

# BRIEFING PAPERS<sup>®</sup>

## SECOND SERIES



PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### IRAQ RECONSTRUCTION: KEY PROCUREMENT ISSUES

By Robert S. Nichols

The reconstruction of Iraq has involved tens of billions of dollars flowing to thousands of prime contractors and subcontractors, creating an unprecedented level of private-sector involvement in a diplomatic and military mission. At the same time, the risks to contractors involved in reconstruction activities—from the attacks on contractor personnel, to high-profile audits and investigations, to the creation of a democratic Iraqi-led government—have received worldwide attention. This BRIEFING PAPER discusses selected Government procurement issues for contractors involved—or contemplating involvement—in the Iraq reconstruction effort, including (1) the legal framework of the reconstruction activities, (2) the current status of the activities, (3) applicable procurement laws and rules, (4) the use of and limits on competition in the award of Iraq reconstruction contracts, (5) relevant bid protests, (6) the pursuit of contractor claims under Iraq-related contracts, and (7) developments related to U.S. Government audits and investigations of Iraq reconstruction contracts. In addition, the PAPER provides a list of useful resources for contractors

interested in pursuing business opportunities related to the Iraq reconstruction efforts.

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#### Legal Framework

From April 2003 through June 28, 2004, the United Nations designated the Coalition Provisional Authority (CPA) as the lawful government of Iraq.<sup>1</sup> From its inception, the UN intended for the CPA to function temporarily, until Iraq was sufficiently stable, politically and socially, to assume its sovereignty.<sup>2</sup> In addition to protecting Iraqi territorial integrity

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and working to provide security to the Iraqi people, the CPA committed itself to rebuilding all aspects of Iraqi infrastructure so that, upon turnover, the democratically elected Iraqi government could assume authority over a country ready to function economically, to provide basic services to its citizens, and to play a responsible role in the community of nations.<sup>3</sup>

During the CPA's existence, reconstruction contracts were awarded primarily by the CPA itself and by agencies of the U.S. Government.<sup>4</sup> The lead U.S. agencies were the Department of Defense, the U.S. Army Corps of Engineers, and the U.S. Agency for International Development. The Iraqi ministries largely played a supporting role during this phase of the reconstruction effort.

The CPA commissioned the Program Management Office (PMO) in November 2003 to oversee and direct the contracting process.<sup>5</sup> With offices in Baghdad and Washington, D.C., the PMO provided oversight, management, and execution of the infrastructure reconstruction efforts in Iraq. In broadest terms, the PMO was responsible for all of the program's activities, projects, assets, construction, and financial management. The PMO's "strategic objectives" were to restore Iraq's political and economic stability through infrastructure development and to transition to host-nation support.

On June 28, 2004, the CPA dissolved and the Iraqi Interim Government (IIG) assumed sovereignty.<sup>6</sup> The new U.S. Embassy in Baghdad established diplomatic relations with the IIG that same day. By National Security Presidential Directive (NSPD), President Bush es-

tablished the new Iraq Reconstruction Management Office (IRMO) within the Department of State and the Project Contracting Office (PCO) within the DOD, as temporary organizations to assist in furthering the mission of reconstructing and rebuilding Iraq.<sup>7</sup> The IRMO is the primary liaison for the IIG and employs advisors within the various Iraqi ministries.<sup>8</sup> The PCO executes the expenditure of U.S. appropriations by awarding and managing contracts.<sup>9</sup> The various ministries of the IIG award reconstruction contracts using Iraqi funds.<sup>10</sup>

The legal framework for the presence of reconstruction contractors in Iraq is contained in CPA Order No. 17. That Order provides Status of Forces Agreement (SOFA)-like immunities and other protections for Coalition forces and contractor personnel.<sup>11</sup> A SOFA is an agreement between the United States and a host nation about the laws and regulations that govern the actions of U.S. forces deployed inside the host nation's borders. The Transitional Administrative Law (TAL), agreed upon by the CPA and the Iraqi Governing Council in March 2004, provides in Article 26(C) that CPA orders and regulations "shall remain in force until rescinded or amended by legislation duly enacted and having the force of law."<sup>12</sup> Most importantly, however, CPA Order No. 100,<sup>13</sup> U.N. Security Council Resolutions (UNSCR) 1483<sup>14</sup> and 1511,<sup>15</sup> and the TAL provide that, following the democratic election of an Iraqi National Assembly, Iraq will have the ability to modify, rescind or maintain all CPA Orders. Thus, the legal framework for the reconstruction process has been and will continue to be fluid.



