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Analysis

Contractors Seek Gov't Guidance Amid Afghanistan Chaos

By [Daniel Wilson](#)



Law360 (August 18, 2021, 9:31 PM EDT) -- The chaos in Afghanistan amid the U.S. exit has left contractors scrambling for guidance from the government on how to ensure the safety and security of their workers and secure visas for their local employees and subcontractors.

While President Joe Biden initially set a Sept. 11 deadline for withdrawal of U.S. forces from the country and then moved the date up to the end of August, the Taliban's **recent march** into the capital Kabul has effectively moved up the already-tight deadline and created a dangerous situation for those trying to leave the country.

It has also left U.S. contractors unsure of exactly what they can do to help support that withdrawal, including how they can help secure immigrant visas or refugee status for as many of their local workers and partners as possible, said Stephanie Kostro, executive vice president for policy at contractor industry group the Professional Services Council.

"We've been in Afghanistan for nearly 20 years. A lot of personal relationships have been formed, and there are people here in the states getting frantic phone calls and text messages, and people feeling a bit helpless in terms of where they can turn to help U.S. citizens, to help third-country nationals, to help Afghans," she said. "It's horrifying, and people are doing all they can, but a little bit more guidance from the U.S. government would be welcome."

The government has provided more flexibility recently in the **Special Immigrant Visa** program, which is open to Afghans who worked to support the U.S. military or government and their families, by reducing the requirement for "faithful and valuable service" from two years to one year, according to Kostro.

But contractors and industry groups want the government to "open the aperture" more on the SIV program and maximize flexibility for eligibility, particularly for qualifying subcontractors, vendors and those who are working on deals funded by government grants, Kostro said.

The SIV program doesn't currently cover those who did work funded by a grant or cooperative agreement, nor those employed by a contractor for the International Security Assistance Force rather than the U.S. directly, even if they worked with U.S. troops.

And although subcontractor workers may in theory be eligible for a SIV, proving that eligibility may be difficult. Prime contractors typically don't have employment records for employees of those subcontractors, some of which may no longer exist, and key people who could have attested to workers meeting the service requirements for the SIV program may have retired or died, Kostro said.

While contractors' immediate focus has understandably been on protecting and evacuating their employees, they will also eventually have to square up their contractual obligations, and even in a chaotic environment, it is important that they document what they are doing in as much detail as possible, said [Wiley Rein LLP](#) partner Rick O'Keefe.

Recent overseas contingency contracts generally won't contain robust war risk clauses, so the standard when responding to situations like the chaos in Afghanistan will instead be whether the contractor acted in a "reasonable manner," which is best demonstrated through explanatory documentation that includes a clear rationale, according to O'Keefe.

"To the extent that you can document: 'Hey, this is what I did on this occasion, and here's why I did it. Here are the things that influenced us to do this thing at this time and in this place.' When you have that, you maximize your chances of being able to justify your actions in a way that will improve your financial position and position vis a vis any investigations," he said.

While that documentation should be as timely and extensive as possible, any documentation, such as a report filled out once safe after evacuation, is better than none, O'Keefe said.

He cited as an example a 2009 Armed Services Board of Contract Appeals decision in which he had served as counsel for [BearingPoint Inc.](#), which had appealed the denial of costs stemming from a [U.S. Agency for International Development](#) contract during the Iraq War. The board found in that case that documentation to support a cost claim did not necessarily need to be contemporaneous nor presented in "nice neat little files."

Contractors' documents detailing their work in Afghanistan and evacuation efforts, including any related instructions from the government and the level of military force protection that was available, could also be relevant in addressing potential wrongful death and injury lawsuits, said Lisa Himes, of counsel at [Rogers Joseph O'Donnell PC](#).

"Whatever you can get in writing and whatever you can get where [you can show] the troops that are there are providing the direction to these contractors, the better these contractors will be down the road in mitigating any kind of tort suit," said Himes, who has extensive experience representing federal contractors in tort cases stemming from overseas combat and contingency operations.

It's unclear exactly what approach agencies will take when eventually closing out Afghanistan contracts, but they may find it difficult to play hardball with contractors, said Dov Zakheim, senior fellow at research and analysis nonprofit CNA and a former [U.S. Department of Defense](#) comptroller and coordinator of the DOD's civilian programs in Afghanistan.

The situation in Afghanistan is outside contractors' control, so contracts will need to be terminated for convenience, and the government will have the termination liability, he said.

"I don't know how the government gets out of that," Zakheim said. "At the end of the day, the government told the contractors, 'Get out.' The contractors didn't tell the government we want to get out, the contractors were told to get out. And it was obvious why they were told."

But the DOD, responsible for the bulk of U.S. contracts in Afghanistan, does have some latitude in specifically how it approaches a contractual settlement, and it "should do so at a reasonable minimum, rather than giving the contractors the candy store," said Charles Tiefer, a professor at the University of Baltimore School of Law.

