

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. THE DUE DILIGENCE PROCESS	1
A. Non-Disclosure or Confidentiality Agreements	2
1. Process Issues.....	2
a. When to Put a Confidentiality Agreement in Place.....	2
b. Battle of the Forms and Negotiations	3
c. Timing of Negotiation	3
d. Administrative Matters	3
2. Types of Non-Disclosure Agreements	3
a. Target-Acquirer	3
b. Internal with Employees.....	3
c. Third-Party Experts	3
3. Substance of a Confidentiality Agreement	3
a. Typical Provisions in Confidentiality Agreements	3
b. How Acquisition Non-Disclosure Agreements/CAs Differ from Non-Disclosure Agreements Used for Other Government Contracting Purposes.....	3
c. How to Integrate CA Provisions into the Acquisition Agreement.....	3
d. How CAs Can Be Misused.....	3
B. Composition of the Due Diligence Team	3
1. Initial Diligence.....	3
2. Comprehensive Diligence	3
3. Additional Team Members for Government Contracts	3
4. Organizing the Diligence Team	3
5. Issues Concerning the Diligence Team.....	3

TABLE OF CONTENTS

	<u>Page</u>
6. Performing Diligence on the Acquirer	3
C. The Data Room.....	3
1. Working with the Target’s Data Room.....	3
2. Electronic vs. Physical Data Rooms	3
3. Restricted Material	3
4. Review of Sensitive Information	3
5. Follow-up Inquiries	3
6. Interviews as Part of the Diligence Process	3
7. Performing Diligence on Classified Matters.....	3
8. The Diligence Report	3
9. How to Use a Diligence Report	3
D. Developing a Government Contracts Due Diligence Document Request	3
1. Contracts and Related Information	3
a. Prime Contracts	3
b. Subcontracts.....	3
c. Specific Contract Documentation.....	3
2. Proposal Files	3
3. Asset Lists	3
4. Claims, Disputes, Litigations and Investigations.....	3
5. Government-Approved Systems	3
6. Compliance Program Documentation	3
7. Environmental Issues	3
8. Employment Law Issues	3
9. Export Controls	3

TABLE OF CONTENTS

	<u>Page</u>
10. National Security Issues.....	3
11. Antitrust Issues.....	3
III. SCOPE OF GOVERNMENT CONTRACTS REVIEW.....	3
A. Methods of Selling to the Government.....	3
1. Fixed-Price vs. Cost-Reimbursement Contracts	3
2. FAR Part 15 v. FAR Part 12	3
B. Contracting Parties.....	3
1. U.S. Government Prime Contracts.....	3
2. Subcontracts under Federal Prime Contracts	3
3. Teaming Agreements	3
4. State and Local Contracts.....	3
IV. COST ISSUES PARTICULAR TO GOVERNMENT CONTRACTS.....	3
A. “Cost-Disclosure” Contracts.....	3
B. Allowability Cost Principles under FAR Part 31	3
1. Applicability of the Cost Principles	3
2. General Requirements	3
a. Reasonable.....	3
b. Allocable.....	3
c. Unallowable or Conditionally Allowable Costs	3
d. Advance Agreements.....	3
3. Certification of Indirect Costs.....	3
4. Allowability Issues That Frequently Arise in Acquisitions.....	3
a. Organizational Costs.....	3
b. Goodwill	3

TABLE OF CONTENTS

	<u>Page</u>
c. Interest and Other Financial Costs.....	3
d. Compensation Costs	3
e. Relocation Costs	3
f. Idle Facilities and Idle Capacity Costs	3
g. Asset Valuations from Business Combinations.....	3
C. Allocation Under Cost Accounting Standards.....	3
1. List of Standards	3
2. Applicability.....	3
a. Full Coverage	3
b. Modified Coverage	3
3. Exemptions.....	3
4. CAS Disclosure Statements	3
a. Requirements for Filing.....	3
b. Content of the CAS Disclosure Statement	3
c. Revisions to CAS Disclosure Statements.....	3
d. Procedure for Government Audit for Adequacy	3
5. Noncompliances and Voluntary Changes	3
a. CAS Standards or Disclosed Practices	3
b. Voluntary Changes	3
6. Consideration of Changes in Applicability	3
a. Large CAS-Covered Business Purchase of a Small Business Acquisition Target.....	3
b. Non-CAS-Covered Contractor Acquisition of a CAS-Covered Target	3
7. Post-Closing Changes to the Acquiring and the Acquired Companies' CAS Disclosure Statements	3

