

# BRIEFING PAPERS<sup>®</sup> WEST<sup>®</sup>

## SECOND SERIES

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

### SELECTED COMPLIANCE & CONTRACT ADMINISTRATION ISSUES IN CONTINGENCY CONTRACTING

By Andrew D. Irwin and Michael J. Navarre

Since 2001, the fundamental nature of U.S. Government contracting has changed significantly. So much of contracting has occurred abroad, in austere and ever-changing contingency environments such as Iraq and Afghanistan, or in countries in the Middle East or South Asia where U.S. troops and contractors operate in a support capacity. This is not the first time that U.S. contractors have operated abroad in challenging environments—there was significant contracting activity in the Balkans, for example—but the nature, scope, and length of activity in the last eight years is unprecedented. Although at present it appears as if operations in Iraq will ultimately wind down, there is significant and even growing activity in Afghanistan. Given the uncertain

global environment, the possibility of future operations remains evident. For the foreseeable future, therefore, contractors need to be able to understand and manage the challenges of operating in a contingency environment.

Contingency contracting and subcontracting is a wide-ranging topic that has been written about extensively both in this series and elsewhere.<sup>1</sup> This BRIEFING PAPER does not seek to revisit past territory in any significant way. Instead, it seeks

#### IN BRIEF

##### Export Controls, Sanctions & Antiboycott Rules

- ITAR
- EAR
- Sanctions
- Antiboycott Rules
- Practical Circumstances
- Compliance Scenarios

##### Foreign Corrupt Practices Act

- Background
- Practical Issues

##### Compliance With Local Laws & Regulations

- Sources Of The “Compliance” Requirement
- Practical Application

##### Special Requirements When Subcontracting For Private Security

- Interagency Oversight Of PSCs In Contingency Operations Areas
- Governing Rules
- Practical Application
- Rules For Use Of Force

*Andrew D. Irwin is of counsel in the Washington, D.C. office of Steptoe & Johnson LLP, where he is a member of the firm’s International Regulation and Compliance practice as well as its Government Contracts practice. Michael J. Navarre is special counsel in the Washington, D.C. office of Steptoe & Johnson LLP, where he is a member of the Litigation Department and Government Contracts practice.*

to address selected issues that are of continuing relevance for Government contractors and subcontractors. These topics include export controls, sanctions, and antiboycott rules, the Foreign Corrupt Practices Act, local law issues, and special considerations regarding subcontracting for private security. The BRIEFING PAPER covers each topic from a legal perspective and then attempts to offer practical considerations that assess how these legal risks are borne out in the field, both at a prime contractor and subcontractor level. Given the variety of topics discussed here, the continuing evolution of the law, and the fact that each scenario is dependent on its own facts, it is important to recognize that this PAPER should be viewed as background information only. Contractors and subcontractors are encouraged to keep themselves apprised of all relevant laws and regulations and seek legal and risk management advice early and often.

### Export Controls, Sanctions & Antiboycott Rules

U.S. contractors operate in a highly regulated environment. The Federal Acquisition Regulation and agency supplements such as the Defense FAR Supplement are of paramount importance. However, it may not be immediately apparent to some contractors that above and beyond the FAR and agency supplements, other U.S. laws and regulations also apply during the performance of a federal contract. Although in recent years there have been increasing attempts to contractualize various elements of U.S. law (including export controls) into the FAR or DFARS,<sup>2</sup> contractors should recognize that various laws apply whether or not they are in the FAR. This is particularly

the case with respect to export control laws and regulations.

The U.S. has several sets of export control regulations. These include the International Traffic in Arms Regulations (ITAR)<sup>3</sup> and the Export Administration Regulations (EAR).<sup>4</sup> In addition, the U.S. maintains economic sanctions rules<sup>5</sup> and also has laws and regulations relating to unsanctioned foreign boycotts, such as the Arab league's boycott of Israel.<sup>6</sup> A brief summary of each of the sets of rules follows. Contractors and subcontractors need to be mindful of these laws and regulations when, among other things, shipping products or providing services in Iraq or Afghanistan or working in countries in the Middle East or South Asia.<sup>7</sup>

#### ■ ITAR

The Department of State's Directorate of Defense Trade Controls (DDTC) administers the ITAR,<sup>8</sup> which are promulgated under the Arms Export Control Act.<sup>9</sup> The DDTC regulates and requires licenses or approvals for the export, reexport, and retransfer of "defense articles," "technical data," and "defense services," as well as "brokering" of defense transactions<sup>10</sup> to all countries. These terms are interpreted broadly by the DDTC to cover many types of goods and services that are conventionally considered not specific to the military but have some military application to them.<sup>11</sup> In addition, the DDTC requires registration of U.S. defense manufacturers and exporters, as well as brokers,<sup>12</sup> and regulates payments of commissions or fees in securing defense business.<sup>13</sup> The ITAR apply to U.S. persons and to foreign persons in possession of ITAR-controlled goods or technical data.<sup>14</sup>

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## ■ EAR

The Department of Commerce's Bureau of Industry and Security administers the EAR,<sup>15</sup> which are promulgated under the Export Administration Act<sup>16</sup> and the International Emergency Economic Powers Act (IEEPA).<sup>17</sup> The EAR are the principal regulatory framework for controlling exports and reexports of U.S.-origin goods, software, and technology. Although BIS has regulatory authority over all U.S.-origin commercial items, the EAR generally impose export licensing requirements only for a specified subset of goods known generally as "dual-use" items that have both commercial and military or proliferation applications.<sup>18</sup> Virtually all items not controlled by the ITAR are controlled in some manner by the EAR, although unlike the ITAR, which draws a distinction between U.S. and all other contractors in the world, the EAR does not require a license or approval for the export or reexport of most commercial or dual-use goods for many countries.

## ■ Sanctions

The U.S. maintains economic sanctions against certain countries and entities for foreign policy reasons. Sanctions regulations are administered primarily by the U.S. Department of the Treasury's Office of Foreign Assets Control and are promulgated pursuant to IEEPA,<sup>19</sup> the Trading With the Enemy Act,<sup>20</sup> and related Executive Orders issued by the President pursuant to these statutes.<sup>21</sup> OFAC has civil enforcement authority over sanctions violations; the Department of Justice handles criminal prosecutions.

Nearly all OFAC sanctions regimes restrictions apply primarily to "U.S. persons." Apart from citizens and permanent residents, in nearly all cases this term includes U.S.-incorporated entities and their foreign branches and foreign persons located within the territory of the United States.<sup>22</sup> Some provisions of these sanctions regulations—especially restrictions pertaining to the transfer of U.S.-origin goods from foreign locations to sanctioned countries—also apply to foreign persons. Some sanctions are country- and government-specific, although there are also an increasing amount of restrictions targeting persons and entities supporting terrorism, weapons of mass destruction proliferation, and

narcotics trafficking. These sanctions can apply to so-called "Specially Designated Nationals (SDNs) and Blocked Persons."<sup>23</sup> From the perspective of contingency contracting, restrictions against Iran and Syria are most relevant, though the United States currently imposes sanctions against other countries, including but not limited to Sudan,<sup>24</sup> Cuba,<sup>25</sup> North Korea,<sup>26</sup> and Myanmar (Burma).<sup>27</sup> Afghanistan was also subject to sanctions for a number of years, but notwithstanding continued Taliban activity, the sanctions program is essentially inactive, except for transactions related to the Taliban.<sup>28</sup>

The U.S. first levied sanctions against Iran in 1987<sup>29</sup> and substantially expanded them in the mid-1990s.<sup>30</sup> The Iran transactions regulations prohibit U.S. persons, wherever they may be, from participating in virtually any business activities in Iran or with the Government of the Iran, including export and reexporting U.S.-origin goods, services, or technology to Iran, importing most goods and services of Iranian-origin, and "facilitating" the business of third-country nationals or companies with Iran.<sup>31</sup>

