

**AGENTS IN MILITARY CONTRACTS:
EVOLVING KUWAITI POLICY**

**Confusion over Ministry of Defense Change
From Prohibiting to Requiring Agents**

by Howard L. Stovall

In the aftermath of the Gulf War, the Kuwaiti Ministry of Defense has changed its policy regarding agents.¹ For many years, MOD policy prohibited defense contractors from using sales agents or intermediaries. Now, MOD has said that it will not deal with any foreign company that does not have a Kuwaiti agent.²

The MOD's policy apparently continues to evolve. It is extremely difficult to provide definitive advice on such policy, particularly as revision or change may be based on broad administrative discretion. With that caveat, this article first summarizes the general outlines of the MOD's prior policy and then describes and preliminarily analyzes some of the more important aspects of the MOD's current policy as it appears from available information.³

Sales Agency in the Middle East

During U.S. Congressional hearings in 1975, which examined specific overseas sales activities of U.S. multi-national corporations,⁴ a memorandum entitled "Agents Fees in the Middle East" was submitted into testimony. That memorandum apparently was approved by the U.S. Department of Defense and previously circulated to U.S. defense contractors by the Defense Security Assistance Agency. The historical role of agents described in that memorandum provides some useful background:

The Middle East, Far East and Latin America are areas of the world where an agent is generally required for the successful completion of a commercial sale. In some areas of the Middle East it is a legal requirement to have a local agent before a proposal is considered. For the most part the Request for Quotations will request among other things, who the local agent is and without this information little or no serious consideration will be given to the contractor's response.

History

While agents or concessionaries existed since prebiblical times, it was during the industrial revolution that the prominence of agents became a factor to be considered in manufacturing/commerce as we know it. At that time a local agent was engaged by the purchaser who required a given product or commodity and did not

have the talent, facility, or faculty to locate the equipment or product in a complex international market place. The local agent who was well versed in national and international commerce was rewarded for his time and effort in the form of a fee paid by the purchaser. Hence, the term "finders fee" evolved and was based on a negotiated amount, depending entirely upon the supply and demand of the commodity. Since then, the term finders fee has taken on a somewhat different connotation.

As manufacturers or users of equipment became more sophisticated, they began employing their own purchasing agents at a fixed salary to fill the role formerly accomplished by an outside agency on a percentage basis. This was done primarily to eliminate the excessive fees required for alleged scarce material. With this transition, the more aggressive agents turned their efforts from a purchasing function, on behalf of the buyer - to one of selling - on behalf of the supplier, in many cases dealing with the same principals.

Why Use an Agent

The use of sales agents in some foreign countries by U.S. companies has developed over the years on the basis that locals must deal with locals because of an inherent mistrust of foreigners. Foreign marketeers generally have a reputation for aggressiveness (not appreciated in some areas of the world), have little or no local language competence, insist on doing business in their language and on their terms, and are unfamiliar with customs, procedures and regulations of the purchasing country. Generally, the local purchaser is much more at ease in dealing with a local representative or agent because of long standing friendships or business arrangements. In addition, the local agent relieves the purchaser of the arduous task of communicating with the foreign supplier in a strange language. In essence, the agent again becomes a middleman between buyer and seller, serving a useful purpose to both parties.⁵

A Kuwaiti agent is required or customary in a number of different contexts. The Kuwaiti Commercial Agencies Law states that only a Kuwaiti national (whether a natural person or juristic entity) may practice commercial agency in Kuwait.⁶ Under the Kuwaiti Commercial Code, no foreign company may establish a branch in Kuwait or practice any commercial activities in Kuwait except through a Kuwaiti agent.⁷ In addition, the Kuwaiti Companies Law requires a non-Kuwaiti contractual joint venture partner to have a Kuwaiti who "guarantees" or "sponsors" any transaction with a third party.⁸

Many other Middle Eastern countries have enacted laws that require the use of a local commercial agent in various transactions. The underlying justification for these requirements appears to be a mixture of factors; for example:

- reserving a commercial activity (trading) for nationals;
- ensuring that a local party is responsible for product warranty, repair and provision of spare parts;⁹ or
- simply making the foreign party accessible (through an agent's local address) for service of process and other written communications.

