

# Mistakes in Subcontracting

**Other people might tell you how to do it right... But I'll show you what happens when you don't.**

Alan Rither, J.D., CPCM, Fellow NCMA

teamwork

mwork

# Overview



- Contracting for goods and services has been around at least 6,000 years.
- The FAR came into existence in 1984 as a result on the 1973 Commission on Government Procurement.
- Even though the basic techniques are simple enough to follow, people keep on finding new ways to get lost on the way.

# What could possibly go wrong?



# Well, what can't go wrong?

- Every stage of a procurement has its own raft of potential problems – let's look at some of them



# Contract Formation

- Pre-procurement planning
- Development of specifications
- Choice of contracting vehicle
- Sole source vs. competition
- Evaluation of offers (best value vs. price)
- Negotiation
- Making the award
- Bid protests





# Pre-procurement planning

- Don't let one group scope the project and then turn it over to others without knowledge of all the background
- Optimism is a great personal quality, but not a substitute for realism
- Drinking your own bathwater is bad enough – don't drink his



# Development of Specifications

- Janis Joplin sang “Freedom’s just another word for nothing left to lose.” 📣
- “Flexible” to one person means “vague” to another
- “When you don’t know where you are going, any road will get you there.”



# Ways to ruin a negotiation fast

## #10 Not listening carefully

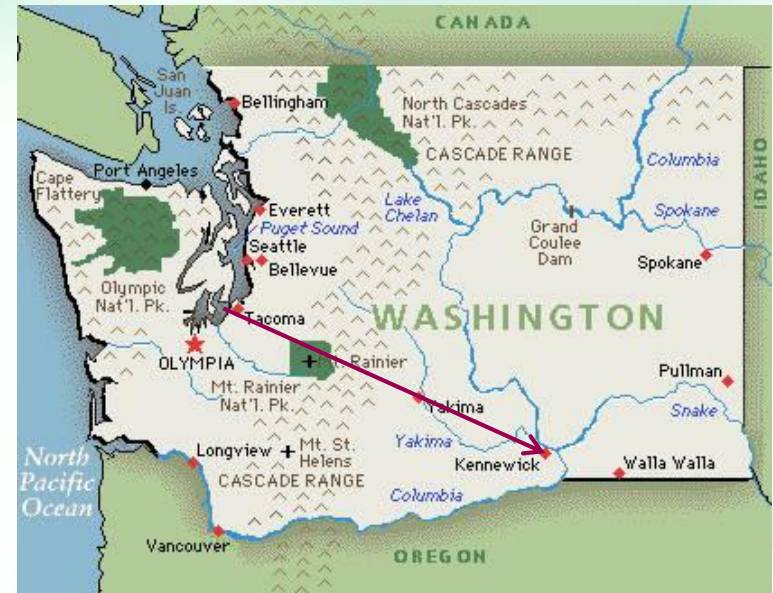


- “I know you *think* you know what you *thought* I said, but what you *thought* I said isn’t what I really *meant*.”
- We tend to hear what we expect like the kid in the Christmas play who thought the angel’s name was “Harold”.
- Failing to listen to the other side leads to unfounded optimism and baseless beliefs.



# #9 Jumping to conclusions

- The most obvious path isn't necessarily the best way to reach your goal.
- Exploring the consequences of various options that may turn up better ways.
- Take the time needed to weigh alternatives.



# #8 Leaving terms undefined

- Some things can be filled in later, but unless you have the key terms pinned down before you leave the table, you will pay for it later.
- As Mama always used to say, “Son, if you sin in haste, you’ll repent in leisure.” After the deal is signed, changing the meaning is out the window.



# #7 Adopting their assumptions

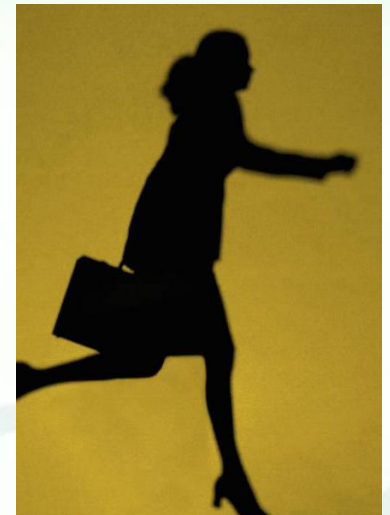
- We all know what “assume” stands for.
- Whether deliberately or not, if you base your decision on a poor foundation, the results will be ugly.
- “Everyone is entitled to his own opinion but not to his own facts.”



*Senator Daniel Patrick Moynihan*

# #6 Having a return flight

- The problem can be lessened even if you do have a return flight as long as you don't let the other side know you do.
- State of Alaska – bring a book and wait
- Westinghouse training example  
“Is the turkey gone yet?”





# #5 Unclear Objectives



- “When you don’t know where you are going – any road will get you there.”
- If the other side is prepared with specific objectives and you are not, be prepared to dance to their tune.
- Focused negotiators generally go back to their hotels to prepare for the next day while those who aren’t go out on the town.



# #4 Negotiating with yourself

- A corollary of not being prepared is to have members of the same team who are not in agreement with the objective.
- When that happens – and it will – you need to take swift, decisive action. Because murder is illegal, something less effective must be done, like walking out of the room.



# #3 Protracted negotiation

- Our ancestors had an expression –  
“YOU’VE GOT TO STRIKE WHILE THE IRON’S HOT.”  
There is a period during which a deal can still be reached. After that, you’re just wasting your time, irritating your customer, and making noise.



