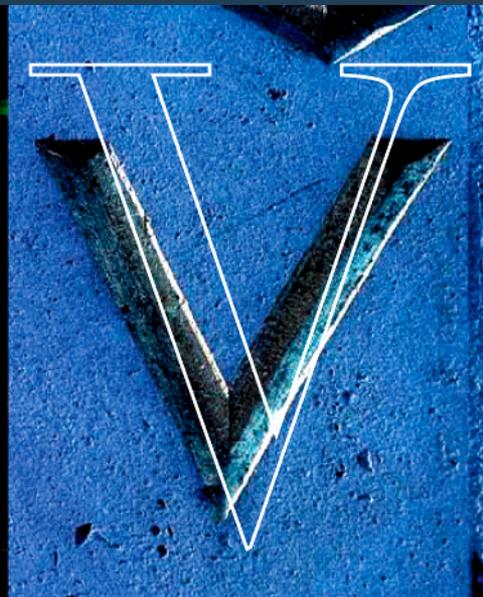


# WMACCA Government Contractors Forum

## *It's All About the Bottom Line:* Avoiding Litigation and Maximizing Claims in Today's Challenging Environment

March 11, 2014



# WMACCA Government Contractors Forum

## *It's All About the Bottom Line:* Avoiding Litigation and Maximizing Claims in Today's Challenging Environment

### **Moderator:**

Scott Hommer

Co-Chair, Government Contracts Practice Group, Venable LLP

### **Panelists:**

Jim Rittinger

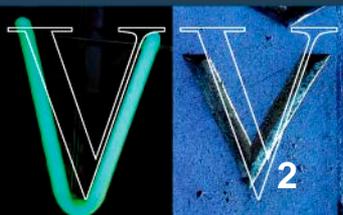
Legal Director, V.P. and Secretary, Dell Services Federal  
Government, Inc.

Paul Debolt

Co-Chair, Government Contracts Practice Group, Venable LLP

Michael Robinson

Litigation Practice Group, Venable LLP



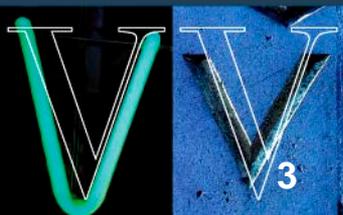
# Biographies

## 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

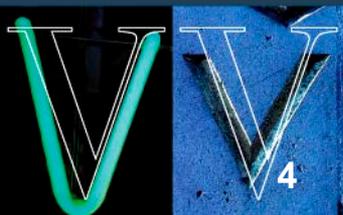
## Jim Rittinger

Legal Director, V.P. & Secretary, Dell Services Federal Government, Inc.

Jim Rittinger is the Legal Director, V.P. and Secretary for Dell Services Federal Government, Inc., the federal contracting subsidiary for Dell, Inc. He previously served as the Associate General Counsel and Secretary for Perot Systems Government Services prior to Perot Systems' acquisition by Dell.

Before joining Perot Systems, Mr. Rittinger practiced law in New York and Washington, DC, most notably with the New York office of Quinn Emanuel Urquhart & Sullivan, where his practice focused on trade secret, securities, white collar and government contract and procurement law. Mr. Rittinger has tried over twenty cases to juries and made numerous oral arguments to a wide variety of state and federal courts. Mr. Rittinger has also served as a law clerk to the late Honorable Charles L. Brieant, then Chief Judge of the United States District Court for the Southern District of New York and to the Honorable Mary Ellen Coster Williams, a judge sitting on the United States Court of Federal Claims.

Mr. Rittinger received a J.D. from the Fordham University School of Law and a B.A. in history, Magna Cum Laude, from Boston College. He is a member of the bars of the State of New York, District of Columbia and the Commonwealth of Virginia and is admitted to practice before numerous federal district and appellate courts across the United States.



# Panelist Biographies

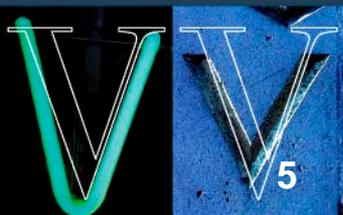
## Paul A. Debolt, Venable LLP



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.



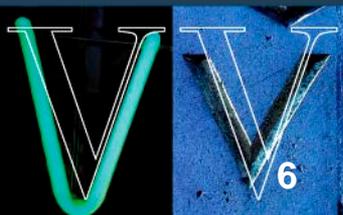
# Panelist Biographies

## Michael W. Robinson, Venable LLP



Michael Robinson is an AV<sup>®</sup> Preeminent<sup>™</sup> Ranked attorney who brings 20 years of broad litigation experience to resolving business disputes. His practice focuses on commercial disputes, business torts, and the protection of intellectual property rights. His practice emphasizes litigation in the United States District Court for the Eastern District of Virginia and the local state courts in Northern Virginia.

