

# BRIEFING PAPERS<sup>®</sup>

## SECOND SERIES



PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### SPECIAL COMPLIANCE CONSIDERATIONS WHEN SUPPORTING THE U.S. GOVERNMENT ABROAD

By Andrew D. Irwin

In the past decade, starting with logistical support contracts in the Balkans and extending to current reconstruction and logistical support contracts in Afghanistan and Iraq, contractors are increasingly becoming involved in the performance of U.S. Government contracts overseas. Indeed, in the past few years alone, thousands of companies that have never before been involved in Government contracting have sought opportunities to serve the U.S. Government abroad—as either prime contractors or subcontractors. While many companies have jumped at the chance to serve the Government and explore new markets, for contractors inexperienced working abroad, supporting the U.S. Government overseas presents risks as well as opportunities.

Indeed, when performing contracts in the United States, contractors operate in a highly regulated environment. Many of these thousands of companies that are now seeking work internationally face numerous challenges understanding the basic ins and outs of Government contracting in the first place. However, in addition to the traditional rules that apply to Government contracting generally (many of which apply to work performed abroad), there are numerous other special considerations that must be taken into account to work successfully overseas, especially when supporting U.S. Government programs. For instance, working in places like the Middle East—in particular—raises a plethora of sanctions and export control issues, as well as issues related to U.S. anti-boycott rules and the Foreign Corrupt Practices Act.

#### IN BRIEF

##### Sanctions

- Background
- Afghanistan
- Iraq
- Iran
- Libya
- Syria
- SDNs
- FAR Clause
- Diligence Issues

##### Other Purchasing Restrictions

- Export Controls
  - Background
  - Exports To Afghanistan
  - Exports To Iraq
  - Exports To Libya
  - Exports To Syria
- Anti-Boycott Rules
- Foreign Corrupt Practices Act

The purpose of this BRIEFING PAPER is to assist you, the contractor, in understanding a number of these special requirements. However, as mentioned above, it is important to realize that there are countless rules that apply to Government contracts—both domestic and international—and this PAPER cannot cover all

*Andrew D. Irwin is a Special Counsel with Steptoe & Johnson LLP in Washington, DC (<http://www.steptoec.com>), where he is a member of the firm's Government Contracts Team and works closely with the firm's International Department.*

of them. In that regard, several other BRIEFING PAPERS have addressed a number of issues specific to contractors accompanying forces on the battlefield,<sup>1</sup> and contractors intending to deploy overseas would be well served by reviewing these publications as well. Specifically, this BRIEFING PAPER provides a basic explication of U.S. economic sanctions, other special purchasing requirements and preferences, and export controls. It also briefly touches upon anti-boycott laws and anti-bribery laws. These are all major risk areas that should not be overlooked as a contractor sets its sights on supporting the U.S. Government abroad, and contractors wishing to work overseas should consider carefully how these risks apply to their businesses.

## Sanctions

### ■ Background

For a number of years, the United States has had in place sanctions and embargoes against other countries. Some of these sanctions regimes are multilateral and arise from U.S. participation in the United Nations. Others are unilateral, resulting from U.S. foreign policy imperatives. Given the number of sanctioned entities in the Middle East, U.S. sanctions have the potential to affect dramatically the business operations of U.S. contractors operating in the region. Moreover, because there are also specific sanctions on individuals and companies in most countries in the world, it is important to realize that U.S. sanctions issues also can arise in other, seemingly less risky, locales.

Typically, sanctions regimes are administered by the Office of Foreign Assets Control (OFAC), a relatively small but important office within the U.S. Department of the Treasury. OFAC regulations can be found in the *Code of Federal Regulations* at Title 31, Chapter V. OFAC has a useful website at <http://www.ustreas.gov/ofac>, which also contains various short summaries of U.S. sanctions rules. OFAC's rules are typically promulgated pursuant to the International Emergency Economic Powers Act,<sup>2</sup> the Trading With the Enemy Act,<sup>3</sup> and related Executive Orders issued pursuant to these statutes. If a contractor wishes to deal with a sanctioned country or entity, it must request a specific license to do so from OFAC.<sup>4</sup> When presented with a license request, OFAC generally consults with the U.S. Department of State for foreign policy guidance before making a decision whether to authorize a transaction.

OFAC's jurisdiction is far reaching. All U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, and all U.S. incorporated entities and their foreign branches. In the cases of certain sanctions programs (e.g., North Korea and Cuba), all foreign subsidiaries owned or controlled by U.S. companies also must comply.<sup>5</sup>

Over the years, U.S. sanctions have applied to a wide range of countries or regions, including Afghanistan, Angola (UNITA), the Balkans, Burma, Cuba, Iraq, Iran, Libya, North Korea, Syria, Sudan, and Zimbabwe, among others.<sup>6</sup> In addition to country-specific sanctions, as mentioned above, is important to note



## BRIEFING PAPERS

*West, a Thomson business, has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. West is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.*

BRIEFING PAPERS® (ISSN 0007-0025) is published monthly except January (two issues) and copyrighted © 2004 ■ Valerie L. Gross, Editor ■ Periodicals postage paid at St. Paul, MN ■ Published by West, a Thomson business / 901 15<sup>th</sup> Street, NW / Washington, DC 20005 ■ <http://www.west.thomson.com> ■ Customer Service: (800) 328-4880 ■ Postmaster: Send address changes to Briefing Papers / PO Box 64526 / St. Paul, MN 55164-0526

