

FAILURE TO NOVATE

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The Assignment of Claims Act, 31 USC § 3727 and the Assignment of Contracts Act, 41 USC §6305 broadly prohibit transfers of contracts involving the United States, or interests therein, and assignment of claims against the United States. And although a US government contract cannot be sold and then assigned, the Federal Acquisition Regulation (“FAR”) permits the assignment of a federal government contract through novation, which requires that the assignor, the assignee and the government enter into a novation agreement that is approved by the contracting officer. FAR 42.1204. The successor in interest under a novation agreement enjoys all the rights of its predecessor as if it were the originally contracted party. This includes the right to pursue any claims the original awardee could have pursued.

There are very specific procedures set forth in FAR part 42.12 for requesting and receiving government approval of a novation. The failure to novate a contract properly can result in unfortunate consequences, as demonstrated in *Trinity Source Logistics LLC*, ASBCA No. 62435, Aug. 11, 2022. (Although the caption of the case is “Trinity Source Logistics,” the appellant actually is “Trinity Logistics Source,” as agreed to by the parties.)

The Air Force in 2018 awarded a contract to Trinity Logistics Source, Inc. (“Trinity-US”) to provide school and teaching supplies for children in Syria. Ms. Nasrin Yamolky had, in 2017, registered Trinity-US in the Joint Contingency Contracting System and also had filed articles of incorporation for Trinity-US with the State of Washington’s Secretary of State Office.

In 2018, Trinity Logistics Source Company in Erbil, Iraq (“Trinity-Iraq”) was incorporated.

In the appeal, Trinity-Iraq asserts that the owners of Trinity-Iraq are the owners of Trinity-US, (including a man named Mr. Mala Amin Mala Amin Haji-hereafter Mr. Mala), and sought payment for the work performed in the Air Force contract cited above. The Air Force moved to dismiss the appeal asserting that the government entered a contract with the US-based company with the same name, and therefore the Board lacked jurisdiction to hear the appeal.

After considering the evidence, the Board concluded that the government had contracted with Trinity-US to perform the contract. Trinity-Iraq completed performance and sought payment based on some type of assignment of the contract or the claim for a contract. However, the Board concluded that Trinity-US and Trinity-Iraq failed to follow the required procedures (i.e., a proper novation) for assigning any money due under the contract. Therefore, because Trinity-Iraq had no privity of contract with the government, the Board lacked jurisdiction and dismissed the case.

This conclusion was based on the following findings.

1. The government originally contract with Trinity-US, not Trinity-Iraq, as shown by the fact that the government only interacted with Ms. Yamolky until some time in 2018, when she and one of the owners of Trinity-Iraq reached an agreement (see below), but this was after the contract was awarded.

2. Trinity Logistics Source submitted a quotation in response to the solicitation with Ms. Yamolky listed as CEO.
3. Ms. Yamolky signed the contract as CEO of Trinity Logistics Source.
4. Later, Ms. Yamolky communicated with the government regarding logistics for delivering the supplies under the contract

Trinity Iraq asserted that the government should have understood it was the contractor, because the contract document identified “Trinity Logistics Source” of Erbil (Iraq) as the awardee. However, the Board noted that the address merely constituted a place of performance, not the name of the company.

The Board also held that Trinity-US failed to effectively assign any money due under the contract or the claims to Trinity-Iraq, nor did it novate the contract. The two parties had executed a “Contract Agreement and Finalizing Sharing Agreement” between Mr. Mala and Ms. Yamolky, but the Board held that it was simply a stock purchase agreement that did not properly assign or novate the contract from Trinity-US to Trinity-Iraq. The Board concluded that this agreement fell short of the FAR’s novation requirements in FAR 42.1204. The Board also rejected the idea that partial contract performance “constructively” novated the contract. The Board stated that partial performance did not result in any change in privity, and the assignor, not the assignee, remained the “contractor” for purposes of the Board’s jurisdiction.

Takeaway. If you want to “buy” a contract or begin its performance by other than the awardee, you must follow the novation procedures in FAR 42.1204 in order to have the government change the party responsible for performance and the party to whom the government must make payment. Informal procedures, or incomplete procedures will not be accepted. You run a serious risk of losing the proceeds from the contract absent a formal novation agreement, approved by your contracting officer.

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