Mr. Robinson's career includes substantive experience in areas as wide ranging as antitrust litigation, trademark litigation, patent infringement litigation involving computer software and other products, business dissolution litigation, and substantial litigation experience involving employee covenants not to compete, fiduciary duty claims, and the protection of trade secrets and other commercial proprietary information.



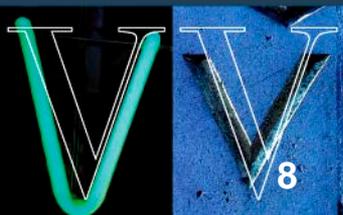
# Agenda

- Current Contracting Environment
- In-House Counsel Perspective
  - Avoiding Litigation
  - When Litigation is Unavoidable
- Outside Counsel Perspective
  - Mitigating Risk and Avoiding Litigation
  - Maximizing Claims and REAs
  - Recent Case Law and Practical Tips



# Current Environment

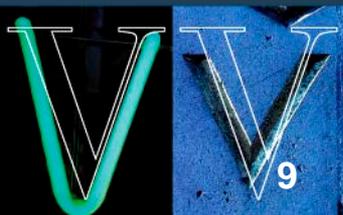
- Sequestration – Continued Expectation that Contractors Should “Do More With Less”
  - Decrease in the number of contract awards and \$ value of those awards
  - Increased terminations for convenience
  - Government restructuring scope of existing contracts
- Post-Government Shutdown
- Increasingly Litigious Contract Parties & Surplus of Lawyers



# Current Environment

## Impact on Government Contractors

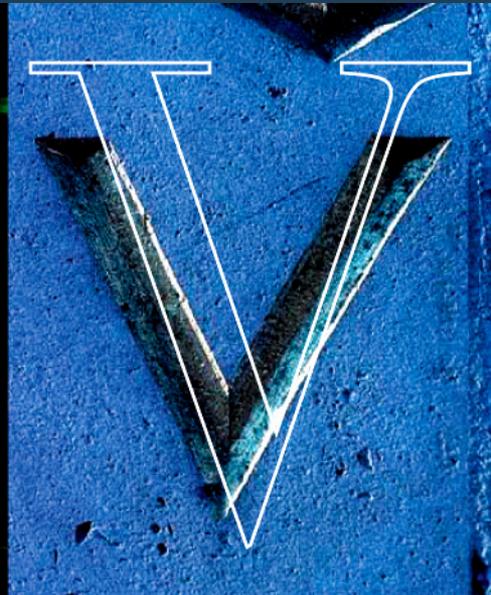
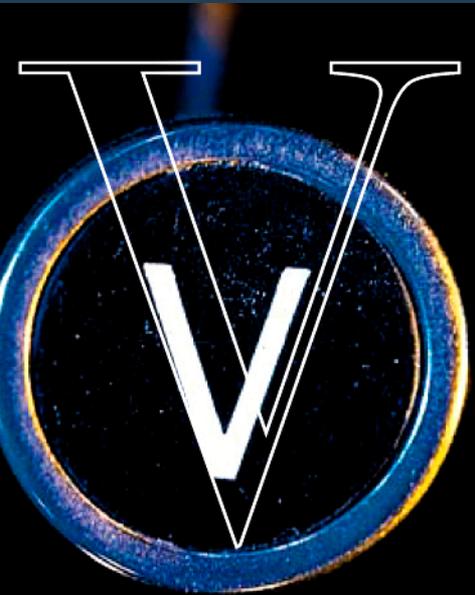
- Increased tension / disputes between primes and their subcontractors
- Increased tension / disputes between contractors and DCMA/DCAA as the Government questions more costs
- Increases in both contractor and Government claims (stop-work orders, deductive change orders, constructive changes, cost allowability, quantum for valid claims)
- DOJ continuing to treat claims which were previously treated as contract administration issues as potential fraud claims
- Increase in bid protest litigation



# In-House Counsel Perspective: Lessons Learned & Best Practices

**Jim Rittinger**

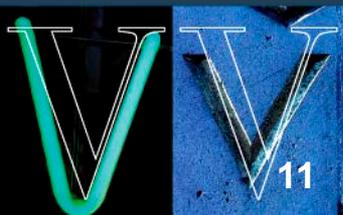
Legal Director, V.P. & Secretary, Dell Services Federal Government, Inc.



# Avoiding Litigation

## Three Keys:

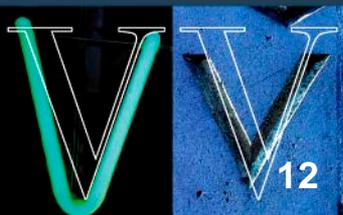
1. Communication
2. Education
3. Evaluation



# Communication

## With Contracts Department

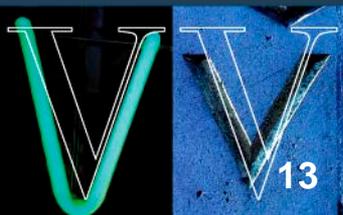
- Hold formal weekly meetings with your Contracts Department to discuss any emerging issues with customers or subcontractors.
- Implement several informal check-ins per week with your Director of Contracts and Subcontracts Administrator.
- Dedicate a legal team member to Subcontracts because this is an area where potential disputes often arise at an elevated level.



