

# CONTINUING OPPORTUNITIES AND CHALLENGES IN IRAQ, AFGHANISTAN, AND PAKISTAN CONTRACTING

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## I. The Government's Continued Reliance on Contractors

The conflict with al Qaeda and other terrorist groups, “if measured from September 11, 2001 to the present, is already among the longest wars in American history.”<sup>1</sup> In 2007, the Congressional Budget Office projected a total combined cost through 2017 between \$1.2 trillion and \$1.7 trillion.<sup>2</sup> Adjusted for inflation, that cost surpasses any other war in American history except World War II. Much of that cost has gone and will continue to go to private sector contractors. Despite President Obama's promises to withdraw troops from Iraq, the opportunities for contractors will continue for the foreseeable future.

### A. The Drawdown in Iraq and Ramp-Up in Afghanistan and Pakistan

President Obama has directed that American military forces in Iraq be reduced to no more than 50,000 by the end of August 2010, and the Security Agreement between the U.S. and Iraqi governments calls for American troops to be out of the country by the end of 2011. While this drawdown of combat troops will reduce the number of contractors as well, the government's reliance on contractors – including materiel handling teams, engineers, and transportation specialists – may actually increase temporarily.<sup>3</sup> Lieutenant General James H. Pillsbury, Deputy

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<sup>1</sup> *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 2262, 171 L.Ed.2d 41 (2008).

<sup>2</sup> *See Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism: Hearing Before the H. Comm. on the Budget*, 110th Cong. 3 (2007) (statement of Peter Orszag, Director of the CBO).

<sup>3</sup> SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 43 (April 30, 2010).

Commanding General, U.S. Army Materiel Command put the drawdown into sharp perspective:

The magnitude and scope of the Iraq drawdown is unprecedented. To better understand the scale of this operation, consider that more than 341 facilities; 263,000 Soldiers, DOD civilian employees and contractor employees; 83,000 containers; 42,000 vehicles; three million equipment items; and assets worth approximately \$54 billion dollars, will ultimately be removed from Iraq. This is the equivalent, in personnel terms alone, of relocating the entire population of Buffalo, New York.<sup>4</sup>

At the same time, the contracting opportunities in Afghanistan and Pakistan are expanding as the U.S. focus on those areas ramps up. The Commission on Wartime Contracting noted in December 2009 that “[c]onservatively speaking . . . the total warfighter and contractor workforce in [Afghanistan] will likely exceed 300,000 by the end of 2010.”<sup>5</sup> The increase in spending is no less impressive:

- From FY 2009 to FY 2010, cumulative appropriations for Afghanistan increased by 29.4% – from \$39.42 billion in FY 2009 to \$51.01 billion in FY 2010.<sup>6</sup>
- In FY 2010, almost \$11.60 billion was appropriated for Afghanistan reconstruction efforts, surpassing FY 2009 levels by 13.8%. This is the highest amount appropriated in a single year for the reconstruction effort in Afghanistan since 2002.<sup>7</sup>

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<sup>4</sup> *U.S. Army Materiel Command Transitions in Iraq: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 6 (March 29, 2010) (written statement of Lieutenant General James H. Pillsbury, Deputy Commanding General, U.S. Army Materiel Command).

<sup>5</sup> *Contractor Training of Afghan National Security Forces: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 2 (Dec. 18, 2009) (Joint Statement of Christopher Shays and Michael Thibault, Co-Chairs of the Commission on Wartime Contracting in Iraq and Afghanistan).

<sup>6</sup> SPECIAL INSPECTOR GENERAL FOR AFGHAN RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 44 (Jan. 30, 2010).

<sup>7</sup> *Id.* at 45.

- In FY 2010, security had the largest gain in cumulative appropriations (32.6%) over FY 2009, followed by governance and development, which had an increase of 27.6% in cumulative appropriations.<sup>8</sup>

In Pakistan, the U.S. is seeking to counter anti-American attitudes by assisting Pakistan's civilian government in delivering essential services to its people. Congress passed the Enhanced Partnership with Pakistan Act ("Kerry-Lugar Act") in October 2009 to provide \$7.5 billion in non-military aid over the next five years.<sup>9</sup> Many officials believe that this figure will increase dramatically over the coming years.

