

# Caught in the Federal Procurement Fish Bowl

*26th Annual Ounce of Prevention Seminar*

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## **Continuing Opportunities and Challenges in Afghanistan, Iraq, and Pakistan Contracting**

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# Continued Reliance on Contractors

- Conflict with al Qaeda: projected \$1.2-1.7 trillion through 2017
- More costly than any US war but WWII
- Contractor opportunities will continue

# Drawdown in Iraq

- No combat troops by end of 2011
- DOD predicts 70,000+ contractors in August 2010
- “The magnitude and scope of the Iraq drawdown is unprecedented.”
  - 341 facilities
  - 263,000 Soldiers, DOD civilian employees and contractor employees
  - 83,000 containers
  - 42,000 vehicles
  - three million equipment items
  - Assets worth approximately \$54 billion dollars
- Some types of contractors—including materiel handling teams, engineers, and transportation specialists—may temporarily increase while U.S. troops draw down

# Ramp-up in Afghanistan

- 300,000+ troops and contractors by end of 2010
- FY09 to FY10: Cumulative appropriations increased by 29.4%— from \$39.42 billion to \$51.01 billion
- FY10: \$11.60 billion appropriated for reconstruction efforts, up 13.8% from FY09
- FY10: Security had largest cumulative appropriations gain (32.6%), followed by governance and development (27.6%)

# Pakistan: The Next Big Thing?

- Kerry-Lugar Act: \$7.5 billion in nonmilitary aid over the next five years
- US Embassy in Islamabad: Largest and most expensive in the world

# Persistent Challenges

- Top 5 contracting challenges:
  - Inadequate contract oversight and management personnel
  - Training personnel to work with contractors
  - Screening local and third-country nationals
  - Data on the number of contractor personnel
  - Identifying requirements for contractor support in ongoing operations

# The Government's Inadequate Contracting Apparatus

- Between 1994 and 2008:
  - Army contracts awards increased by 660% and the value increased by 1,400%
  - Contracting workforce *decreased* by about 55%
- Taji National Maintenance Depot 2008 to 2010:
  - 6 procuring contracting officers
  - 6 program management officers
  - 5 administrative contracting officers
  - 7 CORs
- Reversing the trend: Army COR fill rate up 32% in Iraq and 54% in Afghanistan over past year

# Applying U.S. Government Standards Overseas

- USG is applying the same audit standards in war zones as in Reston, VA
- Different accounting systems
- Culture of corruption
  - Transparency International's annual Corruption Perception Index in 2009: Afghanistan 2<sup>nd</sup> worst and Iraq 5<sup>th</sup> worst
  - UN estimates that Afghans paid \$2.5 billion in bribes to their government officials in 2009
- Risk to U.S. contractors working overseas



# Policy Decisions to Spend Locally

- Afghan First and Iraq First: FY08 National Defense Authorization Act
- DOD to limit competition and give local preference when acquiring goods or services in support of operations in Iraq and Afghanistan (DFARS 252.225-7024 and 252.225-7026)
- Pakistan Policy

# Most Common Mistakes by Contractors in Iraq and Afghanistan

- Not Understanding U.S. Legal Restrictions and Requirements
- Not Having an Adequate Compliance System

# Oversights, Audits, and Investigations

- DOD IG
- SIGIR
- SIGAR
- DCMA
- DCAA
- DOS IG
- USAID IG
- GAO
- Commission on Wartime Contracting

## Oversights, Audits, and Investigations (cont.)

- 200 planned or ongoing oversight investigations or audits in the Middle East and Southwest Asia
- March 2010: 42 SIGAR investigations on contract fraud, bribery, and procurement fraud
- March 2010, 116 SIGIR investigations

# Oversights, Audits, and Investigations (cont.)

- SIGIR: 6-Year Retrospective
  - 336 audit and inspection reports
  - \$800M “saved, recovered, or put to better use”
  - 30 convictions
  - \$69 million in court-ordered restitution payments, forfeitures, and fines

# Oversights, Audits, and Investigations (cont.)

- Recent Headlines:
  - “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”
  - “U.S. Army Colonel Pleads Guilty to Accepting Illegal Gratuities Related to Contracting in Support of Iraq War”
- Corporate Ramifications
  - PWC indictment and suspension
  - KBR False Claims Act cases

# Application of U.S. Criminal Laws

- USG pursuing U.S. citizens and companies
- Difficulty in pursuing foreign nationals, but enforcement actions against foreign nationals increasing
- Military Extraterritorial Jurisdiction Act (MEJA) provides for U.S. criminal jurisdiction over foreign nationals for certain criminal offenses
- *In re: Hijazi*
- Rendition

# Reporting of Alleged Crimes

- DFARS 252.225-7997 (Class Deviation – Dec. 09)
  - Applies to all Iraq and Afghanistan contracts for work performed in country longer than 14 days
  - Contractor must report to “the appropriate investigative authorities” any alleged offense under the UCMJ or MEJA



# Reporting of Alleged Crimes

- DFARS 252.225-7997 (Class Deviation – Dec. 09) (cont.)
  - Contractor shall provide to all contractor personnel before beginning work information on (1) how and where to report an alleged crime and (2) where to seek victim or witness protection and assistance available to contractor personnel

## **JCC-I/A CLAUSE 952.225-0004 COMPLIANCE WITH LAWS AND REGULATIONS (MAR 2009)**

**(f) Contractors shall immediately notify military law enforcement and the Contracting Officer if they suspect an employee has committed an offense. Contractors shall take any and all reasonable and necessary measures to secure the presence of an employee suspected of a serious felony offense. Contractors shall not knowingly facilitate the departure of an employee suspected of a serious felony offense or violating the Rules for the Use of Force to depart Iraq or Afghanistan without approval from the senior U.S. commander in the country.**

# Wartime Suspension of Limitations

- 18 U.S.C. § 3287
- WWI-era statute rarely invoked after WWII
- Amended in October 2008 to cover specific authorizations, e.g., Afghanistan and Iraq
- Suspends the running the statute of limitations for fraud-related offenses “when the United States is at war” and until five years afterward

# Proposed Global Code of Conduct

- Being developed through a series of workshops and consultations with industry, governments, NGOs, and other stakeholders
- As currently drafted, could cover any business supporting the DOD
- U.S. likely to adopt

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

- Iraq and Afghanistan requiring compliance with local taxes, registrations, and customs where not exempt
- FCPA implications
  - Contractor reported that its subcontractors may have paid \$300,000 to “expedite” visa issuance, in possible violation of FCPA
  - Registration of vehicles problematic

# Defense Base Act Developments

- *Irby v. Blackwater Security Consulting*, 44 BRBS \*\*\* , BRB No. 09-0548 (April 14, 2010):
  - DBA applies only to employees and not independent contractors
  - Does DBA's "exclusive remedy" provision apply to contractors using an IC model?
- *Fisher v. Kellogg Brown & Root Services, Inc.*, No. 10-20202 (S.D. Tex. Mar. 25, 2010):
  - DBA's exclusive remedy can be avoided by plaintiff who files a common law tort action against employer and meets reasonable person/foreseeability negligence standard

# Battle-field Preemption

- *Saleh v. Titan*, 580 F.3d 1 at 9 (C.A.D.C. 2009): “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.”
- 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”
- 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

# Questions