Contracting in Postwar Kuwait

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by Paul F. Wellborn, III*

I. BACKGROUND AND OVERVIEW

Many of the normal rules governing Government of Kuwait ("GOK") procurements were waived in the initial phases of postwar recovery. Contracts were awarded to large firms on a cost-plus basis and certain agency requirements were waived. It is unclear how long this policy will continue in the various areas of Kuwaiti procurement. The bulk of the postwar procurement policy is likely to closely resemble the pre-war contracting procedures discussed below.

II. FORMS OF DOING BUSINESS

Foreign companies doing business in Kuwait must ally themselves with Kuwaiti companies or nationals. This alliance can be formed by either setting up a Kuwaiti company or joint venture with a Kuwaiti partner or by transacting business through a Kuwaiti commercial agent or distributor.¹

A. Kuwaiti Agency Law

The agency relationship is probably the most popular form of business relationship for American companies in postwar Kuwait.² The agency relationship gives United States companies the benefit of a local agent who speaks the language and knows the customs.³ The United States compa-

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3. See infra notes 6-77 and accompanying text.
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Firms also retain control, for the most part, over the company's activities. For companies planning on a short term presence in Kuwait, this relationship is particularly attractive. Nonetheless, agency relationships must be entered into cautiously. Once the agency relationship is established, it may be difficult for the principal to extricate himself without incurring liability to the agent.

The primary sources of agency law in Kuwait are Law Number 68 of 1980 (Commercial Law), Law Number 36 of 1964 (Rules Governing Commercial Agencies) (to the extent that it is not superseded by the 1980 law), and Law Number 37 of 1964 (Law of Public Tenders).

Who Must Have an Agent? Virtually all foreign (non-Kuwaiti) companies doing business in Kuwait must have an agent unless they comply with other business forms permitted under Kuwaiti law. Foreign companies wishing to conduct business in the private sector in Kuwait, wishing to bid on government tenders, or wishing to import goods or materials into Kuwait must all comply with agency requirements. Only doctors, lawyers, engineers, and other such professional consultants are exempt from this requirement, as these classes of professional activities are not considered "commercial acts" under Kuwaiti law. The prudent course of action for a foreign company wishing to do business in Kuwait is to first obtain an agent. Recently, however, due to the urgent need for postwar reconstruction, the Kuwaiti government has either waived this requirement or allowed the foreign contractor to obtain an agent within some time period after contract execution. Foreigners conducting business in Kuwait in violation of the commercial agency requirements are normally

4. See infra notes 6-77 and accompanying text.
5. See infra notes 6-77 and accompanying text.
7. See Thomas W. Hill & Mary Swanson, Agencies, Sponsorships and Local Partnerships in the Gulf (Part II), 6 MIDDLE E. EXECUTIVE REP. No. 3, 13 (March 1983).
10. See J. Sorton Jones, Foreign Consultants—Agent or Partner Required, 2 MIDDLE E. EXECUTIVE REP. No. 5, 7-8 (May 1979).
11. Homesy I, supra note 1, at 18.
subject to three months in prison and a fine of not less than one hundred dinars.\textsuperscript{13}

**Who May Be an Agent?** Only Kuwaiti nationals may serve as commercial agents for foreign companies.\textsuperscript{13} Agents must have a direct relationship with the foreign principal.\textsuperscript{14} Thus, the use of sub-agents is not allowed.

Agents may represent only one principal in any given industry sector.\textsuperscript{15} The Ministry of Trade ultimately decides whether a conflict of interest exists when an agent seeks to represent more than one principal.\textsuperscript{16} Kuwaitis who falsely represent themselves as agents of a foreign company or who submit false information to the Ministry of Commerce are subject to fines and imprisonment.\textsuperscript{17}

**How to Find an Agent.** Companies without experience in the Middle East may wish to consider these standard sources for agents:

1. United States Department of Commerce’s Agents Distributor Service (ADS), which, for a nominal fee, will provide a list of agents;
2. Kuwait Commercial Register, which may be searched by Contractors themselves or their local attorneys; and
3. Kuwaiti Banks, which have provided references as well as letters of comfort in the past.\textsuperscript{18}

However, the safest course of action is to obtain a “first-hand” referral from a company or firm with hands-on experience in Kuwait and direct knowledge of the agent.

Experts offer differing advice regarding agent selection. Some insist that postwar contracting will be no different from pre-war contracting, with contract awards based on how closely the agent is related to the royal family.\textsuperscript{19} Other experts, however, caution against “automatically” seeking an agent based on the agent’s family’s pre-war prominence.\textsuperscript{20} These agents may be too busy seeking compensation for their own families from the Kuwaiti government to put in the time and footwork re-

\textsuperscript{12} Paul Hosmy, *Agency Law in Kuwait*, 14 MIDDLE E. EXECUTIVE REP. No. 7, 19 (July 1991) [hereinafter Hosmy II].
\textsuperscript{13} Law No. 36 of 1964, cited in Hosmy I, supra note 1, at 18.
\textsuperscript{14} Id.
\textsuperscript{15} Commercial Law No. 68 of 1980, Art. 273, cited in Hosmy I, supra note 1, at 19.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Roy S. Mitchell, supra note 2.
\textsuperscript{20} Id.
quired of a successful agent. Instead, United States companies may wish to seek agents from middle class families whose pre-war success was stunted by the prominent families' exclusive stronghold in the agency field.

