

Novation Agreements



Guiding Principles:

- *Novation* is a legal concept that aims to achieve a process of substitution. It is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that already exists.
- The effect of a novation is to discharge the original contract between two parties (the continuing party and the outgoing party) and substitute it with a new contract between the continuing party and a new party (the incoming party).

[References: [FAR 42.12](#), [FAR 4.11](#), [41 U.S.C. 6305\(a\)](#)]

1.0 Summary of Latest Changes

This update: (1) implements the Government policy pursuant to the references listed within this Chapter and (2) establishes policies, assigns responsibilities, and provides procedures for novation, change-of-name, and business recombination (restructuring) agreements.

2.0 Discussion

This chapter provides guidance on Novation Agreement processes and required documentation. If it is consistent with the Government's interest, it is the DOE policy to follow the procedures below described in this chapter.

2.1 Inherent Consideration. The inherent considerations that should be made related to a Novation Agreement include:

2.1.1 Is a Novation Agreement Required? Federal law prohibits the transfer of government contracts to a third party (discussed in paragraph 2.4). Nevertheless, under certain circumstances, FAR 42.1204(a)(2) identifies three situations in which the Government may consent (through the execution of a formal "Novation Agreement") to the transfer of a federal contract.

In the end, a contractor's novation obligations will depend upon the form of merger/acquisition selected by the parties. While many factors obviously will bear upon that selection, the potential novation obligations should be among them.

2.1.2 What Should Be Included In The “Novation Package”? Once a contractor has determined that a novation agreement is required, it will need to prepare a “novation package” for submission to the cognizant contracting officer (more on this below). While the contracting officer has some discretion in the matter, he/she generally will expect the parties to submit the documents listed in Paragraph 2.4 below.

2.1.3 To Whom Should The “Novation Package” Be Submitted? The “novation package” is usually submitted to the cognizant contracting officer who will coordinate the novation process on behalf of all interested federal agencies. This single point of contact relieves the contractor of the burden of having to submit paperwork to multiple agencies, and it allows the Government to speak with a single voice.

The appropriate point of contact may vary depending on whether the acquisition involves a single transferor or multiple transferors. In situations involving only one transferor and a CO has been assigned to any of the contracts, then the “novation package” should be submitted to that CO or the CO responsible for corporate office (if the contracts are in more than one plant or division). Alternatively, if a CO has not been assigned to any of the contracts, then the “novation package” should be submitted to the CO with the largest unsettled dollar balance (unbilled plus billed but unpaid).

2.2 Procedures. The following procedures and steps are required when processing a Novation Agreement. Documentation of the results, and in support of the results, is required and must be included in the official contract file.

2.2.1 CO Responsibility. Recognize a successor in interest to Government contracts when contractor assets are transferred. The recognition process is conducted through execution of a legal document “Novation Agreement” by the contractor (transferor), successor in interest (transferee), and the Government. Through the use of the “Novation Agreement,” the transferor, among other things, 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. Document, in the contract file, the principal elements of the negotiated agreement and the justification for the CO’s acceptance/non-acceptance of the contractor’s proposal.

2.2.2 Evaluation Requirement. Evaluate the proposal of sale, business combination, or change-of-name.

2.2.3 Recognition of Successor. Determine whether it is in the best interest of the Government to recognize a successor in interest to the Government contract. Recognize a change in a contractor’s name. 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.

2.2.4 Execute Novation/Change-of-Name Agreement. The CO is required to prepare a modification in order to execute the Novation/Change-of-Name Agreement. The agreements are legal documents requiring the related parties to use suggested format and contents. The format may be adapted to fit specific cases by the CO in consultation with DOE's Office of General Counsel (GC).

2.2.5 Distribution. Distribute the agreements to related parties which include but are not limited to the transferor, the transferee and the Chief Financial Officer (CF). The agreements must be reviewed by GC prior to "acceptance" and distribution.

2.2.6 Records Management. Comply with records management and retention requirements, as further described in [DOE Records Management Handbook](#).

2.3 Proposal of Sale, Business Combination, or Change-of-Name.

2.3.1 Applicability. Section 6305(a) of Title 41 U.S.C. (formerly section 15 of Title 41 U.S.C.) prohibits transfer of Government contracts from the contractor to a third party. However, the Government may, when in its interest, recognize a third party as the successor in interest to a Government contractor when the third party's interest in the contract arises out of the transfer of all the contractor's assets.

