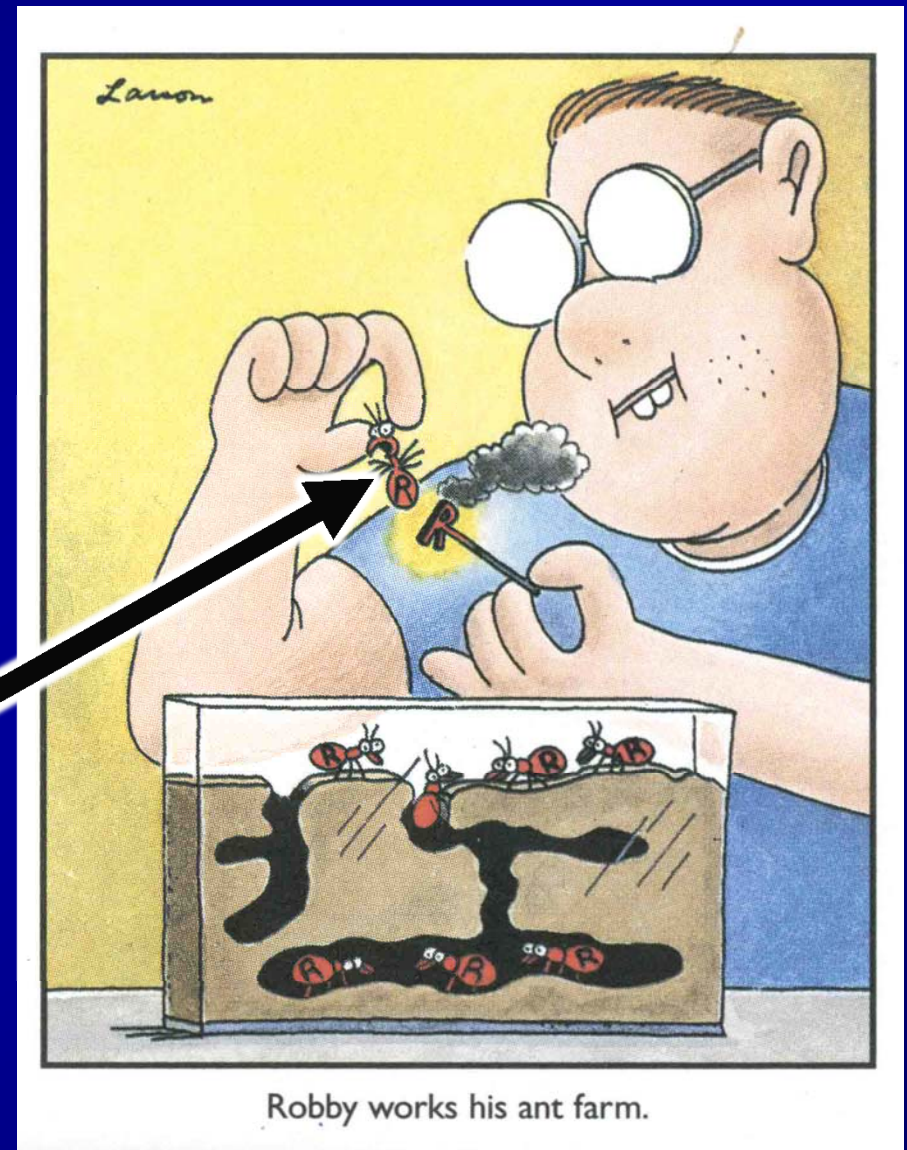
Lesson Learned

- 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.

Small Business Federal Contractor Legal Lessons

**HOW MANY LARGE
CONTRACTORS VIEW
SMALL BUSINESS**

YOU ARE HERE



Small Business Federal Contractor Legal Lessons

#6 – Limits on Subcontracting

“Work Is The Curse Of The Drinking Class...So Get Over It”

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.

Small Business Federal Contractor Legal Lessons

“When in Rome, Shut Up and Find an Interpreter”

Horror Story

- SB 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.
- Using them as your Controller saves money on CPA at year-end.
- Get them on board up-front, not to clean-up after an actual DCAA audit.
- Hire them through your law firm to benefit from attorney-client privilege.

Small Business Federal Contractor Legal Lessons

“Squeaky Clean Beats Enron Any Day Of The Week”

Horror Story

- CEO makes uninformed good faith “mandatory disclosure” to DoD IG; inadvertently incriminates himself & waives Fifth Amendment rights.

Legal Nutshell

- FAR 52.203-13 now prescribes “Contractor Code of Ethics and Business Conduct” and “Mandatory Disclosure Rule” clauses for contracts if value is expected to exceed \$5M and performance period is 120 days or more.
- Requires due diligence to prevent & detect criminal conduct; promoting culture of ethics & compliance; mandatory disclosures to government.
- Small contractors exempt from formal compliance program & internal control system BUT must comport with business ethics & conduct rules.
- MDR does not require contractor to waive attorney-client privilege.

