

# Client Alert

Latham & Watkins  
Litigation Department

## Commission on Wartime Contracting First Public Hearing: Burgeoning Waste, Fraud and Abuse Investigations

*A former Inspector General, a veteran contracting auditor, a former prosecutor and a former senior official at the US Department of State make up part of the eight-person Commission on Wartime Contracting. This Commission, which displayed strong prosecutorial vigor at their first public hearing, has been legislatively mandated to investigate the whereabouts of billions of dollars of government contract spending in Iraq and Afghanistan. In the midst of extensive procurement law reforms and the National Procurement Fraud Task Force's mounting caseload, the Commission will put many contractors under increased scrutiny and, potentially, investigation.*

### Commission on Wartime Contracting

#### Employing its Broad Mandate and Investigatory Powers

On February 2, 2009, the Commission on Wartime Contracting (CWC), an independent legislative commission established to investigate wartime contracting in Iraq and Afghanistan, conducted its first public hearing. In their opening statements, the Commissioners emphasized the parallels between this Commission and the 1941

Truman Committee (which investigated waste, fraud and abuse in defense contracting throughout World War II). Senator McCaskill (D, Mo.), who co-wrote the legislation which created the CWC, stressed at the Hearing that the government's contracting practices have been a "massive failure," so a final report by the Commission is simply "not going to be enough" to remedy what she believes to be the absolute lack of contractor accountability.<sup>1</sup> The Senator noted that "a general went to jail after Harry Truman finished his work."<sup>2</sup> Inspired by Truman's Committee, the CWC seeks to identify and disclose the conditions that have led to what many Commissioners asserted were inefficient and inappropriate contracting practices. The Chairman of the Hearing, Commissioner Thibault, detailed the CWC's "broad" mandate, which includes investigating federal reliance on contracting; contractor performance and accountability; contractor use of force; contract management and oversight by government agencies; waste, fraud and abuse; and potential legal violations related to operations in Iraq and Afghanistan.<sup>3</sup> The National Defense Authorization Act outlines the CWC's mandate and provides that the CWC may refer any violations or potential violations of law to the Attorney General.<sup>4</sup>

"Government contractors and their counsels should be ever vigilant in preventing, detecting and remedying any improper procurement activity."

Additionally, the Commission announced its intent to cooperate with various federal agencies' Inspectors General and obtain information from these "cops on the beat," as the IGs' "staff have literally walked the battlefield in pursuit of inefficient contracting practices and potential wrongdoing."<sup>5</sup> Most significantly, the Commissioners reinforced the importance of coordination between law enforcement agencies and the Commission, as these agencies' "perspectives carry power and insight."<sup>6</sup>

At this Hearing, Principal Deputy Inspector General of the Department of Defense Thomas Gimble supported such "cooperation and mutual support," and noted that in the recent past the "unprecedented" level of formalized cooperation among the various agencies has created the "ideal fraud and corruption fighting federation."<sup>7</sup> The benefits of this cooperation, he explained, include "no duplication of effort; information and intelligence are shared; resources (*e.g.*, testing and polygraph support) are shared; and agents consult and assist each other."<sup>8</sup>

The focus of this initial Hearing was the Special Inspector General for Iraq Reconstruction (SIGIR) report "Hard Lessons: The Iraq Reconstruction Experience" presented by Special Inspector General (IG) Stuart Bowen.<sup>9</sup> The Report, in part, details SIGIR's "robust investigative capacity" to pursue allegations of contractor waste, fraud and abuse.<sup>10</sup> SIGIR reported that, since 2003, its investigations have resulted in at least 35 convictions stemming from criminal misconduct committed during the US reconstruction program; 13 of those convictions were obtained just in the last year.<sup>11</sup>

At the Hearing, IG Bowen confirmed that, with the assistance of the Criminal Investigation Division of the US Army, he now has 72 active cases.<sup>12</sup> Of those open cases, IG Bowen testified that he anticipates 25-30 new indictments

within the next year. This burgeoning caseload may be attributed, in part, to the ongoing two-year joint investigative audit effort (where the SIGIR office reviews billing statements, questionable payments and other indicators of fraud). SIGIR IGs (as well as Special Inspector General for Afghanistan Reconstruction (SIGAR) IGs) have considerable resources to carry out their investigations. Recently, they were given the authority to issue subpoenas for information and documents, administer oaths for taking testimony, and have ready access to agency heads and direct access to all records and information of the agencies.<sup>13</sup>

