

Government Contracts Advisory

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DCMA Form 1620 Places Enormous Potential Liabilities On Novation Agreement Transferors

When a government contractor acquires another government contractor or a business unit of such a contractor in a transaction that requires the parties to enter into a Novation Agreement, the acquiring entity normally must execute a Defense Contract Management Agency (DCMA) Form 1620, "Guaranty Agreement for Corporate Guarantors." This Agreement is intended to embody the obligations undertaken by the Guarantor pursuant to paragraph (b)(8) of the boilerplate Novation Agreement found at FAR 42.1204(i).

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.

By its express wording, this language obligates the Transferor to the requirements and liabilities of the contracts being performed by the Transferee as of the date of the Agreement. This provision is consistent with paragraph (a)(1) of the boilerplate Novation Agreement:

The Government, represented by various Contracting Officers ... has entered into certain contracts with the Transferor, namely 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

Thus, it appears to be abundantly clear that the government intends for the provisions of Novation Agreements to cover existing contracts, including possible future modifications issued under those contracts. The wording of the DCMA Form 1620, however, is not consistent with that understanding. Paragraph 10.a. of Form 1620 states:

Except as otherwise provided herein, this Guaranty Agreement refers to and shall be effective with respect to any and all contracts for supplies or services entered into, on or after the date of this Agreement between the Government and the Contractor.

As worded, this provision purports to obligate the Guarantor forever with respect to contracts entered into between the government and the business unit being sold or transferred. It seems apparent that the wording in paragraph 10.a. of the Form 1620 was intended to state: "on or prior to the date of this Agreement," not "on or after."

Since the provision as worded can necessitate the incurrence of substantial cost to protect against possible future, unknown and unknowable liabilities, DCMA should undertake to modify the wording of its Form 1620 as soon as possible. Such a request has been made. In the meantime, contractors should try to get the ACO responsible for entering into any Novation Agreement to limit the coverage of the Guaranty obligations to those contracts in existence as of the date of the Guaranty Agreement.

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