Some critics have claimed that local agents corrupt Middle East trade and government by giving foreign influence greater access into the region.¹⁰ Allegations of such influence have often involved large military sales contracts, particularly in the widely publicized investigations leading up to enactment of the U.S. Foreign Corrupt Practices Act (FCPA) in 1976. At approximately that same time, a number of Middle East countries enacted rules that prohibited agency and commission payments in connection with military sales contracts.¹¹

The Kuwaiti MOD's prior policy prohibiting agents is interesting because it was established at least as early as 1972 - in other words, a few years before the FCPA investigation and the notoriety surrounding certain large military sales contracts. In this regard, the MOD's prior policy is similar to the Iranian prohibition on agents in military sales contracts, which appeared as early as 1973.¹²

Prior MOD Policy

A number of Kuwaiti statutes regulate the relationship between a Kuwaiti agent and a foreign principal, including the Commercial Code, which addresses the general legal relationship between an agent and principal;¹³ the Commercial Agencies Law, which stipulates the prerequisites for acting as an agent in Kuwait and specifies registration procedures; and the Public Tender Law, Law No. 37 of 1964 as amended, which governs (among other things) the use of agents in connection with public sector contracting. Two provisions of the Public Tender Law are particularly relevant to MOD policy on the use of agents.

Public Tender Law

Article 5 of the Kuwaiti Public Tender Law states that a foreign (non-Kuwaiti) party is not permitted to submit tenders to Kuwaiti government entities unless that foreign party has appointed a Kuwaiti partner or "agent" pursuant to an officially authenticated agreement.¹⁴

The most notable exception to this general rule is in Article 65 of the Public Tender Law, which states that purchases of military materials for the Ministry of Defense and the Security Forces are exempt from the provisions of the Public Tender Law. (Article 65 states that this exemption also applies, in emergencies, to contracts for military installations.) This exemption literally constitutes a complete exemption from all the provisions of the Public Tender Law, including the requirement for a Kuwaiti partner/agent contained in Article 5.¹⁵

"Military materials," the procurement of which is exempt from the Public Tender Law, are broadly defined in an Emiri Decree dated October 11, 1964, and include various kinds of armaments, ammunition, boats, aircraft, telecommunications equipment, radar equipment, mobile hospital units, and other military articles.¹⁶

1972 MOD Circular

MOD procurement of military materials was exempt from the Public Tender Law requirement that foreign tenderers have a Kuwaiti partner or agent. However, this exemption did not - in itself - have the effect of prohibiting a foreign company from using (and paying) an agent in such MOD procurement. In 1972, the MOD established such a prohibition. MOD Circular No. 4A/88 (the Circular), dated June 8, 1972, provided that contracts for arms, ammunition and spare parts should be concluded between the MOD and its suppliers directly, without the intervention of any agent or intermediary.

In the Circular, the MOD emphasized that the prohibition against any agent or intermediary is "a fundamental condition, the violation of which constitutes [the contractor] being in serious violation of the contract, with all legal consequences entailed thereby, including the rescission of the contract." The MOD also confirmed in the Circular that it would not approve of any commission paid to an agent or intermediary, and that it would deduct any such commission from the contract price, in addition to considering the contractor's action to be a breach of the "fundamental condition."¹⁷

Although the Circular was expressly addressed only to arms, ammunition and spare parts, the prohibition on agents and intermediaries in connection with MOD procurement was extended in practice to almost all procurement of military materials by the MOD and the Security Forces.¹⁸

Prior MOD Contract Supplements

The MOD enforced the provisions of its 1972 Circular with diligence. It often required "no agency" assurances from a

contractor either in the standard terms of the relevant MOD contract or by contractual supplement and/or affidavit.

For example, under a typical MOD contract supplement, which was detailed and elaborate,¹⁹ the MOD required contractors to make the following declarations:

Clause 2 The [Contractor] undertakes to refrain from giving benefit to any person: natural or legal, Kuwaiti or non-Kuwaiti, in Kuwait or abroad, whether in the form of Commissions, doles, expenses, disbursements, bonuses, gifts, or promises for any reason whatsoever, whether it is remuneration, bonus or compensation. The [Contractor] also declares that, with respect to the transaction covering the original Contract, it has neither committed itself nor provided to any person at any place of any of the aforesaid either before or after the signature of the original contract.