President Bush signed the Syria Accountability and Lebanese Sovereignty Restoration Act in December 2003.<sup>32</sup> The Act imposed a broad set of restrictions on business with Syria, which the Department of State has branded a state sponsor of terrorism.<sup>33</sup> Aside from sanctions applying to transactions with SDNs, these sanctions are primarily administered by the Department of Commerce rather than OFAC.<sup>34</sup>

The Syria restrictions ban exporting or reexporting to Syria virtually any U.S.-origin goods and technology, though they provide that the Department of Commerce may license the shipment of limited types and amounts of goods on a case-by-case basis.<sup>35</sup> In contrast to the OFAC-administered trade restrictions that apply to Iran and Sudan, the Syrian restrictions do not prohibit U.S. persons from doing business in or providing commercial services to Syria, so long as there is no use of restricted U.S. goods or technology.<sup>36</sup>

## ■ Antiboycott Rules

The U.S. maintains two sets of antiboycott rules. One set of provisions is enforced by the

Department of Commerce, Office of Antiboycott Compliance (OAC) under the EAR,<sup>37</sup> while the other is enforced by the Department of the Treasury through the Internal Revenue Service under the Internal Revenue Code.<sup>38</sup> The anti-boycott rules prohibit persons subject to the rules (relevant persons) from agreeing with or refraining from, implicitly or explicitly, or participating in transactions where restrictions are placed on suppliers, couriers, vendors, or products to be used or supplied to a country that maintains a boycott on a third country that the United States does not condone. Relevant persons may include entities not organized in the U.S.<sup>39</sup> The U.S. Department of the Treasury publishes periodically a list of countries that may require participation in, or cooperation with, an international boycott of Israel. That list currently consists of Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, and the Republic of Yemen. Treasury continues to review the status of Iraq.<sup>40</sup> The OAC does not publish such a list, but the EAR can apply to those countries on Treasury's list, as well as others. The antiboycott rules also apply to dealings with other countries that a person knows or has reason to know require participation in or cooperation with an international boycott.<sup>41</sup>

U.S. persons must not only refuse to participate in or cooperate with such a boycott, but must also report certain boycott requests to the OAC and/or to the IRS, even if the U.S. person has no intent to respond to or agree to such requests. Generally, a request is not a violation and need not be reported if certain reporting exemptions apply.<sup>42</sup>

#### ■ Practical Circumstances

Export controls have been difficult for companies to manage in the field. All too often, there is the sense that the U.S. Government customer needs equipment immediately and that because the U.S. Government is the customer, export control considerations do not apply. Indeed, even in a noncontingency environment, contractors sometimes assume, often incorrectly, that because the U.S. Government is the customer, there is a light export control burden. Contingency contractors should recognize that if they ignore export control restrictions they may well incur

significant liabilities and that, notwithstanding wartime urgency, export control compliance is an important business imperative. Contractors should be mindful that both primary sets of export control regimes are managed by agencies that are not necessarily the "customer" in a contingency environment, and the fact that those agencies review and approve licenses and other authorizations may lead to tension between the needs of the U.S. Government customer agency and the agency administering the regulations. These cross-checks are inherent in U.S. law.

Many defense contractors are subject to the ITAR. For instance, munitions shipments are ITAR controlled. But the ITAR typically define munitions to include items that are modified or adapted for military applications. So the list of munitions items subject to potential ITAR control is broad and many companies that operate in Iraq and Afghanistan produce or ship covered equipment. In addition, services such as training of foreign governments with respect to defense articles are subject to controls. So there are many ways to fall within the ITAR, some of which are seemingly innocuous or counterintuitive. For example, personal protective equipment may be subject to the ITAR. It is important to note, however, that the ITAR extends beyond traditional defense contractors. Civilian contractors that use personal protective equipment, for instance, may be subject to the ITAR. Ruggedized equipment, for instance, may also be subject to the ITAR.

Even if a contractor is not subject to the ITAR, it is subject to the EAR. That is because virtually everything that is of U.S. origin that is not covered by the ITAR is covered by the EAR. And while many items do not need licenses to be shipped to battlefield environments, some do.

Apart from export controls, Iraq and Afghanistan also border Iran and Iraq borders Syria. That causes potentially significant sanctions concerns. Items cannot be purchased from Iran, nor can items be transshipped through Iran. Similarly, contractors need to be mindful of restrictions regarding the export or shipment of U.S.-origin goods to or through Syria. And contingency contractors face the potential of boycott violations, as they almost invariably will have dealings with

countries or contractors from boycotting countries as part of their supply chain or logistics plans.<sup>43</sup>

### ■ Compliance Scenarios

Faced with these restrictions, how do you effectively get equipment to the battlefield or to the U.S. Government abroad? Here are some examples and options, although as indicated at the beginning of this BRIEFING PAPER, this is a nuanced area (subject to frequent regulatory changes) and a contractor's compliance with the rules is subject to the facts and circumstances of each case.

(1) *EAR GOV Exception*—To the extent that you are shipping for the U.S. Government and the item is subject to the EAR, there is the GOV exception.<sup>44</sup> This exception applies to items for the official use of personnel and agencies of the U.S. Government.<sup>45</sup> Accordingly it may be useful for many shipments related to Government contracts.

(2) *Relevant ITAR Exemptions*—There are several ITAR exemptions that may be applicable to work in contingency environments. For example, the exemption for “Shipments by or for United States Government agencies” is applicable in some cases, although it is important to recognize that the exemption is narrower than its title suggests.<sup>46</sup> Under this exemption, a license is not required for the temporary import, or temporary export, of any defense article, including technical data or the performance of a defense service, by or for any agency of the U.S. Government for the official use of such agency, or for carrying out any foreign assistance, cooperative project, or sales program authorized by law and subject to control by the President by other means.<sup>47</sup> This exemption applies only when all aspects of a transaction (export, carriage, and delivery abroad) are affected by a U.S. Government agency or when the export is covered by a U.S. Government bill of lading.<sup>48</sup> It does not apply when a U.S. Government agency acts as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements.<sup>49</sup> In addition, a license is not required for the temporary import, or temporary or permanent export, of any classified or unclassified defense articles, including technical data or the performance of a

defense service, for end-use by a U.S. Government agency in a foreign country under the following circumstances: (a) the export or temporary import is pursuant to a contract with, or written direction by, an agency of the U.S. Government; (b) the end-user in the foreign country is a U.S. Government agency or facility, and the defense articles or technical data will not be transferred to any foreign person; and (c) the urgency of the U.S. Government requirement is such that the appropriate export license or U.S. Government bill of lading could not have been obtained in a timely matter.<sup>50</sup> Note that this means that the exception is generally confined to truly urgent scenarios.

(3) *New ITAR Exemption for Body Armor*—With respect to a commonly exported item, the Department of State recently created an ITAR exemption for exports of U.S.-origin body armor that allows individuals temporarily to carry one set of body armor with them out of the United States if the armor is exclusively for that person's use and is taken to Iraq, Afghanistan, or another country not subject to other restrictions under ITAR provisions regarding U.S. arms embargoes.<sup>51</sup> Individuals must declare that they are taking such armor with them to a U.S. customs officer, and if they are going to Iraq they must be affiliated with the U.S. Government or traveling under its authorization for “humanitarian activities” for, on behalf of, or at the request of Iraq.<sup>52</sup> Note that there may be local law considerations associated with body armor, such as restrictions regarding its import and transit.