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## Status Of The Reconstruction Activities

### ■ Funding

As of December 31, 2004, approximately \$60.3 billion in grants, loans, assets, and revenues from various sources had been made available or pledged for the reconstruction of Iraq.<sup>16</sup> This sum is composed of three separate “pots” of money: U.S. appropriated funds, Iraqi funds, and grants and loans from other nations.

The United States has appropriated \$24.1 billion toward the relief and reconstruction of Iraq.<sup>17</sup> Funds were included in the Emergency Wartime Supplemental Appropriations Act, 2003, Public Law 108-11;<sup>18</sup> the Emergency Supplemental Appropriations Act for the Defense and Reconstruction of Iraq and Afghanistan, 2004, Public Law 108-106;<sup>19</sup> and the Department of Defense Appropriations Act, 2005, Public Law 108-287.<sup>20</sup> As of December 31, 2004, approximately \$15.9 billion (54%) has been obligated and \$6.8 billion (28%) has been expended.<sup>21</sup>

The \$32.8 billion Iraqi “pot” of money is composed primarily of proceeds from oil sales, United Nations’ Oil-for-Food program surplus funds, and other assets.<sup>22</sup> Pursuant to UNSCR 1483, these monies were placed in the “Development Fund for Iraq” (DFI), held in the U.S. Federal Reserve Bank in New York. The funds must be used to finance the Iraqi civilian administration, humanitarian needs, infrastructure repairs, economic reconstruction, and other purposes benefiting the Iraqi people.

The CPA was responsible for the DFI funds before June 28, 2003, but transferred the account to the IIG with the transition of sovereignty. Before the transition, the CPA created a subaccount at the New York Federal Reserve for the Central Bank of Iraq. This account’s exclusive purpose is to pay outstanding DFI-funded CPA contracts. The Iraqi Ministry of Finance has transferred funds into this subaccount on a routine basis to pay for outstanding liabilities.

Additionally, a large number of countries and international organizations have provided aid in response to the relief and reconstruction requirements in Iraq.<sup>23</sup> Periodic conferences have been held to coordinate international activities, the first of which was the Madrid Donor Conference in October 2003. At the Madrid Donor Conference, non-U.S. donor nations and international organizations pledged \$13.5 billion for reconstruction in 2004–2007. Additionally, the Paris Club, a group of 19 donor countries, has taken the lead in negotiating reductions in Iraq’s external debt, which has been estimated at between \$120–125 billion.<sup>24</sup>

### ■ Priorities

In October 2003, the United Nations and the World Bank issued a “Joint Iraq Needs Assessment” on immediate (2004) and near-term (2005–2007) reconstruction requirements in Iraq.<sup>25</sup> The Needs Assessment was developed in accordance with the ¶ 8 of UNSCR 1483 and included contributions from experts from the European Commission, Australia, Japan, member countries of the European Union, the International Monetary Fund, and the CPA. It covered various economic, social, and government sectors, not including oil and security and estimated that the overall cost of reconstruction needs for the medium-term will be \$36 billion U.S. dollars.

In September 2004, the Iraqi Strategic Review Board produced a similar assessment entitled “National Development Strategy.”<sup>26</sup> The National Development Strategy enumerated social and economic reforms needed for the reconstruction of Iraq, the development of its economy, and the advancement of its people. In this report, the Iraqi Strategic Review Board concluded that rebuilding programs and economic reform face major challenges as a result of the loss of the country’s financial resources, sanctions, loss of hundreds of thousands of lives during Saddam Hussein’s rule, emigration, excessive inflation, deterioration of infrastructure caused by the misguided economic policies, and the three wars of the previous Iraqi regime.