# Communication

## With Business Leaders

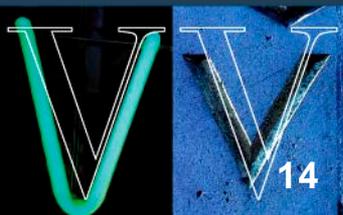
- Hold formal weekly meetings with your client executives to report on any customer issues or issues with subcontractors.
- Attend Business Review meetings wherever practicable to allow for visibility into programs and to facilitate informal, open channels of communication.
- Participate in Deal Governance Review Committee to fully understand pursued opportunities, and anticipate what sort of legal issues may arise once the contract has been awarded and performance has begun.



# Communication

## With Subcontractors

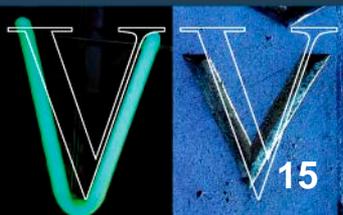
- Communication will be dictated by your internal assessment of the relative merits of the dispute:
  - Where your position is strong, you are the enforcer who is there to intimidate and explain the considerable costs that will be incurred by the subcontractor if this goes down the litigation path.
  - Where your position is weaker, you are there to gently point out whatever weaknesses that exist within the subcontractor's position and cut the best deal possible for the business.



# Communication

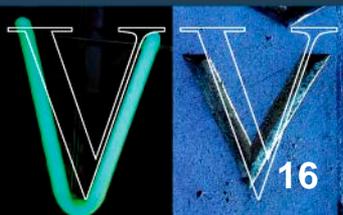
## With Customers

- Must be circumspect in communicating with customers:
  - Customers are often extremely uneasy when lawyers are brought into a potential dispute.
  - Try to diffuse that tension by making sure the customer knows an attorney is coming and giving them an opportunity to have a lawyer present.
  - Think like a business leader instead of a legal strategist there to win a fight. Stress the mutual benefits of reaching an accommodation. Make sure you are completely aware of the potential holistic damage that can be done to the business when evaluating your position-- more strategic and less tactical.
  - Be willing to take less than what you can get in exchange for future opportunities.



# Education

- Educate Yourself
  - In addition to CLE requirements, require personnel to take additional hours of CLE on government contracting-related issues.
- Educate Contracts Department
  - Provide a mandatory education program for Contracts professionals.
- In addition to mandatory education programs, implement mandatory quarterly training for customer facing employees and yearly interactive tests that employees must take to be eligible to receive a bonus on government contracting centric issues like Security, DCAA, Qui Tam, etc.



# Evaluation

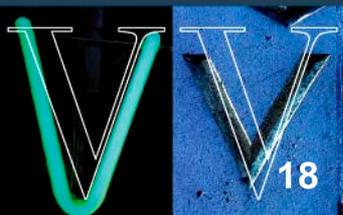
- Legal Team should conduct a quarterly review/examination/autopsy of disputes and identify what happened and what might have been done differently, and make changes to litigation risk mitigation program accordingly.
- First-Hand Examples:
  - Dedicated a member of legal team to Subcontracts because it was identified as an area with an elevated risk of disputes.
  - Identified certain contracts where there were more issues and assigned legal team members to those contracts departing from the standard model of leveraging legal coverage from across the entire team.
  - Identified certain subcontractors with whom issues arose with greater frequency than the norm. Have taken steps to limit their participation in future pursuits where practicable.



# When Litigation is Unavoidable

## Bring in Help Quickly

- Reluctance to spend money for outside counsel is penny wise and pound foolish.
- In an environment where Legal Departments are being asked to do more with less you do not want to be caught in the position of playing too many positions in the field when litigation is imminent.



