



FEDERAL CONTRACTS



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Iraq Reconstruction

Without doubt, the reconstruction of Iraq is the most ambitious program of nation-building since the Marshall Plan in 1945. Estimates to complete the task range from \$50 billion to \$75 billion in total reconstruction funds, and most of this money will be spent in the form of contracts awarded to the private sector. The applicable procurement rules depend upon the issuing authority and the source of funds. Understanding Iraq's immediate and near-term needs, the opportunities for businesses to meet those needs, and the still-evolving structure and funding of the contracting activities is essential for any company wishing to play a role in this effort.

Iraq Reconstruction: Needs, Opportunities, and the Contracting Environment

By ROBERT S. NICHOLS

—Ambassador L. Paul Bremer, September 2003

President Bush has asked Congress to invest in the future of Iraq as much money as the United States invested in the future of France through the Marshall Plan between 1948 and 1951.

This money will be spent with prudent transparency. Every contract of the \$20 billion for Iraq will be competitively bid.¹

The nascent process of rebuilding Iraq is underway. The needs have been identified, significant funds are being made available, and the contracting apparatus is gearing up. Given the substantial role of the private sector in the rebuilding process, it is important for businesses to understand the structure of the contracting activities and the applicable contracting rules. This article describes this continually evolving landscape.

Needs and Opportunities

In October 2003, the United Nations and the World Bank issued a Joint Iraq Needs Assessment on the cur-

¹ Statements of Ambassador Bremer to the Senate Appropriations Committee (Sept. 22, 2003) and to the Iraqi people (Sept. 12, 2003), respectively. Both statements are available at <http://www.cpa-iraq.org/transcripts/index.html>.

rent status and priority of reconstruction requirements in Iraq.² The report focuses on immediate (2004) and near-term (2005-2007) priorities in various sectors.³ Most of the required work will be performed *via* contracts awarded to the private sector.⁴

Following is a broad sampling of Iraq's immediate needs, as well as opportunities for businesses to participate in the process:

- **Infrastructure and Transportation.** Decades of conflict, deferred maintenance, weakened technical and management capacity, and neglect have seriously degraded Iraq's infrastructure. Contracts can be expected for the rebuilding of the water supply system, sanitation, solid waste, highways, roads, bridges, railways, airports and civil aviation, ports and inland waterways, public transport, and freight and commercial transport.
- **Communications.** Iraq's telecommunications, post, and Internet infrastructures are significantly underdeveloped. Contracts should be forthcoming for the expansion of the switching and local access networks and the postal system, as well as for hardware and software to operate those systems.
- **Education.** One quarter of Iraqi children do not attend primary or secondary schools, due primarily to poverty, poor quality of instruction, and past politicization of the curriculum. Contracts most likely will be awarded to provide basic training for teachers, needed materials and equipment, physical rehabilitation of schools, and development of new curriculum and educational priorities.
- **Health.** The previous regime reduced health care spending by 90 percent, resulting in health levels comparable to the least developed countries. Contracts should be awarded for the implementation of public health programs, rehabilitation of essential infrastructure and health services, development of a national health plan, and medical equipment and supplies.
- **Electricity.** Most generation stations are only partially operable because of the absence of maintenance and spare parts. Recommendations for rehabilitation works and new programs are now being sought and considered.
- **Housing.** Iraq currently has a housing shortage of over 1 million units, and existing houses are of low quality due to poor construction, overcrowding, and lack of maintenance. A wide range of contracts should be forthcoming for a new system of land management, training for laborers and management, the building of units, and a 15-year upgrading program.
- **Agriculture, Water Resources, and Food Security.** These sectors are underperforming due to past policies that maintained artificially low food prices, production con-

trols, and marketing restrictions. Contracts can be expected for rehabilitation and expansion of critical infrastructure, assessment of water resources and needs, and development of food security controls.