The CPA, and since the June 28 transition, the IRMO and the PCO, have focused the reconstruction efforts on many of these same priority areas. Section 2207 of Public Law 108-106 requires the Administration to submit quarterly reports to Congress outlining the current conditions for programs and initiatives supported by the U.S. appropriations.<sup>27</sup>

The Office of Management and Budget submitted the first “Section 2207 Report” to Congress January 5, 2004, and subsequent reports on April 5 and July 2, 2004. The State Department submitted the quarterly reports on October 5, 2004, and January 5, 2005.<sup>28</sup>

The “Section 2207 Report” from January 2005 shows the reconstruction priorities as of the end of 2004, based on spending. A detailed presentation of the “Spending Plan” presented in the Report is contained in an Appendix to this PAPER. A brief summary of the

priorities detailed in the Report’s “Spending Plan” is provided in the chart at the bottom of this page.<sup>29</sup>

#### ■ Accomplishments & Challenges

The reconstruction of Iraq is the most ambitious program of nation-building since the Marshall Plan in 1947. The CPA, IIG, and U.S. Government agencies have awarded over 4,000 reconstruction prime contracts in 2003–2004.<sup>30</sup> While the large-dollar contracts have been awarded primarily to established, proven U.S. contractors, Iraqi companies have won the majority of prime contracts. Additionally, the large U.S. prime contracts are expected to result in approximately 15,000 subcontracts, involving a wide range of contractors in the reconstruction process.<sup>31</sup>

During the week of November 30, 2004, the PCO surpassed the 1000th construction start mark—one month ahead of schedule.<sup>32</sup>

IRAQ RELIEF AND RECONSTRUCTION FUND - Spending Plan					
Millions of Dollars					
Category	Jan. 5, 2005 Allocation	Apportioned (as of Dec. 17)	Obligated (as of Dec. 29)	Actual Outlays (as of Dec. 29)	TOTAL
Security & Law Enforcement	5,045	5,045	3,159	1,026	5,045
Justice, Public Safety Infrastructure, and Civil Society	1,953	1,953	1,166	288	1,953
Electric Sector	4,369	3,627	2,772	554	4,369
Oil Infrastructure	1,701	1,701	977	107	1,701
Water Resources and Sanitation	2,279	1,373	875	29	2,279
Transportation and Telecommunications Projects	513	513	316	25	513
Roads, Bridges, and Construction	360	355	175	28	360
Health Care	786	786	508	24	786
Private Sector Employment Development	843	843	327	69	843
Education, Refugees, Human Rights, Democracy, and Governance	379	379	171	42	379
Administrative Expenses	213	29	29	29	213
<b>GRAND TOTAL</b>	<b>18,439</b>	<b>16,603</b>	<b>10,475</b>	<b>2,221</b>	<b>18,439</b>

A summary of the projects is provided in the chart below:

RECONSTRUCTION PROJECTS (underway as of Dec. 2, 2004)	
Schools	363
Public Health Clinics	41
Hospitals	14
Railroad Stations	58
Border Posts	88
Ports of Entry	6
Fire Stations	20
Police Stations	17
Military Bases	16
Water	67
Electricity	58
Oil	19
Sewer	24
Roads	66
Other	194
GRAND TOTAL	1051

As PCO Director Charles Hess observed in November 2004, “Compare Boston’s ‘Big-Dig,’ a \$14.6 billion program of 188 projects—the first 25 percent of construction took five years to complete.”<sup>33</sup>

Contractors have played a significant role in the effort in Iraq, including contributions to the following activities:

- (1) Feeding, housing, and supplying the forces that liberated Iraq.
- (2) Maintaining and operating complex systems vital to the war-making capability.
- (3) Building civil works projects (e.g., water and power projects).
- (4) Rebuilding the financial structures of Iraq.
- (5) Upgrading the education and health systems.
- (6) Training and equipping the new Iraqi military.
- (7) Developing democratic institutions.

The challenges facing contractors reconstructing Iraq have also received significant attention, with security presenting the foremost concern. Operation Iraqi Freedom began on March 20, 2003, and President Bush declared an end to major combat operations in Iraq on May 1, 2003. Nevertheless, the insurgents’ warmaking activities escalated in 2004, with their focus turning increasingly to contractors and reconstruction projects. Terrorists have sabotaged major pipelines, cut power to more than 100 electrical lines, and routinely ambushed contractor convoys. In the Sunni Triangle, small-scale rehabilitation projects have been destroyed soon after completion. For example, in March 2004, insurgents bombed a telephone exchange in Baghdad, just after it was repaired by contractors at a cost of \$50 million.

