



Acquiring a Federal Government Contractor: Avoiding Pitfalls

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This Practice Note highlights common pitfalls to avoid in an acquisition of a federal government contractor. It contains a discussion of typical issues that arise during all stages of the transaction, from structuring the deal and conducting due diligence to drafting the purchase agreement and satisfying post-acquisition requirements.

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Over the past several years, federal government contractors have increasingly been involved in mergers and acquisitions. Given the specific laws, regulations and other requirements that apply to federal government contractors, transactional attorneys must take a different approach when structuring the deal, conducting the due diligence and drafting the purchase agreement. A failure to understand and mitigate against potential risks can result in a significant devaluation of the target company.

This Note discusses how to avoid pitfalls when acquiring a federal government contractor, including:

- Factors to consider when structuring the transaction.
- How to identify the federal government contract requirements of the target.
- How to assess the target's compliance with these requirements.
- How to mitigate both identified and unknown risks in the purchase agreement.
- Post-acquisition federal government notifications requirements.

STRUCTURING THE TRANSACTION

When structuring an acquisition of a federal government contractor, the parties must consider the federal Anti-Assignment Act and the requirement to obtain a novation.

The Anti-Assignment Act

The Anti-Assignment Act prohibits the contractor from assigning a federal government prime contract (a contract directly between the contractor and the US government) to a third party (41 U.S.C. § 15(a)). While a federal government subcontract is not subject to the Anti-Assignment Act, during due diligence the buyer should carefully review all subcontracts to ensure there are no contractual restrictions on the target's ability to assign the subcontract to the buyer.

The Anti-Assignment Act aims to ensure that a federal government contractor that receives a federal prime contract

actually performs the contract, providing the government with the performance for which it bargained. However, the government may waive the Anti-Assignment Act if the transfer involves either:

- All of the contractor's assets.
- All of the contractor's assets involved in performing the prime contract, for example, through:
 - a sale of these assets with a provision for assuming liabilities;
 - a transfer of these assets incident to a merger or corporate consolidation; and
 - the incorporation of a proprietorship or partnership or formation of a partnership.

(48 C.F.R. § 42.1204.)

This transfer becomes effective by the execution of a novation agreement. The novation process can be triggered by the transfer of one or many federal government prime contracts.

Novation

A contractor can request that the government permit the transfer of its prime contracts by submitting a written request for a novation to the responsible contracting officer. There are specific criteria for identifying the contracting officer responsible for processing the novation (see 48 C.F.R. § 42.1202).

Sections 1204(e) and 1204(f) of Part 42 of the Federal Acquisition Regulation (FAR) (48 C.F.R. pts. 1-53) contain a laundry list of documents that a contractor must submit to the contracting officer with the novation request. The contractor must also submit three signed copies of a form novation agreement contained in the FAR, which must be signed by:

- The federal government.
- The federal government prime contractor (the transferor).
- The successor-in-interest (the transferee).

(48 C.F.R. § 42.1204(i).)

The form agreement can be modified to reflect the facts and circumstances of the transaction, but any significant changes to the agreement may increase government scrutiny and delay the novation process.

Depending on the facts and circumstances of each transaction, the contractor and the successor-in-interest can request to submit alternative documents to provide the contracting officer with the information and reassurances needed to approve the assignment. While the parties can submit some of the key documents before the close of a transaction, importantly, the novation request and related documents cannot be fully processed by the contracting officer until after the acquisition closes.

The contracting officer responsible for processing the novation retains discretion regarding whether to execute the novation agreement and approve the transfer of the government contract. The contracting officer's decision is based on several factors, including:

- The proposed transferee's:
 - responsibility under FAR Part 9 (Contractor Qualifications) (*48 C.F.R. § 9*); and
 - ability to successfully perform the contract from both a technical and financial prospective.
- Input from the contracting officer on the contract at issue. (*48 C.F.R. § 42.1203(c)*)

Therefore, when submitting the novation documents, the parties should provide the government with as much reassurance as possible regarding:

- The successor-in-interest's ability to perform the contract.
- The continuity of personnel and facilities in the performance of the contract.
- The successor-in-interest's financial stability.