- **Finance and Private Sector.** Iraq's financial system is dysfunctional, with little financial intermediation, ineffective institutions, and a poorly organized regulatory framework. Contracts probably will be awarded for the rewriting of laws in this area, modernization of offices and technology, and reform of accounting and banking standards to ensure congruence with internationally-applicable standards.

These examples of the broad range of identified needs suggest that the opportunities in Iraq are similar to, but also go beyond, the traditional roles of government contractors.⁵ The UN/World Bank Assessment estimates that these immediate and near-term needs will cost \$36 billion through 2007. The White House estimates that Iraq will need between \$50 billion and \$75 billion in total reconstruction funds.⁶ This is the most ambitious program of nation-building since the Marshall Plan in 1945.⁷

The Structure and Funding of the Contracting Activities

The contracts to perform services and to provide supplies in the Iraq reconstruction program currently are being awarded primarily by two groups: the U.S. government and the Coalition Provisional Authority ("CPA"). The U.S. government awards contracts funded by U.S. appropriations. The CPA—which has temporary governance over Iraq—awards contracts funded by the Development Fund for Iraq. Additionally, the United Nations and the World Bank are finalizing plans for a new fund to participate in the reconstruction efforts.

The U.S. government has been at the forefront of the reconstruction efforts. Congress initially appropriated \$2.5 billion for U.S.-funded reconstruction contracts in its April 2003, Emergency Wartime Supplemental Appropriations Act, 2003 (Pub. L. No. 108-11). President Bush submitted a request for an additional \$20.3 billion for Iraq reconstruction and security funding on Sept. 17, 2003. It is expected that Congress will appropriate most, if not all, of those funds by the time this article is published.

Reconstruction contracts funded by U.S. appropriations currently are being administered primarily by the Department of Defense ("DOD") and the Department of State ("DOS"). Within DOD, the Army Corps of Engineers is most directly involved in physical repair and reconstruction activities on the ground in Iraq. Within DOS, the U.S. Agency for International Development ("USAID") has been the lead agency for disbursing and

² The Needs Assessment was developed jointly by the UN Development Group and the World Bank Group, in accordance with the Provisions of Paragraph 8 of UN Security Council Resolution 1483. Contributors to the Assessment also included experts from the European Commission, Australia, Japan, member countries of the European Union, the International Monetary Fund, and the Coalition Provisional Authority in Iraq. See United Nations/World Bank, *Joint Iraq Needs Assessment* (2003), available at [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Iraq+Joint+Needs+Assessment/\\$File/Joint+Needs+Assessment.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Iraq+Joint+Needs+Assessment/$File/Joint+Needs+Assessment.pdf).

³ The sectors addressed include: education, health, employment creation, water and sanitation, transportation, telecommunications, electricity, housing and land management, urban management, agriculture, water resources, food security, finance, state-owned enterprises, investment climate, mine action, and government institutions.

⁴ See *Business Guide for Iraq*, U.S. Dep't of Commerce, Oct. 8, 2003.

⁵ Indeed, BearingPoint Inc., a Virginia-based consulting company, won a \$9 million contract to support integrated and sustainable economic reform in Iraq. BearingPoint's work will involve the examination of Iraq government policies, laws, regulations, and institutions to advise on ways to create a competitive private sector. 80 FCR ¶ 101.

⁶ See The White House, *Fact Sheet: Request for Additional FY 2004 Funding for the War on Terror*, Sept. 8, 2003, available at www.whitehouse.gov/news/releases/2003/09/iraq/20030908-1.html. This estimate may be conservative.

