

CHANGE REQUEST COVER SHEET

Change Request Number: 13-60

Date Received: 1/28/2013

Title: Novation Agreement

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Policy OR Guidance: Guidance

Section/Text Location Affected: T3.10.1.A8

Summary of Change: Correct an erroneous citation to the Novation Appendix

Reason for Change: Correct a typographical error

Development, Review, and/or Concurrence: AAP-110

Target Audience: Contracting Officers

Potential Links within FAST for the Change: none

Briefing Planned: No

ASAG Responsibilities: Approve

Potential Links within FAST for the Change: none

Links for New/Modified Forms (or) Documents (LINK 1) [null](#)

Links for New/Modified Forms (or) Documents (LINK 2) [null](#)

Links for New/Modified Forms (or) Documents (LINK 3) [null](#)

SECTIONS EDITED:

Procurement Guidance:

T3.10.1 Contract Administration

Contract Administration

Section 8 : Novations and Change-of-Name Agreements [\[Old Content\]](#)[\[New Content\]](#)

[\[RedLine Content\]](#)

SECTIONS EDITED:

Section 8 : Novations and Change-of-Name Agreements

Old Content: Procurement Guidance:

T3.10.1 Contract Administration

Contract Administration

Section 8 : Novations and Change-of-Name Agreements

a. *Novation.*

(1) Novation is a legal instrument executed by the contractor (transferor), the successor in interest (transferee) and the Government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets. Novations typically occur when the assets of the transferor are purchased by another company but may also be considered when a contractor is unable to perform and another viable contractor is willing to assume the original contractor's rights and duties under the contract.

(2) When in its best interest, the FAA may 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:

(a) All of the contractor's assets; or

(b) The entire portion of the assets involved in performing the contract.

Examples of such transactions include, but are not limited to

(i) Sale of the contractor's assets with a provision for assuming liabilities;

(ii) Transfer of the contractor's assets incident to a merger or corporate consolidation; and

(iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(3) A novation agreement may not be necessary 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.

(4) *Contractor (Transferor) Responsibilities.* Contractors requesting a novation of a contract to recognize a successor in interest must provide the information the CO needs to evaluate and process the novation request. This includes information that validates that novation of the contract is in the best interest of the FAA and should include:

(a) Three copies of the proposed novation agreement (see "Paragraph (7) Content of Novation Agreement") signed by the original contractor and the successor in interest;

(b) One copy each, as applicable, of the following:

(i) The document describing the proposed transaction, purchase/sale agreement or memorandum of understanding;

(ii) A list of all affected contracts between the transferor and the FAA, as of the date of sale or transfer of assets, showing for each, as of that date, the

(A) Contract number and type;

(B) Name and address of the contracting office;

(C) Total dollar value, as amended; and

(D) Approximate remaining unpaid balance;

(iii) Evidence of the transferee's capability to perform;

(c) Any other relevant information requested by the CO;

(d) One copy of each of the following documents, as applicable, as the documents become available except as provided in (5) below:

(i) An authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree;

(ii) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets;

- (iii) A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets;
- (iv) An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts;
- (v) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer;
- (vi) Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants;
- (vii) Evidence that any security clearance requirements have been met;
- (viii) The consent of sureties on all contracts listed under (4)(b)(ii) of this section if bonds are required, or a statement from the transferor that none are required.

(5) The CO may modify this list of documents, provided that the CO receives information sufficient to protect the Government's interest.

(6) *CO Responsibilities.* The CO has the primary responsibility to process the novation and determine, in consultation with legal counsel, if it is in the best interest of the FAA.

(a) *Novations Involving More Than One Contract.* When multiple contracts are involved, the CO administering the contract with the largest unpaid dollar balance should coordinate the novation agreement for all FAA contracts.

(b) *Coordination with Other Executive Agencies.* The FAA may elect to have its contracts included in the novation agreement (the "global agreement") being processed by the responsible contracting officer for all of the other executive agencies. If this election is made, the FAA CO should negotiate a separate advance agreement with the contractor that addresses any issues unique to the FAA, if appropriate. This agreement should be attached to and incorporated in the global novation agreement.

(c) *Evaluating the Novation Request.* The CO should consider all the information collected as a result of the proposed novation request with emphasis on the successor's ability to perform including:

- (i) Contractor submissions under (5) above;
- (ii) Information provided by other contracting offices;
- (iii) Information indicative of the successor's responsibility such as debarment and suspension information;
- (iv) National Institute of Health's Past Performance Database;
- (v) Organizational conflict of interest;
- (vi) Any other information that reflects the successor's ability to perform the contract.

