

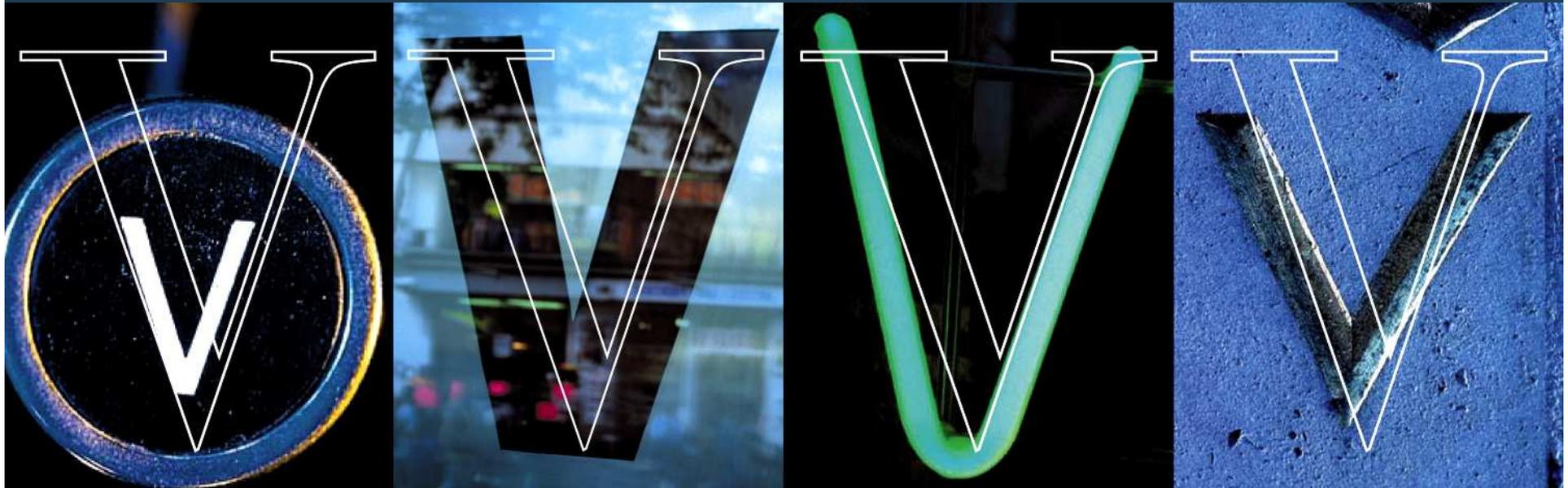
VENABLE[®]_{LLP}

Lunch & Learn: Defining the Pros and Cons of Joint Ventures and Teaming Agreements

Prince George's County Supplier Development & Diversity Division
January 28, 2014

Presented by:
Featuring:

Keir X. Bancroft, Esq., Venable LLP
Heidi Gerding, President and CEO, HeiTech Services, Inc.



Keir X. Bancroft – Presenter

Keir Bancroft is a Counsel at Venable LLP, where he represents clients in litigation including bid protests, size protests, and contract-related disputes before tribunals including the GAO, the SBA, boards of contract appeal and the United States Court of Federal Claims. Mr. Bancroft also drafts and negotiates subcontracts, nondisclosure agreements, joint ventures, mentor-protégé agreements, and licensing agreements on behalf of clients. Mr. Bancroft serves as Vice-Chair on the American Bar Association Public Contract Law Section’s Strategic Alliances, Teaming, and Subcontracting Committee.

Within the broad rubric of cybersecurity, Mr. Bancroft specializes in information security and privacy compliance. He helps clients comply with standards under the Federal Information Security Act (“FISMA”) and similar requirements. Mr. Bancroft also focuses on industrial security issues arising under the National Industrial Security Program Operating Manual (“NISPOM”).

Before joining private practice, Mr. Bancroft served as an attorney advisor and the Privacy Officer in the United States Department of the Treasury, Bureau of Engraving and Printing. There, he counseled and represented the Bureau in all facets of federal procurement.

Mr. Bancroft began his legal career as a judicial law clerk in the chambers of Judge George W. Miller at the United States Court of Federal Claims. He is a 2004 graduate of the Georgetown University Law Center in Washington, DC.



Heidi W. Gerding – Presenter

Heidi Gerding is the President and CEO of HeiTech Services, Inc., a Prince George's County woman and service-disabled veteran owned business successfully transitioning out of its small business size status. Ms. Gerding is an entrepreneur, accomplished business leader – and wife and a mother of four, who holds the distinction of being the first woman from Minnesota to graduate from the U.S. Naval Academy. After leaving the Navy, her leadership and organizational skills placed her in management positions of increasing responsibility with Washington-area management services firms contracting with the Federal Government.

In October 1999, Ms. Gerding formed HeiTech Services to provide management consulting and information technologies services to the Federal Government. She based the company's founding principles of Honor, Excellence, and Innovation on ideas learned as part of the Naval Academy's Honor Concept. As an active business owner, she leads employees by example, through her own dedication and commitment to her work, to incorporate the founding principles into all aspects of the business, provide exceptional customer service to her clients, and nurture the professional and personal needs of her employees.

