

Government Contractor Mergers and Acquisitions

Creating Value For Our Clients

Merger and acquisition (“M&A”) activity involving government contractors has increased substantially in recent years. A combination of factors has led to this dramatic growth, including the market adjustment to changing government priorities, projected decreases in government procurement and excess advisory capacity. As a result, businesses serving government entities in such areas as information technology, communications, specialty software, ordinance, professional services, transportation and manufacturing are becoming high value acquisition targets.

Companies pursuing acquisition or disposition of a government contractor, or a merger or joint venture with a government contractor, face a complex transaction cycle and a number of unique issues beyond those involved in deals not involving a non-government contractor. Those involved in these transactions must bear in mind (i) restrictions imposed by various regulations (for example, the International Traffic and Arms Regulations, the Exon-Florio Amendment, the Homeland Security Act and the Buy American Act), (ii) novation requirements as to any transfer of the government contracts, (iii) necessary governmental approvals, including those of the Defense Security Service, the Department of Defense, the State Department and the Treasury Department if the buyer (or its ultimate owner) are foreign nationals, and (iv) special issues relating to intellectual property rights. Due diligence, accounting and indemnification requirements all are intensified in these transactions.

Seyfarth Shaw Capabilities

The attorneys of Seyfarth Shaw’s Government Contractor M&A Practice are adept at providing strategic counsel to companies who are engaged in transactions involving the government contractor industry. Our clients are in the defense, intelligence and civilian sectors, and our transactions include companies involved in both classified and unclassified matters. Some develop or manufacture ordinance, hardware, communications and other specialty software, or medical devices. Others provide electronic mapping, transportation or other services. Regardless, companies that rely on government contracts as a source of revenue must reconcile numerous compliance obligations, contract restrictions

and other constraints. To help such companies pursue their business strategies with a minimum of delays and maximum benefit, our attorneys:

Conduct due diligence—sophisticated due diligence is required for M&A work involving government contractors. Our long-standing knowledge of government contract issues, the nature of contract awards, and the manner in which federal agencies conduct their investigations enables us to identify crucial issues that could compromise the integrity of a proposed transaction. Such issues include accurate valuation of a company's government contracts, and risk assessments with respect to a wide variety of issues including those pertaining to data rights, TINA/defective pricing, schedule contracts, FOCI, security clearances, foreign corrupt practices, country of origin issues, and small business size status. Our interdisciplinary team, which includes cleared attorneys for classified projects, is ready to move quickly and efficiently so that our clients can take advantage of any opportunity that presents itself and be secure in the knowledge that

they have a clear picture of the target company and any risks that might exist. In addition to our government contracts and regulatory attorneys, the team includes attorneys with expertise in M&A transactions, securities and other corporate matters, tax, employment, benefits and other HR issues, financing, environmental issues and intellectual property rights.

Advise on compliance with government requirements—we have exhaustive knowledge of the government's novation policies, as well as the regulatory issues involved in these specialized M&A transactions (for example, ITAR, Exon-Florio, Hart-Scott-Rodino, Buy-American Act). Additionally, we have experience with the host of restrictions imposed by governmental agencies when transactions involve parties who are exposed to classified material.

Negotiate with federal and other government agencies—we can anticipate and provide guidance for the variety of government restrictions, controls

Providing Strategic Counsel

CREATIVE SOLUTIONS TO UNIQUE GOVERNMENT CONTRACTOR ISSUES

A potential acquirer lacking government security clearance sought to purchase a government contractor whose operations required such clearance. If acquired, the target company would lose its security clearance and most of its revenue (which came from classified work).

We advised all parties on how the target's classified status would affect the deal and proposed that the acquirer work directly with the Department of Defense to maintain the target's clearance, while concurrently applying for clearance of its own.

Clearance was granted, and the deal was completed in a timely fashion with no loss of revenue.

BREADTH AND DEPTH

A U.K.-based buyer sought to purchase a domestic U.S. Government contractor. We were retained to handle all aspects of the transaction.

In addition to guiding the buyer through the rules and legislation restricting foreign ownership of contractor companies with classified programs, our due diligence review uncovered numerous problems with the seller's ownership of and title to its purported assets. This was the result of an earlier organizational re-structuring in which both tangible and intangible assets had not been properly transferred to the newly created business entity.

Security clearances were maintained, government contracts were novated, tangible property was properly transferred, and the deal closed successfully.

