

An “Inside-Out” Manual: Conducting Construction Overseas

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1.0 Executive Summary

Federal overseas construction is a critical, albeit below the radar, component of United States foreign policy, geopolitical positioning, emergency response and humanitarian relief. Even as the U.S. military presence in Iraq and Afghanistan wanes, the government will increasingly² rely on construction contractors’ overseas experience to cut costs associated with rebuilding the physical infrastructure of those distressed countries and to secure U.S. interests worldwide. Ironically, however, few observers have discussed the ways in which federal contractors can be prepared to operate in high-risk and otherwise uncertain circumstances abroad in a manner that is relatively comprehensive, yet practical, and informed both from the vantage point of an in-house practitioner and outside legal advisors. Accordingly, while much of this article identifies best practices and considerations in Middle East and Africa construction, many of the points raised here can also be applied to help companies that are performing U.S. service contracts, domestically³ and abroad, comply with the complex federal acquisition legal regime, ensure timely payments, and realize profits.

2.0 Federal Overseas Construction Programs

The distinctions among overseas military, diplomatic, emergency and humanitarian-response construction projects are often hard to discern, and the agencies responsible for overseeing and funding these projects periodically have overlapping jurisdiction. This complex, overlapping jurisdiction is either explained by or accounted for, in part, by federal appropriations law. Indeed, when it comes to federal appropriations law, determining which agency has been authorized to do what and when is not always readily apparent.⁴ What is clear, however, is that the Department of State (“DoS”), the U.S. Army Corps of Engineers (“USACE”), and the U.S. Agency for International Development (“USAID”) are three agencies that are authorized to meet U.S. military and civil construction objectives overseas, whether directly for the U.S. government or, equally important, for foreign governments (*e.g.*, Iraq and Afghanistan) on behalf of the U.S. government. An understanding of each of these programs is fundamental to representing federal overseas construction contractors.

2.1 USACE: Military and Civil Construction Management

Although several entities manage reconstruction activities in places like Iraq and Afghanistan, the U.S. Army Corps of Engineers is the “world’s largest public engineering, design and construction management agency,” and it performs these functions through its

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Military and Civil Works Programs.⁵ The Military Program provides “engineering, construction, and environmental management services to the Department of Defense (“DoD”), other U.S. government agencies, and *foreign governments*.”⁶ Through the Civil Works Program, the USACE plans and manages construction of, among other things, projects relating to water resources, hydroelectricity and environmental restoration.⁷ The USACE’s management of construction contracts is subject to the Federal Acquisition Regulation (“FAR”),⁸ the Army Federal Acquisition Regulation Supplement (“AFARS”),⁹ the Department of Defense Federal Acquisition Regulation Supplement (“DFARS”),¹⁰ and the Engineering Federal Acquisition Regulation Supplement (“EFARS”),¹¹ with the latter containing contracting requirements issued by the Corps.

2.2 DoS: Diplomatic Construction on Behalf of the U.S. Government Overseas

In conjunction with other Department of State components, the Bureau of Overseas Building Operations (“OBO” or “Bureau”) establishes, manages and maintains the U.S. physical presence on foreign territory via the design and construction of secure embassies and other overseas posts. Prior to awarding design and construction contracts, the Bureau’s Facilities Design and Construction Division (“FDCD”) pre-qualifies architectural and engineering firms (often abbreviated together as “A-E”), using criteria specified in the Brooks Architect-Engineer Act,¹² and construction firms, by considering their ability to meet the sensitive and classified information security requirements of the National Industrial Security Program Operating Manual (“NISPOM”), DoD 5220.22-M (Feb. 2006).¹³ The acquisition and performance of OBO design and construction contracts are governed by the FAR and the DoS Acquisition Regulations (“DOSAR”).¹⁴

In addition to focusing on security requirements, the OBO is committed to “green” building. This is evidenced in OBO’s Guiding Principles, Design Excellence Program, and the “Green Guide,” all of which promote integration of “green” and sustainable design and construction into OBO’s overseas facilities.¹⁵ Indeed, it is now OBO policy to apply for Leadership in Energy and Environmental Design (“LEED”) certifications for all newly constructed embassies.¹⁶ Although these green reforms and managerial and operational enhancements to OBO’s overseas diplomatic construction programs are promising developments, contracting with the OBO has, historically, presented additional risks to contractors, especially regarding substantially delayed project completion and cost overruns that arguably relate to inadequate planning and unclear requirements on the part of DoS.¹⁷

2.3 USAID: Humanitarian Relief and Disaster Response on Behalf of the U.S. Government Overseas

The U.S. Agency for International Development provides foreign assistance to “friendly foreign countries”¹⁸ for construction and infrastructure projects. These projects are either implemented by USAID or the country receiving aid (the host country) and are established by procurement assistance agreements and economic development grants.¹⁹ Regardless of

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whether the project is implemented by USAID or the host country, USAID helps ensure that foreign aid dollars “reflow” back into the U.S. by including in their contracts a domestic preference requirement that favors qualified U.S. construction service providers, whether administered directly by USAID or through a USAID-funded host country contracting programs.²⁰

In order to be eligible to compete for these overseas construction contracts, any offeror, including the parent companies of a joint venture, must be qualified as citizens of an eligible nation under the “Rules on Source, Origin, and Nationality for Commodities and Services Financed by USAID,”²¹ and must meet other criteria,²² which are somewhat similar to a responsibility determination under the FAR.²³ “Nationality” of a construction contractor is determined by its legal organization under the laws of an eligible country and its eligibility to contract is determined largely by its ability to meet certain ownership, performance, employment and technical/financial capability requirements.²⁴ In the event that no U.S. firms are both capable and qualified to perform in the locale, a foreign-owned firm can receive an award from USAID or can operate as a subcontractor under such a contract; provided that the estimated project cost does not exceed \$5 million, only local firms will be solicited, and the foreign-owned firm is an integral part of the local economy.²⁵

3.0 Considerations Regarding Federal Construction Overseas

As a practical matter, we have not attempted to address every possible issue in federal construction; rather, our goal is to provide insight into the unique aspects of the federal construction legal regime that may be implicated when doing business abroad. While many of these principles readily apply to all construction, whether domestic or performed outside the continental United States (“OCONUS”), we note that overseas federal construction often occurs in high-risk conditions. Therefore, we have addressed situations specific to emergency, contingency, humanitarian and disaster relief construction projects overseas that typically arise during the pre-construction, construction, and post-construction phases. A common thread between each of these phases includes the fact that best practices that may seem natural are not always implemented in practice, especially due to the substantial and regular employee turnover rates in high-risk conditions. In order to operate effectively, contractors should not only adopt the managed risk strategies presented in this section wholesale but should also consult with company attorneys in order to *adapt* these strategies to the contractor’s unique culture of risk acceptance and operations.

3.1 Preconstruction

3.1.1 Risk Identification, Clarification and Mitigation

The various types of overseas construction contracts — design-build, design-bid-build, architect-engineer, and construction management — each come with their own set of risks. Acclimating to these risks may be especially challenging for companies that are just entering

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the overseas construction market.²⁶ As a result, the early identification of the type of construction project and related requirements in the solicitation provides company attorneys with an idea of the risks associated with the project. Given the often uncharted and substantial risks associated with a corporate move into overseas federal construction, company attorneys should be closely integrated with the project pursuit team and, to the greatest extent possible, with the relevant contracting program representatives. This high level of integration will best shape the potential end-user relationship and requirements, along with promoting a corporate culture of compliance, from the outset of any emergency or other construction contracting effort.

A standardized, but flexible, process for reviewing requests for proposals is a way to bring potential risks to the attention of company attorneys and executives. This review process should be informed by the company's ever-evolving policy positions regarding acceptable programmatic risks. After receiving insight from management, company attorneys might develop mitigation strategies that could include, among other things, distilled questions for clarification or talking points for any forthcoming discussions with the program representatives. *Indeed, given the often urgent, unusual, and compelling²⁷ requirements associated with supporting contingency, emergency and humanitarian efforts, there may be much more room to negotiate performance terms and to partner with the government in addressing requirements than in a standard acquisition.*

Prior to submitting a proposal, company attorneys should review any certifications for accuracy and determine the extent to which risks that are specific to overseas federal construction can be mitigated and accepted by the company. Key areas of risk identification, mitigation and acceptance might relate to the following:

3.1.1.1 Delivery Systems

As a result of the often uncertain conditions and requirements associated with high-risk overseas construction contracting for the Federal Government, indefinite-delivery/indefinite-quantity ("ID/IQ") contracts incorporating both fixed-price and cost-reimbursable task orders, are commonly used for construction, construction incidental to logistical support operations, and construction-related services (*e.g.*, operations and maintenance for existing construction). Further, agencies may utilize and waive requirements for undefinitized contract actions in emergencies because specific contract requirements and costs may not be determinable.²⁸

In addition to developing a robust system for receiving, rejecting, responding to, formalizing and recording incidental oral work orders that may arise under these conditions, contractors that regularly perform fixed-price construction should integrate cost principle considerations, along with necessary tracking and allocation requirements, into their business systems and should encourage agencies to definitize interim contract actions as soon as accurate estimates can be assessed.²⁹ If single- or sole-source bridge contracts are anticipated, construction contractors should not only ensure that the appropriate justifications and approvals³⁰ are in place, but should also develop a public relations strategy that involves the

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government customer in the promotion and communication to the public of the associated benefits of the contracting action and protections for the taxpayer.