Types of Agents. Kuwaiti agents are classified according to three categories: contract agents, commission agents, and distribution agents. Kuwaiti law defines a contract agent as one who "undertakes in a certain area of activity to continuously encourage and negotiate the conclusion of transactions for the benefit of his principal in consideration of a remuneration." Thus, the contract agent's job is to solicit contracts for his principal. A contract agent's duties may also include "the conclusion and execution of such transactions in the name of the principal and for his account." Most foreign companies desiring to seek construction-related work in Kuwait use this type of agent.

Contract agencies should be established in writing and filed with the Chamber of Commerce and Industry within two months of the agreement's execution. The writing should state the following: The duration of the agency, the agent's fee, the scope of the subject area in which the agent will solicit contracts, the scope of the geographical area in which the agent may solicit, any limitations on the agency, and any commercial trademarks involved in the sale of merchandise.

A commission agent is one who "undertakes, in consideration of a remuneration, to carry out in his own name any legal act for the account of the principal." Many of the rules that apply to contracting and distribution agents do not apply to commission agents. A commission agent, in substance, is comparable to a broker trading in international goods. For example, if the agent bears the negative price differential between the price at which he is authorized to conclude a transaction, and the actual price of a transaction, then the principal cannot reject the transaction. Conversely, if the agent concludes a deal on terms more favorable than those for which he was authorized, he must make an accounting to the principal. The agent forfeits any right to a commission should he transact business on the principal's behalf with an operation or company in

21. Id.
24. Id.
which the agent has an interest. The commission agent also has substantially more power to alter the payment terms on a customer's account than do contracting or distribution agents.

A commission agent may not disclose his principal's name without the consent of the principal. Likewise, a commission agent is under no duty to disclose the name of any customers to the principal unless the customer's payment is due on an installment basis. In that instance, if the agent refuses to divulge the customer name, the principal may request the agent to immediately tender the full sale price.

Customers of a commission agent may seek legal redress for their injuries only against the agent. The principal is not liable. Unless the commission agent assumed the duty under the agency agreement, he is not liable to the principal for a customer's nonpayment. If the commission agent does guarantee payment by the customers as a part of the agency agreement, he is entitled to extra compensation for his increased duty. Should an agent go bankrupt, a principal may require a customer to submit product delivery or payment directly to the principal, rather than the agent.

A distribution agent is a Kuwaiti merchant who "undertakes to promote and distribute the products of an industrial or commercial firm in a certain territory provided that he shall be the sole distributor thereof." In other words, a distribution agent is an importer of foreign goods who makes his profit through a mark-up on the price of the goods prior to resale.

Multiple Agents. There is no provision under Kuwaiti law prohibiting a principal from having more than one agent. The foreign principal must remember, however, that absent a specific agreement to the contrary, an agent is entitled to receive compensation for all business secured by the principal within the scope of the agency agreement, whether or not that particular agent played any role in procuring the business. Thus, a foreign company utilizing multiple agents must include in the agency

32. See generally Homsy II, supra note 12.
34. Id.
35. Id.
38. Id.
41. Law No. 36 of 1964, Art. 278, cited in Mitchell & Ball, supra note 18, at 22.
agreements clauses that limit a given agent's compensation to a percentage of work which the agent actually procures for the foreign company.

**Compensation of the Agents.** The fee payable to an agent should be agreed upon by the principal and the agent during the negotiation of the agency arrangement. In the absence of such an agreement, Kuwaiti courts determine the fee according to standard fee schedules, custom, or circumstance.\(^4\) Unlike certain other nations in the Gulf, such as Saudi Arabia, there is no maximum limit fixed by law on agent commissions.\(^4\)

Generally, the fee is based upon a percentage of the price of the contract obtained by the principal.\(^4\) In the absence of an agreement to the contrary, contracting and distribution agents must bear the expenses associated with the operation of their agencies.\(^4\) Unlike the other types of agents, courts will not estimate the compensation due a commission agent.\(^4\) Thus, the principal of a commission agent who acts beyond the scope of his authority in transacting a deal must immediately reject the deal or else be deemed to have accepted the terms of prices set by the agent.\(^4\)

If the principal prevents a deal from being concluded, the principal is liable to the agent for the value of the fee the agent would have otherwise earned.\(^4\) Kuwaiti law creates lien rights in favor of an agent to guarantee that the agent secures payment of his fees and costs.\(^4\) These lien rights cover any merchandise or other property of the principal in the possession of the agent.\(^4\) The agent's lien rights are subordinate only to liens for judicial fees and liens created by governmental statute.\(^4\)

**Duration of the Agency Agreement.** In most cases, the parties may establish an agency relationship for any length of time they desire.\(^4\) If, however, the relationship requires that the agent establish a warehouse, showroom, maintenance facility, or repair facility, then the agency relationship must have a term of at least five years.\(^4\) This protects the

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43. Id.
45. Homsy I, supra note 1, at 18.
48. Id.
A good agent is vital for an American company that chooses this form of doing business in Kuwait.\textsuperscript{44} Agents give valuable insight into the thoughts and positions of Kuwaiti parties during contract negotiation.\textsuperscript{45} A good agent will help the principal spot upcoming business opportunities and, if necessary, will help in preparing a bid.\textsuperscript{46} The good agent can provide important information about local markets and prices.\textsuperscript{47} The agent may also be able to suggest qualified Kuwaiti personnel to use in place of non-Kuwaiti workers, which will often result in great savings to the principal.\textsuperscript{48}

The principal and agent may agree to any terms relating to the agent's authority to act on behalf of the principal. In the absence of specific agreement, however, the agent's authority will be defined by certain standards of Kuwaiti agency law. The agent is neither allowed to collect on the accounts owed to his principal, nor is he allowed to modify the payment terms of such accounts.\textsuperscript{49}

