

NEWSLETTER

January 2024



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TIP OF THE MONTH

What is Novation in Federal Government Contracting?

In the world of federal government contracting, it’s not uncommon for a contractor to transfer one or more of its existing contracts to another company. For the seller, a transfer of government contracts – along with other assets – may be part of the owner’s retirement plan, or may arise because the contractor wishes to exit the government market or concentrate on its core business, among other reasons. For the buyer, purchasing federal contracts can allow access to previously unavailable vehicles, such as certain government-wide acquisition contracts, as well as bolster the buyer’s past performance to make the buyer more competitive in the government marketplace.

In order for a federal contract to be transferred from one contractor to another, the government must approve the transfer in a process called “novation.” This newsletter provides a high-level introductory overview of novation; if you’re contemplating the transfer of a federal contract, you should consult an attorney to assist you both with the novation and the underlying transfer.

When Is a Novation Required?

According to [FAR 42.1204\(a\)](#), a novation is required whenever a federal contract will be transferred “from the contractor to a third party.” In other words, a novation is necessary if the identity of the contractor will change. For example, if Company X holds a federal contract and wishes to transfer the contract to Company Y, a novation will be required.

On the other hand, [FAR 42.1204\(b\)](#) clarifies that novation “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.” For instance, if Bob owns 100% of Company X and sells his ownership interest to Sally, a novation is not required because the identity of the contractor — Company X — has not changed.

How Does a Contractor Obtain a Novation?

A contractor obtains a novation by submitting a request to the “responsible contracting officer,” an individual specified in [FAR 42.1202](#). The request must include a novation agreement, which is a three-party contract between the transferor, transferee, and government. The initial novation request must also include several supporting documents identified in [FAR 42.1204\(e\)](#), and the contractor must provide additional documents identified in [FAR 42.1204\(f\)](#) “as the documents become available.”

Where Can a Contractor Obtain a Template Novation Agreement?

While a novation request involves substantial paperwork, the FAR makes one facet of that paperwork relatively easy for contractors. [FAR 42.1204\(i\)](#) includes a template novation agreement that contractors should use as their starting point.

Must the Government Approve Every Novation Request?

Even if a novation request satisfies all FAR requirements, the responsible Contracting Officer will evaluate the request to determine whether the proposed novation is “in the Government’s interest.” For example, if the transferee is deemed non-responsible under the standards outlined in FAR Subpart 9.1, the government likely will deny the request.

What Else Should a Contractor Considering Novation Do?

While novation is the centerpiece of any potential transfer of a federal contract to a third party, the parties to a potential novation should carefully review the contract(s) in question to determine what other requirements or restrictions may apply. Due diligence is critical!

NICC APEX ACCELERATOR NEWS YOU CAN USE

DoD Mentor-Protege Program Solidified Under Proposed Rule

Federal contractors considering a mentor-protege program usually think of the U.S. Small Business Administration’s program first; however, the Department of Defense (DoD) runs a separate mentor-protege program that may be a good choice for some contractors. Recently, the DoD issued a proposed rule to permanently establish the DoD mentor-protege program as part of the DoD procurement landscape and make several other notable changes, including lowering the barriers to entry. [Read more about the proposed rule.](#)

If you want to learn more about federal mentor-protege programs and how they can benefit your business, your APEX Accelerator can help! Contact your APEX counselor today to schedule an appointment.