Clause 3 Confirming the undertaking and declaration contained in the preceding Clause (2), the [Contractor] declares that the price of the original contract as well as the prices of its products have been and will be fixed exclusive of any hidden additions to offset commissions of agents or expenses of independent offices for rendering facilities to the [Contractor's] activities in Kuwait or abroad or fees and remuneration to consultants, intermediaries or public relation unattached to the [Contractor] by way of direct employment.

In a separate clause, the MOD's contract supplement broadly defined the words "commissions, expenses and disbursements," and in another clause, required the contractor to cancel all previously existing arrangements and contracts that contradicted the MOD's contract supplement.

The MOD's contract supplement also contained detailed provisions describing the MOD's rights in the event the contractor violated the supplement:

Clause 6 Failure by the [Contractor] to comply with provisions of this contract, in particular the undertaking contained in Clause (2) hereof, shall render it liable to compensation for any consequent damages sustained by the [MOD], and such compensation shall cover both its moral and financial elements. In addition to the said compensation, the [Contractor] hereby undertakes in the event of failure to fulfill the above-mentioned undertakings, to pay to the [MOD] a fine equivalent to twice the total amount of the commissions and expenses paid or committed for payment by him, breaching the

provisions of Clause (2) and without any failure to implement penalty provisions contained in the law.

Clause 8 of the MOD contract supplement suggested that a contractor might use and pay an agent or intermediary as long as the contractor provided the requisite disclosure to the MOD. Nonetheless, over the years, Kuwaiti lawyers have advised that the MOD most probably would not enter into a contract if it became aware of an agent's involvement. Moreover, a number of Kuwaiti lawyers have confirmed that they are now aware of any instance in which a contractor was permitted to execute a contract with the MOD after disclosing, theoretically in accordance with Article 8 of the MOD contract supplement, the contractor's use of an agent/intermediary for that contract.²⁰

Basis for Prior Policy

The MOD's policy was generally recognized to prohibit not only a contractor's payment of commissions, but also its mere use of a commercial agent or intermediary, in connection with military sales contracts. There appears to have been a three-fold rationale for the MOD's prohibition.

First, the MOD sought to ensure that purchase prices were not increased by the supplier's payment of commissions or contingent fees. This is evident from the 1972 Circular's provision indicating that the MOD will deduct any agency commission from the contract price. In Clauses 2 and 3 of its contract supplement, the MOD more specifically sought to avoid the financial burden of any such commissions and similar charges.

Second, the MOD sought to ensure that its military materials were of the highest quality and not purchased through the undue influence of an agent or intermediary. For example, Clause 7 of the MOD contract supplement stated:

The [MOD] may annul or terminate this contract, if it has become evident to the [MOD] that the [Contractor] has given, whether before or during the execution of this contract, bribe hidden or unhidden to any of the [MOD's] staff. Annulment or termination will be effected by a decision from the [MOD] without any need to any further procedures.²¹

Third, the MOD was motivated by considerations of confidentiality in its defense requirements and purchases; in other words, a reluctance to have the Kuwaiti private sector involved in any capacity in such "national security" transactions. The first paragraph of the MOD's 1972 Circular stated:

In view of the strict secrecy with which contracts for arms, ammunition, and spare parts concluded by the Ministry of Defense with you should be treated, we hereby direct that such contracts be arranged directly between both [the Contractor] and the Ministry of Defense without the intervention of any agent or intermediary. [Emphasis added.]

At least before the Gulf War, the MOD therefore preferred to deal directly (and exclusively) with the manufacturer/supplier of relevant products or services. Such direct contracting generally was the most common and successful approach by foreign companies contracting with the MOD.²² It was not common for Kuwaiti individuals or companies to be involved in such MOD contracts of a "national security" nature whether as a subcontractor or joint venture partner to the foreign defense contractor.²³

MOD's Recent Policy Change

In the immediate aftermath of the Gulf War, the MOD's policy appeared to change. For example, it became increasingly common for defense contractors to use Kuwaiti agents in negotiations for MOD contracts, particularly after contracting authority moved from the Kuwait Emergency and Recovery Program in Washington, D.C. back to the government in Kuwaiti. In addition, the MOD was not generally including contract clauses or supplements prohibiting the use of agents in military sales contracts immediately after the liberation of Kuwait.²⁴

Written Statements of New Policy

On May 30, 1991, the Undersecretary of the MOD sent a letter to the Kuwaiti Liaison Office (defense attaché) at the Kuwaiti Embassy in Washington, D.C., in which the MOD requested the defense attaché to:

inform all companies with whom transactions are concluded through your office, especially in military equipment or [other equipment] of a military or civil nature, that they must disclose the names of their authorized agents in the State of Kuwait.