BRIEFING PAPERS® is a registered trademark used herein under license. All rights reserved. Reproduction, storage in a retrieval system, or transmission of this publication or any portion of it in any form or by any means, electronic, mechanical, photocopying, xerography, facsimile, recording, or otherwise, without the written permission of West is prohibited, except that the publisher grants permission to reproduce portions of this publication (not the entire issue) provided that a \$2.50 per page per copy fee is paid directly to Copyright Clearance Center (CCC), 222 Rosewood Drive, Danvers, MA 01923. (978)750-8400. Fee Code: (0007-0025)/97/\$0+\$2.50.

that OFAC also publishes a list of so-called Specially Designated Nationals (SDN) and Blocked Persons, which includes thousands of names of companies and individuals located throughout the world who are connected with sanctioned countries or are terrorists or narcotics traffickers.<sup>7</sup> (The State Department publishes a separate, much shorter list of Foreign Terrorist Organizations such as Al-Qaida and Hizballah.<sup>8</sup>)

Although some sanctions regimes are more restrictive than others, sanctions violations can result in the imposition of criminal liability for both corporations and individuals. Civil and criminal penalties for violations may be quite significant.<sup>9</sup> Moreover, violations and settlements—including those that result from voluntary disclosures—are published by OFAC regularly on its website.<sup>10</sup> Finally, as with any violation of this nature, there is always the looming threat of potential suspension or debarment from Government contracting, as well as related negative publicity.<sup>11</sup> Indeed, major newspapers have regularly reported on alleged sanctions violations and voluntary settlements with OFAC.

Many sanctions regimes have been part of U.S. law for years, and, as such, U.S. Government contractors have been subject to them. Indeed, the “Restrictions on Certain Foreign Purchases” clause at Federal Acquisition Regulation 52.225-13, which is in many U.S. Government prime contracts, further implements and “contractualizes” U.S. sanctions regimes for Government contractors. For the most part, however, Government contractors operating domestically have probably not focused much attention on this clause or on sanctions more generally. And absent having large international supplier bases, the sanctions compliance risks faced by many domestic Government contractors has traditionally been modest.

Nevertheless, although sanctions have not historically been a major concern of domestic contractors, for contractors working abroad or wishing to work abroad, now more than ever, it is important to pay attention to U.S. sanctions, particularly given their constantly evolving nature. Though sanctions involving Iraq

and Libya have been vastly downscaled throughout the last year and now basically lifted, sanctions against Iran remain, and new sanctions and export controls against Syria have been implemented. Moreover, as the war on terror continues to unfold, the SDN list—which includes numerous entities in otherwise “friendly” countries—continues to increase.

By way of example, contractors operating abroad deal with many subcontractors, and they receive many expressions of interest from potential vendors. They may need to hire freight forwarders and other entities that assist with shipping and logistics. In short, they deal with many different parties every day. In each instance, every dealing that they have with another entity represents a sanctions risk and, in some senses, a physical security risk. In the current environment, U.S. contractors can ill afford to take the risk of having subcontractors—or even business contacts—that the U.S. Government has identified as terrorists or as associated with countries that support terrorism.

A number of the sanctions regimes most relevant to U.S. Government contractors are discussed below, along with suggested measures for compliance. Sanctions regimes that Government contractors are less likely to contend with, e.g., Cuba and North Korea (because few suppliers would be associated with such countries), or the Balkans (because those sanctions are largely lifted) are not addressed, but details regarding these and other sanctions can be found on OFAC’s website.

#### ■ Afghanistan

A July 1999 Executive Order blocks the property of and prohibits most trade with the Taliban or involving the territory of Afghanistan controlled by the Taliban.<sup>12</sup> In January 2002, however, as a result of U.S. military actions in Afghanistan, the U.S. Department of State issued a notice in the *Federal Register* modifying the description of the “territory of Afghanistan controlled by the Taliban.” As of the date of that notice, the U.S. Government determined that no territories within Afghanistan were controlled by the Taliban. As a conse-

quence, Afghanistan was returned to its pre-July 1999 legal status.<sup>13</sup>

However, though the Taliban no longer controls Afghanistan, U.S. sanctions against the Taliban remain.<sup>14</sup> In short, though dealings with Afghanistan and Afghan parties are no longer unilaterally proscribed and therefore do not require a specific OFAC license, Government contractors working in the region must take steps to ensure that they are not working with parties identified by the U.S. Government as associated with the former Taliban regime and, therefore, when working locally, need to ensure that they are screening suppliers against the OFAC SDN list. Likewise, as will be discussed later, significant export control restrictions remain.

#### ■ Iraq

In 1990, the U.S. first implemented sanctions against Iraq.<sup>15</sup> The U.N. also imposed multilateral sanctions.<sup>16</sup> That meant that all dealings by U.S. persons with Iraq were several proscribed, except for the now much-scrutinized U.N. Oil-for-Food Program. In May 2003, as a result of the coalition military campaign's ouster of Saddam Hussein, both U.S. and U.N. sanctions were largely suspended and U.S. contractors were able to ship equipment into the Iraq.<sup>17</sup> However, given that the sanctions were suspended rather than rescinded, OFAC retained independent export control jurisdiction over shipments to Iraq.<sup>18</sup> Indeed, the case of Iraq is a prime example of the overlap between export control and sanctions policies.

As of July 30, 2004, sanctions have been formally lifted, with the exception of the U.N. arms embargo.<sup>19</sup> Consequently, with the exception of continuing jurisdiction over existing licenses, OFAC no longer is the "gatekeeper" to working in Iraq generally. The new export control regime for Iraq—administered now mainly by the Department of Commerce—is discussed below. It is important to note, however, that sanctions remain in place with respect to working with SDNs who might be in Iraq. In other words, it is illegal to deal with members of the former Iraqi regime who are on OFAC's SDN list or other designated ter-

rorists who may happen to be in or have dealings with the country.

