

## International Gov't Contracts: New Markets, Same Risks

By Stephen McBrady, Crowell & Moring LLP

Law360, New York (November 22, 2011, 12:11 PM ET) -- As contractors survey the market for their products and services on a federal and state level, they are finding that the future is increasingly uncertain. For policymakers, the focus du jour is "reining in" government spending, trimming programs and stepping up acquisition oversight. What that means in the short term is an open question — some have suggested, for example, that increased bid protest activity stems in part from anxiety that new requests for proposals may become scarce when and if budget woes starve customer agencies.

But in the long term, what is clear is that this uncertainty has spurred many contractors to seek out new markets for their solutions; as a hedge against dwindling domestic budgets, but also as a classic opportunity to "grow the pie." Increasingly, traditional government contractors are looking abroad in search of new customers and new opportunities to sell their goods and services, and they are finding that international government contracting carries with it many of the same risks and rewards (with a few additional wrinkles) as contracting with domestic governmental entities.

### The Opportunities

Contractors seeking to enter into contracts with foreign governments do so for many of the same reasons that they enter into contracts with U.S. federal and state governments. First, sovereign governments typically have unparalleled purchasing power, and second, they typically pay their bills (there is, for example, a minimal risk that a government customer will go bankrupt).

In addition, in emerging economies, many governments need services of a quality or quantity that they have not purchased before, or that may not exist domestically, so "foreign" contractors can provide products and services with less domestic competition. And finally, sovereign governments in emerging economies have an abundance of the most basic, and most important, item that any contractor wants to see: demand.

As emerging economies around the globe seek to expand economic growth, the need for basic and high-end goods and services is growing. Infrastructure — including roads, bridges, rail, airports, hospitals, prisons and schools — and technology — including IT services and energy production facilities — are in particular demand. A good example of such demand can be found in Brazil. In the next five years, Brazil will host the Federation Internationale de Football Association World Cup (2014) and the Olympics (2016).

A country with a population of 200 million, or roughly two-thirds the size of the U.S., Brazil is currently the No. 8 economy in the world, and is projected to emerge as the No. 5 economy in the world (behind only the U.S., China, Japan and Germany) by the time the Olympics begin in 2016.

As Brazil prepares for these two major events, it anticipates approximately \$200 billion in new investments — including a 300-mile high-speed rail line connecting Rio de Janeiro and Sao Paolo, and major upgrades to airports, hospitals, and other critical infrastructure.

Many of these projects are set to be competitively bid under the Brazilian public-private partnership regime, and most will require extensive foreign expertise, which means that foreign contractors will play a major role in helping the government accomplish its ambitious infrastructure agenda. So, what must contractors looking to bid on these projects (and similar projects in other emerging economies) consider?

### **Contracting With a Foreign Government**

Contractors already doing business with U.S. federal and state government entities are aware of the risks associated with the complex web of statutes and regulations that accompany government contracts, and the myriad of enforcement mechanisms at the government's disposal. Many of the same risks apply to foreign government contracts.

In every country, governments have unique rules, oversight and enforcement regimes designed to protect the integrity of the public contracting process. In many countries, the roles of "federal" and "state" laws are somewhat different than in the U.S. Nevertheless, the basic framework for contracting with public entities — if you want to be paid from the public fisc, you must play by the public rules — is universal.

Typically, foreign government customers do not engage in a "battle of the forms" contract negotiation. While some terms and conditions will be negotiable, governments have many standard/mandatory contract terms that contractors will have to accept.

There are also competitive bidding rules for public contracts, similar to the U.S., and in cases where contracts are awarded "sole source" (i.e., without competition), there are typically extensive rules covering those transactions as well. In addition to traditional breach of contract claims, such as those which companies might find in the commercial context, sovereign governments also have other levers at their disposal, including: extensive audit rights, severe fines and penalties, suspension and debarment, and a justice ministry to pursue its rights.

### **Managing Risk**

There are a number of strategies that companies must pursue in order to manage their risk profile when bidding on and performing international government contracts. The most obvious rule is that contractors must avoid even the appearance of corruption. Fortunately, this should be an easy one to remember, since bribery is illegal in every country in the world. But it is incumbent on contractors to monitor their interactions with foreign government officials — it is not up to the officials.

Under the Foreign Corrupt Practices Act, the U.S. government has jurisdiction over U.S. citizens and companies (and foreign citizens working for those companies) anywhere in the world. It is a crime under the FCPA to corruptly offer to pay or authorize "anything of value" to a foreign government official, either directly or indirectly, to influence or secure an improper advantage through an act or omission to obtain or retain business. Contractors who violate the FCPA risk steep penalties and potentially long-term reputational harm associated with allegations of bribery and corruption.

In addition to playing by the rules when it comes to foreign officials, contractors must also commit to learning the host country's procurement system, in order to preserve their legal rights. For example, after the award of a competitively bid public contract, disappointed bidders can issue a challenge to the award in a bid protest (or foreign equivalent administrative proceeding). Thus, contractors who win international government contracts must be prepared to defend those awards in accordance with the local procurement rules.

By the same token, if a contractor wishes to challenge a contract awarded to a competitor, it must follow typically strict rules governing when and how such challenges can be filed. And even in the case of sole source contracts, contractors must often be prepared to provide detailed information to the customer so that the customer can justify the contract award to its own oversight authorities.

In such cases, contractors often have to make strategic decisions regarding how much information (for example, internal pricing metrics and confidential business information) they can and should reveal to a foreign government. Finally, contractors must closely scrutinize other key contract provisions, including those relating to the control of intellectual property, data rights, and local employment laws and social tax obligations, which can differ significantly from country to country, and in many cases are less "contractor friendly" than their U.S. counterparts.

Given the complexity of entering into prime contracts with foreign governments, some contractors opt to "get their feet wet" by entering into new markets first as a subcontractor. Performing as a subcontractor is certainly not a zero-risk proposition, and companies must remain aware of flow-down obligations, but in some instances market entry as a subcontractor provides companies with the opportunity to learn more about a host country's procurement culture and procurement system before making a more substantial commitment.

But whether entering into foreign government contracts as a prime contractor or a subcontractor, the most important commitment a contractor can make is to undertake an early assessment of the "rules of the road" in the host country, and its ability and desire to adapt to local procurement customs and regulations.

## **Conclusion**

As government contractors look abroad in search of new customers and new markets in which to sell their goods and services, there are no shortage of opportunities. The emergence of economies across the globe is creating demand for many of the products and services that contractors have been delivering domestically for years. The pathway for international expansion is there for contractors who seek to globalize and diversify their revenue streams, while recognizing and managing the risks associated with international government contracting.

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