Corporate and individual recognition includes:

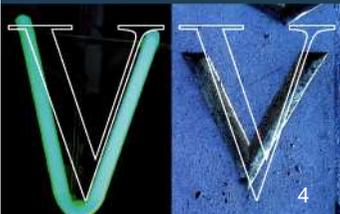
- 2013 King's College Washington Area Alumni Club (KWAC) Woman of the Year 2012
- 2012 Finalist at the 2012 National Capital Business Ethics Awards
- 2008 Enterprising Veterans Award, U.S. Department of Veterans Affairs
- 2008 Mentor-Protégé Team Award, U.S. Department of Homeland Security



Agenda

Introduction: Schedule for the Session

- ***First Things First***
 - *Reviewing Recent Small Business Administration Rules*
- ***Agreeing to “Date”***
 - *Strategies and Tactics in Teaming Agreements*
- ***Agreeing to “Marry”***
 - *Strategies and Tactics in Prime and Subcontracts*
- ***True “Commitment”***
 - *Strategies and Tactics in Joint Ventures*
- ***Bringing Up “Baby”***
 - *Strategies and Tactics in Mentor-Protégé Agreements*



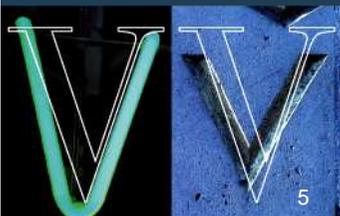
First Things First

2013: A Busy Year!

■ ***Changes to the “50 Percent Rule”***

- Limitations on Subcontracting:
 - Currently, a small business prime must incur *50 percent of the cost of contract performance* with its own personnel, which helps limit small businesses acting as “fronts” for large business primes.
 - No limits, however, on costs for materials or other direct costs.
 - Changes to the rule, yet to be finalized by SBA, now limit the application to no more than 50 percent *of the amount paid* to the prime.
 - The 50 percent obligation is spread across all contract costs, including materials and other direct costs.
 - Also specifies it does not apply to payments to “similarly situated entities.” Thus, for example, a service-disabled veteran owned small business may subcontract to another SDVOSB ,and will not be affected by the 50 percent rule.
 - Penalty for noncompliance: \$500,000

- SBA also considering establishing mentor protégé program for *all* small business concerns (beyond those under section 8(a))



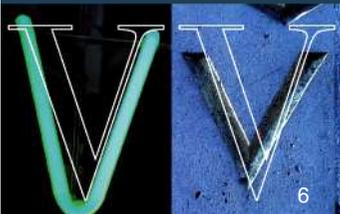
First Things First

2013: A Busy Year!

■ ***SBA Rule on Size and Status Integrity***

- Penalties imposed for “willful misrepresentation” of size or status
 - Applies to response to small business solicitations
 - Applies when registering as a small business on SAM.gov or other database
 - “Presumption of loss applies” - size status misrepresentation causes a loss equal to all contract payments made by the Government
 - Potential for False Claims Act liability, qui tam actions
 - Potential debarment

- Small business must provide annual size and status certification on SAM.gov
- Any proposal submitted in response to a set aside requirement is deemed a certification, no express signature needed
- Company official must sign the page of the proposal identifying size and status of the small business

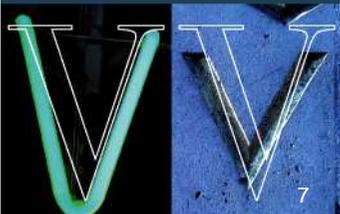


First Things First

2013: A Busy Year!

■ ***SBA Rule on Small Business Contracting***

- Prime must notify CO when:
 - It fails to use the small business subcontractor used in preparing proposal
 - It reduces payments to the small business subcontractor, or delays payments beyond 90 days
- Prime must explain at contract conclusion why it did not meet small business subcontracting goals
- Small business subcontractor may discuss material matters of prime utilization with CO
- Must give “maximum practicable opportunity” for small businesses to participate
- Must give pre-award written notice to unsuccessful small business subcontractors

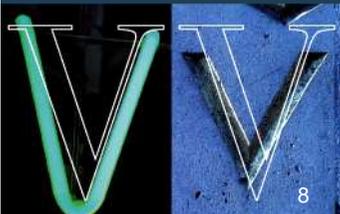


First Things First

2013: A Busy Year!

■ ***SBA Rule on Multiple Award Contracting***

- Total Set-Aside – apply rule of two and parity analysis; consideration of on and off ramps; 50-percent rule applied to each period (e.g., base period and each option year); CO may apply 50-percent rule at order level
- Partial Set-Aside – if procurement can be broken up into discrete portions, and rule of two is satisfied on set-aside portion (which is reserved for small businesses)
- Reserve of Multiple Award Contract – subject to full and open competition
 - Applies if 2 or more awards may be made to one type of small business; if rule of two is satisfied, set aside the orders
 - Applies if 2 or more awards may be made to different types of small business; if rule of two is satisfied, set aside the orders
 - Applies if 1 award may be made to any small business; direct the award to the small business



First Things First

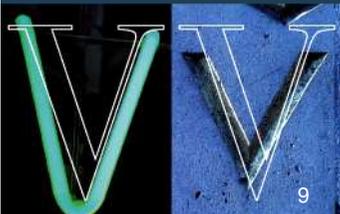
2013: A Busy Year!

