



Government Contracts Symposium 2013

April 17, 2013

9:00 AM – 5:30 PM

Venable LLP

575 7th Street, NW

Washington, DC 20004



Panel One:
Protecting Your Intellectual
Property

9:00 a.m. – 10:20 a.m.

Moderator:
J. Scott Hommer, III, Venable
LLP

Panelists:
Thomas McCabe, Alion
Science and Technology
Paul A. Debolt, Venable LLP
Jeffri Kaminski, Venable LLP
Armand J. (A.J.) Zottola,
Venable LLP

VENABLE[®]
LLP

VENABLE[®]_{LLP}

Protecting Your Intellectual Property

April 17, 2013



Agenda

- *J. Scott Hommer III, Venable LLP – Moderator*

- **Data Rights and Claims**
 - *Paul A. Debolt, Venable LLP*

- **Patents**
 - *Jeffri Kaminski, Venable LLP*

- **Trade Secrets, Copyrights, Trademarks & Managing Your IP**
 - *AJ Zottola, Venable LLP*

- **Practical Considerations for the Government Contractor**
 - *Thomas McCabe, Alion Science and Technology*



Panelist Biographies

J. Scott Hommer, III, Venable LLP - Moderator



Scott Hommer serves as a partner in the Tysons Corner office of Venable LLP. He concentrates his practice in business counseling and litigation, with an emphasis on technology companies and government contractors. He represents clients locally, nationally, and internationally on issues including negotiating contracts, doing acquisitions, protecting intellectual property rights, and litigating successfully. Mr. Hommer also has significant experience in counseling clients who do business with the federal, state, and local governments and has represented clients on contract administration matters,

contract claims and disputes, bid protests, contract terminations, teaming agreements, conflicts of interest issues, intellectual property rights issues, government socio-economic programs, and small business matters.

Mr. Hommer is committed to developing relationships with his clients that go beyond the usual role of legal advisor. He works closely with his clients on a proactive basis, developing strategic plans and managing legal issues that may arise, and, more importantly, identifying potential problems before they develop. This approach is not only smart; it is efficient and cost-effective and significantly enhances opportunities for success.



Panelist Biographies

Paul A. Debolt, Venable LLP



Paul Debolt assists companies and individuals on issues that arise from conducting business with the federal government, including civil fraud. He is experienced in the competitive source selection process, defending or prosecuting bid protests, issuing advice concerning compliance with government regulations and laws during the performance of a contract, and helping to resolve disputes and claims during contract performance or as a result of contract termination. Mr. Debolt

also has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novations. He counsels clients on the Service Contract Act, the civil False Claims Act, joint ventures and teaming agreements, prime-subcontractor disputes, internal investigations, mandatory disclosures and data rights issues.

Mr. Debolt has extensive government contracts law experience and applies a team approach that ensures clients receive the benefit of firm-wide strength in all related areas.

Panelist Biographies

Jeffri Kaminski, Venable LLP



Jeffri Kaminski focuses on protecting and enforcing his client's intellectual property rights. He has experience in all aspects of patent prosecution, litigation and licensing. He works primarily in the semiconductor, software, Internet, wireless and telecommunications fields.

Mr. Kaminski counsels clients regarding the protection of their intellectual property. He works with his clients to help identify intellectual property and to protect it. Mr. Kaminski has prepared and prosecuted

hundreds of patent applications relating to wireless devices, networking, semiconductors, software, computer architecture, business process management and medical devices. His practice includes all aspects of patent prosecution before the U.S. Patent and Trademark Office, including successfully arguing appeals. Patents that Mr. Kaminski has obtained on behalf of his clients have been successfully enforced and licensed, generating revenue for his clients and keeping competing products out of the market.

Mr. Kaminski is also active in litigating patent infringement actions. He handles both the defense and assertion of these actions, including pre-filing investigations, strategic counseling, Markman and summary judgment.



Panelist Biographies

Armand J. (A.J.) Zottola, Venable LLP



Working at the intersection of commerce and technology, A.J. Zottola focuses his practice on the exploitation of intellectual property, intangible, and technology assets in business and strategic relationships.

Mr. Zottola's skills enable him to handle all types of issues, negotiations, and agreements involving:

- intellectual property;
- franchise;
- privacy;
- information security;
- contract; and
- business tort law.

His extensive experience also helps clients resolve and craft settlement arrangements for misappropriation and infringement matters and for disputes involving commercial and licensing agreements. In addition, he regularly counsels clients on intellectual property, e-commerce and privacy issues, and prosecutes and manages U.S. and foreign trademark and copyright portfolios.

His in-depth knowledge helps clients achieve practical and creative solutions to procure, exploit, manage and protect their intangible and proprietary assets. Whether resolving employer/employee intellectual property ownership issues, assessing new technology developments, or acquiring technology assets through mergers and acquisitions, Mr. Zottola assists a variety of companies and funding sources in maximizing asset value, identifying new opportunities for business expansion and generation, and preventing the unwanted loss or infringement of proprietary rights.



Panelist Biographies

Thomas McCabe, Alion Science and Technology



Tom McCabe has been Senior Vice President, General Counsel and Secretary of Alion Science and Technology Corporation since March 2010. With over 30 years of legal and business experience, his responsibilities at Alion include Law, M&A, Internal Audit, Security, Export Compliance and Ethics.

From 2008 to February 2010, Mr. McCabe was Executive Vice President and General Counsel, and President of the federal business, of publicly traded Braintech, Inc., which provided automated vision systems for industrial and military robots. He was Vice President and Deputy General Counsel of XM Satellite Radio from 2005 through its merger with Sirius Satellite Radio in 2008. From 2001 to 2005, he was President, CEO and a director of software provider MicroBanx Systems and President, CEO and a director of its parent company, COBIS Corporation, from 2004 to 2005. From 1992 to 2000, he was a senior executive at GRC International, Inc., a publicly traded defense contractor, serving as Senior Vice President, General Counsel, Secretary and Director of Corporate Development through its sale to AT&T in 2000.

Mr. McCabe was an attorney in private practice from 1982 to 1991. He began his career as judicial clerk for Judge Charles R. Richey at the United States District Court for the District of Columbia from 1981 to 1982.



Protecting Your Intellectual Property

Data Rights and Claims



Current Environment

- *March 1, 2013 – Sequester went into effect*
- *Mandates \$1.2 trillion in cuts to discretionary budget over 10 years*
- *FY 2013 cuts*
 - *7.9% Defense = \$30 billion in Department of Defense*
 - *5.1% Non-Defense*
- *Government continues to seek greater rights in technical data and computer software to foster competition*



Current Environment

- *More competition!!*
- *Historically, government contractors have not exploited the competitive advantage that arises from their IP.*
- *Current fiscal environment should cause contractors to re-think their IP strategy.*
- *Get back to the basic blocking and tackling involved with building and protecting your company's IP castle.*



Basic Blocking and Tackling

- *What definitions apply to the data?*



Definition – Technical Data

- Technical data means recorded information, regardless of the form or method of recording, of a scientific or technical nature, including computer databases. It does not include computer software.
- Technical data does not include data incidental to contract administration, such as financial or management information.



Definitions – Computer Software and Documentation

- Computer software means computer programs, source code, object code listings, design details, algorithms, processes, flowcharts, and any other material that would enable the software to be reproduced, recreated, or recompiled.
- Computer software documentation includes owner's and user's manuals as well as installation and operating instructions.
- Computer software does not include computer databases or computer software documentation.



Basic Blocking and Tackling

- *What definitions apply to the data?*
- *What are your company's and the government's respective rights in the technical data?*



Rights in Noncommercial Technical Data and Computer Software – DFARS 252.227-7013(b) and 7014(b)

- Preamble to DFARS 252.227-7013(b) and 7014(b) recognizes that the contractor owns any technical data or software developed under or used in performance of a contract. Contractor provides the government with different types of license rights in technical data or software.



Rights in Noncommercial Technical Data and Computer Software – DFARS 252.227-7013(b) and 7014(b) (con't.)

- The rights that the government can acquire under the DFARS fall into five categories:
 - Unlimited rights;
 - Government-purpose rights;
 - Limited rights (technical data only);
 - Restricted rights (computer software only);
and
 - Special-purpose license rights.



Basic Blocking and Tackling

- *What definitions apply to the data?*
- *What are your company's and the government's respective rights in the technical data?*
- *Who paid for the development of the data?*



Allocation of Rights

Key Definitions Related to Rights in Technical Data and Software

- The rights that the government acquires are based on the source of funding for the development of the technical data or software. To understand the rights that the government may acquire, it is necessary to understand the definitions of four terms:
 - Developed;
 - Developed at private expense;
 - Developed with mixed funding; and
 - Developed exclusively with government funds.



Definition of Developed – Technical Data 7013(a)

- Developed means an item, component or process exists and is workable.
- An item or component exists if it has been constructed.
- A process exists if it has been practiced.



Definition of Developed – Computer Software and Documentation

7014(a)(6)

- Developed means that a computer program has been successfully operated in a computer and tested to the extent necessary to demonstrate to people skilled in the art that the program can be reasonably expected to perform its intended function.
- Developed means that computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to people skilled in the art that the software can reasonably be expected to perform its intended purpose.
- Developed means that computer software documentation has been written, in any medium, in sufficient detail to comply with the requirements of a contract.



Developed Exclusively at Private Expense

- Developed exclusively at private expense means that development was accomplished entirely with:
 - Costs not allocated to any government contract, or
 - Costs charged to indirect cost pools.



Developed Exclusively with Mixed Funding

- Developed with mixed funding means development occurred partially with costs charged to indirect cost pools or costs not allocated to a government contract and partially with costs charged directly to a government contract.
- The government usually obtains Government-Purpose Rights when an item is developed with mixed funding. DFARs 252.227-7013(b)(2).



Data Rights under SBIR Program

- SBIR data rights means a royalty-free license for the government, including its support service contractors, “to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated and delivered under this contract for any United States Government purpose.” DFARs 252.227-7018(a)(18).
- “Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (b)(1) of this clause, the Government shall have SBIR data rights in all technical data or computer software generated under this contract during the period commencing with contract award and ending upon the data five years after completion of the project from which such data were generated.” DFARs 252.227-7018(b)(4).
- Government obtains unlimited rights in SBIR data upon expiration of the SBIR data rights period. DFARS 252.227-7018(b)(1)(vi).
- The SBIR data rights period commences on the date of award and ends 5 years after completion of project from which SBIR data was generated.



Basic Blocking and Tackling

- *What definitions apply to the data?*
- *What are your company's and the government's respective rights in the technical data?*
- *Who paid for the development of the data?*
- *What are your rights if you are a subcontractor?*



Current DoD Policy – Subcontractor Rights in Technical Data (DFARS 227.7103-15)

- Subcontractors at all tiers enjoy the same protection for technical data rights as provided to prime contractor.
- Subcontractors are permitted to deal directly with government on matters relating to validation of rights in technical data.
- Prime contractors are required to flow-down DFARS clauses without modification.
- Government may not normally require contractors to have their subcontractors relinquish rights in technical data to contractor, higher-tier subcontractor, or government as a condition of award.