The agent has an affirmative duty to represent the principal against all complaints and claims arising out of the contracts he procured.\textsuperscript{50} The agent must take necessary steps, including obtaining licenses and registrations, to protect the financial interests of his principal.\textsuperscript{61}

An agent must abide by the directives of his principal and is liable for damages resulting from his failure to do so. If the agent feels that a directive given by the principal would harm the principal, the agent may delay performance of the directive until he has a chance to clarify the matter with the principal.\textsuperscript{62} An agent will also be liable for damage or loss of any products held by him on behalf of the principal, unless the loss results from inherent defects in the products or force majeure.\textsuperscript{63} An agent is not required to insure products in his custody, unless the principal so requests.\textsuperscript{64}

\textsuperscript{44} Dep't of State, Airgram No. A-8, 9 (March 6, 1982).
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Commercial Law No. 68 of 1980, Art. 276, cited in Homisy I, supra note 1, at 19.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Commercial Law No. 68 of 1980, Art. 280, cited in Homisy I, supra note 1, at 19.
\textsuperscript{56} Commercial Law No. 68 of 1980, Art. 262, cited in Homisy II, supra note 12, at 18.
\textsuperscript{57} Commercial Law No. 68 of 1980, Art. 263, cited in Homisy II, supra note 12, at 18.
\textsuperscript{58} Id.
An agent has an affirmative duty to inspect goods shipped to him by his principal to discover damages that may have occurred during transit. If the goods are subject to a quick decline in value or to spoilage and their sale has not yet been authorized by the principal, the agent may apply to the Chief Judge of the Kuwaiti Court of First Instance for permission to sell the goods. Also, an agent is deemed to be the authorized agent for the service of process of his principal.

Obligations of the Principal. Absent any contractual agreement to the contrary, a principal must provide the agent with material and information sufficient to allow the adequate representation and promotion of the principal by the agent. This obligation may require such things as the provision of company information, product specifications, technical data, brochures and literature, and samples.

Termination of the Agency Agreement. An agency agreement may be terminated by law by one party upon a breach of the agreement by the other party. Termination by operation of law occurs when the work or project giving rise to the agency ends, the fixed term of the contract expires, or either party dies or becomes incapacitated. These rules, however, are less clear-cut than they may appear.

In the event of a wrongful termination, the terminating party will be liable to the terminated party, even if the agency agreement purported to eliminate or limit a party’s liability for wrongful termination. Such liability-limiting clauses are generally given no effect under Kuwaiti law. Even when the term of an agency agreement expires by operation of law, a principal may be liable to an agent for “wrongful nonrenewal” unless the principal can show the agent substantially failed in some aspect of his agency responsibilities. In awarding damages for a wrongful termination, Kuwaiti courts look to the harm suffered by the agent and the benefit that inured to the principal on account of the agent.

An agent has ninety days after the contract’s expiration within which to bring a claim for wrongful nonrenewal. For other claims related to

66. Id.
69. Id.
72. Id.
73. Id.
74. Id.
75. Mitchell & Ball, supra note 18, at 24.
breach of the agency agreement, the agent has three years from the date of termination within which to assert his claim against the principal. These claims are heard by a court sitting in the agent’s territory.

B. Kuwaiti/Foreign Joint Venture Forms

De Facto Joint Ventures. A de facto joint venture, sharika muhasa, is not subject to certain legal formalities or rules of commercial registration. It is not recognized as being a separate entity from its principal individuals and, in this way, is similar to the American partnership. Nonetheless, the principals may enforce among themselves any agreements made with regard to the individual rights and obligations of firm participants. The de facto joint venture is “invisible” to any outside parties dealing with it. To outside parties, the “venture” assumes the individual identity of the person from the venture with whom they are dealing.

Each participant of the de facto joint venture is subject to the same legal requirements otherwise applicable under Kuwaiti agency and joint venture law except registration requirements. Authorities disagree, however, as to whether the requirement of fifty-one percent Kuwaiti ownership applies to de facto joint ventures. The prudent American businessman should assume, however, that the requirement does apply.

Joint Stock Companies. The joint stock company (“KSC”), or closed shareholding company, is commonly used by foreign companies wishing to ally themselves with Kuwaiti businesses or companies. Like the American corporation, the joint stock company is a legal entity separate and independent from its shareholders. A joint stock company is established by execution of the joint stock company’s articles of associa-

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78. Dep’t of State, Airgram No. A-17, 3 (June 19, 1983) [hereinafter Airgram No. A-17].
80. Id.
81. Id.
82. Id.
83. Id.; see also Airgram No. A-17, supra note 78, at 4.
84. Kassim, supra note 79, at 16.
85. Id.
86. Id.
87. Id.; see also Mitchell & Ball, supra note 18, at 27.
tion.** Formation of such a company is complete upon its entry in the Commercial Register and the publication of its Document of Formation in the Official Gazette.**

Shareholders may be corporate or individual, and, as in an American corporation, a shareholder's liability is limited to the amount of his equity participation in the company.** Joint stock companies traded on the Kuwaiti stock exchange must be owned entirely by Kuwaiti nationals or companies.** Foreign companies and persons are, however, allowed to own shares in companies not publicly traded.** These nonpublic companies are known as closed joint stock companies.** Foreign ownership even in a closed joint stock company must be authorized by the Ministry of Commerce and Industry.** Foreign ownership may not exceed forty-nine percent of the capital shares of the company.**