U.S. Department of Labor data indicates that 23 contractor deaths occurred in Iraq in 2003.<sup>34</sup> In contrast, as of December 31, 2004, contractor fatalities in Iraq numbered 232. Also as of December 31, 2004, companies filed 1,778 insurance claims under Defense Base Act policies, mandatory workers’ compensation insurance policies that provide death or disability payments for workers killed or injured overseas while employed on U.S. contracts.<sup>35</sup>

Over 16.5% of reconstruction projects in central Iraq have been delayed for more than 2 weeks.<sup>36</sup> In December 2004, for the first time, a major U.S. contractor dropped out of the reconstruction effort. Contrack International Inc., the leader of a partnership that won a \$325 million contract to rebuild Iraq’s transportation system, cited skyrocketing security costs in its decision to terminate work in Iraq.<sup>37</sup> Although a few companies and non-profit groups have similarly asked to cancel their contracts because of security concerns, Contrack’s is the largest to be canceled to date. U.S. reconstruction officials said the termination of Contrack’s contract would not hamper rebuilding.

The security challenge has also affected reconstruction costs. Contractors are responsible for providing security for their employees, equip-



ment, and work sites. Private security forces have stepped up to meet this requirement, but the use of private security forces has not put an end to attacks against contractors—and it has raised issues of its own. The Government Accountability Office is currently studying the use of private security contractors, which number 20,000 individuals and account for 30–50% of the total reconstruction cost by some estimates. Many companies have suffered significant cost escalations, which are likely to produce claims by fixed-price contractors on legal or equitable grounds.

## Applicable Laws & Rules

### ■ U.S. Government Contracts

Contracts awarded by U.S. agencies are governed by U.S. federal procurement laws and regulations. Beyond these commonly understood rules, however, there are significant Iraq-specific issues of which contractors involved in the reconstruction effort must be aware.

(a) *“Contractors on the Battlefield” Rules*—The participation of contractors in the Iraq reconstruction effort raises issues related to “contractors on the battlefield”—the use of contractors to support combat and contingency operations. Although these are not traditional Government contracts issues, they include such legal and practical matters as the legal status of contractor personnel; the payment of benefits for captured and detained personnel; the use of Contractor Central Processing points, standard identification cards, and Individual Readiness files; training contractor personnel on the Geneva Conventions, health concerns, security, the use of chemical weapons protection kits, and customs and courtesies for the area of deployment; the carrying and use of firearms; and applicable criminal and civil jurisdiction.<sup>38</sup>

While many of the topics in this area are usually governed by a SOFA, there is no SOFA between the U.S. and Iraq yet. Instead, the CPA issued regulations, orders, and memoranda covering such issues as local licensing and registration requirements and the application of Iraqi laws and legal process to con-

tractor personnel.<sup>39</sup> As mentioned earlier, TAL Article 26(C) provides that these CPA orders and regulations “shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.”<sup>40</sup>

Additionally, solicitations and contracts address “contractors of the battlefield” issues. For example, the “Capture and Detention” clause at Defense Federal Acquisition Regulation 252.228-7003 covers detention benefits to a captured person.<sup>41</sup> Other special contract clauses govern compliance with combatant command orders, contractor personnel administration, clothing and equipment issue, vehicle and equipment operation, passports, visas, and customs.<sup>42</sup>

Guidance published by the DOD and the Military Departments can also assist contractors working in Iraq. For example, the DOD drafted a Directive entitled “Management of Contractor Personnel in Support of Joint Operations and Declared Contingencies” in March 2003, just as the war in Iraq was about to begin.<sup>43</sup> In November 2003, the Army attempted to consolidate much of its guidance for contractor personnel deployments by amending the Army Federal Acquisition Regulation Supplement Part 5125.<sup>44</sup>

In March 2004, the DOD also issued a proposed rule that would amend the DFARS to require companies to accept “the risks associated with required contract performance” in inherently dangerous areas.<sup>45</sup> The proposed rule would require a new clause to be included in defense contracts for work to be performed outside the U.S. in support of humanitarian, peacekeeping, and combat missions. The clause would specify that contractors should not rely on the Government for security, food, lodging, transportation, telephone service, or medical treatment. Contractors would also be required to assume greater responsibility for contractor casualties, such as notifying next of kin in the event of death or injury and for flying the bodies of deceased workers back to the United States. The rule would also give military commanders the authority to make contractual changes in the field. Comments on the proposed rule were due May 24, 2004; it has not yet been finalized.

