

# PCI GovCon 101: Novations and Name Changes

Scott Freling and Carl Wiersum  
Covington & Burling LLP  
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# Agenda

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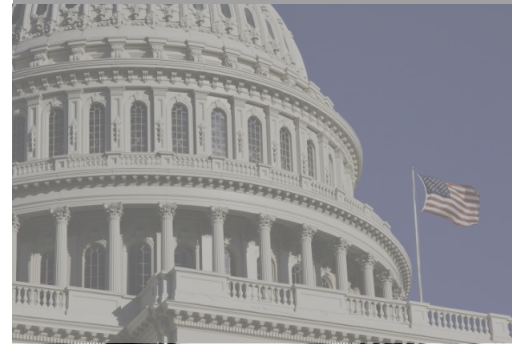
**The Anti-Assignment Act**



**Novation Requests**



**Change-of-Name Requests**



**Special Cases**



# Anti-Assignment Act

170

THIRTY-SECOND CONGRESS. SESS. II. CH. 81. 1868.

Feb. 26, 1868.

CHAP. LXXXI.— *An Act to prevent Frauds upon the Treasury of the United States.*

Transfers of  
claims on United  
States, how and  
when legal.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.*

## 41 U.S.C. 6305(a)

The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.

## FAR 42.1204, *Applicability of Novation Agreements*

(a) 41 U.S.C. 6305 prohibits transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of- (1) All the contractor's assets; or (2) The entire portion of the assets involved in performing the contract. . . .

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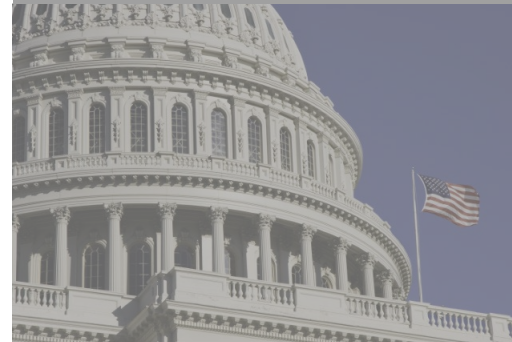
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# Novation Requests

A novation request is a formal request to transfer a federal contract or contracts to a new counterparty (the “successor-in-interest” or “transferee”)

## **NOVATION AGREEMENT**

ABC Government Contractor Inc. (Transferor), a corporation duly organized and existing under the laws of Delaware; XYZ Government Contractor Inc. (Transferee), a corporation duly organized and existing under the laws of Delaware; and the United States of America (Government) enter into this Agreement as of January 1, 2023.

(a) The parties agree to the following facts:

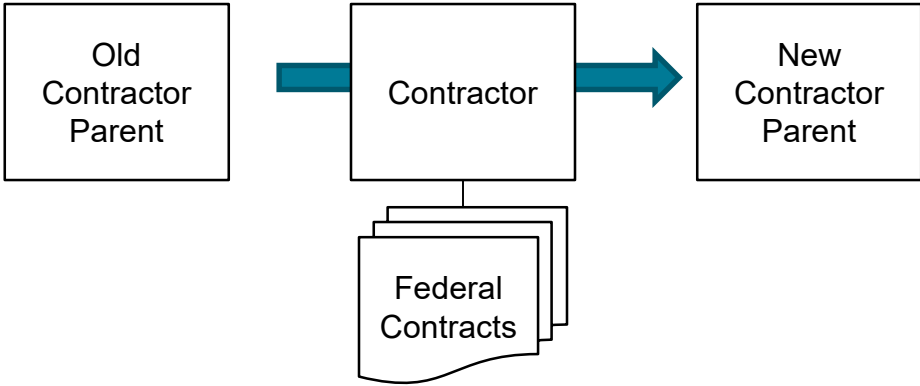
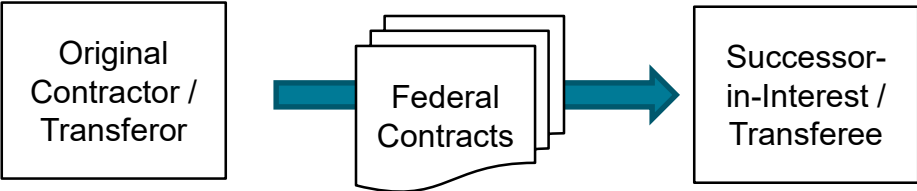


Practice Tip: FAR Template Novation Agreement

# Novation Requests

When is novation required?