US law enforcement investigations in Afghanistan and Iraq have led to the prosecution of both contracting companies and their employees. For instance, on August 21, 2008, six individuals and two government contracting companies were indicted for their participation in a vast bribery scheme. An Army Major who served at the Bagram Airfield in Afghanistan (BAF) and an Air Force Technical Sergeant/contracting officer at BAF were two of the defendants charged. These two men were indicted for receiving bribes in exchange for steering BAF contracts to provide cement bunkers and barriers, as well as asphalt paving services, to allegedly corrupt contractors.

The four men (along with their respective companies) who allegedly paid the bribes were also indicted; and on August 25, 2008, those men were arrested as they entered the United States at O'Hare Airport in Chicago. The investigation is ongoing. In another case, Eagle Global Logistics (EGL), a global transportation and information services company, paid \$750,000 in August 2008 to settle the civil allegations that its employees provided gratuities to KBR employees responsible for overseeing EGL's subcontract with the Army for support of military operations in Iraq.

## Mandatory Disclosure Rule

### Imposing Reporting Obligations to Increase Referrals of Illicit Conduct to the Government

At the Hearing, Department of Defense Inspector General Gimble confirmed the recent success of SIGIR's investigations.<sup>14</sup> IG Gimble predicted that the Mandatory Disclosure Rule, which was issued on November 12, 2008, will lead to "[g]reater revelations of misconduct" among government contractors and "cause a significant workload increase for investigators and prosecutors."<sup>15</sup>

The Mandatory Disclosure Rule amended the Federal Acquisition Regulation (FAR) to establish mandatory disclosure requirements for certain violations of federal criminal law and for violations of the civil False Claims Act.<sup>16</sup> Generally, the Rule requires a federal contractor or subcontractor to timely disclose to the relevant agency's Office of Inspector General and/or the Contracting Officer whenever they have "credible evidence" of such violations, or potential violations.<sup>17</sup> A failure to timely disclose these violations (in addition to a failure to disclose "significant overpayments") could lead to the contractor's suspension or debarment, or the imposition of criminal sanctions.<sup>18</sup> In addition, this Rule obligates government contractors to establish a business ethics awareness and compliance program, with minimum requirements for an internal control system.

## National Procurement Fraud Task Force

### Coordination and Cooperation with Federal Law Enforcement Agencies

The investigating components of the National Procurement Fraud Task Force have been very active in referring cases of contract fraud to other

agencies. The Task Force was originally created in 2006 to promote the early detection, prevention and prosecution of procurement and grant fraud associated with increased contracting activity for national security and other government programs. In essence, this group is a partnership of more than 35 investigative and law enforcement agencies, in an effort to allocate resources effectively in procurement fraud cases. The Task Force works hand-in-hand with Office of Inspector General special agents who have the authority to serve subpoenas, seek and execute arrest warrants, make arrests and carry firearms.

Since their inception, the Task Force has tallied more than 400 civil and criminal procurement fraud cases with more than 300 of these cases resulting in criminal convictions.<sup>19</sup> The Department of Justice and the United States Attorney's Offices are responsible for prosecuting these cases. The criminal cases include offenses such as false claims, grant fraud, false statements, bid rigging, kickbacks, bribery, false testing, defective pricing and product substitution. The civil procurement fraud cases arise from agency referrals and *qui tam* actions filed under seal pursuant to the False Claims Act. Attorneys from the Criminal Division often work closely with those in the Civil Division to review potential cases, subject to the applicable rules concerning parallel proceedings.