The U.S. is also planning to construct embassies in Afghanistan and Pakistan that will be among the largest and most expensive in the world – exceeding the scope and price tag of the unprecedented U.S. Embassy in Baghdad.

## **B. The Policy Decisions to Spend Locally**

The rebuilding efforts in Iraq and Afghanistan, as well as the support that the U.S. is providing to Pakistan, are similar to the efforts conducted under the Marshall Plan in post World War II Europe: to stabilize and foster sustainable local governments and to build goodwill in the region for the long-term security of the U.S.<sup>10</sup> This objective has led to U.S. policy decisions to create "localized socio-economic programs" (i.e., to spend money directly with local contractors rather than with U.S. contractors).

The "Iraqi First" or "Afghan First" program, which provides a preference for spending locally and an exception to the Competition in Contracting Act, is codified in Section 886 of the FY08 National Defense Authorization Act<sup>11</sup> and Defense Federal Acquisition Regulation 225.77. Ambassador (Ret.) Kenneth P. Moorefield, Assistant Inspector General for Special Plans & Operations for the GWOT and Southwest Asia Inspector General, Department of Defense, has observed that this "Afghan First" initiative has had mixed results:

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<sup>8</sup> *Id.*

<sup>9</sup> *See* Pub. L. No. 111-73, 123 Stat. 2060 (2009).

<sup>10</sup> *See* Maj. Bradley A. Cleveland, *The Last Shall Be First: The Use of Localized Socio-Economic Policies in Contingency Contracting Operations*, 197 MIL. L. REV. 103, 104 (2008).

<sup>11</sup> Pub. L. 110-181, 122 Stat. 266 (2008).

Efforts via the ‘Afghan First’ program to hire Afghan companies and Afghan personnel to construct needed roads and facilities to support the development and expansion of the ANA and ANP have been essential in the building effort, but also have proven problematic. There are few Afghan companies with the requisite experience to effectively undertake and complete projects at the required standards. In some instances, Afghan companies hired proved unable to meet contractual timing and quality requirements. While many Afghans gladly accept the offer of employment, most are not qualified to contribute more than manual labor.<sup>12</sup>

In Pakistan, Special Representative Richard Holbrooke has made a policy decision to rapidly shift U.S. aid from American contractors to local Pakistani organizations.<sup>13</sup> This decision is not directly supported by any statute or regulation, and the mechanics have not yet been worked out. For example, the State Department is considering transferring the bulk of the Kerry-Lugar Act funds directly to the Pakistan government to spend subject to U.S. oversight – outside of the U.S. procurement laws and regulations. This approach has significant detractors. In an October 2009 formal dissent memo, a senior USAID economist made similar observations about local spending in Pakistan:

On the one hand, [the mission] is expected to achieve high-impact counterinsurgency and broad-based economic development objectives as quickly as possible, especially in those areas more susceptible to radical Taliban recruitment. ... On the other hand, it is asked to do this by working through national and local government channels and host country contractors and [nongovernmental organizations], and not through U.S. contractors and NGOs, to avoid the overhead charges of the latter and to improve the institutional capacity and legitimacy of government agencies and local institutions.

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<sup>12</sup> *Risks and Challenges Associated with ANSF Training Contracts: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 12 (Dec. 18, 2009) (written statement of Ambassador (Ret.) Kenneth P. Moorefield, Assistant Inspector General for Special Plans & Operations for the GWOT and Southwest Asia Inspector General, Department of Defense).

<sup>13</sup> See Ken Dilanian, *State Dept. Split Over Pakistan Aid*, USA TODAY, Oct. 11, 2009, available at [http://www.usatoday.com/news/world/2009-10-11-pakistan-aid\\_N.htm](http://www.usatoday.com/news/world/2009-10-11-pakistan-aid_N.htm).

These are all worthy goals ... and USAID can achieve them all. However, they are contradictory objectives without a reasonable period for the latter.<sup>14</sup>

## II. Persistent Challenges for the Government and Contractors

In testimony on March 17, 2010, William Solis of GAO outlined five challenges that the Defense Department continues to face in contingency contracting:<sup>15</sup>

- having adequate numbers of contract oversight and management personnel;
- training personnel to work with contractors;
- ensuring that local and third-country nationals are properly screened;
- compiling reliable data on the number of contractor personnel; and
- identifying requirements for contractor support in ongoing operations.

