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Addressing the Unique Aspects
of Defense Industry M&A

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West

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Biographies

Howard B. Adler

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Howard B. Adler has been a partner at Gibson, Dunn & Crutcher since 1987. He was co-chair of the Firm's Corporate Transactions practice for many years, and is currently co-chair of the Real Estate Investment Trust (REIT) practice. Mr. Adler represents major corporations, investment banks, merchant banks and financial institutions in securities offerings, mergers and acquisitions, joint ventures, venture capital investments, and other matters. Mr. Adler also has experience in the general representation of business organizations, and has advised corporations and their boards of directors and audit committees on a range of corporate governance issues.

Mr. Adler has been ranked as one of the top five corporate/M&A and private equity attorneys (Tier 1) in the District of Columbia by Chambers USA: America's Leading Business Lawyers, every year for the past ten years (2005 – 2015). Chambers Global 2016 selected Mr. Adler as a top lawyer for USA Corporate/M&A. From 2007 - 2015, he has also been ranked as a top REIT lawyer nationally by Chambers. In 2015, Mr. Adler was recognized in Who's Who of M&A Lawyers by Who's Who Legal. He is listed in the 2007 edition of The Best Lawyers in America® under the category of securities law, in the 2008 - 2016 editions under the categories of securities laws and mergers and acquisitions, and in 2007 was named to the LawDragon 3000 list of top lawyers. He was named to the 2006 International Financial Law Review 1000 as a Leading Lawyer in US Mergers & Acquisitions. In August 2009, Mr. Adler was named as a finalist for the top Corporate M&A lawyer in Washington by The Washington Business Journal. He was a finalist in the Corporate Finance category in The Washington Business Journal's Top Lawyer competition in 2004 and 2007.

Mr. Adler has led teams of Gibson, Dunn lawyers in some of the most significant transactions in the Washington, D.C. and Mid-Atlantic areas in recent years. Mr. Adler's transactional work has focused on several industries, including financial institutions, REITs, health care, retail, and technology.

Mr. Adler also represents the Audit Committees of a number of major public companies.

From 1984 through 1987, prior to joining Gibson, Dunn & Crutcher, Mr. Adler was General Counsel of Riggs National Corporation and The Riggs National Bank of Washington, D.C., where he attained the rank of Executive Vice President. He served as Managing Counsel - Finance for Mellon Bank, N.A., from 1982 to 1984 and was also an associate with two major law firms from 1975 to 1982.

Mr. Adler received his law degree from the New York University School of Law, where he was Note and Comment Editor of the Law Review, and his Bachelor of Arts in Humanities, with general honors, from The Johns Hopkins University in 1972. He has written several articles for The Legal Times of Washington, D.C. and has co-authored a book on the Federal Deposit Insurance Corporation Improvement Act of 1991, published by Sheshunoff Information Services, Inc.

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Jonathan L. Corsico is a corporate partner in the Washington, D.C. office of Gibson, Dunn & Crutcher.

Mr. Corsico's practice focuses on mergers and acquisitions, where he represents corporations, private equity firms and boards of directors in a wide range of matters, public and private, friendly and hostile, domestic and cross-border. Mr. Corsico also has significant experience representing clients in connection with stockholder activism, joint ventures, minority investments, syndicated lending transactions and general corporate matters.

In 2016, Mr. Corsico was selected as a "Rising Star" in mergers and acquisitions by *Law360*. In 2014 and 2013, Mr. Corsico was selected as a "Rising Star" in mergers and acquisitions by *Super Lawyers*.

Mr. Corsico has represented clients in many significant transactions, including recently, Marriott International's acquisition of Starwood Hotels & Resorts. Other recent clients of Mr. Corsico include VeriSign, Neustar, Ford Motor Company, IAP Worldwide Services, United Therapeutics and Clark Enterprises.

Mr. Corsico received his law degree, *magna cum laude*, from Northwestern University School of Law in 2003, where he was a member of the Order of the Coif, served on the *Northwestern University Law Review* and was awarded Senior Research Honors. He received a bachelor of science in electrical engineering from Cornell University in 2000.

Joseph D. West

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Joseph D. West has worked for over thirty years in the area of contract counseling and dispute resolution, with particular emphasis on government and construction contracts. He has been involved in cases before various United States Courts of Appeals and District Courts, the United States Court of Federal Claims, numerous Federal Government Boards of Contract Appeals, the United States Government Accountability Office and the Small Business Administration. Mr. West has represented parties on all sides of government and construction contract transactions and disputes

In 1999, Mr. West was elected a Fellow in the American College of Construction Lawyers, and he has been given a "First Tier" ranking as a construction lawyer in the inaugural (2003), and all subsequent editions of Chambers USA - America's Leading Business Lawyers. In 2004 he was identified as one of the "Top Twelve Federal Procurement Lawyers" in the DC area by The Legal Times. He also has been recognized in the 2005 - 2012 editions of Chambers USA as one of the top twenty-five government contracts lawyers nationwide. In September, 2006, he was chosen by The Washington Business Journal as the city's "Top Government Contracts Lawyer" in its 2006 Top Washington Lawyers edition, and in March, 2007, he was recognized by Washington DC Super Lawyers in the Government Contracts practice area. Mr. West has been subsequently recognized by Washington, DC Super Lawyers in 2008 – 2012. In December 2009, 2011, 2013 and 2015 he was named one of Washington's "Top Lawyers" in Government Contracts law by The Washingtonian magazine. Mr. West has held leadership positions in The American Bar Association's Public Contract Law Section and Forum on the Construction Industry, as well as the Construction and Public Contract Law Section of the Virginia State Bar, and the Government Contracts and Litigation Section of the DC Bar.

A registered professional engineer in the Commonwealth of Virginia, Mr. West has been involved in government and construction contracts since 1971 when, as a junior officer in the U. S. Navy's Civil Engineer Corps, he assumed responsibility for major construction and renovation projects at a Washington, DC, location. He continued his work in government/construction contracts while he was in law school by working as a contract claims administrator for the Washington, DC, subway system.

Mr. West also has substantial experience in general commercial litigation, representing both plaintiffs and defendants in a variety of disputes. In connection with these matters, as well as with those related to government and construction contracts, he has developed considerable expertise in ADR techniques, including arbitration, mediation, mini-trials, and third-party neutral evaluations.

Mr. West graduated magna cum laude from Villanova University in 1971 with a Bachelors degree, and was elected to Tau Beta Pi (National Engineering Honorary) and Chi Epsilon (National Civil Engineering Honorary). After his Navy service, he graduated from George Washington University Law School, with high honors, in 1977, where he was elected to the Order of the Coif, and was an editor of The George Washington Law Review.

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Big Picture Trends

Big Picture Trends in Defense Sector M&A

- Global deal activity in 2016 slowed down after a robust 2015
 - Quarter-on-quarter declines in both total deal volume and average deal value
 - Commonly cited rationales for this trend include:
 - Election and post-election uncertainty in the U.S.
 - Uncertain government spending outlook (*i.e.*, probable continuing resolution)
 - Global economic and political risks
 - Regulatory risks (*e.g.*, CFIUS, antitrust)
- Some bright spots emerged in Q3 2016
 - An uptick in the volume of deals valued over \$50 million (*i.e.*, 8 to 11)
 - Deal pipeline anticipates significant acquisitions by Rolls-Royce and GE
 - Financial buyers have become more prominent
 - Strong balance sheets throughout the defense sector

Big Picture Trends in Defense Sector M&A

- Cybersecurity assets remain coveted
 - Worldwide information security spending will likely reach \$73.7 billion in 2016 and \$101.6 billion in 2020 (Source: IDC Research, Inc.)
 - The total value of cybersecurity M&A deals will exceed \$8 billion in 2016 compared to ~\$3 billion in 2015 (Source: PrivCo and The Financial Times)
 - Smaller companies are expected to consolidate in light of market fragmentation and similar product offerings
 - VC funding is attracted to IP and talented employees
 - PE funding is attracted to strong cash flows
 - Larger companies are selectively identifying targets for specific products
 - For example, Symantec complimented its existing email and endpoint security offerings by acquiring Blue Coat and its web gateway offerings

