

GOVERNMENT CONTRACTS

CLASH OF AGENDAS MEANS MORE UNCERTAINTY



With a new negotiator-in-chief at the table, will there be more or less regulation of government contractors? It depends.

Donald Trump expressed his view on government contractors even before he officially became president. In a six-day period in December 2016, he said that the costs of both the new Air Force One presidential aircraft and the F-35 next-generation fighter jet were “out of control.”

The message was clear: contractors were taking advantage of the government and their prices (presumably attributable to waste, fraud, and abuse) had to come down.

One of President Trump’s policy imperatives, meanwhile, is that government regulations are strangling businesses and economic growth and must be dramatically reduced. His executive order of January 31, 2017, stipulated that for every new regulation issued, at least two existing regulations must be eliminated.

The most natural way to accomplish the first objective would be to create new checks and balances—i.e., regulations. But doing so clashes head-on with the call for regulatory rollbacks.

UNCERTAIN NEW WORLD

Welcome to the uncertain new world of government contractors.

“The administration has put forth two mandates that are very difficult to reconcile,” says [David Ginsberg](#), a partner in Crowell & Moring’s [Government Contracts Group](#). “It’s impossible to predict which, if any, will prevail, which means that government contractors will have to be prepared for both.”

Given the strength of the administration’s conviction about both goals, it’s not unreasonable to think that a third scenario—call it “convenient coexistence”—could emerge.

According to [Gail Zirkelbach](#), a partner in Crowell &

NEW LIFE FOR COMMERCIAL ITEMS?

In the world of government contracting, commercial items are non-defense goods sold to the government that also are sold to the private sector. Think coffee makers and office supplies rather than weapons and radar systems.

The primary law governing the sale of commercial items to the government is the Federal Acquisition Streamlining Act of 1994, which was originally intended to make the procurement process easier both for contractors and the government. Over the years, though, many clauses have been added to FASA, making the procurement of commercial items more burdensome for both parties—and more expensive for the government.

“FASA is a natural candidate for regulatory rollbacks,” says Crowell & Moring’s Gail Zirkelbach. “Contractors and the government would both be very pleased to have less red tape to deal with, and the government could conceivably save billions as contractors cut prices to reflect their savings from reduced compliance requirements.”

Moring’s Government Contracts Group, the implementation of cost controls doesn’t necessarily have to take the form of new regulations. “There are other ways to reduce spending on contractors,” she says. “The budget proposal for fiscal 2018, which directs non-national security federal agencies to cut spending by \$54 billion, is the most obvious. The administration could take the executive order route as well, which it clearly won’t hesitate to do. Agencies could also simply take a tougher nego-



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tiating stance and encourage their personnel to try harder.”

At the same time, there’s no shortage of candidates for contractor regulations or prior executive orders that could be eliminated, watered down, or enforced less aggressively.

WHAT SHOULD CONTRACTORS DO?

[Alan Gourley](#), a Crowell & Moring partner in the firm’s Government Contracts Group, recommends several measures that contractors should take to adjust to the new regulatory environment:

- **Don’t forget about current regulations.** It’s prudent to stay focused on compliance with existing regulations—especially regarding costs—until things change.
- **Prepare to change course.** Even as contractors comply with current regulations, they must be ready to do things differently, which appears inevitable.
- **Be ready for terminations for convenience.** Government contracts give the government the right to terminate the contract at any time without giving a reason, a provision known as termination for convenience. In the current environment, such terminations could become more frequent. Contractors should expect more of them to happen and be sure that they have the ability to terminate their own subcontractors for convenience if necessary.

Since government contractors are generally entitled to a negotiated settlement for an equitable recovery of costs and losses incurred in the event of termination for convenience, they should keep ample documentation to submit potential recovery claims and to have those claims certified (which is required for claims to proceed).

INFRASTRUCTURE: GOOD NEWS AND BAD NEWS

In President Trump’s initial address to Congress in February, he called for \$1 trillion in new infrastructure spending. The goal would be to repair and upgrade the nation’s aging highways, bridges, airports, dams, railroads, mass transit systems, and more.

If the president’s intentions become reality, government contractors could see a bonanza of new projects and revenue streams. But the picture might not be entirely rosy, says Crowell & Moring’s David Ginsberg.

“If infrastructure projects materialize on the grand scale that’s expected,” Ginsberg says, “they’ll be administered and at least partially funded not just by the federal government but by states and local governments too. Having more parties to deal with would likely compel contractors to hire additional counsel with deep experience in local laws and policies.”

Two other issues raise potential red flags that could persuade contractors to enlarge their legal teams even further. The first of these is labor. Up to 1.1 million U.S. construction workers reportedly are undocumented immigrants—meaning not only that the supply of skilled workers could be materially reduced by the administration’s tough stance on immigration, but also that contractors would need to be extra vigilant about compliance with immigration laws.

The second issue relates to financing. The administration says that its plan should be funded through a combination of public and private capital, rather than direct appropriations. Contract provisions accordingly could become more complicated.



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