Contractors, by extension, suffer from the government's challenges and face additional concerns of their own. Two areas are of particular concern.

### A. The Government's Inadequate Contracting Apparatus

The growth in military contracting since the first Gulf War is staggering. Between 1994 and 2008, the number of Army contracts awarded increased by 660%. In terms of value, the increase was 1,400%.<sup>16</sup> In stark contrast, the size of the Army

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<sup>14</sup> Laura Rozen, *USAID Official: Pakistan Plan Flawed*, POLITICO, Oct. 13, 2009 (quoting C. Stuart Callison, "Dissent memo: Contradictory objectives for USAID/Pakistan program," Oct. 2, 2009).

<sup>15</sup> See SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 43 (April 30, 2010).

<sup>16</sup> *Use of Service Contracts in Support of Wartime Operations and Other Contingencies: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 4 (April 19, 2010) (written statement of Lieutenant General William N. Phillips, Principal Military Deputy to the Assistant Secretary of the Army for Acquisition, Logistics and Technology and Director, Acquisition Career Management and Mr. Edward M. Harrington, Deputy Assistant Secretary of the Army (Procurement) Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology)).

contracting workforce decreased by about 55% during that time.<sup>17</sup> The Army has documented the need for 1,885 acquisition positions, the majority of which are contracting positions.<sup>18</sup> Additionally, turnover of government contracting personnel is still a problem.

The Taji national maintenance depot contract in Iraq is a case in point. It is a complex, \$213 million, fixed-price contract with about 600-employees that requires the contractor, AECOM, to procure, install, and commission 6,000 pieces of industrial plant equipment and train 700 personnel within two-and-a-half years. From 2008 to 2010, the project rotated through six procuring contracting officers, six program management officers, five administrative contracting officers, and seven Contracting Officer Representatives (COR).<sup>19</sup>

The Army is seeking to reverse this fifteen year steady decline in its workforce. It projects recovery will take at least ten years:<sup>20</sup>

In April 2009, the Secretary of Defense gave direction to grow and in-source the acquisition workforce. By Fiscal Year 2015 the Army contracting civilian workforce will grow by more than 1,650 new hire

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<sup>17</sup> *Id.*

<sup>18</sup> *Use of Service Contracts in Support of Wartime Operations and Other Contingencies: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 86 (April 19, 2010) (testimony of Lieutenant General William N. Phillips, Principal Military Deputy to the Assistant Secretary of the Army for Acquisition, Logistics and Technology and Director, Acquisition Career Management).

<sup>19</sup> *Use of Service Contracts in Support of Wartime Operations and Other Contingencies: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 171 (April 19, 2010) (statement by Commissioner Robert Henke, Commission on Wartime Contracting in Iraq and Afghanistan).

<sup>20</sup> *Use of Service Contracts in Support of Wartime Operations and Other Contingencies: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 4 (April 19, 2010) (written statement of Lieutenant General William N. Phillips, Principal Military Deputy to the Assistant Secretary of the Army for Acquisition, Logistics and Technology and Director, Acquisition Career Management and Mr. Edward M. Harrington, Deputy Assistant Secretary of the Army (Procurement) Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology)).

contracting positions. This growth has been facilitated by Section 852 of the 2008 National Defense Authorization Act which provides short term (two to three years) funding while permanent positions are resourced. Section 852 has been used to hire more than 700 personnel from various career fields including roughly 500 contracting personnel.<sup>21</sup>

According to Shay Assad, Director, Defense Procurement and Acquisition Policy Performing the Duties of the Assistant Secretary of Defense (Acquisition), this effort is already being felt on the ground:

Within the last year, the number of CORs in Iraq has jumped from a 59-percent fill rate up to a 91-percent fill in March 2010. Similarly the number of CORs in Afghanistan has more than doubled, jumping from a 38-percent fill rate in January of last year to a 92-percent fill rate in March of this year. In short, the Army has added hundreds of CORs to the war zone to help oversee theater contracting.”<sup>22</sup>

## **B. Applying U.S. Government Standards Overseas**

Despite their unusual circumstances, contractors in Afghanistan and Iraq are not receiving special treatment from U.S. auditors, at least not the favorable kind. The government is applying the same audit standards in these war zones as it does in Reston, Virginia.