(4) *Export License Approval Requests*—Where possible, you need to plan for export licensing approvals as part of your work processes. Both the Departments of Commerce and State will treat license requests expeditiously, and in some cases there are special procedures for such licenses, but to take advantage of such procedures, some degree of preplanning is required. In particular, contractors should refer to DDTC's “Guidance for Iraq and Afghanistan Cases” which is available on the agency's website and periodically updated.<sup>53</sup> That document notes that it is the policy of the Department of State to expedite all requests for exports directly supporting Coalition efforts in Operation Iraqi Freedom and Operation Enduring Freedom.<sup>54</sup> Among other

things, this document refers to the process for marking and submitting expedited licenses requests, as well as explains the process for reexport requests under general correspondence. There is also a process for the export of fully automatic weapons to private entities.<sup>55</sup>

(5) *Compliance With U.S. Sanctions and Antiboycott Rules*—Above and beyond export control considerations, however, contractors need to comply with U.S. sanctions and not to run afoul of the antiboycott provisions. As to U.S. sanctions, contractors need to be mindful of potential Iranian transactions in your supply chain. One way to deal with this is to ensure that you spell out sanctions restrictions carefully in your subcontracts and purchase orders. Indeed, while sanctions are referenced in the FAR 52.225-13 “Restrictions on Certain Foreign Purchases” clause, it is often helpful to spell out the restrictions in greater detail so that subcontractors (particularly from third countries) will understand the nature of the restrictions. Moreover, there may be times in the Middle East where you may face language in purchasing documents that implicates boycott concerns, including the possible need for boycott reporting.

## Foreign Corrupt Practices Act

### ■ Background

The Foreign Corrupt Practices Act (FCPA)<sup>56</sup> has two major components: antibribery prohibitions<sup>57</sup> and accounting requirements.<sup>58</sup> The antibribery prohibitions (focused on in this PAPER) were created to address what were thought of as corrupt practices used by U.S. companies obtaining business abroad. When the law was enacted in 1977, typical examples of such practices included large bribes to foreign government officials to obtain government contracts, as well as payments of large fees to “consultants” who did not perform services, but instead acted as conduits who passed the money on to government officials. The accounting provisions of the FCPA were enacted because such payments were frequently disguised by slush funds, off-book accounts, and other financial practices, both in the United States and abroad.<sup>59</sup>

The elements of an antibribery violation are as follows: A covered person, with a nexus to U.S. commerce (when required), takes an action in furtherance of a payment of—or an offer, authorization, or promise to pay—money or the giving of anything of value to (1) any “foreign official,” (2) any foreign political party or party official, (3) any candidate for foreign political office, (d) any official of a public international organization, or (3) any other person while “knowing” that the payment or promise to pay will be passed on to one of the above and does so “corruptly” for the purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit to do any act in violation of his or her lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision in order to obtain, retain, or direct business to any person.<sup>60</sup>

The FCPA’s sole statutory exception permits “facilitating” or so-called “grease” payments to government officials who perform “routine governmental action.” The examples of such action enumerated in the statute itself are (1) obtaining business permits (that do not involve the obtaining of business), (2) processing governmental papers such as visas, (3) providing police protection, mail delivery, or scheduling inspections associated with contract performance or the shipment of goods, (4) providing phone, power, or water service, loading and unloading cargo, or protecting perishable products from deterioration, or (5) other similar activities that are ordinarily and commonly performed by an official.<sup>61</sup> This facilitating payment exception is not contained in many countries’ domestic bribery laws or FCPA analogues, which raises conflict-of-law issues. In addition, the exception is of limited scope, particularly because there is no parallel exception on the books-and-records side of the statute for such payments.

1988 amendments to the FCPA added two affirmative defenses. First, the statute provides an affirmative defense where the payment at issue “was lawful under the *written* laws and regulations of the foreign official’s...country.”<sup>62</sup> The second affirmative defense relates to certain payments

made to reimburse foreign officials for expenses directly associated with visits to product demonstrations or tours of company facilities or in connection with the execution or performance of contracts.<sup>63</sup>

The facts of most cases do not typically support the application of the first defense, especially when interpreted literally. The defense may, however, still be applied—at least by analogy—to actions that are legally required by the written laws and authorities of the host country, such as the requirements that a parastatal entity participate in a project or that the investor satisfy other terms or conditions mandated by the government. In practice, the second defense is used much more frequently.

#### ■ Practical Issues

There are many FCPA issues regarding contingency contracting. While the U.S. Government customer is not a “foreign official” and thus payments to U.S. Government officials will not implicate the FCPA (but instead improper payments to U.S. Government officials may constitute violations of other laws), there are many opportunities for contingency contractors to interact with foreign officials in the course of doing U.S. Government-related work. For instance, Government contractors operating abroad have frequent opportunities to interact with foreign officials, whether going through customs, obtaining licenses, permits, and visas, or setting up project offices. In some circumstances, the foreign official might solicit a bribe, or the U.S. contractor might offer one. It is also possible that contractor employees operating under U.S. Government contracts will view local markets as opportunities for future commercial business and may be tempted—on occasion—to engage in questionable conduct with local officials to enhance the possibility of downstream work with the host country. Moreover, it is not just the activities of the contractors, but also activities of those operating on their behalf, that can create FCPA risks. That means that although a contractor may have an ethics and compliance program to ensure that its employees do not make improper payments, third-country national subcontractors (or smaller, less sophisticated U.S. subcontractors) operating under a U.S. Government prime

contractor have the potential to make payments that could be attributable to the prime contractor.

The next section of this BRIEFING PAPER discusses in more detail issues related to compliance with local laws and regulations. With respect to anticorruption compliance, it is essential to distinguish local written laws from customs. In the Middle East and South Asia, in some circumstances paying bribes may be “customary.” But contractors need to resist the temptation to succumb to local custom, otherwise they may find themselves in the cross-hairs of a U.S. enforcement action. Moreover, an FCPA bribe does not need to be a direct cash payment. Charitable contributions, gifts and entertainment, and political contributions may also be “things of value” for purposes of the FCPA. Having a formal FCPA compliance program in place with individual elements to address these and other risks is a key step to managing FCPA compliance risk. Also, engaging in due diligence with respect to teaming or joint venture partners or third parties is important.<sup>64</sup>

### Compliance With Local Laws & Regulations

A series of events leading up to and during the early stages of the conflicts in Iraq and Afghanistan brought to the forefront an area of compliance that traditionally was not a major emphasis in U.S. military operations—compliance with local law. While the U.S. Government has generally urged compliance with local laws (and sensitivity to local customs) to maintain good relations with host nations, not until the advent of modern counterinsurgency (COIN) operations was compliance with local law a focus of contingency operation strategy.<sup>65</sup> Additionally, U.S. uniformed military personnel in past contingency operations composed the vast majority of the U.S. force in the contingency area.<sup>66</sup> These uniformed personnel operated under relative immunity from local law due to international legal norms that have been supplemented with negotiated status of forces agreements (SOFAs) that usually reinforce this immunity.<sup>67</sup> Finally, the military had a quick and ready way to police the majority of its force (uniformed personnel) in the Uniform Code of Military Justice, which provided the host nation with some comfort

regarding accountability of the personnel involved in the operation. However, with the increased use of contractors in areas where active COIN operations are taking place, compliance with local law by contractors accompanying or working alongside U.S. forces in contingency operations areas has taken on increased importance.

#### ■ Sources Of The “Compliance” Requirement

This change in contingency operation strategy and the use of contractors has led to several recent efforts to mandate compliance with local law by government contractors. Most notably, FAR Subpart 25.3 and the clause at FAR 52.225-19, “Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States (MAR 2008)” provide a broad rule governing contingency contractors. The clause specifically states that in a contingency operation area.<sup>68</sup>

The Contractor shall comply with, and shall ensure that its personnel in the designated operational area or supporting the diplomatic or consular mission are familiar with and comply with, all applicable—

(1) United States, host country, and third country national laws;....

