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Iraq Reconstruction: Political Situations Creating Legal Risks For Contractors

Contractors working for the U.S. Government in Iraq as prime and subcontractors have encountered considerable risk, from attacks by insurgents and inhospitable working conditions to unprecedented political and media scrutiny. The last few months have seen the emergence of two new legal risks directly tied to politics: the planned lifting of contractor immunities from Iraqi legal processes, and potential widespread contract terminations in the event of a withdrawal of U.S. forces. Contractors would be well advised to know the risks, monitor developments in these areas and prepare accordingly.

Lifting Contractor Immunity from Iraqi Legal Process—The issue of immunity for contractors supporting U.S. efforts in Iraq has become a sticking point in negotiations between the U.S. and Iraqi governments over the continued U.S. presence in Iraq. Although those negotiations continue, it is highly likely that contractors soon will lose their legal shield and become subject to the Iraqi legal system. This creates potential legal risks, both criminal and civil.

The legal status of U.S. military personnel operating abroad usually is governed by a status of forces agreement (SOFA). SOFAs are international agreements that define the relationship between a host government and foreign forces. The U.S. has approximately 120 SOFAs with foreign countries.

SOFAs cover a range of issues such as the exit and entry of forces, taxes, and employment terms. They also usually address whether the military personnel operating in a host country are subject to that country's domestic civil and criminal jurisdiction. For civil matters, a SOFA may, for example, create a special process for determining and paying claims for damage caused by U.S. forces.

For criminal matters, a SOFA may subject U.S. military personnel to the criminal jurisdiction of the foreign country, at least for certain crimes.

Some SOFAs also address the legal status of contractor personnel working abroad for the U.S. Government. SOFAs with long-established allies typically do not immunize contractors from the domestic laws of the country in which they operate. Rather, contractors are subject to both the criminal and civil legal systems of the foreign countries, as though they operate independently of the U.S. Government. The U.S. usually accepts this condition because those countries' judicial systems are fairly mature, and provide sufficient due process and other protections.

Iraq is different. Since the coalition forces toppled the former Iraqi regime, the Iraqi government largely has been in a state of transition. From May 2003 through June 2004, the Coalition Provisional Authority (CPA) acted as the lawful government of Iraq, pursuant to U.N. Security Council Resolution (UNSCR) 1483, until an Iraqi government could be established. The CPA was replaced in June 2004 by the interim Iraqi government, and a permanent government was elected in October 2005. As a result, the U.S. has not yet established a SOFA with Iraq.

Instead, the CPA administrator issued CPA Order No. 17, governing the status of coalition forces and the contractors supporting them. Section 4 of the order grants broad immunity to contractors working for coalition forces in Iraq. It states in relevant part, "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a [coalition forces'] Contract or any sub-contract thereto." Although subject to waiver by the contractor's "sending" government, this immunity has shielded U.S. Government contractors from Iraqi criminal and civil laws.

Before the CPA's dissolution, some Iraqi politicians pushed to lift the contractor immunity provisions of CPA Order No. 17. The issue became a negotiation point between the U.S. and Iraq as the 2004 transition was formulated. Just three days before the CPA dissolved, however, the matter was resolved when the CPA administrator signed an order extending Order No. 17,

until the new Iraqi government eventually acted to revoke it. But the controversy over this issue has worsened. Over the last few years, a series of high-profile contractor incidents have focused attention on contractor immunity, sparking outrage among Iraqis.

The U.N. resolution authorizing the presence of coalition forces in Iraq will expire December 31. This circumstance has led the U.S. and Iraq to negotiate for continued U.S. security operations and reconstruction activities in Iraq. Just a few days ago, Secretary of State Condoleezza Rice and Iraqi Prime Minister Nuri al-Maliki agreed in principle to a SOFA-like agreement, subject to the approval of their respective governments. The text of the agreement remains confidential, but it appears that the U.S. has relented and agreed that contractors will be subject to Iraqi criminal and civil jurisdiction under the new arrangement. See August Cole, "Contractors Face Loss of Immunity in Iraq," *Wall St. J.*, p. A3 (Aug. 23, 2008).

Precisely how the lifting of immunity will occur and the implications for U.S. contractors are unclear. Most commentary on the issue has focused on potential criminal prosecutions of, for example, security contractors that harm or kill Iraqi bystanders. In this author's view, however, there are immediate practical considerations, such as increased insurance costs and more difficulty recruiting personnel. But the greatest legal risk for companies most likely lies in the unknown Iraqi civil courts.

If contractor personnel are involved in a crime, the contractor may be able to move its people out of Iraq quickly to avoid prosecution. But imagine if the contractor were subject to tort and contract claims brought by Iraqis in Iraqi domestic courts. This could include claims for wrongful death, intentional and negligent infliction of emotional distress, and violations of international law such as human trafficking. A negative decision in a civil claim could be enforced against contractor assets in Iraq or, potentially, in other foreign jurisdictions. The public relations implications also could be troublesome.

Given this circumstance, legal counsel for contractors should monitor how the U.S. and Iraqi governments treat the immunity issue and should take appropriate steps to mitigate a client's legal exposure to the Iraqi system. This includes:

- understanding which Iraqi laws apply to their activities, e.g., labor laws;
- making their employees aware of the potential exposure to Iraqi civil and criminal processes to ensure proper behavior to mitigate risks;

- drafting subcontracts and employment contracts to include binding dispute provisions that call for dispute resolution outside of the Iraqi legal system, e.g., in U.S. courts or somewhere outside of Iraq; and
- establishing good relations with the U.S. State Department, which likely will be on the front lines for many of these issues.