(d) *Conflict of Interest (COI)*. If the CO determines that a COI exists and cannot be resolved, but the novation is in the best interest of the FAA, the CO may initiate action to waive or mitigate the COI in accordance with AMS Procurement Guidance T.3.1.7.

(e) Coordinate the action with legal counsel to assure legal sufficiency.

(f) *CO's Decision*.

(i) *Rejecting the Novation Request*. If the CO determines that it is not in the best interest of the FAA to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

(ii) *Executing the Novation*. If the CO approves the novation, he/she should

(A) Prepare and sign a written contract modification for each affected contract;

(B) Incorporate a copy of the agreement into the contract modification;

(C) Place the original contract modification in the official contract file;

(D) Distribute the modification to the transferor; the transferee, affected FAA contracting offices, the paying office and any other distribution that is required for contract modifications.

(7) *Content of the Novation Agreement.* Appendix 8 to this guidance is a novation agreement that provides a guide to preparing novation agreements. This may be adapted, subject to legal counsel's review, to fit specific cases but should include the following provisions:

- (a) Successor contractor/transferee Responsibilities;
- (b) The transferee assumes all the transferor's obligations under the contract;
- (c) The transferor waives all rights under the contract against the Government;
- (d) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
- (e) A statement that nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

(8) Any separate agreement between the transferor and the transferee regarding assumption of liabilities (e.g., an Advance Agreement covering the treatment of long-term incentive compensation plans, cost accounting standards noncompliance issues, environmental cleanup costs, final overhead costs) and any other issues should be incorporated in the novation agreement.

b. *Change of Name Agreements.*

A change of name agreement is appropriate when only the contractor's name changes and the rights and obligations of the parties are not affected.

(1) *Contractor's Responsibilities.* The contractor should submit the following to the CO:

- (a) A written request to the CO to change the name;
- (b) The document effecting the name change, authenticated by a proper official of the State having jurisdiction;
- (c) The opinion of the contractor's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date;
- (d) A list of all affected contracts and purchase orders remaining unsettled between the contractor and the Government, showing for each the contract number and type, and name and address of the contracting office. The CO

may request the total dollar value as amended and the remaining unpaid balance for each contract.

(2) *CO's Responsibilities.* The CO will then prepare a contract modification in the new name of the firm, and reference in the body of the modification the former name and date of the vendor's request. The modification should state something similar to: "This modification changes the name of the Contractor from [enter contractor's previous name] to that shown above. This change is made at the request of the Contractor received on [insert date]."

(3) A format for a Change of Name agreement is in Appendix 5.

New Content: Procurement Guidance:

T3.10.1 Contract Administration

Contract Administration

Section 8 : Novations and Change-of-Name Agreements

a. *Novation.*

(1) Novation is a legal instrument executed by the contractor (transferor), the successor in interest (transferee) and the Government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets. Novations typically occur when the assets of the transferor are purchased by another company but may also be considered when a contractor is unable to perform and another viable contractor is willing to assume the original contractor's rights and duties under the contract.

(2) When in its best interest, the FAA may 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:

(a) All of the contractor's assets; or

(b) The entire portion of the assets involved in performing the contract.
Examples of such transactions include, but are not limited to

(i) Sale of the contractor's assets with a provision for assuming liabilities;

(ii) Transfer of the contractor's assets incident to a merger or corporate consolidation; and

(iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(3) A novation agreement may not be necessary 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.

(4) *Contractor (Transferor) Responsibilities.* Contractors requesting a novation of a contract to recognize a successor in interest must provide the information the CO needs to evaluate and process the novation request. This includes information that validates that novation of the contract is in the best interest of the FAA and should include:

- (a) Three copies of the proposed novation agreement (see "Paragraph (7) Content of Novation Agreement") signed by the original contractor and the successor in interest;
- (b) One copy each, as applicable, of the following:
 - (i) The document describing the proposed transaction, purchase/sale agreement or memorandum of understanding;
 - (ii) A list of all affected contracts between the transferor and the FAA, as of the date of sale or transfer of assets, showing for each, as of that date, the
 - (A) Contract number and type;
 - (B) Name and address of the contracting office;
 - (C) Total dollar value, as amended; and
 - (D) Approximate remaining unpaid balance;
 - (iii) Evidence of the transferee's capability to perform;
- (c) Any other relevant information requested by the CO;
- (d) One copy of each of the following documents, as applicable, as the documents become available except as provided in (5) below:
 - (i) An authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree;

(ii) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets;

(iii) A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets;

(iv) An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts;

(v) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer;

(vi) Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants;

(vii) Evidence that any security clearance requirements have been met;

(viii) The consent of sureties on all contracts listed under (4)(b)(ii) of this section if bonds are required, or a statement from the transferor that none are required.

