

Acquiring A Company With Government Contracts

A Checklist Of Unique Issues

PRESENTATION OUTLINE

- Introduction/Overview
- Due Diligence and Sales Agreement Negotiation
- Government Approval Requirements
- Checklist of Unique Considerations
 - Not an exhaustive list
 - Highlight six key issues
- Compliance Risk/Extraordinary Penalties

INTRODUCTION

- **Investor Interest in Government Contractors**
 - Internet bubble bursts
 - Government outsourcing
 - Post-9/11 increase in Homeland Security spending
 - Iraq and Afghanistan
- **“Government Contractors”**
 - Specialty contractors (e.g., IT security, biodefense)
 - Traditional government contractors
 - Commercial companies with some public sector customers

Introduction

- **Today’s presentation focuses on Federal government prime contracts**
- **State government contracts have many of the same considerations**
 - often less complex and lower risk
- **Federal subcontracts**
 - Many of the same unique considerations (e.g., intellectual property)
 - Some issues implicated to much lesser extent (e.g., GSA multiple award schedule contract program)

Due Diligence And Sales Agreement Negotiation

- Due diligence is standard process following term sheet and letter-of-intent
- Buyer assesses quality and risk areas in Seller's business (i.e., "am I really buying what I think I am?")
- Results can affect valuation or terminate transaction
- Checklist of questions and requests for key documents
 - Customized list for government contractors
- Discussions with Seller's management and employees

Due Diligence And Sales Agreement Negotiation

- Sales agreement with Buyer representations/warranties
 - E.g., no litigation except as disclosed
- Customized government contract representations/warranties
 - E.g., no pending government contract audits
- Further customize Buyer representations/warranties based upon due diligence
 - E.g., specific IP developed exclusively at private expense

Due Diligence And Sales Agreement Negotiations

- **Modify other Sales Agreement terms based upon results of due diligence**
- **Increase size of purchase price escrow to account for possible government contracts liabilities**
- **Increase duration of purchase price escrow to match statutory limitations period for potential government claims**
- **Make government approval of Seller's transfer of key contracts a closing condition**

Novation Agreement and Associated Issues

- **Government contracts and contract claims are transferable only with government consent. (41 U.S.C. § 15; 31 U.S.C. § 3727)**
- **Concern about persons of influence selling government contracts dates to Civil War**
- **Consent to transfer now routinely granted, but must be in "government's best interests"**
- **Novation Agreement is the contract modification expressing the government's consent to the transfer**
- **Attachment A**

Novation Agreement and Associated Issues

- 3-party agreement between Seller, Buyer and Government
- Accompanied by FAR-specified document package
 - **Practice Tip.** Sales agreement should specify post-close obligation for Seller to timely provide required documents
- Buyer guarantees Seller's past performance, Seller guarantees Buyer's future performance
- Required for asset purchase contract transfers but generally not required for stock purchases
 - GSA requires for mergers

Novation Agreement and Associated Issues

- "Lead Agency" contracting officer (CO) approves all transferred government contracts
 - Lead agency CO is generally largest contract CO
 - Some opportunity to "forum shop"
- **Practice Tip:** Include GSA Schedule contract Blanket Purchase Agreements (BPAs) and outstanding task and delivery orders on list of transferred contracts
- No government "pre-approval" of Novation Agreement but sometimes advisable to speak with CO during due diligence phase

Novation Agreement and Associated Issues

- Time required for government review and approval varies, can require 2-6 months
- Seller remains the legal party to the contract until novation approval
- Subcontract necessary to cover approval “gap”
 - Buyer performs in the Seller’s name
 - Invoicing and payment issues
 - Government approval (not for commercial items)
 - Transition services agreement for government contracts

Checklist of Unique Issues to Consider when Acquiring a Government Contractor

A. Intellectual Property (IP)

- **Government gains substantial rights in IP developed with government funds**
 - Enhanced rights also to “mixed-funding” IP (public/private)
- **IP includes Inventions, Technical Data and Software**
- **Potentially unrestricted competitor access to government-funded IP for future government procurements**
- **Contractor gains exclusive commercial market rights to IP but only if it meets notice and marking requirements**
 - But possibly releasable under Freedom of Information Act (FOIA)

A. Intellectual Property (IP)

- **Was the Seller’s IP developed exclusively at private expense?**
 - **Red Flag:** Seller performs government research and development (R&D) prime contracts or subcontracts
- **If not developed exclusively at private expense, examine:**
 - **Extent of government’s rights in the IP**
 - **Is it subject to release under FOIA**
 - **Did contractor perfect its ownership of the IP? If not, is defect subject to cure?**
- **Is original IP valuation affected? If so, by how much?**