■ ***SBA Rule on Multiple Award Contracting***

- Bundled Contracts – may be awarded to multiple contractors who enter into a small business teaming agreement
 - Rule of 2 will not satisfy entire requirement
 - No small business can perform the entire requirement
 - Under a reserve, the Small Business Teaming Agreement is eligible for an award, and competes with the other non-small business contract holders for orders issued under the contract

- NAICS Codes – either one NAICS code applied to the entire requirement, or different NAICS codes applied to differing discrete categories of work
 - Codes must be applied at the task and delivery order level

- Compliance – CO will document compliance with the 50-percent rule and the non-manufacturer rule; will be recorded as part of performance evaluation



Agreeing to “Date”

Teaming Agreements

■ Pros and Cons?

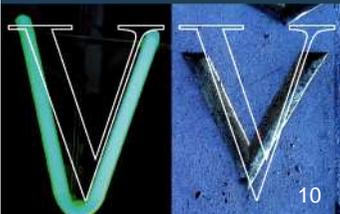
– *Here are some considerations:*

– ***Small Businesses***

- Pro - Access to a federal market
- Con - Requirements for exclusivity can reduce chances for success

– ***Large Businesses***

- Pro - Satisfy small business subcontracting plan requirement
- Con – Tables can turn if small business sub becomes small business prime under a set-aside



Agreeing to “Date”

Teaming Agreements

■ **Strategies**

– ***Commitment***

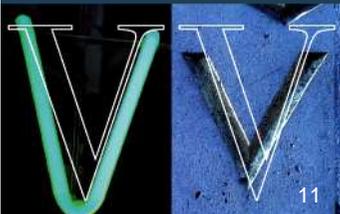
- Team members commit to cooperate in a signed, written agreement
- FAR 9.601 refers to teaming “arrangement”

– ***FAR 9.602 Contemplates Benefits***

- Team members
 - (1) complement each other’s unique capabilities; and
 - (2) Offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.

– ***Resource Exclusivity***

- Allows a prime contractor work with a key subcontractor exclusively to prepare a proposal.
- Keeps a valued team member from working on competitors’ proposals.



Agreeing to “Date”

Teaming Agreements

- **Tactics**

- ***Agreement to Subcontract***

An example of potential prime-friendly language:

“Upon award of the contract to Team Lead, the Parties shall negotiate in good faith the terms of a Subcontract for the provision of services identified in the attached Statement of Work. The terms and conditions of the Subcontract shall not be inconsistent with the terms and conditions of this Teaming Agreement.”

- ***Exclusivity***

An example of potential prime-friendly language:

“Team Member agrees that it shall work with Team Lead exclusively in preparing a proposal in response to the Solicitation.”



Agreeing to “Date”

Teaming Agreements

- **Tactics**

- ***Workshare***

An example of potential subcontractor friendly language.

“Team Lead shall provide to Team Member no less than 30 percent of the delivery orders issued under the prime contract for software upgrade services.”

An example of potential prime friendly language

“Upon award, Team Lead and Team Member shall make reasonable efforts to negotiate an equitable allocation of task and delivery orders under a Subcontract.”

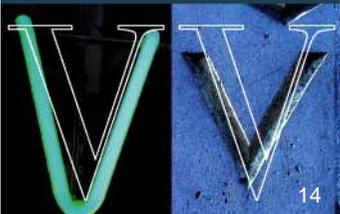


Agreeing to “Date”

Teaming Agreements

- **Tactics**
 - ***Nondisclosure***

An example of language potentially beneficial to both prime and sub
“Upon receipt of information identified by the disclosing party as
“Proprietary,” the receiving party shall undertake reasonable care to
protect it from disclosure to third parties without express written
authorization. The receiving party shall treat the disclosing party’s
Proprietary Information with a degree of care no less stringent than its
own.”



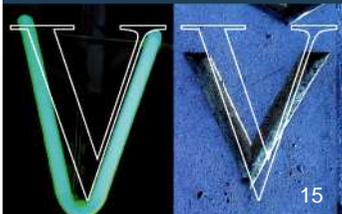
Agreeing to “Date”

Teaming Agreements

■ Tactics

– ***Enforceability***

- Subject to state law; choice of law provision is crucial.
- Can be enforced for specific performance if there is specificity as to “essential elements” of the Agreement:
 - (a) the nature and scope of the services to be performed;
 - (b) the compensation to be paid for the work;
 - (c) the place of performance; and
 - (d) the duration of the contract.
- Other Factors Requiring Commitment
 - Agency approval of subcontractor
 - Disclosure of team member



Agreeing to “Marry”

Prime and Subcontracts

■ **Pros and Cons?**

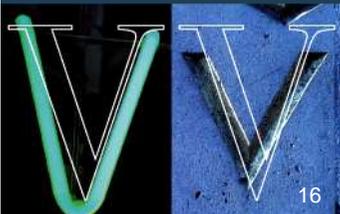
– ***Here are some considerations:***

– ***Small Businesses***

- Pro – Develop solid experience and past performance
- Con – Issues concerning affiliation with large business