# When Litigation is Unavoidable

## Bring in Help Quickly

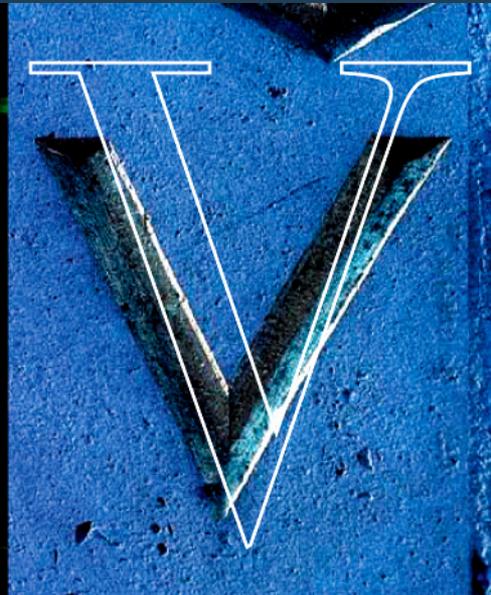
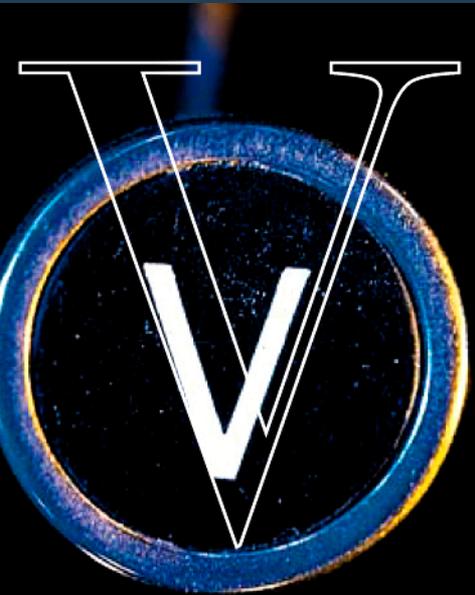
- A pair (or a couple of pairs) of outside eyes are invaluable in testing your assumptions and making sure you are doing what is best for your business.
- "Lawyering Up" quickly with the right outside counsel also sends a message to your potential adversary-- be it a customer or a prime/subcontractor that you are prepared to go to the mat to prevail on your claim. Taking such strong action can be very helpful in rekindling settlement discussions and short circuiting the litigation process before the bill gets too high.



**VENABLE<sup>®</sup><sub>LLP</sub>**

# Outside Counsel Perspective: Key Considerations in Avoiding Litigation and Maximizing Claims

Michael Robinson  
Paul Debolt



# Managing Risk & Avoiding Litigation

## Choosing the “Law of the Case”

- Parties will be given great latitude to create “the law of the case.”
  - “[A] term of the parties’ contract becomes the law of the case unless such term is repugnant to public policy or to some rule of law.”

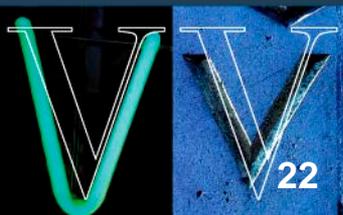
*Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*,  
257 Va. 344 (Va. 1999)



# Managing Risk & Avoiding Litigation

## Choosing the “Law of the Case”

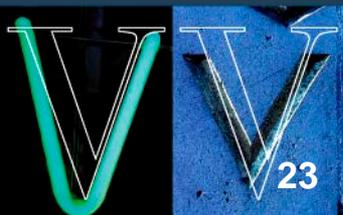
- **Use Contract as Risk Management Tool.**
- **Address:**
  - Pre-requisites to litigation
    - Including informal or formal mediation
  - Where any litigation will take place
  - The manner of dispute resolution
  - Scope of dispute
  - The location/forum
  - Available relief



# Managing Risk & Avoiding Litigation

## Pre-Litigation Requirements

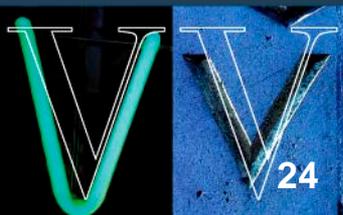
- **Consider incorporating the following as pre-requisites to filing suit:**
  - Notice of Claim provisions
    - Tie notice and waiver together
  - Statute of Limitations
  - Informal resolution efforts, such as management-level negotiation
  - Formal resolution efforts, such as mediation



# Managing Risk & Avoiding Litigation

## Selecting the Battlefield

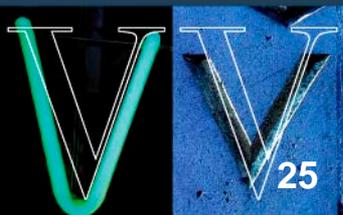
- Forum/Requirements for claims involving the Government versus Sub-Prime disputes
- Arbitration
- Litigation



# Managing Risk & Avoiding Litigation

## Selecting the Battlefield

- **Arbitration versus Bench Trial**
  - Need for expertise
  - Predictability
- **Standard of Review for Arbitration Awards: High degree of deference to arbitrators!**
- ***Lackman v. Long*, 266 Va. 20 (Va. 2003)** – “[W]hether an arbitration panel applies the contract between the parties in a manner consistent with its terms *is not a matter for consideration by the trial court or this Court when reviewing an arbitration award.*”

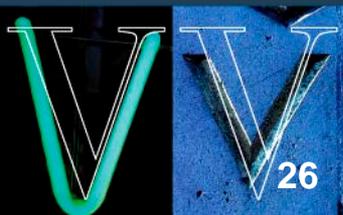


# Managing Risk & Avoiding Litigation

## Selecting the Battlefield

### Standard of Review for Arbitration Awards (cont'd)

- ***Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38 (Va. 2003)** – The VA Supreme Court refused to set aside an arbitration award, despite evidence that the arbitrators did not apply the correct legal standards or follow the terms of the subcontract in question.
  - “Even though courts in other jurisdictions have vacated arbitration awards when there has been a ‘manifest disregard of the law,’ we [Virginia] refuse to adopt that standard....”