B. Cost-Reimbursable Contracts

- Cost contracts (vs. fixed-price) often involve complex cost and pricing issues
- Compliance risk areas:
 - *Defective pricing* penalties for inaccurate pre-award pricing disclosures
 - Post-award penalties for time charging errors and billing *unallowable* costs

B. Cost-Reimbursable Contracts

- Post-close performance and integration impacts:
 - Cost accounting issues may dictate maintaining Seller as separate division or subsidiary after close
 - Enhanced government audit rights for cost contracts and subcontracts
 - Cost contracting rules and government audit rights may impede direct collaboration after close
 - Especially if Buyer is a “commercial item” contractor

B. Cost-Reimbursable Contracts

- Is the Seller performing cost-reimbursement contracts?
 - **Red Flags:** (i) R&D contracts; (ii) contract files with cost or pricing data disclosure and certification

- If the Seller is performing cost contracts, examine:
 - Process for cost and pricing data disclosure and certification
 - Time-charging system and procedures
 - Post-close cost accounting system options
 - Barriers to post-close Buyer/Seller collaboration

C. GSA Schedule Contracts

- GSA's multiple award schedule program is the premier government contract sales program for "commercial items" (\$35 billion in annual sales)
- GSA Schedule contracts have complex pre-award pricing disclosure and post-award price reduction monitoring requirements
- Commercial companies often obtain a GSA contract without investing the resources to comply with the contract's complex pricing rules
- GSA's Office of Inspector General and the Department of Justice now focused GSA Schedule contract audits

C. GSA Schedule Contracts

- Does the Seller hold a GSA Schedule contract?
 - **Red Flag.** Seller listed in GSA Schedules E-Library. Check for d/b/a and previous names. <http://www.gsaelibrary.gsa.gov/>
- If Seller holds a GSA Schedule contract, examine:
 - Pre-award sales practices disclosures
 - Procedures for monitoring post-award price reduction events
 - Procedures for paying administrative fee to GSA
 - Procedures for selling only approved items to GSA customers
 - Procedures for complying with product country of origin rules

C. GSA Schedule Contracts

- Administrative considerations
 - Need to identify and confirm new tracking customer based upon Seller's new structure
 - GSA allows only one Schedule per contractor
- Significant Potential Exposure
 - Oracle acquires PeopleSoft in December 2004
 - PeopleSoft employee files *qui tam* False Claims Act lawsuit
 - October 2006, Oracle agrees to pay \$98.5 million fine for GSA contract pricing errors (not discovered in due diligence)
 - Attachment B

D. Small Business Set-Aside Contracts

- **Federal government procurement preference programs for “Small Business”**
- **Small Business size standards are industry-specific, based upon -**
 - **total employees (manufacturing) or**
 - **average annual revenue (services)**
- **“Small Business” is “affiliated” with its owners**
- **“Affiliate” revenue and employees count when determining a company’s size status**

D. Small Business Set-Aside Contracts

- **Small Business status can be a key ingredient in a company’s success**
- **Loss of Small Business status could result in -**
 - **Immediate termination of some contracts**
 - **Re-competition among Small Businesses instead of exercising contract renewal options**
- **Absolute barrier to participation in future competitions for Small Business set-aside contracts**
- **Possible competitive disadvantage at subcontract level**

D. Small Business Set-Aside Contracts

- **Old Rule:** contractor required to update size status representation only for asset purchase
 - **Practice Tip:** structure acquisition as stock purchase if “small business” contracts are key to acquisition
- **New Rule (effective June 30, 2007):** contractor must update its size status within 30 days of stock purchase or merger
 - **Practice Tips:** (i) reach out to CO for key small business contracts before closing; (ii) closing condition of government approval of the contract transfer
- Attachment C

D. Small Business Set-Aside Contracts

- Does the Seller hold set-aside contracts?
 - **Red Flags.** (i) Contract standard form (SF) with “set-aside” box checked; (ii) listed in government databases as “Small Business”
 - Attachment D
- If the Seller holds set-aside contracts, examine:
 - Would Seller qualify in key industries
 - Value of contracts and contract options that could be affected by loss of size status
 - Impact of Seller’s exclusion from future Small Business set-aside procurements

