

BMSS Presents:

GOVERNMENT CONTRACT NOVATIONS

– Processes, Pitfalls & Best Practices



Thursday
February 26



8:30 a.m. to
9:30 a.m. CST



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Agenda

1. What is a Novation?
2. Why Novations are increasing
3. What is the process of a Novation
4. Pitfalls of Novations
5. Best Practices

What Is a Novation?

A novation agreement is the government's formal recognition that:
A successor company has assumed a government contract, which is
Governed by **FAR Subpart 42.12**

Required when contract transfer occurs by operation of law, such as:

- Mergers
- Consolidations
- Asset purchases
- Corporate reorganizations

A novation is generally required when: The **legal entity performing the contract changes**

Why Novations Are Increasing

- Increased M&A activity across the government contracting sector
- Asset transfers and internal restructurings are more common



What is the Process of a Novation?

FAR 42.1204(a):

The government does not recognize assignments of contracts.

Contractors cannot transfer contracts without government approval.

Exception:

The government *may* approve a novation when it is in the government's interest



What is the Process of a Novation (Continued)

FAR 42.1204(b):

Novation approval is not automatic.

Contracting officer must determine:

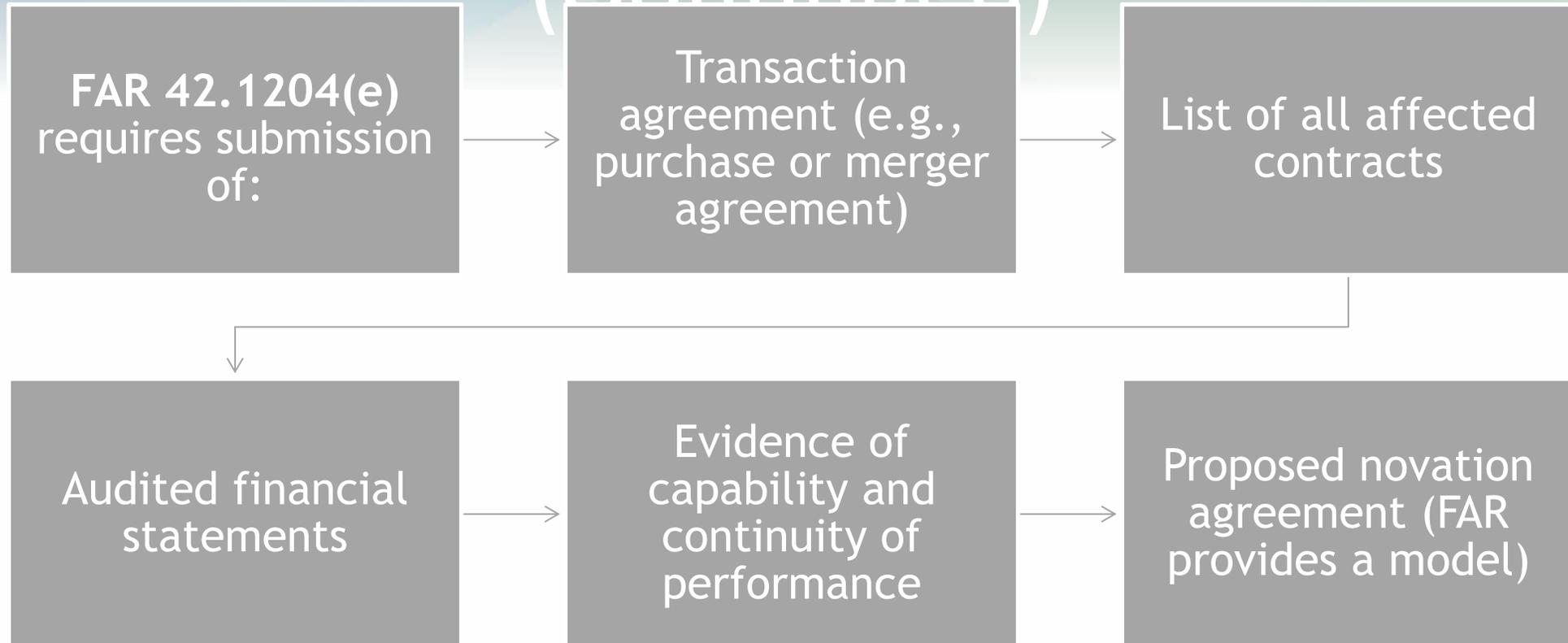
- Successor is responsible
- Successor has financial and technical capability
- Novation is in the government's interest



Important:

Until approval, the original contractor remains liable. This may be where contractors have to keep the acquired company as a subsidiary.

What is the Process of a Novation (Continued)



What is the Process of a Novation (Continued) The Government's Focus

Contracting officers primarily assess:

- Continuity of performance
- Financial stability of the successor
- Management and systems capability
- Risk to the government



Novation is about risk mitigation—not deal

What is the Process of a Novation (Continued)

Timing & Practical Realities

Novations can take several months or longer!

Delays are common due to:

- Incomplete submissions
- High contract volume
- Contracting officer workload

Multiple agencies = multiple approval & different timelines

What is the Process of a Novation (Continued)

There is a Novation Agreement in 42.1204 (i) and Change-of-Name Agreement in 42.1205. These are easy templates and can be use to submit to the government.



Pitfalls of Novations

Potential challenges include:

- Invoicing complications- timely invoicing
- Contract modifications delayed
- Confusion over contractor of record
- Customer confidence concerns



Pitfalls of Novations as a Prime



Government Can Reassess Responsibility



The ACO may evaluate:



Financial capability



Technical capability



Past performance



Accounting system adequacy

Remember is it the Governments Discretion

Pitfalls of Novations as a Subcontractor

Due diligence is often insufficiently addressed — this can create major performance and revenue risk.

Assignment Clause Review is Critical

Does the subcontract permit assignment to another entity?

Is prime contractor consent required?

Has the clause been negotiated to state that consent will not be unreasonably withheld?

Without favorable assignment language, the subcontract may not transfer.

Prime Contractor Approval Risk

The prime may refuse consent.

This can result in loss of the subcontract post-transaction.

Revenue tied to that subcontract may be at risk.

Small Business & Similarly Situated Concerns

Are you performing under a set-aside contract?

Are you part of the prime's Small Business Subcontracting Plan?

If ownership changes, will you still qualify as "similarly situated"?



Pitfalls of Novations as a Subcontractor

Without properly negotiated subcontract assignment language and a clear understanding of small business implications, the subcontract itself can become a deal breaker.

As the buyer:

Did you conduct contract-by-contract due diligence?

Did you assess assignment risk and prime approval requirements?

Did you evaluate small business and similarly situated implications?



Best Practice of a Successful Novation

1. Engage contracts counsel early in deal planning
2. Communicate proactively with contracting officers
3. Submit complete, well-organized documentation
4. Align legal, contracts, finance, and program teams
5. Due Diligence

6. CALL BMSS TO HELP YOU!



Key Take Away

- Novation is a required step in many M&A transactions
- FAR 42.12 gives the government discretion
- The original contractor remains liable until approval
- Proactive planning reduces risk and delays
- Successful novations protect both the deal and contract performance



Questions?

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*If you have a question that you'd like to ask, please use the **Q&A Button** at the bottom of your screen.*

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