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US-Iraq SOFA and Recent Decisions Highlight Risks for US Contractors Supporting US Efforts Overseas

Summary: Companies performing contracts for the US Government in Iraq entered into those contracts with certain expectations about the risks they might face trying to perform in a hostile operational environment. They may not, however, have foreseen that the Status of Forces Agreement ("SOFA") between the United States and Iraq – which became effective on January 1, 2009 – would subject contractors and their employees to Iraqi criminal and civil jurisdiction, and impose new requirements concerning entry and exit of personnel and equipment; possession and use of weapons; loss and damage claims; import/export controls; and registry and operation of aircraft and vehicles. Although many specific SOFA provisions are suspended pending further coordination among US and Iraqi officials, it is not too early for contractors to consider how the SOFA's provisions and recent opinions from the Armed Services Board of Contract Appeals and federal Courts affect their assumptions about requirements, costs and liabilities when bidding and performing government contracts in Iraq.

Background: On December 5, 2008, the Iraqi Parliament adopted the terms of the US-Iraq SOFA and established January 1, 2009 as the effective date of its implementation. On December 30, 2008 the Iraqi Ministry of Interior postponed the effective date of many of the agreement's provisions in part to give the parties more time to work out how the Iraqi government would implement the SOFA's terms. Meanwhile, contractors are continuing to perform under current contracts and competing for new or expanded work. At the same time, legal disputes arising under contracts in Iraq have been adjudicated and these decisions illustrate the application of government contract law in a dynamic operational environment.

Iraq SOFA Application to Contractors: The Iraq SOFA resembles, in many ways, agreements the United States has entered into with Japan, Korea, and NATO. All of these agreements provide a framework governing the issues and concerns that normally arise when one nation's military forces are deployed within another nation's borders. SOFAs normally waive, in part, the application of host nation laws regarding such matters as taxation, import duties, labor laws and immigration. Additionally, the parties reach an understanding concerning which nation's laws will apply to conduct and misconduct by personnel serving in or with the visiting force. While the provisions vary, the above-mentioned SOFAs contemplate that some contingent of civilians, including US civil servants, military family members, and contractors, will normally accompany the visiting force and will enjoy some level of so-called "SOFA privileges" (i.e., they will receive similar exemptions from taxation, import duties, and the like afforded to members of the armed forces).

- A key difference between the Iraq SOFA and most other SOFAs, however, greatly diminishes the privileges afforded to contractors and their employees working in Iraq. Under the Iraq SOFA, “‘Member of the civilian component’ means any civilian employed by the United States Department of Defense” unless that person ordinarily resides in Iraq. The terms ‘United States contractors’ and ‘United States contractor employees’ are separately defined as “non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country...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” unless the person or entity ordinarily resides in Iraq.
- This definitional distinction under normal rules of interpretation means that protections available to members of the US armed forces and DOD civilians—collectively “United States Forces”—do not apply to contractors or their employees. Potentially more troubling is that the definition of United States contractors appears only to apply to DOD contractors. Thus, the few privileges afforded DOD contractors are not clearly available to contractors working for the State Department, US AID and other agencies.

Key Provisions of the Iraq SOFA: Key privileges available to United States Forces and the Civilian Component are either unavailable to contractors or, in some instances, it is unclear whether contractors enjoy the same privileges. Those privileges include:

- Right to possess and carry weapons;
- Entry into and exit from Iraq with ID card and military travel orders;
- Import and export of reasonable quantities of personal items;
- Exemption from fees to use transmission airwaves;
- Iraqi authorities accept the registration and license for “Official Vehicles of the US Forces”;
- Government aircraft and DOD-contracted civil aircraft are not subject to taxes, duties, overflight charges, navigation, landing or parking fees;
- Iraqi authorities must notify the US within 24-hours of arrest or detainment by Iraqi authorities and handover to US authorities;
- US tort law covers claims for damages to third parties; and
- Primary US legal jurisdiction and US due process for all except grave premeditated felonies occurring off-duty and outside agreed facilities

The above privileges assure relative ease of movement, freedom from Iraqi bureaucracy, exemption from fees and taxes, and the protections of the US legal system in all but the most egregious cases. Without these privileges, contractors and their employees face considerable risk, both in terms of personal security and impact on their ability to perform contracts at the level of effort and costs they anticipated when originally bidding on such work. Contractors must take these factors into account going forward.

Recent Legal Decisions: Two significant series of cases involving performance under contracts in Iraq have been the subject of recent Board and Court decisions that underscore the risks faced by contractors performing in a hostile operational environment. In the first, several contractors making deliveries of fuel or other supplies have made claims for

vehicles and equipment lost during convoy operations. Often, vehicles were left behind or destroyed in place at the direction of US government or Defense Energy Support Center (“DESC”) contractor personnel. In the second series of cases, claims have been made against government contractors for their alleged participation in tortious conduct while performing under government contracts in Iraq. One such case alleges that contract personnel tortured inmates in the now-infamous Abu Ghraib Prison scandal.

Two general themes emerge from these cases. First, the general principles that govern contract formation, administration and disputes do not change merely because the contract involves performance in an operational environment. Second, there is no assurance that a contractor will enjoy any protection against third-party claims for everything it undertakes on behalf of, or even at the direction of, the government in an operational setting. Two recent cases are summarized below.