If such [an authorized agent] does not exist, it is necessary to appoint one, of Kuwaiti nationality, either an individual, a company or an establishment, so that it would be possible in the future for the Ministry to coordinate with [such agent] regarding its purchasing requirements in general. Transactions shall not be acceptable with any company unless it has a Kuwaiti agent authorized in the State of Kuwait.²⁵

That letter appeared clearly to reverse the MOD's prior prohibition on agents.

The Kuwaiti defense attaché in Washington, D.C. subsequently circulated a letter to U.S. parties, generally confirming the MOD's more recent policy. The defense attaché indicated that he had been receiving numerous requests for information on possible MOD military and commercial opportunities and that, as a result, the MOD established the new policy on agents in order to coordinate effectively and assist parties making such requests. He concluded that this new policy was necessary and in the best interest of all parties.²⁶

The MOD Undersecretary's letter could be narrowly read to indicate that an authorized Kuwaiti agent must be used in all transactions involving a Kuwaiti Liaison Office ("... transactions... concluded through your office..."). MOD officials confirmed at an early stage, however, that the MOD intended to require the appointment of agents in all MOD contracts executed directly with a defense contractor, not merely those going through a particular Kuwaiti Liaison Office.

Basis for Change

Ostensibly, the MOD changed its policy because of problems it had in communicating with foreign military contractors, reviewing their bona fides, and generally managing the huge volume of proposals and inquiries from them. If this were the sole or primary basis for the policy change, one might expect a return to prior policy (prohibiting agents) after the short-term deluge of contract seekers dropped to a normal flow.

In post-liberation Kuwait, however, the MOD and other Kuwaiti government ministries have emphasized a strong preference for involving the Kuwaiti private sector. For example, some efforts have been made to require Kuwaiti participation in U.S. Army Corps of Engineers reconstruction contracts, including mandatory Kuwaiti joint venture partners and a specified minimum percentage of Kuwaiti-sourced supplies and subcontracting.²⁷ In this light, the Kuwaiti government may feel the need to involve the Kuwaiti private sector in the widest area of agency activities, even for MOD procurement previously kept secret in the interests of "national security."²⁸

Subsequent "Clarifications" of New Policy

More recently, some confusion was created when an official at the Kuwaiti Embassy in Washington, D.C. told a defense contractor that it needed a Kuwaiti agent for MOD contracts subject to U.S. Foreign Military Sales (FMS) procurement rules.²⁹ U.S. government

sources suggested that other statements made by the Kuwaiti Embassy in Washington might not be "well coordinated" with the policies and statements of the MOD in Kuwait. As a result, staff of the U.S. Embassy in Kuwaiti (including the U.S. commercial and defense attachés), appropriate personnel from the U.S. Army Corps of Engineers in Kuwaiti, and Kuwaiti MOD officials, held meetings in the fall of 1991 to discuss the MOD's policy on agents.

In late October and early November 1991, the U.S. Embassy in Kuwait attempted to summarize and clarify the MOD's rules for use of agents in a two-page handout for interested U.S. business people. Three general aspects of this handout are worth particular analysis.

First, the handout states that agents are not required but optional for defense contractors selling directly to the MOD. (This conclusion was apparently based on a MOD statement, made during one of the above-mentioned meetings, that defense contractors always have direct access to the MOD, including the Undersecretary, without the need for a Kuwaiti agent.) This statement is difficult to reconcile with the letter from the MOD Undersecretary, discussed above,³⁰ indicating that agents are required for dealings with the MOD.

Second, the U.S. Embassy handout states that agents are not required nor are they desired for sales under the FMS program. The handout might have mentioned - but did not - the U.S. procurement rules that restrict and regulate the use of and payments to an agent in FMS contracts.³¹ For example, special FMS rules established a number of years ago, and applicable to sales to Kuwait and other specified countries, require the FMS contract to "prohibit the payment of sales commission and fee unless the payments have been identified and payment approved in writing by the foreign customer . . . before contract award."³² Unless the sales commission or fee is identified and payment thereof approved by the Kuwaiti government before contract aware, the following provision (for fixed-price contracts) applies.³³

The Contractor certifies that the contract price (including any subcontracts) does not include any direct or indirect cost of sales commissions or fees for contractor sales representatives for solicitation or promotion or otherwise to secure the conclusion of the sale of any of the supplies or services called for by this contract to the Government of [Kuwait].

