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Commercial Real Estate Transactions with Federal Government Tenants

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For first time landlords of property leased to the U.S. government (more commonly referred to by the courts and boards as “lessors”), and even for experienced lessors, the process of buying or selling a property leased to U.S. government tenants can be daunting. Government money comes with strings, and assigning government leases in connection with the sale of a property requires a significant amount of extra preparation and research.

Federal agency tenants can be very attractive to lessors. They can agree to extended lease terms up to 20 years, they pay their rent in a timely fashion (if in arrears), and they are backed by the full faith and credit of the U.S. government. The only other investment that can make that claim is a U.S. Treasury bill, but the cap rates on properties leased to the U.S. government tend to far exceed the returns on Treasury bills.

But government tenants do present unique challenges. When it comes time to buy or sell a property with a government tenant, there are a number of statutes, regulations, and contract provisions that govern U.S. General Services Administration (GSA) leases (as discussed further below), which require additional consideration. These government-specific requirements have implications at all stages of the purchase and sale process and are addressed in this practice note. To navigate the purchase and sale process, this practice note discusses the statutory and regulatory framework governing the transfer and assignment of government leases, then examines the lease provisions, and concludes with a discussion of considerations for purchase and sale agreements.

Overview of Novations

Prohibition on Transfer of Contracts

The process for transferring a government contract or lease (as the Federal Circuit held in *Forman v. United States*, 767 F.2d 875, 879 (Fed. Cir. 1985), U.S. government leases are government contracts) stems from a statutory prohibition on the transfer of government contracts. Pursuant to 41 U.S.C. § 6305(a), a party to a contract with the federal government cannot transfer the contract to another party without government approval.

This blanket prohibition provides the government with discretion to approve or deny the transfer of any government contract or lease. Specifically, this discretion falls to a lease contracting officer (LCO), who has the final authority to approve or deny transfer of a government lease and recognition of a purchaser as a successor in interest lessor. The Federal Acquisition Regulation (FAR) defines a “contracting officer” as “a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.” 48 C.F.R. § 2.101. Throughout this practice note, “lease contracting officer,” “LCO,” “contracting officer,” and “CO” are used interchangeably.

Government Contracts Law / The FAR

The statutory restrictions on the transfer of government contracts and leases have been implemented through the FAR. The FAR, at Part 42.12, mirrors the blanket prohibition on the transfer of contracts in the statute, while providing the government with the discretion to approve such transfers when appropriate:

(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 48 C.F.R. 42.104-2(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.

48 C.F.R. § 42.1204(a). While the FAR opens the door for the transfer of government contracts (and leases), it provides the government with the discretion to approve or deny any such transfer.

Application to Leases

The FAR generally, and Subpart 42.12 more specifically, were not written with real estate transactions and leases in mind. In fact, the FAR by its own terms does not apply to leasehold procurement. 48 C.F.R. § 1.104; 48 C.F.R. § 2.101. Instead, these procedures were written to protect the government's interests when transferring contracts for goods (or supplies) and services.

So, perhaps understandably, the procedures and requirements governing novations are a poor fit for the realities of commercial real estate transfers. Nonetheless, the General Services Acquisition Manual provides that “[i]n the event of a transfer of ownership of the leased premises or a change in the [lessor]'s legal name, FAR 42.12 applies.” 48 C.F.R. § 570.115.

What Is a Novation?

A novation is a three-way agreement between the original lessor under a lease or original party to a contract and the prospective new party to the lease (the successor lessor to which the lease is being assigned) or contract, wherein the lessor (or contract party) agrees to assign the lease (or contract) and the government tenders its approval. Pursuant to 48 C.F.R. § 2.101(b), under the novation agreement, “among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.”

Purpose of the Novation Process

The purpose of the novation process is to protect the government's interests. The FAR explicitly acknowledges this purpose at 48 C.F.R. § 42.1204(a), which gives the government the right to recognize a third party as the successor in interest to a government contract (when it is in the government's interest to do so). Conversely, the government may exercise its discretion not to approve transfer of a lease or contract. Specifically, 48 C.F.R. § 42.1204(c) indicates that when it isn't in the government's interest to approve a transfer, the original party to the contract (which seeks to transfer the contract or lease) shall remain under contractual obligation to the government and the contract or lease may be terminated should the original lessor or contract party not perform.