(b) *Special Export License*—On July 30, 2004, the Bureau of Industry and Security of the Department of Commerce created a new license to assist contractors and subcontractors with certain exports in furtherance of civil reconstruction projects in Iraq.<sup>46</sup> The Special Iraq Reconstruction License (SIRL) may be used for the export to Iraq of commercial and “dual use” items that are subject to the Export Administration Regulations. Applications for a SIRL are given expedited processing by U.S. Government agencies, and the licenses are valid until the project described in the license application is completed or discontinued. In addition, the U.S. Government also has authorized contractors and subcontractors to engage in transactions with certain Iraqi state entities that are controlled by the IIG.

#### ■ Iraq Ministry Contracts

Contracts awarded by the Iraqi ministries are not governed by U.S. procurement rules as a matter of law. Although they may look to U.S. acquisition provisions when drafting their contracts, the ministries are governed by the Iraqi procurement rules, and firms must understand that legal framework to compete for ministry reconstruction contracts. Beginning in 2004, there has been a praiseworthy collaborative effort to bring Iraq’s procurement rules into compliance with international standards.

During the spring of 2004, a diverse group of public officials drafted the Iraqi Public Procurement Order, signed by CPA Administrator L. Paul Bremer on May 14, 2004. This exercise involved attorneys from the CPA Office of General Counsel in Baghdad; the Departments of Commerce, State, and Treasury; the affected Iraqi ministries; the World Bank and the International Monetary Fund; the governments of the United Kingdom and Australia; and procurement experts from the American Bar Association’s Iraq Initiative and the Central European and Eurasian Law Initiative.

The attorneys first identified and reviewed existing Iraqi procurement law, with an eye toward making only minimal modifications. However, a consensus formed that the bulk of the law did not meet international stan-

dards for ensuring transparency, cost effectiveness, and fair procurement. The group determined that modifying the existing laws and regulations would be impossible, and the only feasible approach would be to start from scratch. The ABA Iraq Initiative developed a paper presenting basic concepts for the law, and attorneys from the DOD and the Department of Commerce took the lead in drafting. The result was CPA Order No. 87, a set of guiding principles with implementing regulations to be left to the Iraqis to promulgate.<sup>47</sup>

## Competition

### ■ Early Use Of Noncompetitive Contracting

Many of the contracts awarded in the early months of the Iraq reconstruction process received tremendous scrutiny for the lack of competition. The highest profile circumstance involved the Army Corps of Engineers’ \$1.8 billion sole-source contract award to Halliburton’s subsidiary Kellogg, Brown and Root (KBR) for oil services. The Corps announced the contract on March 24, 2003, citing “unusual and compelling urgency”<sup>48</sup> as grounds for using noncompetitive procedures and stating that KBR was the only contractor with equipment and personnel available to respond to oil well fires on extremely short notice. The Corps expected to use this contract for an interim period until it had an opportunity to award additional contracts.

Members of Congress and the media complained about “favoritism” and “secret procedures” in awarding the contracts.<sup>49</sup> During congressional testimony, Pentagon officials disclosed that, as the Government prepared for war in Iraq in the fall of 2002, a senior DOD political appointee chose Halliburton to plan how to repair Iraqi oil fields and then briefed Vice President Cheney’s chief of staff and other White House officials about the sole-source contract before it was granted. An official from the Corps also alleged improprieties in the early contracting process with Halliburton.

While this set of circumstances provided plenty of political fodder and media headlines, the

DOD consistently has stated that the use of noncompetitive contracting procedures was justified by the circumstances and permitted by law. Additionally, after the urgent need passed, the Corps used competitive procedures to replace the sole-source contract with two new contracts. On January 16, 2004, KBR won the competitive solicitation to rebuild the oil industry in Southern Iraq.<sup>50</sup>

Furthermore, the DOD was not alone in limiting competition for early reconstruction contracts. In a Senate hearing on February 25, 2004, the USAID Inspector General Everett L. Mosley testified that his agency had used less than full and open competition in awarding several contracts awarded for the reconstruction work in Iraq. USAID's chief procurement officer, Timothy Beans, testified that the agency had chosen to use limited competition for most of its initial awards because of "the need to act quickly following the end of active hostilities."<sup>51</sup>