The original contractor remains responsible for performing the outstanding contract until both:

- A novation agreement is fully executed by all parties, including the government.
- The applicable government contracts are modified to incorporate the novation agreement and recognize the successor-in-interest.

Because in an asset transfer the transferor typically no longer has the assets or personnel necessary to perform the government prime contract, while the novation is pending:

- The transferor and transferee typically enter into a subcontract agreement where:
 - the transferee agrees to perform the contract; and
 - the transferor agrees to transfer all payments received from the government to the transferee.
- The contractor must:
 - remain in corporate existence;

- maintain its System for Award Management (SAM) account through which the contractor receives payment from the federal government; and
- have at least one employee who can act on behalf of the company.

Novation Not Required for a Stock Purchase

A novation is required for an asset purchase, a corporate consolidation or a merger. However, a novation **is not** required for a stock purchase if:

- There is no legal change in the contracting party.
- The contracting party remains in control of the assets.
- The contracting party performs the contract. (*48 C.F.R. § 42.1204(b)*)

However, the government may still insist that the prime contractor execute:

- A formal agreement addressing identified issues and providing the government with reassurances related to the change in ownership (*48 C.F.R. § 42.1204(b)*).
- A change-of-name agreement, if it intends to change its name after the acquisition (for the required process, see *48 C.F.R. § 42.1205(a)* and for a suggested form of a change-of-name agreement, see *48 C.F.R. § 42.1205(b)*).

Parties to an acquisition should consider the novation process when determining whether to structure the transaction as a stock or an asset purchase because:

- Pursuing a novation requires time and effort.
- The relationship between the buyer and seller must continue after the acquisition while a novation is pending.
- The government retains discretion whether to grant a novation.

If a novation is required, the parties should address in the purchase documents their post-closing responsibilities to pursue the novation, especially since each party must submit documents and sign the novation agreement.

For more information on the Anti-Assignment Act and the novation requirement, see *Practice Note, M&A Transactions in the Aerospace and Defense Industry: Key Issues and Considerations: Acquiror as a Successor in Interest* (<http://us.practicallaw.com/3-517-1090>).

Small Business Concerns

In an acquisition of a federal government prime contractor that also qualifies as a small business concern, when structuring the transaction the buyer should assess whether the target still qualifies as a small business concern after the acquisition. The federal government's policy is to provide small business concerns with the maximum practicable opportunity to participate in performing federal government prime contracts and subcontracts (*48 C.F.R. § 52.219-8(a)*).

Small business concerns include special types of small businesses such as:

- Women-owned small business concerns.
- Small disadvantaged business concerns.
- Veteran-owned and service-disabled veteran-owned small business concerns.
- Historically Underutilized Business Zone (HubZone) small business concerns.

The federal government restricts certain procurements to these types of businesses and provides price evaluation preferences to them.

Qualifying as a Small Business Concern

Under the Small Business Administration (SBA) regulations and the North American Industry Classification System (NAICS) codes set up by the SBA, a company qualifies as a small business concern by meeting requirements for either:

- Number of employees.
- Annual average gross revenue, including all affiliates, for the preceding three fiscal years (referred to as annual receipts).

(13 C.F.R. §§ 121.101-121.103.)

While the definition of affiliate can vary, a person is automatically considered an affiliate of a company if it owns or controls or has the power to control 50% or more of the company's voting stock. For determining affiliation, it does not matter whether control is exercised, so long as the power to control exists. Companies are also considered affiliates of each other if a third company controls or has the power to control (directly or indirectly) both companies.

When determining whether the target will still qualify as a small business concern after the acquisition, if the buyer will own more than 50% of the target's voting stock it must consider the target's number of employees and annual receipts of all other holdings in which the buyer owns a majority or substantial interest.

If the successor-in-interest no longer qualifies as a small business after the acquisition, it will not be eligible to compete for prime contracts that are set aside for small businesses. The new company can complete its performance of existing small business set-aside contracts, but the government is not permitted to count any options exercised, modifications issued, or additional orders issued to the contractor under these contracts towards the government's small business contracting goals.