3.1.1.2 Government Furnished Reporting, Site Data, Designs and Verification

Government-furnished data regarding the site conditions will not always be available or wholly accurate in high-risk overseas construction. If the government does furnish site conditions information, the contractor must consult with counsel to gauge the extent to which the data may contain language and other disclaimers of liability that could effectively shift the risk of liability for certain site conditions to the contractor following the contractor's site visit and investigation. Depending on the type of services provided, if an Architect-Engineering firm has not verified its designs and there is any language that can even be remotely construed as requiring the contractor to verify the accuracy of any government-furnished designs, the contractor must decide whether to accept the risk of the designer's errors and omissions associated with any forthcoming verification decision under the timing/operational circumstances or to forego the pursuit.

3.1.1.3 Schedule Delays and Liquidated Damages

Any contract review for high-risk operational conditions should assess the likelihood of delays, including whether the government has made promises related to facilitating and enforcing its transition timeline from any incumbent contractor. If liquidated damages will be assessed for delays, then the contractor should determine whether the specified rate is acceptable and should consult with company attorneys when developing a mitigation strategy for any anticipated delays prior to commencing performance.

3.1.1.4 Managing Oral Change Orders

If a contracting officer issues an oral request for "unprogrammed" work, whether within or outside the scope of an awarded contract vehicle, then contractor should determine whether it will, respectively, risk breach by refusing to perform altogether or indicate the circumstances under which it will perform should it choose to do so. While these circumstances could include a decision to perform under protest pursuant to any included Changes³¹ clause, the contractor should also attempt to leverage the urgent need to negotiate for a waiver of liquidated damages and consequential damages; favorable limitations on liability; reciprocal indemnification; and, warranty provisions that take into account the performance conditions. In any event, the contractor should always insist upon having any agreement related to additional work memorialized at earliest possible date and, if possible, prior to beginning performance.

3.1.1.5 Standards of Performance and Applicable Building Codes

In addition to reviewing any applicable design and performance specifications for

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conformance with the anticipated work, the construction contractor should determine in advance whether it is capable of adjusting to any specified international building code standards given that those standards may be more strict than other federal and state agency codes with which contractors are accustomed to complying with domestic operations. If the contract specifies any “green” standards that the prime contractor is not familiar with then the prime contractor should consider employing or subcontracting with consultants that are experienced with the application of these standards to international requirements on federal contracts.

3.1.1.6 Environmental Requirements

The duty of care associated with handling hazardous materials (“HAZMAT”) associated construction activities, along with complying with extraterritorial environmental regulations and adequately managing potential liability for environmental remediation efforts can subject contractors to substantial risk. While environmental regulatory compliance is a mandatory cost of conducting federal business domestically or abroad, contractors should strongly consider whether any contracted level of responsibility for environmental remediation and HAZMAT duties, both within and beyond their control, is acceptable for the company to assume in the event that such provisions are nonnegotiable and related concerns are not adequately addressed during any pre-bid questions and discussions periods. Further, contractors should determine whether subcontracting these responsibilities can adequately address the attendant risks in the event that the contractor is unwilling or unable to perform remediation and HAZMAT handling requirements.

3.1.1.7 Payment Provisions

In high-risk overseas construction, federal agencies may refrain³² from making payments via electronic fund transfer in the event of unusual and compelling circumstances and may also authorize advance payments.³³ An agency decision to waive the electronic payment provisions can create considerable audit and disallowance risk for contractors in the event agencies resort to temporary cash payments to ensure and expedite construction objectives during the early stages of an emergency. Sourcing resources during the early stages of an emergency will likely result in the purchase of goods at costs that may be questioned, regardless of the circumstances in which those costs were incurred. As a result, it is important to establish an effective accounting system and set of controls that ensure costs are adequately tracked, payments are recorded, and written receipts are signed by the contracting officer.

3.1.1.8 Waivers and Exceptions to Domestic Acquisition Requirements

3.1.1.8.1 Bonding Waivers and Exceptions

Bonding on overseas construction can be difficult, if not impossible, to obtain given the risk presented to a given surety. Bonding, when available, can also be extremely costly when used to provide assurance for the government regarding the prime contractor’s performance and payment obligations in high-risk overseas conditions. In emergencies, the relevant contracting

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office can waive a bid bond requirement even though a performance and payment bond may be required.³⁴ That said, the contracting officer can also waive³⁵ Miller Act³⁶ performance and payment bond requirements because it may be impracticable for a construction contractor who is performing work in a foreign country to obtain the required bonding.³⁷

3.1.1.8.2 Selected Waivers and Exceptions

Agencies are provided various waivers and can utilize exceptions to meet the requirements of high-risk overseas construction projects.³⁸ These waivers and exceptions are often difficult to track in the aggregate, unless a provision is implicated by operational conditions. Construction contractors entering the federal market overseas should note that the prevailing wage requirements of the Davis-Bacon Act³⁹ do not apply to overseas federal construction. Further, neither the Buy America Act⁴⁰ nor the Berry Amendment⁴¹ applies to overseas federal construction.

3.1.1.9 Security Clearances

The National Industrial Security Program Operating Manual (“NISPOM”) “provides baseline standards for the protection of classified information released or disclosed to industry in connection with classified contracts under the NISP [National Industrial Security Program],”⁴² including standards applicable to the construction⁴³ of sensitive compartmented information facilities (“SCIFs”) and other closed areas approved for safeguarding classified materials.⁴⁴ Although it is typical for a prime contractor to complete projects through subcontractors, U.S. contractors should be prepared to perform the work themselves or subcontract to other qualified⁴⁵ companies when a project is covered by the NISP. Prospective subcontractors that are owned by non-U.S. citizens are prohibited from obtaining the facilities security clearance⁴⁶ and personnel security clearance⁴⁷ required to build secure facilities. Therefore, the only subcontractors who can undertake projects covered by the NISP are (a) owned by U.S. citizens and employing cleared, U.S. citizen personnel,⁴⁸ or (b) foreign-owned and operating in the U.S. after mitigation of Foreign Ownership, Control, or Influence (“FOCI”) concerns.⁴⁹

3.1.1.10 Insurance and Related Risk Allocation Considerations

High-risk overseas federal construction presents risks that many insurance companies have not been willing to underwrite without impracticable expense. In order to promote contractor support that would not otherwise be available — even though many of these costs are often ultimately passed⁵⁰ on to the government under a fixed price or cost reimbursable construction contract — several agencies⁵¹ have implemented special insurance incentives for insurers and programs for contractors along with clauses allocating certain risks to the Federal Government. In situations where risks are not especially high, corporate and project-specific insurance premiums provide greater coverage at lower cost. However, Defense Base Act (“DBA”) insurance,⁵² a prominent⁵³ form of federally contracted or private carrier provided⁵⁴ worker’s compensation for all contractor and subcontractor employees providing construction

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services on bases overseas,⁵⁵ has been a cost-effective⁵⁶ method of protecting contractors in the event their employees are injured in high-risk situations.

Although DBA insurance is an employee's sole⁵⁷ remedy for work place injuries where applicable, it does not insulate contractors from all third party liability and does not protect them from the other potential liabilities inherent in high-risk conditions. In order to mitigate other risks associated with wartime construction contracts, the USACE, among other agencies, has included a special clause in its contracts that, upon the occurrence of specifically covered war risks, effectively shifts the risk of loss, damage and destruction of government property to the relevant agency. In the event that contractors are not able to successfully negotiate the inclusion of a war risk clause or in the event that a war risk clause⁵⁸ is removed from subsequently competed contracts, contractors might attempt to negotiate for the inclusion of "extraordinary contractual relief" under Public Law Indemnity 85-804.⁵⁹ Also, it is likely that contractors will do their best to shift the risk to suppliers via corresponding subcontract terms, even though doing so will substantially increase the contractors' costs.

A war risks clause is just one example of a clause that shifts risk from the contractor to the government. Many other "special clauses" that are developed for and included in a specific contract at the agency's discretion, on the other hand, can create considerable risk for contractors because these clauses are not subject to public comment or prior experience. While these special clauses will likely be negotiated by the contractor and may not be mandatory, the contractor should periodically review the company's compliance with these provisions in consultation with counsel. These compliance reviews indicate a good faith attempt to meet special contract requirements and will very likely contribute to a defense, albeit limited, against disallowances or other inquiries by government auditors and other agency representatives.

