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New U.S.-Iraq SOFA Lifts Contractor Immunity

In an article published in INTERNATIONAL GOVERNMENT CONTRACTOR this past August, entitled *Iraq Reconstruction: Political Situations Creating Legal Risks For Contractors*, we noted that the issue of contractor immunity had become a sticking point in negotiations between the U.S. and Iraqi governments over the continued U.S. presence in Iraq, and that contractors likely would soon lose their legal shield and become subject to the Iraqi legal system. See 5 IGC ¶ 63. This concern was realized in the November 27 status of forces agreement (SOFA) between the U.S. and Iraqi governments.

The article also noted that lifting immunity would create not only criminal risks, but potential civil risks as well—especially if contractors were subject to tort and contract claims brought by Iraqis in their domestic courts. Unfortunately, although these hazards also have been realized, the SOFA has created even greater dangers because of the significant ambiguities that were written into the text and that resulted from omissions. This circumstance has left many contractors scratching their heads as to the nature and extent of the legal predicament that will exist when the SOFA takes effect Jan. 1, 2009.

Before the new SOFA, contractors working for the U.S. Government in Iraq were granted immunity by Coalition Provisional Authority Order No. 17. Section 4 of that order states in relevant part, “Contractors shall be immune from legal process with respect to acts performed by them pursuant to the terms and conditions of a [coalition forces] Contract or any subcontract thereto.” CPA Order No. 17 was extended by CPA Order No. 100 until the Iraqi government revokes or supersedes it.

Instead of revoking CPA Order No. 17, the Iraqi government attempted to supersede it with a provi-

sion in the new SOFA. As with many situations in this reconstruction effort, however, contractor issues were again inadequately addressed because of the larger context of the political and security situation. The primary purpose of the new SOFA is to extend the U.S. military operations in Iraq beyond the term of the U.N. mandate, which expires December 31. Within this milieu, the government negotiators apparently gave the issue of contractor immunity short shrift, leaving many important issues unaddressed.

The final agreed text of the SOFA, as it pertains to contractor immunity, states in relevant part, “Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.” SOFA Article 23, Jurisdiction, ¶ 2. The SOFA defines “United States contractors” and “United States contractor employees” as

Non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces.

Id., Article 2, Definition of Terms, ¶ 5.

This ambiguous language creates almost as many questions as it answers. Clearly contractors will be subject to Iraqi criminal and civil laws, as well as the Iraqi judicial system, starting Jan. 1, 2009. But which contractors? The language addresses only contractors in Iraq to supply goods, services and security *to or on behalf of the U.S. Forces or under a contract or subcontract for the U.S. Forces*. Does this apply to contractors working for the several other U.S. agencies in Iraq, such as the State Department or the U.S. Agency for International Development? Or are those contractors still covered under the immunity protections found in CPA Order No. 17?

Contractors also will be subject to “licenses, other restrictions, taxes, custom duties, or any other charges imposed in Iraq” for personal effects and equipment for personal consumption and use. As a result, contractors must understand the Iraqi laws in these areas to start complying with them immediately. If a contractor does

not pay proper taxes, is it an immediate criminal violation?

There has been speculation that lifting immunity could apply retroactively, allowing criminal prosecutions or civil lawsuits for actions that occurred before the SOFA. Could a security contractor that harmed an innocent civilian while defending against insurgent attack be criminally prosecuted for improperly firing his weapon? Could a logistics contractor involved in a traffic accident in Baghdad two years ago now face a tort suit in Iraqi courts? Could a construction contractor using inexpensive foreign labor face a class-action tort suit for human trafficking?

There are other nuanced questions about how Iraqi laws could be applied. Could a contractor employee be extradited from the U.S. back to Iraq for a criminal trial for an offense that would not be considered criminal in the U.S.? Will contractor equipment in Iraq be subject to seizure or attachment if a civil suit is filed against the contractor?

And then there are more practical implications of the new legal paradigm. Will contractors have more difficulties or incur more costs to recruit personnel? Will insurance companies cancel their policies or increase premiums for coverage in Iraq because of the new legal risks?

Given these circumstances, legal counsel for contractors would be wise to learn the Iraqi legal system as quickly as possible. In the meantime, one thing is clear: the U.S. Government is unlikely to allow contractors to walk away from their obligations even though it created the reconstruction program under one legal scenario and now has entirely changed the legal landscape. Nor is the Government going to reimburse contractors for attorneys fees related to any legal actions in Iraq or even for learning the new laws that will govern them.



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