#### ■ Iran

Iran, which is designated as a state supporter of terrorism by the U.S. Department of State, is under a comprehensive U.S. embargo.<sup>20</sup> U.S. sanctions were first implemented in the 1980s.<sup>21</sup> Except as authorized by amendments to the Iranian Transactions Regulations involving carpets and food, which were issued at the end of April 2000,<sup>22</sup> U.S. persons are prohibited from engaging in any transactions, including purchase, sale, transportation, swap, financing or brokering transactions, related to goods or services of Iranian origin or goods or services owned or controlled by the Government of Iran.<sup>23</sup>

Indeed, these restrictions are so strict that the prohibitions apply to transactions by U.S. persons in locations outside the United States with respect to goods or services that the U.S. person knows or has reason to know are of Iranian origin or are owned or controlled by the Government or Iran. Also, U.S. persons may not import such goods or services into or export them from foreign locations.<sup>24</sup>

For contractors, the impact of some of the restrictions is obvious. Specifically, contractors cannot purchase Iranian-origin goods. They cannot hire Iranian subcontractors. They cannot ship items through Iran. Beyond these seemingly relatively straightforward scenarios, however, the restrictions affect U.S. contractors working in the Middle East more than is readily apparent and there lurk a larger range of potentially nettlesome situations. For instance, a subcontractor may be from a third country but have a representative office in Iran that it would like to use to support work. Or a first-tier subcontractor may not be sensitive to sanctions issues and attempt to purchase or ship items through Iran to supply the prime contractor. Each of these instances represents a potential sanctions violation. Accordingly, when working in support of the U.S. Government in the Middle East, it is important to brief employees about the broad reach of Iran sanctions and communicate with subcontractors and suppliers regarding their sourcing and shipping plans.

### ■ Libya

In February 2004, the United States began the process of formally rescinding sanctions against Libya, and by September 2004, those sanctions were lifted.<sup>25</sup> The sanctions had been in place largely as the result of the 1988 bombing of a Pan-Am jet over Lockerbie, Scotland.<sup>26</sup> Although the sanctions have been removed, tight export controls remain in place, as discussed below. Moreover, there are still SDNs present in Libya with whom U.S. contractors cannot deal and Libya, at least for now, is still designated by the State Department as a state sponsor of terrorism. Thus, dealings with a number of entities in Libya by U.S. contractors, although not outright prohibited under many Government contracts (except for the time being, for instance, those subject to separate Foreign Assistance Act restrictions and subcontracts with entities owned or controlled by the Government of Libya),<sup>27</sup> will be difficult in the near term.

### ■ Syria

In December 2003, the President signed the Syria Accountability and Lebanese Sovereignty Restoration Act (SAA).<sup>28</sup> Congress enacted the SAA to sanction Syria for its support of terrorism, its occupation of Lebanon, its weapons of mass destruction programs, its illegal imports of Iraqi oil, and its role in the ongoing security problems in the Middle East. In May 2004, the President issued an Executive Order implementing the sanctions.<sup>29</sup> This essentially eliminates the export and reexport of all items subject to the Export Administration Regulations (EAR) to Syria.<sup>30</sup> Because these restrictions are administered by the Department of Commerce rather than OFAC, they are discussed later in this PAPER in the section on export controls.

### ■ SDNs

As discussed previously, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or behalf of, targeted countries. It also lists individual groups and entities, such as those designated as terrorists and narcotics traffickers, that are not country-specific.<sup>31</sup> Collectively, such individuals

and companies are called SDNs. The SDN list is updated frequently. It is illegal for persons subject to U.S. jurisdiction to deal with SDNs. Because an SDN might just as easily be an entity in London as Dubai, it is important for contractors to screen all contacts with other businesses or persons as a matter of routine course, no matter where such businesses might be located. The SDN list often provides aliases or alternative spelling for people whom it identifies. Moreover, persons and businesses on the list may move from country to country.

### ■ FAR Clause

For many contractors, the most practical manifestation of sanctions requirements is the FAR "Restrictions on Certain Foreign Purchases" clause. The current December 2003 version of the clause reads as follows:<sup>32</sup>

(a) Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of Treasury, the Contractor shall not acquire, for use in the performance of this contract, any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

(b) Except as authorized by OFAC, most transactions involving Cuba, Iran, Libya and Sudan are prohibited as are most imports from North Korea, into the United States or its outlying areas. Lists of entities subject to economic sanctions and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at <http://www.epls.gov/TerList1.html> [sic]. More information about these restrictions, as well as updates, is available in the OFAC's regulations at 31 CFR chapter V and/or on OFAC's Website at <http://www.treas.gov/ofac>.

(c) The Contractor shall insert this clause, including this paragraph (c), in all subcontracts.

In essence, this straightforward FAR clause simply requires contractors to comply with OFAC rules. Importantly, it notes that the prime contractor must ensure that this clause is flowed down to subcontractors.<sup>33</sup>

Some contracts may contain an outmoded version of this clause, either inadvertently or

as a vestige of an award date several years previous. These clauses are less carefully matched to OFAC rules than the current clause. The 2000 version of the clause provides as follows:<sup>34</sup>

(a) The Contractor shall not acquire, for use in the performance of this contract, any supplies or services originating from sources within, or that were located in or transported from or through, countries whose products are banned from importation into the United States under regulations of the Office of Foreign Assets Control, Department of the Treasury. Those countries are Cuba, Iran, Iraq, Libya, North Korea, Sudan, the territory of Afghanistan controlled by the Taliban, and Serbia (excluding the territory of Kosovo).

(b) The contractor shall not acquire for use in the performance of this contract any supplies or services from entities controlled by the Government of Iraq.

(c) The contractor shall insert this clause, including this paragraph (c), in all subcontracts.