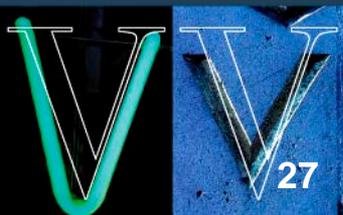


# Managing Risk & Avoiding Litigation

## Selecting the Battlefield

### ■ Forum Selection Clauses

- U.S. Supreme Court recently held that forum selection clauses are *almost always enforceable*. *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. Of Tex.*, 134 S. Ct. 568 (2013)
  - “[A] valid forum selection clause should be given controlling weight in all but the most exceptional cases.”
  - “When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient for themselves or their witnesses.”
- International Implications?



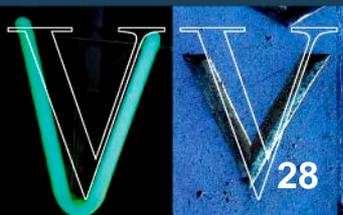
# Managing Risk & Avoiding Litigation

## Selecting the Battlefield

### Forum Selection Clauses (cont'd)

- Careful drafting is critical
  - Decide on a forum and make it exclusive
- “Courts of Virginia” versus “Courts in Virginia”
  - The 4th Circuit follows the “widely-accepted rule that forum selection clauses that use the term ‘in [a state]’ express the parties’ intent as a matter of geography, permitting jurisdiction in both the state and federal courts of the named state, whereas forum selection clauses that use the term ‘of [a state]’ connote sovereignty, limiting jurisdiction over the parties’ dispute to the state courts of the named state.”

*FindWhere Holdings, Inc. v. Sys. Env’t Optimization, LLC*,  
626 F.3d 752 (4th Cir. 2010)

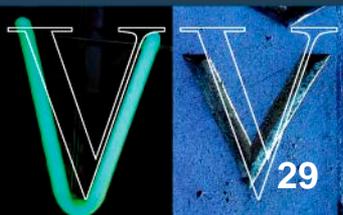


# Managing Risk & Avoiding Litigation

## Limitation on Liability

### Use the Contract to Address Remedies

- Can be Done by Negative/Limiting Remedies
- Affirmatively as Addressing Available Remedies
- Lost Profits
- Attorney Fees
- Interest



# Managing Risk & Avoiding Litigation

## Waiver of Rights

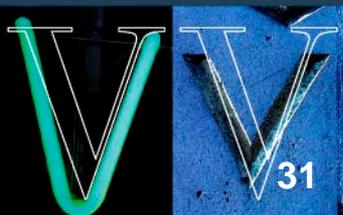
- ***Gordonsville Energy, L.P. v. Va. Elec. & Power Co., 257 Va. 344 (Va. 1999)***
  - Contract provision provided for \$600,000 per day in liquidated damages - void as a penalty?
  - Contract included a waiver: “[Gordonsville] hereby waives any defense as to the validity of any liquidated damages stated in this Agreement as they may appear on the grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages.”



# Managing Risk & Avoiding Litigation

## Waiver of Rights

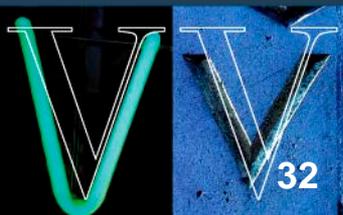
- In *Gordonsville Energy*, the VA Supreme Court upheld the waiver of liquidated damages:  
“Generally, a party may waive by contract *any right conferred by law or contract.*”
- “If the party being charged with relinquishment of a right had knowledge of the right and intended to waive it, the waiver will be enforced.”
  - Did the waiver result from “extended, arms-length negotiations between two sophisticated corporate entities, represented by counsel”?
  - If so, a waiver will likely be enforceable.



# Managing Risk & Avoiding Litigation

## Intellectual Property

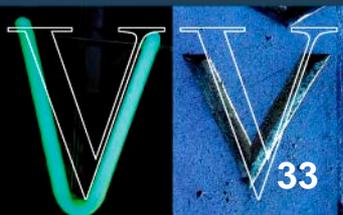
- Applicability of Government License Rights to Contracting Parties
  - Government-Prime/Subcontractor Relationship v. Prime-Subcontractor Relationship
- In conveying a Prime Contractor's rights to Subcontractor intellectual property, careful, measured drafting is critical.
  - Require confirmation from the Subcontractor that there is no valuable IP at issue; and if there is, specifically identify as such in a schedule.



