Special Considerations in Overseas Military Contingency Real Estate Transactions*

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I. Introduction

Securing real estate interests for military projects in a dynamic, overseas contingency environment can pose significant challenges for military commands. The web of potential pitfalls for real estate in contingency settings includes the potential for fraud, waste and abuse, for claims or challenges from third parties if property rights are not carefully secured and costs logically calculated, and even for the commission of crimes by unwitting federal employees under certain circumstances. Commands responsible for acquiring property interests for military projects must ensure legal reviews are provided prior to securing property rights and moving forward with projects in overseas contingency locations. And the military attorneys advising real estate contracting officers must be cognizant of the shifting legal landscape – including operational changes and an evolving mission – that governs the actions they are taking.

II. The Army Corps of Engineers Real Estate Program

Although Congress does not provide authority for federal agencies to purchase land absent specific authority,[1] the military services have broad statutory authority to acquire property interests when necessary to carry out their missions.[2] The Department of Defense has

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* The views expressed herein are those of the authors and do not necessarily reflect the official position of the United States Department of Defense, the Department of the Army, or the U.S. Army Corps of Engineers.

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1 41 U.S.C. § 6301(c).

2 *See, e.g.,* 10 U.S.C. § 2663, which provides limited general authority to each military department to acquire real estate using various methods, including condemnation and acquisition. The statutory limits are refined by DoD

established policies with respect to how and when land can be acquired in fee simple, leased, or withdrawn for military purposes from public domain.[3] In foreign countries, the military services are authorized to obtain leases for up to 10 years "relating to structures that are needed for military purposes other than for military family housing."[4] The Department of Defense has divided the responsibility for engineering services, including real estate services, by global region among the service military construction activities including the Army Corps of Engineers (USACE), the Naval Facilities Engineering Command (NAVFAC), and the Air Force Civil Engineer Center (AFCEC).[5] Under the division of responsibilities, USACE is responsible for real estate activities in contingency or potential contingency areas such as Afghanistan, Iraq and the Middle East, South and Central America, and Sub-Sahara Africa while NAVFAC is responsible for such areas as Somalia and North Africa, Southeast Asia, and areas of the Pacific Ocean.[6]

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policy, which requires that acquisitions of land of more than 1,000 acres, or which has an estimated purchase price or annual lease value of $1 million or more, be approved by the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)). *Dep't of Defense, DoD Instruction 4165.71, Real Property Acquisition*, para. 6.1 (Jan. 6, 2005) [hereinafter DoDI 4165.71]. With respect to military construction activities in some circumstances, the services may also enter into agreements with private contractors for the "lease-purchase" of facilities for a term not to exceed 32 years, with title vesting in the United States at the end of the term. 10 U.S.C. § 2812.

[3] See DoDI 4165.71, para. 6.6. For a discussion of authorities pertaining to withdrawn public lands, which is beyond the scope of this article, *see* William A. Wilcox, Jr. & Andrew J. Vliet III, *The Engle Act and Military Land Withdrawals: A Blueprint for Inter-Agency Cooperation*, 32 Land & Water L. Rev. 461 (1997).

[4] 10 U.S.C. § 2675. The time period may be for up to 15 years in Korea. For Army activities the lease term is limited to five years. *Dep't of Army, Army Regulation 405-10, Acquisition of Real Property and Interests Therein*, para. 3-3 (1970) [hereinafter AR 405-10]. By contrast, if construction, alteration, or improvement of facilities is proposed, Air Force policy requires the lease term be for "the maximum term allowed" under the statute. *Dep't of Air Force, Air Force Instruction 32-9001, Acquisition of Real Property*, para 6.12 (Sept. 28, 2017) [hereinafter AFI 32-9001]. For authority respecting military housing, see 10 U.S.C. § 2828.

[5] *See*, *Dep't of Defense, Joint Publication 3-34, Joint Engineer Operations*, ch. I, para. 5.h and Appendix D (Jan. 6, 2016) [hereinafter Joint Pub. 3-34].

[6] *Id*., at App. D, Figure D-1.