TABLE OF CONTENTS

	<u>Page</u>
D. The Truth in Negotiations Act.....	3
a. Overview	3
b. Disclosure of the Potential Acquisition	3
E. Government Audit Rights.....	3
1. Nature and Scope of Government Audit Activities	3
2. Types of Government Audits	3
a. Pre-Award Audits	3
b. Incurred Cost Audits.....	3
c. Defective Pricing Audits	3
d. CAS Audits.....	3
e. Audits of Contract Terminations, Delay and Disruption Claims and Other Price Adjustment Proposals.....	3
3. Role of the Defense Contract Audit Agency	3
a. Subjects of DCAA Audit.....	3
b. Sarbanes-Oxley Considerations.....	3
4. Role of Inspectors General and Investigative Organizations	3
5. Role of the Department of Justice.....	3
F. GSA Schedule and Other IDIQ Contracts	3
1. Principal Risks of GSA Schedule Contracts	3
a. Pricing and Disclosures	3
b. Price Reductions	3
c. Industrial Funding Fee and Sales Reporting Clause	3
d. GSA OIG Audits	3
V. CLAIMS, DISPUTES AND BID PROTESTS	3

TABLE OF CONTENTS

	<u>Page</u>
A. Claims Against the Government.....	3
1. Requests for Equitable Adjustment.....	3
2. The Contract Disputes Act.....	3
3. Effect of Certification	3
4. Contractor’s Obligation to Continue with Performance	3
B. Government Claims Against the Contractor	3
1. Government Claims Under the Contract Disputes Act.....	3
a. The Contract Disputes Act	3
2. Forfeitures	3
3. Civil False Claims Act	3
a. Overview of the Civil False Claims Act.....	3
b. Post-Acquisition Impact of FCA Actions.....	3
4. Criminal Statutes	3
a. The False Claims Act	3
b. The False Statements Act	3
c. Bribery of Public Officials and Witnesses	3
5. Procurement Integrity Act.....	3
6. Other Statutes and Regulations	3
a. Labor and Employment Provisions	3
C. Environmental Liability at Government Contract Sites	3
1. Background	3
2. Contractor Direct Recovery of Environmental Costs	3
3. Contractor Recovery Based on Contribution Under CERCLA	3
4. Allowability of Environmental Costs as Indirect Costs.....	3

TABLE OF CONTENTS

	<u>Page</u>
D. Disputes Arising out of Subcontracts	3
E. Pending and Potential Bid Protests Involving the Target.....	3
F. Balance Sheet Analysis.....	3
1. Recognition of Revenue Based on Unresolved Claims	3
2. Recognition of Contingent Liabilities.....	3
VI. ADEQUACY OF THE TARGET’S COMPLIANCE PROGRAM	3
A. Overall Company Compliance Program and Internal Controls.....	3
B. Present Responsibility	3
1. Debarment and Suspension	3
a. Present Responsibility	3
2. Past Performance on Competitive Procurements.....	3
a. Past Performance as an Evaluation Factor	3
b. Past Performance Information of Predecessors and Affiliates	3
C. Existing Arrangements for Classified Contracts	3
1. Assessing a Company’s Existing Compliance Program	3
a. Facility and Personnel Clearances.....	3
b. Compliance Procedures	3
2. Identification of FOCI and Security Issues Arising from the Acquisition	3
a. Forms and Reports.....	3
b. Deal Structure	3
3. Integration of the Target into Corporate Structure.....	3
D. Foreign Sales	3
E. Export Control Compliance.....	3

TABLE OF CONTENTS

	<u>Page</u>
VII. OTHER RISK AREAS	3
A. Assignment and Change of Control Provisions.....	3
B. Warranties and Indemnities	3
1. Warranties	3
2. Statutory Indemnities	3
a. Government Statutory Indemnities.....	3
3. Contractual Indemnity for Liability to Third Persons.....	3
C. Organizational Conflicts of Interest.....	3
1. Overview of OCI Requirements.....	3
a. FAR and DFARS Coverage of OCIs.....	3
b. Types of Contracts Most Likely to Present OCIs.....	3
2. How OCIs Can Arise in Acquisitions	3
3. Mitigation of OCIs	3
D. “Revolving Door” Restrictions.....	3
1. Overview of “Revolving Door” Restrictions	3
2. Relationship Between the Representational Prohibitions and the Procurement Integrity Act	3
3. How “Revolving Door” Issues Can Arise.....	3
E. Intellectual Property Under Government Contracts	3
1. Patents	3
2. Copyrights	3
3. Technical Data	3
a. Unlimited Rights.....	3
b. Limited Rights	3
c. Government Purpose Rights (DOD Only).....	3