The challenges of legal compliance in a war zone are exacerbated by the government policy of contracting locally. As the Commission on Wartime Contracting in Iraq and Afghanistan observed in June of last year:

Nearly 80% of contractor personnel in the U.S. Army Central Command area of responsibility are foreign nationals, most working as subcontractors to American companies. The contract’s most important terms and conditions apply to the subcontractors; however, the governments of Iraq or Afghanistan do not cooperate with the US to enforce federal procurement laws. The practical matter is that the

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<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Use of Service Contracts in Support of Wartime Operations and Other Contingencies: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 6 (April 19, 2010) (written statement of Mr. Shay D. Assad, Director, Defense Procurement and Acquisition Policy Performing the Duties of the Assistant Secretary of Defense (Acquisition)).

United States has little remedy for a foreign subcontractor's unfair pricing and failures to perform.<sup>23</sup>

This observation is subject to one important qualification: the practical matter is that the United States will likely seek its remedy from the prime contractor whenever possible.

There are more subtle, and less sinister, challenges as well. Foreign-national companies often use different accounting systems and pricing techniques from U.S. companies.<sup>24</sup> But their business systems are not the only ones that are problematic. The Commission on Wartime Contracting's independent analysis of 5 of the 15 high-value contractors revealed that 24 of 39 business systems were determined by the Defense Contract Audit Agency to contain significant deficiencies. These 5 contractors account for over \$34 billion in cost-reimbursable contract awards.<sup>25</sup>

The political climates in Iraq and Afghanistan continue to pose unique compliance risks. Only Somalia fared worse than Afghanistan in Transparency International's annual Corruption Perception Index in 2009. Iraq was fifth from the bottom. According to Iraq's Minister of Finance, corruption has never been worse.<sup>26</sup> The UN estimates that Afghans paid \$2.5 billion in bribes to their government officials and members of the police force in 2009. That is about 25 percent of Afghanistan's GDP and almost as much as is generated by the illicit drug trade.

### **III. Oversights, Audits, and Investigations**

According to the "Comprehensive Oversight Plan for the Southwest Asia and Surrounding Areas" (February 2010 Update), the agencies involved in oversight of contracting in Iraq and Afghanistan include: Department of Defense Inspector General, Special Inspector General for Iraq Reconstruction (SIGIR), Special Inspector General for Afghanistan Reconstruction (SIGAR), Defense Contract

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<sup>23</sup> COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN, INTERIM REPORT 34 (June 2009).

<sup>24</sup> COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN, INTERIM REPORT 29 (June 2009).

<sup>25</sup> *Id.* at 31.

<sup>26</sup> SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 66 (Jan. 30, 2010).

Management Agency, Defense Contract Audit Agency, Department of State Inspector General, United States Agency for International Development Inspector General, Government Accountability Office, and the Commission on Wartime Contracting in Iraq and Afghanistan. The same February 2010 Update stated that these agencies are currently undertaking at least 200 planned or ongoing oversight investigations or audits in the Middle East and Southwest Asia, the majority of which are explicitly focused on Iraq and/or Afghanistan.

During the last reporting period (Jan. 1 – Mar. 29), SIGAR opened 19 criminal cases and conducted joint investigations with other federal law enforcement agencies that resulting in the recovery of more than \$2 million.<sup>27</sup> As of March 29, 2010, SIGAR had 42 cases under investigation, primarily focused on contract fraud, bribery, and procurement fraud.<sup>28</sup>

In the course of more than six years of oversight of the Iraq reconstruction effort, SIGIR has issued 336 audit and inspection reports. It claims to have saved, recovered, or put to better use more than \$800 million. In addition, SIGIR's investigative work has led to 30 convictions and more than \$69 million in court-ordered restitution payments, forfeitures, and fines.<sup>29</sup> SIGIR continues to actively pursue allegations of fraud, waste, and abuse in Iraq, with 116 open investigations.<sup>30</sup> Recent headlines include:

- “Marine Corps Captain Charged with Skimming \$1.7 Million from Military Contracts”
- “Former U.S. Military Contractor Pleads Guilty to Bribery and Money Laundering Scheme and Agrees to Forfeit \$15.7 Million”
- “United States Sues Former Army Officer and Three Contracting Firms in Connection with Bribery Scheme”
- “Two Additional Coalition Partner Citizens Arrested in \$8.4 Million Scam Involving CPA Contract”

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<sup>27</sup> SPECIAL INSPECTOR GENERAL FOR AFGHAN RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 29 (April 30, 2010).