Within the Army, the Chief of Engineers has staff responsibility over real estate matters overseas.[7] USACE is charged with initiating and maintaining records necessary to administer the real estate program, providing technical advice and assistance to overseas commanders, ensuring that overseas real estate activities are conducted in compliance with established rules, and tracking overseas real estate information.[8] USACE real estate activities are divided into geographic regions, with USACE major subordinate commands holding responsibility for real estate activities within those regions.[9] Under USACE regulations, real estate instruments must be "documented and signed by persons having statutory or actual delegated authority to bind the Government for the action being made."[10] If a Status of Forces Agreement (SOFA), treaty or use agreement has been established with a host nation, terms for land acquired under the USACE real estate program must not conflict with such SOFA, or other binding international agreement.[11] In implementing the real estate program on behalf of another agency, such as the Air Force, USACE generally relies on the process authorities of the agency requesting the real estate work.[12] Under USACE guidance, "[a]s a general matter, USACE will defer to the other agency's interpretation or implementation of its legal authorities so long as the reviewing USACE counsel agrees such an interpretation is reasonable. However, this does not prevent respective counsels from discussing issues or elevating the issue to its chain of command."[13] If

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7 AR 405-10, para. 3-2. *See, also, Dep't of Army, Army Regulation 10-87, Army Commands, Army Service Component Commands, and Direct Reporting Units,* ch.18.
8 *Id.*
9 USACE Transatlantic Division, for instance, is responsible for real estate activities within the United States Central Command (CENTCOM) Area of Responsibility (AOR). *See Dep't of Army, U.S. Army Corps of Engineers, Operations Order 2009-07 (Establish Transatlantic Division (TAD)),* Annex K, Jan. 26, 2008.
10 *U.S. Army Corps of Engineers, Engineer Regulation 405-3-10, Real Estate Planning – Military*, para. 1-3.a (Oct. 31, 2013) [hereinafter ER 405-3-10].
11 *Id.,* at para. 1-2.
12 For Air Force policy regarding real estate acquisitions, see AFI 32-9001. Note, USACE performs the real estate function on a reimbursable basis in accordance with the Economy Act, 38 U.S.C. § 701, and must have independent authority to take any action.
13 ER 405-3-10*,* at para 1-4.

another agency requesting real estate work has no policy or procedure to acquire real estate, then USACE real estate contracting officers may rely on USACE regulations "to fill in a void where the other agency has no policy or procedure that covers the particular issue, unless contrary to the other agency's enabling authority."[14]

To carry out its land acquisition mission, USACE must comply with any clearances, or approvals, required by the Department of Defense.[15] Requirements must be validated through appropriate command channels.[16] For Army projects, USACE may not proceed to acquire real estate interests until legislative authorization is identified, appropriations are available, requirements have been validated by the appropriate approving official, and any necessary Congressional clearances have been obtained.[17] Real estate acquisition projects for the benefit of other departments or agencies must follow their policies and requirements.[18] Prior to soliciting offers and negotiating with landholders, real estate work may entail research of tract ownership data, legal descriptions and mapping, title evidence, and individual tract appraisals.[19]

III. Potential for Fraud, Waste and Abuse

As with many activities in contingency environments, there is a heightened potential for fraud, waste, and abuse with respect to land acquisitions. Acquisitions of real estate interests have been identified as a challenge during contingency deployments.[20] Issues identified in past deployments have included rapid turnover of real estate officers in contingency areas, which can

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[14] *Id.*
[15] *Id*, at para. 2-19.
[16] *Id*., at para. 2-19.b.
[17] *Id*., at para. 2-20.
[18] *Id.*
[19] *Id*., at para. 2-24.
[20] *See, e.g*., *Int'l & Operational Law Dep't, U.S. Army Judge Advoc. Gen. Sch.*, *Operational Law Handbook*, 16, para. IV.g, 263 (2017) [hereinafter *OPLAW Handbook*].

make building relationships in a hostile theater challenging.[21] Army legal commentators have suggested that "[c]oordination and regular communication between JAs and Corps of Engineers (COE) officers after deployment is essential."[22] Under time pressures inherent in contingency operations, there may be a tendency to short circuit established processes with respect to lease valuation or avoid required clearances, including legal review.

The Army claims policy assigns responsibility for real estate claims to USACE.[23] USACE Transatlantic Division has addressed claims arising from Army activities as long as a decade before they were formally raised. In reviewing claims based on historical activities, we have observed that thorough real estate documentation is key to addressing these challenging cases. The veracity of such claims must be carefully scrutinized. Going forward, it is important that real estate officers proceed according to established USACE procedures, including accurate identification of property owners, accurate valuation of properties, close coordination with requesting agencies and their counsel, and a legal review by USACE real estate attorneys.[24] The USACE real estate claims regulation emphasizes that, "[w]here feasible, efforts should be made to minimize the number of requests for money present."[25] The drive to limit claims for use and occupancy by entering into leases with purported landowners, however, can lead to the execution of leases with, and payment of substantial sums of money to, people whose land ownership is legally questionable. Legal review by USACE real estate attorneys is key to ensure that executed instruments comport with established USACE and U.S. government laws and policies and that the government's potential liability is limited to the extent practicable.