E. Organizational Conflicts of Interest (OCI)

- Traditional defense contractors expanding and merging (e.g., TRW & Northrop)
- OCI rules are designed to prevent unfair structural competitive advantages
 - E.g., evaluating an affiliate for award
 - E.g., helping to draft specifications that you'll later bid on
- OCI could bar participation in procurements to the extent Seller is in the same industry as Buyer
 - Resulting entity disqualified
 - Surrender of existing contracts to avoid or mitigate OCI

E. Organizational Conflicts of Interest (OCI)

- Does the transaction create a potential OCI?
 - **Red Flag:** Buyer and Seller compete in the same or substantially similar industries
- If there is a potential OCI, examine:
 - Value of potentially affected programs
 - Whether existing mitigation plan is sufficient
 - Cost of additional mitigation steps
 - Restriction on future business development resulting from OCI

F. Outstanding Proposals

- Seller often has outstanding, open proposals
- Unlike commercial sector, proposals can result in new contract without further action by Seller (or Buyer)
- Buyer may inherit unanticipated, new obligations
- Protest risk (confusion with regard to “offeror”)
- **Practice Tip:** Create procedure to amend novation agreement if awarded new contracts in Seller’s name after close but before novation agreement approval

F. Outstanding proposals

- Does the Seller have outstanding proposals?
 - **Red Flags:** (i) recently dated proposals; (ii) notice of award letters.
- If so, examine:
 - Performance requirements, terms and price
 - If unfavorable, subject to withdrawal?
 - Whether to exclude/include resulting contract in asset purchase

Transaction Structures

1. Asset Purchase

Buyer purchases some or all of seller's assets.
Buyer may or may not assume liabilities.

2. Stock Purchase

Buyer purchases seller's stock. Corporation continues to exist with assets and liabilities, but with new stockholders.

3. Merger

Combination of firms where one survives to hold the assets and liabilities of the combined firms and the others are dissolved.

Transaction Structures

- **Asset Purchase**
 - Pro: avoid assumption of some liabilities.
 - Con: (i) subject to novation agreement approval process; (ii) cross-guaranty of past and future performance. Note: unclear if novation agreement "guaranty" includes penalties
- **Stock Purchase**
 - Pro: (i) no government approval; (ii) no Seller guaranty of future performance
 - Con: retain all government contract liabilities, including penalties. Note: limitations period 6 years or more
- **Merger**
 - Same as stock purchase except novation agreement may be required

Compliance Risk/Extraordinary Penalties

- **Substantial government audit rights**
 - **Especially for cost-reimbursement and GSA Schedule contracts**
- **Extended statutory limitations periods**
- **Potential for negative press coverage**

Compliance Risk/Extraordinary Penalties

- **Termination for Default**
 - **Excess re-procurement costs**
- **Negative past performance ratings**
- **Suspension and debarment for up to 3 years**

Compliance Risk/Extraordinary Penalties

- **Civil False Claims Act**
 - “Reckless disregard” standard, no intent required
 - Treble damages, \$11k per invoice
 - Oracle pays \$98.5 million fine on \$200 million in contract sales

- **Criminal penalties for intentional violations**

Questions?

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Attachment A:

**Federal Acquisition Regulation (FAR)
Subpart 42.12**

Subpart 42.12—Novation and Change-of-Name Agreements

42.1200 Scope of subpart.

This subpart prescribes policies and procedures for—

- (a) Recognition of a successor in interest to Government contracts when contractor assets are transferred;
- (b) Recognition of a change in a contractor's name; and
- (c) Execution of novation agreements and change-of-name agreements by the responsible contracting officer.

42.1201 [Reserved]

42.1202 Responsibility for executing agreements.

The contracting officer responsible for processing and executing novation and change-of-name agreements shall be determined as follows:

(a) If any of the affected contracts held by the transferor have been assigned to an administrative contracting officer (ACO) (see 2.1 and 42.202), the responsible contracting officer shall be—

- (1) This ACO; or
- (2) The ACO responsible for the corporate office, if affected contracts are in more than one plant or division of the transferor

(b) If none of the affected contracts held by the transferor have been assigned to an ACO, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts shall be the responsible contracting officer.

(c) If several transferors are involved, the responsible contracting officer shall be—

- (1) The ACO administering the largest unsettled dollar balance; or
- (2) The contracting officer (or ACO) designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

42.1203 Processing agreements.

(a) If a contractor wishes the Government to recognize a successor in interest to its contracts or a name change, the contractor must submit a written request to the responsible contracting officer (see 42.1202). If the contractor received its contract under Subpart 8.7 under the Javits-Wagner-O'Day Act, use the procedures at 8.716 instead.