TABLE OF CONTENTS

	<u>Page</u>
4. Software	3
5. Data and Software Relating to Commercial Items.....	3
6. Identification and Marking Requirements	3
F. Small Business Issues	3
1. Overview of Small Business Requirements in Federal Procurement	3
2. Impact of Acquisition on Small Business Status and Contracts	3
a. Small Business Status	3
b. SBA Affiliation Rules	3
c. SBA Rules on Size Recertification for Long- Term Contracts and Where an Acquisition, Merger or Novation Takes Place	3
G. Terminations	3
1. Convenience—Fixed-Price Contract	3
2. Default—Fixed-Price Contract	3
3. Cost-Reimbursement Contracts	3
VIII. ACQUISITION DOCUMENTS AND PRE-CLOSING ACTIVITIES	3
A. Nature of the Acquisition.....	3
1. Structure of the Acquisition	3
2. Nature of the Target (Public vs. Private)	3
3. Economics of the Transaction (Deal Consideration)	3
4. Ancillary Agreements	3
B. Representations and Warranties	3
C. Disclosure Schedules	3
D. Covenants Between Signing and Closing.....	3

TABLE OF CONTENTS

	<u>Page</u>
E. Conditions to Closing	3
F. Classified Business	3
IX. ANTITRUST REQUIREMENTS	3
A. Background.....	3
1. Overview	3
2. Confidential Treatment of HSR Materials	3
B. HSR Filing Requirements.....	3
1. Thresholds	3
2. Failure to File	3
3. HSR Notification and Report Form—Information and Materials Required	3
a. Item 4(c) of the HSR Notification and Report Form.....	3
b. Filing Fees	3
c. Additional Resources for Information Regarding Completion of HSR Filings	3
C. HSR Review	3
1. HSR Waiting Period.....	3
2. Agency Clearance to Investigate a Proposed Transaction	3
3. Substantive Review of HSR Filing—Initial Inquiry	3
4. Procedural Implications if Open Issues Remain at the End of the Initial 30-day HSR Waiting Period	3
a. Pull/Refile HSR	3
b. Second Requests	3
5. Resolution of Transactions the Agency Believes Are Anticompetitive.....	3
a. Consent Orders	3

TABLE OF CONTENTS

	<u>Page</u>
b. District Court Litigation	3
D. Antitrust Limits on Parties’ Pre-Closing Conduct—“Gun Jumping”	3
1. Gun Jumping under the HSR Act.....	3
2. Gun Jumping under the Sherman Act	3
3. Implications for Transaction Agreements	3
4. Implications for Pre-Closing Activities	3
E. Anatomy of a Substantive Investigation.....	3
1. Multi-Party Government Investigation	3
2. FTC vs. DOJ Clearance Process	3
3. Confidentiality Agreements	3
4. What to Expect Procedurally in First 30 Days.....	3
a. Investigation	3
b. Interviews	3
c. Seeking Information from Other Sources.....	3
d. Clearing Certain Issues but Reserving Others.....	3
e. Options if Transaction Not Cleared.....	3
5. Substantive Antitrust Issues in Defense M&A Deals	3
a. Governing Law	3
b. Merger Guidelines	3
c. Market Share and Concentration Not as Significant in the Defense Industry	3
d. Anticompetitive Effects.....	3
e. Barriers to Entry	3
f. Efficiencies	3
g. Failing Firm Defense	3