# Managing Risk & Avoiding Litigation

## Intellectual Property

- Trade Secrets v. Confidential Information
  - If you are the owner of the Trade Secrets at issue, you will want to protect the information in a contractual form.
  - On the other hand, the opposite party will want to protect itself from accusations of misappropriation.



# Managing Risk & Avoiding Litigation

## Teaming Agreements

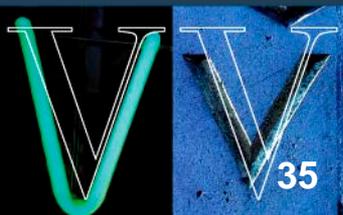
- “One size fits all” does not apply with teaming agreements. TAs must be drafted carefully in order to avoid finding an unenforceable “agreement to agree.”
- *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013)
  - Prime IE and subcontractor Cyberlock entered into a TA to submit a bid to the Office of Personnel Management.
  - The TA stated that each party would “exert reasonable efforts” to negotiate a subcontract if awarded the contract.
  - When negotiations fell through, the Eastern District held that this was an unenforceable “agreement to agree.”
  - “[A]n agreement to negotiate open issues in good faith to reach a contractual objective within an agreed framework *will be construed as an agreement to agree* rather than a valid contract.”
  - 4th Circuit affirmed in January of 2014.



# Managing Risk & Avoiding Litigation

## Tips for Creating Enforceable TAs

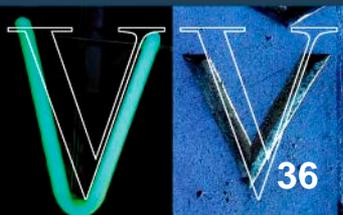
1. **Choose your words wisely**: “[C]alling an agreement something other than a contract or subcontract, such as a teaming agreement or letter of intent, implies that the parties intended it to be [] nonbinding.”
2. **Be wary of explicitly contemplating a later, formal contract**: “[T]he circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement which is binding.”
3. **Avoid tentative language**: The *Cyberlock* Court found persuasive that the contract referred to “work *anticipated to be performed*,” and Cyberlock’s “role in the Program, as *presently understood*.”



# Managing Risk & Avoiding Litigation

## Tips for Creating Enforceable TAs (cont'd)

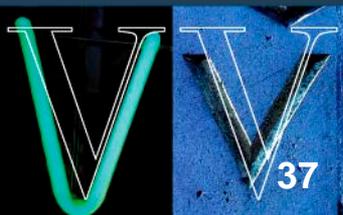
4. **Provide as much detail as possible**, such as a statement of work, the subcontract to be executed upon award, etc.
5. **Limit approval and termination clauses**: The *Cyberlock* TA provided that it was subject to approval of the government customer and would terminate in the event of the “failure of the parties to reach agreement on a subcontract” after good faith negotiation.
6. **Put everything in writing**: Courts may refuse to look at extrinsic evidence, such as oral agreements or prior negotiations, to support finding an enforceable TA.



# Managing Risk & Avoiding Litigation

## Teaming Agreements

- Exclusivity provisions may be enforceable and can lead to damages – proceed with caution!
- *X Techs., Inc. v. Marvin Test Systems*, 719 F.3d 406 (5th Cir. 2013)
  - Prime contractor and subcontractor entered into an exclusive TA under a USAF solicitation.
  - “This is an exclusive agreement between X-Tech and Geotest.... Geotest will not team up with any other company for [this] solicitation....”
  - Subcontractor Geotest nonetheless submitted a separate bid in its own name, which was selected by USAF.
  - Prime X-Tech sued under a breach of contract claim, and won a jury verdict at the district court.
  - 5th Circuit affirmed the jury verdict and found the exclusive TA to be enforceable.



# Maximizing Claims & REAs

## Preparatory Steps

- Identifying and managing risk at the contract's outset is not only a contractor's best opportunity to ensure successful performance of its contract, but also allows the contractor to implement necessary preparatory steps to maximize recovery in the event of litigation.
  - Ensure that specifications clearly define contract work.
  - Ensure personnel understand the scope of the contract and periodically review for potential exposure or changes.
  - Implement internal procedures to identify and manage contract changes and maintain complete records of the issue.
  - Verify that the individual issuing any change order has actual authority to do so.
  - Give prompt notice of any identified changes.
  - Implement tools to accurately segregate cost and schedule changes associated with changed work.



# Maximizing Claims & REAs

## Recent Case Law

### *Bell/Heery v. United States*, No. 2013-5002 (Fed. Cir. Jan. 7, 2014)

- An unexpected permit denial by the New Hampshire Department of Environmental Sciences (NHDES) imposed additional requirements and costs on the contractor.
- Contractor consistently notified its Government customer of these additional costs and delays.
- Contractor submitted an REA for \$7,724,885, which the agency denied.
- Contractor's complaint at the CoFC was dismissed for failure to state a claim. The Federal Circuit upheld the CoFC's dismissal.



