

# HAVE WE JUST SEEN THE DECADE OF GOVERNMENT CONTRACTING? LOOKING BACK AS WE GO FORWARD

BY MATTHEW J. MCGRATH AND JERRY MILES

As the nation approaches the 10-year anniversary commemorating Sept. 11, 2001, the federal government arrived at an inevitable decision point: What can and should be done about the extent of government contracting? In an effort to balance budgetary concerns with national security, international obligations, the need for economic stimulus, and green purchasing requirements, the federal government must decide whether to continue as the world's largest purchaser of goods and services, and, more importantly, what structural and regulatory changes are required to strike the right balance. Weighing the benefits derived from the government's increased reliance on contractors' ingenuity against the loss of governmental control over core functions and decisions, the fundamental approach to government contracting may be changing.

During the past 10 years, the surge in contracting related to antiterrorist and war efforts have formed the contracting landscape. The stresses of conducting wartime contracting activity resulted in shortcuts in formal acquisition procedures, with purchasing decisions being made based on imminent needs that often took priority over competition and pricing concerns. In retrospectively evaluating the results, policy-makers are struggling with basic issues, such as the following:

- How much shortcutting of competition is acceptable in an emergency situation?
- What value judgments should be applied when reviewing decisions made in the heat of battle, under extreme deadlines, or other contingencies?
- When is it appropriate to use performance subcontracts to hire private security personnel?
- How much accountability should be imposed on local contractors to justify expenditures made to local militias for facilitating the movement of goods?
- More generally, what laws should apply to civilian contractors working overseas in a wartime environment?
- Should there be a separate regulation in the Federal Acquisition Regulations for "contingency contracting?"
- Where should liability lie when technologies developed for homeland defense cause civilian casualties in the hands of terrorists?

These questions will be addressed in the next decade.

In response to the deep recession, part of the solution was to put America back to work with billions of infrastructure dollars awarded under the American Reinvestment and

Recovery Act (ARRA). This hurried legislation contained unique and somewhat controversial provisions that influenced regulation in other contracting areas. The Recovery Act's executive compensation reporting requirements, job creation reporting, expanded whistleblower protection, transparency provisions, and domestic content requirements created confusion and concern among contractors. The weak economy also caused many companies and consultants without prior government contracting experience to enter the field, only to be shocked by the complexity of the Federal Acquisition Regulations.

The uptick in foreign sourcing by U.S. government contractors during the last decade was driven by both the pursuit of foreign markets and the advent of military operations overseas. Performing contracts abroad required the use of foreign suppliers for onsite work, giving rise to challenges related to establishing and interpreting basic contract requirements, applying technical requirements, setting up payment mechanisms, making choices between which laws apply, resolving disputes, and so forth. The pursuit of new markets also contributed to similar concerns as well as increased enforcement in areas such as anticorruption legislation, security regulations, and export controls. Using foreign suppliers also raises issues under the Buy American Act and the Trade Agreements Act, as seen in recent enforcement cases against contractors who improperly certified the country of origin of goods sold to the U.S. government.

Recently, the government is rethinking the balance between using contractors and hiring government employees. This rebalancing is based on consideration of what constitutes an "inherently governmental" function. The trend over the last decade heavily tilted toward outsourcing; whereas the current trend seems to be going the other way, as the government revamps its hiring practices to encourage increased internal capabilities. It is not surprising that "insourcing" is creating concerns for contractors, who are afraid of losing their human capital to the federal government. **TFL**

---

*Matthew J. McGrath, the immediate past section chair of the FBA Government Contracts Section, is the owner of the McGrath Law Group LLC. He can be reached at [mmcgrath@mjmccgrathlaw.com](mailto:mmcgrath@mjmccgrathlaw.com). Jerry Miles, the section chair of the FBA Government Contracts Section, is associate counsel at KBR Inc. He can be reached at [Jerry.Miles@kbr.com](mailto:Jerry.Miles@kbr.com).*