– ***Large Businesses***

- Pro – Develop relationship with a possible future prime contractor
- Con – Responsible for maintaining relationship with the government customer, even if performance quality issues arise



Agreeing to “Marry”

Prime and Subcontracts

■ **Strategies**

– ***Range of Capabilities***

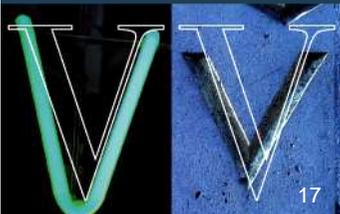
- Extends capabilities of prime contractor
- Allows subcontractor access to a potential new customer; opportunity to develop experience

– ***Leverage a Relationship with an Agency***

- Large business incumbent may serve as a subcontractor on a follow on set-aside

– ***Privity***

- Allows prime to maintain privity of contract with Agency



Agreeing to “Marry”

Prime and Subcontracts

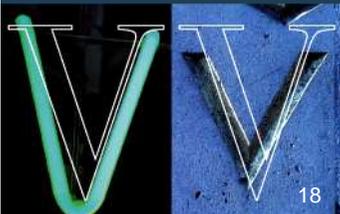
■ Strategy

– *50 Percent Rule Applied to Full or Partial Small Business Set-Asides*

- FAR 52.219-14, Limitations on Subcontracting
- Services: “At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.”
- **Note: In 2014, SBA is working on a rule changing the rule to 50 percent of the amount paid under the contract; not just limited to personnel**
- Supplies: “The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.”

– *Effects on Work share*

- Prevents a small business prime from acting as a pass-through to a large business incumbent.



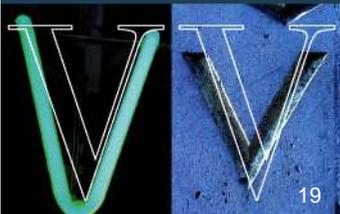
Agreeing to “Marry”

Prime and Subcontracts

■ **Strategy**

– ***Ostensible Subcontractor Rule***

- Small Business Regulations, 13 C.F.R. 121.103(h)(4)
- A contractor and ostensible subcontractor are treated as affiliated for size purposes.
- An ostensible subcontractor:
 - performs primary and vital requirements of a contract or an order under a multiple award schedule contract
 - OR
 - is a subcontractor upon which the prime contractor is *unusually reliant*.



Agreeing to “Marry”

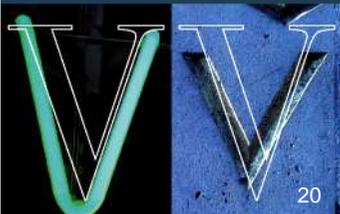
Prime and Subcontracts

■ **Strategy**

– ***Ostensible Subcontractor Rule***

• **Determining Unusual Reliance**

- terms of the proposal (including contract management, technical responsibilities, and the percentage of subcontracted work)
- agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement)
- whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.



Agreeing to “Marry”

Prime and Subcontracts

■ **Strategy**

– ***Subcontract Reporting Thresholds***

- FAR 52.215-23 – Limitations on Pass-Through Charges
- Reporting rules apply if 70% or more of the total cost of work to be performed under a prime contract or any individual subcontracts thereunder are subcontracted to a next lower tier subcontractor.
 - “The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value[.]”
- Contracting Officer may find “Excessive Pass-Through Charges” of no or negligible value, i.e., a charge for indirect cost or profit/fee on subcontractor work
 - Exception for costs of managing subcontracts and any applicable indirect costs.



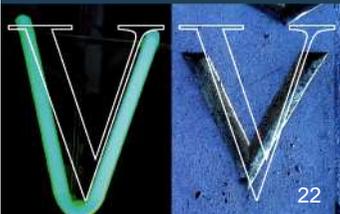
Agreeing to “Marry”

Prime and Subcontracts

■ **Tactics**

– ***Flow Down Provisions***

- Either Mandatory or Necessary/Essential Clauses
 - Mandatory clauses must be flowed down
 - Necessary/Essential clauses flowed down in the prime’s interest
- Provide for government control of subcontractors



Agreeing to “Marry”

Prime and Subcontracts

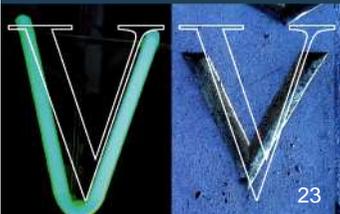
■ **Tactics**

– ***Determining Mandatory Flow Down Provisions***

- Status-based: small business
- Value-based: greater than the simplified acquisition threshold
- Type-based: a cost-reimbursement type contract
- Territory-based: contracts performed CONUS, OCONUS

– ***How Mandatory Flow Down Provisions are Prescribed***

- Prescribed by clause: 52.222-50, Combating Trafficking in Persons
 - Requires that “Contractor shall include the substance of this clause . . . in all subcontracts.
- Prescribed by underlying statute: 52.211-15 Defense Priority and Allocation
 - FAR 11.602, which required 52.222-50, expressly references the National Defense Production Act of 1950.



