



**Leverage your Small Business Bid by Adding a Team;
Joint Ventures, Teaming Agreements, and Strategic Alliances
by Stuart Adams**

Size Does Matter

Yes, sometimes size does matter. While more and more people in the computer industry, from consultants, programmers and graphic artists to those engaged in job sharing, are working from home as solos, big business and big government often award bids for projects based on factors including size of the contractor. Quite often contractors will be excluded from the bid pool if they do not have a certain minimum number of employees or requisite net worth. After all, the big guys want a backup and somebody to sue who can pay.

If you are one of those people who wants to continue to work out of your home, rather than playing the Dilbert cubicle game, but you still want to go after the big fish, there are some ways. Historically, companies have formed joint ventures to pursue limited projects. A joint venture does not fit the classic business entity mold. A joint venture is typically an association of two or more people or business entities which enter into an agreement for a limited purpose. That purpose is usually to complete a project or to develop a bid and obtain a contract.

A joint venture agreement does not have to be in writing. Then again, in some states you are not required to wear a helmet while riding a motorcycle. The undocumented joint venture is probably the more dangerous of these two situations. Under the laws of most states, a joint venture would be considered a partnership. That probably makes you a partner if you enter into one. Partners typically have the ability to bind each other, to involve each other in litigation resulting from breach of contract or negligence, and are personally liable for claims against the partnership.

Of course, you would never do anything to get your partner in trouble, such as to die, become disabled, incur too much debt, go bankrupt, get divorced, be negligent, etc. Can you say as much for your partner? If you are not overly excited about the thought of losing the ranch because your partner let you down, there are other alternatives.

Teaming Agreements

If you anticipate a long term arrangement between you or your small company and another company, you will probably want to consider forming a separate legal entity, such

as a corporation or limited liability company. That entity would be owned by you and the other participant, but it, rather than either of you, would enter into the contracts with customers. If, however, you anticipate the relationship to be short or limited, then a "teaming agreement" may be the way to go.

The terms of a typical teaming agreement go to great lengths to indicate the relationship between the parties will not be any form of partnership or joint venture. There normally will be at least one paragraph indicating that the parties do not have "agency" authority to bind each other except as specifically agreed to in the teaming agreement. Each agreement will be different and each should be tailored to the anticipated relationship of the parties, the relationship of the "team" to the customer and to any others your crystal ball tells you might play a role in the project.

While the relationship between joint venturers is typically one of partnership, the role between those in a teaming agreement would often be that of contractor and subcontractor. Just as with a joint venture agreement, a teaming agreement should always be in writing and negotiated with great care. One of the great advantages of the Internet in this situation is the ability to locate and conduct additional screening of potential "team" members. One of the potential disadvantages, however, is the increasing likelihood your other team members will be in some other remote jurisdiction and previously unknown to you, so that you cannot fully check their credentials. Remember those blind dates in high school? This latter factor sometimes results in jurisdictional conflicts, communication difficulties and other impediments to normal team building efforts.

To complicate matters even further, a new breed of business cyberbroker has emerged to "help" you find other members of your team. Unfortunately, there is no certification, national association or specialized credentialing of those claiming expertise as online brokers. Plugging the right words into most of the more powerful search engines will result in retrieval of a substantial list of match makers and team dating services which claim they can put you together with just the right business to land that big contract, for a price. Just as with a real estate agent or traditional business broker, one of the first questions you should ask, get in writing, and then do your very best to verify, is whether there will be a conflict of interest between the broker and the others solicited to join your team.

Your agreement with the business broker should be in writing and clearly define who the broker is working for, who will pay the broker and it should cover all the other typical contractual terms. Additionally, be sure to include nondisclosure, noncompete, and other such language if the broker might be exposed to information you do not want made public or put in the hands of another company, which might take it and cut you out of the deal.

Use Protection

When you were a kid, if you ever got jilted by your true love, a parent or friend may have given you the sage advice that "there are lots of other fish in the sea." Rather than making you seasick, this was supposed to make you feel better because there were so

many other prospects to choose from. Unfortunately, none of these folks would probably tell you that some of those other "fish" were piranha, barracuda, sharks, and killers whales. One of the most common mistakes made by entrepreneurs in the business of developing innovative products like software or unique computer hardware designs, is to accidentally broadcast their design or process before it is protected.

