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# Steps For Gov't Contractors As US Leaves Afghanistan

By **Robert Nichols and Alan Chvotkin** (August 17, 2021, 3:17 PM EDT)

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As of Aug. 16, the U.S. embassy in Kabul is closed and all embassy staff are being evacuated. The U.S. military, and most aligned governments, have accelerated the withdrawal of troops and support personnel from Afghanistan. The government of Afghanistan led by President Mohammad Ashraf Ghani has collapsed.

As counsel to several major U.S. government contractors and grantees that work in Afghanistan, we have received numerous requests for legal guidance on what contractors and nongovernmental organizations should be doing to manage the situation.

We offer the following general guidance, which is applicable to all contractors in Afghanistan, whether under contracts or grants to the U.S. Department of Defense, U.S. Department of State, U.S. Agency for International Development or other U.S. government agencies.

**Safety Is No. 1**

Keep the safety of all personnel still in Afghanistan as your highest priority, and take whatever actions are available to keep them safe while in country and to facilitate the rapid evacuation of personnel out of Afghanistan. Document the actions being taken and any costs incurred by increasing security or facilitating departures. This is important for two reasons.

First, the government may or may not reimburse such costs — see analysis below — but it certainly can refuse to pay costs that are not properly documented.

Second, employees and subcontractors may bring tort or contract claims against prime contractors for injuries and trauma that they may suffer. Defending against such claims will involve demonstrating that the prime contractor took all reasonable steps under the circumstances to warn and protect their employees and subcontractor or subgrantee personnel.

**Seek and Follow U.S. Government Direction — and Otherwise Take Reasonable Steps**

To the extent that contractors receive guidance or direction from the U.S. government, whether from contracting and grants officers or otherwise, follow that guidance or direction to the maximum extent possible.

Memorialize when the guidance or direction was received, the steps taken to comply, any impediments to complying, the costs of compliance and the ripple effects from compliance. This will help in resolving contract claims later.

The larger problem, of course, is that the government is not issuing sufficient, if any, guidance or direction to contractors, leaving the contractors to decide next steps.

The prudent course is to take reasonable steps, notifying the government contracting officers and other government officials in writing as far in advance as possible of the urgency of the planned steps and the basis for your actions — to give them a chance to confirm or object.

Save those communications and any "out of office" or other responses.

As an example, one of our clients evacuated its personnel to Qatar but has not yet received government direction about whether its program and contract are ending. Its personnel, unsurprisingly, want to return to the U.S. or to their country of origin. Surely evacuating personnel from Afghanistan was essential, but sending those personnel home may put the underlying program and contract in jeopardy.

Clearly thinking through reasonable steps to mitigate the programmatic and financial fallout, and communicating that plan to the government, would be helpful in working through the contractual fallout from what the contractor does next.

**Keep Working if Possible and Safe**

Some contractors have told us that, in the absence of a stop-work order from their customer, they intend to continue performing their prime contracts through Afghan subcontractors. This course of action may avoid many of the legal issues outlined below, but obviously brings substantial risks.

However, we suggest putting in place express agreements with subcontractors — and if possible, with any individuals staying in country — that acknowledge and accept the risks of continuing work in this nonpermissive environment and release the prime contractor from legal liability for harm caused by the Taliban.

If the U.S. government directs a contractor to continue working, such direction may entitle the contractor to immunity from tort suits by harmed employees.[1] Understanding the scope of these defenses is important for any contractor remaining in country.

**Dealing with Local Nationals**

The U.S. government's Afghan and Iraqi special immigrant visa program allows Afghan individuals who supported our military and the U.S. mission in Afghanistan — including working on State Department and USAID contracts and grants — and who face threats resulting from their service, to apply for refugee status in the U.S.

There are a limited number of special immigrant visas available. Given the dangers these Afghans and their families face, it is crucial to start the visa process as quickly as possible.

The process starts with contractors providing letters of employment and support to their Afghan personnel. However, we are aware of both the limited U.S. government capacity to process such applications and the reluctance of many Afghan nationals to have such documentation in their possession.

**Move, Disable or Destroy Information**

Various government offices have advised contractors to destroy documentation in Afghanistan before departing. This could include documents showing programs in-country, information on Afghan beneficiaries or organizations that are core to program design or implementation, personally identifiable information of Afghans that have assisted U.S. efforts, and even company finances.

To the maximum extent practicable, move — physically or electronically — such information to a safe location. As contractors know, government audits and claims can sometimes last for years and, if the contractor does not have good documentation, it can make supporting such audits and claims difficult.