In practice, particularly in real estate, the government only very rarely refuses to recognize a successor in interest following the purchase and sale of real property that is leased to a government tenant once the prospective lessor has offered some evidence of the purchase and its ability to perform under the terms of the lease. One scenario that could trigger heightened scrutiny or even denial of a novation request is the potential for foreign ownership of buildings housing government agencies involved with national or homeland security efforts. As discussed below, foreign ownership of these assets is receiving increased attention from the U.S. government.

Goods and Services vs. Leasehold Interests in Real Estate

The novation process outlined in the FAR is a poor fit for real estate transactions because, as mentioned above, the process was designed with contracts for goods and services in mind. In practice, this makes a lot of the deliverables outlined in the FAR overkill for the purposes of protecting the government's interests when recognizing new lessors in real estate transactions. In a typical real estate transaction, a deed demonstrates that title to the property was legally transferred and ownership of the property should be enough of a guarantee of a lessor's ability to perform. However, the government is bound by the terms of the FAR and, as discussed below, these terms are explicitly incorporated into GSA leases.

The Lease

GSA's Change of Ownership Clause

Typical GSA leases include a provision governing change of ownership which incorporates by reference the requirements of FAR as follows:

If during the term of the Lease, title to the Property is transferred, the Lease is assigned, or the Lessor changes its legal name, the Lessor and its successor shall comply with the requirements of FAR Subpart 42.12. If title is transferred, the Lessor shall notify the Government within five days of the transfer of title.

GSA Global Lease Form L100 (L100), ¶ 2.06(a). FAR Subpart 42.12 includes two basic requirements for lessors: (1) the execution of a novation agreement and (2) the production of a number of deliverables intended to demonstrate the purchaser's fitness to perform under the terms of the contract or lease. Each is discussed below.

GSA's Requirement for Novation Agreement / Order of Events

The typical GSA lease mirrors the FAR's requirement for the execution of a novation agreement and includes the following language:

If title to the Property is transferred, or the Lease is assigned, the Government, the original Lessor (Transferor), and the new owner or assignee (Transferee) shall execute a Novation Agreement providing for the transfer of Transferor's rights and obligations under the Lease to the Transferee. When executed on behalf of the Government, a Novation Agreement will be made part of the Lease via Lease Amendment.

L100, ¶ 2.06(c).

Catch-All Provision

The lease also provides a "catch-all" provision that gives the contracting officer authority to request any documentation he or she may require:

In addition to all documents required by FAR 42.1204, the LCO may request additional information (e.g., copy of the deed, bill of sale, certificate of merger, contract, court decree, articles of incorporation, operation agreement, partnership certificate of good standing, etc.) from the Transferor or Transferee to verify the parties' representations regarding the transfer, and to determine whether the transfer of the Lease is in the Government's interest.

Unlike traditional government contracts, the sale of the asset used in performing under the terms of a government lease generates a legal record of the transaction: the deed. A deed is a legal instrument that transfers a right (or rights) in real property to individuals or entities. An executed and recorded deed is evidence of title to the real property in question. For standard forms of deed, see [Bargain and Sale Deed](#) and [Special Warranty Deed](#). In addition, as noted above, the contracting officer may require both the articles of incorporation and certificate of good standing for potential lessors. Purchasers should plan on this requirement and should reach out to the appropriate secretaries of state early to obtain copies of each.

Foreign Ownership

GSA may also consider the nationality of the entity seeking to be recognized as the lessor when reviewing a request for novation of a government lease. The issue of foreign ownership of buildings housing U.S. government agencies has recently been spotlighted by a Government Accountability Office (GAO) report addressing the same. In an early 2017 report, GAO found as follows:

GAO reviewed available information on the ownership of General Services Administration (GSA) leased space that requires higher levels of security protection based on factors such as mission criticality and facility size (high security space) as of March 2016 and found that GSA is leasing high-security space from foreign owners in 20 buildings. The 26 tenant agencies occupy about 3.3 million square feet at an annual cost of about \$97 million and use the space, in some cases, for classified operations and to store law enforcement evidence and sensitive data.