Many a secret has been lost in the process of dealing with brokers and others involved in getting the business off the ground. Believe it or not, there is even a certain large software company which has a reputation for initiating discussions with small, new technology companies under the pretense of buying them or entering into a lucrative co-development agreement with them, only to abort the effort after the discussions go from hypothetical to technical. If you plan to use a joint venture or teaming agreement to further the development of something you have invented, and the invention can be patented, trademarked, copyrighted or otherwise protected, do so before you go too far in negotiating any of these deals.

Equally important, in a teaming agreement, you will often be likely to come up with something unique and valuable which could be protected. Be sure your agreement defines who, for instance, will be in charge of filing and prosecuting the patent application, in whose name it will be patented, and how the participants will share in any monies resulting from sale, assignment or licensing of the patent.

It's the Money, Stupid

You probably are doing this for the money, right? Then shouldn't some effort be devoted to making sure you have the best shot at getting and keeping your fair share? Your agreement should define who is in charge of financial matters, who keeps the books, who the customer writes the check to, who pays the expenses, how the various parties can get access to the books, etc. Also built in should be your ability to obtain independent verification of the books if necessary and delineation of what happens if another round of funding is necessary from members of the team. You may find, especially when playing with a much bigger team member, that they may be able to buy you out of your share of the venture because of cost overruns they can afford but you cannot. Usually such agreements provide that the shortfall in funding by one party can be made up by another, but with a corresponding increase in control and profits going to the one who takes up the slack. Many a founder has been bought out by a bigger fish who was on the inside. Sometimes Jonah eats the whale, but the odds don't favor it.

Other "control" issues involve who the "lead" person or company will be, in terms of public notoriety and client contact, who will submit the proposal or sign the client contract if the bid is successful, who will be the media contact, etc. Who will monitor progress of any project at the client's facilities or answer questions or complaints from the client? Even more important, of course, could be what happens if the client likes what the team has done and wants more. Who will the client contact? Who will get any profit from the second round of business? Suppose the other team member gets business as a result of working on your team but they can provide the second round service or product and you can't by

yourself. If not defined in the initial agreement, should you be entitled to a finder's fee, royalty or other piece of the action? What if the roles are reversed? This can be a double edged sword.

Obviously, in high tech or other situations involving trade secrets, you should carefully address protection of the rights of the parties. There are usually several stages and levels of attention here that deserve your scrutiny and tight documentation. First, there is what you have already created and what you control. That may be patented technology or it could be the name of the company getting ready to send out a request for proposal that few others know about. It could also be access to critical skills, such as your own employees or independent contractors. It could also be access to materials needed to complete the project, which are generally unknown and give you a competitive advantage. Be sure to spell out entitlement to any profit to be derived from such assets (knowledge being an asset) and protect this to the death.

Second, put in a provision with teeth prohibiting your team members from intentionally or accidentally disclosing this trade secret or using it to compete against you. These are standard noncompetition and nondisclosure provisions which any professional should be willing to sign to get into the deal, if they are not already working on it. Keep in mind, however, that many large companies with vast R&D departments are typically unwilling to sign any such agreement, if for no other reason than that they really can't be sure someone, somewhere in their organization, isn't already working on it. Additionally, put in a noninterference provision in both your teaming agreement and your contract with your ultimate customer. Too many great small innovation companies get an initial small job only to find that their key employee has been lured away by their business partner or their customer. Remember, however, that these agreements are enforced with varying degrees of success in different jurisdictions, depending on local. While generally enforceable, they are not uniformly accepted.

There are way too many issues involved in this type of agreement to cover all the possibilities here. If the potential, reasonably anticipated net profit from a job is big enough or important enough to the growth and exposure of your small company, don't let it slip through your fingers just because you're too small to handle it yourself or because you are missing a couple of the pieces of the puzzle. Chances are that many others are in your position and if you make the right moves, carefully and quickly enough, you can make a bunch of money. If you're afraid of the agreements discussed above, there are other forms of strategic alliance, such as with suppliers and other vendors, that might allow you to get into the "big game" with risk proportionate to your nerve and resources.

Don't forget in the rush, that you might be involved in litigation or have to collect a debt in another jurisdiction. Don't forget you can lose the "secret" edge if you have not protected it going into the search for a team member or in dealing with the ultimate client. Make sure you know what happens if the rules are changed, the contract is modified or cancelled, or if a second round of work springs up part way through the first project. Build in mediation, arbitration or choice of jurisdiction for the litigation if problems arise. Do you really want to have to fly to China to face local law? Be sure you define what is or is not a

breach of the agreement and what happens, including right to monies, payment of expenses and ownership of work product in that event. If you've been careful, after landing that big contract and successfully leveraging the growth of your small business, you can sit on your yacht and reflect on just how smart you really were.

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