



POST-ACQUISITION INTEGRATION AFTER A GOVERNMENT CONTRACTOR M&A TRANSACTION

A PRESENTATION SPONSORED BY ASSOCIATION OF CORPORATE COUNSEL – NATIONAL CAPITAL REGION

HOLLAND & KNIGHT LLP, TYSONS , VA
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I. Planning

- Legal integration begins well before deal closing
- Diligence should be planned with an integration mindset
- Diligence team and reports should include items and tasks that are required and/or will be needed/desired post-closing
 - **Timeline:** Integration plan should include timeline for legal matters: e.g., milestones for Closing Date, 5 days, 30 days and 90 days post-closing; “nice to haves”
 - **Legal Function:** Diligence also an opportunity for both buyer and acquire legal teams to observe legal department/function and plan for change and new processes
 - **Pending Litigation/Regulatory Matters:** Attention should particularly be given to pending litigation/regulatory matters that will need to be addressed post-closing, and legal integration plan should provide for disposition and/or mitigation of both closing and post-closing related risks
- Function Clarity: Planning should address which corporate departments will carry out post-Closing tasks (e.g., Legal or HR for employment changes/severance; Legal or Contracts for post-Closing contract notices and consents)

II. Contract Novations, Consents and Notices

- Basis of Novation Requirement
 - Deal structure determines
 - Asset sale – novation typically required
 - Stock/Equity Purchase – novation typically not required
 - Merger (forward, reverse, reverse triangular) – forward or reverse: novation typically required; reverse triangular – novation typically not required
- Novation Process
 - Supporting materials for novation package
 - To whom is package submitted?
 - When contracting officer requests additional material
 - Does entity structure change (e.g., LLC to corp.) require novation?
- Period between signing and novation
 - Subcontract pending novation
 - Handling bids and proposals

II. Contract Novations, Consents and Notices, continued

- Proposals pending as of signing
- Proposals submitted between signing and novation approval
- Considerations:
 - How does novation impact evaluation of the proposal
 - How does novation impact past performance
 - Who prepares proposal pending novation
 - Wylie Laboratories – who is an interested party?
 - Engility – be careful about IDIQ vehicles
 - Fci Federal – what resources are being evaluated?

II. Contract Novations, Consents, Notices, continued

- Consents and Notices
 - Reliance on Disclosure Schedules
 - Internal parties responsible for notices and consents (legal vs. customer-facing or other) – tracking
 - Classified contracts – may not have been diligenced
 - Challenges obtaining consents
 - Anti-assignment clauses (interpretation, ambiguities)
 - Pushback or concession demands (particularly leases)
 - Consents required pre-Closing but not obtained (material consents condition to Closing)
 - What to do if consent not obtained?

III. Security Clearance (DCSA), ITAR and International Considerations

- Purchase by foreign owners requires DCSA approval before closing.
- Foreign Ownership Control and Influence (“FOCI”) mitigation measures:
 - Special Security Agreement and Security Control Agreements
 - Proxy and Voting Trust Agreements
 - Exclusionary Resolutions
- ITAR considerations: Products, including defense articles
 - Foreign ownership will require advance notification and approval
- CFIUS
 - Foreign ownership or control requires pre-closing approval
- Issues and Concerns
 - CFIUS is a lengthy process – plan accordingly
 - Each regulatory scheme has its own definition of foreign ownership

IV. Small Business/Set-Aside Issues

- Affiliation issues:
 - Depending on size of acquiring entity, target may still be small for some contracts
 - Five-year vs. Three-year revenue look-back rule
- Recertification requirements for small businesses
- Because SBA regulations state that size is established at the time of proposal submission, existing contracts are not impacted.
- FAR 52.219-28: Post-award size recertification requires notice of the acquisition 30 days after closing. Practical impact is that agency cannot include contract in its small business spending.
- Impact of acquisition on 8(a) contracts
 - Termination regulation
 - Waiver process

IV. Small Business/Set-Aside Issues, continued

- Issues and considerations
 - SBA “present effect” rule – LOI and/or exclusivity could trigger affiliation.
 - Target may stay small for some NAICS codes
 - IDIQs and GWACs:
 - May have unique procedures
 - May allow target to “jump” to Full & Open contract

V. Organizational Conflicts of Interest (OCIs)

- Issues arising in connection with identifying OCI situations pre-closing
 - Procedures for handling acquirer competitive information to identify OCI situations pre-closing
 - Evaluate likelihood of agency acceptance of mitigation
- Process for identifying OCI situations after closing
- Scope of OCI: Limited to contractor or applicable to corporate family?
- Mitigation measures
- Situations in which both acquirer and acquire hold the same GWAC, IDIQ, or Schedule contract
 - Determine plan for indirect rates
 - Check contract for any prohibition on holding two contracts