In closed joint stock companies there must be at least five original stockholders, each of whom must hold their shares for at least three fiscal years after the founding of the company or until a dividend of at least five percent has been paid.** Otherwise, shares of stock in joint stock companies are generally freely negotiable.** The founding stockholders must pay at least one-fifth of the nominal value of their shares upon subscription and must pay the remaining four-fifths within five years.** The joint stock company must hold at least ten percent of its net annual profit for each year in reserve until the reserves equal or exceed one-half of the joint stock company's capital.** A reserve must also be established by the company to comply with the requirements of Kuwaiti labor law.** Finally, a depreciation reserve must also exist for the repair and replacement of equipment.**

The joint stock company is run by a board of directors.** The chairman of the board also acts as the joint stock company's president.**

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89. Id. at 16-17.
90. Mitchell & Ball, supra note 18, at 31.
91. Kassim, supra note 79, at 16.
92. Mitchell & Ball, supra note 18, at 30; Airgram No. A-17, supra note 78, at 4.
94. Id.
95. Id.; Airgram No. A-17, supra note 78, at 4.
97. Id.
98. Id.
99. Id. at 30.
100. Id. at 31.
101. Id.
102. Id.
103. Id.
104. Id.
chairman is authorized to act on behalf of and for the entire board. The board must have at least three members, and a member's term may not exceed three years. Board members may, however, be re-elected upon their term's expiration. Each director must own at least the lesser of 7,500 KD in shares or one percent of the KSC's capital shares. The director's shares are held in trust by a designated bank to ensure that the director properly carries out his duties. The director may reclaim his shares after his term expires and the balance sheet from his last year on the board is approved.

Directors may be held liable to the company, to shareholders, and to injured third parties for such acts as fraud, violation of the Articles of Association, illegal acts, and abuse of power. However, in contrast to the American "business judgment rule," which holds harmless the directors or officers of a corporation for errors in business judgment, a director in the joint stock company may in certain instances be liable for judgmental errors in management.

Foreign companies wishing to become shareholders in a joint stock company must provide the following documents: (a) the company's corporate charter, Articles of Association, or the equivalent; (b) the company's balance sheets for the two preceding years; (c) a board resolution approving the company's participation in the joint stock company, nominating an officer or officers to act for the company to incorporate the joint stock company, and setting forth the portion of ownership in the joint stock company sought by the company (The resolution should be notarized in the country of execution and attested to by a Kuwaiti consulate.); (d) a resolution nominating a company director or directors to represent the company on the joint stock company's board (This item is not mandatory, but is suggested. It may be included in the same resolution as the items detailed in (c) above); (e) certification that the company is in good standing in its state of incorporation.

In addition to the above-listed requirements, some sources suggest that a certificate from the Israeli Boycott Office in Kuwait, attesting that the company is in no way restricted or prohibited from boycotting Israel, is

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105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
113. Mitchell & Ball, supra note 18, at 31.
required.115 As a practical matter, however, the GOK usually ignores a United States company's failure to supply the boycott certificate.116

"With Limited Liability Companies." The "with limited liability company" ("WLL") is also similar to the American corporation in that the company is a legal entity separate from its shareholders. All partners in a WLL company must be individuals.117 Corporate ownership is not permitted.118 The WLL company must have at least two partners.119 A husband and wife are counted as one person in determining the number of partners in this type of company.120 Foreign ownership in a WLL company must be approved by the Under Secretary of the Ministry of Commerce and Industry.121 This approval is much less time-consuming than the ministerial approval required in forming a joint stock company.122 Foreign ownership in a WLL may not exceed forty-nine percent of the company's share capital.123

A partner's liability in a WLL company is limited to the amount of the partner's equity participation in the company.124 Ownership is delineated in "parts" rather than shares.125 Parts are generally freely negotiable.126 Certificates are not issued as evidence of ownership.127 Instead, proof of ownership is found in the company books and in the Memorandum of Association.128

The WLL company, like the joint stock company, must hold at least ten percent of its net annual profit for each year in reserve until the reserves equal or exceed one-half of the company's capital.129 A separate reserve must also be established by the company to comply with the requirements of Kuwaiti labor law as well as a depreciation reserve for the repair and replacement of equipment.130

115. Id. at 17.
117. Kassim, supra note 79, at 16; Airgram No. A-17, supra note 78, at 3.
118. Kassim, supra note 79, at 16.
119. Id.
120. Id.
121. Id.; Mitchell & Ball, supra note 18, at 32.
122. Kassim, supra note 79, at 16.
123. Id.
124. Id.; Airgram No. A-17, supra note 78.
125. Kassim, supra note 79, at 16.
126. Id.
127. Id.
128. Id.; Mitchell & Ball, supra note 18, at 32.
129. Mitchell & Ball, supra note 18, at 32.
130. Id.
WLL companies are run by one or more directors. The directors do not have to be part-holders in the company. A director may not also serve as a director for a competing company, nor may he, without permission, transact business with a competing company.

Unless the Memorandum of Association names the directors and sets their terms, the part-holders carry out this function at a general meeting. Absent an express restriction, directors may bind the company. Any restriction on a director's authority to bind the company is ineffective until and unless the restriction is published in the Commercial Register. Publication ensures protection of unsuspecting third parties.

WLL companies with more than seven part-holders must also create a control board. The control board is optional for companies with less than seven part-holders. The control board regularly inspects the accounting records and assets of the company, and reports to the part-holders. WLL companies may not issue insurance, engage in banking or financial related services, or issue debentures.

Directors may be held liable to the company, to part-holders, and to injured third parties for such acts as fraud, violation of the Memorandum of Association, illegal behavior, and abuse of power. A director in a WLL company, like a joint stock company director, may be liable for judgmental errors in management. Members of the control board are liable to part-holders only if they knew of wrongful acts by a member or members of the board of directors and failed to report those acts to the part-holders.