Inspector General Gimble, at the Hearing, highlighted the success and expansive reach of the National Procurement Fraud Task Force.<sup>20</sup> In particular, IG Gimble touted the International Contract Corruption Task Force (ICCTF), an outgrowth of the National Procurement Fraud Task Force, for employing a comprehensive approach to overseeing international corruption and procurement fraud cases.<sup>21</sup> The ICCTF has established a Joint Operations Center (JOC) to serve as the nerve center for the collection and sharing of intelligence concerning

corruption and fraud related to funding for the Global War on Terrorism. The JOC is located in Washington, D.C. and is a target-specific program of the FBI's Public Corruption Unit. The FBI has been playing a key role in this Task Force. FBI Director Robert S. Mueller III has testified that they have "agents on the ground in the Middle East, investigating nearly 60 cases" for this Task Force.<sup>22</sup>

## Conclusion

### Suggested Practices and Future Commission Hearings

Government contractors and their counsels should be ever vigilant in preventing, detecting and remedying any improper procurement activity. In light of the Commission's fact-finding mission and articulated desire to reach out to the contracting community, particular contractors may want to consider:

- when contacted by the Commission, providing them with relevant facts and information so that the Commission's record is complete and accurate, rather than based on flawed assumptions or incomplete information;
- immediately implementing internal controls and investigatory capacity, due to the advent of the Mandatory Disclosure Rule;
- tracking the manner, means and time that the government uses to address the mandatory disclosures, should the contracting community decide to propose modifications to the FAR;
- having their counsel explain to them the milestone, reporting and audit obligations in their government contracts to avoid creating inadvertent red flags that will require or prompt inquiry from the Commission or Federal agencies.

The Commission's next hearing will focus on the Logistics Civil Augmentation Program (LOGCAP), a US Army initiative for peacetime planning for the use of civilian contractors in wartime and other contingencies.<sup>23</sup> The Commission also noted that they will gather testimony from the contractor community in their future inquiries and hearings.<sup>24</sup> Latham & Watkins's White Collar and Government Investigations, and Government Contracts Practice Groups will continue to provide updates on the Commission's future hearings.

\* \* \*

The Latham & Watkins White Collar and Government Investigations Practice Group is comprised of a former Assistant Attorney General and a former Deputy Assistant Attorney General of the Criminal Division for the Department of Justice, a former Chair of the National Procurement Fraud Task Force, and individuals who have testified before the US Congress on numerous occasions regarding government contracting issues.

### Endnotes

<sup>1</sup> *Lessons From the Inspectors General: Improving Wartime Contracting*, Comm'n on Wartime Contracting in Iraq and Afghanistan (Feb. 2, 2009) (statement of Sen. McCaskill), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Statement\\_of\\_Sen\\_McCaskill.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Statement_of_Sen_McCaskill.pdf). The Commission is required by statute to submit to Congress an interim report (on March 1, 2009) and a final report (on August 1, 2010), which must include findings, identify lessons learned and include specific recommendations for improvements to be made in a broad range of matters related to contracting.

<sup>2</sup> *Id.*

<sup>3</sup> *Improving Wartime Contracting* (joint statement of Michael Thibault and Grant Green, Co-Chairs, Comm'n on Wartime Contracting in Iraq and Afghanistan), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Joint\\_Statement\\_MichaelThibault\\_GrantGreen.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Joint_Statement_MichaelThibault_GrantGreen.pdf).