An earlier 1996 version has a slightly different first paragraph that reads as follows:<sup>35</sup>

(a) Unless advance written approval of the Contracting Officer is obtained, the Contractor shall not acquire, for use in the performance of this contract, any supplies or services originating from sources within, or that were located in or transported from or through, countries whose products are banned from importation into the United States under regulations of the Office of Foreign Assets Control, Department of the Treasury. Those countries include Cuba, Iran, Iraq, Libya, and North Korea.

Arguably, the historical clauses have the potential to cause confusion. The 2000 clause, for example, contains a now incorrect list of sanctioned countries and suggests that the list is the full universe of such countries. Likewise, some readers might be tempted to interpret the 1996 clause as stating that the CO has the apparent unilateral right to allow what otherwise might be OFAC violations.

#### ■ Diligence Issues

Contractors face a number of challenges to ensure that they—and entities working at their behest—are not potentially violating U.S. sanctions. Contractors are used to undertaking some level of diligence with respect to business partners in the United States in that

they frequently run a check of a party's name against the List of Parties Excluded From Federal Procurement and Nonprocurement Programs maintained by the General Services Administration<sup>36</sup> to ensure that the party is not suspended or debarred. Contractors need to apply the same diligence efforts with respect to the SDN list. While a number of approaches are available and there is no “one size fits all” solution, at a minimum, contractors should regularly run the name of any parties with whom they are in contact against the Government's version of the SDN list, which is available electronically and can be fed into a database.<sup>37</sup> Indeed, the process is now easier, as a copy of the SDN list resides on the GSA's main excluded parties website. There are also a number of commercial vendors that provide inquiry-based computer systems to check the names of possible business partners against the SDN list and other related Government lists. (The Departments of Commerce and State issue lists of parties that are debarred from export transactions, and the Department of Commerce issues a list of parties that are known weapons proliferators; ideally, these lists should be checked contemporaneously with the SDN list.)<sup>38</sup>

In addition, contractors also need to ensure that their employees—particularly members of their procurement staffs—are well versed about country-specific sanctions. Employees should be instructed to report any contact or expression of interest from a person or entity in a country subject to sanctions to the contractor's legal or compliance staff as soon as possible and not to initiate contact or respond to entities from such countries unless authorized by those responsible for compliance matters within their organizations.

#### Other Purchasing Restrictions

The U.S. Agency for International Development funds a number of U.S. contracts abroad in a wide range of countries pursuant to the Foreign Assistance Act.<sup>39</sup> With respect to these contracts, there is an entire set of additional rules set forth at 22 C.F.R. Part 228 entitled

“Rules on Source, Origin and Nationality for Commodities and Services Financed by USAID.” In some respects, these rules overlap with sanctions, but the coverage is far broader, and it behooves any entity working with USAID to familiarize itself with the 22 C.F.R. Part 228.

In this regard, USAID contracts have a clause setting forth this requirement, which reads as follows:<sup>40</sup>

Source, Origin and Nationality Requirements  
(FEB 1997)

(a) Except as may be specifically approved by the Contracting Officer, all commodities (e.g., equipment, materials, vehicles, supplies) and services (including commodity transportation services) which will be financed under this contract with U.S. dollars shall be procured in accordance with the requirements of 22 CFR Part 228, “Rules on Source, Origin and Nationality for Commodities and Services Financed by USAID.” The authorized source for procurement is Geographic Code 000 unless otherwise specified in the schedule of this contract. Guidance on eligibility of specific goods or services may be obtained from the Contracting Officer.

(b) Ineligible goods and services. The Contractor shall not procure any of the following goods or services under this contract:

- (1) Military equipment,
- (2) Surveillance equipment,
- (3) Commodities and services for support of police and other law enforcement activities,
- (4) Abortion equipment and services,
- (5) Luxury goods and gambling equipment, or
- (6) Weather modification equipment.

(c) Restricted goods. The Contractor shall not procure any of the following goods or services without the prior written approval of the Contracting Officer:

- (1) Agricultural commodities,
- (2) Motor vehicles,
- (3) Pharmaceuticals and contraceptive items,
- (4) Pesticides,
- (5) Fertilizer,
- (6) Used equipment, or
- (7) U.S. government-owned excess property.

If USAID determines that the Contractor has procured any of these specific restricted goods under this contract without the prior written authorization of the Contracting Officer, and has received payment for such purposes, the Contracting Officer may require the Contractor to refund the entire amount of the purchase.

This clause is potentially deceiving, however, as 22 C.F.R. Part 228 covers even more ground than set forth in the clause.

With respect to country-specific purchasing preferences, these source/origin rules partially replicate, or in some instances expand upon U.S. sanctions. For instance, the source/origin rules delineate certain “Foreign Policy Restricted Countries”—from which purchases cannot be made and to which other restrictions apply.<sup>41</sup> This list includes Laos, and until May 2003, included China, despite the fact that it was not sanctioned.<sup>42</sup> Likewise, Libya is also still included on the list, despite no longer being subject to sanctions.<sup>43</sup> (Several other countries that are subject to OFAC sanctions, e.g., Burma (Myanmar), are not included but are obviously subject to those independent OFAC restrictions.) But beyond that, the rules grow increasingly complex with respect to their coverage and definitions of appropriate items and suppliers. For instance, Government-owned organizations operated as commercial businesses—so called “parastatals”—generally cannot become subcontractors.<sup>44</sup> Because exigencies can arise in the course of performing such work, contractors should also review portions of the rules that may allow agency waivers of certain of the source/origin requirements.<sup>45</sup>

Contractors working for USAID should disseminate information about these rules to their procurement staffs, and prime contractors and higher-tier subcontractors should likewise take steps to let lower-tier subcontractors know of these rules as well.