When is novation not required?



# Novation Requests

## Sequencing

- Coordinate with Responsible Contracting Officer
- Complete Transaction / Reorganization
- Submit Novation Request
- Respond to Followup as Necessary
- Receive Novation Agreement
- Request Contract Mods



Practice Tip: Pre-Novation Agreements

# Novation Requests

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## Submission

- Responsible Contracting Officer:
  - Administrative Contracting Officer (ACO), if available
  - If no ACO, Contracting Officer with largest unsettled balance of contracts
- No set timing for processing novation requests



Practice Tips: Avoiding Delay



# Novation Requests

Novation requests must include, as applicable (FAR 42.1204(e)-(f)):

1. A list of all affected contracts, including specified information;
1. Three original copies of the proposed novation agreement;
2. Document describing the proposed transaction;
3. Authenticated copy of instrument effecting the transfer of assets;
4. Evidence of the transferee's capability to perform the contracts;
5. Certified copy of each resolution of the parties' Boards authorizing the transfer;
6. Certified copy of the minutes of each party's stockholder meeting necessary to approve the transfer;
7. Authenticated copy of transferee's articles of incorporation, if transferee was formed for the purpose of receiving the assets;
8. Opinions of counsel for transferor and transferee that transfer was properly effected under applicable law and effective date;
9. Audited balance sheets of transferor and transferee as of dates immediately before and after the transfer;
10. Evidence that any security clearance requirements are met;
11. Consent of sureties if bonds are required under the contracts, or confirmation none are required.



Practice Tips: Assembling the Novation Request

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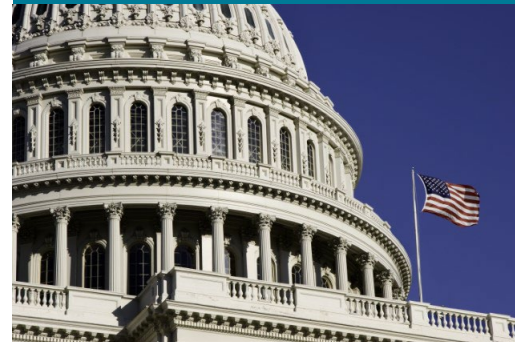
**The Anti-Assignment Act**



**Novation Requests**



**Change-of-Name Requests**



**Special Cases**



# Change-of-Name Requests

A change-of-name request is a formal request for the Government to recognize a contractor's change in entity name

## **FAR 42.1205(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.

Change-of-name requests are generally required whenever the contractor has a change of legal entity name and a novation request is not required.

# Change-of-Name Requests

## Sequencing

- Coordinate with Responsible Contracting Officer
- Process Legal Paperwork
- Submit Change-of-Name Request
- Respond to Followup as Necessary
- Receive Change-of-Name Agreement
- Request Contract Mods and Update SAM.gov (+CAGE)



Practice Tip: Name Changes With No Active Contracts

# Change-of-Name Requests

- Submit to the Responsible Contracting Officer
- No set timeline for processing change-of-name requests

Change-of-name requests must include(FAR 42.1205(a)):

1. A list of all affected contracts, including specified information;
2. Three original copies of the proposed change-of-name agreement;
3. Document effecting the name change, authenticated by a proper official of the State having jurisdiction; and
4. Opinion of counsel stating the change of name was properly effected under applicable law and showing the effective date.