The references to Kuwait in the FMS rules reflect the MOD's prior prohibition against commercial agents and intermediaries. At least for FMS transactions, the MOD's policy apparently remains unchanged. The MOD reportedly has said that it "discourages" any agency in FMS transaction because it has the U.S. Department of Defense functioning in the role of "agent" in FMS contracts,

coordinating the procurement and receiving any administrative fee generally calculated at three percent of the contract value.

Third, the U.S. Embassy handout emphasizes that Kuwaiti "sponsors" are considered a separate and distinct arrangement from "agents," and that sponsorship fees can be a necessary cost of doing business abroad. The handout indicates that sponsors help a foreign company in "getting established" and, by implication, assist with entry and exit visas, work permits and the like. A recent U.S. Embassy cable discussing MOD policy also suggested that FMS regulations recognize such a distinction between sponsorship and agency, with sponsorship considered "a necessary cost of doing business in gaining access to the country and handling administrative requirements."³⁴

In theory, a distinction can be made between sponsorship and commercial agency arrangements. On the one hand, sponsorship aims at "legalizing" the presence of a foreign individual or company and providing government authorities with a local guarantor.³⁵ On the other hand, and as discussed above,³⁶ commercial agents are almost always involved in sales promotion and usually are compensated by commissions contingent on the award of a contract. It is such contingent commissions that are most obviously restricted and regulated under FMS rules.³⁷

In Middle East practice, however, the activities and compensation arrangements of sponsors and agents often intermingle or overlap. In addition, in the MOD's recent written statements (mentioned above) that it requires a foreign company to have an agent for dealings with the MOD, it has consistently used the term "agent" (al-wakeel) and not "sponsor" (al-kafeel). It appears that the MOD's recent policy statements were not simply intended to encourage sponsorship, and that a mere distinction in terminology will not entirely eliminate the uncertainty surrounding the MOD's current policy.

Other Issues of Interpretation

Currently, the MOD does not require disclosure of the size of commissions or of any agency agreement, nor does it impose any maximum commission rate.³⁸ According to at least one Kuwaiti attorney, the MOD is unlikely to become involved in reviewing or interfering with the parties' agency agreement or its contractual requirements and clauses.

Moreover, at least some Kuwaiti attorneys believe that the MOD policy change is not likely to be only temporary, for the first year or so of reconstruction, but rather a long-term reversal of its prior policy of prohibiting agents in its contracting. This conclusion is supported by recent issues of the Kuwaiti Official Gazette, which have published the registration details of at least

a few Kuwaiti agents now representing U.S. and U.K. companies in "defense industry" work.

However, the MOD has significant administrative discretion to establish, revise and revoke such rules as these, as witnessed by the relatively significant and rapid reversal of the MOD prohibition on agents, which had existed for 20 years. The MOD undoubtedly continues to recognize the potential for abusing the role of agent in military sales contracts, with the resulting exercise of undue influence and excessive commission costs. In fact, there have already been some rumors of such abuses in post-liberation Kuwait.³⁹

Quick, Public Clarification Needed

It appears relatively clear that the MOD has made a basic change in its policy regarding foreign contractors' use of agents or intermediaries. Recent sources of information suggest that the MOD may be retreating from, or at least clarifying, certain aspects of its broad statements on this basic change. In these circumstances, most attorneys would advise their clients that additional time and information are needed for an accurate interpretation and assessment of MOD policy. Businessmen, however, do not often have the luxury of being able to wait for the meaning of legal rules to gradually unfold.

Kuwait has survived an immense tragedy, the full implications of which have not yet been accurately gauged. One year after its liberation, however, Kuwait has reestablished the rule of law, its courts are again functioning, and its Official Gazette is publishing regulations and administrative decisions.

The MOD's prior policy on agents was defined by written and publicized ministerial decree, which should not be repealed or revised simply by internal letters and limited communications with interested parties. One hopes that the MOD will quickly and publicly clarify its current policy on the use of agents in military contracts.