(b) The responsible contracting officer shall—

- (1) Identify and request that the contractor submit the information necessary to evaluate the proposed agreement for recognizing a successor in interest or a name change. This information should include the items identified in 42.1204 (e) and (f) or 42.1205(a), as applicable;

(2) Notify each contract administration office and contracting office affected by a proposed agreement for recognizing a successor in interest, and provide those offices with a list of all affected contracts; and

(3) Request submission of any comments or objections to the proposed transfer within 30 days after notification. Any submission should be accompanied by supporting documentation.

(c) Upon receipt of the necessary information, the responsible contracting officer shall determine whether or not it is in the Government's interest to recognize the proposed successor in interest on the basis of—

(1) The comments received from the affected contract administration offices and contracting offices;

(2) The proposed successor's responsibility under Subpart 9.1, Responsible Prospective Contractors; and

(3) Any factor relating to the proposed successor's performance of contracts with the Government that the Government determines would impair the proposed successor's ability to perform the contract satisfactorily.

(d) The execution of a novation agreement does not preclude the use of any other method available to the contracting officer to resolve any other issues related to a transfer of contractor assets, including the treatment of costs.

(e) Any separate agreement between the transferor and transferee regarding the assumption of liabilities (e.g., long-term incentive compensation plans, cost accounting standards noncompliances, environmental cleanup costs, and final overhead costs) should be referenced specifically in the novation agreement.

(f) Before novation and change-of-name agreements are executed, the responsible contracting officer shall ensure that Government counsel has reviewed them for legal sufficiency.

(g) The responsible contracting officer shall—

(1) Forward a signed copy of the executed novation or change-of-name agreement to the transferor and to the transferee; and

(2) Retain a signed copy in the case file.

(h) Following distribution of the agreement, the responsible contracting officer shall—

(1) Prepare a Standard Form 30, Amendment of Solicitation/Modification of Contract, incorporating a summary of the agreement and attaching a complete list of contracts affected;

(2) Retain the original Standard Form 30 with the attached list in the case file;

(3) Send a signed copy of the Standard Form 30, with attached list to the transferor and to the transferee; and

(4) Send a copy of this Standard Form 30 with attached list to each contract administration office or contracting office involved, which shall be responsible for further appropriate distribution.

42.1204 Applicability of novation agreements.

(a) 41 U.S.C. 15 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(f) 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]

42.1205 Agreement to recognize contractor's change of name.

(a) If only a change of the contractor's name is involved and the Government's and contractor's rights and obligations remain unaffected, the parties shall execute an agreement to reflect the name change. The contractor shall forward to the responsible contracting officer three signed copies of the

Change-of-Name Agreement, and one copy each of the following:

(1) The document effecting the name change, authenticated by a proper official of the State having jurisdiction.

(2) 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.

(3) 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 contracting officer may request the total dollar value as amended and the remaining unpaid balance for each contract.

(b) The following suggested format for an agreement may be adapted for specific cases:

CHANGE-OF-NAME AGREEMENT

The ABC Corporation (Contractor), a corporation duly organized and existing under the laws of _____ [insert State], and the UNITED STATES OF AMERICA (Government), enter into this Agreement as of _____ [insert date when the change of name 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 and purchase orders with the XYZ Corporation, 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 by the Government and the Contractor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Contractor has any remaining rights, duties, or obligations under these contracts and purchase orders)

(2) The XYZ Corporation, by an amendment to its certificate of incorporation, dated _____ 20__, has changed its corporate name to ABC Corporation

(3) This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change

(4) Documentary evidence of this change of corporate name has been filed with the Government

(b) In consideration of these facts, the parties agree that—

(1) The contracts covered by this Agreement are amended by substituting the name "ABC Corporation" for the name "XYZ Corporation" wherever it appears in the contracts; and

(2) 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]

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]

Attachment B:

**Department of Justice Press Release for
PeopleSoft Settlement**



Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, OCTOBER 10, 2006
WWW.USDOJ.GOV

ODAG
(202) 514-2007
TDD (202) 514-1888

Oracle Agrees to Pay \$98.5 Million for False Pricing Information Provided by PeopleSoft to Obtain Government Contract