In addition, the clause contains a flowdown provision requiring the contractor to incorporate the substance of the FAR 52.225-19 clause “in all subcontracts that require subcontractor personnel to perform outside the United States” in designated contingency areas or in support of a diplomatic or consular mission.<sup>69</sup> The clause at DFARS 252.225-7040, “Contractor Personnel Authorized To Accompany U.S. Armed Forces Deployed Outside the United States (JUL 2009),” contains language identical to FAR 52.225-19.<sup>70</sup>

Similarly, the U.S. Central Command’s DFARS Deviation 2007-O0010, “Contractor Personnel in the United States Central Command Area of Responsibility,” states:<sup>71</sup>

The Contractor shall comply with, and shall ensure that its personnel in the USCENTCOM AOR are familiar with and comply with, all applicable—

(1) United States, host country, and third country national laws;....

Joint Contracting Command—Iraq and Afghanistan (JCC-I/A) Clause 952.225-0004, “Compliance With Laws and Regulations (MAR 2009),” likewise states:<sup>72</sup>

(a) The Contractor shall comply with, and shall ensure that its employees and its subcontractors and their employees, at all tiers, are aware of and obey all U.S. and Host Nation laws....

The JCC-I/A clause also contains an enforcement mechanism that permits the senior military commander of the battle space to order contractor employees “removed from secure military installations or the theater of operations...for acts that disrupt good order and discipline or violate applicable laws [or] regulations.”<sup>73</sup> An example of a specific requirement to follow local law is a recent fragmentary order (FRAGO) from the Commander of Multi-National Force-Iraq (MNF-I) requiring that all private security contractors in Iraq “comply with Iraq law and regulations... including flowing with traffic and not disturbing local driving patterns.”<sup>74</sup>

#### ■ Practical Application

Ensuring that all participants in the contingency contracting effort are aware of the potential sources of law that may apply to their actions and their employees’ actions is crucial, in the short term, to both complying with these new rules and being a part of the solution to the insurgency problems in current contingency operations. In the long term, meaningful and effective local law education programs (whether implemented by the Government or the contractors) combined with effective local law compliance systems will enhance public perception about the use of contractors in contingency operations—an image that has taken some hits in recent years.

The implementation of the recent “Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces From Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq” (the U.S.-Iraq SOFA) provides an interesting case study in local law compliance. The provisions of the U.S.-Iraq SOFA regarding contractors are rather sparse.<sup>75</sup> A literal reading of the SOFA, however, requires that U.S. contractors and their employees abide by the great

majority of Iraqi business, taxation, and licensing laws immediately upon the agreement's taking effect on January 1, 2009. More dramatically, the agreement effectively removed previous contractor (and employee) immunity from Iraqi civil and criminal law.<sup>76</sup> While the agreement seemingly threw contractors into the Iraqi legal system overnight, actual practice has not been quite so stark. As U.S. and Iraqi authorities set up processes and bureaucracy to handle the new legal requirements, it has been reported that the Iraqis have not enforced various licensing and other provisions of Iraqi law made applicable to contractors by the U.S.-Iraq SOFA.<sup>77</sup> Instead Iraqi and U.S. Government representatives have worked out several interim procedures to transition from the prior U.S.-controlled system to a system fully under the sovereign control of Iraq.<sup>78</sup>

The current implementation process of the U.S.-Iraq SOFA also illustrates the unstable legal landscape in contingency contracting. The SOFA called for an Iraqi referendum on the U.S.-Iraq SOFA. However, delays in the Iraqi elections have also delayed the national referendum on the U.S.-Iraq SOFA. If the Iraqi people vote against the U.S.-Iraq SOFA, there is a potential that, among other consequences, legal relations could be restored to the environment immediately preceding the SOFA, where contractors were immune from local law, or to any of a series of other permutations—including one where contractors would face the whim of any Iraqi agency that decided to exert its power over U.S. Government contractors. While at present, the turmoil over 2010 Iraqi elections makes it unlikely that the referendum on the U.S.-Iraq SOFA would be part of the voting,<sup>79</sup> the possibility, however, demonstrates the extreme uncertainty that local law issues create in these environments.

The current Iraqi legal and political situation, while an extreme example of the changing environment faced by contractors supporting contingency operations, is not all that different from conditions faced in other contingency operations environments. The overarching lesson learned from local law compliance challenges in Iraq is that typically the United States is not involved in contingency operations in countries with stable governments and political systems. For

example, contracting in Afghanistan may present even larger challenges than in Iraq due to the emphasis on contracting with local companies and employing local nationals. In many cases, local nationals working for U.S. contractors may not be immune from local law and may not be subject to U.S. laws applying to U.S. employees.<sup>80</sup> Contractors should be sure to understand that inherent risk in contracting in this environment and the very real potential for overnight changes in local law and the legal environment.

To mitigate that risk, contractors can take several proactive steps to assist in complying with applicable local law. First, each contractor at every level of the contract performing in the contingency operation area must stay informed about local law. As the U.S.-Iraq SOFA implementation has demonstrated, however, knowing the rules is only half the battle. The application and interpretation of these laws, particularly in countries where the rule of law is in its fledgling stages, may change as frequently, and often in parallel with, the security situation. Second, typically with the assistance of U.S. counsel, the contractor should consider establishing contacts in country with one or more of the legal authorities in the operations area, including lawyers for the military commanders in the operations area, any Department of State representative or consular authority, and a local civilian lawyer who can provide guidance on host nation laws and represent the contractor's interests should the need arise. These sources will be able to provide the best guidance on current application of local law, any SOFA provisions applicable to contractors, and resources to provide up-to-date training to contractor personnel. Finally, the contractor should also take steps to try to ensure that the relevant Contracting Officer is equally aware of local laws and current enforcement regimes.

Of course, notwithstanding the importance of local law and the recent steps taken in the FAR to emphasize the generalized need for contractors to be aware of and comply with local law,<sup>81</sup> there are some instances where a contractor's agreeing to "comply with" local law, rather than merely acknowledging its "applicability" can potentially run afoul of U.S. laws such as in the antiboycott area.<sup>82</sup> Thus, contractors always need

to be mindful of potential conflicts between U.S. and local law, as well as potential extraterritorial application of U.S. law, and seek appropriate guidance in managing such issues.

### **Special Requirements When Subcontracting For Private Security**

While much of the media and legislative attention surrounding the use of contractors in contingency operations focuses on the Government's direct private security contractors (PSCs), the issues raised by the use of security contracting in contingency operations are far from limited to the small portion of prime contractors providing private security services directly to the Government. Some estimates suggest that subcontractors providing private security in reconstruction or contingency operation support contracts outnumber direct security contractors in both Iraq and Afghanistan.<sup>83</sup> While the causes of this phenomenon have been greatly debated, the nature of current U.S. contingency operations requires that all prime contractors consider the need to subcontract for private security when performing in a contingency operation area.<sup>84</sup> Furthermore, subcontracted private security has itself recently come under scrutiny in various audits of private security oversight. An April 30, 2009, Special Inspector General for Iraq Reconstruction (SIGIR) Report went so far as to call for immediate changes in incident reporting by and tracking of subcontracted PSCs because “[n]o organization appears to have visibility of subcontractor PSCs.”<sup>85</sup>

Some important guidance for prime contractors needing to subcontract for private security can be taken from the changes that have occurred in direct PSC oversight. Two areas where subcontracted private security can find lessons learned from directly contracted private security are (a) the increasing PSC oversight by multiple U.S. Government agencies and (b) confusing rules for the use of force issued by agencies using PSCs in Iraq.