Also, if the contractor's customers relied on purchases from the small business contractor to satisfy their small business subcontracting goals under their small business subcontracting plans with the government, the contractor's customers can no longer count purchases from the successor-in-interest towards their small business subcontracting goals. There are also some requirements from which small business concerns are exempt that the successor-in-interest could potentially be exposed to after the acquisition, such as:

- The federal government's cost accounting standards (CAS) (for more information on CAS, see *Practice Note, Government*

Contracts: Reduced Risk Through Commercial Item Contracting: Cost Accounting Standards (<http://us.practicallaw.com/5-532-3257>)).

- Creating and adhering to a small business subcontracting plan.
- Implementing a business ethics awareness and compliance program and a robust internal control system.

All of these factors should be considered in assessing the valuation of the target.

Non-US Buyers May Have Additional Requirements

Non-US buyers or buyers subject to foreign ownership, control or interest (FOCI) should be aware of various laws that could restrict a contractor's ability to continue performing federal government contracts after the acquisition. Foreign acquirors must determine during the structuring and due diligence process how they will address potential issues if:

- The target has classified information.
- The target holds export control licenses.
- The transaction may affect national security.

For more information on due diligence by non-US buyers, see *Practice Note, M&A Transactions in the Aerospace and Defense Industry: Key Issues and Considerations: Due Diligence by a Foreign Acquiror* (<http://us.practicallaw.com/3-517-1090>).

Classified Information

If the target has classified federal government contracts or contracts involving classified information, it must have applicable security clearances to perform the contract. The target could lose its clearance and its ability to perform the contract, if the target is acquired by a non-US company or a company with FOCI. To avoid the loss of the contract, the target and the buyer must work together before the acquisition to implement mitigation steps and corporate control measures acceptable to the government.

Export Control Licenses

If the target has export control licenses under the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR), the target must:

- Notify the federal government of the impending change in ownership before the closing.
- Work with the federal government after the acquisition to transfer the registrations and licenses to the new entity.

The EAR and the ITAR even prohibit the transfer of technical data to a foreign person within the US. A foreign person is any person who is not a lawful permanent resident of the US, including foreign governments and organizations (22 C.F.R. § 120.16). If the new company will have foreign owners, it must either:

- Seek a license from the applicable government agency to permit the foreign persons to have access to the export-controlled data.
- Implement firewalls and other screens to prevent the foreign persons from having access to this data.

For more information on the ITAR, see *Box, International Traffic in Arms Regulations*. For more information on the EAR, see *Box, Export Administration Regulations*.

National Security

The Committee on Foreign Investment in the United States (CFIUS) is authorized to review transactions that could result in the control of a US business by a foreign person to determine the effect of the transaction on national security. While the CFIUS review is a voluntary process, this review is effectively mandated for an acquisition involving federal government contractors with:

- Security clearances.
- Particular EAR/ITAR-controlled exports.
- Significant defense, national security or homeland security contracts.

A positive CFIUS review provides a safe harbor from future Exon-Florio review and the possibility of the unwinding of the transaction after the acquisition (*50 U.S.C. § 2170*). For more information on CFIUS review, see *Practice Note, M&A Transactions in the Aerospace and Defense Industry: Key Issues and Considerations: CFIUS Review* (<http://us.practicallaw.com/3-517-1090>).

IDENTIFYING THE GOVERNMENT CONTRACTING REQUIREMENTS WITH WHICH THE TARGET MUST COMPLY

Federal government contractors are potentially subject to many government-specific requirements, including, but not limited to:

- Import and export restrictions.
- Intellectual property rights. Under federal government prime contracts and subcontracts, the government may receive certain rights in a contractor's technical data, computer software and inventions. Therefore, if the target's intellectual property is an important asset to the buyer, it is critical that the buyer assess the rights the government received in the target's intellectual property. For more information on intellectual property rights, see *Practice Note, Intellectual Property: Overview* (<http://us.practicallaw.com/8-383-4565>).
- Restrictions on recruiting and hiring former federal government employees.
- The Anti-Kickback Act.
- Wage and hour laws.
- The Truth in Negotiations Act (TINA). TINA requires a contractor to:
 - disclose to the federal government all of its cost or pricing data as of the date of price agreement; and
 - certify that its disclosure is current, accurate, and complete.

(*10 U.S.C. § 2306a and 41 U.S.C. § 254b*).