Big Picture Trends in Defense Sector M&A

- Antitrust enforcement activity is high
 - Perception that DOJ blessed “bad deals” (e.g., American - US Air)
 - Willingness to challenge vertical tie-ups (e.g., Lam Research - KLA-Tencor)
 - Growing hostility to industry concentration even where economic analysis demonstrates that competitive harm is unlikely (e.g., AT&T – Time Warner)
 - The DOJ and FTC continue to accept DOD primacy in approving defense deals, and the DOD continues to focus on its interests
- Global backlash and emerging opposition to acquisitions by foreign buyers
 - Perception that CFIUS is expanding its authority to review more deals with enhanced scrutiny
 - Non-filers have been targeted (e.g., Fosun – Ironshore)
 - Growing hostility in Europe to foreign acquisitions, particularly in Germany where China has been active

Big Picture Trends in Defense Sector M&A

- What can we expect post-election?
 - Republican control of the legislature and executive will likely lead to a budget deal that provides increased defense spending
 - The markets responded to president-elect Trump's victory with higher yields, rising equity prices and diminished volatility
 - Defense firms have outperformed the broader equity markets
 - Deregulation across industries is anticipated
 - However, uncertainty exists from populist rhetoric, at least with respect to antitrust enforcement (*i.e.*, threat to block AT&T's acquisition of Time Warner)
 - The geopolitical environment supports a dynamic defense industry

Increasing revenues along with strong balance sheets provide defense firms ammunition to pursue combinations even if the cost of capital increases

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Due Diligence

What is “Due Diligence”?

- Due Diligence is the exercise of investigating the business being sold
- Both the buyer and the seller engage in due diligence, albeit for different purposes
- The buyer is primarily attempting to understand what it is buying:
 - Validate its assumptions about the target business
 - Financial assumptions, such as projections
 - Operational assumptions, such as relationships with customers and suppliers
 - Employee related assumptions, such as around labor unions
 - Confirm that the target business does not contain any hidden liabilities / risks
 - Determine the information necessary to structure the transaction
 - Identify and define areas of negotiation / key deal terms (e.g., identify liabilities that should remain with the seller)
 - Plan for the post-closing integration and operation of the target business

What is “Due Diligence”?

- The seller is primarily attempting to understand what it is selling, and how that business can be best marketed to potential buyer:
 - Prepare a confidential information memorandum that describes the business being sold in great detail
 - Prepare financial projections that are suitable for sharing with bidders
 - Assemble and review a data room
 - Confirm that the target business contains all of the assets and liabilities that the seller actually wants to dispose of
 - Confirm that the target business does not contain any assets that the seller wants to retain
 - Determine the information necessary to structure the transaction
 - Identify and define areas of negotiation / key deal terms
 - Plan for the post-closing separation of the target business

What is “Due Diligence”?

- Because of the allocation of risk in most M&A deals (with the buyer bearing almost all of the post-closing risk), due diligence is inherently more important to the buyer than the seller
 - It is rare and difficult for the seller to “miss” something of material importance in diligence, as the (a) the seller has a huge informational advantage over the buyer and (b) the sale process itself will tend to flush out all material information that the seller did not already know
 - It is much easier for the buyer to “miss” something of material importance, and then have to live with the consequences post-closing

Areas of Focus in Defense Industry Due Diligence

- FCPA
 - A potential problem in all industries, but particularly acute for defense contractors with foreign operations in “difficult” jurisdictions (e.g., Afghanistan, Iraq, Africa, etc.)
 - Targeted FCPA due diligence requests
 - Interviews of selected personnel
 - Forensic accounting investigation
 - Goal is to both (1) uncover issues and (2) establish a good faith diligence defense so that, if issues are discovered post-closing, the acquiror can show the government everything it did pre-signing to try to discover the problems
- Import / Export
 - Many defense contractors need specialized import and export credentials, such as registration under ITAR
 - Targeted import / export due diligence requests
 - Conference call discussion with head of import / export at target
 - Goal is typically to discover what is required, and then determine how to transfer it to the buyer or confirm that the buyer already has appropriate clearances / permits

Areas of Focus in Defense Industry Due Diligence

- Ethics and Compliance Programs
 - Different companies implement different types of programs, so there is no universal template
 - But a simple investigation into such programs (or the lack thereof...) can reveal meaningful insights into a target company's culture
 - *E.g.*, if there is no person at the target who is generally responsible for maintaining ethical business practices, receiving whistleblower complaints, investigating complaints, etc. – that fact can be very telling
 - Having ethical and compliance standards in place, even when not legally required, can show the government that the target is at least trying to be a good actor
 - Can help confine potential infractions to a “few bad apples” rather than an infection of the entire organization
 - Targeted compliance program due diligence requests
 - Conference call discussion with head of ethics and compliance at target
 - Greater chance of problems at smaller, less sophisticated, companies

Areas of Focus in Defense Industry Due Diligence

- Top Secret Programs and Contracts
 - Diligencing top secret programs and contracts can be very challenging because only personnel with the appropriate security clearances will be allowed to engage in diligence
 - These personnel will then be limited in what information they can convey to others who do not have security clearances
 - Primarily a process difficulty, rather than a substantive difficulty
 - Need to assemble diligence team that includes personnel with appropriate security clearances
 - Sometimes outside advisors will have these personnel, but not always
 - In house team often leads the charge
 - Top secret personnel will have to be very careful in terms of what information is conveyed to the larger working group
 - Information must generally be aggregated, and must generally focus on business and financial (as opposed to technical or operational) topics

Areas of Focus in Defense Industry Due Diligence

- False Claims Act / Government Audits / Similar
 - The government contains a plethora of tools in order to uncover wrongdoing – everything from routine cost accounting audits to full blown prosecutions under the False Claims Act
 - Critical to diligence these topics
 - Targeted due diligence requests
 - Conference call discussion with in house personnel who handle these matters
 - Goal of diligence is typically to understand (1) prior audit / claim history and (2) currently pending audits / claims
 - Attempt to then establish a general level of comfort around these topics
 - Virtually impossible to discover intentional wrongdoing on your own...
 - So risk always remains, despite thoroughness of diligence

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Allocating Risk in the
Purchase Agreement

Using the Purchase Agreement to Allocate Risk

- Due diligence attempts to discover risks
- Much of the purchase agreement attempts to allocate risks, whether those risks are known or unknown
- The efficacy of risk allocation in the purchase agreement depends, in large part, on whether the deal is a “private deal” or a “public deal”
 - In private deals, there are three primary tools that can be used:
 - Closing conditions on the accuracy of reps and warranties
 - Indemnification (*e.g.*, accuracy of reps and warranties or specific liabilities)
 - Earn-outs
 - In public deals, there are only two primary tools that can be used, and both tools are rather weak:
 - Closing conditions on the accuracy of reps and warranties (but, in most public deals, this tool is quite ineffectual as the materiality standard is high)
 - Earn-outs / Contingent-value-rights (very uncommon)
 - Stresses importance of diligence in public deals

Key Reps to Address Important Topics

Financial Statements

- Representation that requires delivery of the target's financial statements and provides assurances regarding quality of those financial statements (e.g., compliance with GAAP)
- Statements typically include audited annual financial statements and unaudited interim statements for period subsequent to last fiscal year end
- Carve-out deals present timing and cost issues in preparing carve-out financials
- Ability of government to audit contracts for a multi-year period can call into question accuracy of prior period results (i.e., future audits effectively impact prior results)

No Undisclosed Liabilities

- Representation that there are no liabilities or obligations of the target except those reflected on most recently available balance sheet or incurred in ordinary course of business
- Often negotiation of this representation revolves around whether or not it will be limited the GAAP liabilities, or all liabilities
- If drafted well, can capture False Claims Act, FCPA and other significant problems

Absence of Changes

- Representation that since date of most recently available balance sheet there has not been any "Material Adverse Effect" on the target or its business
- Definition of "Material Adverse Effect" is heavily negotiated and typically includes various exceptions
- If drafted well, can capture newly arising government audits, investigations, bid losses, etc.