GAO-17-195 at 2. GAO went on to suggest:

We recommend that the Administrator of the General Services Administration determine whether the beneficial owner of high-security space that GSA leases is a foreign entity and, if so, share that information with the tenant agencies so they can adequately assess and mitigate any security risks.

GAO-17-195 at 35.

In response to this report, GSA issued Leasing Alert LA-FY17-06 – Implementing GAO’s Recommendation Regarding Foreign Ownership of High Security Leased Space, which is available at <https://www.gsa.gov/portal/getMediaData?mediaId=158062>. This leasing alert accepts GAO’s recommendation, and requires contracting officers to review highest level ownership of entities in the System for Award Management and to communicate the same to tenant agencies.

The impact on lessors is relatively straightforward: tenant agencies will now be made aware of foreign ownership (to the extent that the online registrations capture such ownership) and may have mitigation requirements or, in extreme scenarios, may ask the contracting officer to disapprove of a novation request.

The General Clauses

Every GSA lease includes the general clauses, a set of terms and conditions to the GSA lease that distinguish the lease from a more traditional commercial real estate lease. The general clauses include a number of noteworthy provisions, but for the purposes of a purchase/sale of property, there are two provisions, discussed below, with which lessors should be familiar: the statement of lease and the SNDA. The most current version of the general clauses is available on the GSA website at <https://www.gsa.gov/portal/forms/download/114942>.

Statement of Lease vs. Estoppel

Unlike traditional leases, GSA leases do not have a provision guaranteeing delivery of an estoppel letter by the tenant to the lessor upon request. GSA leases have a somewhat limited set of facts to which government tenants will certify. Specifically, GSA “Statements of Lease” (which are issued in lieu of estoppel letters or certificates) only certify that “(1) the lease is in full force and effect; (2) the date to which the rent and other charges have been paid in advance, if any; and (3) whether any notice of default has been issued.” General Clause No. 4, 48 C.F.R. § 552.270-24.

Subordination, Nondisturbance, and Attornment

The subordination, nondisturbance, and attornment clause in a lease provides the mechanism for obtaining a subordination, nondisturbance, and attornment agreement (SNDA), as well as the substance of what an SNDA will contain for a government lease. An SNDA provides three agreements that identify and define the post-default relationship between a lender, a lessor, and the government under a lease for mortgaged property where the borrower is the lessor. The purpose of the SNDA is to establish three elements that govern what happens in the event of a foreclosure:

- **Subordination.** GSA allows its leases to be junior to the lien of the loan for leveraged properties.
- **Attornment.** GSA recognizes and accepts the lender as the new lessor under the same terms and conditions of the lease in the event of a foreclosure or a deed in lieu.
- **Nondisturbance.** In exchange for the above two obligations, the lender/new lessor agrees that it accepts GSA as the tenant under the same terms and conditions of the lease.

General Clause No. 3, 48 C.F.R. § 552.270-23. GSA has historically been amenable to working with lessors to amend SNDA language, and the Leasing Desk Guide notes that “[i]f the lender asks you to modify this or the equivalent form that your region uses, immediately contact your Office of Regional Counsel for assistance.”

For more on SNDAs, see 1-4 Federal Government Real Estate Leasing § 4.03[3]. For a sample SNDA, see 1-9 Federal Government Real Estate Leasing § 9.03.

Required Deliverables

As mentioned above, the FAR (at Part 42.1204(e) and (f)) includes a number of deliverables to be provided in support of a novation request. These deliverables are discussed below.

Document Describing the Proposed Transaction

Most real estate transactions are governed by a purchase and sale agreement (PSA or P & S), and the PSA or a memorandum of understanding will typically suffice for the purposes of the contracting officer review. Along with several of the other deliverables, lessors should consider marking this document in such a way that indicates it contains confidential and proprietary business

information and is exempt from disclosure under the Freedom of Information Act exemption found in 15 U.S.C. § 552(b)(4). Drafting considerations for the PSA are discussed further below.

List of All Affected Contracts between the Transferor (Seller) and the Government

Another deliverable is a list of all affected contracts between the transferor (seller/original lessor) and the government, as of the date of sale or transfer of assets. For each contract, this list must show, as of that date:

- The contract number and type
- The name and address of the contracting office
- The total dollar value, as amended –and–
- The approximate remaining unpaid balance

This should be fairly straightforward; the parties will need to include a list of all GSA (or government) leases for space in the real estate being acquired.

