

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\(e\)](#)).

(c) When it is in the Government's interest not 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.

(d) When considering whether to recognize a third party as a successor in interest to Government contracts, the responsible *contracting officer shall* identify and evaluate any significant organizational conflicts of interest in accordance with [subpart 9.5](#). If the responsible *contracting officer* determines that a conflict of interest cannot be resolved, but that it is in the best interest of the Government to approve the novation request, a request for a waiver *may* be submitted in accordance with the procedures at [9.503](#).

(e) When a contractor asks the Government to recognize a successor in interest, the contractor *shall* submit to the responsible *contracting officer* three signed copies of the proposed *novation agreement* and one copy each, as applicable, of the following:

(1) The document describing the proposed transaction, *e.g.*, purchase/sale agreement or memorandum of understanding.

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

(i) Contract number and type;

(ii) Name and address of the *contracting office*;

(iii) Total dollar value, as amended; and

(iv) Approximate remaining unpaid balance.

(3) Evidence of the transferee's capability to perform.

(4) Any other relevant information requested by the responsible *contracting officer*.

(f) Except as provided in paragraph (g) of this section, the contractor *shall* submit to the responsible *contracting officer* one copy of each of the following documents, as applicable, as the documents become available:

(1) 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.

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

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

(4) 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.

(5) 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.

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

(7) Evidence that any security clearance requirements have been met.

(8) The consent of *sureties* on all contracts listed under paragraph (e)(2) of this section if bonds are required, or a statement from the transferor that none are required.

(g) If the Government has acquired the documents during its participation in the pre-merger or pre-*acquisition* review process, or the Government's interests are adequately protected with an alternative formulation of the information, the responsible *contracting officer may* modify the list of documents to be submitted by the contractor.

(h) When recognizing a successor in interest to a Government contract is consistent with the Government's interest, the responsible *contracting officer shall* execute a *novation agreement* with the transferor and the transferee. It *shall* ordinarily provide in part that-

(1) The transferee assumes all the transferor's obligations under the contract;

(2) The transferor waives all rights under the contract against the Government;

(3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond *may* be accepted instead of the guarantee); and

(4) Nothing in the agreement *shall* relieve the transferor or transferee from compliance with any Federal law.

(i) The responsible *contracting officer shall* use the following format for agreements when the transferor and transferee are corporations and all the transferor's assets are transferred. This format *may* be adapted to fit specific cases and *may* be used as a guide in preparing similar agreements for other situations.

Novation Agreement

The ABC Corporation (Transferor), a corporation duly organized and existing under the laws of _____ [*insert State*] with its principal office in _____ [*insert city*]; the XYZ Corporation (Transferee), [*if appropriate add "formerly known as the EFG Corporation"*] a corporation duly organized and existing under the laws of _____ [*insert State*] with its principal office in _____ [*insert city*]; and the *United States of America* (Government) enter into this Agreement as of _____ [*insert the date transfer of assets became effective under applicable State law*].

(a) The parties agree to the following facts:

(1) The Government, represented by various *Contracting Officers* of the _____ [*insert name(s) of agency(ies)*], has entered into certain contracts with the Transferor, namely: _____ [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."*]. The term "the contracts," as used in this Agreement, means the above contracts and *purchase orders* and all other contracts and *purchase orders*, including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and *purchase orders*). Included in the term "the contracts" are also all modifications made under the terms and conditions of these contracts and *purchase orders* between the Government and the Transferee, on or after the effective date of this Agreement.

(2) As of _____, 20___, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a _____ [*insert term descriptive of the legal transaction involved*] between the Transferor and the Transferee.

(3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

(5) The Transferee is in a position to fully perform all obligations that *may* exist under the contracts.

(6) It is consistent with the Government's interest to recognize the Transferee as the successor party to the contracts.

(7) Evidence of the above transfer has been filed with the Government. [*When a change of name is also involved; e.g., a prior or concurrent change of the Transferee's name, an appropriate statement shall be inserted (see example in paragraph(8) of this Agreement)*].

(8) A certificate dated _____, 20___, signed by the Secretary of State of _____ [*insert State*], to the effect that the corporate name of EFG Corporation was changed to XYZ Corporation on _____, 20___, has been filed with the Government.

(b) In consideration of these facts, the parties agree that by this Agreement-

(1) The Transferor confirms the transfer to the Transferee, and waives any *claims* and rights against the Government that it now has or *may* have in the future in connection with the contracts.

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all *claims* against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term "Contractor," as used in the contracts, *shall* refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it *shall* be construed as a waiver of any rights of the Government against the Transferor.

(6) All payments and reimbursements previously made by the Government to the Transferor, and all other previous actions taken by the Government under the contracts, *shall* be considered to have discharged those parts of the Government's obligations under the contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor *shall* have the same force and effect as if made to the Transferee, and *shall* constitute a complete discharge of the Government's obligations under the contracts, to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee-

(i) Assumes under this Agreement; or

(ii) *May* undertake in the future *should* these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

(9) The contracts *shall* remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the *day* and year first above written.

United States of America,

By _____

Title _____

ABC Corporation,

By _____

Title _____

[*Corporate Seal*]

XYZ Corporation,

By _____

Title _____

[*Corporate Seal*]

Certificate

I, _____, certify that I am the Secretary of ABC Corporation, that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this day of _____ 20 ____.

By _____

[*Corporate Seal*]

Certificate

I, _____, certify that I am the Secretary of XYZ Corporation, that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this day of _____ 20 ____.

By _____

[*Corporate Seal*]

Parent topic: Subpart 42.12 - Novation and Change-of-Name Agreements