To the extent that moving the documents is not possible, destroy documents and disable systems. But try to keep a list of what documents were destroyed, since this type of information will be valuable in future audits and claims.

**Move Money**

Some contractors and NGOs are currently being sued for intentionally or inadvertently providing funds to the Taliban.[2] For funds held in Afghan bank accounts, take steps immediately to transfer funds to other accounts outside of Afghanistan, while you are still able to do so. Document the steps taken to try to keep funds from falling into the hands of the Taliban.

**Protect Property**

Many contractors working in Afghanistan receive government-furnished property, or purchased property for or on behalf of the government.

To the extent possible, try to remove or otherwise protect this property to avoid liability for losses. Otherwise, document the property that was destroyed or left behind and the steps taken to try to preserve it.

This may help in defending against claims or disallowances for that property loss.

**Prepare for Claims and Audits**

While the immediate focus should be on protecting personnel and keeping sensitive information and property from falling into the hands of the Taliban, eventually the government and contractors will need to work through the financial impacts of these circumstances. Looking ahead toward that, contractors should prepare now for future claims and audits.

As a threshold matter, contractors and NGOs working on cost-type contracts should be able to recover all reasonable costs arising from contract performance, including evacuation of personnel and of shutting down a project or contract on an emergency basis.

This does not mean that a claim will be easy, though. Does the government want to continue the program from elsewhere — e.g., working from Kuwait or from the U.S.? Should you terminate employees or keep them on payroll to keep the program capability intact?

Contractors should make these types of decisions in light of government direction — or absence of direction — and the case law governing similar situations, or risk losing any chance of recovery.

Time-and-material contractors will face even more challenges, where the circumstances in Afghanistan keep a contractor from actually performing on the contract.

For example, in Dynamics Research Corp., the contractor had a time-and-materials contract that it was unable to perform while the government customer's computer networks were down.[3] The government would not allow the contractor to bill during the downtime, arguing that it was not responsible for idle labor costs.

The contractor appealed its claim to the Armed Services Board of Contract Appeals. In a 2004 decision, the ASBCA permitted the cost recovery — based on an interpretation that the stop-work clause in the contract controlled the matter.

Fixed-price contractors are in a more difficult position — made even more difficult by the recent decisions regarding the Ebola crisis. In 2013, the Department of State awarded Pernix Serka Joint Venture a firm fixed-price contract for a rainwater capture and storage system in Freetown, Sierra Leone.

When the Ebola epidemic reached Sierra Leone, Pernix Serka asked the Department of State for guidance on whether to cease or delay performance. The Department of State refused to provide guidance or direction to Pernix Serka, stating that "the decision for your people to stay or leave for life safety reasons rests solely on your shoulders."

Pernix Serka ultimately withdrew its personnel from Sierra Leone and submitted a request for equitable adjustment for the increased time and cost to complete the project, and the additional health services it provided its personnel.

The Department of State granted a contract extension but refused to pay the requested costs, because Pernix Serka had a fixed-price contract that included Federal Acquisition Regulation 52.249-10. That provision grants excusable delays, but not money, for force majeure events.

In 2020, the Civilian Board of Contract Appeals upheld the Department of State's position because the contracting officer had remained silent — i.e., did not direct Pernix Serka — on what it should do in the circumstance. Without such direction, there was no change to the scope of work, and the financial risk from the force majeure event fell on the fixed-price contractor.

In June, the U.S. Court of Appeals for the Federal Circuit upheld the board's decision, sending an important signal on which party bears the costs of force majeure events for fixed-price contracts.[4] But the Afghanistan crisis may present a different set of facts.

This type of detailed factual and legal analysis is usually how these types of claims get resolved. As such, a prudent contractor should understand the implications of its planned actions before proceeding. Otherwise, it heightens its risk of loss when the government finds a basis for denying a claim.

All of these legal issues are very factually intensive and require knowledge of government contracts law — and a lot of creative thinking — to minimize risk during this crisis.

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[1] See Tort Suits Against Federal Contractors: Selected Legal Issues, Congressional Research Service, March 31, 2014.

[2] See https://www.cnn.com/2019/12/27/politics/afghanistan-contractor-suit/index.html.

[3] Dynamics Research Corp., ASBCA No. 53788, 04-2 BCA ¶ 32,747.

[4] See Pernix Serka JV v. Secretary of State, No. 2020-2153, June 9, 2021 (summarily affirming the CBCA).