(5) The CO may modify this list of documents, provided that the CO receives information sufficient to protect the Government's interest.

(6) *CO Responsibilities.* The CO has the primary responsibility to process the novation and determine, in consultation with legal counsel, if it is in the best interest of the FAA.

(a) *Novations Involving More Than One Contract.* When multiple contracts are involved, the CO administering the contract with the largest unpaid dollar balance should coordinate the novation agreement for all FAA contracts.

(b) *Coordination with Other Executive Agencies.* The FAA may elect to have its contracts included in the novation agreement (the "global agreement") being processed by the responsible contracting officer for all of the other executive agencies. If this election is made, the FAA CO should negotiate a separate advance agreement with the contractor that addresses any issues unique to the FAA, if appropriate. This agreement should be attached to and incorporated in the global novation agreement.

(c) *Evaluating the Novation Request.* The CO should consider all the information collected as a result of the proposed novation request with emphasis on the successor's ability to perform including:

- (i) Contractor submissions under (5) above;
- (ii) Information provided by other contracting offices;
- (iii) Information indicative of the successor's responsibility such as debarment and suspension information;
- (iv) National Institute of Health's Past Performance Database;
- (v) Organizational conflict of interest;
- (vi) Any other information that reflects the successor's ability to perform the contract.

(d) *Conflict of Interest (COI).* If the CO determines that a COI exists and cannot be resolved, but the novation is in the best interest of the FAA, the CO may initiate action to waive or mitigate the COI in accordance with AMS Procurement Guidance T.3.1.7.

(e) Coordinate the action with legal counsel to assure legal sufficiency.

(f) *CO's Decision.*

(i) *Rejecting the Novation Request.* If the CO determines that it is not in the best interest of the FAA to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

(ii) *Executing the Novation.* If the CO approves the novation, he/she should

(A) Prepare and sign a written contract modification for each affected contract;

(B) Incorporate a copy of the agreement into the contract modification;

(C) Place the original contract modification in the official contract file;

(D) Distribute the modification to the transferor; the transferee, affected FAA contracting offices, the paying office and any other distribution that is required for contract modifications.

(7) *Content of the Novation Agreement.* Appendix 5 to this guidance is a novation agreement that provides a guide to preparing novation agreements. This may be adapted, subject to legal counsel's review, to fit specific cases but should include the following provisions:

- (a) Successor contractor/transferee Responsibilities;
- (b) The transferee assumes all the transferor's obligations under the contract;
- (c) The transferor waives all rights under the contract against the Government;
- (d) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
- (e) A statement that nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

(8) Any separate agreement between the transferor and the transferee regarding assumption of liabilities (e.g., an Advance Agreement covering the treatment of long-term incentive compensation plans, cost accounting standards noncompliance issues, environmental cleanup costs, final overhead costs) and any other issues should be incorporated in the novation agreement.

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(2) *CO's Responsibilities.* The CO will then prepare a contract modification in the new name of the firm, and reference in the body of the modification the former name and date of the vendor's request. The modification should state something similar to: "This modification changes the name of the Contractor from [enter contractor's previous name] to that shown above. This change is made at the request of the Contractor received on [insert date]."

(3) A format for a Change of Name agreement is in Appendix 6.

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T3.10.1 Contract Administration

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- (v) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer;
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(7) *Content of the Novation Agreement.* Appendix 8.5 to this guidance is a novation agreement that provides a guide to preparing novation agreements. This may be adapted, subject to legal counsel's review, to fit specific cases but should include the following provisions:

- (a) Successor contractor/transferee Responsibilities;
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(2) *CO's Responsibilities.* The CO will then prepare a contract modification in the new name of the firm, and reference in the body of the modification the former name and date of the vendor's request. The modification should state something similar to: "This modification changes the name of the Contractor from [enter contractor's previous name] to that shown above. This change is made at the request of the Contractor received on [insert date]."

(3) A format for a Change of Name agreement is in Appendix [56](#).