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[21] *Id.*, at 20, para. J, 315-16.
[22] *Id.*
[23] *Dep't of Army, Army Reg*. 27-20, Claims, para. 2-15.m (Feb. 8, 2008) [hereinafter AR 27-20].
[24] *See, e.g*., ER 405-3-10, para 1-4.
[25] *U.S. Army Corps of Engineers, Engineer Reg. 405-1-21, Real Estate Claims and Damages*, para 2-1.a (Aug. 14, 2017) [hereinafter ER 405-1-21]. As an example, the regulation suggests that "prompt negotiation of a lease will often avoid the subsequent submission of a claim for use and occupancy of real property." *Id.*

The Army claims regulation notes that in contingency operations "there is a large potential for overlap between contractual property damage claims and noncombatant activity/maneuver claims."[26] Addressing claims arising from real estate issues, Army legal commentators confirm that the claims are normally based in contract. However, they note that not all claims for damage or use of real estate are based on contract.[27] Some claims may be based on tort law and can be considered under the authority of the Foreign Claims Act (FCA).[28] Under the FCA, meritorious claims for property losses, injury, or death caused by U.S. forces may be settled in an amount not more than $100,000, "[t]o promote and maintain friendly relations" with a host nation.[29] Such claims are not compensable if they arose from several scenerios such as: "action by an enemy or … from an act of armed forces of the United States in combat,"[30] contractual matters, certain domestic obligations, and claims that are not in the best interest of the United States to pay or the payment of which would be against public policy.[31]

IV. Potential Fiscal Law Issues

Failure to secure real estate properly for a military project in a contingency environment could arguably run afoul of fiscal law constraints under certain circumstances. Generally, appropriated funds should not be used to make permanent improvements to property not owned by the Government. However, exceptions to this general tenet can be justified under appropriate circumstances. Though it is arguable whether the test would apply to projects in contingency environments overseas, the Comptroller General's decision in *Demolition of the Existing*

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26 AR 27-20, para. 2-15.m. See also, ER 405-1-21, para. 2-1.c.
27 OPLAW Handbook, at 20, para. J.1, 315.
28 *Id.*
29 10 U.S.C. § 2734.
30 10 U.S.C. § 2734(b)(3).
31 *Dep't of Army, Army Reg. 27-20, Claims*, para 10-4 (Feb. 8, 2008).

LaGuardia Air Traffic Control Tower,[32] may be instructive. There, the Comptroller General outlined a four-part test to determine when certain appropriated funds may be expended for permanent alterations to property not owned by the government: (1) the improvements are incidental to and essential for the accomplishment of the purpose of the appropriation; (2) the cost of the improvement is in reasonable proportion to the overall cost of the contract price; (3) the improvements are used for the principal benefit of the government; and (4) the interests of the government in the improvements are protected.[33]

If the government fails to secure real property that addresses the fourth prong of the *LaGuardia* test (i.e., the improvements the government builds are *legally* protected by the proper acquisition of property), then there may be an argument that the government's expenditure on military improvements (i.e., construction) is improper. However, in contingency situations, where the United States military's hold on property interests in a foreign nation may be precarious depending on the United States' overall relationship with the host nation, it is questionable whether this test would apply directly to a real estate acquisition. The Comptroller General, for instance, noting that the concept of 'operational control' necessary to support military construction has not been clearly defined, also opined that the term "should not be construed so narrowly as to exclude overseas facilities over which the U.S. military may, by formal or informal agreement with a foreign government, exercise a large measure of control."[34] However, legal advisors should ensure that the United States is put in the best position possible to protect the government's investment under any given circumstances. This may include taking

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[32] B-286457 (Jan. 28, 2001).

[33] The principle was first cited in *To the Secretary of Health, Education and Welfare*, a case concerning expenditure of funds by the Public Health Service for research at the San Diego Zoo, B-141839 (March 12, 1963). *See also*, *Matter of: Federal Aviation Administration – Permanent Improvements to a Leasehold*, B-239520, 69 Comp. Gen. 163 (Aug. 16, 1990); and *Matter of: Department of the Air Force – Purchase of Decals for Installation on Public Utility Water Tower*, B-301367, 2003 U.S. Comp. Gen. LEXIS 230 (Oct. 23, 2003).

[34] *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

appropriate actions to ensure property interests are secured to the greatest extent possible, which could include using a combination of international agreements and land use agreements.[35] USACE counsel and real estate officials have developed a template for real estate documents that can be used, as appropriate, to secure real estate interests under such circumstances.