## Export Controls

### ■ Background

Although domestic U.S. Government contractors—particularly those with diverse workforces and foreign supplier bases—are not

immune from needing to understand U.S. export controls, complying with U.S. export controls becomes increasingly more difficult when a U.S. company wishes to ship commodities, technology, and software (collectively “items”) abroad in support of a U.S. Government contract. That is because many seemingly innocuous items might actually be subject to dual-use export controls and conceivably need a license to be shipped in support of the U.S. Government contract being performed abroad.

Some background regarding basic export controls is in order. Most U.S. export control laws fall within the jurisdiction of either the Department of State or the Department of Commerce. (The Department of Energy and the Nuclear Regulatory Commission also have export control rules.<sup>46</sup>) The Department of State Office of Defense Trade Controls (ODTC) administers the International Traffic in Arms Regulations (ITAR),<sup>47</sup> and the Bureau of Industry and Security (BIS) of the Department of Commerce administers the Export Administration Regulations (EAR).<sup>48</sup> This discussion below focuses mainly on the dual-use restrictions of the EAR, as they are often less obvious to contractors. Needless to say, all contractors working with potentially military-controlled items should review the U.S. Munitions List<sup>49</sup>—which is the list of items controlled under the ITAR—before shipping any such items or technical data abroad or before performing defense services.

In short, under the EAR, any item that is sent from the United States to a foreign destination is an export.<sup>50</sup> “Items” include commodities, software, and technology.<sup>51</sup> Some examples include building materials, circuit boards, automotive parts, blue prints, design plans, retail software packages, and technical information.<sup>52</sup> U.S.-origin items sent from elsewhere in the world to a foreign contract site are also typically subject to export control rules, and sharing technical data, even in the United States with a foreign national who is not a permanent resident alien (green card holder), constitutes a “deemed export.”<sup>53</sup>

It is also important to realize that the means by which an item is transferred outside the

United States does not matter in determining export license requirements. An item can be mailed, or it can be shipped. Documents can be faxed or sent via the internet. Indeed, a telephone conversation can result in an export. Moreover, an item is also considered an export even if it is leaving the United States temporarily or if it is going to a U.S. subsidiary in a foreign country.<sup>54</sup>

License requirements depend on an item’s technical characteristics, the destination, the end-user, and the end use. When determining whether a license is required, a contractor must consider (1) what is it exporting, (2) where is it exporting, (3) who will receive its item, and (4) for what purpose the item will be used.<sup>55</sup> In this regard, contractors who know little about Commerce Department export controls would be well served by reading the “Export Control Basics” page on the BIS website at <http://www.bis.doc.gov>. There are also a number of useful flowcharts in the EAR itself that can act as “decision trees” for contractors and their compliance staffs.<sup>56</sup>

Under the BIS regime, the first step in determining export control requirements involves ascertaining the item’s export control classification number (ECCN). ECCNs are part of a large list of item descriptions called the Commerce Control List (CCL).<sup>57</sup> Once you have an item’s ECCN, you can determine whether the item is controlled by looking at the reasons for control for that item, e.g., anti-terrorism (AT) or nuclear nonproliferation (NP) or missile technology (MT), as well as other reasons, and comparing them with the country chart included in the EAR to see if the country to which the export is being made is subject to control for those reasons.<sup>58</sup> If it is, then absent a license exception applying (e.g., exceptions with respect to certain items and countries may allow the temporary shipment of items),<sup>59</sup> you will need to apply for and receive a license before shipment. For instance, if “Widget A” has an ECCN that states that the item is controlled for MT reasons, a contractor working in Saudi Arabia or Kuwait generally could not ship that item there without first obtaining a license because

Saudi Arabia and Kuwait (as well as many other countries in the Middle East) are controlled under the EAR for missile technology reasons.

If, as a prime contractor, you are the exporter of record for an item being shipped abroad, it is therefore important to ascertain the item's ECCN and likewise determine if there are any license restrictions (or exceptions that you can use) before shipping the item in support of your contract. Oftentimes this will require cooperation with the supplier or manufacturer of the item. If you are not the exporter of record, however, it is nonetheless important to convey to your subcontractors or suppliers the importance of complying with U.S. export control laws, including obtaining licenses if necessary. In many circumstances, it may be helpful to have a separate clause in subcontracts or purchase orders addressing compliance with export controls and delineating how the parties intend to allocate compliance and licensing responsibilities.

#### ■ Exports To Afghanistan

Afghanistan remains subject to a range of export control rules.<sup>60</sup> In many respects, it faces a similar number of controls as many countries in the Middle East. Consequently, before shipping to Afghanistan, contractors must carefully review any ECCNs to ensure that they are not controlled for categories for which licenses are needed for Afghanistan.

#### ■ Exports To Iraq

On July 30, 2004, the BIS changed the export control rules for Iraq.<sup>61</sup> As discussed previously, while sanctions were still in place, licenses needed to be obtained by applying to OFAC. Now, licenses may be obtained by applying to BIS through normal licensing procedures.<sup>62</sup>

The new regulations require a license for all reasons for control except most items controlled for anti-terrorism purposes only. (A small number of AT-controlled items still require a license.)<sup>63</sup> However, many previously

unavailable licensing exceptions may now be used in support of work in Iraq. For example, an exception commonly used elsewhere that facilitates the unlicensed export of certain encryption products to most countries is now available for Iraq.<sup>64</sup> Certain temporary exports are also now allowed.<sup>65</sup> Moreover, contractors may now also apply for a Special Iraq Reconstruction License (SIRL).<sup>66</sup>

The SIRL would allow seemingly blanket exports for U.S. Government-funded reconstruction projects, as well as U.N., World Bank, or International Monetary Fund projects.<sup>67</sup> The SIRL would appear to facilitate exports of all items on the CCL, except those controlled for reasons of missile technology, nuclear non-proliferation, and chemical and biological weapons controls.<sup>68</sup> Although the SIRL license application process contemplates a 40-day processing period<sup>69</sup>—which is shorter than the time for processing standard applications—it will not be a panacea for contractors, however. That is because applicants will need to identify ahead of time all items that they intend to ship under the license.<sup>70</sup> As a practical matter, such advance planning may be difficult to achieve.