Agreeing to “Marry”

Prime and Subcontracts

■ Tactics

- ***Mandatory Flow Downs For Commercial Items Subcontracts***

- ***52.244-6 Subcontracts for Commercial Items (Dec 2010)***

- Mandates that the Contractor “shall insert the following clauses in subcontracts for commercial items[.]”
- Clauses include:
 - 52.203-13, Contractor Code of Business Ethics and Conduct (Apr 2010) . . . if the subcontract exceeds \$5,000,000 and has a performance period of more than 120 days.
 - 52.219-8, Utilization of Small Business Concerns . . . if the subcontract offers further subcontracting opportunities. [Requires further flow down to lower tier subcontracts that exceed \$650,000]



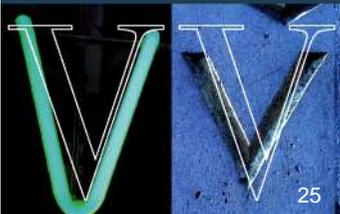
Agreeing to “Marry”

Prime and Subcontracts

■ **Tactics**

- ***Mandatory Flow Downs For Commercial Items Subcontracts***

- ***52.212-5(e) Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items***
 - “Unless otherwise indicated below, the extent of the flow down shall be as required by the clause”
 - Clauses include:
 - *52.203-13, Contractor Code of Business Ethics and Conduct.*
 - *52.219-8, Utilization of Small Business Concerns*
 - *52.222-17, Non-displacement of Qualified Workers (Jan 2013)*
 - *52.222-26, Equal Opportunity*
 - *52.222-35, Equal Opportunity for Veterans*



Agreeing to “Marry”

Prime and Subcontracts

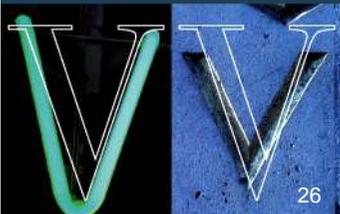
■ **Tactics**

– ***Necessary Flow Downs***

– ***52.212-5(e)(2) Provides a Prime Example:***

“While not required, the contractor may include in its subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.”

- Depends on what the Prime perceives to be “additional clauses necessary to satisfy its contractual obligations.”



Agreeing to “Marry”

Prime and Subcontracts

■ Tactics

– *Mandatory Representations and Certifications*

- FAR 52.203-12(g), Limitation on Payments to Influence Certain Federal Transactions (Oct 2010)

“The Contractor shall obtain a declaration, including the certification and disclosure in paragraphs (c) and (d) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, from each person requesting or receiving a subcontract exceeding \$150,000 under this contract. The Contractor or subcontractor that awards the subcontract shall retain the declaration.”



Agreeing to “Marry”

Prime and Subcontracts

■ **Tactics**

– ***Representations and Certifications***

– **Mandatory Reps and Certs Include**

- FAR 52.222-22, Previous Contracts and Compliance Reports (Feb 1999)
- “Representations indicating submission of required compliance reports, **signed by proposed subcontractors, will be obtained before subcontract awards.**”



Agreeing to “Marry”

Prime and Subcontracts

■ Tactics:

– *Non-Mandatory, Non-Necessary Flow Downs*

- Apply by operation of the contract itself.
- State that clause “applies if required by law or regulation,” or “to the extent required by applicable law or regulation.”
- If the clauses are unclear or ambiguous, there is a risk of unenforceability.



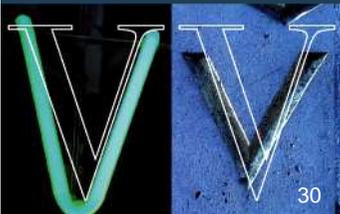
Agreeing to “Marry”

Prime and Subcontracts

■ **Tactics**

– ***Clauses That Do/Should Not Automatically Flow Down***

- Termination for Convenience
 - “Prime Contractor” is not the same as “Government”
- Payment Clauses
 - Pay When Paid versus Net 30 or Net 45
- State that clause “applies if required by law or regulation,” or “to the extent required by applicable law or regulation.”
 - If the clauses are unclear or ambiguous, there is a risk of unenforceability.



Agreeing to “Marry”

Prime and Subcontracts

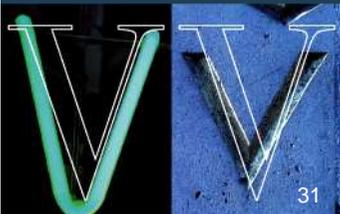
■ **Tactics**

– ***Aside from Flow Downs: Basic Terms and Conditions***

- Limitation of Liability
- Indemnification
- Termination
- Warranties and Disclaimers

– ***Protecting Rights At All Costs Versus Timely Agreement***

- Leverage is Relative
 - Today’s subcontractor is tomorrow’s prime

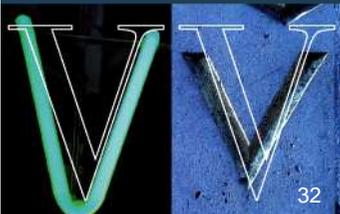


Agreeing to “Marry”

Prime and Subcontracts

- **Tactics**
- **Limitation of Liability:**
 - Absent limitation of liability language, the parties to the contract are free to seek damages to compensate all legally recognizable harms caused by a breach of contract, and/or injury caused by a negligent or other wrongful act committed in the performance of the contract.
 - Generally strictly construed by courts, so they must be clear.