Cost or pricing data is defined broadly as all facts that, as of the date of price agreement, prudent buyers and sellers would

reasonably expect to affect price negotiations significantly (*48 C.F.R. § 2.101*). If the government later determines that the cost or pricing data disclosed was not current, accurate and complete (defective pricing), the government is entitled to a price reduction to exclude the amount by which the price was increased because of the defective data, plus interest. The possibility also exists for double recovery by the government if the contractor knowingly submitted defective data or omitted data. In extreme cases, the contractor can face possible Civil False Claims Act liability or criminal false statement allegations, for a fraudulent or false certification.

- CAS, which govern the measurement, timing and allocability of costs charged to certain negotiated government contracts. The CAS rules and regulations:
 - impose major accounting requirements on government contractors; and
 - require the negotiation of impacts of changes to the contractor's cost accounting practices.

Violations of these accounting principles or the contractor's disclosed cost accounting practices can result in:

- re-pricing of contracts;
- Civil False Claims Act liability; and
- criminal charges.
- Audit requirements.
- Lobbying restrictions.
- In some instances, laws that impose a preference on the use of domestic sources or materials.

While some of these requirements apply to all federal government prime contracts and subcontracts, others only apply depending on:

- The value of the contract.
- The type of work to be performed under the contract.
- The contracting government agency.

To assess which requirements and obligations apply to the target, the buyer should review at the start the due diligence process the target's open prime contracts and subcontracts and those for which the target has received final payment in the last three years. A contractor's obligation to make a mandatory disclosure to the federal government under the suspension and debarment regulations in FAR 9.406 and 9.407 (see *Suspension or Debarment From Government Contracts*) applies up to three years after final payment on a government contract. The government can also audit a federal government prime contract or subcontract within this three-year timeframe.



If the target only accepts and performs FAR Part 12 commercial item prime contracts and subcontracts, then the target will likely be exempt from the TINA (48 C.F.R. § 15.403-1(c)(3)) and CAS (48 C.F.R. § 9903.201-1(b)(6)). If, however, the target contractually accepted FAR clauses implementing these laws in their contracts, then the target may be contractually obligated to comply with these requirements. Therefore, the acquirer should conduct a full review of all of the target's government prime contracts and subcontracts, including all related contract modifications, to identify which federal government contracting requirements apply to the target.

ASSESSING THE TARGET'S COMPLIANCE WITH FEDERAL GOVERNMENT CONTRACTING REQUIREMENTS

Once the buyer has identified all requirements applicable to a federal government contractor, the buyer must then assess the target's compliance with these requirements. The buyer's due diligence should delve into those areas that could:

- Significantly impact the target's ability to:
 - maintain its existing government contracts; or
 - receive future government contracts.
- Result in significant civil or criminal liability.
- Suspension or debarment of the target after the acquisition.

Assessing the Target's Compliance Program

A primary method of assessing a target's compliance with its government contracting requirements is to assess the strength of the target's compliance program. Contractors with a federal government prime contract or subcontract in excess of five million dollars with a period of performance longer than 120 days must adopt a code of business ethics and conduct a compliance program. Even if not required, a robust compliance program is clearly a best practice for all federal government contractors.

During due diligence, the buyer should review the target's:

- Code of conduct.
- Employee handbook.
- Written policies and procedures related to government contracts.

If the target does not maintain written policies or procedures on certain compliance topics, the buyer should interview individuals responsible for compliance with those requirements to understand the target's informal processes and procedures. The buyer should also inquire about the target's employee training programs and internal or external audit policies and procedures.

The buyer should review the various forms and documents that a government contractor must maintain or submit to the federal government on a periodic basis, such as:

- Affirmative action programs.
- Equal Employment Opportunity reports (EEO-1).
- Veterans' Employment and Training Service reports (VETS-

100A).

- Small business subcontracting plans.
- Export control licenses.
- Standard purchasing terms and conditions.
- Recently executed representations and certifications.

The buyer should also review all documents relating to any civil or criminal investigations or audits performed by the federal government and any potential or outstanding claims by or against the government.