<sup>28</sup> *Id.* at 29.

<sup>29</sup> SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 17-18 (April 30, 2010).

<sup>30</sup> *Id.* at 124.

- “U.S. Army Colonel Pleads Guilty to Accepting Illegal Gratuities Related to Contracting in Support of Iraq War”
- “Former U.S. Army Reserve Officer Pleads Guilty to Accepting Illegal Gratuities Related to Contracting While Serving at Camp Arifjan, Kuwait”
- SIGIR Prosecutorial Initiative (SIGPRO) is underway. SIGIR recently hired three former DOJ prosecutors and detailed them as a unit to the Fraud Section of the Criminal Division of DOJ to prosecute SIGIR investigation cases.<sup>31</sup>

Iraq and Afghanistan can be scary environments for U.S. government contractors for a variety of reasons. Every year there are stories that reinforce that notion. Here are a few recent ones:

- In Nov. 2009, PWC was indicted for fraud for allegedly inflating prices in contract to distribute food to US soldiers in the Middle East. They have been paid more than \$8 billion for such contracts.<sup>32</sup> The indictment led to PWC being suspended from government contracting and, therefore, being ineligible to compete for the follow-on contract that was recently awarded to a competitor.
- In April 2010, the government filed an FCA suit against KBR alleging that KBR knowingly included impermissible costs for private armed security in billings to the Army under LOGCAP III. The government’s lawsuit alleges that KBR and 33 subcontractors used private armed security at various times during the 2003-2006 time period without required Army authorization and allowed the use of private security contractors who were not registered with the Iraqi Ministry of the Interior. The subcontractors using private security are alleged to have also violated subcontract terms requiring travel only in military convoys.<sup>33</sup>

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<sup>31</sup> *Id.* at 124-28, 130.

<sup>32</sup> *Company Charged in \$8B Troop Food Fraud*, CBS NEWS, Nov. 16, 2009, available at <http://www.cbsnews.com/stories/2009/11/16/national/main5669764.shtml>.

<sup>33</sup> Press Release, Department of Justice, U.S. Sues Kellogg, Brown & Root for Alleged False Claims Act Violations Over Improper Costs for Private Security in

#### IV. Legal Developments

There have been several important legal developments related to contracting in a wartime environment.

##### A. Reporting Alleged Crimes Committed by or Against Contractor Personnel in Iraq or Afghanistan

Section 854 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (2009 NDAA), Pub. L. No. 110-417, required the DOD to develop mechanisms for contractor reporting of certain alleged offenses by or against contractor employees in Iraq and Afghanistan and incorporating that requirement into current and future contracts. The Defense Department is implementing this requirement in DFARS 252.225-7997 Additional Requirements and Responsibilities relating to Alleged Crimes by or against Contractor Personnel in Iraq and Afghanistan (DEVIATION), which provides in part.

(a) The Contractor shall report to the appropriate investigative authorities any alleged offenses under--

(1) The Uniform Code of Military Justice (chapter 47 of title 10, United States Code) (applicable to contractors serving with or accompanying an armed force in the field during a declared war or a contingency operation); or

(2) The Military Extraterritorial Jurisdiction Act (chapter 212 of title 18, United States Code).

(b) The Contractor shall provide to all contractor personnel who will perform work on a contract in Iraq or Afghanistan, before beginning such work, information on the following:

(1) How and where to report an alleged crime described in paragraph (a) of this clause.

(2) Where to seek victim and witness protection and assistance available to contractor personnel in connection with an alleged offense described in paragraph (a) of this clause.

The Section of Public Contract Law of the American Bar Association has identified a number of concerns regarding the breadth and vagueness of

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Iraq (Apr. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/April/10-civ-359.html>.

the Class Deviation. For example, it fails to identify which “alleged offenses” must be reported by contractors performing in Iraq and Afghanistan. Additionally, as written, it requires contractor reporting of any and all alleged offenses committed by or against employees regardless of whether there is any evidence to support the allegations.