# Maximizing Claims & REAs

## Recent Case Law

### Takeaways from *Bell/Heery*:

1. **Establish the parameters of each party's liability:** Price in risk by clarifying from the beginning which party will bear certain contingencies.
2. **Make your intentions clear:** The contractor did not “refuse to proceed with the construction under the restrictions imposed by the NHDES, nor did [it] press the Government to directly intervene with the NHDES on [its] behalf.”
3. **Get everything in writing:** The agency's verbal assurances that the contractor would be “treated fairly” with regard to delays and increased costs did not entitle the contractor to relief under the Changes Clause. Push the CO for an explicit written order.
4. **Be wary of relying on breach of good faith:** “An implied covenant ... cannot create duties inconsistent with the contract's provisions.”



# Maximizing Claims & REAs

## Litigation Risk

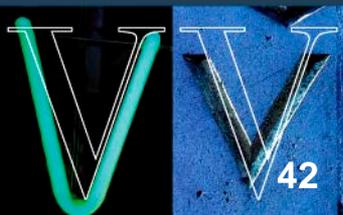
- Expect the unexpected – Develop policies that protect your company in the unlikely event that you become involved in litigation.
  
- Email policies:
  - Ensure that work emails are used for **WORK**.
  - Stress importance of email etiquette.
  - Keep email limited to just the facts.
  
- Follow established document retention procedures. (Exception – Do not destroy documents if litigation is imminent).
  - How long will the documents be retained?
  - Can the documents be taken from the premises by an employee?
  - How will files/documents be processed when an employee leaves the company?
  - Sensitize employees to protecting the attorney-client privilege.



# Maximizing Claims & REAs

## Documentation is the Key to Recovery

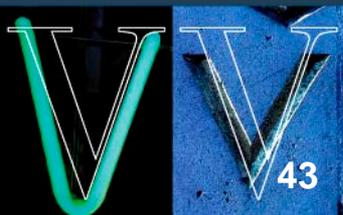
- Courts will give greater weight to contemporaneous written documentation than they will to live testimony and expert analysis that is presented years after the fact.
- Incumbent upon management to:
  - Consider written guidance on appropriate use of email and instant messaging.
  - Instruct employees on how to take notes.
  - Instruct employees on the importance of taking a professional tone in every piece of correspondence – anything they say or write is fair game during future litigation.



# Maximizing Claims & REAs

## Role of Lawyers in Disputes

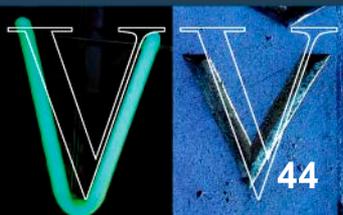
- Why should you get a lawyer involved in a potential dispute?
  - Early identification of risks and potential early problem resolution
  - Preserve claims of privilege
    - Attorney-Client privilege
    - Work product privilege
  - More efficient use of resources
    - It is very expensive to learn and reconstruct events that occurred years ago.
    - Rule of thumb: 2 or 3 times as long to reconstruct events as it is to learn as you go.



# Maximizing Claims & REAs

## Role of Lawyers in Disputes

- How do I effectively use and manage my legal team?
  - Do not “hide the ball” from counsel concerning your business goals.
  - Obtain regular, objective case assessments.
  - For major cases, request a budget linked to phases of the litigation (and update regularly!).
    - Is “mix” of personnel appropriate?
    - Does counsel provide notice when actual expenses are likely to exceed budget?



# Maximizing Claims & REAs

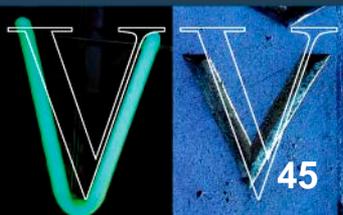
## Theories of Damages

- Breach of Contract
- Breach of Good Faith and Fair Dealing
- Change
- Delay
- Commercial Impracticability
- Defective Specification
- Negligent Estimates

## Types of Damages

- Lost Profits
- Overhead / G&A
- Labor Costs
- Materials Costs

It is important to note that the theories and types of damages available in a prime-sub dispute do not mirror those available to a contractor in a dispute with the Government.



# Maximizing Claims & REAs

## Recent Case Law

### *Nycal Offshore Development Corp.*, No. 2013-5001 (Fed. Cir. Feb. 20, 2014)

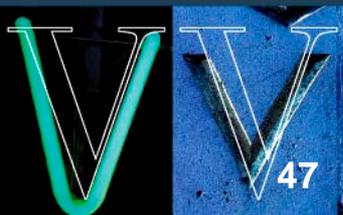
- CoFC held that the Government breached a contract for offshore oil and gas leases, awarded restitution damages.
- Nycal rejected its right to restitution and instead brought a claim for lost profit damages.
- CoFC held, and Federal Circuit affirmed, that Nycal had not proved its case for lost profits, because environmental permitting requirements would have prevented it from further exploration of the oil leases.
- **Takeaway**: The law on lost profit damages is “uniform and clear”: The burden of proof for lost profits rests squarely on the plaintiff. Consider alternate theories of recovery when possible.



