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Contingency Operations

A Mandatory Reference for ADS Chapter 201

New Edition Date: 09/07/2016
Responsible Office: PPL
File Name: 201maj_090716

Since 2008, Congress has enacted a number of special requirements applicable to agency operations in areas of overseas contingency operations (OCO). While these requirements have been included as part of annual DOD authorization acts, they impose a number of obligations on all agencies participating in contingency operations, including State and USAID. The initial set of requirements, originally enacted in 2008 and subsequently amended over several years, deal primarily with contract data collection and reporting and the use of private security contractors (PSCs) in areas of contingency operations. The remaining requirements, enacted in the 2013 National Defense Authorization Act (NDAA), include requirements for special contract risk assessments and mitigation plans; and for necessity and sustainability assessments with regard to certain capital assistance projects in contingency areas.

For the purposes of triggering most contingency operation requirements, what is a “contingency operation” is defined with reference to 10 U.S.C. 101(a)(13). That section defines a contingency operation as: 1) a military operation which is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military action; or 2) a military operation which results in the call or order to, or retention on, active duty of members of the uniformed services under any provision of law during a war or during a national emergency declared by the President or Congress. Generally USAID receives notice that a contingency operation has been declared or has occurred through State or otherwise through DOD sources or other channels. It should be noted, however, that State has its own process of identifying which countries will be treated as if they were contingency operations (called “critical environments”) which may include countries not meeting the statutory definition above. USAID makes its own determination on whether such additional countries should be treated as contingency operations.

It is important to note that, even where it has been determined that a contingency operation is underway, not all of the requirements associated with contingency operations may be triggered. In some cases, requirements are triggered only if the contingency operation includes or is expected to include combat operations; some only with respect to certain types of projects, such as capital projects in overseas contingency operations and only for projects exceeding certain thresholds; and exceptions to various requirements exist for contingency operations which are expected to be short in duration or which do not exceed certain funding thresholds. While most requirements do not legally affect obligation and expenditure of funds, some do preclude obligation and/or expenditure of funds for certain types of activities until certain actions are completed (e.g., obligation and expenditure of funds for certain capital projects in connection with an OCO are prohibited until a necessity and sustainability assessment is completed). For this reason, it is important for project designers and implementers to consult with GC at the earliest stage in the design and analysis process to make sure all requirements are addressed and met in a timely fashion.

The following is a summary of the principal requirements applicable to programs conducted in areas of contingency operations. While most are focused on the contracting process, some affect project design and other aspects of implementation.

Because of their complexity, early consultation with the responsible RLO or GC is highly recommended.

Requirements Relating to Necessity and Sustainability Assessments for Certain Capital Projects in Areas of Contingency Operations.

Section 1273 of the 2013 NDAA requires that a necessity and sustainability assessment be done for certain “covered” capital (infrastructure) projects in connection with an overseas contingency operation prior to the obligation or expenditure of funds by USAID for that project. Capital projects include projects for the benefit of the host country if 1) the project directly supports building capacity of security forces and has an estimated value of more than \$10 million; 2) any project not included in 1) which is done by State or USAID which is more than \$5 million; or 3) any other project with an estimated value of more than \$2 million.

The following, at a minimum, must be addressed as part of the required assessment, which will be included as part of the PAD for each covered capital project to be funded:

- An estimate of the total cost of the completed project to the United States;
- An estimate of the financial and other requirements necessary for the host government to sustain the project on an annual basis after completion of the project;
- An assessment of whether the host government has the capacity (in both financial and human resources) to maintain and use the project after completion;
- A description of any arrangements for the sustainment of the project following its completion if the host government lacks the capacity (in financial or human resources) to maintain the project;
- An assessment of whether the host government has requested or expressed its need for the project and an explanation of the decision to proceed with the project absent such request or need; and
- An assessment by the Secretary of Defense, where applicable, of the effect of the project on the military mission of the United States in the country concerned.

The sustainability analysis must also include the following:

- For each capital project covered by such report, an evaluation (other than by amount of funds expended) of the effectiveness of such project must include, at a minimum, the following:
 - The stated goals of the project;

- The actions taken to assess and verify whether the project has met the stated goals of the project or is on track to meet such goals when completed; and
 - The current and anticipated levels of involvement of local governments, communities, and individuals in the project.
- For each country or region in which a capital project covered by such report is being carried out, an assessment of the current and anticipated risks of corruption or fraud in connection with such project.