VI. Subsidiary Structuring and Functional Group Integration

- Pre-closing restructuring: F-reorganizations, buyer reorganizations
 - Novation/name change issues
- Immediate post-Closing entity
- Subsidiary survey and structure streamlining/collapse:
 - Merge or transfer assets (novation issues)?
 - Effect on 3rd party contracts, including financing agreements
 - Protest considerations
- Group/Division integrations – legal/non-legal issues

VII. Residual Purchase Agreement Issues and Tensions

- Seller/former owners will have residual liability under certain Purchase Agreement provisions including:
 - Net Working Capital Adjustments
 - Breaches of Reps and Warranties or Covenants (resulting in potential indemnification)
- Acquired company employee conflicts of interest – how to address/navigate:
 - Personnel with best knowledge of the matters may also have liability as Sellers – to whom does duty lie?
 - Personnel with knowledge may also have left the company post-Closing but may still be under employment-related obligations to Buyer
- Rollover equity owners/directors – above conflicts may be heightened if Seller employees or equity holders received substantial rollover equity and/or are now directors of the buyer

VIII. Other Areas - Employee Retention and Benefits

- Analysis of Government Contracts requirements:
 - Contract performance requirements
 - Wage considerations such as Service Contract Act or Collective Bargaining Agreements
 - Indirect rates
 - Compliance programs
 - Consideration of impacts on government contracts purchasing systems, accounting systems, etc.

VIII. Other Areas - Employee Retention and Benefits, continued

- Deal structure considerations – asset deals require new offers/hiring
- Purchase Agreement backdrop – benefits maintenance covenants
- Plan maintenance vs. Plan integrations
- Plan integration issues
- Dealing with differences in compensation, benefits and cultures
- Tracking inherited employment agreements
- Institution/integration of employment policies and practices
- Educating acquire employees about Buyer equity awards and programs
- Post-acquisition terminations

VIII. Other Areas – IP, Confidentiality and Insurance

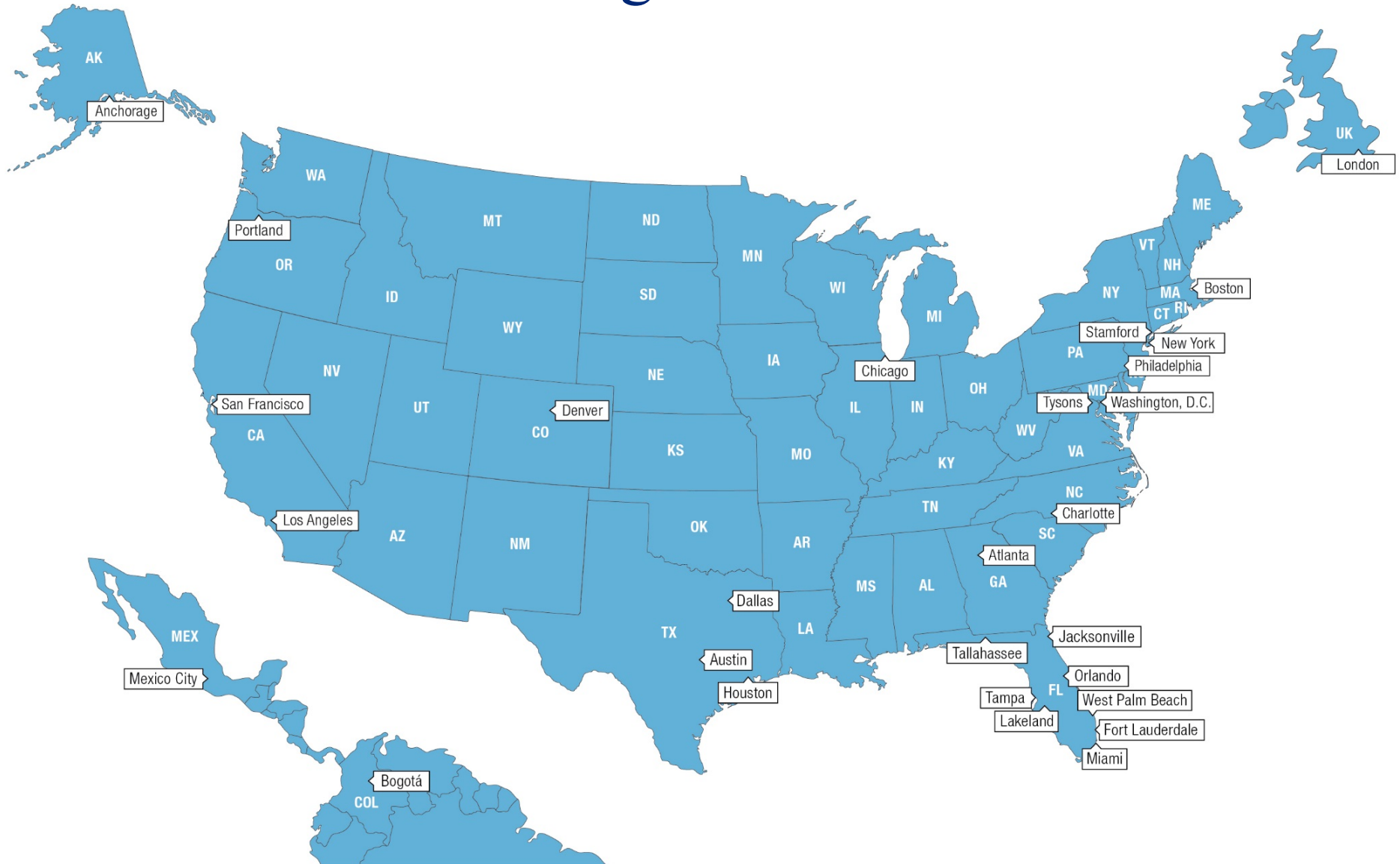
- IP and Confidentiality
 - Analysis of current vs. desired IP ownership and licensing structures
 - Overlapping licenses
 - Transferring IP internally – considerations
 - Need for new protections as a result of the deal (e.g., trademarks if re-naming/branding)
- Insurance
 - Notices to carriers and brokers
 - Policy coverage analysis
 - Updates to D&O Policies (new Ds and Os for acquired company entities)

