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Status of Contractors in Iraq: What Laws Apply?

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Companies performing contracts in Iraq face the challenge of determining which laws apply to them. This is particularly important for contractors trying to establish corporate compliance programs for their Iraq operations. As demonstrated by the recent class action suit against CACI International Inc., Titan Corp. and their employees for the alleged mistreatment of detainees at Abu Ghraib Prison, determining what laws apply is no easy feat. The answer may depend on the nationality of the individuals involved, the nature of the acts or omissions and whether they occurred in the performance of a contract, the identity of the entity that awarded the contract, the source of funding for the contract, and whether and to what extent U.S. courts will adopt norms of international humanitarian law.

In the absence of a status of forces agreement ("SOFA") or other international agreement specifically addressing civil and criminal jurisdiction over contractors, contractors and their employees are subject to all of the host nation's laws, just as a tourist would be. The United States does not have a SOFA with Iraq. However, the day before turning over sovereignty to the Iraqi Interim Government, the Administrator of the Coalition Provisional Authority ("CPA") issued a revised version of CPA Order 17, titled "Status of the Coalitional Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq," which effectively serves as a unilateral SOFA.

Order 17 Grants Limited Immunity

CPA Order 17 grants limited immunity from Iraqi laws, regulations and legal process for certain contractors and subcontractors that are supplying goods or services in Iraq. There are three significant limitations on the scope of the immunity. First, it applies only to

non-Iraqi contractors, including their non-Iraqi employees and subcontractors. Second, it applies only when the prime contract either (1) was awarded by the CPA (including successor agreements to contracts initially awarded by the CPA) or a "sending state," or (2) is for security services provided to a foreign diplomatic mission, the multinational force, an international consultant to the Iraqi government, or a contractor under a CPA or sending state contract. The term "sending state" includes countries participating in the multinational force or international humanitarian and reconstruction efforts.

Third, it applies only to matters relating to, and acts performed pursuant to, the terms and conditions of a covered contract or subcontract. The immunity does not apply to contracts awarded by the Iraqi government, or to private security companies providing security to those contractors. Thus, for example, the immunity will not apply to contracts awarded by the Iraqi government using the remaining Development Fund for Iraq ("DFI") monies not obligated by the CPA before it went out of existence. Nor does the immunity apply to acts that are not performed pursuant to the terms and conditions of a covered contract or subcontract. For example, CPA Order 17 would not provide any protection for a contractor's employee who was involved in an off-duty motor vehicle accident.

When applicable, CPA Order 17 excuses contractors and subcontractors from complying with Iraqi laws and regulations, including, for example:

- licensing and registration of employees, businesses, vehicles, vessels and aircraft;
- import and export taxes, customs, duties and other charges for property required for the performance of the contract; and

Status of Contractors in Iraq: What Laws Apply?

- sales, value added, corporate, income, social security and other taxes arising directly from the performance of the contract.

Although contractors are subject to Iraqi passport and visa regulations, they are entitled to be issued all necessary visas, licenses and permits promptly and free of charge.

CPA Order 17 also immunizes contractors from Iraqi legal process for acts performed pursuant to the terms and conditions of a covered contract or sub-contract. Immunity from Iraqi legal process means the individual cannot be arrested or detained by any Iraqi authority, or subjected to any legal proceedings in Iraqi courts or other bodies, whether criminal, civil or administrative. The sending state's certification that the contractor was acting pursuant to the terms and conditions of its contract is, in any Iraqi legal process, conclusive evidence of the facts so certified.

Importantly, the immunity granted by CPA Order 17 is not for the benefit of the individual, and may be waived by the sending state. Additionally, the order itself is subject to repeal or amendment by the Iraqi government. The order states that it "shall remain in force for the duration of the mandate authorizing the MNF under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions and shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law."

