



# GOVERNMENT CONTRACTS

---

*update*

## **Nuances of Contracting Relationships**

Linda Shapiro  
May 14, 2013

# The Government – Prime Relationship

- Government's authority and contract terms arise out of Federal statutes and regulations.
  - Interpreted through decisions of:
    - Federal Circuit
    - Court of Federal Claims
    - Boards of Contract Appeals

# The Prime – Subcontractor and Teaming Relationships

- Arises out of agreement between the parties
  - Governed and Interpreted under State law.
  - Disputes addressed in State or U.S. District Courts.
  - Government has no “privity of contract” (contractual relationship) with the subcontractor.
  - Government has no stake in a teaming agreement.

# The Prime – Subcontractor and Teaming Relationships

- Set out Key Terms
  - Rule of thumb: The greater the risk, the greater the detail.
- “Agreements to Agree” are unenforceable.
- Comes up mostly at the “Teaming” stage.

# A Common Story . . .

- *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 2013 WL 1395742, April 3, 2013 (E.D. Va).
  - First Teaming Agreement
    - Subcontract and SOW attached.
  - Second Teaming Agreement
    - Upon award, prime to perform 51 percent of the work; subcontractor to perform 49 percent.
    - Parties to “exert reasonable effort” to obtain prime contract and negotiate a subcontract.
    - Teaming agreement to terminate in certain events, including where there is a “failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations.”

# A Common Story . . .

- *Cyberlock Consulting, Inc. (cont.)*
  - After contract award:
    - Parties exchanged draft subcontracts; disagreed on terms.
    - Prime concluded negotiations after one month.
  - Subcontractor sought relief in U.S. District Court.
  - Court: *“The post-award obligations in the Second Teaming Agreement unambiguously set out an agreement to negotiate in good faith to enter into a future subcontract – precisely the type of agreement to agree . . . that [is] unenforceable.”*

# Lessons Learned

- Memorialize your entire agreement(s).
  - Attach detailed subcontract agreement to teaming agreement.
- Beware of using forms.
- Beware of vague terms: “reasonable efforts,” “good faith,” “reasonable period.”
- Include key terms, including:
  - Obligations of each party - Be specific!
  - SOW – Be specific!
  - Payment terms
  - Delivery schedule
  - Changes
  - Exclusivity
  - Subcontractor claims to the Government
  - Termination/Default/Disputes
- Address ambiguities

# Thank You

Linda Shapiro  
Thompson Coburn LLP  
One U.S. Bank Plaza  
St. Louis, MO 63101  
314.552.6107  
lshapiro@thompsoncoburn.com  
www.thompsoncoburn.com