# #2 Hoping it will get better

- There's a song sung by Dionne Warwick called *Wishin' and Hopin'* that goes:

*Wishing and hoping and thinking and praying, planning, and dreaming, each night, of his charms.*

*That won't get you into his arms.*

- If it starts bad – it will only get worse.



# #1 Knowing when to quit

- Kenny Rogers taught us a great lesson on life in his song entitled, “The Gambler”

YOU GOT TO KNOW WHEN TO HOLD 'EM,  
KNOW WHEN TO FOLD 'EM,  
KNOW WHEN TO WALK AWAY  
AND KNOW WHEN TO RUN.  
YOU NEVER COUNT YOUR MONEY  
WHEN YOU'RE SITTING AT THE TABLE.  
THERE'LL BE TIME ENOUGH FOR COUNTING  
WHEN THE DEALING'S DONE.

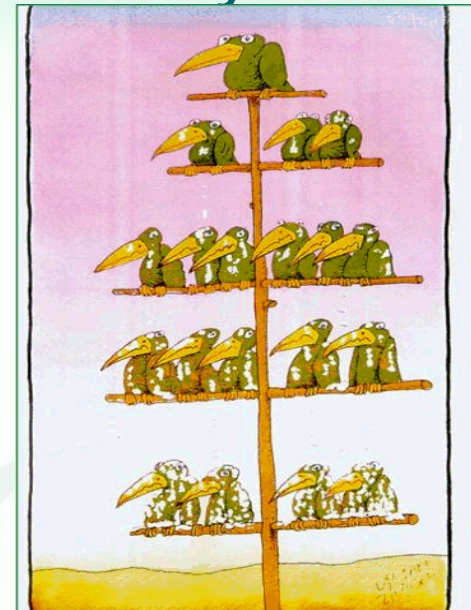




# Beware of a *quid pro quo*

- A *quid pro quo* can arise innocently by trying to combine two reasonable but unrelated objectives into one transaction
- When you think you discovered a way to

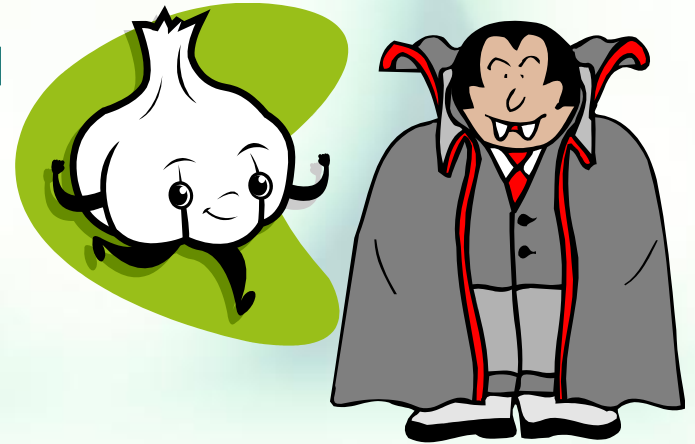
“kill two birds with one stone,” watch out. Birds can do some ugly things to ruin your day!





# Getting an early start

- Don't jump the gun before you have funding or you'll pay for it
- "Anti-Deficiency Act" makes it illegal to spend money of the Government without authority
- No matter how much the customer demands that you start work, if you don't have appropriated funds, you'll get in trouble for it
- Raising the Anti-Deficiency Act is like threatening garlic to a vampire to make them back off



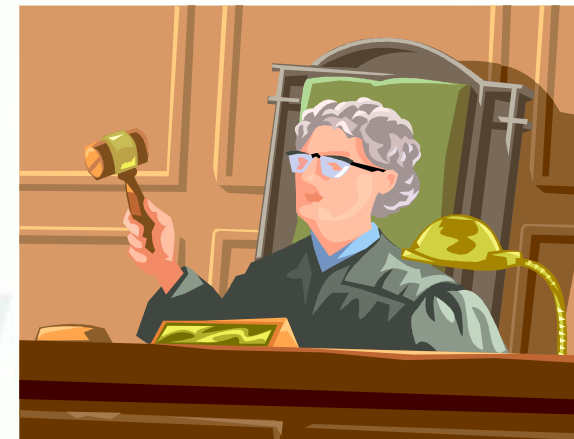
# When legal help is needed

- Reading the contract ≠ understanding it (*precedent*)
- Obligations, prohibitions, discretionary language, representations, acknowledgments, and policies
- The distinction between "shall," "will," and "must"
- Use of the active voice and passive voice
- “Sounding legal” means learning a new language
- What happens if it goes to court – the importance of a punctuation



# Disputes

- If you fail to specify the procedure for dispute resolution in the contract, you will be subject to common law rules.
- Because you are not dealing directly with the Government, the Contract Disputes Act may not apply, but where do you go?
- Can you get the prime contractor to certify the claim for you?



# The Good, the Bad and the Ugly

- Ethics programs are good – if you follow them. Even Enron had a program; they just didn't use it!
- False claims are bad. But not all errors result in false claims, so be careful
- FAR 52.203-13 can cause really ugly things to happen because of mandatory reporting to the IG and the CO if reasonable grounds exist to believe there is a violation of criminal law or the False Claims Act



# What does this add up to?

- Winning a federal prime or subcontract is only the beginning – your first might be your last
- It's not going to get any easier – in fact, it's probably going to get worse as Congress looks for ways to stretch the budget
- There may be 50 ways to leave your lover, but there are hundreds of ways to mess up a procurement





# Questions?



[alan.rither@pnnl.gov](mailto:alan.rither@pnnl.gov)

509-375-2218