3.1.1.11 International Agreements and Extraterritorial U.S. Laws

3.1.1.11.1 Bilateral Intergovernmental Agreements

Recently, high-risk overseas construction, whether performed directly under a construction contract or incidental to logistical support contracts arising from the wars in Iraq and Afghanistan, have shaped international agreements along with extraterritorial and other⁶⁰ U.S. laws that are applicable to overseas government contracts. In addition to the aforementioned special contract provisions,⁶¹ contractors should look to the Status of Forces Agreement ("SOFA")⁶² and diplomatic notes to determine what governs their overseas performance obligations, as these bilateral agreements generally govern the relationship between the parties and may even include exceptions to local, U.S. and international laws.⁶³

Because a SOFA and applicable diplomatic notes may be classified or unavailable to contractors, a company attorney should, upon receipt of the notice to proceed, be introduced to and otherwise openly communicating with the relevant contracting officer and agency counsel. This interchange is critical to preventing delays resulting from the application of local laws and exceptions to international and U.S. extraterritorial laws that may not be readily apparent (*e.g.*,

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criminal jurisdiction under local laws may supersede extraterritorial criminal laws).⁶⁴ In these cases, the contractor may be required to ask the contracting officer to consult with agency counsel to help determine its responsibility under the contract in view of these agreements and/or represent the contractor to request an exemption from local law requirements that do not apply under the aforementioned circumstances.

3.1.1.11.2 Extraterritorial Laws Requiring Ethical Business Conduct

The Foreign Corrupt Practices Act (“FCPA”),⁶⁵ and the prohibition against Trafficking in Persons,⁶⁶ two of the most prevalent U.S. extraterritorial laws applicable to U.S. construction contractors operating overseas, subject these contractors to U.S. ethical norms for conducting business and managing laborers overseas. Compliance with these extraterritorial statutes can be complicated because they contain principles that are often contrary to traditional business practices — whether when dealing with foreign government officials or enforcing the applicable standards upon foreign subcontractors — in many areas of the Middle East and North Africa. However, the risk of inadvertent noncompliance, whether directly by a prime contractor or imputed upon a prime contractor due to the indiscretions of a foreign subcontractor, is high given the substantial “grey” areas that characterize these laws even as applied to Western contractors. Undoubtedly, the best practice in promoting a top-down culture of compliance involves regular and good faith controls that identify potential problems before they arise and rapidly address even the most de minimis noncompliance before the underlying activity burgeons in a manner affecting the project, the company, and broader public perception.

3.1.1.11.2.1 Managing the Foreign Corrupt Practices Act

The FCPA’s anti-bribery provisions⁶⁷ prohibit construction contractors from “knowingly”⁶⁸ and “corruptly” giving anything of value (*e.g.*, gifts, gratuities or money) to a “foreign official”⁶⁹ whether to influence an official act or to gain business opportunities in the region. Importantly, the risk of noncompliance under the FCPA is not limited to what is perceivably⁷⁰ an expansive definition of what constitutes a “knowing” violation; the risk also extends to discrete and arguably inadvertent violations along with grossly negligent violations. For example, a prime contractor may be held responsible for otherwise proper payments⁷¹ made by a legitimate business partner or consultant on the prime’s behalf if the partner or consultant illegally pays a bribe to a foreign government official in order to further the prime contractor’s interests in relation to those proper payments. Further, the prime contractor may also be held responsible for a subcontractor’s indiscretions if the prime contractor’s quality controls neither identify the improper activity nor implement the appropriate corrective actions.

Public construction contractors must also keep detailed books and records (including all transactions with foreign companies) because they are subject to audit under FCPA’s

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anti-bribery provisions.⁷² Facilitating payments are also an exception⁷³ to the FCPA that must be properly recorded in order to prevent liability. Although facilitating payments under the FCPA allow de minimis payments to a foreign government official to conduct nondiscretionary acts⁷⁴ within the scope of his or her authority (*e.g.*, a negligible payment to a customs official to ensure construction materials can cross a given border), many contractors refrain from utilizing this exception.⁷⁵ The reason is that there is often substantial “grey” area regarding what exactly constitutes an acceptable facilitating payment, facilitating payments may not be allowed under the laws of the host country⁷⁶ and the fear of investigation is enough to keep most contractors from making any permitted payments to foreign government officials for routine activities. Contractors should undoubtedly consult with company attorneys⁷⁷ prior to tendering any such payments.

In order to mitigate exposure from any alleged noncompliance at a macro level, construction companies should implement robust internal policies that emphasize good faith and analytical due diligence. These policies should include the investigation of foreign companies, consultants,⁷⁸ and representatives for ties with foreign government officials; integration of legal and executive management when vetting foreign consultants; maintenance of transactional records⁷⁹ and payment approval processes (with graduated levels of internal management review that correspond to the value tendered); and periodic audits of internal compliance systems. At a micro-level, these policies should help identify potential “red flags”⁸⁰ as they arise; emphasize adequate compliance training for sales professionals and foreign subcontractors; require local contractors and consultants to certify compliance with FCPA; incorporate strategies for exercising any necessary defenses⁸¹ to FCPA and for conducting privileged internal investigations of alleged violations; and, include mechanisms for the regular enforcement of corrective actions along with procedures for determining when disclosure of potential violations is required.

3.1.1.11.2 Prohibiting Human Trafficking

Contractors may be subject to liability for their violations of the extraterritorial prohibition on human trafficking.⁸² They may also be subject to risk of imputed responsibility for the related and wrongful acts and/or omissions of foreign subcontractors,⁸³ whose labor policies may not be consistent with U.S. law. The media has commonly reported on foreign subcontractors’ deceptive recruitment tactics; unsanitary, unsafe, and unhealthy work and living conditions for employees; uncompensated and excessive overtime; and denial of employee wage entitlements and compensation for injury. The risks associated with potential trafficking violations are pronounced as a result of the expansive definition of prohibited activities, which includes, among other things, forced labor and recruitment and/or involuntary servitude.⁸⁴ In addition to adopting the government’s “zero tolerance”⁸⁵ anti-trafficking policy, prime contractors should regularly audit and enforce quality controls, among other subcontract terms, when dealing with subcontractors, including corrective action requirements and corresponding payment withholding provisions.

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3.1.1.11.3 Export Controls

Construction contractors responding to rapidly changing requirements in high-risk conditions cannot disregard⁸⁶ export control regulations with impunity⁸⁷ unless an exception applies.⁸⁸ The U.S. export controls regime prohibits certain unlicensed transfers — whether overseas to friendly or sanctioned countries or to non-U.S. citizens resident domestically or abroad — of controlled items (*e.g.*, products of U.S. origin, foreign products containing components of U.S. origin, and foreign products derived from products of U.S. origin). The issue of whether an item is controlled by the export regulations also largely depends on the nationality of the end user and the end destination. Construction contractors should note that, among other things, engineering designs may be controlled by the Export Administration Regulations (EAR),⁸⁹ plans incorporating military specifications may be controlled by the International Trafficking in Arms Regulations (ITAR),⁹⁰ and the Department of Treasury's Office of Foreign Assets Control may place restrictions⁹¹ on sourcing materials necessary for construction from sanctioned countries. That said, export control compliance and risk mitigation strategies for construction contractors are beyond the scope of this white paper.

3.2 Construction

In this section we will build upon the categories of performance-related construction risks that could form the basis for a request for equitable adjustment under any applicable Changes⁹² clause or a related claim by a prime contractor against the government. Unforeseeable subsurface conditions, design and construction deficiencies, project-specific risks and delays, and constructive changes are relatively standard operational risks in any construction project; however, these risks are experienced more frequently by contractors who are working on high-risk overseas federal construction contracts. Again, it is not our intent to address all possible grounds for construction contract adjustment requests and claims. Instead, we are focused on underscoring the circumstances that are encountered by overseas federal contractors most often.

3.2.1. Differing Subsurface and Site Conditions

A sizeable percentage of high-risk overseas construction will test U.S. contractors' geographical expertise because this construction must be performed pursuant to rapidly changing requirements and could subject contractors to non-traditional project risks. Contractors risk⁹³ being required to rely on government-furnished geotechnical surveys — if those documents are even available under the circumstances — that have not been vetted by the relevant contracting officer's technical representative ("COTR") and which do not provide adequate opportunity to inquire into the legitimacy of the government's representations.⁹⁴ Consequently, the tension between the allocation of liability with regard to the contractor's site investigation responsibilities and the differing site conditions looms large.