Application to Subcontracts – 52.227-14(h)

- The contractor has the responsibility to obtain from its subcontractors all data and rights necessary to fulfill the contractor's obligations under a contract and cannot award a subcontract to a subcontractor that refused to accept terms giving the government the required rights.



Basic Blocking and Tackling

- *What definitions apply to the data?*
- *What are your company's and the government's respective rights in the technical data?*
- *Who paid for the development of the data?*
- *What are your rights if you are a subcontractor?*
- *How should your company mark its data under a government contract?*



Requirements for Delivery of Technical Data, Computer Software, and Documentation with Restrictions – 7013(e) and 7014(e)

- The contractor cannot deliver any data, software, or documentation with restrictive markings unless the information is listed on the attachment.
- The contractor must provide the contracting officer sufficient information to enable the contracting officer to evaluate any assertion of limited, restricted or government-purpose rights.



Requirements for Placing Restricted Markings on Data, Software and Documentation – DFARS 252.227-7013(f) and 7014(f)

- The contractor and its subcontractors can assert restrictions on the government's right to use data, software or documentation only if the information contains the appropriate markings that are identified in DFARS 252.227-7013(f) and 7014(f).



Requirements for Placing Restricted Markings on Data, Software and Documentation – 7013(f) and 7014(f) (cont'd.)

- The following general marking instructions apply:
 - The exact language of the markings specified in DFARS 252.227-7013(f) and 7014(f) must be used;
 - All information that qualifies for restrictive markings must be “conspicuously and legibly” marked;
 - The authorized legends must be placed on the transmittal document or storage container;



Requirements for Placing Restricted Markings on Data, Software and Documentation – 7013(f) and 7014(f) (cont'd.)

- Each page of printed material containing restricted information must contain the authorized legends;
- When only portions of a page of printed material are subject to the asserted restrictions, these portions must be identified by circling or underscoring, or with a note or other identifier; and
- Technical data or computer software transmitted directly from one computer to another must contain a notice of asserted restriction.



What if the contractor fails to place any markings at all?

- Data delivered without the required limited or restrictive rights notice authorized by the contract shall be deemed to be delivered with unlimited rights. FAR 52.227-14(f).
- If the data has not been disclosed without restriction outside the government, however, the contractor may request permission, within 6 months after delivery of the data, to have the appropriate restrictive notices placed on the data. FAR 52.227-14(f).
 - The time period may be extended by the contracting officer for good cause.
 - The contracting officer may permit correction of incorrect notices on data at any time.



Applicability of Rights in Technical Data, Computer Software or Documentation Clauses to Subcontractors – DFARS 252.227-7013(k) and 7014(k)

- Whenever noncommercial technical data, software or documentation is required to be delivered by a contractor under a contract that contains the 7013 or 7014 clause, the contractor shall flow down the 7013 or 7014 clause in subcontracts, and require its subcontractors to do so to lower tier subcontractors, without alteration except with respect to the identity of the parties.



Applicability of Rights in Technical Data, Computer Software or Documentation Clauses to Subcontractors – DFARS 252.227-7013(k) and 7014(k) (cont'd.)

- A subcontractor may fulfill its obligation to deliver technical data or software which contains restrictive markings by delivering the technical data or software directly to the government.
- Contractors and higher-tier subcontractors cannot use their power to award subcontracts as economic leverage to obtain rights in technical data from their subcontractors.



Keys

- Follow the money!!!
- Mark your data!!!



Patents



Source of Patent Rights

Congress shall have the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

U.S. Constitution, Art. 1, sec. 8, cl. 8.



What is Patentable Subject Matter?

- (1) Utility Patent: New and useful *process, machine, manufacture, or composition of matter*, or new and useful *improvements* thereof;
- (2) Design Patent: New, original and *ornamental* design for an *article of manufacture*; and
- (3) Plant Patent: Distinct and new variety of plant that was asexually reproduced.



Who May Apply for a Patent?

- (1) The actual inventor or inventors.
- (2) Assignee of entire interest in the name(s) of the inventor(s).
- (3) Patent Agent or Patent Attorney representing inventor(s) and/or assignee in the name(s) of the inventor(s).



Who is an Inventor?

- (1) Anybody and everybody who contributed to at least one claim is an inventor and must be named; and
- (2) No one who did not contribute to at least one claim can be named.



Who Receives Priority?

- (1) U.S. gives priority to the first inventor.
- (2) Lab notebooks are crucial to establishing earliest date of invention.
- (3) Interferences available to determine the first inventor.



What is the Content Required for a Utility Patent Application?

- 1) Specification, including claims; also drawings when necessary.
- 2) Provisional patent application does not require claims.
- 3) Specification must satisfy: description, enablement and best mode requirements.
- 4) The claims define the scope of the patent rights.



What is the Application Process?

- 1) File the patent application with the U.S. Patent and Trademark Office (USPTO).
- 2) **Duty of Disclosure**: Everyone involved in the process must disclose information to the USPTO that is material to patentability.
- 3) Examined for patentability; communicated to the applicant.
- 4) Responses may include arguments, amendments, personal interviews, appeals and further legal action to obtain allowance.



Conditions for Patentability?

Invention that is:

- (1) Novel;
- (2) Nonobvious; and
- (3) No other loss of right (e.g., abandonment, derivation, not the first inventor, previous foreign patent).



What About Foreign Patents?

- U.S. Patents can claim priority to international patent applications and to most foreign patent applications and vice versa.
 - Paris Convention
 - PCT International Patent Application



Are U.S. Patent Applications Available to the Public?

- U.S. patent applications are published 18 months after they are filed.
 - Patent applications are held in secret until they publish (Ans: Before publication, no; after publication, yes)
 - Can elect non-publication if no intention to file any corresponding foreign patent applications (including PCT).



What Are the Rights?

- A right for a limited time (20 years from effective filing date for *utility* patent / 14 years from grant for *design* patent – rights actionable on **issuance**),
 - ... which guarantees its owners the right to exclude others from making, using, selling, offering for sale, or importing the invention.
 - ... nationwide (U.S. only for a U.S. Patent).



What Are the Rights? (cont'd.)

- Based on the issued claims
 - Direct, Induced and Contributory types of infringement
 - Doctrine of Equivalents, i.e., close enough
- Remedies
 - Damages (\$\$\$)
 - Injunction



Remedies: Limited Sovereign Immunity

- Reasonable and entire compensation.
- Owner's lost profits (***cannot get from U.S. or contractor--“by or for” the government limitation***).
- Claims against government: United States Court of Federal Claims



Patent Notices

- *Issued Patents:* “**Patent No. [insert number].**”
 - Required to get damages.
 - Penalty for wrongful use.
- *Pending Patents:* “**Patent Pending.**”
 - No legal effect (unless published + certain conditions met)
 - May deter others.
- Do not use “**P**” in a circle (that is the copyright notice for sound recordings ♪).



How to Lose Patent Rights

1) Public Disclosure

or

2) Offer on Sale

-- 1-year grace period in U.S. (unlike most countries).

Moral: File applications before any disclosure, etc.



What Can I do With a Patent?

- Use it as a sword: file a lawsuit.



What Can I Do with a Patent?

- Use it as a sword: file a lawsuit.
- Use it as a shield: defend a lawsuit with a counterclaim.



What Can I Do with a Patent?

- Use it as a sword: file a lawsuit.
- Use it as a shield: defend a lawsuit with a counterclaim.
- Use it as a source of industry recognition.



What Can I Do with a Patent?

- Use it as a sword: file a lawsuit.
- Use it as a shield: defend a lawsuit with a counterclaim.
- Use it as a source of industry recognition.
- Monetize: sell or license for money.



What Can I Do with a Patent?

- Use it as a sword: file a lawsuit.
- Use it as a shield: defend a lawsuit with a counterclaim.
- Use it as a source of industry recognition.
- Monetize: sell or license for money.
- Use it to barter: sell or license in exchange for other rights.



Patents: Summary of Basics

- Obtaining Rights: Upon issuance.
- Duration/Losing Rights: 20 or 14 years (lose upon public disclosure or offer on sale + 1 year before application).
- Geographic Scope of Rights: Nationwide.
- Sovereign Immunity: Limited (***i.e., government immune from larger money damages like lost profits***).
- Jurisdiction Against U.S. Government: United States Court of Federal Claims.



VENABLE[®]_{LLP}

Trade Secrets, Copyrights, Trademarks & Managing Your IP

Presented by AJ Zottola, Esq.

April 17, 2013



Trade Secrets (TECHNICAL DATA)

What is a Trade Secret?

- Any Formula, Pattern, Device, or Information that is Used in One's Business, Which Gives Its Owner an Opportunity to Obtain an Advantage Over Competitors Who Do Not Know About It or Use It
- Not Readily Ascertainable by Proper Means
- Rights Created/Maintained through Secrecy
- NDA, Non-Competes, Passwords, Firewalls, Need to Know Disclosure, Physical Security



Copyright (DATA RIGHTS/SOFTWARE)

What is a Copyright?

- **An Original Work of Authorship Fixed in a Tangible Medium of Expression**
- **Exists Upon Creation**
- **Can be Registered**
- **Positive Right to Authorize Others to do Five Things (Reproduce, Prepare Derivative Works, Distribute Copies, Perform and Display)**
- **Limited Scope of Work for Hire**
- **Importance of Assignments and Licenses**



Trademark

What is a Trademark?

- **Any Word or Symbol Used to Identify One's Goods or Services and Distinguish Them From the Goods and Services Sold by Others**
- **May Register; Territorial**
- **Rights Based on First Use, Not Registration**
- **Different Priority Rules Overseas**
- **Must Match Actual Products/Services**



Intellectual Property Management

- Regularize the IP generation process
 - Business strategy
 - Budget
 - Available innovations
- Group by:
 - Technology
 - Intended business use
 - Income-generation capability
- Protection/Registration
 - Focus on timing of development and corresponding funding for development.
 - Focus on those items that have a strong chance of being infringed or that force competitors to deal with the company or face infringement claim.
 - But develop and identify portfolio of other IP assets.
 - Regularize the protection (and registration) process after consideration of the foregoing.
 - Confirm ownership and retention of rights from contractors and employees.
- Educate
 - Report to senior management.
 - Establish process.
 - Train staff.