#### ■ Exports To Libya

In April 2004, the Department of Treasury's Office of Foreign Assets Control (OFAC) issued a General License which transferred licensing jurisdiction for the export of items subject to the EAR to the BIS.<sup>71</sup> However, Libya remains subject to a full panoply of export control rules. Essentially, all items on the CCL, including those controlled for anti-terrorism, require export licenses, although a number of licensing exceptions are now available.<sup>72</sup> Therefore, as the environment in Libya continues to unfold, companies will need to carefully assess export control issues before sending items to Libya. Indeed, many seemingly basic items are controlled for AT purposes only, and unlike with respect to Iraq, where all but a handful of AT-controlled items can be shipped without licenses, a license would typically be required for shipments to Libya.

### ■ Exports To Syria

As indicated in the Sanctions section above, because of the SAA—and because like Iran, and at least for time being Libya (as well as several other countries), Syria is also designated by the Department of State as a state sponsor of terrorism—Syria is subject to a wide range of export and other restrictions. Although there are limited exceptions, basically any item subject to the EAR—which means any item on the CCL or any EAR 99 item (a broad catchall category of items not having an ECCN but still subject to the EAR because, for instance, they are of U.S. origin, products of U.S. technology, or have transited through the United States)—cannot be exported to Syria.<sup>73</sup> The SAA itself, however, does not restrict shipments of foreign origin items not subject to the EAR by U.S. persons.

### Anti-Boycott Rules

In the 1970s, Congress enacted two laws aimed at counteracting the participation of U.S. citizens in other countries' boycotts. The anti-boycott laws were included in the 1977 amendments to the Export Administration Act (EAA),<sup>74</sup> which are implemented in the EAR,<sup>75</sup> and the Ribicoff Amendment to the 1979 Tax Reform Act (TRA).<sup>76</sup> The Arab League boycott of Israel is the primary boycott with which U.S. companies must be concerned today.

Conduct that may constitute a violation under the TRA or the EAR includes:<sup>77</sup>

- (1) Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies.
- (2) Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin or nationality.
- (3) Agreements to furnish or actual furnishing of information about business relationships with Israel or with blacklisted companies.
- (4) Agreements to furnish or actual furnishing of information about the race,

religion, sex, or national origin of another person.

There are significant reporting requirements under both the EAR and the TRA. For instance, under the EAR, U.S. persons must report on a quarterly basis requests received to comply with, further, or support any foreign boycott.<sup>78</sup> The TRA mandates taxpayers to report "operations" in, with, or related to a boycotting country or its nationals and requests received to participate in or cooperate with an international boycott.<sup>79</sup> The Department of the Treasury publishes a quarterly list of boycotting countries.<sup>80</sup> The EAR states that reports of receipts of boycott requests must be filed quarterly on form BIS 621-P for single transactions or BIS 6051 for multiple transactions received in the same calendar quarter.<sup>81</sup> TRA reports are filed with tax returns on IRS form 5713.<sup>82</sup> This form is available from IRS offices.

There are a number of ways that Government contractors working abroad—particularly in the Middle East—can run afoul of the anti-boycott rules. For instance, it has been the practice of some Middle Eastern countries to request certificates of origin when items are processed through customs. These certificates might request that a contractor certify that items are not of Israeli origin. Likewise, the registration process for setting up a subsidiary or local presence in some Middle Eastern countries might require the provision of statements or information that would otherwise be restricted by the U.S. anti-boycott laws. Numerous other hypothetical examples of proscribed activity are found in the supplements that are part of the Commerce Department boycott regulations,<sup>83</sup> and contractors working in the Middle East should review these scenarios and Government interpretations carefully.

Therefore, if a contractor begins working in the Middle East, information regarding the importance of complying with U.S. anti-boycott laws will need to be disseminated to contractor employees potentially involved in any activities such as logistics, business development, and procurement. Because a mere boycott request—even if not agreed to—implies reporting obligations under U.S. law, it

is absolutely essential that any such request be internally reported through a contractor's internal channels so that the person with ultimate reporting responsibility can make correct and timely reports. In particular, because Libyan sanctions have now been dropped, to the extent that U.S. contractors may be allowed under certain circumstances to begin dealing with Libyan entities, particular care should be paid to boycott issues, as Libya is not used to dealing with businesses subject to U.S. anti-boycott laws.

### Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act was enacted to prohibit U.S. companies from making bribe payments to foreign officials to obtain or maintain business.<sup>84</sup> Under the FCPA, unlawful payment to foreign officials made by any issuer, person, or domestic concern are prohibited.<sup>85</sup> U.S. citizens or companies that engage in improper acts outside the United

States are also subject to the Act, as are foreign companies that operate within the United States.<sup>86</sup> Apart from covering payments to officials of foreign governments, the Act also applies to payments made to officials affiliated with public international organizations.<sup>87</sup>

In U.S. Government contracting, the "customer" is the U.S. Government. So ostensibly, the risk of making a bribe payment that violates the FCPA under a U.S. Government contract may appear small. But the FCPA still presents risk to U.S. Government contractors operating overseas. That is because it may nonetheless be possible to construe bribes to host country officials as nonetheless implicating the FCPA. For instance, payments by U.S. contractors to host country taxation or customs authorities might conceivably be construed as bribes. Therefore, as they would with respect to the Anti-Kickback Act,<sup>88</sup> contractors should implement policies aimed at ensuring that employees and consultants do not make bribe payments.