The Site Investigation and Conditions Affecting the Work clause, a mandatory clause for fixed-price construction,⁹⁵ requires a contractor to acknowledge that it has satisfactorily

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inspected ground and *reasonably ascertainable* subsurface conditions, along with all related, government-furnished documentation.⁹⁶ If the contractor fails to reasonably investigate⁹⁷ or incorrectly interprets government-furnished documentation,⁹⁸ it assumes the risk of increased costs associated with unexpected site conditions. What is considered to be a reasonable investigation by a contractor will likely be determined by the circumstances and this duty could temper a contractor's claim for Type I differing site conditions or Type II differing site conditions. A contractor's misinterpretation of government-furnished documents could prevent the contractor from bringing a claim that subsurface conditions differed materially from those furnished in the contract ("Type I"),⁹⁹ and a contractor's unreasonable investigation could preclude a claim that a physical condition was of an unknown, unforeseeable and unusual nature ("Type II").¹⁰⁰ Further complicating any overseas contractor's differing site conditions claim resulting from contingency and emergency operations is that the claim will be nullified in cases where differing subsurface conditions or latent defects, exacerbated by supervening events, do not predate¹⁰¹ the contract (*e.g.*, a subsequent tremor or enemy attack).

The potential liability presented by the Differing Site Conditions clause and the contractor's duty to investigate the site underscores the importance of substantially engaging any company attorney in the discussions associated with any impending federal construction bid in high-risk conditions overseas. In addition to raising questions related to a construction requirement or a program where construction is incidental to the requirement, it is important to determine the circumstances under which an alternative to a fixed-fee¹⁰² construction contract might prevent a contractor from assuming the risk of responding to rapidly developing and often-oral construction requirements. In the event that the simplified acquisition threshold is not exceeded, the clauses should be negotiated out of the contract because neither clause is mandatory.¹⁰³

3.2.2 Design and Construction Deficiencies

At least one court has held that contractors are required to abide by government design specifications and drawings and, therefore, are entitled to reasonably rely upon the government's defective designs even where the government has disclaimed liability for the accuracy of the designs or has required the contractor to verify the accuracy of those designs.¹⁰⁴ Generally, courts' apparent¹⁰⁵ disfavor for government attempts to shift responsibility to contractors for design deficiencies bodes well for contractors operating in high-risk overseas construction projects. Given the rapid turnaround requirements on many overseas construction projects, contractors may not have time to verify the accuracy of design specifications and, therefore, have a heightened need to defer to the government with regard to these requirements for the method and manner of the construction.¹⁰⁶

Whereas a contractor should be entitled to recover additional costs related to the government's specification of erroneous materials or measurements in government-furnished design documents, the liability for performance specifications which specify a government objective to which the contractor is entitled to deference in designing¹⁰⁷ and achieving is less

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clear in high-risk overseas conditions. For example, a government performance specification, incidental to a construction contract, requiring a given generator capable of performing at “x BTUs” may not be immediately obtainable due to security or other risks impacting the material supply chain. Indeed, whether a substitute generator that is capable of performing at “x-1 BTUs” is acceptable and, otherwise compensable, is a matter of negotiation with the contracting officer, while responsibility for clearly substandard workmanship is likely best redressed under any included Inspection¹⁰⁸ and Warranty¹⁰⁹ clauses.

3.2.3 Project-Specific Risks and Delays

Generally, a delay will be excused entitling a contractor to a time extension if an unforeseeable triggering condition for which the contractor is not responsible is implicated under any included excusable delay provision of a Default Termination clause¹¹⁰ and, under certain circumstances, the increased costs associated with a given delay caused by the government are available under other remedy granting provisions (i.e., any included Changes Clause)¹¹¹ entitling the contractor to financial compensation. A delay will not be excused and the government may be entitled to liquidated or default termination damages where a delay is due to the fault or negligence of the contractor, its suppliers, or any performance risks that are naturally¹¹² assumed under a fixed-price construction contract.

In high-risk overseas construction, the dividing line between excusable and inexcusable delays is often grey, especially, given the likelihood of supervening events that could further skew the scope of responsibility for a given delay. At least one author has noted:

[T]he contractor in a fixed-price construction contract with the government takes responsibility for many types of risks, such as the availability *and quality of labor*; the *availability, delivery and quality of materials*; submission of adequate shop drawings and submittals; the performance of subcontractors and suppliers; site conditions and work restrictions identified in the contract; and safety. *To the extent that delays arise out of any of these risks that have been assumed by the contractor, those delays will be considered unexcused.* In fact, one can go as far as to say that delays that cannot be brought within the definition of excusable delays ... are by definition unexcused.¹¹³

That author goes further to discuss at least one case that underscores the fact that the application of the triggering standards (i.e., foreseeability and contractor fault) and conditions for excusable delay provisions were not tailored to overseas conditions and, therefore, there is a high likelihood that many overseas federal construction contractors naturally assume the risk of what would likely be deemed excusable delays.¹¹⁴

In order to further this point, we should assume a hypothetical contract for federal construction in Iraq that includes an excusable delay provision¹¹⁵ for fixed price construction

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and a provision requiring compliance with local laws. Under such a contract, a contractor whose ability to operate in Iraq has been suspended by the relevant Iraqi ministry for failing to obtain a building license attributable to bureaucratic delays within the ministry (*e.g.*, an unpublished change in law) may choose to seek a schedule extension from its contracting officer. Even though the “acts of the Government” provision would not apply because 48 C.F.R. §52.249-10 (“Default (Fixed-Price Construction)”) was not intended to apply to sovereign acts by foreign governments on the face of the regulation; the list in 48 C.F.R. §52.249-10(b)(1) is not exclusive. In order to have any attendant delays excused, the contractor may have to prove to the contracting officer that cases like *JTL, Inc.*,¹¹⁶ are inapposite — *i.e.*, the contractor did not assume the risk of the specific bureaucratic delay because the delay was neither foreseeable nor within the contractor’s control.

In order to do so, the contractor would have to prove that even though bureaucratic delays are, generally, foreseeable in overseas construction, the particular delay was neither foreseeable nor attributable to the contractor’s negligent disregard for the local laws and, therefore, could not have been accounted for in the contractor’s original schedule. Similar negotiations regarding foreseeability and contractor responsibility in high risk and uncertain conditions would be required in the event of unavailability of materials or skilled labor due to changes in operational conditions and turnover. Further, a government direction to proceed in the face of an otherwise excusable delay could form the basis for a constructive acceleration claim so even if a contractor does not succeed on the merits of the delay argument, that contractor may be able to argue constructive acceleration with the contracting officer in the alternative.

Other common delays in high-risk overseas construction projects involving the assumption of the risk inquiry include constructive change claims of commercial impracticability due to defective designs. For example, a contracting officer may not accept that an act of the public enemy or opposition forces in Afghanistan which substantially damages a building prior to the conclusion of construction is an excusable delay. Under these circumstances, a contractor may alternatively claim that the designs were defective due to the occurrence of a supervening event that neither party could have contemplate at the time of contract formation that has made performance under the original specifications cost prohibitive.¹¹⁷ However, the contracting officer may argue that the contractor has assumed the risk of the supervening event because it is entirely foreseeable that a contractor performing a wartime contract could be subject to attack. Certainly, the issue of foreseeability of the specific location, nature and effect of a given attack is debatable depending on the circumstances.

In high-risk overseas construction, the contractor will also expressly assume the pre-acceptance risk of loss and/or damage arising from supervening events under 48 C.F.R. §52.236-7 (“Permits and Responsibilities”). Often insurance cannot be obtained or is prohibitively expensive on overseas construction projects and, therefore, if the government includes 48 C.F.R. §52.236-7 in a given contract and if acceptance (including beneficial occupancy by the Government) has not occurred, then many contractors will seek to enforce

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flow-down provisions in affected subcontracts as a means of mitigating the associated risks. Further, contractors may seek to negotiate a settlement with the contracting officer where the excusable delays caused by the government occurred and were the sole reason that construction was not completed prior to the occurrence of a natural disaster.

3.3 Post-Construction Cost Considerations

Prior to and after acceptance of the work¹¹⁸ — whether by beneficial occupancy upon substantial completion, passage of a reasonable time or final payment — an overseas construction contractor will be subject to several cost recovery considerations that will not apply to domestic contractors. There are two reasons for this fact. First, firm-fixed price construction contracts are subject to the cost principles where cost analysis is required (e.g., when certified cost and pricing data is required because there was not adequate price competition for a given requirement because a sole or single source award was issued to address an emergency requirement in high-risk overseas federal construction).¹¹⁹ Second, it is not uncommon for temporary and permanent construction to be required under a cost-reimbursable contract, whether or not such construction is only to be performed incidental to logistical support operations, in high-risk overseas operations. Accordingly and, given the potential for audit, it is even more important for overseas federal construction contractors to document business judgments (especially given the increased likelihood of a need to submit convenience termination settlement proposals), maintain adequate records, and implement business systems capable of tracking costs.