The government may also look to claw back unallowable costs and alleged fraud through audits and investigations, and there may also be broader change down the road for contracting in similar contingency situations once post mortems of the U.S. time in Afghanistan are completed and reviewed by agencies and lawmakers, experts said.

There are already a host of related recommendations that were made by the [Special Inspector General for Afghanistan Reconstruction](#) and by the Commission on Wartime Contracting in Iraq and Afghanistan. Both CNA's Zakheim and professor Tiefer were members of the commission, which was formed by Congress to investigate allegations of misappropriation of federal funding in Iraq and Afghanistan.

The group released its final report in September 2011, saying that "poor planning, management, and oversight of contracts [had] led to massive waste" in Iraq and Afghanistan of at least \$31 billion to that point.

The commission made 15 related recommendations, including "deployable cadres" of acquisition staff for oversight during contingency operations, strengthening enforcement tools and increasing competition for contingency contracts, but "precious little" has changed since, according to Zakheim.

"I think you'll find that very few of them were actually implemented, and then you'll have to ask yourself: This is 10 years later; what is the price of not implementing?" he said. "The price in lives, the price in America's credibility, the price in effectiveness, the price in what's happened to Afghanistan?"

Whatever changes may be coming to contingency contracting in the future, Afghanistan contractors' most immediate concern as they work to secure the safety of their workers is a lack of guidance from federal agencies on whom to contact for unaddressed questions, according to Kostro of the Professional Services Council.

Those key questions include whether contractors can support evacuation efforts with their own airlifts and how people not immediately able to make it to the airport in Kabul will know when to evacuate and what they should do in the meantime, she said.

"We've been having periodic video teleconferences and phone calls with elements of the U.S. government. Some agencies have done a great job in highlighting individuals within their agencies to field questions from contractors. Others have not provided that sort of clarity of guidance," Kostro said. "[There's] a lot of unanswered questions, and it would be very useful to have useful points of contact within each agency."

--Editing by Jill Coffey and Emily Kokoll.

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Daniel Wilson

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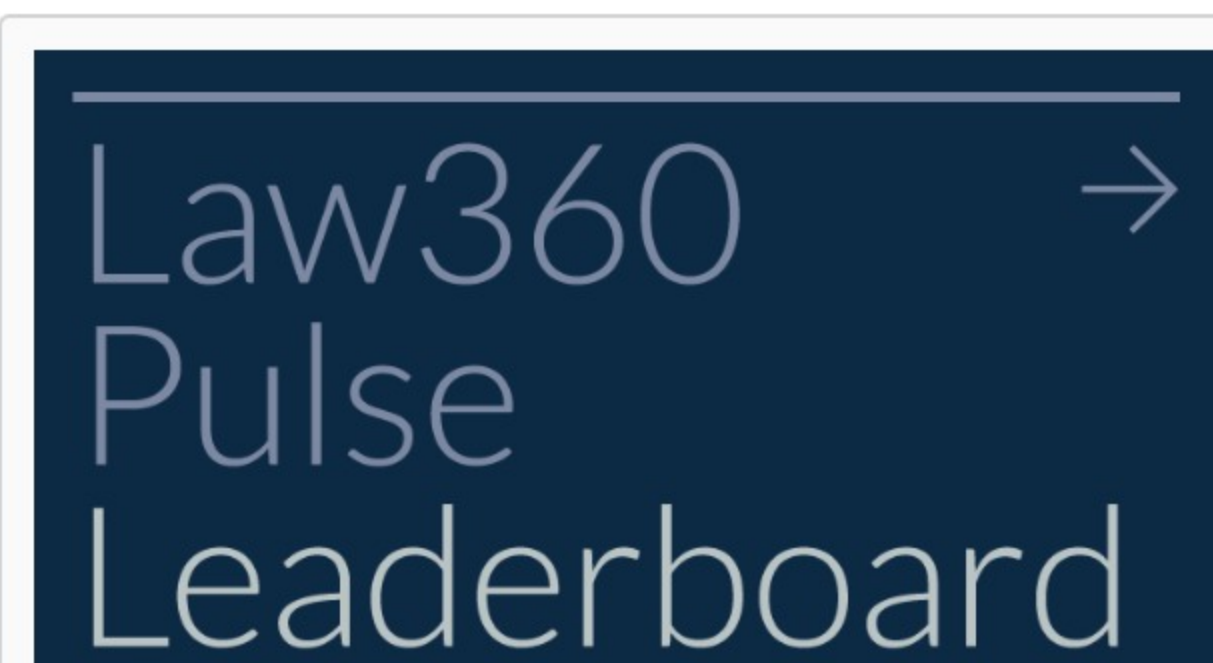
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