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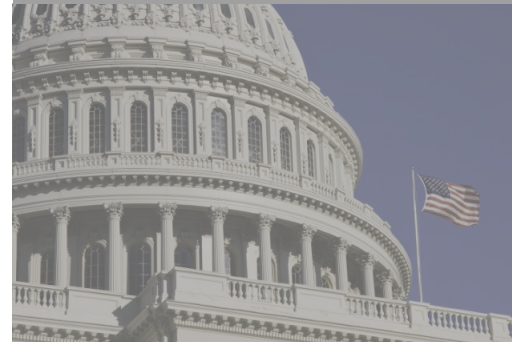
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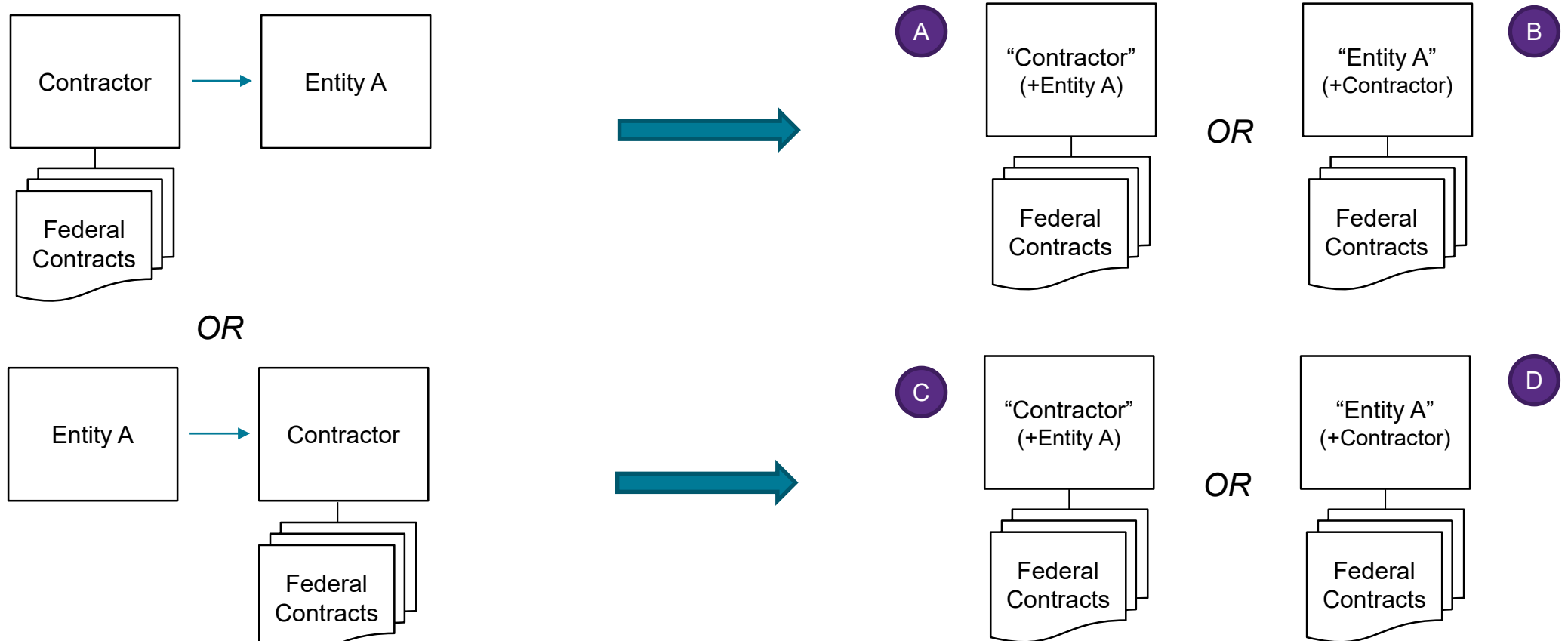


**Special Cases**



# Statutory Mergers

*From the technical perspective, a statutory merger generally should not require a novation request, regardless of which entity survives*



# Statutory Mergers

Delaware General Corporation Law § 259, *Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation*

(see also Delaware Limited Liability Company Act § 18-209(g)):

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. . . .