Ironically, the author has found very few cases interpreting reasonableness of costs incurred under an affected firm-fixed price contract or a cost-reimbursable contract in high-risk federal construction overseas. In the event that performance conditions require a construction contractor to supplement more costly and unanticipated labor or materials, contractors should seek an advance agreement with the contracting officer regarding the allowability of those costs, ensure that the costs are not expressly unallowable (i.e., contingencies or non-Afghan security company costs due to changes in Afghanistan laws) and, otherwise, document related business decisions. However, it should be noted that an advance agreement may not be forthcoming¹²⁰ and may not always insulate the contractor from government auditor inquiries into the allowability of a given cost. Accordingly, a contractor performing construction or incidental construction under a cost reimbursable contract should consult with a company attorney if that contractor is required¹²¹ to fulfill a contractual requirement under a cost-reimbursable contract even though the allowability of those costs could be subject to questioning in the future.

4.0 Managing Subcontractors in Overseas Federal Construction

Generally, prime contractors operating overseas must ensure that any decision to rely upon on foreign sources is guided by determinations of value-added,¹²² risk coverage and

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mitigation; flow-down compliance and monitoring requirements; and adequate enforcement mechanisms. That said, the federal government's emphasis on adequate subcontractor management and oversight has placed risk mitigation at the forefront of all overseas federal construction contractors performing in high-risk conditions. In general, these prime contractors should ensure that any pre-mobilization efforts of subcontractors are performed at risk given the high likelihood of a convenience termination of the prime contract due to changing conditions/requirements. Further, prime contractors should consult with company attorneys in order to adequately shift the risk of delay due to materials and labor shortages, political risk (i.e., changing local governments), and the risk of loss to their subcontractors.

International subcontract management is an arena where developing an internal culture of compliance at the prime level is critical to monitoring and enforcing compliance requirements upon

subcontractors. Indeed, this involves getting the prime contractor's employees, along with the management and employees of overseas subcontractors, to abide by the anti-kickback regulations; observe the extraterritorial criminal laws that are applicable to U.S. companies and contractor employees overseas; fairly recruit, compensate and maintain standards of quality regarding living conditions of third country laborers; observe host-country civil and criminal law requirements; and report any indiscretions as required.¹²⁴

4.1 Purchasing System and Quality Control Considerations

Construction prime contractors can enforce subcontract requirements and defend themselves against responsibility for subcontractor indiscretions via ongoing monitoring, compliance certifications, contingent payment provisions, and enforceable dispute resolution provisions. In addition to requiring subcontractors to certify compliance with applicable laws and other contract requirements; prime contractors should have a purchasing system that involves active monitoring of subcontractor compliance whether through a specified individual or department. If this compliance function of a purchasing system is conducted under the direction of a company attorney, there is some likelihood that attorney-client privilege would attach to the related efforts of the specified individual or department.

The responsible department should document its efforts to regularly inspect the subcontractor's implementation of any quality controls; require periodic compliance certifications and reporting; investigate any perceived noncompliance; require corrective actions where necessary; ensure that corrective actions are completed; provide robust rights to audit; and/or otherwise inspect a subcontractor's books and records when necessary. In addition to ensuring any noncompliance is detected and addressed, these controls will also provide a defense in administrative and legal proceedings in the event that a subcontractor's indiscretions are imputed upon the prime contractor.

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4.2 Enforcement via Contingent Payment Provisions

Contingent payment provisions (i.e., pay-when-paid and pay-if-paid clauses), when enforced in conjunction with retention and set-off rights under a subcontract can be a critical means of enforcing compliance with contract requirements by overseas subcontractors who may have otherwise attempted to evade personal jurisdiction in U.S. courts¹²⁵ and can also shift the risk of nonpayment by the government back to the contractor when related to subcontractor activities. That is, if a subcontractor is subject to the risk of nonpayment under a subcontract term, that subcontractor may be more likely to comply with subcontract requirements and may submit to personal jurisdiction in the U.S. to recover sums allegedly owed. Although contingent payment provisions are heavily scrutinized in some states, many international subcontractors are loathe to incur the expenses associated with resolving disputes in a foreign location and, therefore, may likely accept withholdings and setoffs under any contingent payment provisions so as not to disrupt the business relationship pending a contracting officer's or another fact-finder's final decision regarding the prime's (and, therefore the subcontractor's) entitlement to payment under a contract.

4.3 International Alternative Dispute Resolution

In the event that a dispute occurs, it is critical to account for the risk that an arbitral award and/or decision may not be enforced by a court or administrative entity in the jurisdiction in which the overseas construction is performed. Given what in the author's experience is a generally accepted perception that local court decisions in many jurisdictions within the Middle East and North Africa lack consistency, arbitration in internationally reputable seat is preferable, however, it cannot overcome the risk presented by the fact that many local courts, that are not subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")¹²⁶ often disregard foreign arbitration decisions and may even adjudicate a case brought by a local contractor under the local laws (including, Sharia law, where applicable) while wholly disregarding the choice of law, seat and dispute resolution provisions specified by the parties in a contract. Given that a local court may attach a U.S. contractor's property and may enter an order revoking the foreign contractors license to operate in the jurisdiction, contractors operating in high-risk overseas environments should be prepared to coordinate with the relevant U.S. embassy in the jurisdiction, along with local counsel and a local government relations¹²⁷ representative in order to prevent a court from taking jurisdiction and enforcing a judgment in violation of the parties' agreement.

5.0 Local Law Considerations

Federal construction contractors performing overseas are required to adapt to and comply with the legal regimes within the local area of operation. In high-risk overseas construction, the ability to adapt is often complicated by the absence of the rule of law and an

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opaque bureaucracy. In addition to becoming familiar with the local legal regime and engaging local counsel, any contractor operating overseas must also have a well-vetted government relations officer who can draw upon her bureaucratic connections to prevent project delays in a manner that does not come within the definition of improperly influencing a foreign government official under the Foreign Corrupt Practices Act. Although federal construction occurs world-wide, our focus is upon local operational compliance required throughout the Middle East and North Africa (“MENA”) in the aggregate because that region is currently the location of the substantial majority of overseas federal construction.

5.1. Entity Formation and Registration

Many federal construction contractors, operating outside of a U.S. territory overseas, will establish a registered foreign office¹²⁸ in the locale in order to refrain from incurring taxation costs and mandatory local joint venture requirements in many areas within MENA. However, depending on the level of business activity the contractor intends to conduct in the region; incorporation could either be required or advisable, in which case, the contractor will often be required to establish a joint venture, with a local managing member after meeting minimum capitalization requirements. Although a local managing member requirement serves the government’s interest in ensuring that a party within the region can be made responsible in the event of “flight”¹²⁹ by a foreign joint venture partner; many countries within MENA will further require the parties to operate under the license to do business of the joint venture partner or a local sponsor, with property that is attachable in the country, to ensure that a local partner can always be made to account for the business activities of the non-host country partner. Regardless of whether a registered branch office or incorporated company is formed, each entity will generally be required to file annual financial statements that have been audited by a local accounting firm.

5.2. Compliance

If an exception is not provided under a SOFA or other international agreement, construction contractors will also be required to obtain the necessary professional (i.e., engineering) licenses and work permits in order to be able to perform in a foreign jurisdiction and, often regardless of whether the contractor is operating or performing on U.S. territory (i.e., a military installation) in the region. In addition to incurring local fines and penalties along with performance delays due to performance stays issued by local administrative agencies for the failure to obtain, update and otherwise maintain these local business licenses; the contractor could be subject to disallowances under its U.S. government contract for failure to comply with all applicable laws.

Host-country employment regulations applicable to foreign, domestic and third-country labor also impose requirements and costs with which U.S. government contractors operating in MENA are not familiar. In order to mobilize in MENA, U.S. government contractors that are not operating under any applicable SOFA exception will often have to secure temporary visas,

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while awaiting permanent visas, to import third-country nationals into the region in order to support the work, especially, given that local employees may not be authorized to enter U.S. or host-country military facilities in certain countries. Often the contractor is not able to secure a visa either because a rapidly issued notice to proceed under an award of a U.S. government contract did not provide the U.S. government contractor the time required to register and receive approval of permanent visa applications, or because of a substantial noncompliance with a precondition to receiving a visa. In either case, the contractor could be required to incur costs associated with facilitating the exit and re-entry of workers operating under temporary visas prior to its expiration.

Local labor requirements also entitle foreign and, sometimes direct-hire U.S. citizen and third-country employees,¹³⁰ to benefits that are drastically different from U.S. labor laws and, therefore, impose additional compliance costs on the construction contractor. For example, local employees may be entitled to shorter work weeks and substantially compensated overtime; extended leave; holiday pay; limitations on hours worked; year-end bonuses; guaranteed severance pay with substantial notice of termination; and much more stringent termination rights.¹³¹ The human resources department of any international contractor should work in consultation with a company attorney and local counsel to ensure that policies are in place that specifically integrate the local and U.S. labor policies that apply within area of operations in addition to providing employees clear notice of the corporate procedures for effecting their project related employment rights. This transparency will assist the company in partnering with employees in realizing their labor rights and will reduce the likelihood of costly, project halting disputes.