- <sup>4</sup> National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 841, 122 Stat. 3.
- <sup>5</sup> *Joint statement of Michael Thibault and Grant Green, supra* note 3.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Oversight of Wartime Contracting in Iraq and Afghanistan*, Comm'n on Wartime Contracting in Iraq and Afghanistan (Feb. 2, 2009) (statement of Thomas Gimble, Principal Deputy Inspector General, Dep't of Defense), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony\\_of\\_DOD\\_IG.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony_of_DOD_IG.pdf).
- <sup>8</sup> *Id.*
- <sup>9</sup> Special Inspector General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience* (2009) (SIGIR Report).
- <sup>10</sup> SIGIR Report, ch. 21. SIGIR currently has 26 investigators on staff (including six stationed in Iraq) and will be hiring four additional ground investigators, as a result of its increased caseload.
- <sup>11</sup> *Id.*
- <sup>12</sup> *Oversight of Wartime Contracting in Iraq and Afghanistan*, Comm'n on Wartime Contracting in Iraq and Afghanistan (Feb. 2, 2009) (statement of Stuart Bowen, Special Inspector General for Iraq Reconstruction), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony\\_of\\_SIGIR.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony_of_SIGIR.pdf).
- <sup>13</sup> The National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181), enacted January 28, 2008, provided (a) that SIGIR's audit and investigative oversight covered all spending for assistance for the reconstruction of Iraq, regardless of the fiscal year for which it was appropriated, (b) that SIGIR, in consultation with the Inspectors General to the Department of State, Defense and AID, develop a comprehensive plan for audits relating to Iraq, (c) that SIGIR should terminate only after less than \$250 million in funds appropriated for the reconstruction of Iraq remains to be expended, and (d) that SIGIR should be able to continue to use certain special personnel authorities associated with temporary agencies. NDAA, available at [http://www.sigir.mil/about/pdf/pl\\_110-181.pdf](http://www.sigir.mil/about/pdf/pl_110-181.pdf).
- <sup>14</sup> *Oversight of Wartime Contracting in Iraq and Afghanistan*, Comm'n on Wartime Contracting in Iraq and Afghanistan (Feb. 2, 2009) (statement of Thomas Gimble, Principal Deputy Inspector General, Dep't of Defense), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony\\_of\\_DOD\\_IG.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony_of_DOD_IG.pdf).
- <sup>15</sup> *Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements*, 73 Fed. Reg. 67,064, 67,068 (Nov. 12, 2008); Statement of Thomas Gimble, supra note 14. Acting Inspector General for the Department of State, Harold Geisel, remarked at the Hearing on another important recent legal development: the Status of Forces Agreement (SOFA), which recently came into effect January 1, 2009. This Agreement provides that US citizens who are contractors in Iraq will be subject to the jurisdiction of Iraqi criminal and civil courts. The definitions section of the Agreement adds an important wrinkle: "United States contractors" and "United States contractor employees" mean non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces. In other words, as IG Geisel implied, the SOFA has created the same legal loophole as the 2004 amendment to the Military Extraterritorial Jurisdiction Act: it only covers contractors working "on behalf of" or "under contract with" the United States military. Thus, IG Geisel cautioned that the unresolved status of private security contractors within this Agreement will lead to thorny jurisdictional questions in the future. *Oversight of Wartime Contracting in Iraq and Afghanistan*, Comm'n on Wartime Contracting in Iraq and Afghanistan (Feb. 2, 2009) (statement of Harold Geisel, Acting Inspector General, Dep't of State), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony\\_of\\_State\\_Dept\\_IG.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Testimony_of_State_Dept_IG.pdf).
- <sup>16</sup> 31 U.S.C. §§ 3729-3733.
- <sup>17</sup> *Disclosure Requirements, supra* note 15. There is no set time period for what constitutes timely reporting, although timeliness is generally measured from the date of determination of credible evidence.

<sup>18</sup> *Id.* The term “overpayment” is not defined and could include innocuous situations where a contract claim is in dispute.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Statement of Thomas Gimble, supra* note 14.

<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> *FBI Priorities, Changes, and Challenges: Hearing Before the H. Judiciary Comm.*, 110th Cong. (2008) (statement of Robert S. Mueller, III, Director, FBI), available at <http://www.fbi.gov/congress/congress08/mueller042308.htm>.

<sup>23</sup> *Improving Wartime Contracting* (statement of Charles Tiefer, Professor, University of Baltimore Law School), available at [http://www.wartimecontracting.gov/download/documents/hearings/20090202/Statement\\_of\\_Commissioner\\_Charles\\_Tiefer.pdf](http://www.wartimecontracting.gov/download/documents/hearings/20090202/Statement_of_Commissioner_Charles_Tiefer.pdf). Recently the LOGCAP Working Group (which takes its name from the 10-year contract awarded to KBR, Inc. in 2001 for servicing task orders issued by the US Army to support Operation Iraqi freedom) brought criminal charges against 11 individuals for fraud against the United States, bribery, kickbacks associated with Iraq reconstruction efforts and military operations in Kuwait. The sentences resulting from convictions on these charges have ranged from 12-51 months imprisonment, and restitution and fines totaling almost \$800,000 have been imposed. For more information about these cases, see Nat'l Procurement Fraud Task Force, *Progress Report* at 19-20 (Dec. 2008), available at [http://www.usdoj.gov/criminal/npftf/resource/Dec08progress\\_report.pdf](http://www.usdoj.gov/criminal/npftf/resource/Dec08progress_report.pdf).