# Maximizing Claims & REAs

## Critical Factors Affecting Recovery

- What are some of the key factors that affect the outcome of a case?
  - Organization and planning
  - Establishing an effective case management plan
  - Identifying lines of authority for case strategy
  - Identification and development of process for collecting and organizing documents
  - Identification of key witnesses
  - Early retention of expert witnesses
  - Frequent, objective assessments of the case

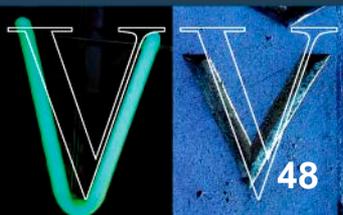


# Maximizing Claims & REAs

## Be on the Lookout for Indicators of Fraud

### ■ By Government Employees:

- Excess purchases
- SOWs written for a specific vendor
- Improper sole-source justifications
- Revealing information to specific contractors
- Improper evaluation of offer/bids
- Seemingly unnecessary contracts
- Material changes in contract just after award
- Backdating documents

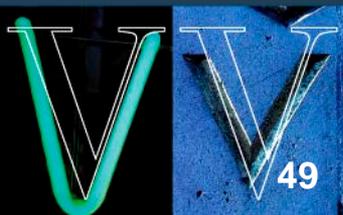


# Maximizing Claims & REAs

## Indicators of Fraud (cont'd)

### ■ By Employees:

- Improper communications (e.g., trade shows, professional meetings)
- Improper social contact
- Discussing possible employment after government service
- Collusive bidding/price fixing
- Cost mischarging, such as:
  - Unallowable costs (political contributions, certain entertainment costs, advertising)
  - Labor mischarging (transfer of labor costs, timesheet fraud, ceiling limitations)
  - Commercial v. Government Contracts
  - Material mischarging and product substitution



# Maximizing Claims & REAs

## Indicators of Fraud (cont'd)

### ■ Other Red Flags of Fraud:

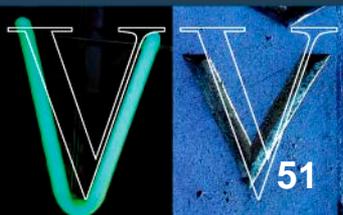
- Lapses in the enforcement of the Code of Conduct
- Transferring charges from one delivery order to another
- Unexpected resignation or replacement of key management personnel
- Managers retroactively assigning charge numbers
- Weakening in the company's financial condition
- Actual results not meeting forecasts
- Unexpected year-end transactions that result in significant revenues
- Unusual accounting practices for revenue recognition and cost deferral
- Changes in accounting methods that are designed to enhance profit numbers
- Changes in independent accounts that resulted from disagreements



# Maximizing Claims & REAs

## Claims versus REAs

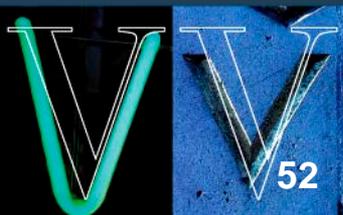
- Decision of whether to bring a dispute as a claim or an REA may affect both the level of recovery and reimbursement of costs of the claim/REA.
  - Consider filing an REA *first*, since related costs are allowable under the FAR.
  - Once it turns into a claim, related costs are unallowable.
- Show Contracting Officer a “draft” of the claim to spur quick payment.



# Maximizing Claims & REAs

## Key Takeaways from Today

- Ensure that specifications clearly define contract work.
- If you believe a problem is going to arise, get your counsel involved early.
- Sensitize your employees to the fact that just about anything they say or write is fair game during future litigation.
- Do not lose sight of your goals (although you may have to revise them as the case develops).



# Questions and Comments

**Scott Hommer**

Venable LLP

shommer@venable.com

t 703.760.1658

f 703.821.8949

**Paul Debolt**

Venable LLP

padebolt@venable.com

t 202.344.8384

f 202.344.8300

**Michael Robinson**

Venable LLP

mwrobinson@venable.com

t 703.760.1988

f 703.821.8949

[www.Venable.com](http://www.Venable.com)



# Government Contracts Symposium

**Date:** April 10, 2014, 8:00 AM – 4:00 PM

**Location:** Venable LLP, 575 7<sup>th</sup> Street NW, Washington, DC

**Topics:**

- Changes to the Small Business Rules
- Protecting Against the Government's Administrative Remedies
- Strategies for Managing & Mitigating Risk in Government Contracts
- Ethics & Compliance in a Heightened Enforcement Environment
- Cyber Pros & Cons for Government Contractors
- Hot Topics in Government Contracts

**For more information:** <http://www.venable.com/government-contracts-symposium-04-10-2014/>