GOVOLOGY WEBINARS

*Please use the new code **24NICC20** when registering for Govology webinars.*



Mastering Government Sales: The Power of Oral Presentations

Date: January 9, 2024

Time: 1:00 p.m. EST

Presenter: Lisa Mundt, The Pulse of GovCon

[Click Here to Learn More](#)



CMMC: Challenges and Tips for Small Businesses

Date: January 18, 2024

Time: 1:00 p.m. EST

Presenter: Nathan Cross, Totem Technologies

[Click Here to Learn More](#)



Market Research 101 for Government Contractors

Date: January 23, 2024

Time: 1:00 p.m. EST

Presenter: Carroll Bernard, Govology

[Click Here to Learn More](#)



How to Write Customer-Focused Proposals (2024 Update)

Date: January 25, 2024

Time: 1:00 p.m. EST

Presenter: Jeff Cuskey, Consultant & Expert Witness

[Click Here to Learn More](#)

RECOMMENDED READINGS

New DFARS Rule Prohibits Flow-Downs in Many Commercial Contracts

Heads up, Department of Defense prime contractors and subcontractors: under the revised DFARS clause resulting from a new final rule, flowing down many FAR or DFARS clauses to commercial items subcontractors is prohibited. [Read more about this new prohibition](#) and how it will affect DoD primes and subcontractors.

DHS Using “Cybersecurity Readiness” as Evaluation Factor

As the Department of Defense moves ahead with Cybersecurity Maturity Model Certification (CMMC), the Department of Homeland Security is taking its own approach to addressing cybersecurity. Recently, DHS announced that "cybersecurity readiness" will be included as an evaluation factor in contracts involving the use of Controlled Unclassified Information. [Read more about the new requirement.](#)

Market Shortages Are No Excuse for Non-Performance

A recent decision by the Armed Services Board of Contract Appeals “provides an important reminder for government contractors to carefully consider the volatility of market conditions before submitting firm-fixed-price contract proposals to the Federal Government.” In this case, the ASBCA upheld the government’s termination for default of a contractor for failure to provide certain vehicles required under the contract, despite the contractor’s contention that there was a market shortage of those vehicles. [Read more about the case and the important principles behind the ASBCA’s decision.](#)

SPECIAL INTEREST

This section highlights items of special interest and importance to the Department of Defense Office of Small Business Programs (DOD OSBP). Please take a moment to visit the sites listed below for additional information. We also suggest that you read the latest edition of the [DOD’s Small Business Digest](#) if you want to do business with the DOD.

Cybersecurity Maturity Model Certification (CMMC)/Cybersecurity Compliance Resources

[DOD CMMC Resource Page](#) – Resources to assist government contractors with understanding and complying with CMMC/cybersecurity requirements.

[Project Spectrum](#) – Project Spectrum is working with APEX Accelerators to assist small businesses in achieving compliance with CMMC/cybersecurity requirements.

Foreign Ownership, Control, and Influence (FOCI) Resources

[FOCI Frequently Asked Questions](#) -- FOCI is a status or situation in which a contractor with access to classified information has some foreign investment or association with foreign interest. Learn more about the federal government's requirements relating to FOCI.

<https://business.defense.gov/> – The official website of DOD OSBP. It contains additional information, news, events, and other items for those interested in doing business (or currently engaged) with the DOD.

CMMC & FOCI News of Note

Five Things to Watch as Pentagon Prepares to Issue CMMC Rule

The CMMC proposed rule will be published in the very near future. As contractors await the proposed rule, [here are five things to watch for](#), including the process for commenting on the proposed rule, how the DoD proposes to address small business concerns, and more.

A Reader's Guide to the Upcoming Draft CMMC Rule

The so-called "father of CMMC" has some thoughts about [what contractors should anticipate in the upcoming proposed CMMC rule](#).

Common Cybersecurity Weaknesses Related to the Protection of DoD Controlled Unclassified Information on Contractor Networks

While the CMMC rule has yet to be implemented, DoD is enforcing existing cybersecurity requirements. In that regard, a new report from the DoD's Office of Inspector General is designed to assist contractors and DoD Contracting Officers in identifying and mitigating common weaknesses related to the protection of Controlled Unclassified Information, or CUI. The report also explains some of the liabilities contractors may face if they fail to comply with existing DoD cybersecurity rules. [Read the report here](#).

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This APEX Accelerator (formerly known as PTAC) is funded in part through a cooperative agreement with the Department of Defense.

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