2.3.2 Contractor's Responsibility. 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.

2.3.3 Documents. When a contractor asks the Government to recognize a successor in interest (Novation) or recognize a change in contractor's name (Change-of-Name), the contractor shall forward documents to the CO in accordance with FAR Part 42.1204(e).

2.3 Evaluation of Contractor's Novation/Change-of-Name Agreement.

2.3.1 List of Documents for Novation. The CO shall obtain one copy of each of the documents, as applicable, in accordance with FAR 42.1204(f) and the documents stated in paragraph 2.4.3.

2.3.2 Modification of Document List. The Novation Agreement Checklist, included as Attachment 1 in this Guide Chapter, should be used as a tool to confirm whether all necessary documents are submitted. If the CO 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 CO may modify the list of documents to be submitted by the contractor.

2.3.3 Determination of Adequacy of Documentation. The CO shall review the documentation submitted by the contractor, and promptly notify the contractor of any deficiencies and request corrective action as required.

2.3.4 Review Request. Prior to the execution of a Novation Agreement, the CO must find that the proposed Novation is in the government's best interest. In order to make such a finding, the CO must consider legal sufficiency and the transferee's capability to perform the contract.

2.3.4.1 Legal Sufficiency. In instances of novation and/or change of name, the CO shall obtain review from GC for a legal sufficiency determination. In instances in which a firm that is to be party to the agreement, a known affiliate of the same, or associated natural person is/are debarred, suspended, proposed for debarment or suspension, or when the CO is aware that such action is being considered even though not yet done, the CO shall notify counsel as part of such request. The official contract file must contain GC's legal sufficiency determination.

2.3.4.2 Financial Capability. As appropriate, a financial capability review should be guided by the specific requirements set forth in the contracts being transferred and should include, but not be limited to, assets, liabilities, and revenue stream of the transferee.

2.3.4.3 Technical Capability. For a Novation Agreement, the CO shall review information regarding the transferee's capability to perform the technical requirements specified in the contracts being transferred. Review and input may be provided by Government personnel at the program activity, and/or other Government personnel involved with or having knowledge of, the requirements and capabilities needed for the item(s) or service(s) at issue.

2.3.4.4 Security Requirements. For a Novation Agreement, the CO shall ensure that the transferee meets all security classification requirements (for both personnel and facilities) specified in the contracts being transferred.

2.3.4.5 Foreign Interests. For a Novation Agreement, the CO shall review whether the transfer of assets and liabilities could potentially result in foreign ownership, control or influence (FOCI), which could jeopardize the ability to perform current and future classified contracts.

2.3.4.6 Business Status. For a Novation Agreement, the CO shall review whether the transferee meets any specified set-aside requirements based on business status, such as small business. Also consider whether the transferee will be able to retain such status after the transfer is completed. FAR 19.301-2(b)(1) requires contractors to recertify their small business size status within 30 days after execution of a novation agreement.

2.3.4.7 Intellectual Property/Data Rights. For a Novation Agreement, the CO shall carefully consider whether the control, ownership, and transfer of data rights has been properly addressed in the transfer of assets and liabilities between the contractors in accordance FAR 27.4. Most importantly, ensure that Government interest and/or rights in such data has been properly addressed and protected.

2.3.4.8 Other Considerations. The CO shall also consider any implications the proposed Novation Agreement may have on Cost Accounting Standards (CAS) coverage, approval status for business systems (accounting, estimating and purchasing), etc., of the transferee.

2.3.5 Conflicts of Interest. When considering whether to recognize a third party as a successor in interest to Government contracts, the CO shall identify and evaluate any organizational conflicts of interest in accordance with FAR 9.5. If the CO determines that a conflict of interest cannot be resolved, but that it is in the best interest of the Government to approve the Novation Agreement request, in accordance with FAR 42.1204(d) a request for a waiver of application of general rule or procedure in FAR 9.5 may be submitted in accordance with the procedures at FAR 9.503.

2.3.6 External Restructuring Costs. When a Novation Agreement is requested and the transferee intends to incur restructuring costs for external restructuring activities, the CO for the transferor shall include “[t]he 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” (or other similar language proposed by GC), 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, as paragraph (b)(7) of the Novation Agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(i).