A non-Kuwaiti national, wishing to participate in a WLL company, must provide the following: (a) a passport; (b) proof of permanent resident status in Kuwait; and, (c) a set of fingerprints.

General Partnerships. Although technically available to the foreign contractor doing business in Kuwait, a general partnership is neither popular nor suggested for foreign companies. This business form is created

131. *Id.*
132. *Id.*
133. *Id.* at 33.
134. *Id.* at 32-33.
135. *Id.* at 33.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
142. *Id.*
143. *Id.*
when two or more persons or entities agree to carry on commercial activities and register in accordance with the Commercial Register Law. At least one partner must be a Kuwaiti national and at least fifty-one percent of the partnership capital must be Kuwaiti-owned. Equity may be divided among the partners in any manner they agree, so long as the sum of Kuwaiti ownership in the partnership is fifty-one percent or greater. All rules governing the relationship among the partners should be set forth in the Memorandum of Association and the Articles of Association. The general partnership exists legally only when it is registered in accordance with the Commercial Register Law. Nonetheless, injured third parties may assert and prove the existence of the partnership prior to registration.

Partners have a fiduciary relationship towards the partnership. No partner may engage in an activity detrimental to the partnership or act outside the scope of his authority on behalf of the partnership. A partner may not engage in any similar business for his own benefit. Unless the partnership agreement provides otherwise, no partner may transfer his partnership interest without the consent of the other partners. Rules for transfer of interest may be set forth in the partnership agreement. A partner may unilaterally transfer the benefits of his participation to a third party.

The partnership is managed by one or more directors who may or may not be partners. Managerial guidelines may be set forth in the Memorandum of Association and the Articles of Association. Partners may not interfere with the decisions of the directors. Partners who are not directors "may, however, inspect the partnership's books and records."

A general partnership is liable to third parties who conduct business with persons with authority to bind the partnership. Partners are

145. Mitchell & Ball, supra note 18, at 33.
146. Id.
147. Id.
148. Id. at 34.
149. Id. at 33.
150. Id. at 33-34.
151. Id. at 34.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id.
jointly and severally liable without limit for the debts and liabilities of the partnership.\textsuperscript{162}

**Limited Partnerships.** As in the United States, a limited partnership is a combination of partners with unlimited liability (general partners) and those with limited liability (limited partners).\textsuperscript{163} In Kuwait, two types of limited partnerships exist—simple limited partnerships and share limited partnerships.\textsuperscript{164}

Simple limited partnerships are generally governed by the same rules as general partnerships.\textsuperscript{165} A limited partner, unlike a general partner, may not participate in the management of the partnership.\textsuperscript{166} If the limited partner exceeds the permissible scope of activity he will be held liable as if he were a general partner.\textsuperscript{167}

A share limited partnership is a hybrid between a joint stock company and simple limited partnership.\textsuperscript{168} Capital is denominated in “shares.”\textsuperscript{169} Limited partners are subject to the rules governing joint stock companies.\textsuperscript{170} The joint stock company rules also apply to issues of director liability.\textsuperscript{171} The rules of simple limited partnerships apply to other partners and aspects of the partnership.\textsuperscript{172} Share limited partnerships must also have a supervisory board of three or more persons, who may or may not be shareholders.\textsuperscript{173} The supervisory board insures that the directors faithfully and diligently carry out their duties.\textsuperscript{174}

III. LICENSING AND REGISTRATION

All agency agreements must be registered with the Minister of Commerce within two months of the date of the agreement.\textsuperscript{175} Also, every enterprise doing business in Kuwait, with the exception of a de facto joint venture, must register with the Commercial Register Ministry of Commerce and Industry.\textsuperscript{176} Applications for registration must include a list of

\textsuperscript{162} Id.
\textsuperscript{163} Airgram No. A-17, supra note 78, at 4.
\textsuperscript{164} Mitchell & Ball, supra note 18, at 35.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 35-36.
\textsuperscript{169} Id. at 35.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 36.
\textsuperscript{172} Id. at 35.
\textsuperscript{173} Id. at 36.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
the officers and shareholders, information on any patents or trademarks held by the entity, information on the entity's capital assets and liabilities, an Arabic translation of the Articles of Incorporation, and the company's financial statements for the two preceding years.\textsuperscript{177} Commercial, industrial and trading enterprises must register with the Chamber of Commerce and Industry on a special register.\textsuperscript{178} Additionally, importers of goods must obtain an import license from the Ministry of Commerce.\textsuperscript{179}

IV. \textbf{Bid Requirements and Procedures}

A. \textit{The CTC and Invitations for Bids}

Government contracting is regulated by the Ordinance Law of 1964 Concerning Public Tenders.\textsuperscript{180} This enactment established a Central Tenders Committee ("CTC") to administer the procurement and award of most government contracts in Kuwait.\textsuperscript{181} The CTC also administers the prequalification process that the GOK uses to insure that only qualified companies bid on a given project.\textsuperscript{182}

Eleven members comprise the CTC.\textsuperscript{183} The Council of Ministers selects six members from the private sector.\textsuperscript{184} The other five members represent the Ministries of Finance, the Legal Department of the Council of Ministers, the Ministries of Planning, the department requesting the procurement, and the department supervising the execution of the tender.\textsuperscript{185} Selectees from the private sector must temporarily divest themselves of any holdings in companies that bid on government projects.\textsuperscript{186} At least six members must be present at a CTC meeting for any action or vote to be taken.\textsuperscript{187}

The CTC typically works hand-in-hand with the government ministry involved in the project to develop the invitation for bids and to oversee the tender and award process.\textsuperscript{188} The Ministry of Defense, the Ministry of Interior, Kuwait University, Shuweikh Port and Industrial Area, and the

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\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} Public Tenders Law No. 37 of 1964.
\item \textsuperscript{181} Airgram No. A-8, \textit{supra} note 54, at 3.
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id.} at 5.
\end{itemize}
National Housing Authority are not required to solicit contracts through the CTC, but for convenience often follow CTC procedures. The CTC publishes notices of the invitation for bids weekly in the Official Gazette. Details of the invitation for bids are posted in the Central Tenders Committee Building.