Examination of the Particular IP Assets

TRADE SECRETS

- Secret?
- Departed and New Employees
- Physical Embodiment of the Rights
- Policy on Disclosure
- Source Code

TRADEMARKS

- First in Time/Registered?
- Descriptiveness Issue
- Use with Product/Service
- ® vs. ™
- Confusingly Similar
- Domain Names
- Role of Mark in Core Business

COPYRIGHTS

- Process of Creation & Acquisition
- Author/Owner
- Registered?
- © _____ All Rights Reserved
- Substantial Similarity
- Contractor Issue



Other Considerations

- **Commercial Exploitation with Non-government Customers?**
- **International Use and Expansion**
- **Confidentiality vs. Publicity**
- **How to Exploit IP -- License vs. Sell? Patent vs. Trade Secret? Copyright Registration vs. Trade Secret?**
- **Enforcement of the Company's IP Rights**
- **Information Security Best Practices**
- **Evolving Data Use and Circumvention Laws**



Data & Software Rights

- **Copyrights & Trade Secrets**
 - Works made by the government (or employees of the government in the scope of their employment) are not copyrightable
 - No automatic government rights to ownership of copyrightable works.
 - Trade secrets are generally addressed as “Data Rights.”
 - Trade Secret Act
 - Non-disclosure agreements
 - Reverse FOIA actions
 - Particular agency administrative proceedings



**Protecting Your Intellectual Property:
Practical Considerations
for the Government Contractor**

Tom McCabe
Senior Vice President,
General Counsel & Secretary
Alion Science and Technology Corporation



Background – It's All About People

- **Service industries account for 80% of U.S. jobs**
- **GovCon counsel should no longer be surprised to find themselves spending much of their time solving people-related legal issues.**
- **Assets are no longer machines; today's key assets are people.**
- **As a result, IP issues become employee issues, and no longer fit nicely within traditional IP categories.**
- **IP quickly bleeds over into a “no-man’s land” somewhere between IP law and employment law.**
- **How can we protect our company’s IP in this environment?**
- **It all starts with the “Employee Agreement.”**



Sample Employee Agreement: Key Terms and Conditions

“Ideas, Inventions, Software”

- Employee agrees to disclose and assign to Company any and all discoveries, technologies or inventions that are:
 - related to Company business;
 - resulting from Employee’s assigned duties; or
 - resulting from any use of Company assets
 - whether “patentable” or not.
- Start with disclosure of Employee’s own prior IP (if any).
- Affirmation that Employee has not brought or disclosed prior employer materials or properties to Company

“Assistance to Company”

- Employee must provide reasonable assistance to protect Company’s IP rights, *even post-employment* (e.g., 1-year).
- Any associated IP rights granted to Employee shall be assigned to Company.



Sample Employee Agreement: Key Terms and Conditions (contd.)

“No Conflict” Provisions

- Employee certifies there are no outstanding agreement(s) which may conflict with Employee’s IP-related obligations to Company (or ability to compete).
- E.g., confidentiality, non-solicitation, non-competition or intellectual property provisions

“Non-Incorporation”

- Employee agrees not to incorporate into Company work product any of Employee’s technology or any third-party technology (unless validly licensed to Company).



Sample Employee Agreement: Key Terms and Conditions (cont'd.)

“Non-Competition”

- Employee agrees not to:
 - Provide services to a competitor in relation to matters the Employee was involved in during employment with Company.
 - During and after employment (e.g., 6 months)

“Non-Solicitation”

- Employee agrees not to:
 - Induce employees, consultants or subcontractors to sever relationship with Company.
 - Solicit/hire employees, consultants or subcontractors of Company.
 - Divert Company business.
 - During and after employment (e.g., 1 year)



Other Strategies

- **But existing employees may not have Employee Agreement, or may have one without these types of provisions – what can you do?**
- **Adopt an adequate Employee Agreement now for new employees, to at least begin curtailing the problem.**
- **Raiding competitor will likely hire some old, some new – this may be enough to tip the balance in your favor.**
- **“Runaway Shop” rule in Virginia may prevent your competitor from conspiring to hire away an entire group of your employees.**
- **Also, consider adopting Company polices that incorporate some of these provisions (backdoor approach).**



Training

- **None of this makes sense if you are not creating valuable IP to protect, and not recognizing when you have created it.**
- **Train employees to spot patent, TM, copyright and trade secret issues.**
- **Trade secret may be the new frontier - for technology that is not patentable.**
- **Train employees to help preserve an appropriate balance of IP rights for Company while rendering technology-based services to your government customer.**
- **Educated, creative employees are the key to a robust program of IP creation and preservation.**





Panel Two:
The Changing Landscape of
Ethics and Compliance

10:30 a.m. – 12:00 p.m.

Moderator:
George W. Wyatt, IV, Venable LLP

Panelists:
Kevin T. Boyle, MCR, LLC
Lindsay B. Meyer, Venable LLP
Dismas N. Locaria, Venable LLP
David R. Warner, Venable LLP

VENABLE[®]_{LLP}

VENABLE[®]_{LLP}

The Changing Landscape of Ethics and Compliance

April 17, 2013



Agenda

- *George W. Wyatt, IV, Venable LLP – Moderator*

- U.S. Export Controls and Anti-Corruption:
Practical Compliance Traps and Tips
 - *Lindsay B. Meyer, Venable LLP*

- Changes for Government Contractor Employers
 - *David R. Warner, Venable LLP*

- The Changing Landscape of Ethics and Compliance Enforcement
 - *Dismas (Diz) N. Locaria, Venable LLP*

- Managing ethics and compliance issues during M&A
 - *Kevin T. Boyle, MCR, LLC*



Panelist Biographies

George W. Wyatt, Venable LLP - Moderator



George Wyatt is an associate in Venable's Government Contracts group, where he assists companies doing business with the federal government. He counsels clients on compliance with procurement regulations, contract drafting, bid protests, subcontractor disputes, claims, and responding to government subpoenas.

Mr. Wyatt's significant matters include:

- Receiving GAO recommended corrective action in a pre-award bid protest for a client excluded from participation in an \$850 million procurement because of allegations of an organizational conflict of interest;
- Representing a company suspended from government contracting for alleged violations of the Procurement Integrity Act, and obtaining an administrative agreement terminating the suspension;
- Winning agency corrective action in a post-award bid protest filed at GAO on behalf of an unsuccessful offeror for an \$80 million procurement, due to errors in the agency's best value determination;
- Appealing an agency's denial of a contractor's \$20 million request for equitable adjustment to the ASBCA; and
- Defending a design firm in U.S. District and state courts against multi-million dollar claims of breach of contract and professional negligence relating to alleged design defects in the construction of precast and cast-in-place concrete segmental bridges.

Mr. Wyatt earned his certification for a Leadership in Energy and Environmental Design Accredited Profession (LEED AP) from the Green Building Council. As a LEED AP, he has demonstrated knowledge of green building practices and the requirements of the LEED Green Building Rating System.

Prior to joining Venable, Mr. Wyatt clerked for the Honorable Lawrence J. Block at the U.S. Court of Federal Claims. He worked on cases covering a range of government contract matters, including bid protests, contractor's data rights, the rights of sureties to bring actions against the government, and contractor claims of differing site conditions.



Panelist Biographies

Lindsay B. Meyer, Venable LLP



Lindsay Meyer is Co-Managing Partner of Venable and heads the International Trade Practice, assisting sophisticated companies to efficiently import and export under U.S. laws and regulations. As a licensed U.S. Customs broker, Ms. Meyer has a detailed knowledge of and extensive experience with the regulations of the U.S. Bureau of Customs and Border Protection. She is also co-chair of Venable's FCPA and Anticorruption Practice.

For over twenty years, Ms. Meyer has provided International Trade and Customs advice at Venable where she heads Venable's International Practice based in Washington, DC. Ms. Meyer concentrates on all aspects of International Trade and Customs matters. She regularly advises companies on their compliance with import and export control laws and regulations, and appears before numerous regulatory authorities such as the U.S. Customs and Border Protection (CBP), International Trade Commission (ITC), Commerce Department's Bureau of Industry and Security (BIS), State Department's Directorate of Defense Trade

Controls (DDTC), Treasury Department's Office of Foreign Assets Control (OFAC), and the Committee on Foreign Investment in the United States (CFIUS).

Ms. Meyer has extensive experience counseling companies on compliance with export controls regulated by BIS, DDTC, and OFAC and actively assists companies in their registration and license authorization needs for exports, re-exports and deemed exports. She guides companies through internal Export Control Assessments, helps develop tailored compliance policies and procedures, and performs training on export laws and regulations affecting a company. Additionally, Ms. Meyer has successfully defended exporters facing civil and criminal investigations for alleged violations of U.S. export control laws and embargoes.

Ms. Meyer also advises clients on international transactional matters, where she counsels on strategic sourcing, targeted acquisitions Helms-Burton analysis, CFIUS investigations and FOCI reviews; sales and distribution arrangements in the U.S. and abroad; the use of foreign agents, affiliated offices, joint ventures and teaming agreements; as well as compliance with antiboycott restrictions and anti-bribery laws, such as the U.S. Foreign Corrupt Practices Act (FCPA).

Panelist Biographies

David R. Warner, Venable LLP



David Warner's practice focuses on the resolution and litigation of complex labor, employment, and business disputes. He represents and counsels both private and public sector clients, with a particular emphasis on the government contractor and non-profit industries.

Business Litigation: Mr. Warner routinely represents companies in commercial litigation matters, often concerning the enforcement of management rights in regard to restrictive covenants, trade secrets, business conspiracy and procurement integrity laws.

Government Contractor Compliance and Audits: Mr. Warner has extensive experience advising government contractors in compliance matters, audits, and litigation with the federal government.

Employment Counseling: Mr. Warner's practice includes counseling employers on labor and employment related matters in order to minimize potential litigation risk. In addition to day-to-day counseling on employment actions, Mr. Warner provides guidance regarding the design and implementation of effective and defensible application, hiring, promotion, and compensation practices, including conducting comprehensive audits of personnel practices to proactively identify and remediate issues that could give rise to class claims. Mr. Warner also advises companies in cross-border employment matters, including the design and implementation of expatriate employment agreements, application of U.S. laws to foreign-based employees, and related issues.

Employment Litigation: Mr. Warner routinely represents employers in litigation concerning alleged violations of Title VII, the ADA, ADEA, and other federal and state laws prohibiting discrimination and retaliation. Mr. Warner's litigation experience includes complex class action litigation, brought by both private claimants and government agencies, involving extensive electronic discovery and statistical analyses.

Panelist Biographies

Dismas (Diz) N. Locaria, Venable LLP



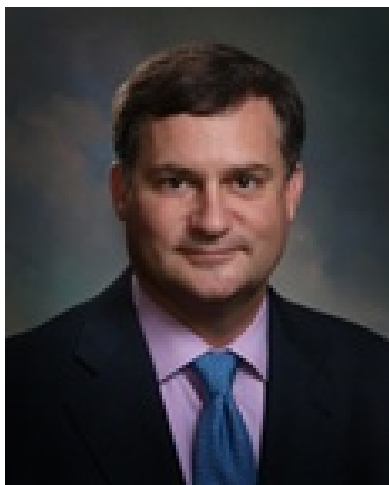
Dismas (Diz) Locaria is a member of the firm's Government Contracts Group. Mr. Locaria's practice focuses on assisting government contractors in all aspects of working with the federal government, as well as representing and counseling clients concerning the peculiarities of the Homeland Security Act's SAFETY Act.

Mr. Locaria has represented clients before various federal agencies, including the Department of Defense, General Services Administration, Department of Homeland Security, Small Business Administration, Environmental Protection Agency, and others. Mr. Locaria has developed several specialty areas, including representing clients in suspension and debarment proceedings, as well as performing internal investigations, which has included assistance and representation for such clients with disclosures to federal officials regarding the findings of such investigations and working with the client to determine and implement compliance enhancements and improvements. Mr. Locaria also has extensive experience in client counseling, including assisting clients with the nuances of becoming government contractors and implementing appropriate systems and methods to achieve and maintain regulatory and contractual compliance. Mr. Locaria is also well versed in assisting clients with GSA Federal Supply Schedule matters, in particular advising clients on how best to structure proposals to avoid price reduction clause (PRC) issues, and addressing PRC, Trade Agreements Act and other compliance matters post-award.



