

**DIVING INTO
UNCHARTED WATERS**

Ounce of Prevention Seminar (OOPS)

Looking Back and Forward – 2017 M&A Highlights and Trends to Watch

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Market Trends

- 2017 Highlights
- 2018
 - Headlines to Date
 - Trends to Watch
 - Emerging Market Areas
 - Market Risks

Novation – FAR Requirements

42.1204 Applicability of novation agreements.

- (a) [41 U.S.C. 6305](#) prohibits transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of—
- (1) All the contractor's assets; or
 - (2) The entire portion of the assets involved in performing the contract.
- (See [14.404-2\(l\)](#) for the effect of novation agreements after bid opening but before award.) Examples of such transactions include, but are not limited to—
- (i) Sale of these assets with a provision for assuming liabilities;
 - (ii) Transfer of these assets incident to a merger or corporate consolidation; and
 - (iii) Incorporation of a proprietorship or partnership, or formation of a partnership.
- (b) A novation agreement is unnecessary when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract. However, whether there is a purchase of assets or a stock purchase, there may be issues related to the change in ownership that appropriately should be addressed in a formal agreement between the contractor and the Government (see [42.1203\(e\)](#)).

Novation Process

- Timing
 - Post-Closing Requirement
 - Impacts Deal Certainty
 - Subcontracts Pending Novation
- Change in Corporate Entity Structure
- Contents of Novation Package
 - Audited Financial Statements
 - Corporate Seal / Board Documents

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Novation – Special Challenges

- Intercompany Transactions
- Agency Coordination and Unique Requirements
- Redundant IDIQ Vehicles
- Pending Bids
- Parent Guarantees



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Identifying Risks

- Determining the scope of diligence
 - What is the business case?
- Prior deals and residual issues
 - Lingering novations
- Organizational conflicts of interest
 - Self-diligence
 - Timing
- Small business matters
 - Impact on prospective business
 - Legacy compliance questions

Identifying Risks

- IP and Data Rights
 - IP/data rights clauses in target's contracts
 - Source of funds to develop software/products
- Supply Chain
 - Domestic preference requirements
 - Detection and avoidance of counterfeit parts
 - Flowdowns, reps and certs
- Cybersecurity and information safeguarding
 - DFARS safeguarding clause
 - Other restrictions/standards
- Attorney-Client Privilege Issues

Mitigation of Risk

- Transaction Risk Insurance
 - Not useful for “known” risks
 - Must meet underwriter’s requirements
 - Heightened diligence for certain risks and industries
- Indemnification Procedures
 - Who will control?
 - Allocation of Risk

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QUESTIONS?

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