Other Key Reps

- Material contracts (e.g., ask for a list of all government contracts and subcontracts, and then confirm you have actually seen each such contract in diligence)
- Environmental matters
- Employee benefits

The Government Contracts Rep

- The government contracts rep is often very lengthy and very detailed
 - Can afford significant protections to the buyer (or expose the seller to significant risks)
 - Often negotiated by government contracts attorneys, rather than the pure M&A team
- Appendix B includes a long-form government contracts rep
 - Goes on for ~10 pages...
 - But we do not recommend using this entire rep – it should be tailored to the target company so as to avoid bogging down negotiations
- The primary goals of the government contracts rep is:
 - Require disclosure to help the buyer identify problems that have not been discovered in diligence
 - Require disclosure to help the buyer plan post-closing operations
 - Allocate risk, both from a closing conditions perspective and from a post-closing indemnification perspective

The Government Contracts Rep

- Biggest risks stem from the Mandatory Disclosure Requirements, the False Claims Act and the FCPA
- Mandatory Disclosure Requirement –
 - Requires disclosure where there is credible evidence of false claims, overpayment and certain other violations
 - Failure to disclose credible evidence may result in suspension or debarment, even where the underlying conduct might not trigger same result (*i.e.*, the Martha Stewart problem, where the investigation is worse than the crime)
- False Claims Act
 - Greatest risk is what the target company does not know
 - Purpose of rep is to identify indicia of a potential FCA claims (*e.g.*, subpoenas or other government inquiries that suggest there may be an issue; prior history of many FCA claims suggest that there may be cultural or procedural shortcomings; etc.)

The Government Contracts Rep

- FCPA
 - Focus on where the target operates
 - Rep should serve as a backup to diligence
- Novation
 - Identify contracts that require novation post-closing (discussed later)
- Due Diligence Defense
 - Purpose is served by almost all reps
 - If the buyer discovers that the target company did not comply with applicable laws pre-closing (*e.g.*, False Claims Act), the buyer can point to comprehensive reps and robust due diligence efforts to attempt to limit the scope of any post-closing suspension / debarment
 - *E.g.*, debarment may be limited by geography or business segment

What is “Indemnification”?

- Indemnification is a contractual right of one party to be paid by the other party when something bad has happened
 - Many practitioners confuse this point, and equate indemnification with the common law legal remedy of “breach of contract”
 - But this conflates two different concepts
 - It is true that indemnification is often available when one party breaches the purchase agreement – but the right to indemnification is contractual, and is not based on the common law legal remedy of “breach of contract”
- Remember that indemnification is not available in public company deals

Indemnification is Typically the “Exclusive Remedy”

- Most purchase agreements provide that indemnification is the “exclusive remedy” of the parties
- This means that, post-closing, the parties cannot sue each other for causes of action such as:
 - Breach of contract
 - Violation of securities laws
 - Violation of the environmental laws
- The exclusive remedy provision is very powerful, as it prevents the parties from suing each other in court

What Items are Typically Indemnified?

- Typically, indemnification is provided by the seller to the buyer, and by the buyer to the seller, for the following:
 - Breach of any representation or warranty in the purchase agreement
 - Stresses importance of negotiating the reps
 - Breach of any covenant in the purchase agreement
- Occasionally, the parties will negotiate that the seller indemnify the buyer for additional items, such as specific and known pre-closing problems:
 - Ongoing government audits
 - Ongoing False Claims Act cases
 - Obligations to make payments under settlement agreements
 - Known environmental cleanup obligations
- These “special” indemnities are almost always tailored to specific items discovered in due diligence
 - Stresses importance of diligence

“Your Watch / Our Watch” Indemnification

- In some transactions, the parties negotiate a “your watch / our watch” formulation for indemnification
 - This concept could apply to the entire business, or just specific issues
 - A “your watch / our watch” construct means that the seller is responsible for all liabilities related to the pre-closing period (*i.e.*, the seller’s watch) and the buyer is responsible for all liabilities related to the post-closing period (*i.e.*, the buyer’s watch)
- This concept can be very useful in defense deals, as it can provide a way to minimize the risk of post-closing government audits
 - For example, the parties could agree that the seller remains liable for any negative post-closing audit adjustments that relate to the pre-closing period. Likewise, the seller would also benefit from any positive post-closing audit adjustments that relate to the pre-closing period.
 - This construct removes all risk from the buyer’s perspective, but obviously forces the seller to retain potential liabilities

Limitations on Indemnification

- The rights of the parties to receive indemnification are typically limited in many respects
- The most common limitations are:
 - A “de minimis” exception (aka, a “mini-basket” or a “threshold”)
 - A deductible or a tipping basket
 - A cap
 - Offsetting provisions that define what constitutes a “loss”
- Although these provisions will occasionally apply equally to both the buyer and seller, the more common approach is that these limitations benefit only the seller
 - Thus, the negotiating lines are usually clearly drawn – the seller pushes for more limitations, and the buyer pushes for less
- Negotiations often become quite complicated and quite detailed

Limitations – The Cap

- Almost all agreements contain some type of cap concept
- The cap is typically the most powerful limit in the indemnification provision
- The idea behind the cap is that the indemnified party should simply not be entitled to recover losses in excess of the cap
 - This allocates the risk of the unknown (*i.e.*, the risk of a breached rep) on both the seller and the buyer, since both must theoretically share in those losses
- Most caps are between 5% and 15% of the purchase price
 - Note that these percentages are very low
 - Even at a 15% cap, the seller's exposure to the buyer for post-closing indemnification claims is significantly limited
 - This makes the cap a very important protection for the seller, and a very important limitation facing the buyer
- Because of the cap, the buyer should not rely on rep and warranty indemnification alone to address potentially significant liabilities
 - *E.g.*, a large False Claims Act problem could easily exceed the cap

Limitations – Survival

- Survival is essentially a statute of limitations concept – *i.e.*, the aggrieved party must bring its claim for damages within some period of time after the closing, or else the claim is waived
- Survival tends to be a highly negotiated concept; that said, the following ranges are fairly common

Obligation	Typical Survival Period
General Reps	9 months to 2 years
Fundamental Reps	3 years to indefinite
Covenants	3 years to indefinite

- As can be seen, the survival periods in a typical M&A deal are very short in relation to the lifespan of many government contracting issues
 - *E.g.*, cost audits can run well past a 12 month survival period
 - Again, buyers should be careful in relying on general rep indemnification

Earn-outs

- An earn out is another way to allocate risk
- It is essentially the opposite of an indemnity
 - An indemnity results in a payment from the seller to the buyer when something bad happens (*e.g.*, a representation is breached)
 - An earn out results in a payment from the buyer to the seller when something good happens (*e.g.*, a pending bid is won)
- Earn-outs require buyer and seller to remain “partners” for earn-out period
 - As with any partnership, issues can easily arise
 - Three key types of issues arise in earn-outs:
 - Formula and measurement of performance that triggers earn-out payments
 - How and when earn-out will be paid
 - Who controls operation of the business during earn-out period
- As a result of the above, earn-outs are typically very time consuming to negotiate and present significant risk of post-closing litigation

Earn-outs

- Earn-outs can nonetheless be useful in the defense contractor space
 - Pending bids are prime targets for earn-outs
 - If the bid is won, the earn out is paid
 - If the bid is lost, the earn out is not paid
 - But, what happens if:
 - The bid is won, but then subject to protest? When is the payment made?
 - The bid is won, subject to protest, and then re-bid on different terms? What payment is made then? When is it made?
 - The bid is lost, but then won on a protest? Is the payment made then? When? What if the protest cost millions in legal fees?
 - All of these theoretical permutations can result in significant negotiations
 - Parties often end up agreeing on a “rough justice” approach, rather than attempting to account for every theoretical bump in the road
 - But rough justice can lead to future litigation

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Certain Structuring
Considerations