V. Potential Criminal Implications

Under some circumstances in overseas contingency environments, host nation personnel may attempt to exploit the U.S. government's requirement for use of real estate for personal benefit. In several recent overseas transactions, for instance, it became apparent that the property interest the United States was looking to acquire, which had been promised by the host nation, was subsequently leased by the host nation security forces to a third party corporation, which was controlled by senior officers of the nation's security forces, who may have had a financial interest in the corporation's activities. In essence, senior officers appeared to be contracting with themselves to profit from leases of properties their government had already promised to the United States. Initially, the host nation security forces were looking to USACE to lease directly with the third party, in contravention of agreements made with the host nation's central government. Recognizing the lease transaction to a third party contractor as a way of undercutting the host nation's agreements with the United States, and in light of representations by U.S. government personnel as to the host nation security forces' potentially corrupt reasons for the third-party corporation's involvement, USACE real estate counsel became concerned that USACE civilian employees could potentially face criminal liability if they were to further the objectives of the foreign national officers.

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[35] The Army Corps' Transatlantic Division Real Estate Directorate has employed no cost Land Use Agreements to complement international agreements that apply at certain CENTCOM locations.

In the above scenario, the United States was contemplating entering into leases and procurement contracts on behalf of the United States, which would have been executed by USACE employees with appropriate warrants. The Foreign Corrupt Practices Act,[36] prohibits, in pertinent part, any individual who is a citizen, national, or resident of the United States from making use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to "(1) any foreign official for purposes of: (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such [individuals] in obtaining or retaining business for or with, or directing business to, any person …."[37] The statute goes on to prohibit "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official … for the purposes of … influencing any act or decision of such foreign official" from influencing such official to obtain or retain business or direct business to a particular individual.[38]

However unlikely in a scenario involving U.S. government employees carrying out their duties in good faith to secure access to military facilities, successful prosecutions under the

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[36] 15 U.S.C. § 78dd-2.
[37] 15 U.S.C. § 78dd-2(a)(1).
[38] 15 U.S.C. § 78dd-2(a)(3).

FCPA have been based upon payments made or benefits conferred through agents and other intermediaries.[39] Thus, the fact that in the contemplated dealings, USACE would make payments to the third party shell company, and not to the host nation officials believed to have financial interests in the subject property, would not shield USACE employees from criminal responsibility for such payments in the event that they knew that any portion of the payments were to be offered, given, or promised to host nation officials illegally. Moreover, the *knowledge of the intended use of money or a thing of value* element of the FCPA can be satisfied by conscious avoidance, or failure to conduct due diligence when on notice of likelihood of corruption in a transaction, as opposed to actual knowledge.[40] Thus, a U.S. government employee who is on notice that payments to a business entity may be part of a corrupt scheme involving officials of a foreign nation, who fails to ascertain whether that is case, may be found to be "knowing" for purposes of satisfying the knowledge element of the FCPA's criminal prohibition of indirect payments.

The Travel Act[41] is another potential criminal trap that might apply under certain circumstances. Under the Act, anyone who travels in interstate or foreign commerce, or uses the mail or any facility in interstate or foreign commerce, with "intent to distribute the proceeds of any unlawful activity or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform such act, shall be fined, imprisoned not more than five years, or

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[39] *See, e.g.*, Criminal Indictment, *United States v. Tesler, et al.*, No. 09-CR-098 (S.D. Tex. Feb. 17, 2009); Judgment, *United States v. Tesler, et al.*, No. 09-CR-098 (S.D. Tex. Feb. 28, 2012); *see generally A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Department of Justice and Securities and Exchange Commission, Nov. 4, 2012, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
[40] *United States v. Kozeny*, 667 F. 3d 122, 132-33 (2nd Cir. 2011), cert. denied, 569 U.S. 917.
[41] 18 U.S.C. § 1952.

both."[42] For purposes of the Travel Act, "unlawful activity" is defined to include bribery in violation of the laws of the State in which committed or of the United States. In practice, this can mean that participation in the use of a facility of interstate commerce, such as a bank transfer or telephone line, in furtherance of an act of bribery that would be illegal under any state law if committed within the state where such facility of interstate commerce was used or any state that such facility passes through, is a federal crime.[43] This expands the scope of corrupt conduct that is prohibited by federal law, for example, to include bribery of employees of private organizations because the laws of many U.S. states, including important states in finance, information technology, and corporate registration (e.g., New York, California, and Delaware) prohibit purely commercial bribery.[44] Virginia's bribery statute (applicable to those departing the United States through Dulles International Airport), for instance, provides: "A person shall be guilty of bribery … [i]f he offers, confers or agrees to confer upon another … any pecuniary benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant …."[45]