Types of Limitations	
Exclusive Remedies	Force Majeure
Caps or Ceilings on Damages	Liquidated Damages
Limits on Consequential Damages	Exculpatory Terms



Agreeing to “Marry”

Prime and Subcontracts

- Tactics

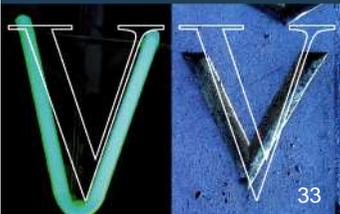
- *Limitation of Liability Examples:*

- “Seller’s sole and exclusive liability under this Subcontract shall be for the amounts actually paid hereunder.”

- *Strict cap on liability.*
- *Significant benefit to the prime, not the subcontractor.*

- “Neither party shall be liable to the other in an amount exceeding the total amount of the contract value.”

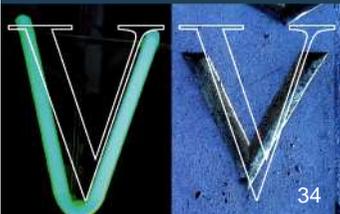
- *Strict cap on liability.*
- *Reciprocal terms, applicable to both parties.*
- *Terms are still unambiguous.*



Agreeing to “Marry”

Prime and Subcontracts

- Tactics
- **Limitation of Liability Examples (continued):**
 - “Neither party shall be liable to the other for any consequential damages.”
 - *Exclusionary clause, limiting a type of damage.*
 - *Another example of a reciprocal version.*
 - *Protects parties from speculative or punitive-type damages that might apply in the event of a breach.*
 - *Not a cap on liability.*



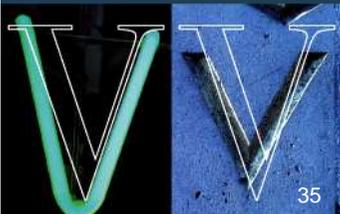
Agreeing to “Marry”

Prime and Subcontracts

- Tactics

- **Indemnification Provisions:**

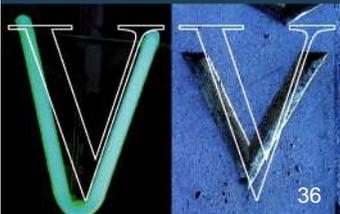
- Indemnification provisions allow the parties to shift certain risks from one party to the other party by having the “indemnitor” assume from the “indemnitee” certain liability for current or future loss or injury incurred by the other party *due to the conduct of that party* or a third party
- Two types:
 - Indemnity against Liability: Triggers the indemnitor’s obligation when the indemnitee becomes liable *even if* the indemnitee has not had loss or damage
 - Indemnity against Loss: Triggers the indemnitor’s obligation *only when* the indemnitee actually experiences loss or damage



Agreeing to “Marry”

Prime and Subcontracts

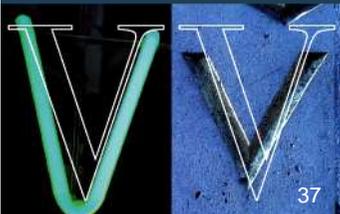
- **Tactics:**
- ***Indemnification Provisions***
 - **Example 1 – Indemnity Against Loss:**
 - “Indemnitor shall indemnify, hold harmless and defend Indemnitee against any claim by any third party from and against **any and all claims, losses, penalties, expenses, demands or judgments** related to bodily injury, death or damage to real or tangible property which result from or arise out of the **negligence or willful misconduct of the Indemnitor** during its performance of its obligations under this agreement. Indemnitee shall notify Indemnitor in writing upon learning of the third party claim, and shall cooperate with Indemnitor at Indemnitor’s expense in all reasonable respects in connection with the defense of any such action.”



Agreeing to “Marry”

Prime and Subcontracts

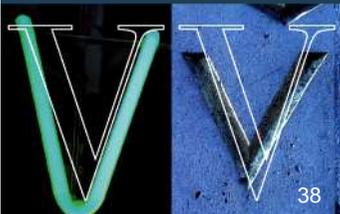
- **Tactics**
- ***Indemnification Provisions:***
 - **Example 2 – Indemnity Against Liability**
 - “Indemnitor shall indemnify and hold harmless Indemnitee and its employees **from liability of any nature or kind incurred in the United States (“Liability”)** to the extent such liability results from a third party claim that services or materials provided by Indemnitor infringe upon that third party’s intellectual property rights.”



Agreeing to “Marry”

Prime and Subcontracts

- Tactics
- *Warranties and Disclaimers:*
 - “Warranty” defined:
 - an assurance or guarantee by a seller promising to indemnify the buyer if the warranted fact proves to be untrue
 - “Subcontractor **represents and warrants** that the Services will be performed in a professional and workmanlike manner consistent with generally accepted industry practices. **Subcontractor shall replace or correct services or materials that at time of delivery failed to meet contract requirements.**”
 - Breach of warranty another ground in a complaint in the event of a breach.