---

## GUIDELINES

---

These *Guidelines* are intended to assist you in addressing some major risks in working abroad in support of the U.S. Government. They are not, however, a substitute for professional representation in any specific situation. Indeed, many of the laws and regulations discussed in this BRIEFING PAPER are exceedingly complex and require careful review when applied to particular factual circumstances.

1. Keep apprised of current sanctions and export control rules, as these rules tend to change frequently and restrictions may sometimes be broader than first meets the eye. Monitoring the websites of the Office of Foreign Assets Control at the Department of Treasury (<http://www.ustras.gov/offices/enforcement/ofac/>), the Bureau of Industry and Security at the Department of Commerce (<http://www.bis.doc.gov>), and the Office of Defense Trade Controls at the Department of State (<http://www.pmdtc.org>) is a good start. Many of these sites allow users to sign up for automatic e-mail updates regarding regulatory changes.

2. Communicate with key functions in your company such as business development, procurement, and information technology about the impact of the sanctions and export control rules. Encourage employees in such areas to ask questions of legal and compliance staff.

3. Develop procedures that "red flag" questionable parties and transactions before they become possible violations. Implement a diligence mechanism to address potential dealings with SDNs and for vetting foreign business partners more generally.

4. Ensure that any boycott requests are declined and that you report all such requests to the U.S. Government in accordance with applicable rules.

5. Inform your personnel working abroad about the anti-bribery rules and develop control mechanisms to ensure that improper payments are not made. Implement periodic training as part of overall business ethics efforts.

## ★ REFERENCES ★

- 1/ McCullough & Edmonds, "Contractors on the Battlefield Revisited: The War in Iraq & Its Aftermath," Briefing Papers No. 04-6 (May 2004); McCullough & Pafford, "Contractors on the Battlefield: Emerging Issues in Combat & Contingency Operations," Briefing Papers No. 02-7 (June 2002).
- 2/ 50 U.S.C. §§ 1701–1707.
- 3/ 50 U.S.C. app. §§ 1–44.
- 4/ 31 C.F.R. § 501.801.
- 5/ See "Frequently Asked Questions" available at <http://www.ustreas.gov/offices/enforcement/ofac/faq/>.
- 6/ See generally Sanctions Program and Country Summaries available at <http://www.ustreas.gov/offices/enforcement/ofac/sanctions>.
- 7/ See generally SDN and Blocked Persons List available at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>; see also 31 C.F.R. § 500.306
- 8/ See list available at <http://usinfo.state.gov/is/Archive/2004/Apr/29-636067.html>.
- 9/ See "Frequently Asked Questions" available at <http://www.ustreas.gov/offices/enforcement/ofac/faq/>.
- 10/ See <http://www.ustreas.gov/offices/enforcement/ofac/civpen/penalties/>.
- 11/ See FAR subpt. 9.4. See generally McCullough & Pafford, "Feature Comment: Government Contract Suspension and Debarment—What Every Contractor Needs To Know," 45 GC ¶ 465 (Nov. 19, 2003).
- 12/ Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 4, 1999).
- 13/ See 67 Fed. Reg. 4301 (Jan. 29, 2002).
- 14/ See generally 31 C.F.R. pt. 545.
- 15/ Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990); Exec. Order No. 12,724 (Aug. 13, 1990).
- 16/ U.N. Security Council Res. 661 (Aug. 2, 1990), available at <http://www.un.org>.
- 17/ See Presidential Determination No. 2003-23 (May 7, 2003), 68 Fed. Reg. 26,459 (May 16, 2003) ; May 7, 2003 OFAC General License Nos. 2 and 4 available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20030508.shtml>; May 23, 2003 OFAC General License available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20030523.shtml>; see also U.N. Security Council Res. 1483 (May 22, 2003), available at <http://www.un.org>.
- 18/ See May 7, 2003 OFAC General Licenses available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20030508.shtml>; May 23, 2003 OFAC General License available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20030523.shtml>.
- 19/ Exec. Order No. 13,350, 69 Fed. Reg. 46,055 (July 30, 2004).
- 20/ See generally 31 C.F.R. pt. 560.
- 21/ See Iran Program Summary available at <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/t11iran.pdf>.
- 22/ See 31 C.F.R. § 560.534.
- 23/ See generally 31 C.F.R. pt. 560, subpt. B.
- 24/ See generally 31 C.F.R. pt. 560, subpt. B.
- 25/ See Exec. Order No. 13,357 (Sept. 20, 2004), 69 Fed. Reg. 56,665 (Sept. 22, 2004), available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20040920.shtml> and various OFAC General Licenses throughout 2004 available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/>.