⁷ See RAND, *America's Role In Nation-Building: From Germany To Iraq* (2003), at xxvii.

administering U.S. foreign assistance, including reconstruction project business contracts. Additionally, the Department of Commerce has established a comprehensive Web site, www.export.gov/iraq, which provides information to assist in U.S. companies' participation in the economic rebuilding of Iraq.⁸

The roles of these U.S. agencies, however, will probably change within the next month. The Bush administration is planning to open a new Project Management Office ("PMO") in Baghdad. Although the PMO will be awarding contracts to undertake the reconstruction needs identified by the CPA, it appears that the PMO will report to the Pentagon and be staffed primarily by U.S. contracting personnel. The PMO is envisioned as the central clearinghouse for all non-security-related contracts funded by U.S. appropriations, and is intended to "rationalize the process" of bidding for U.S.-funded contracts.⁹

While the United States is playing a significant role in rebuilding Iraq, it is the CPA that has the primary responsibility for implementing foreign assistance efforts there. This transitional administration was established to assure the security of Iraq, to create national and local governmental institutions for representative governance, to facilitate economic recovery, and to sustain reconstruction and development. It is staffed by officials and personnel from the U.S. and other coalition member governments. The CPA Administrator is Ambassador L. Paul Bremer, who was appointed by the President and reports to Defense Secretary Donald Rumsfeld.

The CPA awards contracts and grants using monies from the Development Fund for Iraq ("DFI"). The DFI was established by the CPA and is held by the Central Bank of Iraq.¹⁰ There is approximately \$2.8 billion currently available for reconstruction contracting, which will be audited by the International Advisory and Monitoring Board.¹¹ DFI funds come from proceeds of oil and gas sales, frozen Iraqi assets, the UN oil-for-food program, and contributions from the World Bank as well as individual governments. Current business opportunities provided through the CPA can be found at www.cpa-iraq.org/business/index.htm.

In addition to the existing U.S. and CPA activities, the United Nations and the World Bank are finalizing plans for another vehicle to revitalize the Iraqi economy. The Reconstruction and Development Fund Facility for Iraq will serve as an alternative to the DFI, and will include the European Union, Japan, and other potential donors.

Participants met at the International Conference for the Reconstruction of Iraq in Madrid Oct. 23-24, to discuss the fund and to begin raising the \$55 billion in grants and loans estimated to be needed for this new fund over the next four years to rebuild Iraq's infrastructure. Of that \$55 billion, the United States has

⁸ Solicitations for U.S.-funded contracts are located at www.hq.usace.army.mil/cepa/iraq/contract.htm and www.acq.osd.mil/dpap/iraqreconstruction/iraqcontractinfo.htm for DOD contracts, and www.usaid.gov/iraq/activities.html for USAID contracts.

⁹ Chip Cummins & Neil King Jr., "New Office Created to Rebuild Iraq," *Wall St. J.*, Oct. 14, 2003, at A3.

¹⁰ See CPA Regulation No. 2, *Development Fund for Iraq*, June 10, 2003, available at www.cpa-iraq.org/regulations/REG2.pdf.

¹¹ Charles Clover, "Baghdad Board To Oversee Spending," *Financial Times*, Oct. 22, 2003, 6.

committed roughly \$20 billion this fiscal year, and other nations have so far pledged \$13.4 billion, for a total of about \$33.4 billion—60 percent of the amount needed.¹² In conjunction with the meeting in Madrid, a Business Conference was held Oct. 23 to discuss the role of the private sector in Iraq's development. The fund is anticipated to be operational by January 2004.

Applicable Contracting Rules

The contracts awarded by the U.S. government and the CPA are not governed by the same procurement laws and regulations. Rather, the applicable rules depend upon the issuing authority and the source of the funds. Businesses seeking contracting opportunities in Iraq should be aware of some important differences from the U.S. procurement scheme.

Contracts Awarded by the U.S. Government

Contracts awarded by the U.S. government using U.S. appropriations are governed by U.S. federal procurement laws and regulations. However, significant points must be made concerning the application of those laws to U.S.-awarded contracts for the Iraq reconstruction efforts:

- The Buy American Act,¹³ the major domestic preferences statute governing procurement by the federal government, does not apply to procurements of "products or services for use outside the United States." Thus, most contracts for the reconstruction of Iraq would *not* be covered by this statute.
- The "Little Buy American Acts" are domestic preference statutes that govern a specific type of procurement. The most well-known of these restrictions, commonly referred to as the "Berry Amendment," requires domestic origin for the procurement of certain items by the DOD.¹⁴ The applicability of each of these provisions must be determined on a case-by-case basis.
- The Competition in Contracting Act ("CICA")¹⁵ generally requires full and open competition for federal procurements. Although it applies outside the U.S., the Act contains seven exceptions to the general rule, three of which are of particular relevance to Iraq reconstruction contracts. Full and open competition is not required when:
 - only one responsible source is available, and no other supplies or services will satisfy agency requirements;
 - the agency's need is of such unusual and compelling urgency that the government would be seriously injured; or
 - disclosure of the agency's need would compromise national security.¹⁶

Additionally, many contractors and subcontractors interested in Iraq reconstruction contracts have found that private insurance companies have refused to issue, or have substantially increased premiums for, insurance coverage related to activities in a war zone. The

¹² See "U.S. Hopes Iraq Fund Will Attract Donors," Associated Press, Oct. 20, 2003.

¹³ 41 U.S.C. §§ 10a through 10d.

¹⁴ See B-166137, 59 Comp. Gen. 176 (1969.)

¹⁵ See 10 U.S. C. § 2304 (applicable to DOD and NASA); 40 U.S.C. § 253 (applicable to all other executive agencies).

¹⁶ Apart from CICA, USAID need not use full and open competition for certain contracts when it would impair or otherwise have an adverse impact on programs conducted for the purposes of foreign aid, relief, and rehabilitation. 40 U.S.C. § 474.

U.S. government has responded in very limited instances by granting indemnification pursuant to Pub. L. No. 85-804. However, the government has not granted a blanket authorization for such coverage. Accordingly, each contractor that believes that its contracts qualify for such indemnification must persuade the contracting agency to include the Federal Acquisition Regulation ("FAR") clause "Indemnification Under Public Contract Law" in its contract.¹⁷

Contracts Awarded by the CPA

Contracts awarded by the CPA are not governed by U.S. law and regulation. Rather, the CPA has issued Memorandum No. 4, *Contract and Grant Procedures Applicable To Vested and Seized Iraqi Property and The Development Fund For Iraq*, Aug. 19, 2003.¹⁸ The procurement rules contained in that document "appl[y] to contracts and grants executed by or on behalf of the CPA."¹⁹

Memorandum No. 4 is based largely on U.S. federal procurement principles; it even cites to U.S. law and regulation in some instances. However, there are significant differences that contractors must recognize. The primary rules and principles are as follows:²⁰

- Competition is mandatory for all contracts, unless specifically exempted or justified based on a written description of exigent circumstances. Reasonable efforts must be made to obtain competitive offers by advertisements and other means. Similar to the CICA in U.S. law, the compelling reasons justifying sole-source contracting include, but are not limited to:
 - when there is only one responsible source for the supplies or services, due to timeliness, intellectual property rights, or compatibility with existing systems; or
 - unusual or compelling urgency that represents a serious risk to agency objectives.
- "Contracts will be awarded to the offeror providing the greatest value to the CPA or Coalition forces, based on

¹⁷ For comprehensive guidance on the coverage of Pub. L. No. 85-804 and the procedures for requesting relief, see Kevin P. Mullen, "Extraordinary Contractual Relief Under Public Law 85-804," Briefing Papers No. 02-13 (Dec. 2002).

¹⁸ Available at www.cpa-iraq.org/regulations/CPAMEM04_AND_APPENDICES.pdf. The scope of the Memorandum is set forth in Section 1 and is as follows:

This memorandum establishes procedures applicable to the execution of contracts and grants for the benefit of the Iraqi people using Iraqi funds, as defined herein. As steward for the Iraqi people, the CPA will manage and spend Iraqi Funds, which belong to the Iraqi people, for their benefit. Although Iraqi funds are not subject to the same laws and regulations that apply to funds provided to the CPA directly from Coalition governments, they shall be managed in a transparent manner that fully comports with the CPA's obligations under international law, including [UN Security Council] Resolution 1483.