#### **■ Interagency Oversight Of PSCs In Contingency Operations Areas**

Before September 11, 2001, “joint” operations in the military during the past two decades meant

coordinated operations between the services. The post-September 11, 2001 nation-building operations undertaken in Iraq and Afghanistan have, however, added an entirely new dimension to contingency operations. Traditionally, the U.S. military provided the vast majority of the “force protection” for DOD contractors during contingency operations as a secondary mission to their war fighting tasks in theater.<sup>86</sup> At a minimum, uniformed personnel were looked at as the primary source for securing military assets “outside the wire” of U.S. bases and camps in contingency operating areas.<sup>87</sup> Current contingency operations have added the presence of multiple agencies in the contingency operation area. The exponential growth of reconstruction and nation-building activities in Iraq and Afghanistan—areas where counterinsurgency operations are still actively in progress—has resulted in a large number of both DOD and other agency security contractors in contingency areas.<sup>88</sup> The sheer number of U.S. Government agencies involved in the contingency operation area and the presence of armed personnel employed by and supporting the mission of those U.S. Government agencies has also complicated the picture. Additionally, because the Department of State and U.S. Agency for International Development (USAID) were unable to prepare for their new security requirements, these agencies have contracted for private security or required reconstruction contractors to hire their own security.<sup>89</sup>

Because of the decentralized nature of private security oversight in Iraq and Afghanistan, the DOD, the Department of State, and other agencies have begun assembling multiple regulations governing PSC conduct, covering everything from entry-and-exit requirements to incident reporting. As with many multi-agency efforts, this process has led to confusing sets of guidance and lines of authority. Navigating this multi-agency framework is important to successful employment of PSCs in contract performance.

#### **■ Governing Rules**

While the FAR and DFARS have overarching guidance for prime and subcontractor private security working in contingency operations areas, the more detailed guidance is currently contained

in various instructions and other binding orders of U.S. military commanders and the U.S. Embassy Chiefs of Mission.<sup>90</sup> In Iraq that currently means, at the most detailed level, that contractors must comply with the relevant orders issued by the U.S. Embassy Baghdad, Iraq or the Commander, MNF-I.<sup>91</sup> By way of example, MNF-I FRAGO 09-109 is a revision of several prior sets of PSC guidance issued by the Commander, MNF-I, guidance that was required in both the Fiscal Year 2008 and 2009 National Defense Authorization Acts and committed to in prior interagency agreements.<sup>92</sup> The FRAGO is intended to apply equally to DOD and Department of State PSCs by virtue of the Memorandum of Agreement signed by the Departments on December 5, 2007. The FRAGO requests that U.S. Embassy Baghdad implement the FRAGO for Department of State PSCs through its own policies—though to date no Department of State implementing policy has been made public.<sup>93</sup> To this end, FRAGO 09-109 contains a series of required contract provisions for solicitations and contracts (including subcontracts) where arming of contractors is anticipated.<sup>94</sup> Additionally, the order specifies a host of reporting, coordination, and other rules specific to PSCs.

While many of the rules provide relatively clear guidance, the sheer volume of other previously published rules referenced in each FRAGO 09-109 Annex illustrates just how many constituencies are involved in setting rules for PSCs.<sup>95</sup> Furthermore, a comparison of any of the FRAGO rules to those issued by the Department of State illustrates the complicated interagency problem. Even key provisions dealing with the use of force are subtly different in DOD and Department of State guidance. For example, a comparison of DOD and Department of State rules for the use of force shows that the two instructions have different definitions for “hostile act” and “hostile intent.”<sup>96</sup>

#### ■ Practical Application

Under these disparate sets of rules, contractors today must interface with multiple agencies before undertaking even the simplest movement in Iraq accompanied by armed personnel, assuming, of course, that baseline export control restrictions applicable, for instance, to the procuring of

weapons, have been complied with in the first instance. To illustrate the multiple inter-agency coordination, consider a hypothetical scenario where a USAID reconstruction contractor needs to move from Baghdad to some location outside of the city and will be accompanied by Department of State PSCs. Before the USAID convoy moves, under the DOD-Department of State Memorandum of Agreement, the detail members must also coordinate their movements with both the U.S. Embassy Regional Security Officer and the Multi-National Corps-Iraq (MNC-I), Contractor Operations Cells (CONOC).<sup>97</sup> Depending on the type of mission and whether USAID employees are involved, the PSC may have to obtain approval for the mission from the CONOC.<sup>98</sup>

Once the convoy is moving, if the convoy is ambushed or otherwise encounters unfriendlies that it cannot repel on its own, the current process, based on the DOD-Department of State Memorandum of Agreement, for calling in the cavalry is yet another exercise in inter-agency cooperation and navigation, because the quick reaction force in Iraq is typically a military force responding at the direction of the CONOC.<sup>99</sup> And, finally, once the attack is repelled, the prime contractor and the PSC both have a responsibility to ensure that the appropriate incident reporting occurs.<sup>100</sup> Similar to the movement authorization process, the incident reporting framework that is currently in place in Iraq requires reporting to both the MNC-I CONOC and the Department of State Regional Security Officer.<sup>101</sup> However, as the SIGIR’s recent report on PSC incident reporting demonstrated, the serious incident reporting process and follow-up investigation process has been filled with questions and confusion regarding the lines of reporting authority for these incidents, particularly among subcontracted PSCs.<sup>102</sup>

While this example focuses on Iraq, given the increasing nation-building activities and presence of contractors, including PSCs, in Afghanistan, it is not difficult to envision similar issues arising in Afghanistan—or in any other interagency contingency operation effort, for that matter.<sup>103</sup>

#### ■ Rules For Use Of Force

In many respects, changes in the rules for the use of force by PSCs have resulted from

the increasingly interagency nature of PSC oversight in contingency operations areas. The DOD has typically been cautious about DOD PSC use in areas where there is a threat of encountering hostile enemy forces.<sup>104</sup> However, since the threat of encountering a hostile enemy in Iraq and Afghanistan has been present almost anywhere outside of secure DOD bases (and sometimes even inside bases), the typical rules for the use of force by armed contractors have required revision. This evolution is important to remember when interpreting the rules for the use of force. The result of this evolution has been rules for the use of force that today, as noted above, are not always consistent for all PSCs supporting the mission of different U.S. Government agencies operating in the same contingency areas.<sup>105</sup>

What does this mean for a prime contractor? It means that the need for coordination with military and Government contracting officials, senior leaders, and Government lawyers is all the more important when entering into a contingency contract that may require the use of private security. Careful coordination with both contracting officials and on-the-ground civilian and military leadership regarding tactics, use of nonlethal measures, and graduated force continuums, among other issues, is not only prudent but essential to divining current interpretations of the rules that may have evolved over time. As confusing as the rules for the use of force may be, compliance with rules for use of force is not only part of successful contract performance, but arguably also part of the United States' strategy for achieving the broader goals in counterinsurgency and nation-building efforts in these contingency operations.<sup>106</sup>

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## GUIDELINES

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These *Guidelines* are intended to assist you in dealing with certain compliance issues as a contingency contractor. They are not, however, a substitute for professional representation in any specific situation.

**1.** Recognize that there is a significant U.S. regulatory overlay to work that you do abroad, even in a wartime environment with the United States as the customer. Export controls, sanctions, and antiboycott rules are applicable to your work as a contingency contractor, just as they are to commercial work. While it is difficult to plan in advance in a contingency environment, you should have sufficient compliance systems in place to help identify and expeditiously address these issues. It is also important to spell out these issues carefully in your subcontracting and procurement documents. That is particularly the case when you are dealing with a foreign subcontractor base that may be less attuned to such issues and the potentially long reach of U.S. law.

**2.** Be aware that even though the U.S. Government is your “customer” and thus the customer does not count as a “foreign official” for purposes of the FCPA, there are many opportunities for you—or those working on your behalf—to run afoul of the FCPA. Train your employees and make

sure that you have sufficient compliance controls in place with respect to your subcontractors or third parties that may work on your behalf.

**3.** Keep in mind that understanding U.S. law and its potentially broad reach is only part of the compliance battle. U.S. contractors are generally required to comply with local law to successfully perform their contracts in Iraq and Afghanistan. Take steps before entering the theatre to identify applicable local laws, and train your employees on what they will need to do to comply.