This same UK client had the opportunity to pursue 4 transactions within a 6 month period. The target companies were located throughout the US. We were able to appropriately staff all 4 transactions, using an interdisciplinary team comprised of attorneys from 5 of our offices to timely meet the client's needs.

and approvals with which a proposed merger, acquisition or divestiture must comply. If coordination or negotiation with government agencies is needed, our attorneys are there to take the lead or to support our clients, as appropriate.

Structure transactions—there are many ways to structure a transaction depending upon the parties' desires and the circumstances that exist. Are any of the parties a foreign national? What is the impact of the transaction on any set aside contracts or on any preferential status a party might have (or wish to have)? What governmental approvals are necessary and how long will it take to get them? Are classified contracts involved? These and any number of other things can affect the way the transaction is structured. An important part of our role is to help our client sort through its options and decide on a structure that both makes sense and can maximize the chances of a successful transaction.

Confirm intellectual property rights—the use of government funding can compromise intellectual property and data rights, which are often the chief assets at stake in

a proposed transaction. Our attorneys are adept at confirming the registration, preservation and transfer of such rights, and complying with the Department of Defense and Federal Acquisition Regulation requirements.

Benefit to You

Our attorneys advise both target and acquirer clients. Because of our in-depth understanding of the unique issues faced by government contractors, our attorneys provide clients with:

- Enhanced and timely due diligence
- Risk reduction, including reduction of exposure to damages
- Efficiency
- A cost effective, integrated team
- Guidance through complex regulatory issues
- Comprehensive expertise in the full range of M&A transactions involving government contractors

INDUSTRY KNOWLEDGE

A client came to us, deal in hand, for the sale of the business. We quickly identified issues with the proposed structure and the prospective buyer. We also noted that the proposed purchase price appeared to be well below market. The client decided, however, to take the next steps

It soon became apparent that our concerns were well founded and the transaction died. We proceeded to introduce the seller to a number of investment banks and the client moved forward with a new transaction. Working with the buyer, the investment bank and our client, we were able to close that transaction within 75 days at a purchase price twice that of the original proposal.

EXHAUSTIVE KNOWLEDGE OF GOVERNMENTAL PROCESSES AND ACTIONS

Our client, a potential buyer of a business, required due diligence to be conducted on the seller since many of the seller's customers used federal grant funds to acquire its principal product. As a result of this customer funding source, the business was considered to be a de facto government contractor.

Our due diligence effort uncovered that the seller could potentially be a defendant in a sealed False Claims Act lawsuit.

We reported our conclusions to our client and calculated the range of possible damages and penalties that such a suit would likely entail.

Our client opted not to proceed with the transaction, citing this litigation concern, among others. Several months later the suit against the seller was unsealed and the conclusions we developed during due diligence were confirmed.

Practice Description

The attorneys of Seyfarth Shaw's Government Contractor M&A Practice Group have a broad range of experience in guiding companies through mergers, acquisitions, dispositions, joint ventures and financings. We blend our legal knowledge with a practical business sense to help get the deal done. Our clients range from large defense contractors to small information technology start-ups. They include both U.S. and foreign companies and they are engaged in sectors such as communications, software development, medical devices, ordinance, professional services, transportation and manufacturing.

Our attorneys anticipate and resolve the unique issues that arise when a government contractor contemplates a sale, acquisition, or merger. We provide guidance and draft agreements which take into account the variety of government regulations and controls with which a proposed business transaction must comply. From due diligence to financing and product liability protections, our experience encompasses the full range of considerations which must be taken into account in these sensitive and complex transactions. ■

About Seyfarth Shaw

Seyfarth Shaw was founded in 1945 by three lawyers and has grown to more than 800 lawyers across ten offices. We handle issues for our clients in all key areas including corporate and finance, government contracts, intellectual property, trade secrets, workouts and bankruptcy, labor and employment, commercial litigation, construction, employee benefits, environmental, litigation, real estate, securities litigation, and trusts and estates among others.

Our success is the result of a constant, unrelenting focus on the needs of our clients. Our commitment to excellence and our belief in the strength of a team-based approach to the delivery of our services offers an atmosphere of creative and innovative thinking.

Our clients are our partners in business and we are committed to listening to their needs and to aligning the skills and abilities of our people to respond to those needs. Our clients range from *Fortune* 100 to midsize companies, and include publicly traded and privately held companies. We represent clients of all sizes across all industries and we are diligent in providing the same level of commitment to each client.



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