Potential Withdrawal and Contract Terminations—The tentative agreement reached by Rice and al-Maliki calls for a drawdown of U.S. combat troops beginning next summer and concluding in 2011. See Karen DeYoung and Sudarsan Raghavan, "US/Iraqi Negotiators Agree on 2011 Withdrawal," *Wash. Post*, p. A01 (Aug. 22, 2008). Even if approved immediately, that timetable will likely be revisited next year, given that both countries will have elections this fall, and the issue of U.S. troops in Iraq is a primary concern to both electorates. Putting aside their well-crafted words, Sens. Barack Obama (D-Ill.) and John McCain (R-Ariz.), as well as al-Maliki, appear to agree that a withdrawal of combat troops will occur as soon as it makes sense based on circumstances on the ground.

What are the implications for contractors involved in supporting the troops or in reconstruction projects in Iraq?

As mentioned above, the U.S.-led coalition forces in Iraq have been operating pursuant to U.N. Security Council resolutions. UNSCR 1790, approved in December 2007, extended the forces in Iraq—for the "last time"—until Dec. 31, 2008. Any presence beyond that date would be pursuant to a bilateral or multilateral security agreement between the U.S. and Iraq.

As of December 2007, the U.S. had approximately 154,000 Army, Navy, Coast Guard, Air Force and Marine Corps personnel deployed in Iraq. That figure includes the estimated 28,500 troops sent to Iraq as part of the surge plan to defeat insurgents. It is unclear what a withdrawal of U.S. troops would mean because less than half of the troops are combat forces, and many are involved in humanitarian and noncombat stabilization efforts, usually with contractor participation.

Nobody knows the exact number of contractor personnel supporting the U.S.-led coalition efforts in Iraq. In December 2006, the *Washington Post* reported that there were at least 100,000 contractors—"10 times the estimated number of contractors that deployed during the Persian Gulf War in 1991, reflecting the Pentagon's growing post-Cold War reliance on contractors for such jobs as providing security, interrogating prisoners, cook-

ing meals, fixing equipment and constructing bases that were once reserved for soldiers.” Renae Merle, “Census Counts 100,000 Contractors in Iraq,” Wash. Post, p. D01 (Dec. 5, 2006). More recently, the Wall Street Journal put the count at 150,000, with an estimated 63,000 Iraqis. See Cole, *supra*.

When a withdrawal does occur, will it involve only the combat troops and the footprint supporting those troops? Will other noncombat troops stay behind as advisors? And what will be the impact on contractors?

One legal risk to contractors is the potential for widespread terminations by the Government. Indeed, the ability of the U.S. Government to terminate Iraq reconstruction contracts was the subject of a recent report by the special inspector general for Iraq reconstruction. See SIGIR-08-013, *Interim Report on Iraq Reconstruction Contract Terminations*, April 28, 2008.

According to the report, since 2003, Congress has appropriated over \$42 billion for a variety of Iraq reconstruction efforts. These funds have supported approximately 50,000 projects in security and law enforcement, justice and public safety, electric infrastructure, oil infrastructure, water and sanitation, transportation and telecommunications, health care, private-sector development, and education. As of January 2008, only \$35 billion of the \$43 billion was actually obligated to contracts, and only \$29 billion had been expended. Thus, substantial, unobligated, unexpended funds are available for continuing and future projects—if the U.S. remains involved in rebuilding Iraq.

According to the SIGIR report, of the 47,321 projects tracked, only 855 contracts or task orders have been terminated for the convenience of the Government or because of contractor default. If the U.S. Government withdraws its troops from Iraq, this number will surely increase significantly.

Most of the contract terminations associated with a withdrawal will be terminations for convenience. All U.S. Government contracts include a termination for convenience clause that grants the Government a broad right to terminate a contract without incurring liability for breach. The Federal Acquisition Regulation clause

limits a contractor’s recovery to costs incurred and a reasonable profit on work performed, along with the costs of preparing the termination settlement. If the Government and the contractor cannot reach a settlement, the contractor may initiate a dispute under the Contract Disputes Act.

Undoubtedly, some of the Iraq reconstruction contracts will also be terminated for default. The U.S. has the right to terminate a contract for default if a contracting officer determines that the contractor has not adequately performed according to the contract’s terms and conditions. Because a termination for default costs the Government less than a termination for convenience, COs may terminate a contract for default if there is some failure on the contractor’s part. This would relieve the Government of any obligation to pay settlement costs, but it may also subject the contractor to liquidated damages and reprocurement costs. If this occurs, the contractor could contest the action and attempt to convert it to a termination for convenience by filing a CDA claim.

Contract terminations are occasionally tied to political situations, and depending on the timing for pulling out of Iraq, the potential for widespread terminations associated with troop withdrawal may be unprecedented.

Conclusion—Iraq reconstruction contracting has been a risky proposition—both legally and practically—since the beginning of the efforts. These risks have forced contractors to be creative in their risk mitigation techniques. The two legal issues discussed in this article are perhaps the two most significant legal challenges that many contractors in Iraq will face over the next couple of years. Along with the increased volume of audits and investigations, these issues are directly tied to the political situation involving the war in Iraq—a peril that most contractors did not consider when entering into this work.



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