Evidence of the Transferee’s Capability to Perform

Contracting officers may ask for some demonstration of a successor lessor’s ability to perform under the terms of the lease. Assuming that tenant improvements and construction have been completed, the government shouldn’t ask for much more than ownership of the property. Historically, contracting officers have accepted publicly available financials of parent companies as evidence of ability to perform.

Any Other Relevant Information Requested by the Responsible Contracting Officer

The contracting officer may request any other relevant information. Common requests include documentation of signatory authority for the purchaser/transferee and a secretary’s certificate attesting to the same.

Authenticated Copy of the Instrument Effecting the Transfer of Assets

Lessors must also deliver to the contracting officer 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). The deed along with the PSA should suffice for this.

Certified Copies of Corporate Board’s Authorizations to Transfer Assets

A certified copy of each resolution of the corporate parties’ boards of directors authorizing the transfer of assets must be provided. For limited liability companies (LLCs), GSA will typically not require anything more than a general consent of the managers or resolutions granting the officers the power to enter into contractual agreements.

Certified Stockholder Minutes Approving the Transfer of Assets

A certified copy of the minutes of each corporate party’s stockholder meeting necessary to approve the transfer of assets is another deliverable. GSA rarely requires this, particularly when the parties to the transaction are LLCs.

Authenticated Copy of the Transferee’s Certificate and Articles of Incorporation

The transferee must provide an authenticated copy of its certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the government contracts. Bear in mind this requirement only applies to corporations, not LLCs.

Counsel’s Opinion as to Legal Transfer of Title

The attorneys for the transferor and transferee must provide opinion letters stating that the transfer was properly effected under applicable law and the effective date of transfer. Historically, GSA has not often required this, as the deed suffices as evidence of legal transfer of title.

Audited Balance Sheets

The transferor and transferee must provide balance sheets of the dates immediately before and after the transfer of assets, audited by independent accountants. This can be a burdensome requirement, particularly for larger entities that do not use a special purpose entity (SPE) to purchase and hold the property. Lessors should consider engaging early with contracting officers to gauge the government's willingness to waive this requirement. Given that there is to be a transfer of a discrete asset (or assets), GSA may be willing to forego the provision of audited balance sheets.

Security Clearance Requirements

Evidence that any security clearance requirements have been met must also be delivered. If the tenant agency or agency maintains a secure compartmented information facility (SCIF) or handles classified information, the parties should engage with the contracting officer as soon as possible to facilitate any special requirements that the government has concerning security. Typically, property owners are NOT required to obtain or maintain a facility clearance, but there are exceptions.

Consent of the Sureties

Another deliverable is the consent of sureties on all contracts listed above under the subheading entitled "A List of All Affected Contracts between the Transferor (Seller) and the Government" if bonds are required, or a statement from the transferor that none are required. This is fairly self-explanatory. Lessors may simply include a note to the effect that "none are required" on the cover sheet for the novation request.

Contracting or Leasing Process – In Practice

The above list of deliverables may appear daunting. The good news is that this list is a starting point in negotiations with the contracting officer. The contracting officer has the ultimate authority in recognizing a successor in interest to a government contract or lease, and in order to successfully complete the novation process, all that must be provided is the minimum that the contracting officer requires to be comfortable that the government's interest is protected. The list above may be considered a worst-case scenario for those seeking a novation, a scenario that rarely (if ever) plays out.

In practice, contracting officers typically require:

- A recorded copy of the deed
- A secretary's certificate indicating which individuals will be authorized to sign lease documents and bind the purchaser
- Resolutions from the purchaser and seller authorizing the purchase and sale of the property
- Financial information on the purchaser demonstrating financial fitness
- Banking information from the purchaser to allow for electronic rent payments
- Proof of registration in the System for Award Management (SAM) and signature of the Form 3518-SAM –and–
- A novation agreement / change of ownership agreement signed by both parties

Additionally, as discussed in more detail below, GSA has recently begun the process of standardizing its novation procedures across the various GSA regions, and potential lessors may find that contracting officers will be asking for more documentation than was previously typical.