Foreign Investment in Government Contractors

- Where foreign companies are investing in government contractors, the transaction requires two separate but parallel processes:
 - Review by the Committee on Foreign Investment in the United States (CFIUS)
 - Mitigation of any foreign ownership, control or influence (FOCI) to safeguard the U.S. government's national security interests pursuant to the requirements of the National Industrial Security Program (NISP)
- *CFIUS* –
 - Review of a transaction's national security implications
 - Evolving definition of "national security"
 - Three stages of review:
 - Stage 1 – 30-day CFIUS Committee Review
 - Stage 2 (*if CFIUS determines that there might be national security implications during stage 1*) – 45-day CFIUS Committee Investigation, at the end of which committee must either approve the transaction or send a formal report to the President
 - Stage 3 (*if CFIUS sends formal report to President*) – President has 15 days to approve, suspend or prohibit the transaction. Decision is not reviewable
 - Notices concentrated in four business sectors: manufacturing; finance, information, and services; mining, utilities, and construction; and wholesale, retail, and transportation
 - Greatest number of transactions reviewed by CFIUS involve Chinese acquirers

Foreign Investment in Government Contractors

- *FOCI Mitigation Under the NISP* –
 - Defense Security Service (DSS) tasked with providing industrial security services, including facility security clearances
 - Whereas effect of CFIUS review is to determine whether a transaction can move forward, DSS will review to determine what level of mitigation is required
 - Goal is to preserve the government's interest in keeping classified info classified
 - The levels of mitigation, from lowest to highest:
 - Board Resolution
 - Security Control Agreement
 - Special Security Agreement
 - Proxy Agreement and Voting Trust Agreement
 - Nonetheless, if source of funds cannot be identified, DSS may determine that target's facility security clearances are void
- *Relationship between CFIUS and FOCI Mitigation* –
 - Parallel but separate processes
 - While CFIUS mitigation agreement will be implemented in conjunction with a FOCI mitigation plan, CFIUS may not mitigate national security risks that are adequately addressed by other provisions of law

ITAR and Export Licensing Requirements for Foreign Personnel

- The International Traffic in Arms Regulations (ITAR) are State Department controls
- State Department continues to expand the reach of ITAR
- ITAR includes the following requirements:
 - Registration requirements
 - Restrictions on transfer of technical data and regulated software
 - Restrictions on the performance of defense services for foreign parties
 - Requirement to obtain export licenses
 - Recordkeeping requirements
- Note that ITAR applies even if the company's only customer is the U.S. Government
- Penalties include:
 - Criminal liability and monetary fines for the company, including imprisonment for the company's owners and employees
 - Debarment or denial of export privileges and seizure of goods transferred in violation of ITAR requirements
 - If sanctions are imposed, it is customary for the violation to be announced publicly

Novation of Acquired Contracts

- Identify agreements during due diligence and novation process occurs post-closing
- Required for carve-out transactions, including asset sales
- If agreement will transfer by operation of law (e.g., target is acquired via merger or 100% stock purchase), then arguably no novation is required
 - However, the expectation should be that these agreements are novated following a change in control transaction
- Novation is a question of time and money; no real risk of agreement *not* being novated
- Sellers in carve-out transactions may remain liable under novated contract for buyer's failure to perform
- FAR includes a standard form of novation agreement
- Novation rules do not apply to pending bids that are outstanding at the closing

Effect of Sale Processes on Pending Bids of Target

- Past performance is a key factor in government agencies' assessment of bids
- Federal agencies are required to consider past performance as one of several factors used to evaluate bids in competitively negotiated bids
- When acquiring a business with pending bids, consider whether you are acquiring the assets and personnel that will be used to determine past performance
 - This analysis is more important for carve-out transactions and asset sales where key personnel and business lines may remain with the seller
 - For a merger or a stock purchase where the buyer is acquiring the entire target business, past performance should not be an issue

Effect of Sale Processes on Pending Bids of Target

- Announcement of the proposed transaction can have an impact on pending bids
- Government perception of cost and performance risk or uncertainty is the key factor
- *Lockheed Martin Integrated Sys., Inc.*, B-410489 (Sept. 27, 2016)
 - After submitting its proposal, Lockheed Martin announced in a press release that it entered into an agreement to separate and combine its realigned business segment that was proposed to do the work under the Task Order with Leidos.
 - The Army Corps of Engineers determined that this action created risks and cost uncertainties that prevented the Army Corps from assessing the realism of Lockheed Martin's proposal and excluded Lockheed's proposal from award consideration.
 - The USACE awarded the Task Order to SAIC, and Lockheed protested.
 - GAO denied the protest, finding that “an agency should analyze the effect of a possible corporate restructuring on an offeror’s proposal when the transaction at issue is ‘imminent and essentially certain.’”

Effect of Sale Processes on Pending Bids of Target

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Leidos Deal Losses Are Cautionary Tale For Contractor M&A
A recent merger between a former Lockheed Martin unit and Leidos that has cost the combined company **more than \$5.5 billion in federal contracts** because of perceived risks shows the broad power that contracting officers hold, with only limited mitigation options open to companies.

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Appendix A –
M&A Process 101

Public M&A versus Private M&A

	Public M&A	Private M&A
Paramount Issue	Purchase price	Purchase price
Key Second Level Issues	<ul style="list-style-type: none"> • Fiduciary duties of target board • Deal protection provisions (<i>i.e.</i>, protecting the deal from third party topping bids) • “Social” issues, such as management of combined company, employee retention, PR, etc. 	<ul style="list-style-type: none"> • How purchase price is calculated and adjusted for items like working capital • Identification of which assets are actually being sold (particularly relevant in carve out deals) • Indemnification / post-closing remedies
Type of Consideration	Cash or stock	Almost always cash
Primary Negotiator for Seller	Target company board, acting through management, bankers and lawyers	Majority stockholder(s) and management
SEC Disclosure / Publicity	Extensive disclosure always required	Disclosure sometimes required; but many transactions are private
Typical Timeline	1-2 months of negotiation and then 2-5 months to closing	1-2 months of negotiation, and then 1-2 months to closing
Typical Intensity Level in C-Suite	Highest	High, but depends on deal size

Sell-Side M&A versus Buy-Side M&A

	Sell-Side	Buy-Side
Paramount Issue	Purchase price	Purchase price
Key Second Level Issues	<ul style="list-style-type: none"> • Certainty and speed of closing (<i>i.e.</i>, ensuring that the seller gets paid) • In a public deal, ensuring that the target board meets its fiduciary duties and that a good “story” can be told • In a private deal, minimizing the risk of post-closing exposure 	<ul style="list-style-type: none"> • Diligence (<i>i.e.</i>, understanding what you are purchasing) • In a public deal, minimizing the risk that the deal is “jumped” by a third party bidder after signing • In a private deal, leaving as many liabilities as possible with the sellers • In a private deal, maximizing the ability to recover post-closing if something bad happens
Amount of Work	Greater, since significant prep work is often required (<i>e.g.</i> , drafting an information memorandum) and negotiations with multiple bidders possible	Lesser
Timeline	Longer, since prep work often begins earlier	Shorter

Buy-Side M&A Process

1

Assess Proposed Transaction and Other Party

- Identify opportunity and analyze available information regarding other party
- Identify key corporate and regulatory approvals
- Identify other key issues relating to transaction
- Develop rough transaction timeline
- Consider employee retention strategy for target's employees
- Consider high level structuring of transaction

2

The Initial Approach: Preliminary Discussions and Early Stage Documents

- Prepare or review Non-disclosure Agreement
- Prepare or review Term Sheet / LOI
- Prepare or review Exclusivity Agreement, if applicable
- Organize due diligence process
- Coordinate negotiation strategy
- Negotiate, as applicable, Non-disclosure Agreement, Term Sheet / LOI and Exclusivity Agreement

Buy-Side M&A Process

3

Due Diligence and
Negotiation of Definitive
Agreements

- Conduct due diligence review
- Prepare, review and negotiate definitive agreements
- Review and negotiate disclosure schedules
- Coordinate implementation of employee retention plans
- Develop communications / PR strategy

4

Execute Definitive
Agreements & Announce
Transaction

- Sign definitive agreements
- Announce transaction and roll-out PR strategy
- Prepare necessary regulatory filings and interact with state, federal or foreign regulators