## **B. Wartime Suspension of Statutes of Limitations**

In October 2008, Congress updated and expanded a little-known law that suspends the statute of limitations for fraud-related civil and criminal offenses during times of war.<sup>34</sup> The original law was enacted during World War I and was invoked on several occasions during and after World War II but was rarely seen in case law after the 1950s.<sup>35</sup> During the first Gulf War, the U.S. District Court for the Western District of Texas determined that the law did not apply to that conflict because Congress had not declared war.<sup>36</sup> In 2008, the U.S. District Court for the District of Massachusetts rejected that formalistic approach. In that case, *United States v. Prospero*, 573 F.Supp. 436 (2008), the court found that the statute of limitations for certain alleged offenses related to the Big Dig in Boston were suspended because they occurred during the conflicts in Iraq and Afghanistan. Shortly thereafter, Congress effectively codified *Prospero*'s interpretation.

The amended statute suspends the running of the statute of limitations for fraud-related offenses “when the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)),” until five years after “the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.”<sup>37</sup>

The statute raises numerous questions:

- What is meant by “Presidential proclamation” and “notice to Congress”?
- Does U.S. war anywhere suspend the statute of limitations everywhere?

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<sup>34</sup> See 18 U.S.C.A. § 3287 (2010).

<sup>35</sup> See *United States v. Shelton*, 816 F.Supp. 1132, 1135 (W.D. Tex. 1993).

<sup>36</sup> *Id.*

<sup>37</sup> 18 U.S.C.A. § 3287 (2010).

- Does the law suspend the statute of limitations for offenses unrelated to war (e.g., Boston's Big Dig)?
- Is retroactive application of the amended statute constitutional?

One thing is clear, there will be no repose for contractors involved in Iraq and Afghanistan for some time. Even if all hostilities in both locations were "terminated" for purposes of the statute this year, any alleged violation of the False Claims Act, for example, would arguably remain actionable until 2021 given that Congress authorized the use of force in Afghanistan on September 18, 2001.<sup>38</sup>

### C. Application of U.S. Criminal Laws

For all of the discussion about fraud and corruption in wartime contracting, and all of the allegations that the local government in Afghanistan and elsewhere are corrupt, the majority of criminal cases coming out of Iraq and Afghanistan have involved U.S. government contracting officials and contracting personnel of U.S. contractors working abroad. It is the U.S. citizens that are being prosecuted. Foreign nationals, by and large, have not been subjected to the U.S. criminal laws, although the Department of Justice claims that is about to change.

The reasons that foreign nationals have not been vigorously pursued were well-stated by the Seventh Circuit Court of Appeals in *In re Hijazi*, 589 F3d 401 (7th Cir. 2009): "The complexities inherent in transnational criminal law enforcement can be vexing: ordinary tasks like securing the presence of a defendant, collecting evidence, and enforcing a judgment are transformed into hurdles that are difficult, or impossible, to pass . . . ."

Perhaps more importantly, it is not clear that U.S. criminal statutes such as the Major Fraud Act can be applied to foreign nationals who are working on U.S. government contracts where all of the activities related to the contract and the criminal conduct occur outside the U.S. In the Hijazi case, the Justice Department is taking the position that it can bring Mr. Hijazi to justice in the U.S. because his alleged fraud related to a U.S.-funded subcontract awarded by Halliburton. Mr. Hijazi's counsel is arguing that the Major Fraud Act was not written to have extraterritorial effect and that the exercise of jurisdiction over him would violate due process. The Seventh Circuit, ruling on a writ of mandamus, refused to address these issues, so they now stand before the U.S. District Court in Illinois.

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<sup>38</sup> The six-year statute of limitations for FCA violations would be suspended from September 2001 to the date of termination of hostilities (here May 2010) plus five years, and would only begin to run after that period.

Congress is attempting to fix this potential hole in the law by enacting the Civilian Extraterritorial Jurisdiction Act, which is pending in both chambers. These bills provide, in relevant part:

(a) Whoever, while employed by or accompanying any department or agency of the United States other than the Armed Forces, knowingly engages in conduct (or conspires or attempts to engage in conduct) outside the United States that would constitute an offense enumerated in subsection (c) had the conduct been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.<sup>39</sup>

The enumerated offenses include a prodigious list of violent and commercial crimes that military contractors are already subject to under the Military Extraterritorial Jurisdiction Act (MEJA).<sup>40</sup>

As for extradition, the U.S. has been stymied by foreign nationals refusing to come to the U.S. and foreign governments refusing to cooperate. For example, Mr. Hijazi is in Kuwait; the U.S. and Kuwaiti governments have no extradition treaty, so Mr. Hijazi is effectively under “country arrest” in Kuwait.