Agreeing to “Marry”

Prime and Subcontracts

- ***Tactics***

- ***Warranties and Disclaimers:***

- “Disclaimer” defined:

- contract language limiting or eliminating the seller’s warranty liability to the buyer

- Must be express and conspicuous:

“SUBCONTRACTOR EXPRESSLY DISCLAIMS ANY WARRANTIES OUTSIDE THIS AGREEMENT, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. PRIME CONTRACTOR’S EXCLUSIVE REMEDY FOR ANY BREACH OF THIS WARRANTY SHALL BE FOR SUBCONTRACTOR, UPON RECEIPT OF WRITTEN NOTICE, TO USE DILIGENT EFFORTS TO CURE SUCH BREACH, OR FAILING ANY SUCH CURE IN A REASONABLE PERIOD OF TIME, THE RETURN OF PROFESSIONAL FEES PAID TO SUBCONTRACTOR HEREUNDER WITH RESPECT TO THE SERVICES GIVING RISE TO SUCH BREACH.”



True “Commitment”

Joint Ventures

■ Pros and Cons

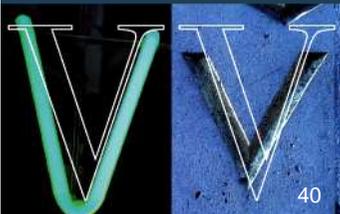
– *Here are some considerations:*

– ***Small Businesses***

- Pro – Provides a strategic alignment, with possibility of direct access to the contracting officer
- Con – Potential to trigger affiliation issues

– ***Large Businesses***

- Pro – Access to certain types of set-aside requirements
- Con – Limits to large business involvement outside the realm of mentor-protégé joint ventures



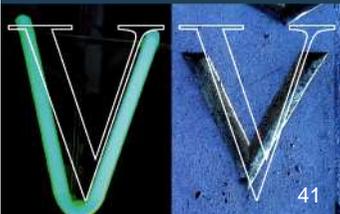
True “Commitment”

Joint Ventures

■ Strategy

– ***Defined Under Small Business Regulations, Title 13 C.F.R. Sec. 121.103(h)***

- An association of individuals or concerns
- By way of contract, express or implied
- Three specific or limited-purpose joint ventures
- For joint profit
- For a two-year period
- Combine efforts, property, money, skill knowledge
- Not formed on a continuing or permanent basis



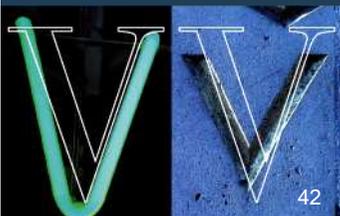
True “Commitment”

Joint Ventures

- Strategy

- **SBA-Allowed Joint Ventures Under 13 C.F.R.**

- 8(a)/Small Business Protégé + Large Business Mentor
 - 124.520(d) – “Any government prime or subcontract . . .”
- Small Business + Small Business
 - 121.103(h) –the dollar value of the procurement . . . Exceeds half the size standard corresponding to the NAICS code assigned to the contract.
- Small 8(a) Business + Small Business (for competitive 8(a) procurement)
 - 124.513(b)(1) – size of one 8(a) is less than half the size standard, and the procurement exceeds half the size of the NAICS code assigned to the contract.
- HUBZone + HUBZone (for HUBZone contract)
 - 126.616 – procurement exceeds half the size standard; aggregate of the JV concerns must exceed the proportional amount under 125.6 (generally 50 percent)



True “Commitment”

Joint Ventures

■ Strategy

– *Partnership*

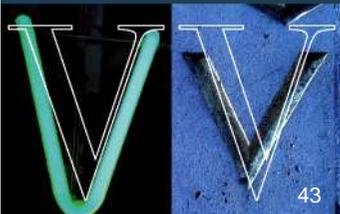
- Generally, JV members are joint and severally liable
 - Alpha Corp. is liable for performance of Beta Corp.
- Exception: LLCs (which require corporate formation)

– *Control*

- Shared by JV partners (though generally a lead JV partner is designated for purposes of contract administration)

– *Benefits of Combined Resources*

- Helpful in obtaining bonding capacity
- A JV partner has more power over contract performance than a subcontractor



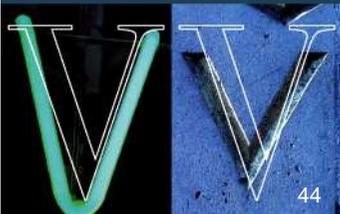
True “Commitment”

Joint Ventures

■ Tactics

– **Control and Management:**

- Shared control means the lead partner does not have the same control as a prime contractor.
- More difficult to terminate a JV partner than a subcontractor.
- Performance issues are visited upon the entire JV; difficult to insulate individual members.
- Clarity of control: unless control and authority is clearly established, government may have questions or concerns about how a contract will be performed.



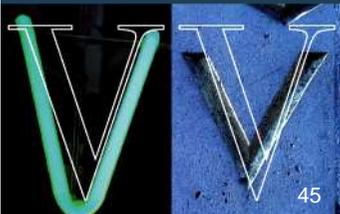
True “Commitment”

Joint Ventures

■ Tactics

– ***Essentials:***

- Formed prior to submission of a proposal.
- JV is disclosed in the proposal.
- The JV is not presented as a “team” under a proposal, with the understanding that a subcontract will be negotiated post-award, it is proposed as its own entity.