B. Qualification to Submit Bid

All bidders must be authorized to conduct business in Kuwait, as evidenced by their registration with the Kuwaiti Chamber of Commerce and Industry and entry in the Commercial Register. Bidders must also be classified by the Control Tenders Committee Classification Committee on the basis of size and technical expertise. Classification determinations may be appealed to the Tenders Committee and contractors may apply for reclassification one year after a previous classification. No entity may bid on a contract the amount of which is greater than its size or technical classification. Contracts already being performed are aggregated with the proposed contract for the purposes of determining eligibility.

Pre-Approval. Bidders must seek prequalification with the appropriate ministry by providing qualifications, experience, and financial information. Information concerning the bidder’s experience on similar projects is especially important to the GOK. When a tender is actually issued, bidding is limited to those companies that have prequalified. For government contracts before the war, the pre-approval entailed providing information to the appropriate Ministry.

Bidders considering subcontracting to or allying with a Kuwaiti construction company may also gain valuable information about local construction companies from the CTC’s local “pre-approval” or classification system for Kuwaiti companies. Kuwaiti contractors are grouped into four categories, based upon the maximum value of projects the company

189. Id. at 5-6.
190. Id. at 4.
191. Id.
192. Id. at 6.
193. Id. at 5.
194. Id.
195. Id.
196. Id.
197. Id. at 6.
198. Id.
199. Id.
200. Id.
201. Id. at 5.
is capable of handling. The categories and respective values are: Category I (no limit), Category II (up to 1 million KD), Category III (up to 750,000 KD), and Category IV (up to 500,000 KD).

Procedures and Requirements. As is the case with governmental solicitations in the United States, bids submitted in response to a GOK solicitation are required to comply exactly with the solicitation. Unlike the United States, however, this rule is sometimes "bent" in Kuwait. The CTC is allowed to consider nonconforming bids upon a unanimous determination that consideration of the bid is in the public interest.

If the tender documents permit, the bidder may submit alternate offers. The alternate bid should be submitted on a separate set of tender documents. In such cases, the bidder should be sure to include in his alternate bid items that correspond to cheaper or more efficient ways to perform the same function or project. The successful bid is often the one utilizing value engineering or efficiency concepts to increase the quality or decrease the price of the project work.

If the tender documents require that a sample be furnished, the sample should accompany the bid. If a sample is unavailable, the bidder should, at the very least, attach to his bid a promise of future delivery of the sample. Otherwise, the bid is subject to disqualification.

The tender must include a fixed-price quote, although, in several post-war instances, contracts have been awarded on a cost-plus basis. The price must be in Kuwaiti dinars unless otherwise specified. A calculation error exceeding five percent of the total price will cause the bid to be thrown out. Unlike government contracting in the United States, the GOK may confine a given tender to a group of companies that it specifies prior to the tender.

The Bid Documents. In Kuwait, an invitation for bids normally constitutes part of the overall contract. The contract is usually composed of

202. Id.
203. Id.
204. Id. at 7.
205. Id.
206. Id.
207. Id.
209. Id.
211. Id.
212. Id. at 7, 10.
213. Id. at 7.
214. Id.
215. Id.
three sections, or documents: Document I, relating to the tender procedure; Document II, the general conditions of the contract; and Document III, the technical specifications for the contract. Each document is further divided into subsections. Summarized below are common subsections that often appear in Document I of GOK contracts.

**Tender Notice or Invitation to Tender.** This is a reprint of the CTC's official notice of call for tenders.

**Instructions to Tenderers.** Generally, bids are submitted in two brown envelopes, labeled A and B, each of which contains certain specified documents. General information and specifics about the contract are often placed in this section to call the bidder's attention to them.

**Form of Tender and Appendix.** The bid form itself is usually in Arabic and English, and must be signed by the bidder and clearly state the bid amount. The bidder should be aware that, in the case of discrepancies between the English and Arabic versions, the Arabic version takes precedence. The Appendix contains fundamental contract information, such as the terms, the warranty period, and bond and insurance requirements.

**Plant Register.** In this section, the bidder is required to provide a description of the plant, if any, he will use to carry out the contract, and all equipment that will be used to carry out the contract. For each item, the bidder must describe its location, manufacturer, age, and condition. A bid will not be accepted until the CTC is satisfied with the bidder's Plant Register. The bidder must be careful to actually have available the equipment listed in the Register.