The U.S. has attempted to sidestep the issue in at least one case. Last April, FBI agents in Afghanistan captured and renditioned a Lebanese contractor accused of contract fraud in Afghanistan.<sup>41</sup> In August 2009, the contractor pleaded guilty to conspiracy to commit bribery, the only charge against him, which carries a maximum sentence of five years.<sup>42</sup> A senior Army official stated that the case “should serve as a warning” to other contractors.<sup>43</sup>

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<sup>39</sup> S. 2979, 111th Cong.; H.R. 4567, 111th Cong.

<sup>40</sup> *Id.*

<sup>41</sup> Bob Drogin, *Lebanese Man Is Target of First Rendition Under Obama*, L.A. TIMES, Aug. 22, 2009, available at <http://articles.latimes.com/2009/aug/22/nation/narrendition22>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

#### **D. Proposed Global Code of Conduct**

U.S. officials have participated in a draft of a Global Code of Conduct for Private Security Companies and Private Military Companies. The draft Code will be further developed through a series of workshops and consultations with industry, governments, NGOs, and other stakeholders who would ultimately endorse and implement the Code once its contents are agreed upon.

According to Ambassador Thomas Greminger, Head of Political Affairs Division IV of the Swiss Federal Department of Foreign Affairs:

This code aims to recognize that private services are often performed in circumstances where the rule of law has been essentially undermined and where governments may be unable to effectively enforce the law, including human rights law. The code will reinforce the firm belief of responsible corporations offering private security functions and military services that recognizing the human rights and humanitarian law responsibilities of a company towards all those affected by its business practices, including its personnel, its customers, suppliers, and shareholders, provides an important foundation for the responsible provision of private services and can promote the rule of law.

The U.S. government is actively participating in the drafting of the Global Code of Conduct, suggesting that the final product may become mandatory as a FAR or DFARS clause. Notably, the Code, as currently drafted, could extend beyond security companies to any business supporting the DOD.

#### **E. Local Legal Issues: Taxes, Registrations, Customs, and Complying with the FCPA**

Iraq and Afghanistan have become more assertive in requiring contractors to comply with local tax laws, registration requirements, and customs restrictions. These local legal issues often are not clearly set out in law and are applied inconsistently, and contractors frequently are receiving demands from local government officials for payments of “required fees.” Compliance with local laws has become a significant concern for U.S. contractors.

At the same time, the Department of Justice has become more aggressive about investigating and prosecuting violations of the Foreign Corrupt Practices Act (FCPA), which prohibits giving anything of value to foreign officials to influence them in their official capacity, induce them to do or omit to do an act in violation of their lawful duties, or “to secure any improper advantage in order to assist in

obtaining or retaining business for or with, or directing business to, any person.”<sup>44</sup> This confluence of events poses unique risks to contractors in Iraq and Afghanistan, whose governments are among the least transparent in the world.

For example, in an SEC filing last year, a contractor reported that its subcontractors may have spent as much as \$300,000 to “expedite the issuance of a limited number of visas and licenses from foreign government agencies,” which may have violated the FCPA. Given the Afghan government’s lack of transparency and the vast number of foreign subcontractors in Afghanistan, this is likely to be a pervasive problem and one that will continue.

## **F. Defense Base Act**

There have been two recent developments concerning the Defense Base Act that calls into question the protections afforded to contractors under that law

### **1. Independent Contractors**

In April 2010, the Benefits Review Board addressed for the second time an appeal in *Irby v. Blackwater Security Consulting*, 44 BRBS \*\*\*, BRB No. 09-0548 (April 14, 2010), involving a claim for death benefits under the Defense Base Act (DBA) arising out of the death of several contractors in an ambush in Fallujah, Iraq. Among other things, the Board vacated the administrative law judge’s finding that the DBA applies regardless of whether decedent was an employee or independent contractor, holding that the Act only applies to employees.

The practical implications of this decision, if not overruled, is to cast significant doubt over whether the DBA’s “exclusive remedy” provision, which protects employers from civil tort actions, extends the same protection when the person claiming DBA benefits is an independent contractor. The use of an independent contractor model has come under attack from certain members of Congress and, historically, the Internal Revenue Service. Stripping a contractor of the exclusive remedy protection under the DBA may be the tail that converts man's best friend into an employee-based dog. It will also mean that the DBA claims review process will include a fact- and discovery-laden analysis of whether the person claiming benefits is an employee or independent contractor.