<sup>24</sup> *Joint Statement of Michael Thibault and Grant Green, supra* note 3.



If you have any questions about this *Client Alert*, please contact one of the authors listed below:

**Barry M. Sabin**  
Washington, D.C.

**Donald M. Remy**  
Washington, D.C.

**Maria A. Fehretdinov**  
Washington, D.C.

Or any of the following attorneys listed to the right.

Office locations:

**Abu Dhabi**  
**Barcelona**  
**Brussels**  
**Chicago**  
**Doha**  
**Dubai**  
**Frankfurt**  
**Hamburg**  
**Hong Kong**  
**London**  
**Los Angeles**  
**Madrid**  
**Milan**  
**Moscow**  
**Munich**  
**New Jersey**  
**New York**  
**Northern Virginia**  
**Orange County**  
**Paris**  
**Rome**  
**San Diego**  
**San Francisco**  
**Shanghai**  
**Silicon Valley**  
**Singapore**  
**Tokyo**  
**Washington, D.C.**

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorneys listed below or the attorney whom you normally consult. A complete list of our *Client Alerts* can be found on our Web site at [www.lw.com](http://www.lw.com).

If you wish to update your contact details or customize the information you receive from Latham & Watkins, please visit [www.lw.com/LathamMail.aspx](http://www.lw.com/LathamMail.aspx) to subscribe to our global client mailings program.

**Abu Dhabi**

Bryant B. Edwards  
+971.2.672.5002

**Barcelona**

José Luis Blanco  
+34.93.545.5000

**Brussels**

Jean Paul Poitras  
Howard Rosenblatt  
+32.2.788.60.00

**Chicago**

Sean M. Berkowitz  
Zachary T. Fardon  
Kevin A. Russell  
+1.312.876.7700

**Doha**

Bryant B. Edwards  
+974.452.8322

**Dubai**

Bryant B. Edwards  
+971.4.704.6300

**Frankfurt**

Bernd-Wilhelm Schmitz  
+49.69.6062.6000

**Hamburg**

Ulrich Börger  
+49.40.4140.30

**Hong Kong**

Joseph A. Bevash  
+852.2522.7886

**London**

John A. Hull  
+44.20.7710.1000

**Los Angeles**

Manny A. Abascal  
David J. Schindler  
+1.213.485.1234

**Madrid**

José Luis Blanco  
+34.91.791.5000

**Milan**

Fabio Coppola  
+39.02.3046.2000

**Moscow**

Mark M. Banovich  
+7.495.785.1234

**Munich**

Claudia Heins  
+49.89.2080.3.8000

**New Jersey**

Alan E. Kraus  
+1.973.639.1234

**New York**

James E. Brandt  
David M. Brodsky  
Noreen A. Kelly-Najah  
Richard D. Owens  
+1.212.906.1200

**Northern Virginia**

Roger S. Goldman  
Abid R. Qureshi  
+1.703.456.1000

**Orange County**

Jon D. Anderson  
+1.714.540.1235

**Paris**

Christophe Clarenc  
Patrick Dunaud  
+33.1.40.62.20.00

**Rome**

Fabio Coppola  
+39.06.9895.6700

**San Diego**

Katherine A. Lauer  
+1.619.236.1234

**San Francisco**

Steven M. Bauer  
Robert E. Sims  
+1.415.391.0600

**Shanghai**

Rowland Cheng  
+86.21.6101.6000

**Silicon Valley**

Patrick E. Gibbs  
Catherine E. Palmer  
+1.650.328.4600

**Singapore**

Mark A. Nelson  
+65.6536.1161

**Tokyo**

Hisao Hirose  
+81.3.6212.7800

**Washington, D.C.**

Alice S. Fisher  
Roger S. Goldman  
Douglas N. Greenburg  
David R. Hazelton  
Donald M. Remy  
Barry M. Sabin  
Eric S. Volkman  
+1.202.637.2200