

SESSION 11

MERGERS & ACQUISITIONS

WEDNESDAY, JANUARY 27, 2021

4:00 PM to 5:00 PM



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Key 2020 M&A Transactions and Trends in the Government Contracting Industry

Key 2020 M&A Transactions and Trends

- Valuation Trends
- Transaction Volume
- Key Investment Priorities
- Private Equity Trends

Impact of COVID-19 on Government Contracts M&A

- Market Impact
- Key Due Diligence Issues
 - PPP loans
 - Diligence Risks
 - Consent Rules
 - Section 3610
 - Authorization
 - Use of Funds

Protest Developments Impacting M&A

- DynCorp International, LLC, B-417611.7 et al.
 - Is a converted entity still the same offeror?
- Knight Point Systems, LLC, B-418746
 - How can you identify a newly acquired subsidiary in a proposal?
- Navarro Research and Engineering v. United States
 - What happens when a teaming partner is sold while a proposal is pending?

Representation & Warranty Insurance

- Prevalence
- Trending Exclusions
 - Cybersecurity
 - CARES Act/PPP

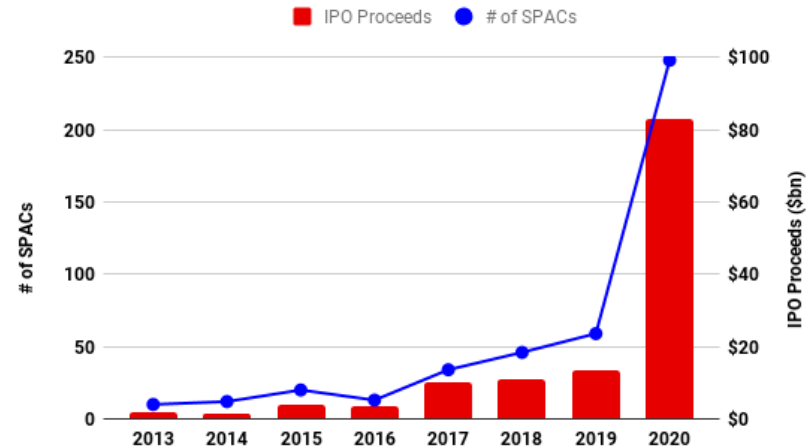
Small Business Developments Impacting M&A

- SBA Regulatory Changes (13 C.F.R. § 121.404(g))
 - ▶ Recertification
 - ▶ Mentor Protégé
 - ▶ Other
- SBA rule clarifying successor-in-interest eligibility for Phase III funding in the 2020 SBIR/STTR Policy Directive

Special Purpose Acquisition Companies (SPACs) and the A&D market

- What is a SPAC?
- SPACs took off in 2020
 - A&D de-SPAC transaction
 - New A&D-focused SPAC
- Impact on A&D M&A market
- Legal implications for government contractors
- SEC focus on SPACs
 - CF Disclosure Guidance: Topic No. 11 (12/22/20)

SPAC IPOs Since 2013



SPAC Research Newsletter (1/4/21)

M&A Trends Impacting 2021

Trends/Issues Impacting 2021

- Tax Policy
- New Administration Budget Priorities
- Buyer Universe / M&A Posture

Backup Materials

Paycheck Protection Program Diligence

■ Diligence Review: Compliance.

- ▶ Small business status (including affiliates)?
- ▶ Was the loan necessary?
 - ▶ Board/Leadership determination at time of loan application?
- ▶ Was the calculation of loan amount correct?
 - ▶ Payroll records?
- ▶ Safe Harbor (May 14/Sub \$2M for necessity)

Paycheck Protection Program Diligence

Transaction considerations

- ▶ Tax consideration – if acquirer has taken credit for employment taxes, can't have PPP loan in the same group.
- ▶ Asset sale or Section 368(a)(1)(F) ("F-reorg") (with pre-closing repayment, could mitigate risk)
- ▶ Paying off the loan vs. forgiveness
- ▶ Reputational risk related to forgiveness
- ▶ Special indemnity vs. robust representations