Firm Allegedly Misrepresented Its Discounting Practices

WASHINGTON – Oracle Corporation (Oracle) has agreed to pay the United States \$98.5 million to settle its liability for defective pricing disclosures made by PeopleSoft Inc. (PeopleSoft) during the negotiation of a contract under the General Services Administration (GSA) Multiple Award Schedule (MAS) program, Deputy Attorney General Paul J. McNulty, Assistant Attorney General Peter D. Keisler of the Justice Department's Civil Division, United States Attorney Rod J. Rosenstein of the District of Maryland, and GSA Inspector General Brian D. Miller, announced today. The settlement resolves allegations that PeopleSoft made pricing disclosures to GSA that were not current, accurate and complete concerning the sale of software licenses and related maintenance services. As a result of the defective disclosures, most federal purchasers under PeopleSoft's MAS contract paid inflated prices for purchases of software and services between March 17, 1997, and Sept. 30, 2005. Due to Oracle's acquisition of PeopleSoft, it inherited PeopleSoft's liability under the GSA contract.

"GSA's Multiple Award Schedule program serves vendors and government purchasers by eliminating red tape while insuring that government agencies get a fair deal for the American taxpayer's procurement dollars," said Deputy Attorney General McNulty. "The program works well when vendors follow the disclosure rules and provide GSA with the information it needs to negotiate good prices for government purchasers. This agreement demonstrates the Department's determination to hold vendors accountable for abusing GSA's trust and damaging its programs."

The payment is the largest ever obtained by the United States in a civil settlement under the False Claims Act involving the GSA's MAS program.

Under the MAS Program, vendors agree to disclose their commercial pricing policies and practices in exchange for an opportunity to gain access to the broad federal marketplace and the ease of administration that comes from selling to hundreds of government purchasers under one central contract. GSA regulations require that vendors seeking an MAS contract disclose their "current, accurate and complete" commercial pricing policies and practices to GSA during negotiations.

"I am proud of the collaborative efforts of the Commercial Litigation Branch, the U.S. Attorney's Office, the GSA Office of the Inspector General, and relator's counsel to protect the public fisc and strengthen the integrity of the federal procurement system," said Assistant Attorney General Keisler. "All companies that want to avoid their disclosure obligations while selling products to the United States government are on notice today that we will use the False Claims Act and all other civil legal tools at our disposal to fight fraud and abuse."

The lawsuit alleged that during PeopleSoft's negotiation of its initial contract and two extensions of the contract's term, PeopleSoft understated the discounts it provided to commercial customers. More specifically, the suit alleged that PeopleSoft failed to disclose the true nature of its multiple product discounting practice, a program that afforded buyers incrementally steeper discounts off list prices on software products based on the number of products purchased at one time. This, plus the use of non-standard discounts, caused at least one 1994 customer to obtain discounts of up to 74 percent off the listed price. GSA relied on the faulty disclosures and negotiated MAS Program discounts for federal customers that were much less favorable than the total discounts PeopleSoft's best commercial customers enjoyed. As a result, federal agencies overpaid for software and related maintenance.

"Because PeopleSoft did not give GSA accurate pricing information, it negotiated higher prices for its products and services than it would have obtained if GSA had known the truth," said U.S. Attorney Rosenstein. "The substantial recovery in this case will help to ensure that vendors provide truthful information and the government pays a fair price for products and services."

GSA Inspector General Miller said, "I want to commend the outstanding work of the Department of Justice, U.S. Attorney Rod Rosenstein and his office, and the GSA IG team for bringing this matter to a successful conclusion. GSA's MAS contracting program – with sales of well over \$30 billion in the last fiscal year – depends on vendors' honesty in negotiations. PeopleSoft misled and overcharged the government for years. Without the auditors' specialized training and years of experience examining federal contracting arrangements, the wool would have remained over everyone's eyes and the taxpayers might have again taken a fleecing."

This case was filed under the qui tam or whistleblower provisions of the False Claims Act by James A. Hicks in the U. S. District Court for the District of Maryland. Mr. Hicks is a former employee of PeopleSoft and the conduct alleged in the qui tam suit predated Oracle's acquisition of PeopleSoft. Hicks will receive \$17,730,000 of the total recovery as his statutory award. Under the whistleblower provisions of the False Claims Act, private citizens known as "relators" can sue on behalf of the government to recover federal funds that were obtained by false or fraudulent claims, and receive a portion of the proceeds of a settlement or judgment awarded against the defendant.

The settlement resulted from an investigation by the Civil Division of the Department of Justice, the U.S. Attorney's Office for the District of Maryland, and GSA's Office of Inspector General.