**4.** Plan for the potential need to contract for private security subcontractors in your proposal costs and risk analysis. The current multi-agency oversight framework for private security in both Iraq and Afghanistan requires that, after winning a contract for private security or a contract that requires subcontracted private security, the contractor stay in close contact with the relevant military and civilian leadership and monitor the changing oversight environment. Changing interpretations of important contractual terms, such as rules for the use of force, are common in contingency environments and may not be effectively communicated to all subcontractors or even all affected prime contractors. Stay informed.

## ★ REFERENCES ★

- 1/ See generally Drimmer, Irwin, Krauland & Low, "International Regulatory Compliance Challenges Faced by EPC Contractors Supporting the U.S. Government Abroad," 6 IGC ¶ 10 (Feb. 2009); Drimmer, Irwin & Krauland et al., "International Regulatory Compliance Challenges Faced by EPC Contractors Supporting the U.S. Government Abroad," Construction Briefings No. 2009-5 (May 2009); Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007); Goins, Fowler & Annus, "Regulating Contractors in War Zones: A Preemptive Strike on Problems in Government Contracts," Briefing Papers No. 07-3 (Feb. 2007); Irwin, "Special Compliance Considerations When Supporting the U.S. Government Abroad," Briefing Papers No. 04-7 (June 2004); McCullough & Edmonds, "Contractors in the Battlefield Revisited: The War in Iraq & Its Aftermath," Briefing Papers No. 04-6 (May 2004).
- 2/ See 73 Fed. Reg. 42274 (July 21, 2008) (adding DFARS 252.204-7008, 252.204-7009); see also 50 GC ¶ 270.
- 3/ 22 C.F.R. pts. 120–130.
- 4/ 15 C.F.R. pts. 730–774.
- 5/ See generally sanctions programs described at <http://www.ustreas.gov/ofac> and set forth in 31 C.F.R. pt. 500 et seq.
- 6/ 15 C.F.R. pt. 760; 26 U.S.C.A. § 999.
- 7/ See generally Irwin & Ryan, "Leveraging the Human Resources Function in Government Contractor Compliance," Briefing Papers No. 08-12 (Nov. 2008); Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007); West, Lee & Monahan, "U.S. Export Control Compliance Requirements for Government Contractors," Briefing Papers No. 05-12 (Nov. 2005); Irwin, "Special Compliance Considerations When Supporting the U.S. Government Abroad," Briefing Papers No. 04-7 (June 2004).
- 8/ 22 C.F.R. pts. 120–130.
- 9/ 22 U.S.C.A. § 2751 et seq.
- 10/ 22 C.F.R. pts. 123, 124, 125, 129.
- 11/ See U.S. Munitions List, 22 C.F.R. pt. 121.
- 12/ 22 C.F.R. 129.
- 13/ 22 C.F.R. pt. 130.
- 14/ 22 C.F.R. pt. 120.
- 15/ 15 C.F.R. pts. 730–774.
- 16/ 50 U.S.C.A. app. §§ 2401–2420.
- 17/ 50 U.S.C.A. §§ 1701–1707.
- 18/ See Introduction to Commerce Department Export Controls, <http://www.bis.doc.gov/licensing/exportingbasics.htm>; see also 15 C.F.R. § 730.3.
- 19/ 50 U.S.C.A. §§ 1701–1707.
- 20/ 50 U.S.C.A. app. § 5.
- 21/ See, e.g., Exec. Order No. 12959 (May 6, 1995); Exec. Order No. 13059 (Aug. 19, 1997) (Iran); Exec. Order No. 12938 (Nov. 14, 1994) (Nonproliferation); Exec. Order No. 13464 (Apr. 30, 2008) (Burma).
- 22/ See OFAC, Frequently Asked Questions, <http://www.ustreas.gov/offices/enforcement/ofac/faq>.
- 23/ See OFAC, Specially Designated Nationals List, at <http://www.treas.gov/offices/enforcement/ofac/sdn/>.
- 24/ 31 C.F.R. pt. 538.
- 25/ 31 C.F.R. pt. 515.
- 26/ 31 C.F.R. pt. 500.
- 27/ 31 C.F.R. pt. 537.
- 28/ 31 C.F.R. pt. 545.
- 29/ Exec. Order No. 12613 (Oct. 29, 1987).
- 30/ See, e.g., Exec. Order No. 12957 (Mar. 15, 1995); Exec. Order No. 12959 (May 6, 1995); Exec. Order No. 13059 (Aug. 19, 1997).
- 31/ OFAC, An Overview of O.F.A.C. Regulations Involving Sanctions Against Iran, available at <http://www.treas.gov/offices/enforcement/ofac/programs/iran/iran.pdf>; Iranian Transaction Regulations, 31 C.F.R. pt. 560.
- 32/ Pub. L. No. 108-175, 117 Stat. 2482 (Dec. 17, 2003); see Exec. Order No. 13338 (May 11, 2004).
- 33/ See U.S. Department of State, State Sponsors of Terrorism, <http://www.state.gov/sct/c14151.htm>.
- 34/ See 31 C.F.R. pt. 542; 15 C.F.R. pt. 746.
- 35/ 15 C.F.R. § 746.9, pt. 736, supp. 1, General Order No. 2.
- 36/ See Syria: What You Need to Know About U.S. Sanctions, available at <http://www.treas.gov/offices/enforcement/ofac/programs/syria/syria.pdf>.
- 37/ See 15 C.F.R. pt. 760; see also <http://www.bis.doc.gov/complianceand/enforcement/antiboycottcompliance.htm#boycottlaws>.
- 38/ 26 U.S.C.A. § 999.
- 39/ 26 U.S.C.A. § 999.
- 40/ List of Countries Cooperating With an International Boycott, 74 Fed. Reg. 33016 (July 9, 2009).
- 41/ See <http://www.bis.doc.gov/complianceand/enforcement/antiboycottcompliance.htm#boycottlaws>.
- 42/ See <http://www.bis.doc.gov/complianceand/enforcement/antiboycottcompliance.htm#boycottlaws>.
- 43/ See 15 C.F.R. § 734.4 and Supp. 2 (de minimis rule).
- 44/ 15 C.F.R. § 740.11.
- 45/ 15 C.F.R. § 740.11(b).
- 46/ 22 C.F.R. § 126.4.
- 47/ 22 C.F.R. § 126.4(a).
- 48/ 22 C.F.R. § 126.4(a).