Paycheck Protection Program Diligence

■ Consent:

- ▶ **No** consent is required (unless loan documents indicate otherwise) if:
 - ▶ Transfer of less than 20 percent of the common stock or other ownership interest of a PPP borrower
 - ▶ Transfer of less than 50 percent of the assets of a PPP borrower (measured by fair market value)
 - ▶ The PPP note is repaid in full
 - ▶ The loan forgiveness process has been completed and (i) SBA has remitted funds to the PPP lender or (ii) the borrower has repaid any remaining balance

Paycheck Protection Program Diligence

■ Consent:

- ▶ ***Lender consent only*** (unless loan documents indicate otherwise) is required for either of the following situations:
 - ▶ Stock Sale: the sale or other transfer of 50% or less of the common stock or other ownership interest of the PPP borrower.
 - ▶ Stock or Asset Sale: the PPP borrower submits its forgiveness application to the PPP Lender ***and*** establishes an interest-bearing escrow account controlled by the PPP lender for the outstanding loan balance.
- ▶ In all other circumstances, both lender consent and ***SBA*** consent are required prior to transaction close.

Section 3610 of the CARES Act

- The CARES Act Section 3610 allowed federal agencies to reimburse contractors for costs for granting leave to employees unable to work due to facility closures.
 - ▷ Limited duration (recently renewed)
- Key Diligence Issues:
 - ▷ Customer-specific guidance:
 - ▷ DoD Guidance (Class Deviation 2020-00013, Revision 1 (Aug. 17, 2020))
 - ▷ No “double dipping” (OMB Memo M-20-26 (June 18, 2020))
 - ▷ Proper use of CARES Act funds:
 - ▷ Observe maximum rates (40 hours/week)
 - ▷ Limited to “minimum contract billing rates”
 - ▷ Documentation
- Congress extended Section 3610 through March 31, 2021 via the Consolidated Appropriations Act of 2021.

Transfer of SBIR Phase I/II Contracts

- Under the Small Business Innovation and Research (SBIR) program, a company that develops technology under an SBIR Phase I or II contract receives a preference for Phase III awards, including on a sole-source basis, for work that derives from, extends, or completes the prior Phase I or II work.
- The Small Business Administration's (SBA) SBIR Policy Directive additionally permits Phase III contracts to be awarded to certain entities that acquire a Phase I or II contract:
 - ▶ “An SBIR...Awardee may include, and SBIR...work may be performed by, those identified via a ‘novated’ or ‘successor in interest’ or similarly-revised Funding Agreement. For example, in order *to receive a Phase III award, the Awardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award.*” SBIR/STTR Policy Directive § 6(a)(5) (May 2, 2019) (emphasis added).

Transfer of SBIR Phase I/II Contracts

- The GAO recently confirmed that, if a third-party acquires an SBIR Phase I/II awardee but does not receive novation of the Phase I or II contracts, the buyer is not itself eligible for award of a Phase III contract. *ASRC Fed. Data Networks Techs., LLC*, B-418028.1, B-418028.2, Dec. 26, 2019, 2019 CPD ¶ 412.
- The SBA objected to the GAO's ruling and has subsequently issued a "technical amendment" to "clarify" that "successor-in-interest entities," at least in certain circumstances, are eligible for Phase III awards even without novation. 85 Fed. Reg. 50,062 (Aug. 17, 2020).
- The "technical amendment," however, attempts to make this clarification simply by changing the word "must" to "may" in SBIR/STTR Policy Directive § 6(a)(5). It is unclear whether this meager revision will actually provide the clarification SBA seeks rather than creating ambiguity – and therefore risk – in what previously was a straightforward bright-line rule.

Challenge Question



Submit your answer to craig@pubklaw.com
Subject line: Panel 11 Challenge Question