2.3.7 Formal Agreement. There may be instances in which the contractor asserts that a Novation Agreement is not required. For one example, a “conversion” from one form of legal entity to a Limited Liability Company (LLC) may be such an instance. The determination of whether a Novation Agreement is needed can entail technical legal considerations, and so the CO should seek assistance from legal counsel before concluding that a Novation Agreement is or is not required in any instance in which questions regarding need for such agreement arise. Further, even if a Novation Agreement is not needed, a formal agreement may be appropriate. Refer to FAR 42.1204(b)

2.4. Determination to Recognize a Successor in Interest or Change-of-Name. The following steps should be followed by the CO:

2.4.1 Basis of Determination. After receiving a legal sufficiency determination from GC, the CO shall make a determination whether or not it is in the Government’s interest to

recognize the proposed successor in interest, giving consideration to the following, in accordance with FAR 42.1203(c).

2.4.2. Novation Agreement. The CO shall notify the contractor if he or she decides that a successor will not be recognized. In this situation, the original contractor remains under contractual obligation to perform the existing contracts as provided in FAR 42.1204(c).

2.4.3. Change-of-Name. When a contractor requests in writing that the Government recognize a name change, the CO, after consultation with GC, shall determine whether the Government and the contractor's obligations remain unaffected and whether advance notification to the contracting and administration offices is warranted in accordance with FAR 42.1205 .

2.4.4. Coordination among DOE Contracting Offices.

2.4.4.1. The cognizant CO over the transferee shall have the responsibility for resolving and dispositioning pre-existing open issues such as reportable audits after the execution of the Novation Agreement. However, the cognizant CO over the transferor shall make every effort to resolve/disposition all open issues prior to the execution of the Novation Agreement.

2.4.4.2. If there are different COs for the transferor and the transferee, such COs shall coordinate and cooperate in the orderly transition of contract. The contracts who manage the COs cognizant over transferor and/or transferee shall communicate with each other in order to resolve and disposition pre-existing open issues.

2.4.4.3. If the contracts director supervises both COs cognizant over transferor and/or transferee, the contracts director shall make a decision on how to resolve and disposition pre-existing open issues.

2.4.5. Memorandum of Record (MOR). In the contract file, the CO shall document the principal elements of the negotiated agreement and the process of decision making. The MOR must support the final conclusion reached by the CO. The MOR shall:

- Be appropriately detailed and organized to provide a clear link to the findings, conclusions, and recommendations contained in the record. The rationale and extent of procedures performed, including the conclusions reached, shall be documented in the MOR as well.
- Be signed by the supervisor as evidence of the work performed.
- Include the analysis of other functional specialist comments or reports, including but not limited to Defense Contract Audit Agency (DCAA), legal counsel, etc., when the CO relies on the specialists' work provided.
- Include sufficient documentation to describe the scope of work performed, the area covered, the nature and extent of procedures applied, the documents obtained and analyzed, and the conclusion, even though the extent of

documentation needed is a matter of the CO's judgment. The MFR may include copies of documents obtained from the contractor, review reports or comments provided by legal counsel, DCAA, and/or other functional specialists.

2.5 Execution of Novation/Change-of-Name Agreement.

2.5.1 Contents of Novation Agreement. The CO, the transferor, and the transferee shall execute the Novation Agreement. It shall ordinarily provide in part that in accordance with FAR 42.1204(h).

2.5.1.1 Specialized Language. The cognizant CO shall include “[t]he 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” as paragraph (b)(7) of the Novation Agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(i) when a Novation Agreement is requested and the transferee intends to incur restructuring costs for external restructuring activities.

2.5.1.2 Assumption of Liabilities. Any separate agreement between the transferor and the transferee regarding the assumption of liabilities (e.g., long-term incentive compensation plans, Cost Accounting Standards non-compliances, environmental cleanup costs, and final overhead costs) should be referenced specifically in the Novation Agreement in accordance with FAR 42.1203(e). Legal sufficiency determination from GC is required.

2.5.2 Format. The format for agreements stated in FAR 42.12 shall be followed by the CO.

2.5.3 Novation Agreement. The CO shall use the format stated in FAR 42.1204(i) for agreements when the transfer and transferee are corporations and all the transferor's assets are transferred. The format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations. However, before making any substantial alterations or additions to the Novation Agreement format at FAR 42.1204(i), the CO, with input from GC. The CO shall resolve any objections from the addressees before executing the agreement.

