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Not so fast: Practical considerations before novating your GSA Schedule contract

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The acquisition market for federal contractors is booming. Acquisition can provide a buyer the opportunity to target its growth strategically by acquiring the seller's past performance and experience, in addition to gaining the seller's personnel and resources.

Of course, part of what makes a seller attractive is the contracts found in its portfolio. While the government does not officially condone the "buying and selling" of federal contracts, a contract may be novated after an acquisition if the buyer has acquired all of the seller's assets or has acquired the entire portion of the seller's assets involved in performing the contract.

Novations are necessary after acquisitions where the seller (or acquired assets or division of the seller) will be merged into the buyer and not be held as a separate subsidiary, so the seller's contracts implicated by the acquisition can continue to be performed and administered under the buyer's name.

One of many ways that U.S. General Services Administration ("GSA") Schedule contracts differentiate themselves from other types of federal procurements is through a variety of unique issues arising in the novation process.

Perhaps most significantly, GSA has taken the position that it will not novate task orders awarded under a Schedule contract separately from the Schedule contract itself — the entire Schedule contract, including all task orders awarded thereunder, must be novated wholesale to a buyer.

This makes it difficult for buyers to target the acquisition of a specific task order under a Schedule contract, no matter how large the dollar value of the task order or readily segregable its performance from the seller's remaining contractual portfolio.

To support this position, GSA relies on a case from the U.S. Government Accountability Office ("GAO"), AllWorld Language Consultants, Inc., B-411481.3 (2016).

In AllWorld, GAO held that task orders issued under Schedule contracts "are not themselves stand-alone contracts" because the terms and conditions of the underlying Schedule contract govern the contractor's and government's rights and obligations with respect to the task order.

Based on this principle, GAO found that the ordering agency's award was unreasonable in part because the awardee's Schedule contract was set to expire before all of the task orders' option periods could be exercised — option periods under a task order cannot be exercised without the underlying Schedule contract still being valid and effective.

Notably, the decision in AllWorld was not rendered in the context of a contract novation. Nevertheless, GSA has extended this concept from AllWorld for the proposition that it (GSA) cannot allow the novation of task orders separate from a GSA Schedule contract, even in a situation where the buyer has the same Schedule contract, with identical terms and conditions to the seller's.

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All of the task orders issued under the Schedule contract must be novated along with the Schedule contract itself, or no novation will be approved. But, GAO did not hold in AllWorld that a task order could not be novated from one schedule holder to another. In the case of a novation of a task order from one schedule holder to another, the task order will not exist independent of the Schedule — it will continue to exist tied to the Schedule of the buyer.

Therefore, AllWorld does not prevent GSA from permitting novations of task orders from one schedule holder to another, but this is how GSA has interpreted it.

In practice, this policy poses problems for buyers acquiring specific assets without buying the seller's entire organization.

For example, a buyer might want to acquire a distinct division of a seller that specializes in work performed with a specific federal agency. Even though this division might be otherwise segregable from the seller's other operations, GSA would not novate the Schedule task orders awarded to the seller and performed by this division unless the buyer acquired the seller's entire Schedule contract.

This means that the seller would need to be willing to part with its entire Schedule contract, including other task orders awarded by different federal agencies that fall outside the assets it had initially targeted for acquisition, as the entire Schedule contract would need to be acquired by the buyer for GSA to approve the novation.

This result inhibits the ability of a buyer to target a specific division or specific assets of a seller involved in the performance of task orders if its entire Schedule contract is not also being sold.

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GSA has taken the position that it will not novate empty Schedule contracts because no "assets" of the seller are involved in contract performance — under the FAR, novation approval requires a buyer to acquire all of the assets involved in contract performance.

This hinders sellers from capitalizing on otherwise valuable Schedule contract vehicles that they perhaps no longer need or have been unable to market to contracting agencies successfully.

As described above, GSA's novation policies present very real road blocks during the acquisition process. It is important for contractors to be mindful of these limitations when structuring their acquisitions, so an otherwise successful deal is not killed when GSA denies a novation after closing.

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