- 49/ 22 C.F.R. § 126.4(a).
- 50/ 22 C.F.R. § 126.4(c).
- 51/ 74 Fed. Reg. 39212 (Aug. 6, 2009) (adding 22 CFR § 123.17(f), (g)); see 22 C.F.R. § 126.1.
- 52/ 22 CFR § 123.17(f), (g).
- 53/ Available at [http://www.pmdtct.state.gov/licensing/documents/OEFandOIF\\_Guidelines2008.doc](http://www.pmdtct.state.gov/licensing/documents/OEFandOIF_Guidelines2008.doc).
- 54/ Available at [http://www.pmdtct.state.gov/licensing/documents/OEFandOIF\\_Guidelines2008.doc](http://www.pmdtct.state.gov/licensing/documents/OEFandOIF_Guidelines2008.doc).
- 55/ Available at [http://www.pmdtct.state.gov/licensing/documents/OEFandOIF\\_Guidelines2008.doc](http://www.pmdtct.state.gov/licensing/documents/OEFandOIF_Guidelines2008.doc).
- 56/ 15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff. See generally Drimmer, Irwin, Krauland & Low, "International Regulatory Compliance Challenges Faced by EPC Contractors Supporting the U.S. Government Abroad," 6 IGC ¶ 10 (Feb. 2009); Drimmer, Irwin & Krauland et al., "International Regulatory Compliance Challenges Faced by EPC Contractors Supporting the U.S. Government Abroad," Construction Briefings No. 2009-5 (May 2009); Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10 (Sept. 2008); Shaheen & Geren, "Foreign Corrupt Practices Act Enforcement Trends," Briefing Papers No. 05-8 (July 2005); Dyer, "Foreign Corrupt Practices Act," Briefing Papers No. 00-5 (Apr. 2000); Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007); 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).
- 57/ 15 U.S.C.A. § 78dd-1 et seq.
- 58/ 15 U.S.C.A. § 78m et seq.
- 59/ See U.S. Department of Justice, Lay-Persons Guide to FCPA, <http://www.justice.gov/criminal/fraud/docs/dojdocb.html>.
- 60/ 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).
- 61/ 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
- 62/ 15 U.S.C.A. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (emphasis added).
- 63/ 15 U.S.C.A. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).
- 64/ See generally Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007).
- 65/ Compare Desert Shield General Order No. 1, ¶ 1 ("Operation Desert Shield places United States Armed Forces into USCENTCOM AOR countries where Islamic law and Arabic customs prohibit or restrict certain activities which are generally permissible in western societies. Restrictions upon these activities are essential to preserving U.S. host nation relations and the combined operations of U.S. and friendly forces.") with Counterinsurgency, FM 3-24/MCWP 3-33.5, at 1-24 (Dec. 15, 2006) ("Moreover, participation in COIN operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is party, and certain [host nation] laws.... Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.").
- 66/ See Government Accountability Office, Military Operations: High-Level DOD Action Needed To Address Long-Standing Problems With Management and Oversight of Contractors Supporting Deployed Forces 1 (GAO-07-145, Dec. 18, 2006) (approximately 9,200 civilian contractors were involved in the 1991 Gulf War); Cullen, "Out of Reach: Improving the System To Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas," 38 Pub. Cont. L.J. 509, 511 (Spring 2009) (estimating that nearly 180,000 contractor employees were supporting 160,000 troops in Iraq in 2007); see also Carafano, Private Sector, Public Wars 38 (2008).
- 67/ See O'Connor, Contractor Tort Immunity Under the Law of Military Occupation, \_\_\_ UCLA J. Int'l L. & Foreign Aff. \_\_\_ (forthcoming Spring 2010) (addressing norms of immunity on the battlefield for uniformed and contractor personnel); see also Coalition Provisional Authority Notice 030628-04, "Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel" 1 (June 26, 2003), available at [http://www.cpa-iraq.org/regulations/20030626\\_20030626\\_CPANOTICE\\_Foreign\\_Mission\\_Cir.html.pdf](http://www.cpa-iraq.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf), ("In accordance with international law, the CPA, Coalition Forces and the military and civilian personnel accompanying them, are not subject to local law or the jurisdiction of local courts."); Coalition Provisional Authority (CPA) Order No. 17, "Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq" 1 (June 27, 2003), available at [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) ("Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war....").
- 68/ FAR 52.225.19, para. (d).
- 69/ FAR 52.225.19, para. (q).
- 70/ 252.225-7040, paras. (d), (q).
- 71/ DFARS Deviation 2007-00010, para. (d).
- 72/ JCC-I/A Clause 952.225-0004, para. (a).
- 73/ JCC-I/A Clause 952.225-0004, para. (c).
- 74/ MNF-IFRAGO09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC) ¶ 3.D.2.B. (Mar. 7, 2009). FRAGOs are abbreviated forms of an operations order (OPORD), which in the case of Operation Iraqi Freedom the OPORD would be the Joint Campaign Plan for Iraq. FRAGOs are issued more frequently than the OPORD and focus on specific changes in the OPORD, usually in a particular subject matter area.
- 75/ See U.S.-Iraq SOFA arts. 14 ("Entry and Exit"), 15 ("Import and Export"), 17 ("Licenses or Permits"), available at [http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE\\_SOFA.pdf](http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf).
- 76/ See U.S.-Iraq SOFA art. 12, ¶ 2 available at [http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE\\_SOFA.pdf](http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf) ("Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.").
- 77/ See Sacilotto, "Iraq SOFA: Issues Abound for Contractors," 91 Fed. Cont. Rep. 44 (Jan. 20, 2009) (reporting that on December

30, 2008, the Iraq Minister of the Interior issued Order D.M. 30134, providing that “no law enforcement or legal action will be taken against United States Government and affiliated contractor personnel” until further clarifications were reached).

- 78/ CENTCOM's most recent guidance regarding entry and exit requirements in Iraq notes only that the U.S. Government and the government of Iraq are working toward entry and exit requirements for U.S. military personnel and refers back to a March 2009 interim policy for purposes of contractor entry and exit. See Memorandum from U.S. Embassy Baghdad, Acting Management Counselor Ellen Engels, “Iraqi Immigration Officials at U.S. Military Transportation Hubs in Iraq—Update” (Oct. 12, 2009), available at <http://www2.centcom.mil/sites/contracts/Joint%20Contracting%20CommandIraqAfghanistan%20Contracti/22-%20Entry%20Exit%20Update%20for%20Iraq.doc>.
- 79/ See Sly, “Iraq’s Plans for Referendum on U.S. Pullout Fades,” L.A. Times, Oct. 16, 2009, available at <http://articles.latimes.com/2009/oct/16/world/fg-iraq-referendum16>; Londono, “Iraq May Hold Vote on U.S. Withdrawal,” Wash. Post, Aug. 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/17/AR2009081700949.html> (Aug. 18, 2009) (describing possibility of a referendum on the SOFA in January 2010); see also Chon, “Iraq Passes Key Election Law and Prepares for January Vote,” Wall St. J. Online, Nov. 9, 2009, [http://online.wsj.com/article/SB125770031185936775.html?mod=WSJ\\_hpp\\_MIDDLETopStories](http://online.wsj.com/article/SB125770031185936775.html?mod=WSJ_hpp_MIDDLETopStories).
- 80/ See O’Connor, Contractor Tort Immunity Under the Law of Military Occupation, \_\_\_ UCLA J. Int’l L. & Foreign Aff. \_\_\_ (forthcoming Spring 2010).
- 81/ FAR 52.225.19, para. (d).
- 82/ See 15 C.F.R. pt. 760, supp. 1 (“Interpretations”).
- 83/ See Congressional Research Service, Report RL32419, Private Security Contractors in Iraq: Background, Legal Status, and Other Issues 2–4 (updated Aug. 25, 2008) (estimating that 10,000 of the estimated 30,000 PSC employees in Iraq worked directly for the U.S. Government); see also Congressional Research Service, Report R40835, The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress 5, 8 (Sept. 29, 2009) (noting that the DOD has poor tracking of subcontracted PSC employees in Iraq).
- 84/ See, e.g., Flaherty, Associated Press, “In Afghanistan, US Military’s ‘Help Wanted’ sign,” Wash. Times, Mar. 22, 2009, available at <http://www.washingtontimes.com/news/2009/mar/22/in-afghanistan-us-militarys-help-wanted-sign/print/> (citing online U.S. Government postings that, according to the report, asked “private security companies to protect traveling convoys and guard U.S. bases in troubled southern [Afghanistan] provinces such as Helmand and Kandahar. And if truckers hired to transport fuel for the military want protection, they can hire their own armed guards, the military says.”).
- 85/ See SIGIR Report 09-019, Opportunities To Improve Processes for Reporting, Investigating, and Remediating Serious Incidents Involving Private Security Contractors in Iraq 27 (Apr. 30, 2009).
- 86/ See U.S. Army, FM 3-100.21, Contractors on the Battlefield 6-1 to 6-2 (requiring military commanders to provide military force protection for their contractors); see also Joint Services Operational Law Handbook 249 (2008) (“Contracts for security services shall be used cautiously in contingency operations where major combat operations are ongoing or imminent.”).
- 87/ USCENTCOM Message DTG 070902ZNOV06, “Modification to USCENTCOM Civilian and Contractor Arming Policy and Delegation of Authority for Iraq and Afghanistan (originally published in December 2005, during the throes of the Iraqi insurgency, this policy stated that “use of PSC can be authorized to protect military personnel and military equipment outside of static facilities (such as for personal security details and convoys) when risk of direct contact with uniformed enemy is not probable.”); see also Congressional Research Service, Report R40835, The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress 12–13 (Sept. 29, 2009) (noting some recent discussion about limiting the role of armed contractors in combat areas).
- 88/ See Report of Secretary of State’s Panel on Personal Protective Services in Iraq 5–6 (Oct. 2007), available at <http://www.state.gov/documents/organization/94122.pdf>; see also Congressional Research Service, Report R40835, The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress 5 (Sept. 29, 2009) (“According to government officials, both DOD and the Department of State would be unable to execute their missions in Iraq and Afghanistan without the support of private security contractors.”).
- 89/ See Office of the Inspector General, USAID, Audit Report No. E-267-09-002-P, Audit of USAID/Iraq’s Oversight of Private Security Contractors in Iraq 2–3 (Mar. 4, 2009), available at <http://www.usaid.gov/oig/public/fy09rpts/e-267-09-002-p.pdf>.
- 90/ See FAR 52.225-19, para. (d)(4) (requiring compliance with all orders of the combatant commander and/or Chief of Mission for the designated operational area); see also DFARS 252.225-7040, para. (d)(1)(iv) (“The Contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause are familiar with and comply with...[o]rders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.”); JCC-I/A Clause 952.225-0004 (“Compliance With Laws and Regulations (MAR 2009)” (“(a) The Contractor shall comply with, and shall ensure that its employees and its subcontractors and their employees, at all tiers, are aware of and obey all...Central Command orders and directives applicable to personnel in Iraq and Afghanistan, including but not limited to USCENTCOM, Multi-National Force and Multi-National Corps operations and fragmentary orders, instructions, policies and directives.”).
- 91/ See, e.g., U.S. Embassy Baghdad, Iraq, Policy Directives for Armed Private Security Contractors in Iraq 2 (May 2008) (“These policy directives are mandatory and apply to [PSCs] in Iraq working under a contract (at any tier) or grant... under Chief of Mission Authority.”); MNF-I FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC) ¶ 1.E. (Mar. 7, 2009) (“This FRAGO...contains mandatory guidance for PSCs operating under DOD contract, other armed DOD contractors and armed DOD civilians.”).
- 92/ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 862, 122 Stat. 3, 254 (2008); Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No.