Panelist Biographies

Kevin T. Boyle, MCR LLC



Kevin T. Boyle is the Senior Vice President, General Counsel & Secretary of MCR, LLC and is responsible for managing all legal affairs of the company. He brings over 18 years of experience delivering outcome-driven solutions to complex legal and business issues facing emerging growth companies. Prior to joining MCR in February 2012, Mr. Boyle was Senior Vice President, General Counsel and Secretary at Vangent, Inc., where he created the company's first legal department, managed M&A matters and led Vangent's industry recognized ethics and compliance

program. Previously, he served as Assistant General Counsel for General Dynamics Information Technology, following its acquisition of Anteon International Corporation. Mr. Boyle was also Vice President and General Counsel for Interworld Corporation and held similar positions with Visual Networks, Inc. and Cambridge Technology Partners.

Mr. Boyle graduated from Yale University with a B.A. in History and received his Juris Doctor degree from Tulane Law School. He is admitted to the Bars of Virginia, New York and Massachusetts. In addition, he is a member of the Washington Metro Area Corporate Counsel Association, the American Bar Association and the Professional Services Council.



U.S. Export Controls and Anti-Corruption: Practical Compliance Traps and Tips

April 17, 2013

Presented by:

Lindsay B. Meyer, Esq.

Venable LLP

LBMeyer@Venable.com

Tel. 202.344.4829



Road Map for Today's Presentation

- Ethics and Compliance in Your International Transactions
 - More Critical Than Ever
- Traps and Tips in Today's U.S. Export Controls
 - Defense Articles and Services (ITAR)
 - Dual-Use Commodities (EAR)
 - Economic Sanctions & Embargoes (OFAC)
- FCPA and Anti-Corruption Laws:
 - Aggressive Enforcement Abounds
- Questions and Answers



Why Should Government Contractors Care?

- Do you work with detailed or sensitive information about U.S. products, software, or technology?
 - *e.g., Aircraft Parts, Chemical Agents, Satellite Systems*
- Do you interact with U.S. persons located overseas?
 - *e.g., Contractors, Multinational Corporations, International Organizations*
- Do you interact or collaborate by email with foreign persons either here or abroad?
 - *e.g., Foreign Agencies, State-Controlled Entities, Visiting Researchers*
- Do you travel outside the U.S. with a computer or documents containing work-related information?
 - *e.g., Overseas International Consortium, Research Presentations*



Primary Regulatory Agencies

- Export Control Laws and Regulations
 - International Traffic in Arms Regulations (“**ITAR**”)
 - Defense articles
 - Administered by State Dep’t, DDTC
 - Department of Defense Regulations (“**DoD**”)
 - Defense items
 - Classified (NISPOM) and unclassified articles
 - Export Administration Regulations (“**EAR**”)
 - Dual-Use Items
 - Administered by Commerce Dep’t, BIS
 - Office of Foreign Assets Control (“**OFAC**”) Regulations
 - U.S. sanctions program
 - Administered by Dep’t of Treasury, OFAC



Who is Affected?

- Are you dealing with the following?
 - Persons and Entities:
 - All U.S. “persons,” wherever located
 - All persons in the U.S., regardless of nationality
 - Non-U.S. persons in the U.S. or overseas
 - Governments
 - Focus on state-controlled entities
 - Governmental end-use
 - Countries
 - Borders matter
 - Jurisdiction attachés



Compliance Considerations

- Do you follow DFARs 252.204-7008 flow-down provisions?
- Are you complying with I-129 Form U.S. Export Control Certification for visa applications?
- Have you kept current with subcontractor changes on TAAs and MLAs?
- Do you follow all conditions of issued licenses? (quantity; value; end users)
- Failure to do so → significant fines & penalties.



Compliance Traps for Contractors

- Export Authorization Controls:
 - Over-shipped quantity / value
 - Unauthorized transfers in country
 - “DoD Approval” or direction \neq license
 - Failure to get USG Authorization for License Exception
 - Forgetting flow-down provisions
 - DFARs 252.204-7008
 - 67 Fed. Reg. 18,029 (Apr. 10, 2010)
- Tip: Train to manage this function.



Compliance Traps for Contractors (cont'd.)

- Reexport Authorization Controls:
 - Different intermediate consignee
 - Different end-user organization
- Unauthorized Transfers in Country
 - Different intermediate consignee
 - Different end user
- Post-Project “Cleanup”
 - Close out licenses and return of goods
 - Import license needed? Goods left behind?
- Tip: Can’t “outsource” responsibility, follow up.



Ubiquitous Defense Services

- Defense services occur more often than realized.
 - Clarification on dealing with non-ITAR items
 - Who exactly are you dealing with?
 - Are your services “training”?
 - Complex organizational structures with foreign defense oversight
- When in doubt, inquire:
 - CJ requests to confirm/clarify
- Tip: Due diligence on all parties to the transaction: check upstream control.



Deemed Export Difficulties

- Managing your (or the USGs) technology?
 - Maintaining a current “inventory”
 - Marking and managing same?
- Lack of in-house worker “inventory”:
 - Visa ≠ export license
 - Spouse visa not sufficient
 - Manage green card validity periods
 - Remember Immigration Form I-129
 - Applicants for H-1B, H-1B1, L-1 or O-1A
 - Burden on Company to certify (Feb. 2011)
 - False statement charge?
- Flow-down to subs? Or service providers?
- Tip: Include contractual provisions.



Consider Other Authorizations

- Lack of Agreement Management
 - Ever-changing subs on TAAs & MLAs
 - Lack of control on nationalities (3rd country?)
 - Failure to follow conditions
 - Changing facts with lack of Authorization updates
- Distribution Agreements
 - Lack of controls downstream
 - Failure to follow up
- Tip: Centralize control - legal oversight / privilege.



Tiptoe Carefully Through US Economic Sanctions and Embargoes

- National Security Basis for Prohibitions and Restrictions
 - Ever-changing targets and Policies
 - Regulations “similar” but not identical
 - Multiple lists now consolidated
 - Fail to follow debarred parties, denial orders
 - Consider other sanction programs’ impact
 - UN Sanctions, EU sanctions, etc.
 - Often in Tandem with U.S. license authorization, but not identical
- Tip: Automate list review to meet business operations.



Why Do We Care? Penalties, and Not Just Monetary Ones

- Criminal Penalties
 - \$1,000,000 per violation and/or
 - 20 years imprisonment for individuals
 - Prosecution by Department of Justice
- Civil Administrative Penalties
 - Fines up to \$250,000 per violation or twice the amount of the transaction at issue, whichever is greater, and/or
 - Placement on Debarred Parties, Denied Persons List, SDN List
 - Don't kill the golden goose!



Aggressive FCPA and Anti-Corruption Enforcement

- Foreign Corrupt Practices Act – No stranger to government contracts industry
 - Dealing with foreign government officials
 - Confusing lines of control
 - “Facilitation payments” U.S. treatment only
 - “Doing business” broadly interpreted
 - Risk with third-party entities/subcontractors
 - Trend - multijurisdictional investigations
 - Significant penalties continue: 2012 ave. >\$17M
- Tip: Ensure solid compliance measures in place for all international operations.



FCPA Penalties: Significant to All

■ Criminal Penalties

- For corporations, up to \$2 million per violation or twice the pecuniary gain, whichever is higher
- For corporate officers, directors, stockholders, employees and agents, up to \$100,000 and imprisonment up to five years

■ Civil Penalties

- Disgorgement;
- Injunction;
- A fine of \$10,000 per violation; and/or
- Enhanced penalties of up to \$500,000

■ Private Lawsuits

- Currently, no FCPA private right of action.
- Nevertheless, civil litigation involving or stemming from alleged FCPA violations is rampant.



VENABLE[®]_{LLP}

Changes for Government Contractor Employers

April 17, 2013



Overview

- New regulatory developments
 - Service Contract Act
 - Non-displacement of incumbent workers
 - OFCCP
 - Rescission of compensation standards
- Old chestnut receiving new scrutiny
 - Use and abuse of independent contractors



Service Contract Act

- Executive Order 13495 – eff. January 28, 2013
- Successor contractor ***and its subcontractors*** to offer incumbent employees a right of first refusal of employment under the successor contract in ***positions*** for which they are qualified.
- Exclusions
 - Contracts under the simplified acquisition threshold (currently \$150,000)
 - Can be waived by contracting agency no later than the contract solicitation date.
- Limited to service employees.



EO 13495 – How does it work?

- Predecessor
 - Inform incumbents of right.
 - Provide certified list of individuals to be terminated to CO 30 days prior to contract end.
- Successor
 - Bona fide offer to everyone on list
 - List continues for 90 days.
 - Need not be identical position but one for which individual is qualified.
 - Can be lower paid if supported by “valid business reasons.”
 - No right to continued employment, but ...

OFCCP and Compensation Analysis

- The “Old”
 - Historically, analysis limited to general overview of compensation system
 - Analysis of *individuals* and comparators but relatively little statistical analysis
- The “New”
 - Mid-2000s increased emphasis on statistical analyses
 - SSEGs & regression analysis as the standard
 - Focus on *systemic* pay disparities



OFCCP and Compensation Analysis (cont'd.)

- The “Now” ... or “Everything Old is New Again”
 - Effective February 28, 2013
 - Reduced emphasis on regression analysis, though still in the agency’s tool chest
 - Case-by-case analysis
- Why it matters
 - Review of compensation likely to be far more invasive than under prior regulations.
 - Agency may examine disparate job titles, assignments, training opportunities, assignment of sales territories, even in the absence of anecdotal evidence of pay discrimination.



Use of Independent Contractor Staff

- “The IRS 20-Factor Test is Dead; Long Live the IRS 20-Factor Test”
 - IRS Form SS-8
 - <http://www.irs.gov/pub/irs-pdf/fss8.pdf>
 - Behavioral control
 - Economic control
 - Agreement between the parties
- Don't forget state law.
 - Can be ***significantly*** more restrictive than IRS.
 - E.g., Maryland – “Service is outside the usual course of business of the employing unit.”



Abuse of Independent Contractor Status – Why it Matters

- Employee headcount
 - Title VII, ADA, ADEA, FMLA, etc.
 - AAP requirement
- Taxes and unemployment insurance
- *Respondeat superior* liability
 - Check agreements for indemnification
- ***BENEFIT ELIGIBILITY***
 - Healthcare
 - 401k



VENABLE[®]_{LLP}

The Changing Landscape to Ethics and Compliance Enforcement

Presented by Dismas N. Locaria, Esq.