5

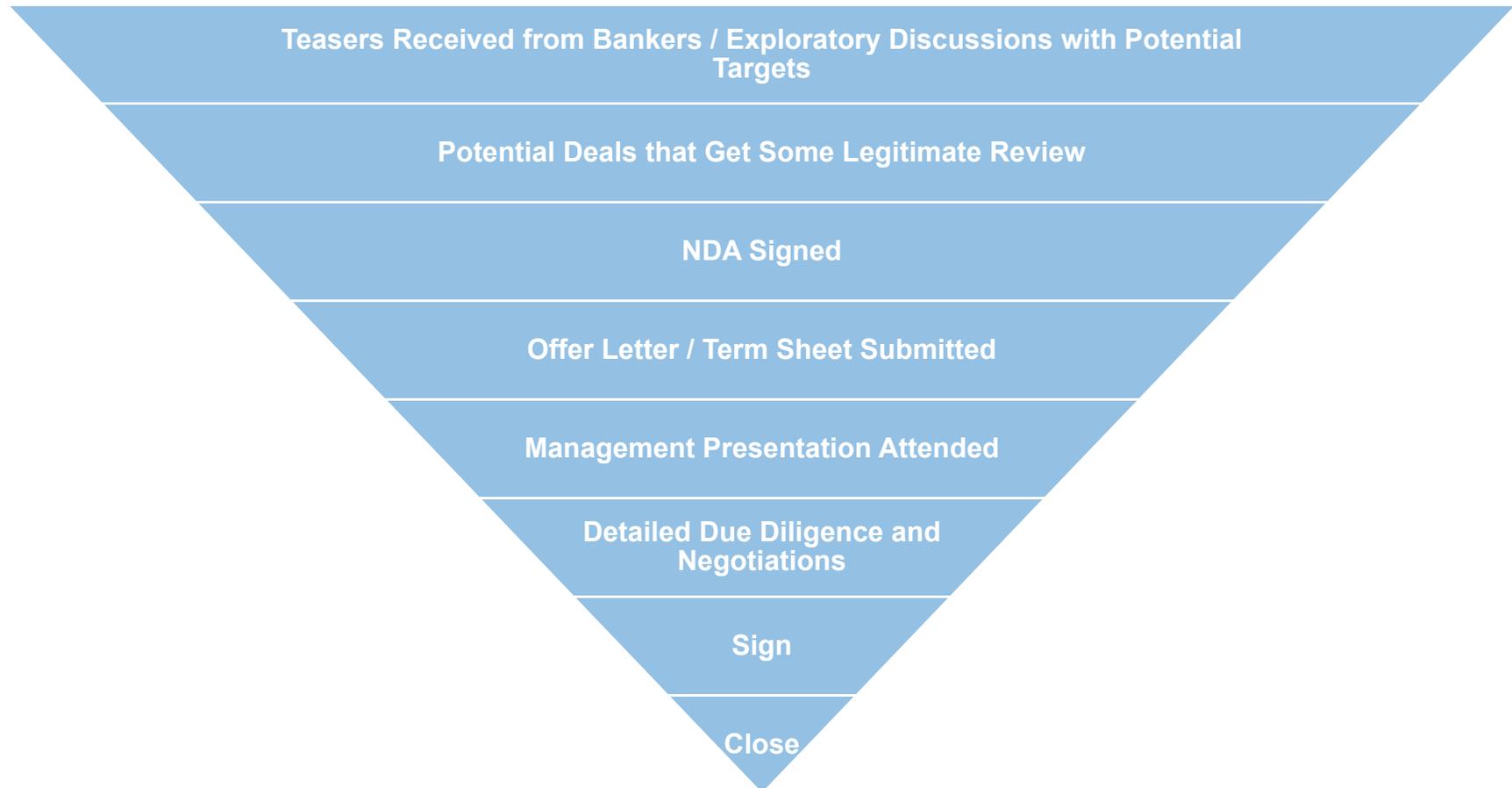
From Signing to Closing

- Push transaction to closing (timeline to closing typically driven by regulatory and financing topics)
- If public deal, extensive efforts required to obtain target company stockholder vote, including proxy statement and holding of special stockholder meeting

Timeline of M&A Buy-Side Process



The Funnel of Potential Buy-Side Deals



Sell-Side M&A Process

1

Initial Preparations

- Engage financial and legal advisors
- Prepare Confidential Information Memorandum
- Collect internal due diligence documentation and prepare virtual data room
- Develop a transaction timeline
- Develop procedures to reduce risk of leaks
- Plan and implement a thorough process to provide Board of Directors with all information reasonably necessary to make an informed decision

2

Comprehensive Internal Review

- Internal review of data room materials
- Identify necessary corporate and regulatory approvals and other third-party consents
- Identify key issues relating to the transaction
- Structure the transaction
- Prepare form non-disclosure agreement
- Prepare first round bid procedures letter

3

Preliminary Discussions and Early-Stage Documents

- Enter into Non-disclosure Agreements
- Review initial indications of interest
- Prepare bid draft acquisition agreement
- Prepare disclosure schedules
- Prepare second round bid procedures letter
- Conduct management presentation for advancing bidders

Sell-Side M&A Process

4

Negotiation of Definitive Agreements

- Review second round bid letters
- Execute exclusivity agreement, if applicable
- Respond to supplemental due diligence requests
- Review and negotiate acquisition agreement and ancillary agreements
- Provide update to Board of Directors regarding process

5

Execute Definitive Agreements & Announce Transaction

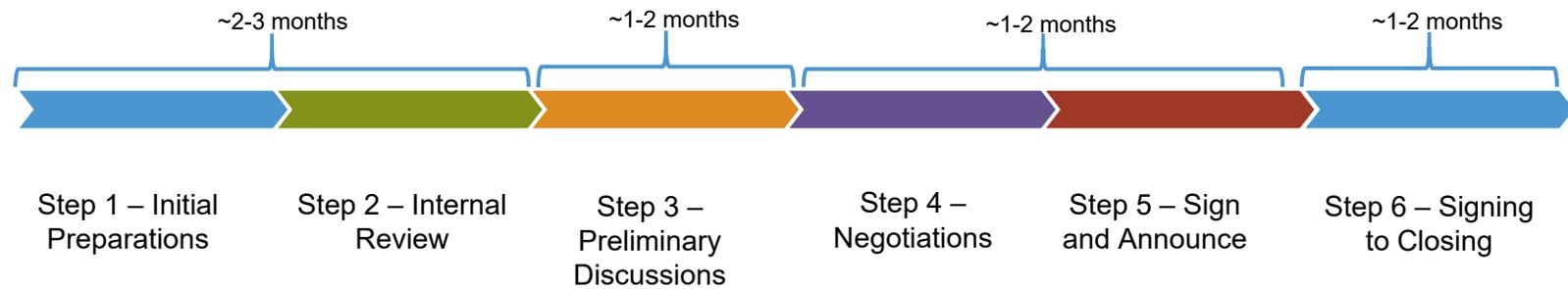
- Sign definitive agreements
- Announce transaction and roll-out PR strategy
- Prepare necessary regulatory filings and interact with state, federal or foreign regulators