Fraud Enforcement Mechanisms Should Guide Due Diligence

When reviewing these documents and interviewing employees, the buyer should focus on those violations that could trigger the government's procurement fraud enforcement mechanisms, including:

- Prosecutions under the False Statements Act.
- Lawsuits under the Civil False Claims Act.
- Suspensions or debarments.

False Statements Act

With various options at its disposal, the federal government uses the False Statements Act (18 U.S.C. § 1001) most frequently to address all categories of procurement fraud. This statute prohibits knowingly and willfully making a false statement to the federal government (18 U.S.C. § 1001). A statement under the False Statements Act may be:

- Oral.
- Written.
- Sworn.
- Unsworn.

Civil False Claims Act

The Civil False Claims Act :

- Provides for treble damages and penalties (generally up to an additional \$11,000 per claim) for the submission of false claims by either a prime contractor or subcontractor to any federal government agency or entity using federal funds to pay these claims.
- Authorizes private citizens with evidence of fraud against the federal government to file lawsuits in their own name (on behalf of themselves and the government) and then keep a significant share of the government's recovery (a *qui tam* action) (31 U.S.C. § 3730). *Qui tam* actions are often brought by disgruntled current or former employees who are aware of the company's business practices in performing its government contracts. Whistleblowers (referred to as relators) often are rewarded with 15% to 25% of the total recovery from the company (31 U.S.C. § 3730).
- Protects employees from retaliation by their employers. (31 U.S.C. §§ 3729-3733.)

Suspension or Debarment From Government Contracts

The federal government can suspend, debar or propose for debarment a federal government contractor. A suspension or debarment prohibits a federal government contractor from:

- Entering into any new federal prime contracts or procurement subcontracts over \$30,000.
- Receiving additional task or delivery orders under existing contracts.
- Having any options under existing contracts exercised by the government.

A suspension period can last for up to one year and can be extended for an additional six months (48 C.F.R. § 9.407-4(b)). A debarment typically lasts for three years, although the contractor may attempt to negotiate a shorter duration with the debarment official (48 C.F.R. § 9.406-4(a)(1)).

As a result, when acquiring a federal government contractor, the buyer should confirm that neither the target nor any of its principals are or have been in the previous three years suspended, debarred or proposed for debarment. The government maintains the Excluded Parties List System (EPLS), a list of individuals and companies that are suspended, debarred or proposed for debarment, available on the SAM website. Many state and local agencies, as well as private companies, check the EPLS and do not contract with companies that are currently suspended, debarred or proposed for debarment by the federal government.

The buyer must perform due diligence to identify any possible factors that may lead to the suspension or debarment of the target after the acquisition. Bases for suspension or debarment include, but are not limited to:

- Commission of fraud or a criminal offense when obtaining, attempting to obtain or performing a public contract or subcontract.
- Commission of:
 - embezzlement;
 - theft;
 - forgery;
 - bribery;
 - falsification or destruction of records;
 - making false statements;
 - tax evasion;
 - violating federal criminal tax laws; or
 - receiving stolen property.
- Violation of federal or state antitrust statutes relating to the submission of offers.
- A knowing failure by a principal (an officer, director, owner, partner or a person having primary management or supervisory responsibilities within a business entity, for example, a general manager, plant manager, head of a division or

business segment) until three years after final payment on any government contract awarded to the contractor, to timely disclose to the federal government:

- violations of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations found in Title 18 of the US Code (Crimes and Criminal Procedure);
- violations of the Civil False Claims Act (31 U.S.C. §§ 3729-3733); or
- significant overpayment on the contract, other than overpayments resulting from contract financing payments as defined in 48 C.F.R. § 32.001.

(For a complete list of causes for debarment and suspension, respectively, see 48 C.F.R. § 9.406-2 and 48 C.F.R. § 9.407-2.)

During due diligence, the buyer should inquire about all aspects of the target's activities that could potentially trigger a suspension or debarment, including the target's failure to make a mandatory disclosure. In particular, since the loss of anticipated future contracts or future work is difficult to quantify, the financial loss caused by a suspension or debarment often cannot be sufficiently addressed through purchase agreement indemnification clauses.

