September 19, 2008

The Honorable Condoleezza Rice
Secretary of State
U.S. Department of State
Washington, D.C. 20520

Dear Madam Secretary,

I write to inquire about the Department’s efforts to establish a Force Investigation Unit (FIU) to investigate use of force incidents by the Department’s security contractors in Iraq. I recently learned that that State Department has hired a contractor to provide six investigators for the unit.

It is highly troubling that the Department is apparently outsourcing oversight of its security contractors. In the wake of the alleged killing of 17 Iraqi civilians by State Department security contractors, it is extremely important that the Department demonstrate a commitment to conducting meaningful oversight of its contractors. The Department’s commitment to improving oversight of its contractors is called into doubt by the outsourcing of its responsibilities. I urge you to cancel the contract and man the Force Investigation Unit solely with government personnel.

Lack of oversight over U.S. security contractors continues to be a contentious issue in Iraq. To date, not a single U.S. security contractor has been prosecuted for misuse of force in the field, notwithstanding the presence of over 20,000 such contractors in Iraq and numerous serious allegations of such wrongdoing. As Secretary Gates has stated, the failure of some contractors to show proper regard for civilian life is at odds with the military’s mission in Iraq. Finally, as you know, this has been a matter of significant concern for the Iraqi Government and has been a barrier in negotiations between our nations. It is imperative that we establish a meaningful oversight regime, including comprehensive criminal investigations of allegations of misconduct.

Criminal investigations are inherently governmental functions that, according to long-standing U.S. government policy, should not be outsourced. Federal Acquisition Regulation part 7.5 lists the “direct conduct of criminal investigations” as an inherently governmental function. “Inherently governmental functions” are defined in Office of Management and Budget Circular A-76 and in the Federal Acquisition Regulation to include those functions that are “so intimately related to the public interest as to mandate performance by government personnel.” Such functions include activities that “significantly affect the life, liberty, and property of private persons.”

The Force Investigation Unit will apparently be charged with the direct conduct of investigating potential misuse of force against civilians by U.S. security contractors. Such investigations are intimately related to the public interest because they are the backbone of any prosecutions for the excessive use of force against civilians. Furthermore, these investigations significantly affect private persons who have been the victims of alleged misuse of force by U.S. contractors.
Since the direct conduct of criminal investigations has not been, historically, outsourced, the use of contractors to fill this role could raise problems that may compromise our ability to prosecute misuse of force incidents. These investigators will apparently be charged with collecting evidence and talking to witnesses. This must be done by law enforcement personnel trained in the preservation of evidence or else the evidence may not be admissible in court.

In recognition of this fact, the Secretary of State’s Panel on Personal Protective Services in Iraq recommended an increase of Regional Security Office personnel to man this investigation unit. Shortly after the Panel’s recommendations were released, the head of the panel, Patrick Kennedy, held a press conference during which he was asked if the units would include contract personnel and he answered that they would be composed of State Department employees. During his confirmation for the position of Under Secretary of State for Management, Mr. Kennedy confirmed that such personnel receive training in “crime scene reservation/management and evidence collection.” The Defense Department also has criminal investigative agencies with personnel in Iraq with expertise in battlefield investigations. Given that the U.S. government has personnel trained for these responsibilities in Iraq, there is no excuse for potentially jeopardizing any prosecutions by outsourcing this inherently governmental function.

I understand that the Force Investigation Unit will also be responsible for activities other than criminal investigations, including preliminary investigations of weapons discharges and the provision of condolence payments. As the unit responsible for first visiting the scene of alleged use of force incidents, it must treat the site as a potential crime scene to ensure the preservation of evidence. The presence of contractors in the Force Investigation Unit could jeopardize this responsibility and undermine the perceived impartiality of the investigation unit. If the unit is not capable of preserving any crime scenes without calling in other investigators, this delay could also compromise the collection of evidence, which was a concern when the FBI was called in to investigate the Nisoor square shooting.

While I appreciate the strains on the Diplomatic Security at this time, I note that the Department has received funding to hire 100 additional Diplomatic Security personnel. Therefore, there is no justification for outsourcing sensitive law enforcement activities to a contractor.

For these reasons, I urge you to cancel the contract and establish a Force Investigation Unit consisting solely of U.S. government investigators. Anything less will further exacerbate tensions within Iraq and the region caused by our perceived failure to hold U.S. contractors accountable for misuse of force against civilians.

Sincerely,

Russell D. Feingold
United States Senator

Cc: Under Secretary of State for Management Patrick Kennedy
    Assistant Secretary of State for Diplomatic Security Eric Boswell