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Attachment C:

K&L Gates E-Alert re: SBA Rule Requiring Updated Size Status Certifications

SBA to Require Updated Contractor Size Status Certifications

K&L GATES GOVERNMENT CONTRACTS ALERT

by Derek D. Crick, Kelley P. Doran, G. Matthew Koehl

November 29, 2006

The Small Business Administration recently published a rule that will require contractors to provide updated small business size status certifications on "long term" contracts and upon merger or acquisition.¹ The rule is intended to address criticism from small business advocates and government auditors that large businesses regularly benefit from government procurement programs designed to assist small businesses. Government agencies have become increasingly reliant upon multiple-award, indefinite delivery /indefinite quantity (ID/IQ) contracts, which run for 10 or even 20 years with options. Since size status is determined at the time of initial award, many such contracts have retained their "small" designation even though the contractor outgrew the applicable size standard or was acquired by a large contractor after initial award.²

The rule will require companies to provide updated size status certifications on "long term contracts," defined as any contract exceeding 5 years. The updated size status certifications must be provided prior to year 6 of contract performance and every time an option is exercised thereafter. Since 2003, GSA has required multiple award schedule (MAS) contractors to supply an analogous updated size status certification in conjunction with the exercise of MAS contract options. In addition, the rule authorizes contracting agencies to require updated size status certifications in connection with individual orders placed against long-term contracts, even if the long-term contract is properly classified as small.

The rule will also require contractors to provide updated size status certifications within 30 days of merger or acquisition by another company. Currently, an updated size status certification is generally required only for asset purchase transactions requiring government novation agreement approval. Contractors have deliberately structured some acquisitions as stock purchases (vs. an asset purchases) to reduce the risk of losing small business status for key contracts. The new rule removes this distinction between asset purchases and stock purchases.

It is important to understand that a contract's reclassification as "large" would not require contract termination (although the agency might be prohibited from exercising additional option periods of contracts originally awarded on a set-aside basis). Rather, the contracting agency will no longer be able to claim credit towards its small business contracting goals for dollars placed against a contract reclassified as "large." Therefore, it seems likely that in some instances the agency will be less inclined to place additional orders or to exercise additional contract options where small business credit is no longer available.

The rule is applicable to all small business programs, including the 8(a) business development program. It is effective June 30, 2007.

¹ The rule is found at the following link: http://www.klgates.com/files/upload/Small_Business_Rule.pdf.

² See, e.g., "Contract Management: Reporting of Small Business Contract Awards Does Not Reflect Current Business Size" (Report GAO-03-704T, May 7, 2003) found here: http://www.klgates.com/files/upload/contract_management.pdf.

Attachment D:

**Tools for Identifying Small Business
Contracts and Contractors**

Dynamic Small Business Search

Most hotlinks on this page will open a new browser window.
(This [Return to CCR Home Page](#) hotlink does not.)

This is generally a self-certifying database. The SBA does not make any representation as to the accuracy of any of the data included, other than certifications relating to 8(a) Business Development, HUBZone or Small Disadvantaged Business status. The SBA strongly recommends that contracting officers diligently review a bidder's small business self-certification before awarding a contract.

[Privacy Statement](#)

[Help](#)

State(s):

[\(How to make multiple selections.\)](#)

- (any state)
- AL - Alabama
- AK - Alaska
- AA - American Atlantic (APO/FPO)
- AE - American Europe (APO/FPO)
- AP - American Pacific (APO/FPO)
- AS - American Samoa
- AZ - Arizona
- AR - Arkansas
- CA - California

Congressional District:

(Requires exactly one state from the list at left.)
2-digit numeric (leading 0 if 1 digit),
or AL for At Large

County Code:

(Requires exactly one state from the list at left.)
3-digit numeric (leading zeroes if 1 or 2 digits)

- Area Code or Phone Number Initial Fragment, (1 to 12 characters, 999-999-9999 format)
- [Metropolitan Statistical Area](#) (4-digit numeric, leading 0's if fewer digits)
- [SBA Servicing Office](#): (4-digit numeric, leading 0's if fewer digits)
- Zip Code or Zip Code Initial Fragment (1 to 5 numeric digits)

