Regulatory Coordinating Committee

Novation and Related Agreements

On October 21, 1996, the Section submitted comments to the General Services Administration on its proposed rule on novation and related agreements.

The Section generally supports the efforts of the FAR Council to improve the current novation regulations. The Section recommends only one alteration to the language of the proposed rule to address the inordinate length of time that it takes to complete the novation process under the current procedural framework. The change affects the portion of the proposed rule concerning the contracting officer's obligations to request information relevant to his or her evaluation after receiving a request for recognition of a successor, and to determine whether to approve such a request upon receipt of that information.

The Section recommends modifying this language of the proposed rule by adding the word "promptly." The Section expresses concern that without this change, and in the absence of a definitive time period, the approval process could be unduly delayed, and that the proposed rule may not adequately serve its stated purpose of facilitating the novation process.

October 21, 1996

General Services Administration
FAR Secretariat (MVRS)
18th & F Streets, N.W.
Room 4037
Washington, D.C. 20405

Re: FAR Case 95-034, Proposed Rule on Novation and Related Agreements;

Dear Sir/Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public work.

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The Section is authorized to submit comments on the acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein are those of the Section and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

In October, 1995, the Section submitted to the Department of Defense suggested revisions to the current regulations governing transfers of contractor assets pursuant to business combinations. This effort was prompted by problems experienced by the contracting community in processing novation agreements and a shared belief that guidance was needed to remedy the problems. Historically, the process of novating contracts has been misunderstood, protracted and difficult for both the Government and the parties to the transaction. In recent years, these problems have been exacerbated by an increase in business combinations as Government contractors have consolidated and restructured in response to Government downsizing and significant reductions in federal procurements. The objective of the suggested revisions was to amend existing procedures where specific guidance or improvement would facilitate the process and insure consistency in implementation of the regulations. The Section therefore appreciates the attention given these issues by the FAR Council and strongly supports the proposed rule.

The Section believes the proposed amendments to FAR Subpart 42.12 represent a substantial improvement to the current regulations by providing contracting officers with guidelines on utilization of novation agreements and flexibility to accommodate transactions, while preserving the Government's legitimate interests in business combinations affecting its contracts. Accordingly, the Section urges promulgation of the changes to FAR 42.1204(b), (d), (e), (f), and (g), which clarify the applicability of the regulations, require contracting officers to identify, evaluate and resolve any significant organizational conflicts of interest early in the process, and reduce the burden of producing documentation related to the transaction. The Section particularly supports the addition of a new provision which grants the responsible contracting officer discretion to modify the list of transaction-related documents to be submitted if the Government already has the information or its interests in the information are otherwise adequately protected. This flexibility should reduce delays and inefficiencies associated with technical transfers of assets incident to reincorporations and reorganizations when the contracting party essentially remains the same.

Although the Section supports the proposed rule, we urge the adoption of one small change, which would promote the rule's fundamental objective. One of the principal concerns with the existing procedures for novating Government contracts raised by Section members from both the public and private sector is the inordinate length of time it frequently takes to complete the process. In many cases, contracts are not novated until months after the transaction has closed, thereby creating an undesirable period of business uncertainties and administrative problems. Unlike transaction approval reviews necessitated by other statutory authority, the current novation regulations do not specify a time period in which the Government must decide whether it is in its interests to recognize a successor in interest. Recognizing that transactions vary considerably, and that the Government needs flexibility to address differing issues and complexities, the Section does not suggest a fixed period of time for action by the responsible contracting officer. Rather, the Section suggests that the contracting officer's obligations to request information relevant to his or her evaluation after receiving a request for recognition of a successor, and to determine whether to approve such a request upon receipt of that information, should be modified by the word "promptly." Without such a modifier, and in the absence of a definitive time period, the Section is concerned that the approval process could be unduly delayed, and that the proposed rule may not adequately serve its stated purpose of facilitating the process. Alternatively, the Section stresses that management attention be given to this aspect of business combination reviews by the Government.

In sum, the ABA Public Contract Law Section supports the efforts of the FAR Council to improve the current novation regulations. The proposed rule addresses the principal concerns of our members and incorporates many of the changes suggested by the Section. As noted, these changes have widespread support within the Section; Section members representing Government and private sector views actively participated in the sponsorship of changes incorporated in the proposed rule.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

cc:  Marcia G. Madsen
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