



Column: Choosing the right advisor for your strategic transaction

By Michael A. de Gennaro and A. John Shoraka

In today's marketplace, many contractors have reached the conclusion that growth through acquisition, as opposed to organic growth, is the right path for their companies.

And government contractors who have decided to expand their businesses by buying a company have a number of tough decisions to make. Whether or not a contractor has a specific enterprise in mind, one of the first choices is whether or not to retain counsel.

"Why do I even need counsel?" a contractor may ask. Sophisticated business owners, experienced in all aspects of the set-aside programs in which they participate, may have a strong inclination to try to go forward alone, particularly if the seller is similarly sophisticated. Additionally, if the contractor is borrowing money to finance the acquisition, he or she may think that the lender, through the underwriting process, will protect everyone's interests adequately.

Corporate attorneys

Even though a contractor may be able to close the transaction without any counsel, it needs to be considered if the deal would provide the best value to them.

Corporate attorneys specializing in strategic transactions between government contractors, especially mergers and acquisitions, understand not only the risks inherent in entering into the various transaction documents that a contractor must review and sign—the stock or asset purchase agreement or the merger agreement being the most central—but they can also help the buyer avoid the pitfalls associated with structuring a transaction between government contractors.

Risk management

Getting to closing on these types of transactions can be tricky and contractors should make certain that they have the right team

in their corner. Knowing what is important and what is not, whether a given risk profile is acceptable or not, in the context of a business purchase, is not the sole purview of a business owner. It takes an advisor with special expertise in government contracts to structure and close a deal between participants in Small Business Administration set-aside programs.

Does a contractor know whether it is permitted to merge or purchase another company's stock under the Federal Acquisition Regulation (FAR), or whether a given contract can be assigned without risking termination for convenience (or another reason)? Probably not, but counsel will know, and will be able to provide crucial risk management advice along the way.

Service-disabled veterans

In a recent buyer-side representation, the parties (both Service-Disabled Veteran-Owned Small Businesses) entered into a letter of intent on the assumption that they would complete a stock purchase. Upon consultation, they realized that the FAR prohibits one SDVOSB from owning another.

To resolve the issue, we advised the parties to pursue a straight merger, whereby Company B merged with Company A, with Company A surviving and adopting Company B's name. Notably, we were able to avoid any novations of contracts with this structure, saving time and money, and avoiding uncertainty. Possibly the most difficult part was persuading the seller's and the bank's respective counsels to accept our interpretation of the FAR and the relevant case law, but in the end, we were successful on all fronts.

Government contracts

Another issue that can sink a transaction before it gets off the ground is the content of a target's government contracts. As discussed above, the question of

whether a novation or a name change needs to take place with respect to any given contract drives both the structure of the deal, and influences the certainty of closing.

Of course, any buyer wants maximum certainty that a valuable contract will convey at closing, or at least, that it will eventually convey. Only a corporate practitioner skilled in the art of government contracts will be able to provide such assurance.

Working with lenders

Finally, a contractor who decides to grow its firm through acquisition should work with a lender who understands the industry and is dedicated to the contractor's long-term success. Lenders who are experts in the terminology and nuance associated with government contracts are crucial to ensure a successful and efficient process. While other banks or non-bank lenders may seem tempting, a specialized lender can guide a contractor through the process with ease and confidence, ultimately obtaining the required financing.

Conclusion

Acquisitions in the government contracting marketplace can be tricky, and in order to get the most value out of the transaction, contractors should assemble the most appropriate team to represent their interests. A contractor certainly wants a team that can perform due diligence, draft documents and close deals, but also an attorney that has experience specific to government contractors, and who is trained to address the unique challenges of the industry, such as deal structure, contract review and getting complex transactions closed.

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