#### ■ Competition Provisions In Public Law 108-106

In addition to providing supplemental funds for Iraq reconstruction, Public Law 108-106<sup>52</sup> addressed the issue of competition for the Iraq reconstruction contracts. Section 2202 allows agencies to waive full and open competition requirements in certain circumstances with the written approval of the CPA Administrator and the head of the contracting agency and also exempts any contract worth less than \$5 million and small business awards from the full and open competition requirements. The CPA Administrator or the head of each executive agency must report to Congress any award not made with competitive procedures, along with the list of contractors solicited for the work and the justification for the noncompetitive award.<sup>53</sup>

Note that the Senate's version of the Iraq supplemental spending bill (S. 1689) included an amendment that attempted to ban no-bid contracts for Iraq reconstruction without approval from Congress. Senator Ron Wyden (D-Or.) explained during floor debate that the proposed amendment was "legislation with

teeth in it," because it would have withheld supplemental funding for any contract action that does not meet the amendment's requirements.<sup>54</sup> This provision was struck from the final version sent to the President, however.

#### ■ The Wolfowitz Memo

In a memorandum dated December 5, 2003, Deputy Secretary of Defense Paul Wolfowitz announced that companies from countries that opposed the Iraq war were barred from competing for reconstruction contracts funded by Public Law 108-106.<sup>55</sup> The memo lists 63 countries eligible to compete, but leaves out countries such as Canada, France, Germany, and Russia. President Bush later responded to Canadian complaints by declaring that Canadian companies would be permitted to compete for the contracts. Certain European nations also complained about the ban, and the European Commission (the European Union's executive body) declared that it may study whether the restriction violates World Trade Organization rules. The memorandum nevertheless remains in effect.

According to Mr. Wolfowitz, this restriction is "necessary for the protection of the essential security interests of the United States," because limiting competition for the reconstruction prime contracts to companies from the U.S., Iraq, Coalition partners, and force-contributing nations is in the public's interest. Mr. Wolfowitz has maintained that international support and cooperation are necessary for Iraq's progress, and an "unsuccessful reconstruction effort would have serious negative effects." Therefore, "[e]very effort must be made to expand the international cooperation in Iraq." And limiting competition for prime contracts will encourage more international cooperation in Iraq and in future efforts, Wolfowitz said.<sup>56</sup>

#### ■ CICA "Unusual & Compelling Urgency" Exception

In *Filtration Development Co., LLC v. United States*,<sup>57</sup> the U.S. Army sought to have Sikorsky



Aircraft Co., the prime contractor for its UH-60 Blackhawk helicopters, procure filter kits for helicopters operating in combat conditions in Iraq and other countries in the region. Sikorsky initiated a “trade study” to evaluate competitive alternatives. Citing “unusual and compelling urgency,” however, the Army directed Sikorsky to cancel the study in favor of a sole-source subcontract to Aerospace Filtration Systems.

In late 2003, a competing filter supplier, Filtration Development Co., filed a bid protest at the U.S. Court of Federal Claims arguing, among other things, that the Army’s action violated the Competition in Contracting Act because it lacked justification under CICA’s “unusual and compelling urgency” exception to the “full and open competition” requirements.<sup>58</sup> This exception permits the head of an agency to use procedures other than competitive procedures when “the agency’s need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.”<sup>59</sup> When relying on this exception, the agency must request offers from as many potential sources as is practicable under the circumstances.<sup>60</sup>

The Government moved to dismiss for failure to state a claim, arguing that the presence of “military matters” made the case “nonjusticiable,” such that the court may not

impermissibly intrude into military affairs that are outside the scope of judicial oversight. Judge Bodhan A. Futey denied the motion to dismiss on February 3, 2004. Judge Futey recognized the special sensitivity of national security cases, but nevertheless concluded that the court’s bid protest jurisdiction<sup>61</sup> was not limited merely because military affairs were implicated.<sup>62</sup>

The court reached the merits of the case in a later decision, issued April 27, 2004.<sup>63</sup> Judge Futey found that the “unusual and compelling urgency” of the situation in Iraq justified the Army’s use of that exception to CICA, at least with regard to immediate needs. Any procurement of additional filters beyond the “minimum necessary,” however, must be made on a competitive basis, unless the Government provides an independent justification for invoking an exception to full and open competition. Thus, national defense considerations cannot justify an indefinite extension of the unusual and compelling urgency exception, according to the court.<sup>64</sup>

#### ■ Increased Competition

Despite the limited competition in the early reconstruction contracts, by the last quarter of 2004, all major contracting actions were being competitively awarded. The following table lists the total value of major contract actions (i.e., those valued at over \$5 million) by competition type:<sup>65</sup>