Local import and export restrictions can also impact supply chain expediency and create project delays,¹³² especially, if a contractor has not accounted for the potential bureaucratic delays in its project management strategy. In order to circumvent the associated “red tape” and delays, many construction contractors attempt to avail themselves of Free Trade Zones¹³³ in the region that are not subject to the same export restrictions and import duties, among other local laws, as other areas in the Middle East. However, if goods that are properly licensed to travel from a Free Trade Zone to another do not exit the country or arrive at their required destination then any applicable license (or license requirement) will be violated and the contractor will incur administrative sanctions, including fines and penalties, regardless of whether an intervening event (i.e., military attack on or robbery of a convoy) is to blame for the violation of the license.

6.0 Conclusion

Federal overseas construction is a critical part of our nation’s security, diplomatic and humanitarian efforts. In recent conflicts, international construction and other contractors’ embedded support for our servicemen and servicewomen is admirable. This reality underscores

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the fact that the risks associated with overseas federal construction matter¹³⁴ in a manner that is as important as and is also intertwined with the protection of corporate best interests. We hope that our efforts will help ensure that responsible companies that are best suited to manage these associated risks in partnership with their government customers, continue forward in this noble and patriotic commitment. The risks associated with overseas federal construction are high but can be managed via a collaborative effort and we are thankful to the government representatives, contractors, and servicepersons dedicated to working together in support of our nation's best interest.

Endnotes

1. Attorney, Shulman, Rogers, Gandal, Pordy & Ecker, P.A., Potomac, MD, and former counsel for Kellogg, Brown & Root (KBR). B.A., University of Virginia (2004); J.D., William & Mary Law School (2007). The author would like to thank Ira E. Hoffman, Chair of the Government Contracts and International Practice Groups at Shulman Rogers, for his invaluable comments, suggestions, and support, and Lauren E. Forgie, a summer law clerk at Shulman Rogers, for her significant contributions toward finalizing this white paper. Further, the guidance and support of Donald R. Rogers and Lawrence A. Shulman is much appreciated.
2. John S. Vento, *Funding and Related Issues Regarding Federal Government Construction Outside the United States*, in *Federal Government Construction Contracts 759, 759* (Michael A. Branca, Aaron P. Silberman, & John S. Vento eds., 2010).
3. Although the substantial majority of this white paper is dedicated to overseas construction, many of the considerations presented could equally apply to high-risk construction, whether in an emergency or otherwise, performed in the United States. Despite this apparent overlap and the mitigation considerations presented, construction contractors should not rely upon this white paper and should always seek the advice of company attorneys when constructing under high risk and emergency conditions whether operating domestically or abroad.
4. *See id.* at 767-769 (providing insight into how the division of responsibility among agencies for overseas federal construction and construction-related services is complicated by allocations of federal appropriations).
5. U.S. Gov't Accountability Office, GAO-10-819, *Army Corps of Engineers: Organizational Realignment Could Enhance Effectiveness, but Several Challenges Would Have to be Overcome* 4 (2010).
6. *Id.* (emphasis added).
7. *Id.* at 3-4.
8. Federal Acquisition Regulation, 48 C.F.R. parts 1-53 (2010).
9. 48 C.F.R. §§5108-5152.
10. 48 C.F.R. §§ parts 201-253 (2010).
11. The EFARS are not published in the Code of Federal Regulations, but the regulations are available at <http://www.usace.army.mil/CECT/Pages/EFARS.aspx>.
12. Pub. L. No. 107-217, 116 Stat. 1129 (1996) (codified at 40 U.S.C. § 1103(d)).
13. *See* U.S. Dep't of State, <http://www.state.gov/m/a/c13743.htm> (last visited June 20, 2011) (containing link to NISPOM).
14. 48 C.F.R. §§601-653.
15. U.S. Dep't of State, OBO, <http://www.state.gov/oboarchive/c29962.htm> (last visited June 20, 2011) (noting that The Energy Independence and Security Act of 2007 has reclassified energy and water as issues of national security).
16. Adam E. Namm, U.S. Dep't of State, OBO, *Constructive Diplomacy: The U.S. Department of State's Overseas Building Program* (2011) available at <http://www.state.gov/obo/news/163300.htm> (last visited June 20,

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2011); Adam E. Namm. U.S. Dep't of State, OBO, <http://www.state.gov/obo/about/dirmmessage/index.htm> (last visited June 20, 2011) (asserting that OBO has published the "first Long Range Overseas Maintenance Plan, mandating all new embassies be built to the specifications of LEED Certification from the U.S. Green Buildings Council[.]").

17. U.S. Gov't Accountability Office, GAO-06-641, *Embassy Construction: State Has Made Progress Constructing New Embassies, but Better Planning Is Needed for Operations and Maintenance Requirements 1* (2006).

18. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified at 22 U.S.C. §2151).

19. Mark Hanson & Edmund Amorosi, *Overseas Construction Under USAID Regulations: Not Business as Usual*, 43 Procurement Law. 7, 7 (Fall 2007).

20. *Id.*

21. 22 C.F.R. §228.

22. *See* Hanson & Amorosi, *supra*, note 13, at 8. (noting that the criteria includes, among other things, having performed similarly complex services to those in the solicitation within three to five years prior to the issuance date of the solicitation, having achieved a total business volume equal to or greater than the value of the project being bid in three to five years of the issuance date of the solicitation, and possessing the technical and financial resources to perform the project).

23. *Compare* 22 C.F.R. §228.31 with 48 C.F.R. §9.104-1.

24. 22 C.F.R. §228.31.

25. *Id.*, §228.35.

26. *See, e.g.*, David S. Hatem, Kenneth B. Walton, & David H. Corkum, *Architect-Engineer Contracting*, in *Federal Government Construction Contracts* 79, 83, *supra*, note 2, at 538 (explaining that a traditional construction company may be unfamiliar with the increased level of design liability exposure associated with a design-build contract as compared to a design-bid-build or construction management contract, and articulating that an Architect-Engineer firm may not be accustomed to the statutory cap on billable design fees that are calculated as a percentage of estimated construction costs).

27. *See, e.g.*, 48 C.F.R. §§18.101 and 218.170 (generally, setting for the proposition that the FAR and DFARS provide flexibility, specifically, in regard to the full and open competition requirement, in the event of unusual and compelling urgency).

28. *See* FAR 48 C.F.R. §16.603.

29. The FAR stipulates that letter contracts shall contain a definitization period within the earlier of 180 days or of 40 percent of work completion, however, construction contractors will likely want definitization to occur as soon as the tacit realism of cost estimates can be verified via actual costs incurred during performance. *See* FAR 48 C.F.R. §16.603-2(c). That said, contractors assume the risk of an agency's waiver of durational and other limitations on undefinitized contract actions. 48 C.F.R. §218.201(7).

30. 48 C.F.R. §6.302-2(c)(1).

31. *See, e.g.*, 48 C.F.R. §§52.243-1 (Aug. 1987); 52.243-2 (Aug. 1987).

32. 48 C.F.R. §§32.1103(e), 18.123 and 218.170(j)(1).

33. 48 C.F.R. §§32.402(c)(1)(ii)a, 32.404(d) and (f), and 18.121.

34. 48 C.F.R. §§18.120 and 28.101(a).

35. A contracting officer can waive the Miller Act bonding requirements for work performed in a foreign country upon determining that it is impracticable for the contractor to furnish performance and payment bonds. 48 C.F.R. §28.102-1(a)(1).

36. The Miller Act applies to government contracts exceeding \$150,000.00 and requires contractors to obtain payment and performance bonds. 40 U.S.C. §3131(b).

37. A contracting officer can waive the Miller Act for work performed in a foreign country upon determining that it is impracticable from the contractor to furnish performance and payment bonds. 48 C.F.R. §28.102-1(a)(1).

38. 48 C.F.R. §§18.000, 218.170.

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39. The Davis-Bacon Act specifies prevailing or minimum wage requirements that apply to Federal construction contractors domestically. *See* 40 U.S.C. §3142(a)-(c); 48 C.F.R. §22.403-1. The Davis-Bacon Act has been waived for overseas construction projects. 40 U.S.C. §3142(a).

40. The Buy America Act requires contractors to use articles, materials and supplies that have been mined, produced or manufactured in federal construction projects. 41 U.S.C. §10a; 48 C.F.R. §§25.1 and 25.2 (2010). In addition to the fact that the Trade Agreements Act creates an exception to the Buy America Act in overseas federal construction projects, the Buy America Act also includes an express exception applicable where products are acquired for use outside of the United States. 41 U.S.C. §10a; 48 C.F.R. §25.004.