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<sup>44</sup> 15 U.S.C.S. §78dd-2(a); Christopher Norton, *DOJ to Expand Fraud, FCPA Investigations*, LAW360, Feb. 26, 2010, available at <http://www.law360.com/articles/152208>; Carrie Johnson, *U.S. Sends Message by Stepping Up Crackdown on Foreign Business Bribes*, WASH. POST, Feb. 8, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/07/AR2010020702506.html>

## 2. Exclusivity-of-Remedy Exception

In March 2010, the U.S. District Court for the Southern District of Texas ruled that the DBA's exclusive administrative compensation remedy can be avoided by any plaintiff who files a common law tort action against his or her employer and can meet a reasonable person/foreseeability negligence standard.<sup>45</sup> This ruling in *Fisher v. Kellog Brown & Root Services, Inc.*, No. 10-20202 (S.D. Tex. Mar. 25, 2010), which is now on appeal before the Fifth Circuit, flies in the face of Fifth Circuit precedent, more than 80 years of consistent case law, and the United State's own statement of interest in the instant case—all of which assert that circumventing the DBA exclusive remedy requires a showing that the employer deliberately harbored and actually acted upon a specific intent or design to inflict injury or death on its employee.<sup>46</sup>

Here, employees were injured or killed in Iraq in April 2004 during Operation Iraqi Freedom when insurgents attacked the U.S. military supply convoy vehicles they were operating under KBR's LOGCAP contract. The district court found "nothing in the record to support the proposition that the defendants desired that any of the drivers be injured or killed in an attack by Iraqi insurgents."<sup>47</sup> Nonetheless, it held that the personal injury/wrongful deaths suits are not barred by the DBA because KBR had not shown that the attacks were "unexpected."<sup>48</sup> If upheld, the decision would undermine predictability of compensation that Congress intended the statute to bring to both injured claimants and their employers.

### G. Battle-field Preemption

On the eighth anniversary of the September 11, 2001 terrorist attacks, the U.S. Court of Appeals for the District of Columbia ruled that state tort law claims were preempted against CACI International Inc. and Titan Corp. whose personnel were effectively integrated into the U.S. military's chain of command while providing interrogation and interpreter services to the DOD in Iraq.<sup>49</sup> Two groups of plaintiffs alleged that their relatives were abused by contractor employees and

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<sup>45</sup> Mem. Op. & Order at 10.

<sup>46</sup> See, e.g., *Johnson v. Oil & Gas Co.*, 864 F.2d 40 (5th Cir. 1989); *Houston v. Bechtel Assocs. Prof'l Corp.*, 522 F.Supp. 1094, 1096 (D.D.C. 1981).

<sup>47</sup> Mem. Op. & Order at 28.

<sup>48</sup> See *id.* at 30-34.

<sup>49</sup> See *Saleh v. Titan*, 580 F.3d 1 at 4 (D.C. Cir. 2009).

brought suit under a number of legal theories, including state tort law.<sup>50</sup> In *Saleh v. Titan*, 580 F.3d 1 at 4 (D.C. Cir. 2009), the D.C. Circuit found that the state law tort claims against both contractors were subject to “battlefield preemption” based upon the Federal Tort Claims Act’s exemption for “any claim arising out of combatant activities of the military or armed forces, or the Coast Guard, during times of war.”<sup>51</sup>

For contractors, the policy behind the exemption is implicated if they engage in combatant activities under the direction and control of the military.<sup>52</sup> The exemption prevents the government from having to pay, indirectly, the cost of imposing tort liability on contractors, avoids distracting military personnel with civil proceedings, and keeps such state law claims from interfering with the federal government’s criminal and contractual remedies for contractor misconduct.<sup>53</sup>

The court established the following test for battle-field preemption:

During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.<sup>54</sup>

It cautioned, however, that a contractor might provide services in such a “discrete manner—perhaps even in a battlefield context – that those services could be judged separate and apart from combat activities of the U.S. military.”<sup>55</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 6 (citing 28 U.S.C. § 2680(j)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 8.

<sup>54</sup> *Id.* at 9.

<sup>55</sup> *Id.*