Online Registrations

Along with the novation and deliverable requirements, landlords have to complete a number of online registrations in order to become recognized as a lessor and to receive rent payments from a government tenant. The primary registration for government lessors (and government contractors more largely) is the SAM. SAM can be difficult to navigate and has an extensive number of representations and certifications. Additionally, SAM also requires the lessor/contractor to have both a Data Universal Numbering System (DUNS) number and a Commercial and Government Entity (CAGE) code. Would-be lessors should begin their SAM registration process as soon as possible, preferably prior to closing. While the representations and certifications of SAM are outside the scope

of this discussion, lessors should closely review and consider these items, particularly those governing small business status and the affirmative action requirements of the Department of Labor.

DUNS numbers are relatively straightforward and can be obtained from the Dun & Bradstreet website <http://www.companyupdate.com/free-duns-number/?&&&medium=tsa&gclid=CJvo4aOpoNYCFQYJaQod3-gCnQ&gclsrc=aw.ds>. However, keep in mind that approval typically takes a few days, and lessors should budget time accordingly.

CAGE codes are a bit more complicated. CAGE codes <https://eportal.nspa.nato.int/AC135Public/scage/CageList.aspx> are five-character ID numbers issued by the Department of Defense, specifically, the Defense Logistics Agency (DLA). CAGE codes provide the government with its only visibility to top level ownership. DLA issues CAGE codes upon an investigation of the requesting entity's registration with its home state's secretary of state. There are often delays at this stage of registration, which tend to stem from errors in the application. It's best to engage early and often with DLA when you're obtaining a CAGE code to sort out any issues before they can delay the SAM registration.

For further discussion of representations and certifications, see 1-4 Federal Government Real Estate Leasing § 4.04.

The Novation Agreement

Of all of the deliverables required for novation of a government lease, the novation agreement itself is probably the most important as it lays out the rights and obligations of each of the three parties involved: the buyer, the seller, and the government.

Standard Language

The novation agreement language in the Public Building Service's Leasing Desk Guide (Chapter 17 of the Guide) very closely mirrors the language from the FAR Part 42.12. It's important to understand that this language can be amended if it's appropriate to do so, but most final novation agreements very closely resemble the one provided by GSA.

Throughout the novation language, the seller, or current lessor, is referred to as "transferor," and the purchaser, or prospective lessor, is referred to as "transferee." Outlined below are the key provisions of the novation agreement and explanations as to the significance of such provisions.

Recitations

Transfer and Deed

The novation agreement begins with a description of the parties and the property, and then continues with a number of recitations. The first recitation indicates that "On [transfer date] the Transferor transferred to the Transferee the real property and improvements to which the Lease pertains (the "Subject Property") pursuant to a deed recorded in the real property records of [state] on [date], as Instrument No. _____." The novation agreement then goes on to note that "[t]he Transferee has acquired and is the current owner of the Subject Property by virtue of the above transfer."

This provision acknowledges the method of transfer. This language may need to be amended to reflect nonstandard real estate transactions, such as a foreclosure.

Assumed All Obligations and Liabilities

The novation agreement also indicates that "[t]he Transferee has assumed all obligations and liabilities of the Transferor under the Lease by virtue of the above transfer." This acknowledges for the first time that the transferee is to be a successor in interest to the transferor. This provision notes the obligations of the buyer to perform in accordance with the terms of the lease.

Transferee Can Fully Perform

The contracting officer acknowledges that the transferee is responsible and capable of meeting the requirements of the lease, and "is in a position to fully perform all obligations that may exist under the Lease." In the context of a real estate transaction, this acknowledgment reflects that ownership has passed to the buyer and that the buyer can perform all of the services required by the lease.

It Is Consistent with the Government's Interest

The recitations conclude with the government approval of the novation, noting that "[i]t is consistent with the Government's interest to recognize the Transferee as the successor party to the Lease." This acknowledgment cuts to the purpose of the novation process,

which is ensuring that the government's interests are protected and that it will continue to receive the benefit of the original bargain.

Agreements

Waiver of Claims

The seller/transferor agrees to waive any of its outstanding or future claims against the government:

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 Lease. Rent adjustments for increases in operating costs and real estate taxes that are currently due, but have not yet been paid, shall be paid by the Government to the Transferee.

This language functions to protect the government from outstanding and potential claims.