¹⁹ Section 2. This includes contracts and grants issued by the CPA Head of Contracting Activity and, in many instances, the CPA Regional Directors, Interim Ministry Officials, and Iraqi Ministries and governmental agencies. Section 3 includes definitions for certain terms. Section 4 authorizes the appointment of contracting officers, and Section 5 makes the CPA Head of Contracting Activity responsible for providing technical supervision over them.

²⁰ These principles are contained in Section 6, unless otherwise noted.

price and all other evaluation factors contained in the solicitation."

- There is a stated preference for Iraqi vendors as prime contractors and subcontractors.
- The contracting officer must determine that the price of a contract is fair and reasonable, based on fair market value and other relevant factors.
- There may not be personal conflicts of interest in a procurement. Organizational conflicts of interest, however, are not addressed.
- To the extent practicable, requirements for a project or related projects may be consolidated into one contract, in order to reduce the administrative burden of contracting.
- The contracting officer must find the contractor receiving a contract award to be responsible.²¹
- Proposal information submitted by a contractor must be afforded protection, in accordance with 5 U.S.C. § 552 and FAR Parts 3 and 24.²²
- Micro-Purchase contracts (up to \$5,000) may be awarded without competition, if the contracting officer determines that the offered price and terms are fair and reasonable.
- Oral solicitations may be used for contracts up to \$25,000, but written solicitations must be used for larger contracts.
- Contracting officers are encouraged to use Blanket Purchase Agreements for repetitive small purchase (\$5,000-\$25,000) requirements.
- For Large Purchase contracts (over \$500,000)—
 - An Invitation for Bids may be used in limited circumstances, but the preferred approach will be contract through negotiation based on a request for proposals.
 - The award evaluation factors must include price and may also include technical expertise, financial stability of the contractor, and prior contract performance.
 - Certain preliminary award decisions for Large Purchase contracts will be reviewed by a Contract Award Committee responsible for ensuring compliance with procedural and competition requirements.
- Contract amendments and modifications that are outside the scope of the original contract should be addressed through new contracts.²³

Memorandum No. 4 also provides standard terms and conditions for solicitations, procurement contracts

²¹ This means that the contractor must: have adequate financial resources to perform the contract, or the ability to obtain them; be able to comply with the required or proposed delivery or performance schedule; have a satisfactory record for performance, integrity, and business ethics; have the necessary organization, equipment, experience, controls, and technical skills, or the ability to obtain them; and be otherwise qualified and eligible to receive an award under applicable laws and regulations.

²² Section 12.

²³ Section 7. Additionally, Section 8 requires each contracting officer to monitor and to document the postaward execution of all contracts that he/she approves. Section 9 establishes procedures unique to grants. It requires grant applications to contain definable goals, with the payment schedule tied to the accomplishment of specific milestones and objective measures of success. Section 10 describes the allocation of funds pursuant to the Iraqi National Budget. Appendix A contains the documentation requirements for each contract (based on the dollar value of the contract), grant, and construction project. It also sets forth the sole-source contracting justification and approval requirements.

in excess of \$5,000, and construction contracts.²⁴ The solicitation terms and conditions are few in number and generally correspond to clauses found in the FAR.²⁵ The exception is the “Protest” clause, which requires any protest of the award decision first to be made to the CPA contracting officer, with appeal to the CPA Head of Contracting Activity for final decision in the matter. There is no express right to bring a protest before any other administrative body or any court.²⁶

The terms and conditions to be used in procurement (i.e., not construction) contracts also generally correspond to clauses found in the FAR.²⁷ However, three of these clauses differ from the U.S. versions in significant ways:

- The “Disputes” clause incorporates FAR Clause 52.233-1, Disputes, and requires that all requests for equitable adjustment, claims, appeals, or actions arising under or relating to the contract shall be resolved in accordance with that clause. Appeals from final decisions of the contracting officer may be appealed only to the U.S. Armed Services Board of Contract Appeals, whose decisions shall be final. The contract shall affirm that it is not subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

²⁴ Appendix B.