41. The Berry Amendment places several contentious restrictions on the use of certain specialty metals from non-U.S. suppliers in United States government procurements. 10 U.S.C. §2533a. The Berry Amendment does not apply to acquisitions outside the United States in support of combat operations, acquisitions in support of contingency operations where there is an unusual or compelling need, or emergency acquisitions by activities located outside the United States for personnel of those activities. 48 C.F.R. §218-201(9).

42. Nat'l Indus. Sec. Program Operating Manual (NISPOM), Dep't of Def. Directive 5220.22-M at 1 (Feb. 2006) (citing Exec. Order No. 12829, 58 Fed. Reg. 3479 (Jan. 1993)).

43. *Id.* at §5-800.

44. *Id.* at §1-100.

45. *Id.* at §§2-100, 2-102(d), 2-200, 2-209, 7-101. In addition, it is worth noting that the NISPOM places restrictions on foreign-owned companies' ability to qualify for facilities and personnel security clearances along with the circumstances in which a cleared prime contractor can enter into subcontracts with foreign companies requiring access to classified information. *See* NISPOM, §§2-300 to 2-310.

46. *Id.* at §2-100.

47. *Id.* at §2-200.

48. *Id.* at §§2-102(d), 2-209, 7-101.

49. *Id.* at §2-300(c). (A U.S. company that is determined to be under Foreign Ownership, Control or Influence is not eligible for a facility clearance "unless and until security measures have been put in place to negate or mitigate FOCL.")

50. Valerie Bailey Grasso, Baird Webel & Scott Szymendera, Cong. Research. Serv., RL 34670, The Defense Base Act (DBA): The Federally Mandated Workers' Compensation System for Overseas Government Contractors, at 15 (Apr. 2010).

51. Another example includes the Overseas Private Investment Corporation ("OPIC"), a quasi-governmental agency that offers political risk insurance for U.S. contractor assets while conducting business with foreign governments overseas. *See* Overseas Private Investment Corporation Insurance, <http://www.opic.gov/insurance>. (last visited June 26, 2011).

52. 42 U.S.C. §§1651-1654. *See*, also, 48 C.F.R. §§28.305, 52.228-3.

53. The War Hazards Compensation Act, 42 U.S.C. §§ 1701 *et seq.*, is another form of federally backed insurance whereby self-insured contractors and insurance providers are reimbursed by the government for employee injuries sustained as a result of identified war hazards on overseas projects.

54. Grasso *et al.*, *supra*, note 48, at 11. (stating that different agencies have different programs. For example, DoD has allowed contractors to select and negotiate rates with DBA insurers of choice. While other agencies have adopted "single-source" models whereby one a single offeror provides DBA insurance to all of that agency's affected contractors).

55. 48 C.F.R. §28.305(d).

56. *Id.* at Summary (stating that contractors are reimbursed for DBA program premiums).

57. *Id.* at 3. (stating: "[D]BA insurance is an exclusive remedy for injured workers." [Therefore,] "Injured workers and the survivors of workers killed on the job are entitled to benefits for employment-related injuries, illnesses, and deaths regardless of fault and are not permitted to sue their employers or the federal government for any types of damages caused by employment-related incidents.")

58. 48 C.F.R. §228.370.

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59. Pub. L. No. 85-804, as amended by Pub. L. No. 93-155 (codified as amended at 50 U.S.C. §§1431-1435). Given the complexity associated with agency approval of the use of the Public Law Indemnity 85-804, its utility is highly questionable. 48 C.F.R. §50.104-3.
60. For example, the Foreign Sovereign Immunities Act provides for jurisdiction over foreign government agencies and instrumentalities (*e.g.*, state-owned enterprises) in U.S. federal district courts under certain circumstances. 28 U.S.C. §§1330(a), 1660(a)(1)-(6). *See, e.g., Wye Oak Tech., Inc. v. Republic of Iraq*, 2010 WL 2613323 at 11 (E.D. VA 2010) (holding that a defense materials and equipment provider could sue the Iraqi government on a breach of contract claim given that the contractor had performed substantial portions of the contract in the U.S.).
61. See 48 C.F.R. §252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States (JUL 2009), (which makes civilians operating in high-risk conditions overseas subject to the law of war, other laws regarding the use of force, and orders of the combatant command. While construction contractors performing construction and construction-related services are subject to the law of nature and, therefore, may resort to acts covered by the law of war; the real risk presented by 48 C.F.R. §252.225-7040 is the potential conflict between orders of the combatant command and the requirements of the contracting officer. Any strategic plan for high-risk construction should involve a company attorney's input regarding the contractor's best action if presented with a situation where circumstances may require rapid interpretation of the contractor's obligations in the event of such conflicting orders or an order that may result in an immediate contract change even though the contracting officer, often located CONUS, may not be able to provide immediate authorization for the action).
62. For a list of applicable SOFAs, *See* Cong. Research. Serv., RL34531, Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?, 17-29 (2011).
63. *Id.* at 1.
64. For example, civilian contractor employees accompanying the armed forces may be subject to the Military Extraterritorial Jurisdiction Act ("MEJA") and even military courts martial under the Uniform Code of Military Justice ("UCMJ"). 18 U.S.C. §3261; 48 C.F.R. § 252.225-7997. The Civilian Extraterritorial Jurisdiction Act ("CEJA") has not been enacted and, therefore, does not yet apply criminal penalties to civilian contractors performing construction on federal projects overseas. S. 2979, 111th Cong. §2 (2010).
65. 15 U.S.C. §§78dd-1 *et seq.*
66. 22 U.S.C. §1704.
67. 15 U.S.C. §§78dd-1(a) and 78dd-2. For a summary of the FCPA's antibribery elements see Jacob S. Frenkel & Ira E. Hoffman, *International Compliance: Mitigating Risk in FCPA and Other Cross-Border Transactions*, 43 Md.B.J No. 4, at 32, 35 (July/Aug. 2010).
68. 15 U.S.C. §§78dd-1(f)(2) and §78dd-2(h)(3). *See* Frenkel & Hoffman, *supra* note 57, at 35 (asserting that knowledge includes actual and conscious disregard of circumstances that suggest high probability of an offense).
69. 15 U.S.C. §78dd-2(h)(2) It is worth noting that the definition of foreign official may include persons acting in an official capacity for or on behalf of a government agency.
70. The author is aware of only a few cases that have been litigated under the FCPA which is likely explained by the fact that the tendency is for contractors to negotiate and settle rather than litigate given the risks at stake. Accordingly, one might assume that the definition what constitutes a "knowing" violation is more likely than not within the discretion of the Department of Justice as-applied simply by raising allegations and during the course of an investigation.
71. Payments that are typically subject to scrutiny include proper cash or any other questionable payments made incidental to a proper payment to agencies for licenses, visas, registrations and customs duties. While any cash payments to agencies could implicate a red flag, there is often real concern that a company's government relations representative or subcontractor could utilize a bribe in order to overcome bureaucratic delays and changing, unpublished laws. In the latter situation, a prime contractor could be held equally responsible such incidental, improper payments made on its behalf regardless of whether the prime contractor only authorized the underlying proper payment.

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Endnotes (cont'd)