2.5.4 Change-of-Name. Upon receipt of a legal sufficiency determination, the CO and contractor shall execute the Change-of-Name Agreement in accordance with FAR 42.1205(a). A suggested format is in FAR 42.1205(b), which may be adapted for specific cases.

2.5.5 Contract Modification. The CO shall issue a contract modification, utilizing, a Standard Form (SF) 30, Amendment of Solicitation/Modification of Contract, to transfer/update contracts.

2.5.6 System for Award Management Coordination. In those cases where a contractual modification is required (e.g., Novation and Change-of-Name Agreements or change in address/CMO), it is important that COs advise contractors to wait until such modifications are actually processed before making changes to SAM information. However, since timing is crucial, the CO shall advise the contractor to update SAM within 48 hours after the signing of the modification. The CO shall follow-up with the contractor or check the SAM to confirm that the change to SAM has been made.

COs should note the Government's right to suspend payments under FAR 4.11 and FAR 52.204-7 when a contractor fails to comply with the FAR 42, Novation and Change-of-Name, requirements after making certain changes in the SAM.

2.5.7 Best-Interest Determination. No term of this Guide Chapter shall be construed as requiring a CO to sign any agreement being discussed herein if contrary to statute or regulation, or if not in the best interests of the Government. A Best-Interest Determination by the CO is required to be in the official contract file.

2.6 Distribution of Novation/Change-of-Name Agreements. The following distribution of documents is required.

2.6.1 Agreements. The CO shall distribute signed copies of Novation/Change-of-Name Agreements as stated in FAR 42.1203(g).

2.6.2 Standard Form 30. The CO shall adhere to the requirements as stated in FAR 42.1203(h).

2.7 Management and Retention of Records. Maintaining records is required in accordance with the information below.

2.7.1 Novation/Change-of-Name Records. The records shall be retained for a minimum of 6 years and 3 months after completion of the contract(s), or final payment or termination of the program effort, or settlement of disputes/incidents, whichever is later. Retention of the file documentation is the responsibility of the COs.

2.7.2 CO Responsibility. The CO is responsible for complying with the records management requirements. The work product shall be stored using a naming convention that will allow for its logical retrieval and shall be stored in a specific location identified by the component or in accordance with Department direction.

3.0 Attachments

1. Novation Agreement Checklist (3 Pages).

ATTACHMENT 1

NOVATION AGREEMENT CHECKLIST

Note: This Checklist is recommended for use and serves as a reminder of the documents that are required to be included in the official contract file.*

1. CHANGE OF NAME REQUIREMENTS * (Reference FAR 42.1205)

_____ 3 Signed copies (original signatures) of the Change of Name Agreement

One copy of each of the following:

_____ Authenticated document by the State effecting the name change

_____ General Counsel opinion stating the transfer was properly effected under applicable law with an effective date

_____ List of all affected contracts and unsettled purchase orders, with the contract number and type, name and address of the contracting office

2. NOVATION AGREEMENT REQUIREMENT * (Reference FAR 42.1204)

_____ 3 Signed copies (original signatures) of the Novation Agreement

One copy of each of the following:

- _____ Document describing the proposed transaction (purchase/sale agreement, memorandum of understanding)
- _____ List of contracts affected reflecting
 - ___ Contract Number and type
 - ___ Name and address of contracting office
 - ___ Total dollar value
 - ___ Approximate unpaid balance

- _____ Evidence of the transferee's capability to perform

- _____ Any other relevant information requested by the CO

- _____ Authenticated copy of the instrument affecting the transfer of assets (bill of sale, certificate of merger, contract, deed, agreement or court decree)

- _____ Certified copy of each resolution of corporate board of directors authorizing the transfer of assets

- _____ Certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets

- _____ Authenticated copy of the transferee's certificate and article of incorporation if a corporation was formed to receive assets

- _____ Opinion of legal counsel of transferor and transferee stating that transfer was properly effected under applicable law and the effective date of transfer

- _____ Balance sheets of the transferor and transferee before and after the transfer of assets

- _____ Evidence of any security clearance requirements

- _____ Consent of sureties if bonds are used, or a statement from the transferor that none are required

* You may not have all of these documents, but each must be addressed.