6

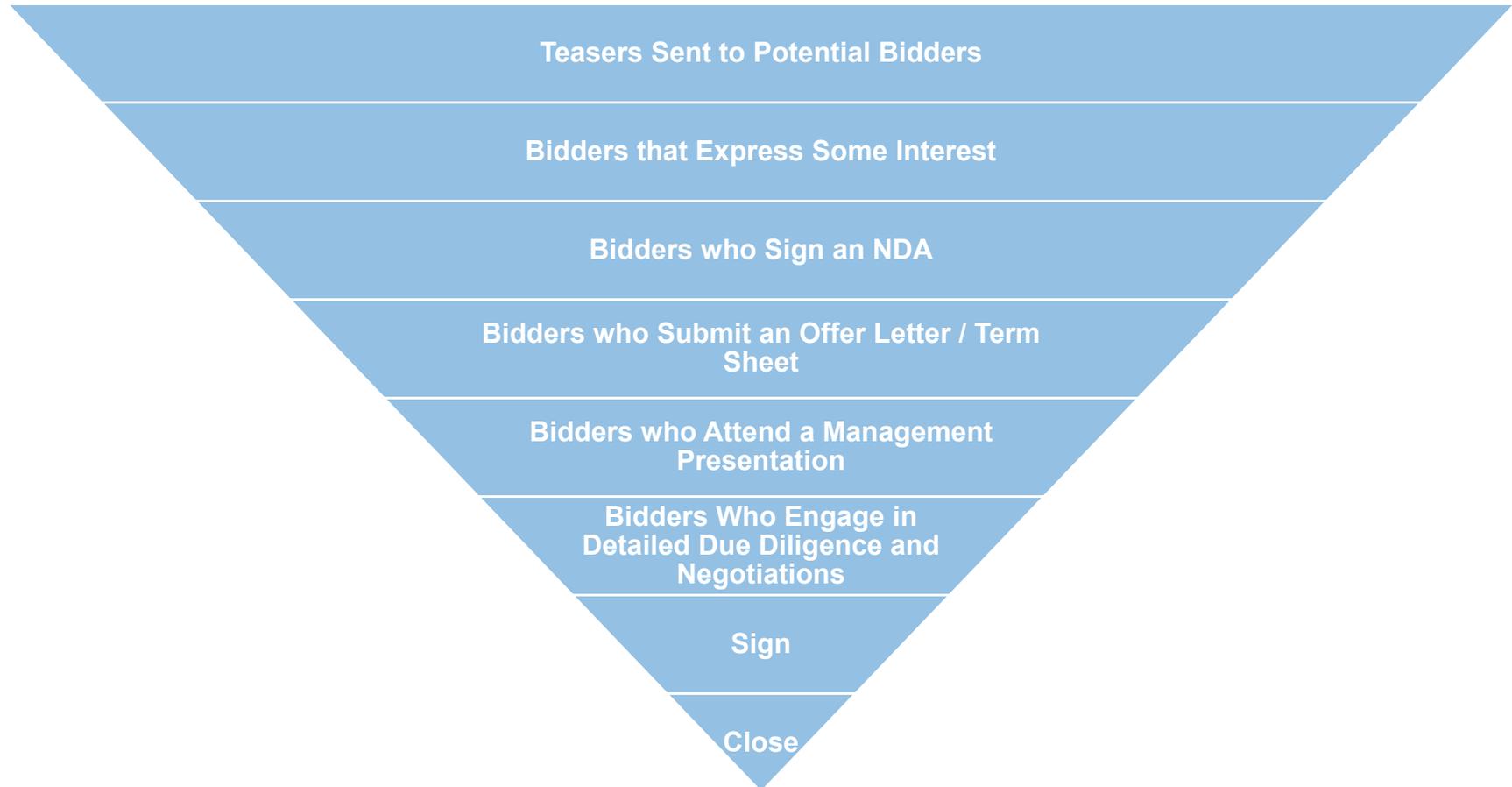
From Signing to Closing

- Push transaction to closing (timeline to closing typically driven by regulatory and financing topics)
- If public deal, extensive efforts required to obtain target company stockholder vote, including proxy statement and holding of special stockholder meeting

Timeline of M&A Sell-Side Process



The Funnel of Potential Sell-Side Deals



Acquisition Agreements – Key Areas of Focus

Deal Economics
<ul style="list-style-type: none">• Price<ul style="list-style-type: none">▪ Formula for computing the price▪ Purchase price adjustments (e.g., working capital)▪ Earn-out (if any)• Form of consideration<ul style="list-style-type: none">▪ Cash, stock or mix▪ Tax treatment of stock consideration• Treatment of equity awards<ul style="list-style-type: none">▪ Rolled over or cashed out▪ Treatment of unvested awards• Allocation of taxes and other pre-closing liabilities• In a carve out, agreeing on what assets the buyer is purchasing



Closing Certainty
<ul style="list-style-type: none">• Deal protection• Closing conditions• Scope of representations• Third party consents• Regulatory requirements / approvals• Buyer financing



Post-Closing Exposure (Private deals only)
<ul style="list-style-type: none">• Indemnification as exclusive remedy• Damage and non-reliance waivers• Survival

GIBSON DUNN

Appendix B – Example
Long-Form Government
Contracts Representation

Government Contracts Representations and Warranties

Definitions:

- “**Governmental Authority**” means any federal, state, local or foreign court or tribunal, governmental, judicial, arbitral, legislative, executive or regulatory body (or subdivision thereof), administrative agency, self-regulatory authority, instrumentality, agency commission or other governmental authority or body.
- “**Government Bid**” means any offer made by the Seller or any of its Affiliates (including its Subsidiaries) prior to the Closing Date which, if accepted, would result in a Government Contract.
- “**Government Contract**” means any Contract, including any teaming agreement or arrangement, joint venture, basic ordering agreement, pricing agreement, letter agreement or other similar arrangement of any kind, between the Seller or any of its Subsidiaries on the one hand, and (a) the United States Government, (b) any prime contractor to the United States Government in its capacity as a prime contractor, or (c) any subcontractor with respect to any Contract described in clause (a) or clause (b) above, on the other hand. A task, purchase or delivery order under a Government Contract shall not constitute a separate Government Contract, for purposes of this definition, but shall be part of the Government Contract to which it relates.
- “**Government Furnished Property**” has the meaning set forth in FAR 45.101.

Representations and Warranties:

General Representations:

- 1) With respect to each Government Contract to which the Company is currently a party or has received final payment within three years prior to the date hereof and to each Government Bid:
 - a) The Company and each of its Subsidiaries has complied and is in compliance in all material respects with all terms and conditions of each Government Contract and Government Bid, including all incorporated clauses, provisions, certifications, representations, requirements, schedules, attachments, regulations and applicable Laws, including without limitation the Truth in Negotiations Act, the FAR, and the Cost Accounting Standards;
 - b) The Company and each of its Subsidiaries has complied in all material respects with all material requirements of statute, rule, regulation, order or agreement with the U.S. Government pertaining to such Government Contract or Government Bid;
 - c) All representations and certifications executed, acknowledged or set forth in or pertaining to such Government Contract or Government Bid were current, accurate and complete as

Government Contracts Representations and Warranties

of their effective date, and the Company and each of its Subsidiaries has complied in all material respects with all such representations and certifications;

- d) Neither the U.S. Government, nor any prime contractor, subcontractor or other Person, has notified the Company or any of its Subsidiaries, in writing, that the Company or any of its Subsidiaries has materially breached or violated any statute, rule, regulation, certification, representation, clause, provision or requirement;
- e) to the knowledge of the Company, each such Government Contract was legally awarded, is binding on the parties thereto, and is in full force and effect in accordance with their terms;
- f) to the knowledge of the Company, no reasonable basis exists to give rise to a material claim by a Governmental Authority for fraud (as such concept is defined under the state or federal Laws of the United States) in connection with any such Government Contract;

Contract Compliance:

- 2) Except as set forth on Section XX of the Company Disclosure Schedule, the Company and its Subsidiaries have not received any written notice of termination, "show cause" or cure notice pertaining to any such Government Contract; provided that this clause (x) shall not apply to any notice received more than three years prior to the date hereof, which notice is related to a Company Government Contract that is no longer ongoing as of the date hereof;
- 3) All sales representatives who assist the Company and its Subsidiaries in soliciting or obtaining a Government Contract are bona fide employees or bona fide agencies as defined in FAR 52.203-5.
- 4) The past performance evaluations received by the Company or its Subsidiaries in the past three years from a Governmental Authority in relation to a Government Contract have been satisfactory or better.
- 5) The Company and each of its Subsidiaries have the capacity, facilities and personnel necessary to deliver, in a timely fashion and in accordance with the Defense Priorities and Allocations System regulations, all outstanding defense rated orders received under a Government Contract.
- 6) The Company has complied in all material respects with all of its material obligations relating to Government Furnished Property, and, upon the return thereof to the United States Government in the condition thereof on the date hereof, would have no material liability to the United States Government with respect thereto.
- 7) The Company is, and in the past five years has been in compliance in all material respects with the requirements for registrations, licenses, and permits administered by the Department

Government Contracts Representations and Warranties

of State Directorate of Trade Controls, the Department of Commerce Bureau of Industry and Security, the Department of Treasury Office of Foreign Assets Control, and the Bureau of Alcohol Tobacco and Firearms, except for licenses for specific shipments of goods for which there are no remaining unshipped balances. There is no charge, proceeding or, to the Knowledge of the Company, investigation by any Authority with respect to a material violation of any applicable Trade Compliance Laws that is now pending, or to the Knowledge of the Company, threatened with respect to the Company. The Company has not, in the past five (5) years, made any mandatory or voluntary disclosure with respect to a possible violation of Trade Compliance Laws or Customs Laws to any Authority.