<p>SBA 8(a) Certification:</p> <p> <input type="radio"/> Required (Active Certifications only) <input type="radio"/> Required (Active Certifications and Previously Certified) <input type="radio"/> Required (Previously Certified only) <input checked="" type="radio"/> Not Required </p>	<p>Small Disadvantaged Business:</p> <p> <input type="radio"/> Required (Active Certifications only) <input type="radio"/> Required (Active Certifications and Previously Certified) <input type="radio"/> Required (Previously Certified only) <input checked="" type="radio"/> Not Required </p>
<p>Disadvantaged Business Enterprise, Certification States:</p> <ul style="list-style-type: none"> Not Required AL - Alabama AK - Alaska AA - American Atlantic (APO/FPO) AE - American Europe (APO/FPO) 	<p>HUBZone Certification:</p> <p> <input type="radio"/> Required (Active Certifications only) <input type="radio"/> Required (Active Certifications and Previously Certified) <input type="radio"/> Required (Previously Certified only) <input checked="" type="radio"/> Not Required </p>
<p>The SBA's 8(a), HUBZone and SDB certifications are also made available to external software via: SBSS Public Web Services For more information, see also SBA Certifications in the search help page.</p>	

Other Ownership Data:

- Minority Native American [Woman/Women](#)
 Veteran Service Disabled Veteran

Nature of Business (comma separated, up to 5 entries or 40 characters) for:

NAICS Code(s):	<input checked="" type="radio"/> Any <input type="radio"/> All (slower)	<input type="text"/>	Help
"Buy Green" NAICS Code(s):	<input checked="" type="radio"/> Any <input type="radio"/> All (slower)	<input type="text"/>	Help

Or keywords (comma separated, up to 25 entries or 125 characters) for:
 [Keywords:](#) Any All (slower) [Help](#)

General Nature of Business:

- Manufacturing Construction
 Research & Development Services
 Has TECH-Net Award(s). (Does not require checking Research & Development, above.)

Profile Last Updated (date):

- On or before (MM/DD/YY or MM/DD/YYYY format)
 On or after

Minimum Acceptable Bonding Levels:

Construction Bonding Level, in dollars (per contract):
Construction Bonding Level, in dollars (aggregate):
Service Bonding Level, in dollars (per contract):
Service Bonding Level, in dollars (aggregate):

Quality Assurance Standards:

- ANSISQC Z1.4 ISO-9000 Series ISO 10012-1
 MIL-Q-9858 MIL-STD-45662A

Size:

- At least Employee(s) and/or Annual Gross Revenue in dollars
 No more than Employee(s) and/or Annual Gross Revenue in dollars

Capabilities:

Accepts Government Credit Card?: <input type="radio"/> Required <input checked="" type="radio"/> Not Required
GSA Advantage Contract?: <input type="radio"/> Required <input checked="" type="radio"/> Not Required
Exporter?: <input type="radio"/> Yes <input type="radio"/> Wants to Be <input type="radio"/> Either <input checked="" type="radio"/> Not Required (To search on Dynamic Small Business Search export profiles, you can use the DSBS-affiliated Trade Mission Online Search .)

Searching for a specific firm (use ONE of the following):

CAGE Code: <input type="text"/>	(up to 5 characters)
DUNS Number(s): <input type="text"/>	(comma separated, up to 25 DUNS numbers or 125 characters)
8(a) Case Number: <input type="text"/>	(6-digit number)
EIN: <input type="text"/>	(99-999999 format)
Company Name or Trade Name: (slow) (up to 120 characters)	<input type="radio"/> Do "sounds like" matching <input checked="" type="radio"/> Do "first letters" matching <input type="radio"/> Do "contains" matching

Maximum number of firms to be returned at a time:

Show the following fields in the firm list:

Name and Trade Name of Firm; Contact; Address and City, State Zip; Capabilities Narrative

Show those fields in:

<input checked="" type="radio"/> Table format	font size (*): <input type="radio"/> Tiny <input checked="" type="radio"/> Normal <input type="radio"/> Large
<input type="radio"/> Mail-merge format	Delimited by: <input checked="" type="radio"/> comma <input type="radio"/> comma and blank <input type="radio"/> tab
(*) On some browsers, the font size options will also affect mail-merge format.	

NOTE: Search results will be randomized by the time of day you press the "Search Using These Criteria" button.



[Home](#) | [Search](#) | [FAQs](#) | [Help](#) | [Security Notice](#)

Welcome to the Online Representations and Certifications Application (ORCA)

ORCA is an e-Government initiative that was designed by the Integrated Acquisition Environment (IAE) to replace the paper based Representations and Certifications (Reps and Certs) process.

Please login to add or update your ORCA record

DUNS Number

+4 (if applicable)

MPIN

Login to ORCA

Reset Fields

NOTE: [Click here](#) to learn how to create your MPIN.

