



# PilieroMazza Webinar

## Mergers and Acquisitions: Overview of the M&A Process and Considerations for Government Contractors

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# Presented by

**Cy Alba, Partner**

[ialba@pilieromazza.com](mailto:ialba@pilieromazza.com)

(202) 857-1000



**Jonathan Bush**

[jbush@pilieromazza.com](mailto:jbush@pilieromazza.com)

(202) 857-1000



# About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs & Advisory Services
- Labor & Employment
- Business & Corporate
- Litigation
- Intellectual Property & Technology Rights

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# Overview

- Stages in an M&A Transaction
- Structuring a Deal – Asset or Stock
- Due Diligence Issues
- Government Contract Considerations

# Today's Objectives

- Give insight and help inform stages of an M&A transaction including:
  - Structuring the deal
  - Performing due diligence
- Identify unique regulatory issues impacting M&A transactions involving government contractors
  - Small Business Size Issues and Affiliation
  - Recertification
  - Novation

# INITIAL TRANSACTION STEPS

# Assembling the Team

- Attorneys who specialize in M&A for government contractors
- Financial Advisors, Investment Bankers and Brokers
  - For valuation
  - For buyers – to cast wide net for targets
  - For sellers – to get advice on the best way to approach the market, how to present seller’s story and, if applicable, to market the target company to a wide audience
- Commercial Bankers
  - For buyers – to provide financing for acquisition
- Accountants
- Other Specialists as needed depending on the business of the seller (environmental consultants, insurance specialists, etc.)

# Getting Ready to Sell

- Corporate Records
  - Formation Documents
  - Equity Ownership
  - Corporate Minutes
- Registrations, Licenses, and Permits
- Financial Reports and Tax Matters
- Bank Financing
- Commercial Contracts
  - Leases
  - Forms (Bill of sale, general terms and conditions, etc)
  - Other Vendors
- Employee Matters
- Insurance
- Intellectual Property Issues



# DOING THE DEAL

# Stages of M&A Transactions

- Pre-Transaction Planning
  - NDA
  - Letter of Intent – Present Effect Rule
- Deal Structure
  - Asset or Stock Purchase or Merger
  - Affiliation Issues
- Due Diligence
- Document Drafting
  - Representations and Warranties
  - Indemnification
- Post Closing Matters
  - Novation
  - Recertification
  - Notifications

# Structuring the Deal

## Asset Purchase

- Buyer prefers
- Title transfer more complicated
- Novation required
- Seller's continued existence
- Subcontracting
- Unwind

# Structuring the Deal

## Stock (Equity) Purchase

- Seller prefers
- All known (and unknown) liabilities to buyer
- Higher level of due diligence
- No novation required (generally)
- By operation of law exception
  - Change of name procedure
- Recertification (size status)

# Structuring the Deal

## Affiliation Issues

- Small business size status – valuable asset
  - NAICS code for primary industry
  - Size status = average annual revenue for 3 most recently completed fiscal years or employees over the past 12 completed months
- Affiliation – Impact on size
  - Size status = average annual revenue or employees PLUS your affiliates' average annual revenue or employees
- Who are your affiliates?
  - All about control. SBA will find affiliation when one firm has the power to control the other or when both firms are controlled by a third

# Letter of Intent

- Non-binding
- Present Effect Rule
  - SBA treats LOI as though rights have been exercised
  - Affiliation issue
- Binding provisions
  - Confidentiality
  - Exclusivity

# Buyer's Due Diligence

- Review of Target's:
  - Corporate Records
  - Registrations, Licenses, and Permits
  - Financial Reports and Tax Matters
  - Bank Financing
  - Commercial Contracts
  - Employee Matters
  - Insurance
  - Intellectual Property Issues

# Buyer's Due Diligence

- Reviewing **Government Contracts**
  - Are these set-aside contracts?
    - Are any 8(a) contracts?
  - Are there any pending proposals?
    - Re-competes?
  - What kind of work is performed?
    - Import/Export Issues?
    - Security clearances?
  - Other types of contracts?
    - Joint Ventures



# GOVERNMENT CONTRACT CONSIDERATIONS

# Small Business Set-Aside Contracts

- Transferable? Generally, yes.
- If SB 8(a) set-aside, however, generally, no.
  - Ownership and control by the 8(a) *individual*
  - SBA approval of change of ownership  
*Prior* to signing purchase agreement
- Request for waiver of termination for convenience

# Other Socio-Economic Set-Aside Programs

- SDVOSBs
- HUBZones
- WOSBs and EDWOSBs
- Size and Status Issues
- Native American Tribes, ANCs, NHOs

# Types of Contracts

- Multiple Award Contracts
  - GWACs, Schedule Contracts, IDIQs
- Firm Fixed Price Contracts
- Cost Reimbursable Contracts
  - Pending DCAA Audits

# Type of Work Performed

- Import/Export
  - Military/ Defense: ITAR (DDTC) – State Department
  - Mixed Use: EAR (CCL) – Department of Commerce
- OCI Issues
  - Mitigation Measures
- Data Rights
  - Limited rights vs Unlimited rights
  - Government Purpose Rights

# Security Clearance

- Does buyer have security clearance at same level or higher as required by the NISPOM
- Seller's diligence materials subject to confidentiality
  - NDA
  - “clean room” with limited access
  - Summaries vs. documents

# Non-US Buyer

- FOCI
  - Mitigation Measures
- CFIUS
  - Exon-Florio Amendment

# Other Contract Considerations

- Term of the Contract
  - Re-compete?
- Compliance Standards/Internal Controls
  - DCAA Audit
- Labor and Employment
  - Key employees critical to performance
  - Service Contract Act Compliance
- CPARs



# Other Agreements

- Pending Proposals
  - Transferable?
  - Recertification Issue
- Subcontracts
- Teaming Agreements
- Joint Ventures
- Mentor-Protégé Agreements

# Definitive Purchase Agreement

- Purchase Price
  - Earn-out
- Representations and Warranties
- Indemnification
- Post Closing Covenants
  - Restrictive covenants
  - Novation

# Post Closing – Novation

- Anti-Assignment Act prohibits transfer of government contracts
- Novation process provides the exception that allows for the transfer of government contracts
- Transfer of all assets necessary for performance – not just the contract
- Novation as a condition subsequent
- Interim period between closing and novation
  - Subcontract
  - Invoicing and Payment
- Rescission and Unwind

# Post Closing

- Notification of Change of Ownership
- Consents
- Recertification
  - For stock purchase – within 30 days after closing
  - For asset purchase and merger – within 30 days after novation

# Questions?

Cy Alba  
ialba@pilieromazza.com

Jonathan Bush  
jbush@pilieromazza.com



888 17th Street, NW  
11th Floor  
Washington, DC 20006  
202-857-1000

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