TOTAL VALUE OF MAJOR CONTRACTS BY COMPETITION TYPE (in millions)					
Competition Type	FY 2003	Quarter 4 FY 2004	Total FY 2004	Total FY2004	Total
Full and Open	\$2,765	\$1,736	\$17,825	\$368	\$20,959
Sole Source	7,290	0	1,344	0	8,634
Limited Competition	958	0	0	0	1,694
Total	\$11,014	\$1,736	\$19,905	\$491	\$31,410

*Note: Summary totals affected by rounding*

## Bid Protests

In addition to *Filtration Development*, there have been a number of bid protests challenging the solicitation and award of Iraq-related contracts. These protests—and the legal issues raised—are discussed below.

### ■ Turkcell Consortium

In *Turkcell Consortium*,<sup>66</sup> the CPA declined to issue Turkcell a mobile telecommunications license under a CPA solicitation. Turkcell filed a bid protest at the GAO, arguing that procurement actions by the CPA were reviewable by the GAO pursuant to its bid protest jurisdiction authorized under CICA. The authority under that statute encompasses “a written objection by an interested party to a solicitation or other request by a Federal agency for offers of a contract for the procurement of property or services.”<sup>67</sup>

Representing the CPA, the U.S. Army argued that the GAO lacked jurisdiction for two reasons: (1) the CPA was not a “Federal agency” under CICA and (2) the transactions at issue did not constitute “procurement of property or services” under CICA. The GAO agreed with the Government on the latter issue and dismissed the protest. The GAO did not reach the question whether the CPA is a “Federal agency” under CICA, but noted that even if the CPA were not a “Federal agency,” the GAO may still retain jurisdiction to hear future protests in instances where a “Federal agency” conducts a procurement on the CPA’s behalf.

### ■ Cemex Global

In *Cemex Global, Inc.*,<sup>68</sup> the CPA issued a solicitation on November 11, 2003, for commercial item supplies and services for the new Iraqi Army. The 21-page statement of work included vehicles and rolling stock, weapons, communications equipment, night vision, fire control, individual soldier equipment, site set-up and preparation of battalion sets, maintenance and support for battalion sets, and training support for battalion sets. Based on “best value” award criteria, the CPA awarded Nour USA

the contract on January 30, 2004, at a price of \$327.5 million.

Five unsuccessful offerors filed protests with the GAO, beginning on February 13, 2004. The protesters, in order of their filing, were Cemex Global, Inc., Bumar Ltd., Raytheon Technical Services, Corp., POSECO-DST, and General Dynamics Ordinance and Tactical Systems, Inc. Bumar, a state-owned Polish arms company, accused the U.S.-led CPA of ignoring key documents in the company’s \$558 million proposal. Newspaper reports also attempted to link Nour USA to Ahmad Chalabi, a member of the Iraqi Governing Council who has had close connections to the Pentagon. This high-profile case drew worldwide attention to how the \$18.4 billion in U.S. taxpayer money earmarked for Iraq’s reconstruction is being spent.

On March 7, 2004, the CPA announced its decision to terminate the contract with Nour USA and to re-open the bidding process. The CPA reported that its decision in no way reflected on Nour USA’s ability to deliver on this contract. The CPA also decisively refuted allegations that politics and personal connections played a role in awarding this bid. Rather, the CPA stated that it had found the solicitation to be “ambiguous” and the evaluation process to contain “procedural irregularities” that necessitated a new competition.<sup>69</sup>

Jurisdiction was one of the threshold issues involved in these protests, as well, given the Army’s argument in *Turkcell* that the GAO had no dominion over the CPA. Once again, however, the GAO never reached the issue, because the protests were dismissed when the CPA took corrective action. This jurisdiction issue is most likely moot given that the CPA has since been dissolved.

### ■ DynCorp International

In *DynCorp International LLC*,<sup>70</sup> the GAO rejected a protest by DynCorp concerning a \$293 million contract for security work in Iraq. The Army contract, awarded in March to British security firm Aegis Defense Services, Ltd., provides for security services for contractor and Government personnel in Iraq. DynCorp al-

leged that its proposal was improperly excluded from consideration. The GAO, however, found that (a) the solicitation provided for a contract award without discussions, (b) the solicitation allowed the Army to consider proposals rated “marginal” to be ineligible for award, (c) the Army’s evaluators rated DynCorp’s proposal “marginal,” and (d) the Army therefore had acted reasonably in finding DynCorp’s proposal to be ineligible for award. DynCorp also challenged the evaluation of Aegis’ proposal alleging that the British firm lacked the requisite responsibility to perform the contract, “due, in part, to certain alleged activities of Aegis’ principal director and largest shareholder.” However, because DynCorp’s proposal was found to be ineligible for award, the GAO held that the protester lacked the “direct economic interest needed to challenge the evaluation of the awardee.”