- 26/ See Exec. Order No. 12,801, 57 Fed. Reg. 14,319 (Apr. 15, 1992); see also Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986); Exec. Order No. 12,544, 51 Fed. Reg. 1235 (Jan. 8, 1986).
- 27/ 22 C.F.R. § 228.03; see also 10 U.S.C. § 2327; DFARS 252.209-7004.
- 28/ Pub. L. No. 108-175, 117 Stat. 2482 (Dec. 17, 2003).
- 29/ Exec. Order No. 13,338, 69 Fed. Reg. 26,751 (May 11, 2004).
- 30/ See 15 C.F.R. pt. 736, supp. 1, General Order No. 2.
- 31/ See SDN and Blocked Persons List available at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>.
- 32/ FAR 52.225-13.
- 33/ See generally Perry & Victorino, "Practical Tips & Considerations for Subcontract Negotiations: A Subcontractor's Perspective," Briefing Papers No. 03-9 (Aug. 2003); Feldman, "Subcontractors in Federal Procurement: Roles, Rights & Responsibilities," Briefing Papers No. 03-3 (Feb. 2003); Humphries & Irwin, "Teaming Agreements/Edition III," Briefing Papers No. 03-10 (Sept. 2003).
- 34/ FAR 52.225-13 (2000).
- 35/ FAR 52.225-11 (1996).
- 36/ See <http://epls.arnet.gov>; see also FAR 9.404.
- 37/ See SDN and Blocked Persons List available at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/>.
- 38/ See Lists To Check available at <http://www.bis.doc.gov/complianceandenforcement/index.htm#lfc>.
- 39/ 22 U.S.C. § 2151 et seq.
- 40/ 48 C.F.R. § 725.225-70.
- 41/ 22 C.F.R. § 228.03.
- 42/ See 68 Fed. Reg. 23,891 (May 6, 2003).
- 43/ 22 C.F.R. § 228.03.
- 44/ 22 C.F.R. § 228.33.
- 45/ 22 C.F.R. § 228.56.
- 46/ See 10 C.F.R. pt. 810 (DOE); 10 C.F.R. pt. 110 (NRC).
- 47/ 22 C.F.R. pts. 120–130.
- 48/ 15 C.F.R. pts. 730–774.
- 49/ 22 C.F.R. pt. 121.
- 50/ 15 C.F.R. § 734.2(b)(1).
- 51/ 15 C.F.R. § 772.1.
- 52/ See "Export Control Basics" available at <http://www.bis.doc.gov/licensing/exportingbasics.htm>.
- 53/ See 15 C.F.R. § 734.2(b)(2). See generally Burgett & Sturm, "Foreign Nationals in U.S. Technology Programs: Complying With Immigration, Export Control, Industrial Security & Other Requirements," Briefing Papers No. 00-3 (Feb. 2000).
- 54/ See "Export Control Basics" available at <http://www.bis.doc.gov/licensing/exportingbasics.htm>
- 55/ See "Export Control Basics" available at <http://www.bis.doc.gov/licensing/exportingbasics.htm>
- 56/ 15 C.F.R. pt. 732, supps. 1, 2.
- 57/ 15 C.F.R. pt. 774.

- 58/ 15 C.F.R. pt. 738, supp. 1.
- 59/ See generally 15 C.F.R. pt. 740.
- 60/ See 15 C.F.R. pt. 738, supp. 1.
- 61/ 69 Fed. Reg. 46,070 (July 30, 2004); see 69 Fed. Reg. 46,090 (July 30, 2004). See generally Irwin, Krauland & Lorello, "Department of Commerce Revises Export Licensing Framework for Iraq: The Practical Impact on U.S. Government Contractors," 82 Fed. Cont. Rep. (BNA) 296 (Sept. 21, 2004).
- 62/ 69 Fed. Reg. 46,070 (July 30, 2004); see 69 Fed. Reg. 46,090 (July 30, 2004).
- 63/ 15 C.F.R. § 746.3(a)(3).
- 64/ 15 C.F.R. § 740.17.
- 65/ 15 C.F.R. § 740.9.
- 66/ 15 C.F.R. pt. 747.
- 67/ 15 C.F.R. § 747.2.
- 68/ 15 C.F.R. § 747.3.
- 69/ 15 C.F.R. § 747.5.
- 70/ 15 C.F.R. § 747.4.
- 71/ See Libya General License available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20040423.shtml>.
- 72/ See 15 C.F.R. pt. 738, supp. 1.
- 73/ See 15 C.F.R. pt. 736, supp. 1, General Order No. 2.
- 74/ See 50 U.S.C. app. § 2407.
- 75/ See 15 C.F.R. pt. 760.
- 76/ 26 U.S.C. § 999.
- 77/ See generally 15 C.F.R. 760.2; see also <http://www.bis.doc.gov/antiboycottcompliance/oacrequirements.html>.
- 78/ 15 C.F.R. § 760.5; see also <http://www.bis.doc.gov/antiboycottcompliance/oacrequirements.html>.
- 79/ 26 U.S.C. § 999(a)(1); see also <http://www.bis.doc.gov/antiboycottcompliance/oacrequirements.html>.
- 80/ 26 U.S.C. §999(a)(3); see also "List of Countries Requiring Cooperation With an International Boycott," 69 Fed. Reg. 42,085 (July 13, 2004); 69 Fed. Reg. 59,643 (Oct. 5, 2004); <http://www.bis.doc.gov/antiboycottcompliance/oacrequirements.html>
- 81/ 15 C.F.R. § 760.5(b)(5); see also <http://www.bis.doc.gov/antiboycottcompliance/BoycottRequestReportingForm.htm>.
- 82/ See <http://www.irs.gov/pub/irs-pdf/f5713sa.pdf>.
- 83/ See 15 C.F.R. pt. 760, Supp. 1–16.
- 84/ 15 U.S.C. § 78dd-1 et seq. See generally Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6 (May 2003); Irwin, "Ethics in Government Procurement/Edition III," Briefing Papers No. 99-8 (July 1999); Dyer, "Foreign Corrupt Practices Act," Briefing Papers No. 00-5 (Apr. 2000).
- 85/ 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.
- 86/ 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.
- 87/ 15 U.S.C. 78dd-1, 78dd-2, 78dd-3.
- 88/ 41 U.S.C. §§ 51–58. See generally Goddard, *supra* note 84; Irwin, *supra* note 84.

**THOMSON**  
—  — <sup>TM</sup>  
**WEST**

**THOMSON**  
—  — <sup>TM</sup>  
**WEST**