**Contractor's Technical Staff.** Similar to the Plant Register, the bidder must also provide a schedule of the senior personnel he plans to use in executing the contract. The bid documents should describe with specificity the positions for which the bidder must submit information. Should a bidder be unable to use the specified personnel to perform the contract, he must replace them with persons of equal or greater experi-

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216. Gov't of Kuwait, Book of Tender, Doc II-1, Legal Clauses and Conditions § 1.
218. Id.
219. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id.
Engineers used on projects are expected to join the Kuwaiti Society of Engineers.\(^\text{229}\)

**Statement of Works in Kuwait.** The bidder must provide a list of its previous projects in Kuwait so that the CTC can check on his past performance.\(^\text{230}\)

**Form of Initial Guarantee (Bid Bond).** A bid bond must be provided.\(^\text{231}\) The bid bond is returned to the unsuccessful bidders, but remains in effect for the successful bidder until the performance bond is supplied.\(^\text{232}\)

**Form of Final Guarantee: Performance Bond.** The performance bond, like the bid bond, is usually required to be in the form of a cashier's check or a letter of credit.\(^\text{233}\) The bond is payable "on demand" of the government, and its amount is usually about ten percent of the contract value.\(^\text{234}\) The bond must initially cover the contract performance period plus ninety days.\(^\text{235}\) If change orders are issued during performance of the contract, the government has the right to insist that the bond amount be accordingly increased.\(^\text{236}\) If the bond is supplied in the form of a letter of credit and the performance period for the contract is extended due to extra work or delay, the letter of credit must not be allowed to expire.\(^\text{237}\) The bond should be returned upon the issuance of the certificate of substantial completion.\(^\text{238}\)

**Form of Agreement.** This section is printed in Arabic and English, with the Arabic portion governing in case of any discrepancy between the two. Contained in this section is the contract price and other terms that the government deems particularly important.\(^\text{239}\) The latter may include requirements that Kuwaiti shipping and air companies be utilized by the contractor and that a portion (usually thirty percent) of the civil and structural contract work be subcontracted to Kuwaiti companies.\(^\text{240}\)

**List of Documents.** This section includes an index of the aforementioned sections, plus any extra submittals by the contractor, such as re-
quests for clarifications by the contractor and governmental responses thereto.241

Bid Bond. Bidders must provide a bid bond in the form of a certified check or a letter of credit from a Kuwaiti bank or an approved insurance company.242 The bond amount is a small percentage of the contract value, usually two to five percent.243 The check or letter of credit is returned to the bidder if he is not awarded the contract.244 The successful bidder's bond remains in effect until he provides the final bond (performance bond) for the project.245

Pre-Award Conference. All prequalified companies are invited to a pretender meeting with the governmental branch that issued the tender.246 The meeting occurs after the notice of tender is published, but before bids are submitted.247 The Kuwaiti client and the potential bidders review the tender documents, the scope of the project, and any concerns raised by the potential bidders.248

Criteria for Award. The CTC generally awards the contract to the low bidder. If, however, the CTC believes there is strong justification for awarding the contract to a nonlow bidder, it may so recommend and refer the solicitation and award of the contract to the Council of Ministers.249 The Council may award the contract to any bidder. The CTC may also refer a solicitation to a technical committee for further study of the bids.250

The Kuwaiti government may also, on major projects for which a number of firms have prequalified, select a "short list" of the top contenders.251 Instead of contract award, the selectees are invited to negotiate with the government.252 The government awards the contract to whichever company offers the best deal during negotiations. In deciding which firm from the "short list" receives the contract, the government is not bound by any mandatory award criteria.253

241. Id.
243. Id.
244. Id.
245. Id.
246. Id.
247. Id.
248. Id.
249. Id. at 4.
250. Id.
251. Id. at 2.
252. Id. at 5.
253. Id.
Finally, on tenders relating to supply contracts, the bid of a supplier of local products will be accepted over the bid of a supplier of imported products if the local supplier’s bid is less than ten percent greater than the importer’s bid.254

V. GOK CONTRACT TERMS

In determining the principles that will govern a GOK contract, consideration of the general contract law of Kuwait is not as important as a careful analysis of the contract provisions common to governmental contracts. Document II contains the Legal Clauses and Conditions; and, for the most part, sets forth the principles that will govern the contract, comparable to general conditions of construction contracts used in the United States industry. General categories of the standard general conditions in a GOK contract usually appear in a form to the following effect.

A. Definitions and Interpretation of Key Contract Terms

Engineer’s Representative. The engineer may not modify the contractor’s obligations under the contract.255 The engineer’s approval of work is not a waiver of the right to later disapprove that same work.256

Assignment and Subletting (Subcontracting). The contractor may not assign the contract without the owner’s written consent.257 The contractor may subcontract portions of the contract, not the entire contract, with the engineer’s permission.258 The contractor must provide all materials and labor to complete the contract.259

Contract Documents. The contract documents shall be in Arabic, with an English translation attached. The Arabic version shall govern in case of conflicts.260 The contract is indivisibly composed of the documents.261 A provision is made in this section for the distribution of drawings.

General Obligations. This section contains many provisions and obligates the contractor to execute the necessary documents to enter into the contract. It sets forth performance bond requirements and imputes

254. Id. at 4-5.
255. Gov’t of Kuwait, Book of Tender, Doc II-1, Legal Clauses and Conditions § 2, at 3.
256. Id.
257. Id. § 3, at 4.
258. Id. § 4.
259. Id. § 5.
260. Id. § 6(1).
261. Id. § 6(2).
knowledge of site conditions to the contractor.\textsuperscript{262} The section establishes that the contractor agrees that there are no discrepancies in the Tender Documents, and establishes a duty to inform the owner if he becomes aware of ambiguities or errors in the contract.\textsuperscript{263}

**Labour.** The contractor shall be responsible for all arrangements concerning the labor and work force.\textsuperscript{264} The contractor shall be responsible for any necessary transportation, food, water supply, welfare facilities and canteen, sanitary accommodations, and first-aid facilities.\textsuperscript{265} The contractor shall also be prepared to deal with festivals and religious customs, and possible outbreak of any epidemic illness.\textsuperscript{266} Finally, the contractor must comply with the "Kuwait Labour Law," and provide a daily statement to the engineer's representative showing the supervisory staff and the number of men employed in each trade.\textsuperscript{267}