Various foreign countries have joined the U.S. in enforcing laws against bribery of foreign public officials. Consistent with the direction of the several multilateral treaties, the U.S. and other countries have successfully prosecuted numerous cases of foreign bribery following cooperative multinational criminal investigations, generally with American leadership.[46] By

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[42] *Id.*
[43] *See* Criminal Indictment, *United States v. Jeffrey Webb, et al.*, 15-CR-0252, (E.D.N.Y. May 20, 2015) (alleged conspirators in schemes to bribe Fédération Internationale de Football Association (FIFA) officials, and the bribed officials of that private organization, were charged with violations of the Travel Act because of acts involving the use of New York Bank Accounts, as well as communications and travel from the State of New York, whose law prohibits payment and receipt of commercial bribes).
[44] *See, e.g.*, *id.*
[45] Va. Code Ann. § 18.2-447(1).
[46] *See* Doreen Edelman and Matthew Tilghman, *Increasing Coordination and More Widespread Prosecution under Anti-Bribery Laws*, Bloomberg L.R.—Corporate Counsel, Sept. 12, 2011, at 3.

statute, treaty, and the practice of the Department of Justice and the Securities and Exchange Commission, the prohibition on bribery of foreign government officials and action to enforce that prohibition are elements of U.S. foreign policy.[47]

There does not appear to be any rule of law that would immunize a U.S. government employee otherwise acting within his or her lawful authority from criminal responsibility, as opposed to civil liability, for acts in violation of the FCPA or the Travel Act. Indeed, with regard to compliance with criminal laws, federal employees face an additional burden that accompanies their federal employment—the obligation to "endeavor to avoid any actions creating the appearance that they are violating the law…"[48] The FCPA was enacted in the 1970s in response to revelations of large-scale bribery of foreign officials by U.S. companies seeking business opportunities abroad.[49] Some of those revelations were associated with the Watergate investigation.[50] Although foreign bribery by American businesses was the principal target of the Congressional investigations that gave rise to the FCPA, the participation of the U.S. government in foreign bribery—even the perception that the government backed foreign bribery financially or tacitly approved of it—was among the evils that Congress targeted.[51] While there is no apparent history of prosecution of U.S. Government employees for corrupt acts undertaken on behalf of the U.S. Government and not for any personal gain, there is also no reason to believe that their status shields them from prosecution. In addition, payments by the U.S. Government to

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47 While there have been news reports that the current President is interested in limiting enforcement of the FCPA because he believes that it will enhance the competitiveness of American businesses abroad, there is no indication from any branch of Government that public policy has changed with regard to foreign bribery. *See, e.g.*, Kenneth A. Blanco, Remarks prepared for delivery to the American Bar Association Institute on White Collar Crime, Mar. 10, 2017, https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.

48 5 C.F.R. § 2635.101(b)(14).

49 *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 930 (2012).

50 *Id.* at 932-34.

51 See *id.* at 935.

businesses as conduits to foreign officials formed part of the basis for the Congressional concerns that gave rise to the FCPA.[52] In any event, there is clear public policy that payments may not be made to foreign government officials, whether directly or indirectly, to influence their official acts, and there is no apparent reason why this policy would not apply to the U.S. Government itself.

Ultimately, USACE attorneys recommended a comprehensive set of due diligence measures to address and avoid any possible violation of the FCPA by USACE employees. Moreover, USACE avoided any financial participation with the third party corporation that was created and controlled by senior host nation military officials.

VI. Conclusion

As with the conduct of many activities in an overseas contingency environment, properly acquiring and maintaining records of real property can pose challenges. Among other things, there is a heightened potential for fraud, waste and abuse, and complex claims that may result if property rights are not carefully secured and costs logically calculated. There may also be a potential for fiscal law issues if real estate is not properly secured. Finally, in some of the circumstances that may arise in overseas contingency situations, U.S. government personnel must be diligent in researching property and project facts to become aware of potential schemes that might result in real estate instruments that are inconsistent with public policy or even raise the specter of potential criminal liability. Commands must ensure that their real estate requirements are followed and clearances received, real estate professionals must carefully review, evaluate, and maintain records that adhere to proper procedures for entering into real

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[52] *Id.*

estate instruments, and real estate attorneys must ensure that every real estate instrument complies with applicable law and policy.