While it is not mandatory to prepare a sustainability analysis at the CDCS level, Missions should consider reviewing some or all of the above issues during the CDCS preparation if the country is in an area of contingency operations. Note that those countries without contingency operations may wish to consider these additional elements of a sustainability analysis as good practice, but it is not mandatory when including any capital activity in a PAD.

The AID Administrator may waive the requirement for completion of an assessment based on a national, diplomatic or humanitarian interest determination and must report such a determination to Congress. USAID is also required to report to Congress on all assessments done under Section 1273 every half fiscal year.

Requirements Relating to Private Security Contractors (PSCs).

The 2008 NDAA, Section 862, as amended, required that DOD, in consultation with State and USAID, prescribe detailed regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a “covered” contract in areas of combat operations. “Covered” contracts include both direct contracts and those entered into by contractors and grantees funded by an agency. In subsequent amendments, the meaning of “contract” was further expanded to include grants, and the coverage of the regulations extended to include subcontracts and subgrants at all levels involving the provision of security services. Consequently, the required regulatory framework essentially applies to the use of all PSCs financed, directly or indirectly, from USG funds.

DOD’s regulations require that detailed rules for the employment of PSCs be prescribed by: 1) commanders of combatant commands (COCOMs) for DOD contracts within their areas of command; and 2) by the responsible Chief of Mission for non-DOD PSCs employed by civilian federal agencies, “consistent with the standards” set forth by the COCOM. PSC instructions have been issued by Embassies for some contingency operation countries (e.g., Iraq). In the absence of any issued instructions, presumably regulations issued by the responsible COCOM, which are sometimes issued in the form of a general or fragmentary order, should be followed to the maximum extent possible.

The DOD regulations exclude from their coverage the use of PSCs in two situations which are particularly relevant to USAID operations: 1) temporary arrangements entered

into by non-DOD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company (local community guards); and 2) an exemption with regard to the employment of PSCs by nonprofit, nongovernmental organizations receiving grants and cooperative agreements in designated areas of significant military operations as agreed upon by State and DOD on an organization-by-organization or area-by-area basis.

These PSC requirements have several implications for the design and implementation of projects which will involve the financing of PSCs in areas of contingency operations, whether directly by USAID or by USAID partners. First, the necessity for, and risks of, using PSCs as part of any project or activity should be carefully considered and limited to manageable levels in order to minimize the risks associated with PSC use. Second, steps should be taken to ensure that partners who will utilize PSCs are capable of adequately managing them and making sure that they adhere to any applicable COM or COCOM guidelines for use of PSCs. Third, projects should be designed to include sufficient resources and mechanisms to ensure proper USAID management and oversight of use of PSCs by USAID and its partners. This has sometimes included the funding and use of contract security coordinators to disseminate embassy PSC guidelines, monitor partner oversight of PSCs, and to review and act upon serious incident reports.

Requirements Relating to Risk Assessment and Mitigation Plans. 2013 NDAA Section 846 requires, not later than 6 months after the commencement or designation of a contingency operation *that includes or is expected to include combat operations*[emphasis added], that an assessment be done of the operational and political risks associated with planned contractor performance of critical functions as part of those operations. Assessments and plans are not required if the operation is expected to last less than 1 year or the amount of obligations for contracts and grants is expected to be less than \$250 million. An assessment/risk benefit plan is required within 60 days whenever an ongoing operation exceeds 1 year or \$250 million. The required content for assessments and plans are detailed in the section. Critical functions are defined as private security services; training of government personnel, including military/security personnel; intelligence/information operations; and any other functions “closely associated” with inherently governmental functions.

Section 846 was intended to compel agencies to do more rigorous and documented assessments of the risks of contracting (and also of programming) in dangerous contingency environments and to consider the findings of such assessments as part of their contract and program decision-making process. Section 846 does not explicitly condition obligation or expenditure of funds on the completion of assessments or mitigation plans, although logically these should be done and considered as part of the project/activity design process and/or before programming and contracting decisions are made.

The completion of section 846 assessments for contingency operation countries is currently being coordinated by OAA. It is expected that these assessments will be updated periodically (State does so on an annual basis) and accordingly project/activity

designers should consult the most recent assessment as part of the design process, particularly with regard to completion of A&A plans.

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