April 17, 2013



The Changing Landscape in Ethics and Compliance Enforcement

- SBA Activity
- False Claims Act and *Qui Tam* Activity
- Suspension and Debarment



Small Business Administration Will Remain Active

- The SBA is continuing to assert its enforcement powers.
 - Suspension and debarments still at post-Clean Contracting Act levels:

2009	2010	2011	2012
3	21	38	19

- More GTSI's on the horizon
 - Enforcement of 8(a) program requirements
- Planning significant regulatory revisions



False Claims Act (FCA) Activity

- FY 2012 – A record year regarding the FCA
 - DOJ recovered nearly \$5 billion in FCA settlements.
 - Second straight year it set a new high.
 - \$3.3 billion attributable to *qui tam* (whistleblower) actions.
- Will FY 2013 break this record?
 - Shaping up that way, in March and April alone:
 - Intermountain Health Care, Inc. - \$25.5M
 - Hospice of Arizona - \$12M
 - CDW-Government - \$5.6M
 - Corning Inc. - \$5.65M
 - CIA Contractors - \$3M
 - Caddell Construction - \$1.1M



False Claims Act (FCA) Activity (cont'd.)

- NDAA FY 2013 Whistleblower Protections
 - Section 828 FY13 NDAA expands employees' whistleblower protections.
 - In particular, an employee may not be discharged, demoted, or otherwise discriminated against for:

[D]isclosing information that the employee reasonably believes is evidence of gross mis-management of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant ...



The Rise of Contractor Ineligibilities

- FCA is not the only action on the rise
- Since 2009, suspension and debarments have increased by more than 60%.
- Why?

Action	Reaction
Clean Contracting Act of 2010	Creation of new S&D offices
2011 DoD IG Report	Actions based on terminations for cause/show cause notices
Congressional concern over felons receiving contracts	DOJ referring convictions and settlements to S&D offices



The Rise of Contractor Ineligibilities (cont'd.)

DoD Suspension and Debarment Figures

	FY 2009	FY 2010	FY 2011	FY 2012
AIR FORCE				
Suspensions	73	91	148	83
Proposed Debarments	86	68	139	401
Debarments	63	206	80	266
ARMY				
Suspensions	134	133	112	195
Proposed Debarments	112	125	235	284
Debarments	117	170	179	186
NAVY				
Suspensions	12	25	24	47
Proposed Debarments	39	38	80	152
Debarments	44	78	92	146
DEFENSE LOGISTICS AGENCY				
Suspensions	48	140	34	18
Proposed Debarments	163	169	206	179
Debarments	131	166	184	202



New Ineligibility Activity

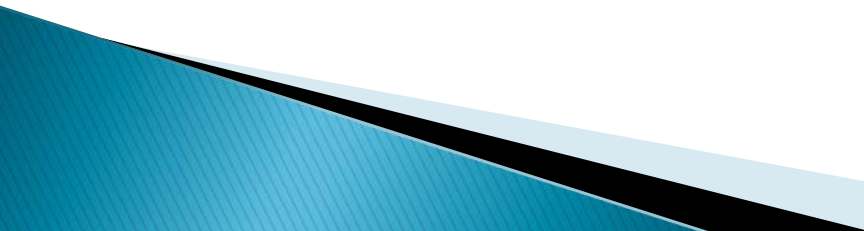
- Consolidated Appropriations Act of FY12 included an ineligibility provision for felons.
 - Inconsistent language
 - Inconsistent application across agencies
- Remains in FY13 appropriations and anticipated in FY14.
 - Inconsistencies addressed
 - Potential expansion of ineligibilities



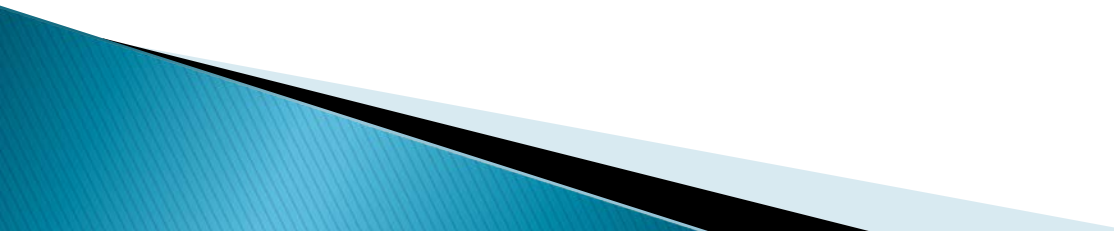
The Changing Landscape of Ethics and
Compliance:
Managing Ethics and Compliance Issues
During M&A

Panelist: Kevin T. Boyle
SVP, General Counsel & Secretary
MCR, LLC

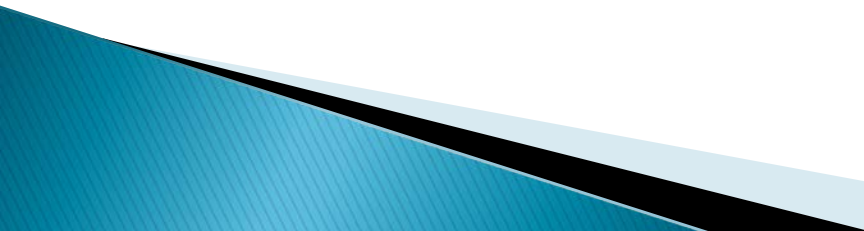
Background

- ▶ A strong commitment to ethics and compliance (E&C) is essential to conducting business with the federal government.
 - ▶ The regulations governing business with the federal government are extremely complex.
 - ▶ In recent years, the government has significantly stepped up enforcement against government contractors to ensure it is doing business with ethical companies.
 - ▶ Small to mid-sized companies often lack the resources to effectively identify, manage and resolve E&C issues.
- 

Summary

- ▶ Even if you avoid government enforcement, E&C issues, both known and unknown, inevitably rear their ugly heads during the diligence process when the company is being sold or taken public and usually at the worst possible time!
 - ▶ It takes a strong commitment from the senior leadership of the company, especially the GC, to quickly neutralize and resolve these issues so that the company's valuation and leverage in negotiations do not take a hit.
- 

The M&A Environment

- ▶ Buyer's market (at least, for now)
 - ▶ Buyers are keenly aware they are buying whatever E&C issues exist in the target, and failure to vet and value them could turn a good deal into a bad one.
 - ▶ The level of Buyer diligence has increased in direct proportion: and focus to track with the government's enforcement priorities.
- 

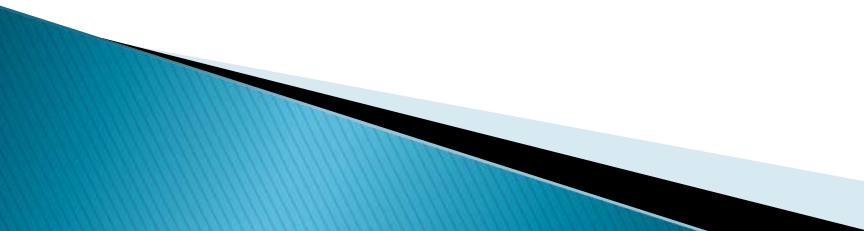
The M&A Environment (cont'd.)

- ▶ Serious E&C issues unearthed during diligence:
 - Put Seller on defense in negotiations and sow doubts in Buyer's mind about true value of Company.
 - Create a distraction to deal participants and pose a direct threat to "speed and certainty of closure."
 - If not handled properly, can result in Seller not achieving full valuation on exit, complicate the post-merger integration process or cause Buyer to walk.


Key Takeaways – Sell Side

- ▶ Manage E&C issues at the point of impact – bad news does not get better with age.
- ▶ Clean up major E&C issues at least 12 months before you issue your book.
- ▶ If you have any international business (even if only FMS):
 - Assess whether you have appropriate policies and training and employ ethical people.
 - Confirm your ITAR compliance.
 - Resolve any FCPA or fraud-related investigations.

Key Takeaways – Sell Side (cont'd.)

- ▶ Litigation and Employee Disputes
 - *Qui Tam*/False Claims Act actions
 - Other unresolved hotline or whistleblower issues
 - Large number of EEOC cases
 - Failure to take action against unethical employees
 - Poor governance practices (e.g., lack of record keeping for board activities and resolutions, incomplete capitalization tables)
 - Unclear IP ownership rights
 - Outdated E&C policies or training program
- 

Resolving Ethics & Compliance Issues to Get the Deal Done

- Understand the Buyer's major E&C concerns up front
 - Do your best to educate the buyer (and counsel) about the issue, its affect on value and a fair resolution.
 - Expect that your proposed resolution to an ongoing E&C issue may not satisfy the Buyer.
 - Work with the Buyer to find a mutually acceptable resolution or, if necessary, agree to a separate rep and warranty and/or indemnification before giving in to a price adjustment.
 - Know your own "bottom line"; sometimes the best deals are the ones you don't make.
- 

Thank you!

Questions and Answers

Lindsay B. Meyer, Esq., Venable LLP

lbmeyer@Venable.com

Tel. 202.344.4829

David R. Warner, Esq., Venable LLP

drwarner@Venable.com

Tel. 703.760.1652

Dismas (Diz) N. Locaria, Esq., Venable LLP

dlocaria@venable.com

Tel. 202.344.8013

Kevin T. Boyle, Esq., MCR LLC

kboyle@mcri.com

Tel. 703.229.4534





Panel Three:
Strategies for Obtaining and
Preserving Your Awards

1:30 p.m. – 2:45 p.m.

Moderator:
Keir X. Bancroft, Venable LLP

Panelists:
Curtis L. Schehr, DCS Corp.
Sherry L. Rhodes, Noblis, Inc.
Rebecca E. Pearson, Venable
LLP
James Y. Boland, Venable LLP

VENABLE[®]
LLP

VENABLE[®]LLP

Strategies for Obtaining and Preserving Your Awards

APRIL 17, 2013



© 2013 Venable LLP



Agenda

Strategies for Obtaining and Preserving Your Awards

- **Courting Customers and Managing (Team) Members**
 - *Curtis L. Schehr, DCS Corporation*
- **Ensuring Eligibility With Continued Compliance**
 - *Sherry L. Rhodes, Noblis, Inc.*
- **Pre-Award Protests and Other Preemptive Practices**
 - *Rebecca E. Pearson, Venable LLP*
- **Post-Award Bid Protests: 10 Reasons to Intervene**
 - *James Y. Boland, Venable LLP*



Panelist Biographies

Keir X. Bancroft, Venable LLP - Moderator



Keir Bancroft provides a range of services to clients throughout the government contracting sector. Mr. Bancroft represents clients in litigation, including bid protests, size and status protests, and contract-related disputes before tribunals including the Government Accountability Office, the Small Business Administration, boards of contract appeal and the United States Court of Federal Claims. Mr. Bancroft also assists clients in responding to investigations by offices of inspector general and congressional committees. He counsels clients in transactional matters, performing due diligence in mergers and acquisitions, and drafting post-merger novation and change-of-name agreements. Mr. Bancroft also drafts and negotiates subcontracts, nondisclosure agreements, mentor-protégé agreements, and licensing agreements on behalf of clients. Further, Mr. Bancroft counsels clients on a range of compliance issues, particularly those pertaining to information security and privacy.