HLStovall/ah
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ENDNOTES

1. Middle East Executive Reports (MEER) (November 1991), p. 7.
2. In the Middle East commercial context, the term "agent" usually refers to parties who assist in promoting and locating potential sales, usually for a commission or percentage fee (computed on the selling price of products) contingent on the conclusion of sales contracts. Such a commercial agent or sales representative is not an "agent" in the technical Western legal sense, as a commercial agent usually does not have the authority to act in the name of, or otherwise bind, the party that it "represents." Compare Cartwright and Henry, "May U.S. Exporters Still Appoint Saudi Sales Representatives and Distributors?", MEER (January 1984), p. 20.
3. This article is based on information currently available in the Chicago office of Baker & McKenzie, including recent correspondence with U.S. and Kuwaiti government officials and attorneys, to whom the author is indebted.
4. Hearings before the Subcommittee on International Economic Policy of the Committee on International Relations, House of Representatives, 94th Congress, 1st Session (1975). These and other related hearings ultimately resulted in enactment of the Foreign Corrupt Practices Act (FCPA).
5. Id., pp. 100-01. For an additional summary of the historical role of commercial agency and similar arrangements in the Middle East, see the discussion (and other sources cited) in Saleh, Commercial Agency and Distributorship in the Arab Middle East (1989 Vol. I), pp. 9-10.
6. Article 1 of Law No. 36 (1964).
7. Article 24 of Law No. 68 (1980).
8. In the Arabic text, yakfulu. Article 61 of Law No. 15 (1960).
9. See, e.g., Articles 3-5 of Saudi Arabian Council of Ministers Resolution No. 96 (1985) (agricultural machinery); Article 5 of Egyptian Ministry of Trade Decision No. 1036 (1978) (local service centers).
10. See, e.g., Zaalouk, Power, Class and Foreign Capital in Egypt (1989).

11. Saudi Arabia enacted various regulations and circulars between 1975 and 1978, Egyptian Ministry of Defense policy prohibitions began appearing at least as early as 1978-79; Jordan amended its commercial agency law in 1979 to prohibit agency and intermediation in some military sales; and certain military procurement in the United Arab Emirates became subject to a similar policy prohibition in 1981-82. See Hamza and Stovall, "Middle East Laws on Bribery, Prohibited Payments, and Conflict of Interest," in Hannay, International Trade - Avoiding Criminal Risks (1991), pp. 6-19 through 6-22.
12. According to FCPA hearings, the Iranian government emphasized in 1973 that it would under no circumstances permit a fee for any agent to be included in the price of any U.S. equipment that it purchased through U.S. Foreign Military Sales (FMS). FCPA hearings, footnote 4 supra, p. 102. The Iranian government also required a broad affidavit from foreign defense contractors that had the effect of prohibiting agents and commissions in military sales. See the English translation of Iranian Law of 22 Dev 1337 and the text of the Iranian affidavit, reproduced in Practicing Law Institute, Legal Aspects of Doing Business with Egypt, Iran, Saudi Arabia and the Gulf States (1975).
13. Under the Commercial Code, a "contract agent" is defined as one who, on a continuing basis in a specified area of activity, and in exchange for a fee, undertakes to promote and negotiate to conclude transactions for the interest of the principal. Articles 821 and 282 of the Commercial Code contain special, so-called dealer protection, rules governing the termination or nonrenewal of a qualified Kuwaiti contract agent.
14. Under the Commercial Agencies Law, only "Kuwaiti nationals" are permitted to act as agents in Kuwait. There are other qualification requirements for such agents, including the need to have a "commercial registration" to do business generally, and explicit "purposes" that include the conduct of commercial agency. Such registration requirements are in addition to the Commercial Agencies Law requirement that an agent register its agency agreements with the Ministry of Commerce within two months from the date the agency is effective.
15. Compare provisions of the prior and current Egyptian Tender Law on the same issue, respectively, Article 9 of Law No. 236 (1954) and Article 36 of Law No. 9 (1983), to the effect that agency or intermediation generally is prohibited in those sales which are usually made only to government ministries, authorities and other such public entities. The 1954 Tender Law explicitly includes "arms and ammunition"

within this prohibition. In Egypt's military procurement immediately before the 1948 Arab-Israeli war, apparently there was a significant amount of agency and intermediation, commission payments and "influence peddling," which resulted in procurement of substandard or overpriced armaments and military equipment. Mohammed Naguib, the director general of the Egyptian Frontier Corps in 1949, complained loudly of such corruption in military procurement. See Naguib, Egypt's Destiny (1955). Naguib later became Egyptian prime minister, and the 1954 Tender Law bears his signature. Al-Waqái Al-Misriyya, No. 32 bis (April 22, 1954), pp. 2-4.