Assumption of Liabilities

Once the transferor has waived its claims, the new lessor assumes all liabilities:

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

Ratification of Previous Actions

The purchaser/transferee also ratifies all previous actions of the seller/transferor:

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

Successor in Interest

Finally, the government accepts the purchaser/transferee as the successor in interest to the original lessor:

The Government recognizes the Transferee as the Transferor's successor in interest in and to the Lease. The Transferee, by this Agreement, becomes entitled to all rights, titles, and interests of the Transferor in and to the Lease, as if the Transferee were the original party to the Lease. Following the Transfer Date, the term "Lessor", as used in the Lease, shall refer to the Transferee.

No Waiver of Claims against the Transferor

The standard novation agreement language includes a reservation of claims against the seller/transferor:

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 for the term of the Lease prior to the Transfer Date.

This language can be problematic for a number of reasons. First, the transferor is often an SPE whose parent intends to wind it down as soon as possible after the sale. In some jurisdictions, this surviving obligation can interfere with the legal authority to wind down. Additionally, this protection is overkill in the case of a lease as opposed to a traditional government contract, as the government's interest is protected by its availability to withhold rent to offset deficiencies in performance.

GSA has historically demonstrated some willingness to either remove or modify this language, and the Leasing Desk Guide explicitly notes that the standard novation language may be amended:

If the transferor or the transferee requests modifications to the novation agreement template (Attachment 6), the LCO should complete a preliminary evaluation of the effect of such removal or modification In all instances where a transferor/transferee requests changes to the novation agreement, the LCO should flag the change and consult with Regional Counsel before final novation approval.

For further discussion of the novation agreement, including a sample agreement, see 1-5 Federal Government Real Estate Leasing §

5.02.

The Purchase and Sale Agreement

Timeline of Approval and Rental Considerations

When drafting the PSA, one of the most important issues for the parties involved with the transfer of a real estate asset to consider is the amount of time it will take for the government to approve the novation and begin forwarding rent payments to the purchaser/successor-lessor. Novation approval will not happen by or before closing. In fact, it typically takes two months or more for novations to be approved by the government. Accordingly, the parties should include language in PSA providing for the forwarding of rent by the seller/original lessor to the purchaser/successor-lessor until such time as the purchaser is recognized as the successor in interest by the government.

Another related consideration is the ability of the seller to wind down. Commercial real estate is often held by single-purpose entities (SPEs), and there are often tax or accounting incentives for winding down as soon as possible after a sale. The ongoing obligation to forward rent and to assist in the novation process will delay a seller's ability to wind down the SPE.

Obligations to Assist / Best Efforts / Commercially Reasonably Efforts

The novation process is a team effort. While one party—and it can be either the purchaser or the seller—typically takes the lead in coordination and organization of the novation package, the government requires documentation (often signed) from both parties. Additionally, any requested edits to the novation language require all three parties to agree. Accordingly, the PSA should contain language ensuring that both parties cooperate in completion of the novation process.

Novation Language Concerns

As discussed briefly above, there are a few provisions in the standard novation agreement that may not be appropriate or necessary in the context of a real estate transaction involving a dissolving SPE as the seller. If the parties do agree to an amendment to the standard novation language, such agreement should be memorialized in the PSA.

Recent Developments in GSA Lease Novation Policy

On May 10, 2017, the Assistant Commissioner of the Public Buildings Service issued Leasing Alert LA-FY-17-08, "Revisions to Novation Agreement Policy." This Leasing Alert outlined a number of changes to GSA policy, and included internal GSA checklists and guidelines, as well as an amended Chapter 17 of the Public Building Service Leasing Desk Guide. The Leasing Alert describes the scope of the policy change, the goal of which is to standardize the novation process across all regions and provide consistency in responses to novation requests. LA-FY-17-08 at 2.

In addition, the Leasing Alert goes on to note that "the LCO should begin by sending the lessor a letter and the novation Checklist that outlines the procedures to follow when requesting a novation," and "the LCO must complete a responsibility determination on the Transferee." LA-FY-17-08 at 2. Finally, "Regional Counsel is required to approve all novation requests."