Mr. Bancroft formerly served as an attorney advisor and 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. In his capacity as Privacy Officer, Mr. Bancroft coordinated the Bureau's compliance with the Privacy Act, and privacy-related issues pertaining to information security under the E-Government Act, and the Federal Information Security Management Act (FISMA).



Panelist Biographies

Curtis L. Schehr, DCS Corporation



Curtis Schehr serves as Executive Vice President and General Counsel of DCS Corporation, where he plays a leading role in the company's mergers and acquisition activities. He organized and led due diligence and negotiation of several transactions in 2012 resulting in the acquisition of OptiMetrics, Inc. and Infoscitex Corporation (IST), and the concurrent divestiture of an IST subsidiary. Mr. Schehr also advises management and the board of directors on matters including corporate governance, litigation, government contracts, bid protests and employment law.

Mr. Schehr served previously as Senior Vice President, General Counsel and Corporate Secretary of DynCorp International Inc., where he actively participated in developing and implementing the company's growth strategy and policies. Mr. Schehr also served as Senior Vice President, General Counsel and Secretary of Anteon International Corporation, where he was part of the executive team that spearheaded Anteon's growth from approximately \$125 million in 1996 annual revenues to an annual revenue run rate of approximately \$1.75 billion in 2006.

Mr. Schehr holds a J.D., with honors, from the George Washington University Law School and graduated summa cum laude from Lehigh University, where he was elected to Phi Beta Kappa.



Panelist Biographies

Sherry L. Rhodes, Noblis, Inc.



As Vice President, General Counsel and Secretary, Ms. Rhodes is responsible for all legal matters and corporate secretary duties within the Corporation. This includes corporate governance, corporate transactions, tax compliance, intellectual property, litigation management, employment issues and real estate. Noblis is a nonprofit science, technology and strategy organization working at all levels of government, in private industry and with other nonprofits in areas that are essential to our nation's well-being: national security, transportation, environmental sustainability, enterprise transformation, and health care. Prior to working at Noblis, Ms. Rhodes was with several publicly traded technology companies where, as Vice President, General Counsel and Secretary, she was responsible for all legal and compliance matters, including SEC compliance and mergers and acquisitions. Ms. Rhodes was in the private practice of corporate law for thirteen years prior to going in-house.

Ms. Rhodes graduated Order of the Coif from the University of Maryland School of Law and Magna Cum Laude from the University of Maryland with a Bachelor of Arts. She is a member of the Maryland and District of Columbia Bars and holds a Corporate Counsel Registration from the Virginia Bar. She is also a member of the Society of Corporate Secretaries and Governance Professionals and the American Corporate Counsel Association.



Panelist Biographies

Rebecca E. Pearson, Venable LLP



Rebecca Pearson focuses on government contracts law. She assists clients in government contract litigation; contract award protests before the Government Accountability Office and federal courts; administrative claims before agency boards of contract appeals; representation before the Department of Justice and federal courts on civil matters involving government contractors; and civil litigation in federal courts involving government prime contractors and subcontractors. Ms. Pearson also counsels clients on matters involving contracts including defective pricing and cost allowance questions, teaming agreements, legal and regulatory compliance and ethics, and small business issues. She has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novation.

Ms. Pearson's extensive experience as an Air Force attorney in federal litigation and client counseling, and in interfacing with other federal agencies, provides her with an invaluable "insider's" perspective and proven skills to render timely and effective assistance to clients in a wide variety of government contracts matters.



Panelist Biographies

James Y. Boland, Venable LLP



James Boland is a member of the firm's Government Contracts group. Mr. Boland's practice covers a broad range of federal procurement counseling and litigation, including bid protests; claims and requests for equitable adjustments; federal appeals; prime/subcontractor agreements and disputes; small business matters; teaming and joint venture agreements; suspension and debarment; compliance and internal investigations; due diligence reviews; and intellectual property issues.

Mr. Boland advises clients in the pre- and post-award source selection stages of procurements. He has successfully challenged and defended solicitations, evaluations, contract award decisions, and offeror size/status eligibility before numerous defense and civilian agencies, the Government Accountability Office, the Small Business Administration, the United States Court of Federal Claims, and the FAA's Office of Dispute Resolution for Acquisition.



Courting Customers and Managing (Team) Members

- Working with your Bus. Dev. Team
- Review Draft RFP
- RFP Shaping
 - One-on-one customer meetings
 - Question/comment submission
 - Perseverance matters
- Provide proposal guidance/input (e.g., OCI)
- Compliance check of proposal against Sections L and M



The Team Member Courtship Begins – Nondisclosure Agreement

- Business development and program personnel may have sensitive discussions with prospective team member before NDA.
- Internal process that triggers NDA
 - Adequacy?
 - Followed?
- Ensure effective date of NDA is retroactive to encompass prior discussions.



Common NDA Issues

- Description of subject matter of expected information exchanges may be too vague.
 - Confidentiality period
 - Retain copy for archival and dispute resolution purposes
 - Governing law; jurisdiction and venue
- Potential emerging issues
 - Uncustomary provisions such as noncompetition clause
- Negotiation of certain NDA provisions may set stage for negotiation of subsequent agreements.



Teaming Agreements – Recurring Issues

- Exhibit A (SOW)
- Non-solicitation of employees
- Award of subcontract
- OCI representation
- Exclusivity
- Term and termination



Preparing for Debriefs

- Request a debrief win or lose.
- Form debrief team before award is announced.
- Push for face-to-face debrief.
 - Suggest to procuring agency that face-to-face will likely be more effective and less likely to lead to misunderstandings and misperceptions.
- Prepare and review written questions for agency.
- Challenge imprecise or evasive written responses.
- Should Company attorney attend the debrief?



ENSURING ELIGIBILITY WITH CONTINUED COMPLIANCE



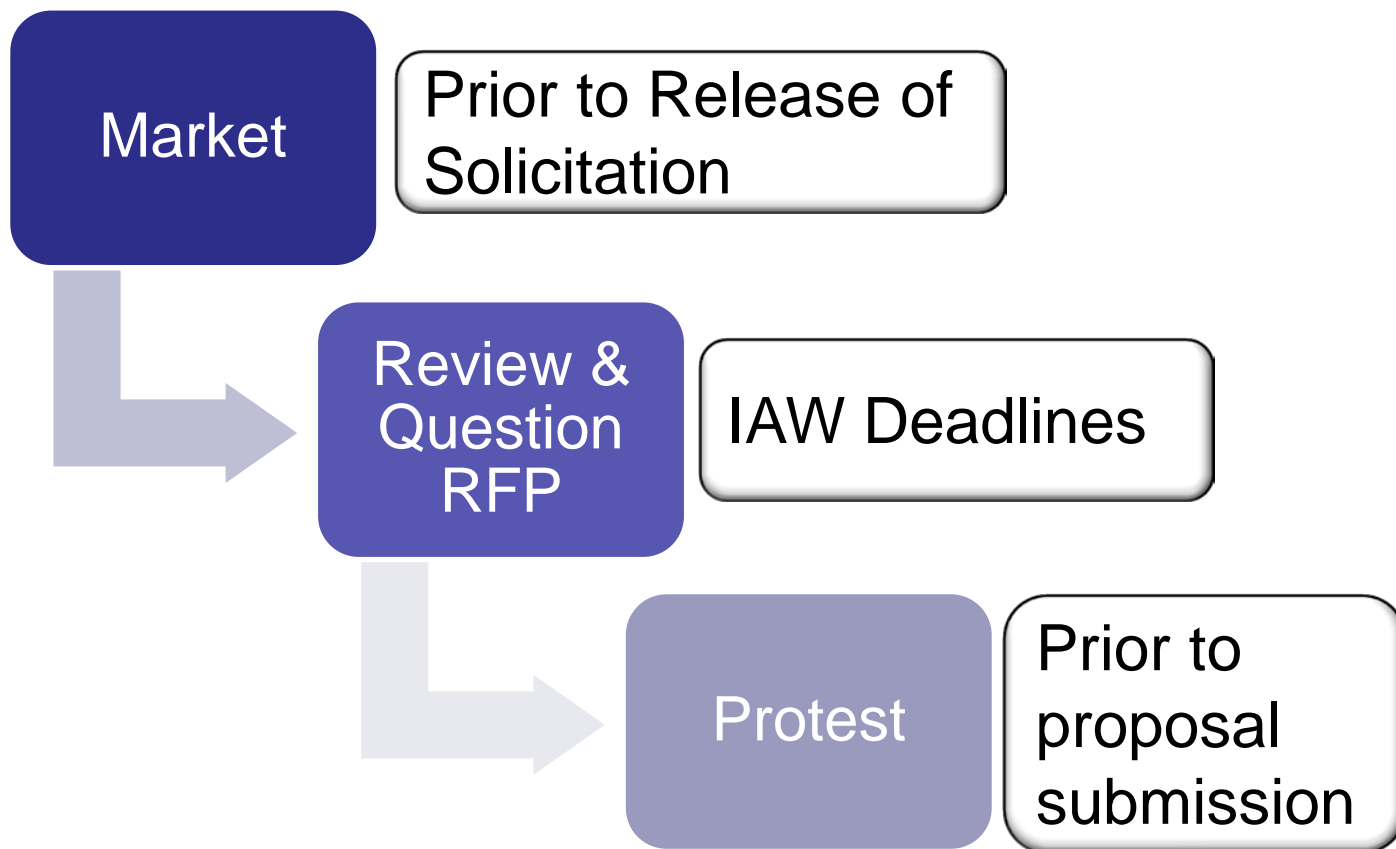
A CULTURE OF COMPLIANCE ENHANCES YOUR ABILITY TO WIN AND MAINTAIN CONTRACTS

- Lack of compliance can lead to ineligibility for current and future opportunities.
 - Debarment, suspension, lack of trust and reputational harm can result from lack of compliance.
 - OCIs
 - Access to nonpublic information
 - Contract clauses may have more stringent requirements than the FAR/DFAR.
 - Disclosure issues
 - PCIs
 - Covered Employees may have financial/personal or relationship issues that impair impartiality or give the appearance of doing so.
- Appearances Matter

CULTIVATING A CULTURE OF COMPLIANCE IS GOOD BUSINESS

- Establish a culture of compliance and ethics through tone from the top, your code and otherwise.
- Promote the compliance and ethics message at every opportunity – training, posters, videos, town halls, employee meetings, manager meetings.
- Track compliance – create a trail of compliance through automated systems or the like.
- Conduct a risk assessment and involve all areas of the organization.
- Require the same rigor of your teammates that you require of yourself.
- Maintain awareness of compliance issues required to be reported and have a plan for communication.
- Audit your compliance.
- Stay professionally engaged, personally and as an organization.

Pre-Award Protests and Other Preemptive Practices



Pre-Award Protests and Other Preemptive Practices

- *Be proactive!*
 - *Prior to the beginning of a procurement, let the agency know your capabilities.*
 - *If you are the incumbent, make sure the agency and its customers understand the value of your services or product.*
 - *During performance*
 - ***Before the re-compete***
 - *Respond to requests for market research or requests for information.*



After Solicitation Release – Review and Question the Solicitation

Review

- Review for the following
 - Ambiguity
 - Unduly restrictive requirements
 - Non-commercial terms and conditions

Question

- Answers become part of the solicitation and bind the agency.
- Question early to meet deadline.
- Question after deadline if necessary.
- Frame challenges as questions.
- Questions may include statements of assumptions for which you request confirmation.