TABLE OF CONTENTS

	<u>Page</u>
h. Horizontal Mergers.....	3
i. Vertical Mergers	3
F. European Union.....	3
1. Procedure for European Union Notifications.....	3
a. ECMR Jurisdiction	3
b. Primary Revenue Threshold	3
c. Secondary Revenue Threshold	3
d. EU Member States.....	3
e. Exceptions to Exclusive Jurisdiction: Referrals to Member States	3
f. Referrals to the Commission	3
g. Measures Related to National Interests	3
2. Anatomy of an EU-Level Notification.....	3
a. Pre-Notification Contacts with the European Commission	3
b. Pre-Notification Contacts with National Competition Authorities	3
3. Phase I Investigation	3
4. Phase II Investigation; Rights of Defense and Appeal	3
5. Suspensive Effect	3
6. Sanctions for Failing to Notify or Submit a Complete Notification	3
a. Substantive Review of Transactions in the European Union.....	3
7. Market Definition.....	3
a. Product Market	3
b. Geographic Market	3
8. Theories of Competitive Harm.....	3

TABLE OF CONTENTS

	<u>Page</u>
a. Unilateral (or Non-Coordinated) Effects	3
b. Coordinated Effects	3
9. Horizontal Mergers	3
a. Six Factors Assessed by the Commission	3
b. Boeing-McDonnell Douglas	3
10. Vertical and Conglomerate Mergers	3
a. Vertical Mergers	3
b. Conglomerate Mergers	3
c. General Electric/Honeywell	3
G. United Kingdom	3
X. EXON-FLORIO APPROVAL FOR FOREIGN OWNERSHIP AND INVESTMENT	3
A. The Exon-Florio Amendment.....	3
B. The CFIUS Process.....	3
1. Joint Voluntary Notice Steps	3
2. Acquirer’s Information Required in Notice of Proposed Transaction	3
3. Target’s Information Required in Notice of Proposed Transaction	3
4. CFIUS’s Response to a Joint Voluntary Notice.....	3
XI. EXISTING CONTRACTS—DEALING WITH THE ANTI- ASSIGNMENT STATUTES	3
A. Applicable Law	3
B. Case Law	3
C. Regulations	3
D. Contract Novations	3

TABLE OF CONTENTS

	<u>Page</u>
1. FAR.....	3
2. Transition Arrangements Pending Novation.....	3
E. Change of Name Agreements.....	3
F. Effect of Acquisition on Bids and Proposals.....	3
XII. ISSUES FOR THE COMBINED COMPANY.....	3
A. Guarantee of Performance of an Acquired Subsidiary.....	3
1. Existing Guarantees.....	3
2. Future Guarantees—General Considerations.....	3
a. Respecting the Organizational Structure.....	3
b. FIN 45.....	3
c. Tax Concerns.....	3
d. First Demand Guarantees and Revenue Recognition Policy.....	3
3. Alternatives to a Guarantee.....	3
a. When Unnecessary.....	3
b. Comfort Letters and “Keep Well” Commitments.....	3
c. Performance Bonds.....	3
d. Letters of Credit or Bank Guaranty.....	3
4. Government Contract Considerations.....	3
5. Legal Issues in Negotiating Guarantees.....	3
a. Allow the Guaranteeing Party to Assert the Defaulting Party’s Defenses.....	3
b. Permit the Guaranteeing Party to Set Off or Net Amounts Owed by the Beneficiary.....	3
c. Require Exhaustion by the Beneficiary of All Remedies Against the Defaulting Party.....	3
d. Limit Guarantee Payment.....	3

TABLE OF CONTENTS

	<u>Page</u>
e. Require Notice of Default from the Beneficiary and Allow for a Cure Period Before Triggering the Guarantee.....	3
f. Limit the Guarantee to a Specified Term	3
g. Specify Obligations Covered by the Guarantee	3
h. Ensure that the Guarantee Is Not Assignable by the Beneficiary.....	3
i. Governing Law	3
B. Restructuring.....	3
1. Allowability of Restructuring Costs.....	3
2. Capturing Restructuring Costs	3
3. Restructuring Agreements.....	3
C. Cost Accounting Issues.....	3
1. Cost Accounting Standards.....	3
a. Cost Disclosure Statements	3
b. Cost Accounting Changes	3
c. Cost Impacts	3
d. Quantifying Cost Impact of Changes	3
2. Effect of Acquisition on Cost-Reimbursement and Incentive Contracts.....	3
3. Stepped-Up Basis and Goodwill	3
a. Allowability of Step-Ups/Downs	3
4. Other Costs—Acquisition of Intangible Capital Assets	3
5. Inter-Company Transfers	3
6. Pension Costs	3