**Materials and Workmanship.** The contractor must provide quality materials and workmanship as specified in the contract. The engineer shall be provided clear access to the job site and shall be permitted to test any materials used in the construction of the project.\textsuperscript{268} The engineer, when necessary, may order the suspension of work.\textsuperscript{269} Costs attributable to testing and work suspensions are often borne by the contractor.\textsuperscript{270}

**Commencement Time and Delays.** The contractor shall be given an order to commence work within ninety days of the signing of the contract.\textsuperscript{271} All work shall be completed to the satisfaction of the engineer within the time period specified in the contract. If the contract is modified, or if additional work is required, which is beyond the control of the contractor, a time extension may be given.\textsuperscript{272} However, if no extension is given, and the work exceeds the time stated in the contract, the contractor will be assessed daily penalties for delayed performance as specified in the contract.\textsuperscript{273} To avoid delay costs, the engineer may expedite perform-

\textsuperscript{262} Id. §§ 9-33, at 5-13.
\textsuperscript{263} Id. § 12(2), at 6.
\textsuperscript{264} Id. § 34(1), at 14.
\textsuperscript{265} Id. §§ 34(1), (2), (6), (7), (9), at 14-15.
\textsuperscript{266} Id. §§ 34(3), (4), at 14.
\textsuperscript{267} Id. § 35, at 15.
\textsuperscript{268} Id. § 37, at 16.
\textsuperscript{269} Id. § 40, at 18.
\textsuperscript{270} Id.
\textsuperscript{271} Id. § 41(a), at 18.
\textsuperscript{272} Id. §§ 43-44, at 19.
\textsuperscript{273} Id. § 47(1), at 20-21.
ance. However, work on Friday nights, the locally recognized date of rest, may only be performed at the approval of the engineer. 274

Maintenance and Defects. “Period of Maintenance” is the period from the date of completion in which the contractor shall remedy all defects and make all necessary repairs. 275 The owner has the option of compelling the contractor to perform the repairs at the contractor’s expense, or the owner may perform the repairs itself and deduct the costs from the contractor’s fee. 276 However, costs associated with defects or imperfections attributable to the engineer or owner will be borne by the owner. 277

Alterations, Additions, and Omissions. At any time prior to the issuance of the Certificate of Substantial Completion of the Works, the owner may, in writing, make any variation in the form or quality of the works. 278 The owner, consistent with valuation rates set forth in the contract, may determine the cost, which should be added or deducted from the contractor’s fee. 279 Contractors shall be given extensions if the modifications or variances cause the work to exceed the time period stated in the contract. 280 When variations exceed fifteen to twenty-five percent of the original value of the job, the contractor and owner shall amend the contract price to reflect the modification. 281 Any claims for additional compensation shall be submitted to the engineer’s representative monthly. 282

Plant, Equipment, Temporary Works, and Materials. The contractor shall be solely responsible for all equipment required for the project. 283 Equipment furnished to the job shall be exclusively used for the project. 284 Upon completion of all work, the contractor shall remove all equipment and clear away any temporary access roads. 285 The engineer

274. Id. § 45, at 19-20.
275. Id. § 49(1), at 22.
276. Id. § 49(4).
277. Id. § 49(1).
278. Id. § 51(1), at 23.
279. Id. § 52(1).
280. Id. § 52(4), at 24.
281. Id. § 52(3).
282. Id. § 52(6), at 25.
283. Id. § 53(1).
284. Id.
maintains the right to reject any equipment or materials used by the contractor.286

Measurement. The Bill of Quantities is merely an estimate and will not be taken as actual quantities.287 The engineer shall conduct his own measurement of the materials and the contractor will receive payment based on the engineer’s measurements.288

Certificates and Payment. This section describes the contents of the Schedule of Prices and the elements included therein. The contractor is to provide a schedule of prices and the engineer will issue Interim Certificates indicating amounts due to the contractor.289 The contractor shall be entitled to payment from the owner within thirty days of approval of the engineer’s certificate.290 Upon substantial completion of the project, a Final Payment Certificate shall be issued.291 Subsequently, a Maintenance Certificate shall be issued when final approval of the job is made.292

Special Risks. The contractor is not responsible for costs attributable to special risks. Payment for damage to the project occurring from missiles or other war-related occurrences will be reimbursed by the owner.293

Notices. The contractor shall maintain an address in Kuwait during the entire contract period at which any notices may be given.294 Notice may be served by registered mail or by leaving the notice at the contractor’s Kuwait address.295

Increase or Decrease of Costs. Payments shall be made in Kuwait currency and no adjustment shall be made to reflect any fluctuation in the rate of exchange, the creation of new taxes, variation in material prices or new legislation.296

Miscellaneous. The contract shall be governed by the laws of Kuwait.297 All details of the contract are confidential.298 The contractor is

286. Id. § 54, at 27.
287. Id. § 55(1).
288. Id. §§ 55(1), 56.
289. Id. § 60(2), at 31.
290. Id.
291. Id. § 60(3), at 33.
292. Id. § 62(1).
293. Id. §§ 65(3), (4), at 37.
294. Id. § 68(1), at 39.
295. Id.
296. Id. § 69.
297. Id. § 74, at 40.
298. Id. § 71, at 39.
required to supply the engineer with monthly photographs clearly showing the work's progress. Pursuant to the Regulations of the GOK, the contractor must maintain a Kuwait Partner or Agent.

299. Id. § 70.
300. Id. § 73, at 40.