## Practical Reasons Why Novation Should Not Be Required

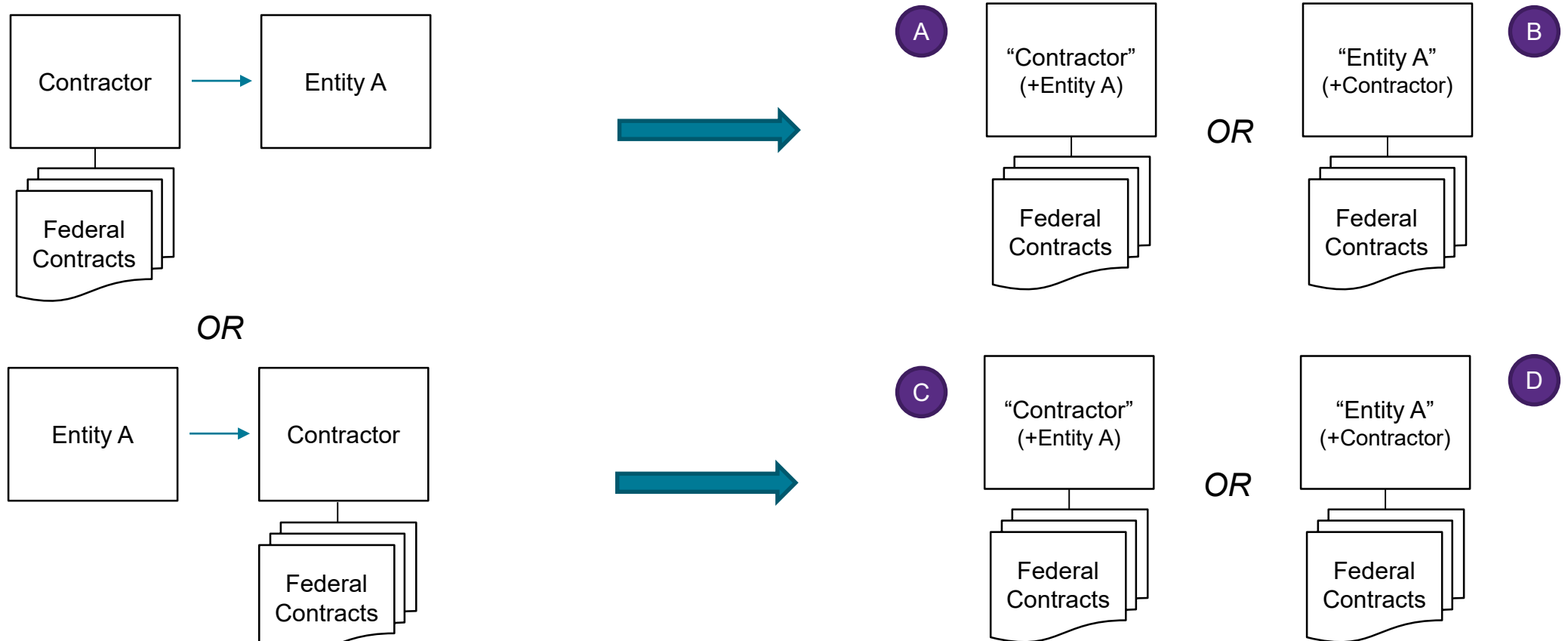
- FAR template Novation Agreement requires separate transferor and transferee
- Novation requests include before *and after* balance sheets, and legal opinions, for both transferor and transferee

Transfer By Operation of Law  
exception to the  
Anti-Assignment Act



# Statutory Mergers

*In practice, contracting officers sometimes insist on receiving a novation request in order to process a merger – early coordination is key*



# LLC Conversions

- Change in corporate form that does not involve the transfer of contracts between entities
- Novation request usually should not be required
- Often will require a change-of-name request



# Polling Questions

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- 1. True or False:** A government contractor can usually assign a federal contract to a third party who has the capability to perform it, unless the contract includes a FAR clause or other provision referencing the Anti-Assignment Act.
- 2. True or False:** Your company or client is acquiring the assets of a government contractor, including a number of federal contracts. Because of the Anti-Assignment Act, the company must submit a novation request to the Government prior to signing the purchase agreement.
- 3. True or False:** Even if multiple contracts are affected, usually a single novation request or a change of name request should be submitted to the “responsible contracting officer,” which is usually the ACO or the CO responsible for the contract with the largest outstanding balance.

# Q&A



**Scott Freling**  
202-662-5244  
sfreling@cov.com



**Carl Wiersum**  
202-662-5172  
cwiersum@cov.com