110-417, § 832, 122 Stat 4356, 4535 (2008); see also SIGIR Report No. 09-022, Field Commanders See Improvements in Controlling and Coordinating Private Security Contractor Missions in Iraq 2-3 (July 28, 2009).

- 93/ See FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC) ¶ 3.D.1. (Mar. 7, 2009); USAID Inspector General Audit Report No. E-267-09-002-P, Audit of USAID/Iraq's Oversight of Private Security Contractors in Iraq 4 (Mar. 4, 2009) ("Multi-National Force-Iraq published comprehensive regulations—documented in a series of updated orders—covering areas related to PSC operations.... Although these orders were applicable to PSCs contracted by the Department of Defense, USAID's PSC subcontractors have relied on the orders for guidance as well and were expected to follow them in reporting serious incidents prior to the issuance of policy guidelines by Embassy Baghdad.").
- 94/ See, e.g., FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC), Annex A, ¶ 1 (Mar. 7, 2009) ("The purpose of this annex is to provide guidance and identify requirements that must be incorporated in all contracts between any DOD contracting agency and civilian contractor companies that will arm employees, to include Private Security Companies.").
- 95/ See, e.g., FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC), Annex B (Mar. 7, 2009).
- 96/ Compare FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC), Annex C, ¶ 3.D.3. (Mar. 7, 2009) with U.S. Embassy Baghdad, Iraq, Policy Directives for Armed Private Security Contractors in Iraq 1 (May 2008).
- 97/ See SIGIR Report No. 09-022, Field Commanders See Improvements in Controlling and Coordinating Private Security Contractor Missions in Iraq 3-4 (July 28, 2009); see also MNF-I FRAGO 07-428, Mod 4, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC) ¶ 3.C.3.E.-F. (July 17, 2008) (requiring MNC-I to review all Department of State PSC movements and make recommendations or alterations).
- 98/ See SIGIR Report No. 09-019, Opportunities To Improve Processes for Reporting, Investigating, and Remediating Serious Incidents Involving Private Security Contractors in Iraq 1-2 (Apr. 30, 2009) (movement of USAID contractors is considered a "Tier 2" movement and would have to be approved by the MNC-I CONOC).
- 99/ See U.S. Embassy Baghdad, Iraq, Policy Directives for Armed Private Security Contractors in Iraq, Directive IV (referring to MNC-I quick reaction forces); MNF-I FRAGO 07-428, Mod 4, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC) ¶ 3.C.3.F. (requiring MNC-I to provide quick reaction force support for all PSCs).
- 100/ See USAID Inspector General Audit Report No. E-267-09-002-P, Audit of USAID/Iraq's Oversight of Private Security Contractors in Iraq 4 (Mar. 4, 2009).
- 101/ See USAID Inspector General Audit Report No. E-267-09-002-P, Audit of USAID/Iraq's Oversight of Private Security Contractors in Iraq 4 (Mar. 4, 2009); U.S. Embassy Baghdad, Iraq, Policy Directives for Armed Private Security Contractors in Iraq, Directive IV (May 2008).
- 102/ See SIGIR Report 09-019, Opportunities To Improve Processes for Reporting, Investigating, and Remediating Serious Incidents Involving Private Security Contractors in Iraq 6-7 (Apr. 30, 2009); USAID Inspector General Audit Report No. E-267-09-002-P, Audit of USAID/Iraq's Oversight of Private Security Contractors in Iraq 4 (Mar. 4, 2009).
- 103/ See Statement of Richard C. Holbrooke, Special Representative for Afghanistan and Pakistan, Department of State, to the House Oversight and Government Reform Committee, Subcommittee on National Security and Foreign Affairs 8-9 (Jun. 24, 2009), available at <http://www.oversight.house.gov/images/stories/documents/20090624104421.pdf> (noting the likely increase in contractors in Afghanistan and "implementing partners on the ground...[that] inevitably will employ private security contractors").
- 104/ See Joint Services Operational Law Handbook 249 (2008); see also Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees, 5 Chi. J. Int'l. L. 511, 538-39 & n.102 (Winter 2005) (noting a CENTCOM policy of restricting use of contractors for security along main supply routes).
- 105/ Compare FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC), Annex C, ¶ 3.D.3. (Mar. 7, 2009) with U.S. Embassy Baghdad, Iraq, Policy Directives for Armed Private Security Contractors in Iraq 1 (May 2008); compare also FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC), Annex C, ¶ 1.B. (Mar. 7, 2009) with U.S. Embassy Baghdad, Iraq, Policy Directives for Armed Private Security Contractors in Iraq, Directive I.B.
- 106/ See FRAGO 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies (PSC), Annex C, ¶ 1 (Mar. 7, 2009) ("The political consequences for one poorly placed round by a PSC are critical at such delicate times. The success of Iraq and private security's role in the reconstruction of Iraq depends heavily on the relationship and perceptions of private security contractors by the [Government of Iraq] and Iraqi People.... All military leaders and armed contractors (and DOD civilians) must clearly understand the severe consequences and resulting negative perception of Coalition efforts that may be created by every Graduated Force Response event.... A mindset shift must occur in which armed contractors view every contact with Iraqi civilians as friendly until actions clearly prove otherwise.").