Search current ORCA Record

DUNS Number

+4 (if applicable)

Search

Reset Fields

[Click Here](#) for Archive Search



Other Links

[Small Business Administration \(SBA\)](#)

[The U.S. Government's Official Web Portal \(USA.gov\)](#)

[Central Contractor Registration.gov \(CCR\)](#)

[Business Partner Network \(BPN\)](#)

[FAC 01-26](#)

The ORCA website is designed to be used with Internet Explorer 6.0 or Netscape 7.x

NOTE: Session will terminate after 20 minutes of inactivity.

[Click Here](#) for feedback or comments form.

**SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS
OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30**

1. REQUISITION NUMBER _____ PAGE 1 OF _____

2. CONTRACT NO. _____ 3. AWARD/EFFECTIVE DATE _____ 4. ORDER NUMBER _____ 5. SOLICITATION NUMBER _____ 6. SOLICITATION ISSUE DATE _____

7. FOR SOLICITATION INFORMATION CALL:  a. NAME _____ b. TELEPHONE NUMBER (No collect calls) _____ 8. OFFER DUE DATE/ LOCAL TIME _____

9. ISSUED BY _____ CODE _____ 10. THIS ACQUISITION IS
 UNRESTRICTED OR SET ASIDE: _____ % FOR:
 SMALL BUSINESS EMERGING SMALL BUSINESS
 HUBZONE SMALL BUSINESS
 NAICS: _____
 SIZE STANDARD: _____ SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS 8(A)

11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED
 SEE SCHEDULE
 12. DISCOUNT TERMS _____ 13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)
 13b. RATING _____ 14. METHOD OF SOLICITATION
 RFQ IFB RFP

15. DELIVER TO _____ CODE _____ 16. ADMINISTERED BY _____ CODE _____

17a. CONTRACTOR/OFFEROR CODE _____ FACILITY CODE _____ 18a. PAYMENT WILL BE MADE BY _____ CODE _____
 TELEPHONE NO. _____

17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER
 18b. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED SEE ADDENDUM

19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT
(Use Reverse and/or Attach Additional Sheets as Necessary)					

25. ACCOUNTING AND APPROPRIATION DATA _____ 26. TOTAL AWARD AMOUNT (For Govt. Use Only) _____

27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4. FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA ARE ARE NOT ATTACHED
 27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4. FAR 52.212-5 IS ATTACHED. ADDENDA ARE ARE NOT ATTACHED

28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN _____ COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED
 29. AWARD OF CONTRACT: REF. _____ OFFER DATED _____. YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:

30a. SIGNATURE OF OFFEROR/CONTRACTOR _____ 31a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER) _____

30b. NAME AND TITLE OF SIGNER (Type or print) _____ 30c. DATE SIGNED _____ 31b. NAME OF CONTRACTING OFFICER (Type or print) _____ 31c. DATE SIGNED _____

19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT

32a. QUANTITY IN COLUMN 21 HAS BEEN

RECEIVED
 INSPECTED
 ACCEPTED, AND CONFORMS TO THE CONTRACT, EXCEPT AS NOTED: _____

32b. SIGNATURE OF AUTHORIZED GOVERNMENT REPRESENTATIVE	32c. DATE	32d. PRINTED NAME AND TITLE OF AUTHORIZED GOVERNMENT REPRESENTATIVE
--------------------------------------------------------	-----------	---------------------------------------------------------------------

32e. MAILING ADDRESS OF AUTHORIZED GOVERNMENT REPRESENTATIVE	32f. TELEPHONE NUMBER OF AUTHORIZED GOVERNMENT REPRESENTATIVE
	32g. E-MAIL OF AUTHORIZED GOVERNMENT REPRESENTATIVE

33. SHIP NUMBER <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL	34. VOUCHER NUMBER	35. AMOUNT VERIFIED CORRECT FOR	36. PAYMENT <input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL	37. CHECK NUMBER
------------------------------------------------------------------------------------	--------------------	---------------------------------	------------------------------------------------------------------------------------------------------------------	------------------

38. S/R ACCOUNT NO.	39. S/R VOUCHER NUMBER	40. PAID BY
---------------------	------------------------	-------------

41a. I CERTIFY THIS ACCOUNT IS CORRECT AND PROPER FOR PAYMENT	42a. RECEIVED BY (<i>Print</i>)		
41b. SIGNATURE AND TITLE OF CERTIFYING OFFICER	41c. DATE	42b. RECEIVED AT (<i>Location</i>)	
		42c. DATE REC'D (<i>YY/MM/DD</i>)	42d. TOTAL CONTAINERS