True “Commitment”

Joint Ventures

■ Tactics

– **Structure**

- Populated: Each concern is part of the JV, its employees function as part of the JV.
- Unpopulated: The concerns remain distinct, perform essentially as subcontractors to the JV.

– **Members Need to Determine**

- Management authority.
- Negotiating authority (prime and subcontracts).
- Labor sources and division of labor.



True “Commitment”

Joint Ventures

■ Tactics

– ***Small Business Regulations Dictate Elements***

- Purpose of the Joint Venture.
- Designation of small business as managing venturer.
- Up to 60% of net profits may be distributed to large business in an unpopulated 8(a) mentor-protégé joint venture, if commensurate with workshare.
- Responsibilities of the parties.
- All concerns must ensure contract performance.
- Managing venturer must keep accounting and administrative records; responsible for records retention.
- Performance of Work.
- Inspection of records requirement.



Bringing Up “Baby” Mentor-Protégé Agreements

■ Pros and Cons

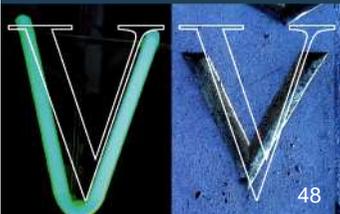
– ***Here are some considerations:***

– ***Small Businesses***

- Pro – Access to assistance and guidance from large business
- Con – Potential still remains for a determination of affiliation

– ***Large Businesses***

- Pro – Access to certain types of set-aside requirements
- Con – Limited number of mentor-protégé agreements the business can enter into; must be strategic in choosing protégés



Bringing Up “Baby”

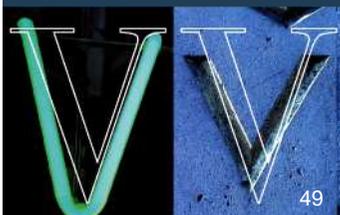
Mentor-Protégé Agreements

- Strategy

- **13 Different Mentor-Protégé Programs**

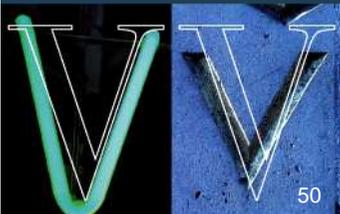
- SBA 8(a) Mentor-Protégé Program
 - Focus of the discussion
 - Potential to expand, pursuant to 2013 requirement for a Mentor-Protégé Program for all small businesses

Other Non-SBA Mentor Protégé Programs	
Defense	State
Treasury	EPA
DHS	VA (not currently on-ramping)
HHS	NASA
GSA	USAID
Energy	FAA



Bringing Up “Baby” Mentor-Protégé Agreements

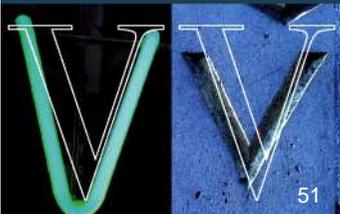
- **Strategy:**
 - ***Business Development***
 - Fosters development of 8(a) Business Development participants via the assistance of a large business mentor
 - ***Contracting Opportunities***
 - Allows a mentor to participate in a joint venture falling within small business size thresholds, provides for eligibility for set-aside contracts.
 - ***Creates Obligations***
 - Requires submission of financial data and annual certifications.



Bringing Up “Baby” Mentor-Protégé Agreements

■ Tactics

- Mentor may own an equity interest up to 40% in the protégé.
- SBA Regulations provide for no affiliation between the mentor and protégé based on the agreement itself, or assistance provided pursuant to that agreement. However, other factors may provide a basis for affiliation.
 - Unusual reliance may still be found:
 - Who is responsible for contract management, technical responsibilities
 - Percentage of subcontracted work
 - Agreements between prime and subcontractor (e.g., bonding assistance)
 - Subcontractor the incumbent prime on what is now a small business set-aside contract for which it is ineligible
- SBA rules provide 60% of work may be performed by an 8(a) in an unpopulated JV; also applies when populated with only one or more administrative personnel.



Bringing Up “Baby” Mentor-Protégé Agreements

■ Tactics

– ***Elements of a Mentor-Protégé Agreement***

- Set forth an assessment of the protégé’s needs and describe the assistance the mentor commits to address those needs
- Demonstrate that the assistance is sufficient to promote real developmental gains by the protégé
- Commit mentor to provide assistance for at least one year (no maximum time required)
- Provide that either party may cancel the agreement with 30 days advance notice
- Be approved by SBA

– ***Annual Certification and Review Requirement***

- In its annual business plan, the protégé must report on
 - Technical and management assistance
 - Loans or equity investments
 - Subcontracts from Mentor
 - Awards to the Mentor-Protégé joint venture



Contact Information

FOR FOLLOW UP QUESTIONS:

Keir X. Bancroft

KXBancroft@Venable.com

t 202.344.4826

f 202.344.8300

m 202.468.2597

575 7th Street, NW

Washington, DC 20004

www.Venable.com