16. This Emiri Decree was published in the Kuwaiti Official Gazette No. 499, October 18, 1964, and explicitly includes "ready-made soldier attire" and "military decorations and emblems" within the definition of "military materials." Compare the more narrowly defined language in Article 3(E) of the Jordanian commercial agency law, amended in 1979 to prohibit agency and intermediation in "the purchase or import or sale of arms and their spare parts and complementary and developmental parts thereto, and ammunition. . . ." Moreover, on September 25, 1979, the Jordanian Prime Minister issued a letter to the Minister of Industry and Commerce clarifying this prohibition. The Prime Minister's letter states that the prohibition on agency and intermediation should not be broadly construed because it might otherwise be applied to sales of other equipment required for the Jordanian Armed Forces. This could result in the prohibition becoming the general rule, something which, according to the Prime Minister, would not be in the interest of the Jordanian Armed Forces. Paragraph 2 of the Prime Minister's letter makes a distinction between "arms" and other supplies for the Jordanian Armed Forces, including "cars, clothing, materials and other equipment."
17. I have changed certain wording in the MOD's English text of the circular to better reflect the original Arabic language provisions.
18. I understand that the MOD permitted some rare exceptions to the prohibitions on agents, e.g., in the procurement of clothing and uniforms. In such instances, the exception was granted by special MOD written directive. Some (or all) of these instances may have been when the MOD utilized the Kuwaiti Central Tenders Committee for procurement of nonarmament products.
19. I have not seen an Arabic text of the MOD contract supplement. The quoted clauses were apparently drafted by the MOD in English.

20. This discrepancy between contract text and administrative practice was apparently quite similar to the position of the Iranian Ministry of Defense in the 1970s. See, generally, footnote 12, supra.
21. A number of recent U.A.E. defense procurement contracts contain generally similar, but more elaborate, undertakings applicable to the foreign defense contractor.
22. In those instances, we understand the MOD would act as the primary "sponsor" for local government liaison needed by the foreign contractor; for example, entry visas and import licenses. If such a foreign company were required to "formalize" its local operations into a branch office, we understand that the MOD usually would stand in place of the commercial agent usually required for such a branch office, or the MOD would otherwise permit the foreign company to operate locally under the MOD's "umbrella."
23. This contrasted with Saudi Arabian regulations and government policies, where one practical effect was to encourage the establishment in the Kingdom of bona fide Saudi/foreign joint venture companies, even in defense-related contracting.
24. During the initial emergency recovery program, and undoubtedly a consequence of the Kuwaiti government establishing its emergency reconstruction program in temporary offices at the World Bank in Washington, D.C., Kuwait utilized a standard contract that the World Bank had developed for its projects. See MEER (March 1991), p. 6. At least some of these initial contracts contained many favorable terms for foreign contractors, including permission to operate in Kuwait without the need for such formalities as a branch office or commercial registration, U.S. governing law clauses, and detailed provisions for indemnification against Kuwaiti income tax.
25. This is my translation from the Arabic original.
26. A similar letter was issued by the Kuwaiti defense attaché at the Kuwaiti Embassy in Paris. (In that letter, the defense attaché indicated that the goal of the new policy is "to set up a better coordination for the Kuwait Ministry of Defense in the field of procurements in general.") I have been told that a similar letter was issued by the Kuwaiti Liaison Office in London. Presumably such letters were issued from other Kuwaiti embassies in those countries with defense contractors who might be selling or tendering to the MOD.

27. Apparently the U.S. Army Corps of Engineers initially required U.S./Kuwaiti joint ventures in the bidding for the contract to supply planning and design services for repair of two Kuwaiti airbases. See, generally, "USACE takes charge of airbase repairs," Middle East Economic Digest (August 30, 1991), p. 23. The contract for reconstruction of one of those airbases, recently awarded by the USACE to a "mixed" foreign/Kuwaiti joint venture, apparently did not require or give preference to such joint ventures.