U.S. Citizens Remain Subject to U.S. Law

U.S. contractors and their U.S.-citizen employees are also subject to U.S. laws, including in particular U.S. laws that have extraterritorial effect. Labor laws governing wage rates and working conditions, such as the Contract and Work Hours and Safety Standards Act, Service Contract Act, Walsh-Healy Public Contracts Act and Davis-Bacon Act, typically apply only within the United States and do not apply in foreign countries. *See generally* Federal Acquisition Regulation ("FAR") part 22, 48 C.F.R. §§ 22.000 – 22.1026. On the other hand, many antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and Americans with Disabilities Act, expressly cover U.S. citizens working for a U.S. employer in a foreign country. In amending these laws to apply in foreign countries, Congress also added a foreign law exception. For example, Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of race, color, sex, religion or national origin, provides that it shall not be unlawful for an employer "to take any action otherwise prohibited by

[the Act], with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located." 42 U.S.C. § 2000e-1(b). However, proving that a discriminatory act was required by a foreign law is frequently problematic since customs, cultural norms and religious rules are not considered laws.

U.S. criminal laws generally do not have extraterritorial effect. Most federal criminal laws cover only those offenses committed within the special maritime and territorial jurisdiction of the United States, as defined in 18 U.S.C. § 7.

Moreover, civilians accompanying the Armed Forces are not subject to the Uniform Code of Military Justice ("UCMJ") unless Congress has formally declared war. *See* 10 U.S.C. § 802(a)(10). The Military Extraterritorial Jurisdiction Act of 2000 ("MEJA") was intended to fill this jurisdictional gap. *See* 18 U.S.C. §§ 3261 – 3266. It establishes federal criminal jurisdiction over persons who engage in conduct outside the United States that would constitute a felony punishable by more than one year's imprisonment if committed in the United States. It applies to civilians accompanying the Armed Forces outside the United States, including Department of Defense ("DoD") civilian employees, DoD contractors and subcontractors at any tier, and dependents residing with the civilian or contractor employee. 18 U.S.C. § 3261. MEJA permits DoD to arrest the person and transport him or her back to the United States for trial. 18 U.S.C. § 3262.

Reach of the USA Patriot Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") significantly expanded U.S. law enforcement jurisdiction over crimes committed by or against U.S. nationals on land or facilities designated for use by the U.S. government. Specifically, the USA PATRIOT Act expanded the definition of the special maritime and territorial jurisdiction of the United States to include:

With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act--

- (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or

Status of Contractors in Iraq: What Laws Apply?

used for purposes of those missions or entities, irrespective of ownership; and

- (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title. 18 U.S.C. § 7(9).

In fact, it was the USA PATRIOT Act, rather than MEJA, that provided the jurisdictional basis for the criminal indictments recently returned by federal grand jury in North Carolina against David Passaro, a Central Intelligence Agency contractor accused of killing a prisoner at Asadabad Base in Afghanistan, because MEJA applies only to DoD contractors.

Who Awarded the Contract?

The procurement laws and regulations that apply to contractors in Iraq depend upon the entity awarding the contract and the source of funding. Contracts awarded by the CPA using DFI funds and seized assets, as well as contracts awarded by the Iraqi Interim Government, are governed by CPA Order 87, Public Contracts, issued on May 16, 2004. As with all of the CPA Orders, Order 87 will remain in effect until superseded or repealed by the Iraqi government. Order 87 adopts the American Bar Association's recommendations for fundamental principles of full, fair and open competitive public tendering procedures; international standards of transparency, predictability, fairness and equality of treatment; procurement process integrity; tender protests; and tender dispute resolution.

It also establishes an Office of Government Public Contract Policy ("OGPCP") within the Iraqi Ministry of Planning and Development Cooperation. The OGPCP is tasked with coordinating government public contract policy for all of the Iraqi Ministries and other public entities, and issuing procurement regulations.