72. 15 U.S.C. §78m(b).
73. 15 U.S.C. §78dd-1(b).
74. 15 U.S.C. §78dd-1(f)(3)(A).
75. David M. Howard & Elisa T. Wiygul, “FCPA Compliance: The Vanishing ‘Facilitating Payments’ Exception?”, Dechert LLP (Apr 2010), http://www.dechert.com/library/4-7-10-WCSL-Howard_and_Wiygul-FCPA_Compliance-The_Vanishing_Facilitating_Payments_Exception.pdf.
76. 15 U.S.C. §78dd-1(c)(1).
77. Frenkel & Hoffman, *supra*, note 57, at 35 (stating: “Implementing a compliance program in consultation with counsel is a best practice, because management and the directors can discuss the issues under the protection of the attorney-client privilege.”).
78. Any agreement with local government relations representatives should be subject to review by local counsel for compliance with and likelihood of enforcement under local laws. Further, any due diligence review of local consultants should be conducted in consultation with a company attorney and should include reference checks, bank account and records reviews, and inquiry into any government relations officer’s familial and other ties in the government.
79. In order to adequately record transactions with foreign government agencies for licenses and related services, company representatives should insist upon receipts. Given that rules throughout MENA are subject to change without public notice and comment, company representatives may want to receive an advance opinion from local counsel confirming the exact cost of licenses along with the legality of the proposed transaction under local law.
80. For Foreign Corrupt Practices Act “red flags,” *See* <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.
81. For example, contractors can reimburse foreign officials bona fide expenses incurred during sales trips whereby the company facilities and product demonstrations occur. 15 U.S.C. §78dd-2(c)(2). However, if the covered activities arise above the level of mere reimbursement and the trip becomes too extravagant, then sales efforts could constitute an illegal bribe.
82. 22 U.S.C. §7104 (2007).
83. *See* 48 C.F.R. §22.1704(a)(4) and (b).
84. 48 C.F.R. §22.1704.
85. 48 C.F.R. §227.1703.
86. For Export Administration Regulations “red flags,” *see* <http://www.bis.doc.gov/enforcement/redflags.htm>.
87. 48 C.F.R. §252.204-7008.
88. Andrew D. Irwin & Michael J. Navarre, *Selected Compliance and Contract Administration Issues in Contingency Contracting*, 09-13 Briefing Papers, at 4-5 (Dec. 2009).
89. 15 C.F.R. §§730-774.
90. 22 C.F.R. §§120-130.
91. *See* Irwin & Navarre, *supra*, note 88, at 3 (discussing executive orders and other laws establishing sanctions against specific countries).
92. *See, e.g.*, 48 C.F.R. §§52.243-1 (AUG 1987); 52.243-2 (AUG 1987).
93. Tony Capaccio, *Dyncorp is Two Years Late Finishing Afghan Barracks Construction*, Bloomberg (Mar. 8, 2011), available at <http://www.bloomberg.com/news/2011-03-08/dyncorp-is-two-years-late-finishing-afghan-barracks-construction.html>.
94. Even though a large majority of contingency and emergency construction overseas may be temporary and, therefore, not as susceptible to subsurface conditions as permanent structures; that which is defined as “temporary” construction overseas seems to be more about mobility than durational use. That is, a building may be deemed temporary if it is movable regardless of whether it has a durational life in excess of a century. Therefore, the duty to build sustainable and safe, temporary structures overseas cannot be underscored enough.
95. 48 C.F.R. §36.503.
96. 48 C.F.R. §52.236-3(a).
97. *Id.*

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Conducting Construction Overseas (cont'd):

Endnotes (cont'd)

98. 48 C.F.R. §52.236-3(b).
99. 48 C.F.R. §52.236-2(a) (requiring contractors to provide prompt notice to the contracting officer of subsurface or latent physical site conditions that differ material from those indicated in the contract documents furnished by the government).
100. 48 C.F.R. §52.236-2(a) (requiring contractors to provide prompt notice to the contracting officer of previously unknown and unusual physical site conditions that are materially different from those ordinarily encountered or which may inhere in the character of work performed).
101. Arundel Corp. v. United States, 103 Ct. Cl. 688, 711, 1945 WL 4054 (1945).
102. 48 C.F.R. §36.502 (establishing an exception to the requirement that the Differing Site Conditions clause be included in an other than fixed price contract or in the event that the simplified acquisition threshold is not exceeded).
103. *Id.* at §36.503.
104. United States v. Spearin, 248 U.S. 132, 136, 39 S. Ct. 59, 61(1918); PCL Constr. Services, Inc. v. United States, 47 Fed. Cl. 745, 795, 2000 WL 1474486 (2000).
105. *See, e.g.*, Geoffrey T. Keating, *Changes*, in Federal Government Construction Contracts, *supra*, note 2, at 23, and Robert K. Cox, *Defective Specifications—Impracticability/Impossibility of Performance*, in Federal Government Construction Contracts, *supra*, note 2, at 492 (both articles discussing cases where the government was responsible for defective designs that it provided and from which the contractor could not deviate).
106. J.L. Simmons Co., v. United States, 188 Ct. Cl. 684, 689, 412 F.2d 1362, 1362 (1969).
107. Appeals of Columbia Engineering Corp., ASBCA No. 32679, 89-2 B.C.A. (CCH) ¶21689 (Feb. 13, 1989).
108. *See, e.g.*, 48 C.F.R. §§46.312 (2010) and 52.246-12 (AUG 1996).
109. *See, e.g.*, 48 C.F.R. §§46.710(e)(1) and 52.246-21 (APR 1994).
110. *See, e.g.*, 48 C.F.R. §52.249-10(b)(1) (APR 1984).
111. *See, e.g.*, 48 C.F.R. §52.243-4(d) (AUG 1987).
112. Andrew D. Ness, *Delay, Suspension of Work, Acceleration and Disruption*, in Federal Government Construction Contracts, *supra* note 2, at 538 (discussing risks naturally assumed by contractors under fixed price construction contracts).
113. *Id.* (emphasis added).
114. JTL, Inc., ENGBCA No. 6323, 98-2 B.C.A. (CCH) ¶29873 (May 22, 1998).
115. *See, supra*, note 111.
116. *Id.* (In JTL, Inc., a contractor was found to have assumed the risk of failing to timely obtain certain state permits and certifications that were normal and expected).
117. L.W. Matteson, Inc. v. United States, 61 Fed. Cl. 296, 320, 2004 WL 1662264 (Fed. Cl. July 20, 2004).
118. In the event that a contractor is reliant upon progress or other contract financing payments in high-risk emergency conditions, it is important for contractors to not only submit timely invoices but to consider whether submitting a certified request for payment is in the company's best interest given that the Prompt Payment Act has been waived for delinquent invoices in certain contingency and emergency operations. Defense Federal Acquisition Regulations, 76 Fed. Reg. 11371 (Mar 2, 2011).
119. 48 C.F.R. §§31.102, 15.403-1, 15.403-4.
120. 48 C.F.R. §31.109 (suggesting that contracting officers should, but are not required to, consider an advance agreement where costs are "special" or "unusual.").
121. *See, e.g.*, 48 C.F.R. §52.243-2(d) (Aug. 1987).
122. 48 C.F.R. §31.203(i).
123. 18 U.S.C. §3261; 48 C.F.R. §252.225-7997.
124. 48 C.F.R. §52.203-13.
125. *c.f.*, Baragona v. Kuwait Gulf Link Transp. Co., 594 F.3d 852, 854-855 (11th Cir. 2010). The Baragona case neither involved a subcontractor nor contingent payment provision. However, it is worth noting that the court found that it did not have personal jurisdiction over a foreign contractor under a Georgia long-arm statute even

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Conducting Construction Overseas (cont'd):

Endnotes (cont'd)

though, among other things, a substantial majority of contract administration occurred in the state of Georgia.

126. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 9 U.S.C.A. 201, 330 U.N.T.S. 38.

127. Government relations representatives will often have close relationships with government officials, but will not be legally affiliated with the ruling families and government representatives in various Middle Eastern countries. In the event of bureaucratic delays at a local government agency, government relations representatives are critical to opening and streamlining communication channels with local government officials in order to accomplish business objectives.

128. Given the fact that title to land is often not properly recorded and is otherwise not clear throughout many regions in MENA, many contractors will rent office space within the vicinity of the area of operation. That said, it is important to note that any contract with local businesses should be vetted to ensure that the company is reputable, will not pass bribes to government officials, and is not owned by local government officials.

129. A common "exit strategy" for some financially distressed contractors has been to simply leave a country without formally dissolving an entity or otherwise "winding down" a companies' efforts in a country under the corresponding legal requirements in the host country.

130. Local employment laws generally do not provide employees the same entitlements as local laborers and, therefore, construction contractors can often reduce projects costs by hiring third-country nationals and employing them under the extraterritorial U.S. laws that apply to expat employees.

131. Local labor laws may require construction contractors to provide employees with substantial notice prior to terminating a given employee. Further, foreign employers may be required to provide an end-of-service gratuity which is a pre-calculated payment to the terminated employee that is contingent upon the time with which the employee was working for the contractor within the country.

132. Augusto Lopez-Claros and Simon C. Bell, *Doing Business in the Arab World 2011: Comparing Business Regulation in 20 Economies.*, World Bank Group (2011), available at <http://www.doingbusiness.org/reports/regional-reports/arab-world> (stating "In the Arab world, the average time for export has fallen from 28 days to 22 days in 2011 and the time for imports has been reduced from 34 to 26 days.")

133. See John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 28 Cornell Int'l L.J. 414 (2005) (discussing Free Trade Zones throughout the Middle East, generally, and in specific countries within the Middle East).

134. Steven L. Schooner, *Why Contractor Fatalities Matter*, *Parameters*, Volume 38, No. 3, at 79 (Autumn 2008), available at <http://www.carlisle.army.mil/usawc/parameters/Articles/08autumn/schooner.pdf>. See, also, Valerie Bailey Grasso, Baird Webel & Scott Szymendera, Cong. Research. Serv., RL 34670, *The Defense Base Act (DBA): The Federally Mandated Workers' Compensation System for Overseas Government Contractors* at 4 (Apr. 2010) (stating with regard to DBA claims alone: "Between September 2001 and the end of December 2009, there were 1,987 deaths covered by the DBA").