- 8) Except as set forth on Section XX of the Company Disclosure Schedule, no Government Contract or Government Bid was awarded or made on the basis of any representation by the Company of a Preferred Bidder Status.
- 9) Each Government Contract was legally awarded, is in full force and effect and constitutes a legal, valid and binding agreement, enforceable against the Authority and the Company in accordance with its terms. Except as set forth in Section XX of the Company Disclosure Schedule, the Company has not received written notice that any Government Contract is the subject of bid or award protest proceedings.

Violations of Law:

- 10) Except as set forth on Section XX of the Company Disclosure Schedule, within the past three years, neither any Governmental Authority nor any prime contractor, subcontractor or other Person or entity has notified the Company, in writing, or, to the knowledge of the Company, orally, that the Company has, or may have, breached or violated in any material respect any Law, certification, representation, clause, provision or requirement pertaining to any such Company Government Contract;
- 11) to the knowledge of the Company, except as set forth on Section XX of the Company Disclosure Schedule, within the past three years, all facts set forth in or acknowledged by any representations, claims or certifications submitted by or on behalf of the Company or any of its Subsidiaries in connection with any such Government Contract were current, accurate and complete in all material respects as of their effective date;
- 12) To the knowledge of the Company, except as set forth on Section XX of the Company Disclosure Schedule, with respect to any ongoing Government Contract or completed Government Contract under which final payment was received by the Company within three years prior to the date hereof, the Company and its Subsidiaries do not have credible evidence that a Principal, Employee, Agent, or Subcontractor (as such terms are defined by FAR 52.203-13(a)) of the Company or any of its Subsidiaries has committed a violation of Federal criminal Law involving fraud, conflict of interest, bribery, or gratuity violations

Government Contracts Representations and Warranties

found in Title 18 of the United States Code or a violation of the civil False Claims Act and the Company and its Subsidiaries have not conducted and are not conducting an investigation to determine whether credible evidence exists that a Principal, Employee, Agent, or Subcontractor (as such terms are defined by FAR 52.203-13(a)) of the Company or any of its Subsidiaries has committed a violation of Federal criminal Law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act;

- 13) None of the Company nor its officers, directors nor, to the Knowledge of the Company, any of their respective employees, has been or is under indictment, or Company civil, administrative or criminal investigation involving a Government Contract or Government Bid, including but not limited to any allegations of defective performance or work product, mischarging, factual misstatement, failure to act or other material omission or alleged irregularity or has information with respect to any alleged fraudulent or criminal activity involving a Government Contract or Government Bid. Within the past three years, the Company has not entered into any consent order or administrative agreement relating directly or indirectly to any Government Contract or Government Bid that has had or would reasonably be expected to result in a Material Adverse Effect.

Audits/Inspections/Investigations:

- 14) Except as set forth in Section XX of the Company Disclosure Schedule, there is no pending or, to the Knowledge of the Company, threatened material audit, inspection, survey, examination of records or, investigation by any Authority of Company, or any Company Government Contract or Bid, or to the Knowledge of the Company, any of their respective employees or representatives with respect to any alleged material irregularity, misstatement or omissions arising under or relating to any Government Contract or Government Bid;
- 15) Except as set forth in Section XX of the Company Disclosure Schedule, and excluding routine indirect rate audits (as long as such audits have not resulted in any investigation or claim of defective pricing by any Authority or been subject to penalty assessments) within the past three years, there has not been any material audit, inspection, survey or examination of records by a Authority of the Company or any of its Government Contracts or Government Bids, or any of their respective employees or representatives with respect to such Government Contracts or Government Bids, nor has the Company received written or to the Knowledge of the Company oral notice of any such audit, inspection, survey, examination of records or investigation;
- 16) There have been no subpoenas, search warrants or civil investigative demands addressed to or requesting information involving the Company or any of its officers, employees, Affiliates, agents or representatives in connection with or related to information concerning any Authority, Government Contract or Government Bid;

Government Contracts Representations and Warranties

17) To the Knowledge of the Company, no reasonable basis exists to give rise to a material claim by an Authority for fraud (as such concept is defined under the state or federal Laws of the United States) in connection with any Government Contracts or Government Bids;

Cost Accounting/Rates/Billing:

18) The Company is in compliance with FAR Part 31 and all Cost Accounting Standards and related regulations (to the extent applicable), and all indirect cost and general and administrative expense rates are and have been billed consistent with the applicable Government Contracts and Applicable Laws, and the Company has complied with and is in compliance with all material requirements of the Government Contracts and Applicable Laws relating to the establishment of final indirect cost rates, including FAR 52.216-7;

19) All invoices and claims resulting from Current Government Contracts, including requests for progress payments and provisional cost payments, submitted by the Company to any Authority were correct as of their submission date in all material respects, and related Cost Accounting Standard Disclosure Statements required to be submitted have been submitted and are correct in all material respects;

20) Except as set forth on Section XX of the Company Disclosure Schedule, within the past three years, no cost in excess of \$10,000 incurred by the Company or any of its Subsidiaries pertaining to such Government Contract has been questioned in writing by any Governmental Authority, is the subject of any audit (other than routine audits and similar inquiries) or, to the knowledge of the Company, is under investigation or has been disallowed by any Governmental Authority;

21) Except as set forth in Section XX of the Company Disclosure Schedule, there are (i) no outstanding material Government Contract Claims against Company or by Company, and (ii) within the past three (3) years, no material costs incurred or invoices rendered by the Company have been disallowed (and the Company has no Knowledge that any material cost or invoice will be disallowed), or been under investigation by any individual or Authority or been subject to any penalty assessments. There has not been any material withholding or set off of any payment by an Authority or prime contractor or higher tier subcontractor nor, to the Knowledge of the Company, has there been any attempt to withhold or set off, any material money due under any Government Contract on any basis, including but not limited to the basis that a cost incurred or invoice rendered by the Company was questioned or disallowed by an Authority or its audit representative, and the Company is entitled to all progress or other payments received to date with respect thereto. Except as set forth in Section XX of the Company Disclosure Schedule, there are no financing arrangements or assignments of proceeds with respect to any Government Contract of the Company.

Government Contracts Representations and Warranties

- 22) Except as set forth on Section XX of the Company Disclosure Schedule, with respect to any ongoing Government Contract or completed Government Contract under which final payment was received by the Company or any of its Subsidiaries within three (3) years prior to the date of this Agreement, the Company and its Subsidiaries do not have credible evidence of any significant overpayment(s) on such Government Contract, other than overpayments resulting from contract financing payment as defined in FAR 32.001, and the Company and its Subsidiaries have not conducted and are not conducting an investigation to determine whether credible evidence exists of any significant overpayment(s) on such Government Contract, other than overpayments resulting from contract financing payment as defined in FAR 32.001.
- 23) Except as set forth in Section XX of the Company Disclosure Schedule, no Current Government Contract has, or is currently projected to have, fully burdened costs incurred materially in excess of the Government Contract or order price, or in the case of flexibly priced (as defined in FAR 52.230-6) or cost reimbursement contracts, fully burdened costs incurred materially in excess of the ceiling price or funded amount of the Government Contract or order, with the exception of temporary situations of excess costs due to incremental funding gaps in the ordinary course of business and for which the Company will be fully reimbursed by future funding. The Company is not subject to any forward pricing rate agreements, as prescribed in FAR Subpart 42.17.