Contracts awarded by DoD, including orders under General Services Administration ("GSA") schedule contracts, are subject to U.S. procurement laws and regulations. The extent to which contractors are responsible for the contracting officer's compliance with these laws and regulations has recently become an issue. In the wake of allegations of the mistreatment of detainees at Abu Ghraib prison, CACI was criticized—and even considered for suspension or debarment—for having

accepted orders under its GSA information technology contract to provide the Army with interrogators in Iraq, including at the Abu Ghraib prison. Although *awarding* an out-of-scope order without a properly authorized sole source justification is a violation of the Competition in Contracting Act ("CICA"), there is no statutory, contractual or regulatory proscription against a contractor *accepting* out-of-scope work under its contract. CICA imposes obligations on federal agencies, not their contractors. CICA requires in pertinent part that, except as otherwise provided by law, "the head of an agency in conducting a procurement for property or services—(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation...." 10 U.S.C. § 2304(a)(1).

Nevertheless, GSA's Deputy Associate Administrator for Acquisition Policy has said that, "Industry has a certain responsibility to make sure their contracts are not abused." 82 FCR 35. Unfortunately, even the threat of debarment from federal contracts can have a rather dramatic effect on shareholder value. The Washington Post reported that CACI's stock price dropped 12 percent the day GSA announced its investigation. See Ellen McCarthy, *Government Clears CACI for Contracts*, WASH. POST, July 8, 2004, at E01.

Lawsuit Highlights Vulnerability

The fallout from Abu Ghraib has also demonstrated other sources of law that may be applicable to contractors and their employees working in Iraq. On June 9, 2004, the Center for Constitutional Rights filed a class action lawsuit in federal court in San Diego against CACI International, Inc. and Titan Corp. and their employees and subcontractors for alleged abuses of detainees in Iraq. The suit, captioned *Sami Abbas Al Rawi, et al. v. Titan Corp., et al.*, was filed on behalf of more than 1,000 named and unnamed Iraqis who were detained by U.S. authorities. The complaint asserts claims under the Alien Tort Claims Act, 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964; the Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution; U.S. procurement law; the Geneva conventions; and several other U.S. and international laws. It alleges that the defendants engaged in a pattern of racketeering activity, intentionally and negligently committed a series of tortious acts, and conspired with U.S. government officials to humiliate, torture and abuse the detainees in order to demonstrate their ability to obtain intelligence and thereby obtain more govern-

Status of Contractors in Iraq: What Laws Apply?

ment contracts. The suit seeks a permanent injunction against the mistreatment of detainees, compensatory and punitive damages, treble damages and attorneys fees under RICO, and declaratory and injunctive relief to prevent the defendants from receiving further payments under their contracts or entering into any other contracts with the United States.

Public Relations Impact

The *Rawi* suit is unprecedented in the history of warfare and American jurisprudence. It is a suit by private persons from an occupied country against contractors accompanying the armed forces of the occupying power for acts taken in the performance of their military contracts during the conduct of armed hostilities. Whether or not suits such as *Rawi* will ultimately be successful, widely publicized claims of human rights violations can have a significant adverse affect on a company's reputation and shareholder value. For example, directors of the California Public Employees' Retirement System ("CALPERS"), which owns stock in CACI, have publicly expressed their concerns about CACI's management controls, training and legal procedures to protect shareholders from the risk associated with the company's interrogation work at Abu Ghraib. See Ellen McCarthy, *Pension Funds Press CACI on Iraq Prison Role*, WASH. POST, June 11, 2004, at

E01. For that reason, companies performing contracts in Iraq – particularly those performing functions that have historically been performed by military forces – would be well advised to include international humanitarian law in their compliance programs.

In summary, the jurisdictional landscape in Iraq is complex and rapidly evolving. As with other areas of government contracting, a robust corporate compliance program can significantly lessen the risk to the company, its employees and shareholders of performing work in Iraq. In developing and implementing a compliance program for contracts in Iraq, it is important to initially ascertain all of the potentially applicable sources of law, and then periodically review the program to maintain its currency.

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