Pre-Award Protest

Forum

- Agency
- Government Accountability Office
- U.S. Court of Federal Claims

Deadline

- Prior to the submission of proposal

Factors in Filing

- Will you be competitive without a change?
- Will you bid without a change?
- How important is work with the agency to your business?



Post-Award Bid Protests: 10 Reasons to Intervene

James Y. Boland, Venable LLP

- *Why Intervene?*
 1. *Show of support/team player – your responsibility to help defend new customer's award decision.*
 2. *Discourage agency from taking corrective action.*
 3. *If agency takes corrective action, help shape it to limit its impact.*
 4. *Limit the record (e.g., keep proposal out), which hampers ability of protester to develop a strong protest.*
 5. *Supplemental legal support to agency counsel (research, shape agency legal arguments).*



Post-Award Bid Protests: 10 Reasons to Intervene (cont'd.)

6. *Advance arguments that agency is unwilling to make to resolve protest (e.g., motions to dismiss).*
7. *Provide different perspective on arguments for GAO/court's consideration.*
8. *Protect proprietary information (if corrective action results in new FPRs, you may be at a competitive disadvantage if competitors have insight into your proposal/price).*



Post-Award Bid Protests: 10 Reasons to Intervene (cont'd.)

9. *Assist with factual/technical understanding, factual support (e.g., declarations).*
10. *Monitor developments in the protest.*



Contact Information

Rebecca Pearson
Venable LLP
REPearson@Venable.com
t 202.344.8183
f 202.344.8300

Curtis L. Schehr
DCS Corporation
CSchehr@dcscorp.com
t 571.227.6150

Keir X. Bancroft
Venable LLP
KXBancroft@Venable.com
t 202.344.4826
f 202.344.8300

Sherry L. Rhodes
Noblis, Inc.
Sherry.Rhodes@noblis.org
t 703.610.2430

James Boland
Venable LLP
JYBoland@Venable.com
t 703.760.1997
f 703.821.8949

www.Venable.com





Panel Four:
Litigating Against the
Government

3:00 p.m. – 4:15 p.m.

Moderator:
Paul Debolt, Venable LLP

Panelists:
David Newsome, Jr., KBR, Inc.
Michael Brien, Deloitte Financial
Advisory Services LLP
Lars E. Anderson, Venable LLP
Seth A. Rosenthal, Venable LLP

VENABLE[®]_{LLP}

VENABLE[®]_{LLP}

Litigating Against the Government

April 17, 2013



Speakers

Paul A. Debolt, Venable LLP – Moderator

Panelists

David Newsome, Jr., KBR, Inc.

Michael Brien, Deloitte Financial Advisory Services LLP

Lars E. Anderson, Venable LLP

Seth A. Rosenthal, Venable LLP



Panelist Biographies

Paul A. Debolt, Venable LLP - Moderator



Paul Debolt assists companies and individuals on issues that arise from conducting business with the federal government, including civil fraud. He is experienced in the competitive source selection process, defending or prosecuting bid protests, issuing advice concerning compliance with government regulations and laws during the performance of a contract, and helping to resolve disputes and claims during contract performance or as a result of contract termination. Mr. Debolt also has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novations. He counsels clients on the Service Contract Act, the civil False Claims Act, joint ventures and teaming agreements, prime-subcontractor disputes, internal investigations, mandatory disclosures and data rights issues.

Mr. Debolt has extensive government contracts law experience and applies a team approach that ensures clients receive the benefit of firm-wide strength in all related areas.



Panelist Biographies

David Newsome, Jr., KBR, Inc.



David Newsome, Jr. is an accomplished attorney with extensive education and over fourteen years' experience in federal procurement matters, including bid protests, appeals, and procurement fraud matters.

Mr. Newsome has extensive knowledge of all stages of federal contract law and litigation, including terminations, procurement disputes, protests, procurement integrity and suspensions and debarments.

Mr. Newsome has a proven ability to handle the full spectrum of complex litigation and extensive supervisory experience with legal offices and personnel, including attorneys and paralegals.



Panelist Biographies

Michael Brien, Ph.D., Deloitte Financial Advisory Services LLP



Dr. Brien has extensive experience in applied microeconomics and the statistical analysis of data. He has conducted research in the areas of labor economics, policy analysis, and economic demography and has been published in peer-reviewed economics journals. He has worked on a variety of litigation and business consulting projects involving economic and statistical issues and the analysis of large and complex data.

Dr. Brien's litigation work includes cases related to the False Claims Act, government contracting, employment and credit discrimination, subprime mortgage lending, off-label marketing of pharmaceuticals, and pharmaceutical rebates. He has been qualified as an expert witness and has provided testimony in Federal Court. Dr. Brien's business consulting work has included work for the U.S. Department of Labor in which he has examined the funding mechanism of employer-

provided group health plans, investments of pension assets in hedge funds, and issues that may arise in the certification of portfolio allocation computer models. Many of his engagements have involved statistical sampling and the predictive and statistical analysis of various types of data.

Prior to becoming an economic consultant, Dr. Brien served on the faculty of the Department of Economics at the University of Virginia, where he taught graduate and undergraduate courses in labor economics and in microeconomic analysis. He served as the Associate Chair of the department between 1996 and 1998. In 1999-2000, Dr. Brien served as a Senior Staff Economist for the President's Council of Economic Advisers, where he concentrated on labor market, education and social policies. He has also been an economist at the U.S. Commission on Civil Rights, a Visiting Scholar at the Social Security Administration, and a post-doctoral fellow at the RAND Corporation. Dr. Brien has a Ph.D. in Economics from the University of Chicago.

Panelist Biographies

Lars E. Anderson, Venable LLP



Lars Anderson's practice focuses on government contracting.

In 39 years in the field, he has handled virtually every issue that arises in contracting and doing business with the federal government. Clients rely on him for:

- assistance during the competitive bid process
- defense or prosecution of bid protests
- help in complying with regulations and laws during contract performance
- resolution of disputes and claims during contract performance
- resolution of claims as a result of contract termination

His experience includes resolving disagreements over highly technical specifications -- including changed conditions, delays or

disruption in construction, manufacture or maintenance of weapons systems and equipment, and allegations regarding violations of procurement integrity laws.

His experience encompasses, among other areas:

- aerospace - maritime
- electronics - OMB A-76 competitions
- Travel - information technology
- Small Business 8(a) programs

He also assists contractors in performing risk analysis and developing proposals.

Mr. Anderson's familiarity with the government's internal procedures and regulatory requirements provides invaluable insight for contractor clients, and often facilitates amicable resolutions to contract disputes.

Panelist Biographies

Seth A. Rosenthal, Venable LLP



Seth Rosenthal is an experienced trial attorney and former federal prosecutor representing individuals and businesses in criminal matters, investigations by federal and state regulators, and complex commercial and civil rights litigation. He handles a wide range of cases, including procurement fraud, public corruption, attorney misconduct, partnership and commercial contract disputes and civil rights enforcement. Mr. Rosenthal also directs Venable's *pro bono* program and serves as chair of the firm's *pro bono* committee.

Mr. Rosenthal developed an extensive body of courtroom experience over the span of nearly a decade in the Department of Justice's Civil Rights Division. He conducted grand jury investigations and successfully tried to verdict or obtained guilty pleas in numerous noteworthy cases involving human trafficking, police misconduct and hate crimes, as well as related charges of obstruction of justice, false statements and fraud. He also handled all facets of class-wide civil litigation, including trial, in cases arising under the Fair Housing Act and the Equal Credit Opportunity Act. Early in his career, Mr. Rosenthal litigated death penalty and prison reform cases at the Southern Center for Human Rights.



Current Environment

- Sequester presents a new economic reality for government contractors.
- Current environment makes it much more risky to accept out of scope work or not-to-file claims.
- Best defense against claims is solid risk management.
 - Contract formation
 - Contract administration
 - Contract closeout



Managing Risk During Contract Formation

- Identifying and managing risk at the contract's outset is a contractor's best opportunity to ensure successful performance of its contract.
- Contractors must understand the scope of the contract.
- Contractors must understand the risk associated with performance and factor this into their performance plan.



Understanding the Scope of Work

- Key Questions:
 - What does the contract require us to do?
 - Who will judge whether the contractor successfully meets the terms of the contract?
 - Does the individual that will evaluate performance of the contract have a stake in the outcome?
 - What criteria will the government use to determine if we successfully performed the contract?



Understanding the Scope of Work (cont'd.)

- Key Questions:
 - What are the terms of the contract?
 - Have any contract terms been incorporated by reference?
 - What law will apply to the resolution of a dispute and what forum will handle the resolution of the dispute?
 - What notice must the company give the other party if a dispute arises under a contract?



Understanding the Scope of Work (cont'd.)

- Key Questions:
 - Does the contract obligate the contractor to indemnify the government or a prime contractor for the violation of a patent?
 - What type of warranty will the contractor receive or be required to provide under the contract?
 - Are there clauses that must be flowed down?
 - Are there contract terms that may apply by “operation of law,” even if the government failed to include them in the written contract?



Understanding the Scope of Work (cont'd.)

- Seek clarification on any contract terms that you consider to be ambiguous.
- Identify the standards and regulations that are incorporated into the contract by reference.



Key Areas of Concern

- Schedule
 - Ensure that your company has adequate resources to maintain the schedule.
 - Critical path.



Key Areas of Concern

- Cost
 - Are your subcontractor/vendor costs confirmed?
 - How long are they binding on the subcontractor/vendor?
 - Under what circumstances can the prices be increased?
 - How will multi-year pricing be addressed?
 - Beware of the management challenge.



Key Areas of Concern

- Performance Risk
 - Which party bears the risk of non-performance?
 - Design v. performance specifications
 - Hybrid specifications



Contract Administration

- Contractors must continually monitor the performance, as well as changes to assumptions regarding risks, throughout contract performance.
- Contractors should implement tools that track cost and schedule.



Contract Administration

- Keys to success
 - Know the contract.
 - Know the authority of the parties involved.
 - Manage contract changes.



Contract Administration

- Actual Authority
 - “Where a party contracts with the government, apparent authority of the government’s agent to modify the contract is not sufficient; an agent must have actual (express or implied) authority to bind the government.”
 - Likely culprits: program managers; SCORs; COTRs; inspectors.



Contract Administration (cont'd.)

- Actual Authority
 - Verify that the individual issuing the order has the authority.



Contract Administration (cont'd.)

- Managing contract changes
 - Ensure that personnel have good working understanding of the contract so that they can identify changes.
 - Give prompt notice of any identified changes.
 - Capture the costs associated with the changed work.
 - Establish a separate charge number.



Contract Administration (cont'd.)

- Notice requirements
 - Date, nature, and circumstances of the conduct or government direction that the contractor regards as a change.
 - Name, position, and office of the government officials who are involved in or know about the change.
 - An identification and description of any documents and oral communications relating to the change.
 - Particularized description of the contract elements for which a contractor believes it is entitled to a change.