²⁵ The subjects of the solicitation standard terms and conditions are indicated by their titles: Submission of Offers; Period for Acceptance of Offers; Product Samples; Multiple Offers; Late Submissions, Modifications, Revisions, and Withdrawals of Offers; Contract Award; Multiple Awards; Evaluation; Options; Notice of Award; Protests; and Evaluation of Foreign Currency Offers.

²⁶ At least one disappointed contractor is testing this conclusion. In what is believed to be the first legal challenge to an award by the CPA, the General Accounting Office (“GAO”) received a bid protest concerning the award of three mobile telecommunications licenses in Iraq. On Oct. 22, 2003, GAO dismissed the protest for failure to provide a detailed statement of the factual and legal grounds. The dismissal did not address the jurisdictional issue; however, GAO left the door open for the protester to refile once it obtained more information about the basis for award. On Oct. 27, Turkcell filed a new protest. See 80 FCR ¶ 381 and related story in the Oct. 28, 2003 issue of FCR (*describing Turkcell Consortium*, B-293048 (Oct. 14, 2003)).

²⁷ The titles of the procurement contract terms and conditions are: Inspection/Acceptance; Assignment; Changes; Disputes; Excusable Delays; Invoice; Patent Indemnity; Payments; Risk of Loss; Taxes; Termination for Convenience; Termination for Cause; Title; Warranty; Immunities; Legal Status; Contractor’s Responsibility for Employees; Subcontracting; Indemnification (of the CPA, but not by the CPA); Use of Names and Symbols; Limitation of Liability; Inconsistency Between English Version and Translation of Contract; Correspondence in English; Conflicts of Interest; Order of Precedence; Source of Funds; Option to Extend the Term of the Contract; and Liquidated Damages.

- The “Excusable Delay” clause makes the contractor liable for default, unless nonperformance is caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence, such as acts of God or *the public enemy*, acts of the Iraqi governmental entities, fires, floods, etc.
- The “Liquidated Damages” clause requires the contractor to pay the CPA a sum certain per calendar day of delay if the contractor fails to perform within the time specified in the contract, unless the “Excusable Delay” clause applies.²⁸

Beyond these significant issues, contractors should expect the customary U.S. procurement practices to be modified based on security concerns, geopolitical influences, and the unpredictable wartime environment. Thus, although the CPA procurement rules are in place, their scope is narrower, and their application may be less predictable, than contractors might expect.

Conclusion

The reconstruction of Iraq is among the largest rebuilding efforts in history and likely will continue for years to come. The private sector will play a significant role in this endeavor, and businesses accustomed to U.S. procurement standards will have a unique competitive advantage. They must, however, remain flexible and stay on top of the still evolving contracting processes.²⁹ For those who choose to participate, the rewards—both tangible and intangible—may be well worth the effort.

²⁸ The construction contract standard terms and conditions also generally correspond to clauses found in the FAR. The subjects addressed are likewise indicated by the titles: Performance of Work by the Contractor; Differing Site Conditions; Site Investigation and Conditions Affecting the Work; Material and Workmanship; Superintendence by the Contractor; Permits and Responsibilities; Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements; Operations and Storage Areas; Cleaning Up; Accident Prevention; Schedules for Construction Contracts; and Specifications and Drawings for Construction.

Appendix C contains guidance for issuing grants. It addresses such topics as grant objectives, benefits expected, and assessment and control measures. Grants may be made to government entities or other organizations for purposes of benefiting the public good. Appendix D answers frequently asked questions. Appendix E addresses the Commander’s Emergency Response Program, under which certain U.S. military officials may use limited DFI funds for reconstruction of the Iraqi infrastructure.

²⁹ For example, the New York Times recently reported that “American officials in Baghdad are offering contracts totaling hundreds of millions of dollars, but giving companies as little as three days to submit competing bids.” Edmund L. Andrews & Neela Banerjee, “Companies Get Few Days To Offer Bids On Iraq Work,” N.Y. Times, Oct. 18, 2003, at A1.