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About Holland & Knight's Government Contracting Industry Practice

- Holland & Knight attorneys in the Tysons and DC Offices are **particularly focused on the government contracting industry.** We routinely provide advice to clients in the following sub-industries: Aerospace, C5ISR, SIGINT, AI, Logistics, Systems Integration, Cyber, Engineering, Space, as well as Hardware and Equipment.
- Our **M&A attorneys** in the Tysons Office have completed **more than 100 merger, acquisition and disposition transactions in the last five years,** including some of the industry's most noteworthy deals. We have also completed numerous **public and private financing and restructuring transactions** involving government contractors.
- Our M&A Group represents Fortune 500 and other large buyers, private equity firms, a wide range of sellers, and other strategic and financial parties in government industry transactions. While a majority of our transactions are middle-market focused, our experience includes **acquisitions and dispositions ranging from under \$10 million to \$6 billion.**
- Our **expert Government Contracts Group** has in-depth experience in all facets of doing business with the federal government, and assists the M&A teams on risk mitigation in areas including: Cost Accounting (DCAA audit risks); CIFIUS and FOCI obligations; Data Rights issues; Cyber requirements; and Compliance and Mandatory Disclosure failures.

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Jonathan Wolcott is a partner in the Corporate and M&A group of Holland & Knight's Tysons office. He has represented numerous large to small government contractors in M&A, public and private securities compliance, corporate and governance and related transactional matters for over 17 years, as well as representing private equity firms and investment banks focusing on the government industry. He is also the lead partner for pro bono and public charitable services in H&K's Tysons office.

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Mary Beth Bosco is a partner in Holland & Knights' Government Contracts Group. She utilizes her experience working with contractors on matters such as claims, audits and investigations, and cybersecurity, to assist companies and lenders contemplating a transaction with a government contractor. She has provided government contracts specialist advice to companies making a strategic acquisition, banks contemplating loans, and private equity firms seeking to add a government contractor to their portfolio.

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Brian Geoghegan has been a General Counsel in the national security space for the last fifteen years. He has structured and negotiated many transactions, including mergers, acquisitions and spinouts, joint ventures, financings, equity investments, and other strategic partnerships. One of the transactions won the Association for Corporate Growth's Deal of the Year, and he has been honored as Chief Legal Officer of the Year by ACC-NCR and by the Washington Business Journal C-Suite Awards.

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Danielle Noe has been an employee at KeyW, now a Jacobs company, since 2009. She attended Maryland Law School as a full time KeyW employee. Prior to being acquired by Jacobs, Danielle assisted KeyW with more than 25 acquisitions and 5 divestitures, leading to the growth of the company to nearly 2,000 employees and over \$500M in revenue. She played a key role in the diligence and negotiation of KeyW's acquisition by Jacobs and currently is part of the Jacobs integration management team. As KeyW Corporate Counsel, she manages the day-to-day legal operation of KeyW, and takes particular delight in trade compliance, corporate contracts, and discovering clever ways to get to "yes" to support the company's mission.

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Matt Dost is General Counsel and Secretary of Allied Associates International, a veteran-owned small business that provides software development and support services to Department of Defense and Intelligence Community clients. He is also the lead co-chair for the ACC NCR Government Contractors Forum.