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# CHECKLIST FOR GOVERNMENT CONTRACTORS MERGING WITH OR ACQUIRING OTHER CONTRACTORS

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### **I. Federal Novation Regulations**

Federal law prohibits the transfer of government contracts to a third party.<sup>1</sup> Nevertheless, under certain circumstances, the government may consent to such a transfer if specific steps are taken.

- ✓ Is a novation agreement necessary? The answer is “yes” in the following types of transactions<sup>2</sup>:
  - 1) The sale of all a contractor’s assets or the entire portion of the assets involved in performing a contract with a provision for assuming liabilities;
  - 2) The transfer of assets incident to a merger or corporate consolidation; and
  - 3) The incorporation of a proprietorship or partnership or formation of a partnership.
  
- ✓ What should be included in a novation agreement package? If a novation agreement is necessary, the parties will need to submit a “novation package” to the contracting officer for review. The materials to be included in this package are:
  - Three signed copies of the proposed novation agreement;
  - Document describing the proposed transaction (e.g., purchase/sale agreement, memorandum of understanding, etc.);
  - List of all affected contracts, including: (a) contract number and type; (b) name and address of contracting office; (c) total dollar value, as amended; and (d) approximate remaining unpaid balance;
  - Evidence of transferee’s capability to perform;
  - Authenticated copy of instrument effecting the transfer (e.g., bill of sale, certificate of merger, contract, deed, agreement, court decree, etc.);
  - Appropriate corporate approval: (a) certified copies of board of directors’ resolution authorizing the transfer; and/or (b) certified copies of stockholder minutes approving the transfer;
  - Authenticated copy of transferee’s certificate and articles of incorporation (if formed for the purpose of receiving the assets involved in performing the government contracts);
  - Opinion of Legal Counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of the transfer;
  - Balance sheets of transferor and transferee on the dates immediately before and immediately after the transfer, as audited by independent accountants;
  - Evidence that any security clearance requirements have been met; and
  - Consent of any sureties or a statement from transferor that none are required.

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<sup>1</sup> See Anti-Assignment Act, 41 U.S.C. § 15.

<sup>2</sup> Federal regulation provides that a novation is not required when a stock purchase is contemplated and when “there is no legal change in the contracting party, and when the contracting party remains in control of the assets and is the party performing the contract.” See FAR 42.1204(b).



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- ✓ Is the novation agreement package submitted appropriately? Federal regulation determines the appropriate contracting officer for processing and executing novation agreements.
  - Have any of the affected contracts held by the transferor been assigned to an administrative contracting officer (ACO)? If so, this ACO is the appropriate official.
  - If not, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts shall be the responsible contracting officer.
  - But if several transferors are involved, the responsible contracting officer shall be:
    - The ACO administering the largest unsettled dollar balance; or
    - The contracting officer (or ACO) designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

## **II. Legal Compliance**

- ✓ Does the target entity maintain a compliance program to effectively detect and prevent internal misconduct? Among others, does it detect violations of:
  - FAR mandates?
  - The Gratuities Clause?
  - Antitrust laws?
  - The Covenant Against Contingent Fees?
  - The prohibition against “buying-in”?
  - The prohibition against subcontractor kickbacks?
  - The prohibition against using federal funds to influence federal transactions?
  - Whistleblower protections?
  - Organizational conflicts of interest?
  - The False Claims Act?
- ✓ Does the target entity hold security clearances necessary for performance of its contracts?
  - If so, advance notice must be given to the appropriate agency’s security office.
  - The acquiring entity will need to apply for, and receive, its own clearances prior to completion of the transaction.
  - Failure to properly do so could result in losing the underlying contract.
- ✓ Has the acquiring entity reviewed the past performance evaluations of the target entity?
- ✓ Has the target or any of its affiliates been listed in the Excluded Parties List (EPL) system?
  - If so, do those exclusions relate to principals of the company? Will those personnel be staying on as employees of the entity?
- ✓ Has the target or any of its affiliates been the subject of a debarment, suspension or exclusion from participation in programs funded by any governmental authority?



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- What is the extent of the suspension or debarment?
  - e.g., company-wide, an individual corporate division or a subsidiary?
  - What is the length of time of the suspension or debarment?
- ✓ Does the acquiring or target entity have or maintain foreign operations?
  - If so, the due diligence review must assess the target entity's compliance programs regarding import-export controls, sanctions and customs to ensure compliance with the Foreign Corrupt Practices Act (FCPA) as well as import/export regulations administered by the federal government.
- ✓ Is the acquiring or target entity operating under foreign ownership, control or influence (FOCI)?
  - If so, the remaining entity may be prohibited or limited in the contracts it can obtain from the federal government. The entity will need to take affirmative steps to mitigate the concerns presented by its FOCI.

### **III. Subcontracts of Target Entity**

- ✓ Has the acquiring entity reviewed all subcontracts held by the target entity to ensure they will not be affected by the transaction (*i.e.*, are there subcontract provisions prohibiting assignment)?
- ✓ Have all subcontracts been reviewed to ensure they include appropriate "flow-down" clauses as required by the FAR?
- ✓ Are there any existing or potential claims between the target entity and its subcontractors?

### **IV. Size Determination**

A contractor can be exposed to civil and criminal liability when it falsely claims to be eligible for a small business, or other, set-aside opportunities. As such, a detailed inventory of all current contracts should be taken.

- ✓ Does either entity currently qualify for small business or set-aside contracting opportunities? (*i.e.*, are one or both of the entities):
  - A small business concern?
  - A small disadvantaged business?
  - An 8(a) program participant?
  - A veteran-owned small business?
  - A service-disabled veteran-owned small business?
  - A woman-owned small business?
- ✓ Will the transaction render the remaining entity "other than small" or no longer entitled to set-aside opportunities?
  - If so, additional steps must be taken to ensure that future set-aside contracts are not pursued, and that the government is notified of the contractor's changed status.



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## **V. Collateral Policies**

### ✓ Affirmative Action Plans

- Will the remaining entity hire more than 50 employees and perform a contract or subcontract for \$50,000 or more?
  - If yes to both, the new entity will need to comply with federal affirmative action plan requirements for minorities, women and those with disabilities. See FAR 22.804-1 and FAR 22.14.
- Will the remaining entity hire more than 50 employees and perform a contract for \$100,000 or more?
  - If yes, the entity may be required to take affirmative action regarding qualified disabled veterans. See FAR 22.1302.

### ✓ Labor / Davis-Bacon

- Will the entity perform federal contracts for construction, alteration or repair of public buildings and/or public works?
- Will the contract exceed \$2,000?
  - If yes to both of these, Davis-Bacon prevailing wage requirements will likely apply. See 40 U.S.C. § 3141 et seq.; FAR 22.4 et seq.

### ✓ Labor / Service Contract Act

- Will the entity perform federal contracts principally for services that are furnished by service employees?
- Will the contract exceed \$2,500?
  - If yes to both of these, the Services Contract Act establishes minimum wage rates and fringe benefits based on those prevailing in the locality. See 41 U.S.C. §§ 6701-07.
  - Failure to comply with this law can result in debarment, contract termination or withholding of contracts funds.