Lesson Learned

- Check your contracts: \$10M 5YR IDIQ with 2 Ktrs & no minimum qualifies!
- Bids require affirmative representation & 30 days is not enough time.

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"You Won't Get to Pick Your Roommate on Lockup"

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.
- Mom was right: It's a lot easier to stay out of trouble than to get out of it.

Small Business Federal Contractor Legal Lessons

"Wrestle with a Skunk & You'll End up Stinking"

Horror Story

- AFOSI investigates 8(a) fraud that subsequently refuses to cooperate.
- DOJ notifies SBA; entity suspended pending outcome & final resolution.
- AUSA suspects tax fraud – refers to IRS. Entity & owner on life support.

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.
- Most legal fees are an allowable cost (except to fight). FAR 31.205-33/47

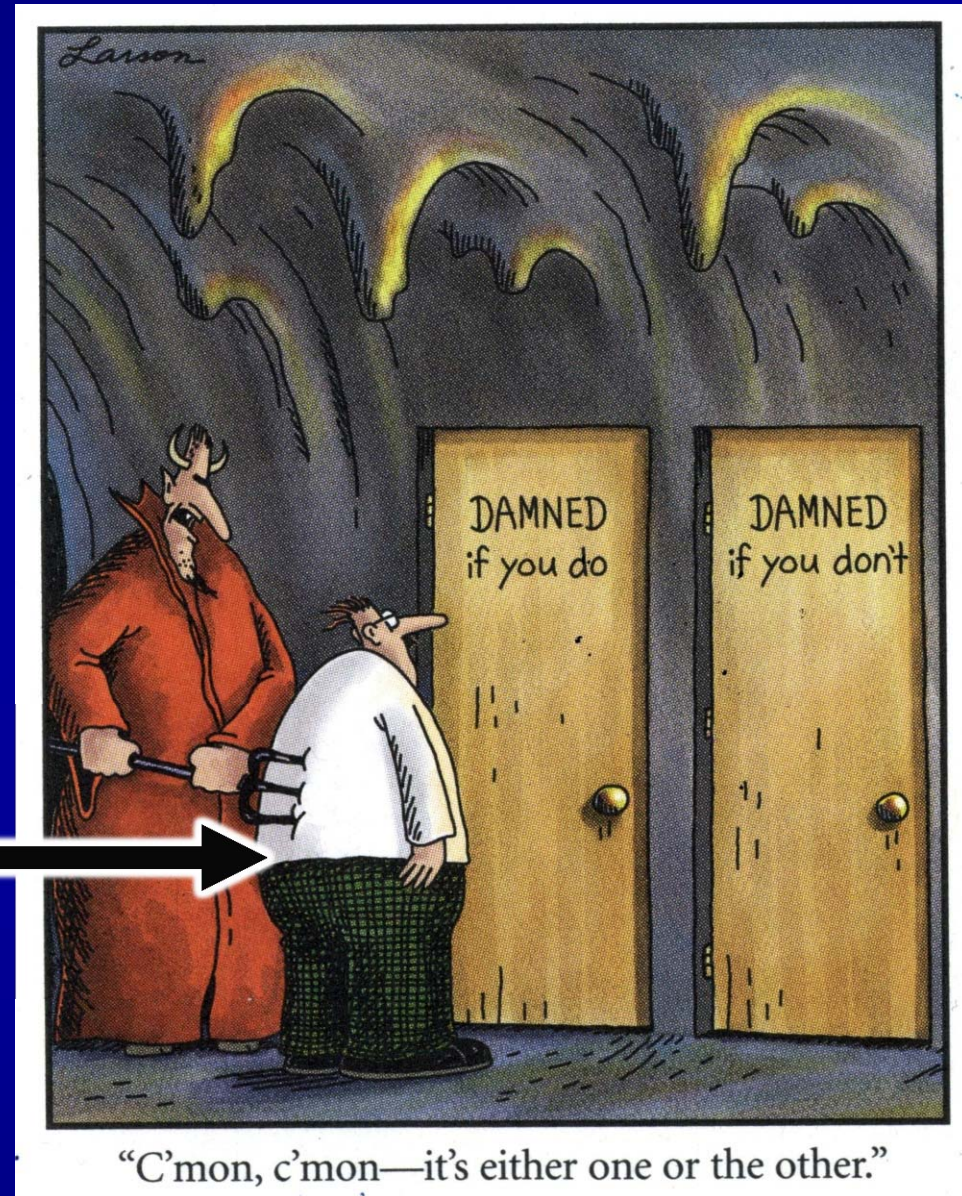
Lesson Learned

- Get in front of it – it will not get better with age – it will only cost you more.
- Cooperate & graduate – always perform... don't add to your problems.
- Litigation = Lose. Retain lawyers who speak FAR, not commercial litigators.
- Best advice: Hire us now, not later. Remember "an ounce of prevention..."?

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HOW SMALL CONTRACTORS VIEW HIRING LAWYERS

YOU ARE HERE



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