MITIGATING AGAINST IDENTIFIED RISKS

By understanding the risks and properly mitigating them in the purchase agreement, buyers can significantly reduce the risk of an unanticipated criminal or civil investigation or suspension or debarment after the acquisition.

Representations and Warranties

Companies face many specific requirements and significant civil, criminal and administrative penalties that apply to a federal government contractor. Therefore, when acquiring the stock or assets of a federal government contractor, typical commercial representations and warranties (for example, relating to claims, litigation and product warranties) are insufficient to identify and address the particular risks encountered by a federal government contractor.

For maximum protection, the buyer should ensure that the purchase agreement contains government contract-specific representations and warranties addressing issues such as:

- The responsibilities of the contractor.
- The contractor's knowledge of facts or circumstances that would result in a mandatory disclosure obligation.
- Potential criminal or civil liability.
- The contractor's compliance with various laws and regulations.

For more information on representations and warranties specific to the acquisition of a government contractor, see *Practice Note, What's Market: M&A Agreements in the Aerospace and Defense Industry: Representations and Warranties in the Aerospace and Defense Industry* (<http://us.practicallaw.com/6-517-9867>).

Indemnification

The buyer should also seek an indemnity for the target's non-compliance with the requirements of its government contracts identified during due diligence or disclosed by the target in the purchase agreement disclosure schedules. In particular, the buyer should include within the scope of the indemnity clause any non-compliance that could result in:

- Significant criminal or civil liability.
- Termination of existing federal government contracts.
- Forfeiture of future government contract awards.
- Suspension or debarment.

Covenants

The purchase agreement should address the post-transaction cooperation between the parties required during the processing of a novation. The buyer should insist on a covenant that obligates the seller to cooperate after the acquisition to obtain the novation. For more information on government contracts-related covenants in purchase agreements, see *Practice Note, What's Market: M&A Agreements in the Aerospace and Defense Industry: Related Covenants, Agreements and Closing Conditions* (<http://us.practicallaw.com/6-517-9867>).

POST-ACQUISITION REQUIREMENTS

Notifications

Regardless of whether a novation is required (see *Novation Not Required for a Stock Purchase*), federal government contracts often require a contractor to notify the government of a change in ownership. In particular, if the target is a small business and its federal government contracts contain a small business program representation, the successor-in-interest must re-represent its small business size status to the contracting officer within 30 days of either:

- The change in ownership, if no novation is required.
- The execution of the novation agreement (see *48 C.F.R. § 52.219-28*).

The target must also notify applicable government agencies to transfer security clearances and export control registrations and licenses to the new entity (see *Non-US Buyers May Face Additional Requirements*).

Updating Information on the SAM Website

The successor-in-interest must review its information in the SAM website to confirm that all of the previously entered information remains accurate.

Promptly Addressing Any Noncompliance

After the acquisition, the successor-in-interest should quickly remedy any compliance deficiencies identified during the due diligence process. Doing so puts the new company on solid ground to demonstrate its present responsibility and negotiate a favorable settlement with the federal government if an issue arises.

INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

The ITAR (22 C.F.R. pts. 120-130) restrict the exports and imports of defense articles and services. Administered by the US State Department's Directorate of Defense Trade Controls, the ITAR generally require approval for the export or import of:

- Defense items, including:
 - technical data related to defense articles, like blueprints, manuals and websites;
 - software related to defense articles; and
 - items designed or modified for military use.
- Services related to defense articles, including their:
 - design;
 - manufacture; and
 - operation.

For more information on the ITAR, see *Practice Note, Export Regulation Laws: Overview: The International Traffic in Arms Regulations* (<http://us.practicallaw.com/1-521-6990>).

EXPORT ADMINISTRATION REGULATIONS

The EAR (*15 C.F.R. pts. 730-774*) apply to the export of goods and services not covered by the ITAR. Administered by the US Commerce Department's Bureau of Industry and Security Items, the EAR regulate items that are suitable for either military or non-military use (referred to as dual-use items) that **are not** designed or modified for military use. These dual-use items are subject to varying controls, depending on:

- The product or technology.
- Destination.
- End user.

For more information on the EAR, see *Practice Note, Export Regulation Laws: Overview: The Export Administration Regulations* (<http://us.practicallaw.com/1-521-6990>).

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