Discussion Topics

- The impact of the current government contract environment on claims
- Tips for successfully preparing, presenting and resolving claims
- Qualification of damages
- Internal investigations
- Where should I litigate?
- Practical tips for litigating against the government





Panel Five: Hot Topics

4:30 p.m. – 5:30 p.m.

Moderator:
Robert A. Burton, Venable LLP

Cybersecurity Panelists:
Benjamin A. Winter, Lockheed
Martin Corp.

Bobby N. Turnage, Jr. Venable
LLP

Business Systems Panelists:
Rod Mateer, Deloitte Financial
Advisory Services LLP
John M. Farenish, Venable LLP

VENABLE[®]_{LLP}

VENABLE[®]_{LLP}

Hot Topics: Cybersecurity Business Systems

April 17, 2013



Agenda

- *Robert A. Burton, Venable LLP – Moderator*

- Hot Topic 1: Cybersecurity
 - *Benjamin A. Winter, Lockheed Martin Corporation*
 - *Bobby N. Turnage, Jr., Venable LLP*

- Hot Topic 2: Business Systems
 - *Rod Mateer, Deloitte Financial Advisory Services LLP*
 - *John M. Farenish, Venable LLP*



Panelist Biographies

Robert A. Burton, Venable LLP - Moderator



A thirty-year veteran of procurement law and policy development, Mr. Burton served in the Executive Office of the President as Deputy Administrator of the Office of Federal Procurement Policy (OFPP), the nation's top career federal procurement official. He also served as Acting Administrator for two years during his seven-year tenure at OFPP.

As Deputy Administrator of OFPP, Mr. Burton was responsible for the government's acquisition policy and procurement guidance to all Executive Branch agencies.

His office was charged with developing policy affecting more than \$400 billion in annual federal spending – a figure that doubled during Mr. Burton's time in office as a result of the Iraq War and other major events.

At OFPP, Mr. Burton was instrumental on a number of fronts, including preparing the Administration's policy positions and testimony on proposed acquisition legislation; working with House and Senate committees on the development of acquisition reform proposals; and serving as a principal spokesperson for government-wide acquisition initiatives. He also served as the Executive Director of the Chief Acquisition Officers (CAO) Council, which comprises the Chief Acquisition Officers from each federal agency. Mr. Burton also managed the activities of the Federal Acquisition Regulatory (FAR) Council, which has statutory authority to promulgate the government's procurement regulations.

Prior to joining OFPP in 2001, Mr. Burton spent over twenty years as a senior acquisition attorney with the Department of Defense. At the Defense Contract Management Agency, he negotiated the resolution of high-profile contract disputes with major defense contractors and provided advice on cost allowability issues. He served as general counsel for DoD's Defense Energy Support Center as well as associate general counsel for the Defense Logistics Agency (DLA), the DoD component responsible for purchasing most of the general supplies and services used by the military services. At DLA, Mr. Burton served as counsel to the agency's suspension and debarment official and managed the agency's fraud remedies program, working with the Department of Justice and the criminal investigative agencies to coordinate appropriate remedies in major procurement fraud cases.

Panelist Biographies

Benjamin A. Winter, Lockheed Martin Corporation



Ben Winter is an Associate General Counsel for Lockheed Martin working out of the company's headquarters in Bethesda, MD. Ben provides legal support to two Lockheed Martin organizations: (1) Lockheed Martin's Chief Information Officer and the Enterprise Business Services ("EBS") organization; and (2) Lockheed Martin's Chief Technology Officer and the Corporate Engineering and Technology ("CE&T") organization. Ben also supports Lockheed Martin's Corporate Office of Counterintelligence Operations. Ben provides a wide range of legal services, focusing on issues driven by technology and Lockheed Martin's position as the world's leading security and aerospace company.

Ben received his JD, *magna cum laude*, from American University, Washington College of Law in 2000 and his BA from the College of William & Mary in 1997.



Panelist Biographies

Bobby N. Turnage, Jr., Venable LLP



Bobby Turnage is a partner with Venable's Corporate Practice Group. He focuses his work primarily on helping companies address the numerous legal challenges that arise from doing business on the Web. Mr. Turnage has nearly 20 years of legal experience in private practice, with the military and as in-house counsel.

Prior to joining Venable, Mr. Turnage served as Senior Vice President, General Counsel and Secretary for Network Solutions, LLC, a Northern Virginia-based Internet company providing Web-based products and services such as domain name registration, email, website design and hosting, e-commerce solutions, online security products, and search engine marketing and optimization. Having worked as both an executive and a lawyer embedded in a business, Mr. Turnage brings valuable experience that enables him to provide practical, business-focused legal advice on matters faced by businesses in their daily operations. Importantly, Mr. Turnage

is experienced in identifying legal issues across the business and, where needed, efficiently and effectively coordinating the work of multiple legal subject matter experts to achieve results consistent with the enterprise's objectives. As it relates to doing business on the Web or providing Web-related services to others, Mr. Turnage has extensive experience in helping his clients address issues related to: hosting third-party content; engaging in online advertising; protecting intellectual property; service interruptions; resolving customer or vendor disputes; contract and acceptable use policy compliance; and privacy and data security.

Mr. Turnage also is experienced in drafting and negotiating many different types of agreements, such as technology transactions, software licensing, B2B partnering, re-selling, affiliate, co-branding, and consulting agreements, as well as drafting online service agreements (or terms of use), and acceptable use policies and privacy policies for use on the Web.

Mr. Turnage's prior legal experience includes work as a litigation associate in private practice, as well as serving as Associate General Counsel for VeriSign, Inc. (a high-tech Internet services company formerly headquartered in the Silicon Valley), and serving as a defense attorney and prosecutor in the U.S. Army Reserve JAG Corps.

Panelist Biographies

Rod Mateer, Deloitte Financial Advisory Services LLP



Mr. Mateer is a Director of the Deloitte Financial Advisory Services LLP (“Deloitte FAS”) government contracting regulatory and compliance practice. With over 35 years of experience, he specializes in government contract cost accounting, audit and regulatory matters relating to the Federal Acquisition Regulation (FAR), Cost Accounting Standards (CAS), Truth-in-Negotiations Act (TINA), and OMB Circulars. Mr. Mateer represents contractors

in such areas as FAR/CAS compliance, business system compliance readiness, claim/proposal preparation, merger and acquisition due diligence, defective pricing, litigation support, and analysis/damage assessment of alleged violations of the civil False Claims Act. He lectures and authors articles on government contract cost issues, and is a member of several professional associations. Mr. Mateer is a Certified Public Accountant and a member of the Virginia State Bar.



Panelist Biographies

John M. Farenish, Venable LLP



John Farenish is a partner in Venable's Government Contracts group focusing on federal, state and local procurement law. He counsels and represents clients on the applicability and interpretation of government contract-related case law, federal procurement statutes, the Federal Acquisition Regulation (FAR), and the Cost Accounting Standards.

Mr. Farenish has more than 30 years of experience in various regulatory, compliance and prosecutorial capacities with the federal government, beginning with the Army's Judge Advocate General Corps and including seven years with the Department of the Navy. Prior to joining Venable, he spent 13 years serving with the Defense Contract Audit Agency (DCAA), starting as deputy general counsel before becoming general counsel in 2003. He also spent several years with the DoD's Inspector General's office, handling criminal matters related to federal acquisition policy.

Mr. Farenish has written and lectured extensively on aspects of government contracting work, including ethics, compliance, criminal investigations, and the conditions for contractor suspension and debarment.

A 1972 graduate of Villanova University, Mr. Farenish earned his J.D. from Delaware Law School of Widener University in 1976. He was awarded a Master's Degree in Strategic Studies from the Army War College in 2002 and completed education programs at the Combined Arms Services Staff School, Command and General Staff College, and through the Judge Advocate General Basic and Advanced Courses. Mr. Farenish also graduated from the Federal Executive Institute, a government leadership and training program.



VENABLE[®]_{LLP}

Hot Topic 1: Cybersecurity

Discussion



VENABLE[®]_{LLP}

Hot Topic 2: Business Systems



DFARS final rule: Business Systems

(Defense Federal Acquisition Supplement 252.242-7005)

- Provides for payment withholds for “significant deficiencies”
- Applies to Department of Defense Cost Accounting Standards (“CAS”)-covered contracts awarded on or after August 16, 2011
- Defined contractor business systems
 - Accounting system
 - Earned value management system
 - Estimating system
 - Material management and accounting system
 - Property management system
 - Purchasing system

DFARS final rule: Business Systems (cont'd.)

- “Significant Deficiency” is a shortcoming that materially affects the ability of Department of Defense (“DoD”) officials to rely upon information produced by the system.
- Withholding payments
 - 5% of amounts due per system with significant deficiency
 - 10% maximum (i.e., if multiple system deficiencies)
 - Interim cost vouchers
 - Incentive contracts
 - Time and material billings
 - Progress payments
 - Performance-based payments

DFARS final rule: Business Systems (cont'd.)

- *When a system is deficient*, contractor must submit an acceptable corrective action to the Administrative Contracting Officer ("ACO").
- Once the contractor is determined to be effectively implementing plan,
 - ACO will reduce the withhold to 2%.
- *When deficiencies are corrected*, contractors notify ACO in writing.
 - ACO must act in 90 days or reduce withhold by at least 50%.
- *When there is a reasonable expectation that deficiencies are cured*, ACO must eliminate the withhold.

DCAA Initiatives: Business Systems Accounting System Administration

- April 24, 2012 DCAA issues Audit Guidance 12 PAS-012 (R) on Auditing Contractor Business Systems and Contractor Compliance with DFARS 252.242-7006, Accounting System Administration.
- New Audit Programs
 - Accounting System Audit (11070)
 - Control Environment Audit (11070)
 - Billing Audit (11010)
- Accounting System Audit (11070) covers all (18) criteria in DFARS 252.242-7006.
- Control Environment Audit (11070) covers criteria at DFARS 252.242-7006 (c)(1).
- Billing Audit (11010) covers criteria at DFARS 252.242-7006 (c)(15) & (16).



DCAA Initiatives: Business Systems Accounting System Administration (cont'd.)

- DCAA's *new approach* will report on compliance with the criteria in DFARS 252.242-7006.
- DCAA has added GAGAS 5.22 material weakness in internal control to definition of *significant deficiency*.
- DCAA modified the definition of material weakness.
- DCAA Reports will now report a material weakness related to control over compliance as:
 - “A deficiency or combination of deficiencies, in internal control *over compliance* such that there is a reasonable possibility that a material *noncompliance with a compliance requirement (e.g., applicable Government contract laws and regulations)* will not be prevented, or detected and corrected on a timely basis.”



DCAA Initiatives: Business Systems

The Accounting System may include five individual subsystems (252.242-7006(a)(2)):

1. Indirect and other direct costs
2. Compensation
3. Billing
4. Labor
5. General information technology

Identification of subsystems is important, because a significant deficiency in a single subsystem (i.e., billing) can compromise the integrity of the entire business system, causing it to fail.



VENABLE[®]_{LLP}

Discussion