The new novation checklist includes four mandatory categories of documents required for approval of a novation, as follows:

1. Three signed copies of the proposed novation agreement (which is unchanged in substance from the agreement provided in 48 C.F.R. § 42.12)
2. The document describing the proposed transaction; this could include the purchase/sale agreement, asset purchase agreement, or deed
3. If the transferor holds multiple leases, a list of all affected leases or contracts between the existing lessor and the government, as of the date of sale or transfer of assets, showing: the lease number and type, name and address of contracting office, total dollar value, as amended, and approximate remaining contract balance, including remaining lease term –and–
4. Evidence of the transferee's eligibility and financial capability to perform; this includes balance sheets of the transferee, dated immediately before and after the transfer of assets; if available, an independent auditor report should be included

This abbreviated list above represents a departure from previous GSA policy, and is a significantly shorter list than the required list of deliverables in the FAR. However, the new checklist goes on to note that, in addition, the documents below may be

required by the LCO:

5. A certified copy of Board resolutions (for both the transferor and transferee) authorizing the transfer of the assets (Note: If either the transferor or transferee does not have a Board of Directors, include a statement to that effect and confirm in the Articles of Incorporation that the company elected not to have a Board of Directors)
6. A certified copy of stockholder meeting minutes (for both transferor and transferee) approving the transfer of assets, as applicable
7. If transferee is a corporation include:
 - a. Copy of the transferee's articles of incorporation and bylaws
 - b. Copy of resolution signed by all the necessary directors of the corporation authorizing the corporate officer who will sign the novation agreement to bind the corporation to the lease
 - c. Incumbency certificate signed by the secretary of the corporation
 - d. If the corporation was formed for a purpose of other than to receive the transferor's assets, include a statement to that effect
8. If transferee is a partnership include:
 - a. Copy of the partnership agreement, statement of partnership, or statement of limited partnership
 - b. Evidence of authority of signatory to bind the partnership if not expressly authorized by the previous item
 - c. If signing partner is a partnership or corporation, submit all items required above for each partnership or corporate layer
 - d. If the partnership was formed for a purpose of other than to receive the transferor's assets, include a statement to that effect
9. If transferee is a limited liability company include:
 - a. Copy of articles of organization and operating agreement
 - b. Evidence of the authority of the signing manager (if company is manager-managed) or member (if the company is member-managed) to sign, if not expressly authorized by the previous item
 - c. If the signing manager or member is itself another business entity, submit all items required herein for each such partnership, corporate, limited liability company, or other business entity layer
 - d. If the limited liability company was formed for a purpose of other than to receive the transferor's assets, include a statement to that effect
10. Consent of sureties if bonds are used
11. Evidence that any security clearances will be met; if high-level security clearances are required as part of the lease, or by the customer agency, the security clearance requirements must be met before the novation process is complete
12. Statement that transferee has registered for "All Awards" in the System for Award Management (SAM) in addition to completing GSA Form 3518-SAM, ADDENDUM to the System for Award Management (SAM) REPRESENTATIONS AND CERTIFICATIONS (Acquisitions of Leasehold Interests in Real Property)
13. [Any additional information the contracting officer requests]

This combined list much more closely resembles the list in the FAR. The amended Chapter 17 of the Public Building Service's Leasing Desk Guide (LDG) also indicates that GSA will continue to follow the requirements of the FAR. See <https://www.gsa.gov/portal/content/171251> for GSA Lease Alerts and Lease Acquisition.

Tips for Obtaining Novation Approval

The novation process can be burdensome and frustrating. There are a lot of moving parts, three parties have to cooperate, and the approval can take a substantial amount of time. But there are a few ways to help ensure a smooth transition and a timely novation approval.

First, engage early and often with the contracting officer. The sooner the parties engage, the sooner they'll be able to sort out any potential issues and to gauge the government's willingness to negotiate on novation terms or deliverable requirements.

Second, a key to avoiding frustration is to understand and appreciate government timelines. Government approvals require several levels of review, and the contracting officers and leasing specialists who process novation requests and lease amendments have responsibility for large numbers of projects. In short, the government is often understaffed, overworked, and novations aren't always a priority. Plan on several months to complete the novation.

Finally, remember that the contracting officer's final word is the only one that matters. While the regulations, policy documents, and internal guidance provide lists of required deliverables, all that's required for approval of the novation is the contracting officer's approval. Understanding the contracting officer's concerns and planning accordingly will allow for a smoother and more efficient novation process.

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