Before the Gulf War, Kuwaiti government tenders often contained so-called "Kuwaitization" requirements, including a "30-percent rule," requiring foreign contractors to subcontract that specified portion of work or supply to Kuwaiti parties, or specifying that a foreign tenderer be aligned in a joint venture with a Kuwaiti party. See, e.g., "Motorway contractors told to prequalify," Middle East Economic Digest (April 4, 1987), p. 16; and id. (June 7, 1986), pp. 15-16.

28. The MOD might not have been initially convinced of the wisdom of such post-Gulf War largesse. See Kabbara, "New Contractual/Legal Challenges in rebuilding/rehabilitation of Kuwait," p. 12, Conference on Reconstruction of Kuwait (Café Royal, London, June 3, 1991). Some observers have speculated that the MOD policy change was not merely an internal ministerial decision. At least one newspaper report has commented on the political implications for Kuwaiti elections scheduled later in 1992:

More indirect political spending is almost certain to follow, not least, some suggest, through the careful award of reconstruction contracts. As one diplomat puts it: "This will be more like an election in southside Chicago than anywhere else."

Nicholson, "Backing for Kuwaiti opposition runs into the sand," Financial Times, December 31, 1991, p. 3.

29. See paragraph 1 of U.S. Embassy (Kuwait) cable, dated November 21, 1991, entitled "Use of Agents for Military Sales to the Kuwaiti Ministry of Defense," photocopy available in the Chicago office of Baker & McKenzie.
30. Paragraph 4 of the U.S. Embassy (Kuwait) cable, id., also contradicts the U.S. Embassy handout:

Kuwaiti agents are required for commercial transactions with the Ministry of Defense. Companies which have both FMS and commercial sales should engage an agent only for the commercial portion of their sales. . . . [Emphasis added.]

31. Similar rules would apply if a proposed contract were a U.S. Foreign Military Funded (FMF) contract. See, e.g., paragraph 7 of "Contractors Certification and Agreement with Defense Security Assistance Agency." In addition, the International Traffic in Arms Regulations (ITAR), issued pursuant to the Arms Export Control Act of 1976, 22 U.S.C.A. Secs. 2278 et seq. (Supp. 1991), require disclosure of certain fees and commissions paid or offered to be paid in connection with a particular sale of defense articles or services.
32. 48 C.F.R. Sec. 252.225.7303-4(d) (1992),
33. 48 C.F.R. Sec. 252.225.7027 (1992).
34. See U.S. Embassy (Kuwait) cable mentioned in footnote 29, supra, at paragraph 4. The permissibility of sponsorship payments under FMS rules, and other such FMS issues and interpretations, are beyond the scope of this article.
35. Saleh, footnote 5, supra, at p. 4. Saleh suggests that the practice of sponsorship might be a vestige of the Islamic amaan, a pledge of security which granted a foreigner protection while in Islamic territory. But in regard to such sponsorship, it was recently held in a Bahraini court case and a Dubai court case that a local sponsor was not financially liable for the actions of the sponsored person. See, respectively, International Business Lawyer (March 1989), p. 97; and MEER (July 1989), pp. 6-7.

Compare the tribal rabia or companion, who eased the comings or goings of a foreigner, described in Thesiger, Arabian Sands (Penguin ed. 1980), especially p. 171.
36. See footnote 2, supra.
37. Under 48 C.F.R. Sec. 3.401 (1990), a "contingent fee" is defined as: "any commission, percentage, brokerage, or other fee that is contingent upon the success that person or concern has in securing a Government contract."
38. The Kuwaiti tax department's practice regarding agency fees is to allow a maximum deduction of three percent of the gross annual revenue (i.e., contract value) from the taxpayer's operations in Kuwait. However, this amount might reflect the mere "sponsorship" functions of the agent, and additional agency fees might be considered deductible expenses for additional specified services provided by the agent to the taxpayer. Compare Article 8 of the Abu Dhabi Tender Law, Law No. 4 (1977), certain aspects of which are discussed in Santire, "Sponsorship Fees: Stated 'Maximum' Not a Limit," MEER (July 1981), pp. 3-4.

39. See, e.g., Middle East Economic Digest (November 22, 1991) at p. 6:

The main problem, [one U.S. bidder] believes, is that local agents are fighting over that smaller than expected slice of cake. Politics are taking over, he believes. "It's business as usual in Kuwait. . . . There's a lot of jiggery-pokery. It's all very frustrating. . . ."