- ***Altanmia Commercial Marketing Company***, ASBCA No. 55393 (Feb. 12, 2009): Implied-in-fact Contract. Altanmia sustained significant losses to its trucks during the base period of its contract for fuel delivery runs in Iraq. It then proposed a doubling of its fuel delivery price during negotiations concerning the first Option period of the contract. The contracting officer (“CO”) said the cost estimate was improper and asked Altanmia to lower its price and submit claims for its destroyed vehicles and equipment. Altanmia did so, but the succeeding CO denied the claim. On summary judgment, Judge Park-Conroy of the Armed Services Board of Contract Appeals (“ASBCA” or “Board”) dismissed Altanmia’s argument that the CO’s direction to submit a claim and lower the price created an implied-in-fact contract to pay the claim.

Political Questions and Sovereign Acts. The government had argued that the adequacy of the government’s convoy protection was a political question. Altanmia abandoned this issue, but further alleged that the government’s delay in scheduling recovery convoys to pick up abandoned vehicles breached the contract. The government asserted the sovereign acts defense, but the Board found the promise to protect convoys amounted to an implied contract to compensate for losses sustained as a failure to protect the convoy. In other words, the government had agreed to compensate offerors for its sovereign acts. Finally, the Board denied Altanmia’s claim that the government-ordered destruction of its vehicles amounted to a constructive change since it had less vehicles with which to perform. The Board found the government’s destruction decisions were sovereign acts for which it could not be held contractually responsible.

- ***Al-Shimari v. CACI***, Case No. 1:08cv827, Order on Government’s Motion to Dismiss (EDVa Mar. 18, 2009): In this case, four Iraqi citizens alleged that CACI contract interrogators tortured them during their detention at Abu Ghraib Prison in Iraq. The Court held the alleged victims claims were justiciable because civil tort claims against private contractors for damages do not interfere with the separation of powers between the executive branch and the courts. The government contractor defense was not available, in the Court’s opinion, because CACI employees could have satisfied their contractual obligations without engaging in allegedly tortious conduct. Only in cases where it would be impossible to satisfy the contract while still abiding by State law is the defense available. Also, it found that the contractors would not necessarily enjoy immunity for their acts because the CACI employees were not “government

employees” and may have exercised some discretion in deciding how to perform the contract. The Court also noted that immunity may be outweighed by other considerations such as fairness and access to the courts. The Court went on to say further evidence was needed to determine whether these interrogations were “combatant activities,” and therefore excepted from coverage of the Federal Tort Claims Act, but that there was no jurisdiction available under the Alien Tort Statute. The case is proceeding with the possibility that the contractors from CACI will be held civilly responsible for acts for which the government claims immunity. The Court, in fact, noted CACI’s argument that this case had been brought solely against contractors because of the government’s immunity.

Discussion and Practitioner Tips

Mitigating Contractor Risk:

- **Cost considerations.** The issues raised above indicate potential risks which contractors should seek to mitigate and, where appropriate, request an adjustment to cover costs.
 - Contractors may be subject to Iraqi laws regarding the possession and discharge of weapons. If your contract requires or authorizes contractor employees to carry weapons, you should seek clarification of these issues.
 - Without some separate accommodation, contractor employees are subject to Iraqi entrance and exit requirements. This factor may not only impact direct costs to obtain visas and to comply with other requirements, but may be particularly troublesome where a contractor is carrying sensitive equipment or documents. With respect to transport of sensitive equipment or documents, contractors might seek to shift this responsibility to the government.
 - While contractors are permitted access to military exchange services where they can purchase personal items, contractor employees should be made aware that they may be assessed import and export duties on their personal effects.
 - Fees and registration requirements for vehicles, aircraft, broadcasting, and weapons are normally allowable costs that a contractor would either include in its price under a fixed-price contract or include in its invoices under a cost type contract. Contractors should consider seeking the CO’s guidance as to whether they will be entitled to an adjustment in price or to include these costs in their charges to the government.
 - Contractors should diligently document costs in order to preserve their ability to submit claims for any increased costs to enter and exit the country.

 - **Legal Status considerations.** Iraq now has primary jurisdiction over US contractors and their employees, with no guarantees of due process or fundamental rights ordinarily available under US law. Contractor employees are now subject to detention, trial, and confinement by Iraqi authorities with no requirement that Iraqi authorities notify US authorities that they have detained a contractor employee.¹ Furthermore, the Iraqi criminal and civil laws
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differ greatly from US law. Iraq prosecutes social crimes such as adultery, gambling and intoxication criminally as well as “Offenses Against the Internal Security of the State,” which include publicly insulting the Arab Community or Arab Governments. In the civil law context, Iraq imposes strict liability for any conduct which causes an injury without examining negligence or intent as is the case under US law.

- Contractors should review their existing employment agreements and policies to ensure that they accurately advise employees of the above changes and the additional risks they will now face working in Iraq.
- Similarly, Contractors should review their existing physical security and personnel accountability practices to ensure that all employees are informed of the steps they should take if they, or any their co-workers or subordinates, are detained by Iraqi authorities or served with process of Iraqi courts.

Conclusion. The developments above underscore the importance of monitoring legal and political developments for contractors performing work for the US Government in Iraq or, indeed, in any area that subjects contractors and their employees to a hostile operational environment and the jurisdiction of local authorities. It remains to be seen, for example, whether the US will eventually take a similar approach to any SOFA that may be negotiated with the government of Afghanistan.

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¹ Contractors should be mindful of the present state of Iraqi legal institutions, which are substantially less developed than those of the United States. As noted in a recent United Nations Report: Ongoing widespread ill treatment and torture of detainees by Iraqi law enforcement authorities, amidst pervasive impunity of current and past human rights abuses, constitute severe breaches of international human rights obligations...

Many have been deprived of their liberty for months or even years, often under harsh physical conditions without access to defence counsel, or without being formally charged with a crime or produced before a judge. Continuing allegations of widespread torture and ill-treatment of inmates are of particular concern.

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