Security Clearance

- 24) The Company and its Subsidiaries have complied in all material respects with the National Industrial Security Program Operating Manual, their respective facility clearances, and the personnel clearances of their respective officers, directors, and employees;
- 25) Except as set forth on Section XX of the Company Disclosure Schedule, the Company and each of its Subsidiaries has complied in all material respects with all requirements of such Government Contracts and any Law relating to the safeguarding of, and access to, classified information (or, in the case of Contracts governed by Laws other than the state or federal Laws of the United States, the functional equivalent thereof, if any); and, all violations of the Company's policies or such Laws relating to the safeguarding of, and access to, classified information have been reported to the appropriate Governmental Authority and contracting parties as required by any Government Contracts or any Law relating to the safeguarding of, and access to, classified information;
- 26) The employees of the Company possess all United States Government security clearances required to perform the Government Contracts of the Company, and the Company possesses all facility security clearances required to perform the Government Contracts of the Company.

Government Contracts Representations and Warranties

Compliance/Conflict of Interest/Procurement Integrity

- 27) To the knowledge of the Company, no Company employee formerly employed by a Governmental Authority in the past three years (“Former Government Employee”) participated personally and substantially in any procurement decisions by such Governmental Authority, and the Company and all Former Government Employees are in compliance with all Laws regarding post-employment conflict of interest restrictions applicable to such Former Government Employees.
- 28) The Company has a written code of business ethics and conduct, a business ethics awareness and compliance program, and an internal control system that are in material compliance with all requirements of the Government Contracts of the Company and of applicable Laws (including without limitation FAR 52.203-13, where applicable). It has not performed any activities under any Government Contract nor has it had any other relationship with any other Person or entity that at the time constituted an “Organizational Conflict of Interest” (as defined by FAR 9.501) or a violation of the Procurement Integrity Act (41 U.S.C. §§ 2101-2107). There are no Organizational Conflict of Interest mitigation clauses or other provisions contained in any Government Contract that would render it or its Affiliates ineligible to participate on future specifically identified contracts or programs.
- 29) None of the Company nor, to the Knowledge of the Company, any of its officers, employees, agents, nor any “Principal” (as defined in FAR 52.209-5) of the Company has been debarred, or suspended from participation in the award of contracts with any Authority, or been the subject of a debarment, suspension or exclusion from participation in programs funded by any Authority, nor are any of them listed on the Excluded Party Listing (the “Listing”), nor to the Knowledge of the Company has any such debarment, suspension or exclusion proceeding or proposed Listing been initiated in the past three years. The Company is not, nor has it ever been, suspended or debarred from doing business with an Authority or, to the Knowledge of the Company, proposed for suspension or debarment by an Authority and has not been the subject of a finding of non-responsibility or ineligibility for contracting with an Authority. To the Knowledge of the Company, there are no matters pending that are believed reasonably likely to lead to the institution of suspension or debarment proceedings against the Company, any of its Subsidiaries, any of its officers, employees, agents, or any Principal.

Intellectual Property

- 30) All Company software and other Intellectual Property or technology owned by, purported to be owned by, or exclusively licensed to Company, developed, delivered, or used by Company under or in connection with any Government Contract has been properly and sufficiently marked and protected so that no more than the minimum rights or licenses required under applicable regulations have been granted, and Government Contract terms, if any, have been made delivered to Buyer. All disclosures, elections, and notices required by

Government Contracts Representations and Warranties

applicable Law and Government Contract terms to satisfy these requirements, or to protect ownership of any inventions of the Company developed, conceived or first actually reduced to practice in the performance of work under a Government Contract have been made and have been delivered to Buyer. Except for minimum rights or licenses required under applicable regulations granted to the United States Government as set forth above, no Authority or prime contractor or subcontractor to an Authority has obtained, by contract, applicable Law or otherwise, rights in any Company Intellectual Property or technology owned by, purported to be owned by, or exclusively licensed to Company, that will affect the commercial value thereof. All Government Contracts and documents related thereto, in each case, in the possession of the Company or any of its employees or independent contractors, have been made delivered to Buyer.

- 31) No government funding, facilities of a university, college, other educational institution or research center or funding from third parties was used in the development of any material Company-Owned IP Rights. To the Company's Knowledge, no employee of the Company or a Subsidiary who was involved in, or who contributed to, the creation or development of any Company-Owned IP Rights was performing services for any Governmental Authority, university, college, or other educational institution or research center relating to the subject matter of such Company-Owned IP Rights during the period of time such employee was also performing services for the Company or such Subsidiary.

Export/International Issues:

- 32) To the knowledge of the Company, the Company and each of its Subsidiaries are in compliance in all material respects with all statutory and regulatory requirements relating to export controls and trade sanctions under the Laws of the United States, as well as applicable Laws of each jurisdiction in which the Company or its Subsidiaries are doing business, including, without limitation, the Export Administration Regulations administered by the United States Department of Commerce (including anti-boycott laws), International Traffic in Arms Regulations, the Export Administration Regulations, the anti-boycott Laws, and regulations administered by the Office of Foreign Assets Control, and the United States Foreign Corrupt Practices Act ("FCPA").
- 33) The Company and its Subsidiaries have developed and implemented an export control and trade sanctions compliance program that includes corporate policies and procedures designed to ensure compliance with applicable government export control and trade sanction statutes, regulations, and other obligations, including obtaining licenses or other authorizations as required for access by foreign nationals in the United States to controlled technology.
- 34) In the past three years, the Company has not been, nor is it now being audited or investigated by the U.S. Government Accountability Office, the U.S. Department of Defense or any of its agencies, the Defense Contract Audit Agency (other than an audit in the ordinary course of

Government Contracts Representations and Warranties

business), the auditing, investigative or contracting function of any other U.S. Governmental Authority (including the Inspector General offices of federal agencies), the Department of Justice or any Committees of the United State Congress with regard to the performance by it of work on a U.S. Government Contract being performed overseas or any other Contract being performed overseas. To the knowledge of it, no such audit or investigation has been or is presently threatened.

- 35) In connection with its export control and trade sanctions matters, the Company has received no notice from any Governmental Authority of deficiencies in its compliance efforts nor in the past five years made any voluntary disclosures to any Governmental Authority or other Person of facts that could result in any adverse action being taken by a Governmental Authority against the Company with respect to export authorizations in the future.
- 36) No Governmental Authority nor any other Person has notified the Company or any of its Subsidiaries in writing in the past five years of any actual or alleged violation or breach of any statute, regulations, representation, certification, disclosure obligation, licensing obligation or other authorization or provision relating to export controls or trade sanctions.
- 37) Neither the Company nor any of its Subsidiaries has undergone or is undergoing any audit, review, inspection, investigations, survey or examination of records relating to the Company's or any of its Subsidiaries' export activity that would, individually or in the aggregate, reasonably be expected to affect adversely its future export activity in any material respect or otherwise result in government sanctions and, to the knowledge of the Company, there is no basis for any such audit, review, inspection, investigation, survey or examination of records.
- 38) To the knowledge of the Company, the Company and its Subsidiaries have not been in the past five years, and are not now, under any administrative, civil or criminal investigation or indictment involving alleged false statements, false claims or other improprieties relating to the Company's or any of its Subsidiaries' export activity, nor, to the knowledge of the Company, is there any basis for such investigation or indictment. The Company and its Subsidiaries have not been and are not now a party to any administrative or civil litigation involving alleged false statements, false claims or other improprieties relating to the Company's or any of its Subsidiaries' export activity, nor, to the knowledge of Seller, is there any basis for any such proceeding.

GSA Schedule Contract

- 39) With respect to its multiple award schedule Government Contracts: (i) it has complied in all material respects with their requirements; (ii) it has filed all reports related to such multiple award schedule Government Contracts and paid all industrial funding fees required to be paid by it; (iii) all orders issued to it pursuant to such multiple award schedule Government

Government Contracts Representations and Warranties

Contracts are within the scope of such Government Contract; and (iv) it has complied with the notice and pricing requirements of the price reduction clause in each of its multiple award schedule Government Contracts and, to its knowledge, there are no facts or circumstances that could reasonably be expected to result in a demand by the U.S. Government for a refund based upon its failure to comply with the price reduction clause.