#### ■ Kenwood USA

In *Kenwood USA Corp.*,<sup>71</sup> the U.S. Army published a request for proposals for portable and mobile encrypted radios and base stations for use by the Iraqi Police Service (IPS). On September 1, 2004, Kenwood, a prospective offeror, protested to the GAO that the RFP’s specification was unduly restrictive of competition in requiring the supply of Motorola brand radios that improperly excluded sources of supply other than the manufacturer. The Army voluntarily took corrective action by eliminating the Motorola brand name, but Kenwood filed a supplemental protest claiming that the specification continued to “mimic” Motorola brand radios that exceeded the agency’s minimum needs. Although the Army again took corrective action by expanding the acceptability range for certain requirements, Kenwood maintained that the specification remained unduly restrictive of competition.

While few “Iraq-unique” issues arose in the GAO protest itself, an interesting development arose incidental to that action. On October 29, 2004, the Army determined that “urgent and compelling circumstances” required it to override the automatic stay of contract award while a protest at the GAO is pending.<sup>72</sup> On Novem-

ber 1, 2004, the Army awarded the contract to Nour USA, Inc., which had submitted a competitive proposal that included the Motorola encrypted radios. On November 3, 2004, Kenwood filed a complaint for injunctive and declaratory relief with the Court of Federal Claims, alleging that the Army’s finding of “urgent and compelling circumstances” for the stay override was arbitrary and capricious.

The action at the court lasted less than 72 hours. The Army produced evidence that the IPS’s “lack of radios has directly led to their suffering much higher death and casualty rates even though they are engaged in fewer ‘hostile activities.’”<sup>73</sup> This situation, in turn, “has a direct impact on Iraqi stabilization and the welfare of our United States troops who are concurrently conducting their own operations in Iraq.”<sup>74</sup> Furthermore, the Army maintained that:<sup>75</sup>

One of the most pressing issues in Iraq is the upcoming January 2005 Iraqi National Elections. In the best case scenario, it is anticipated a minimum of two weeks will be required to distribute the radios once they are delivered. The IPS need communications in place in order to provide an orderly election process for the upcoming elections.

Following oral arguments with Judge Lawrence J. Block, Kenwood withdrew its complaint on November 5, 2004.

On November 29, 2004, the GAO denied Kenwood’s protest, finding that the specifications were based on technical capabilities of various vendors.<sup>76</sup>

## Claims

Disputes under U.S. Government contracts are governed by the procedures set forth in the Contract Disputes Act of 1978.<sup>77</sup> Under the CDA, a contractor may appeal a Contracting Officer’s final decision on a contract claim within 90 days of receipt of the final decision to the applicable agency board of contract appeal—the Armed Services Board of Contracts Appeals in the case of DOD contracts—or bring an action within one year of receipt of the final decision in the Court of Federal Claims.<sup>78</sup> Most contracts awarded by the CPA required

contractors to accept the exclusive jurisdiction of these same two forums for the hearing and determination of any and all disputes that may arise under the “Disputes” clause included in the contracts. As of December 15, 2004, only two Iraq-related claims had been filed at the ASBCA.

On June 30, 2004, Gulf Supplies and Commercial Services LLC, a United Arab Emirates-based firm that had won several building contracts in Iraq, filed a notice of appeal. The case involves a partial termination for cause of a commercial item contract. It is docketed as ASBCA 54668. As of the date of this PAPER, this case had not yet been resolved.

On December 14, 2004, Abt Associates, Inc. filed a notice of appeal docketed as ASBCA No. 54871. The company provides consulting services to strengthen the Iraqi health care system, pursuant to a cost-type contract with USAID. Finding that its Defense Base Act insurance policy provided insufficient benefits, Abt requested extraordinary contractual relief under Public Law 85-804,<sup>79</sup> but USAID denied the request. The company next purchased supplemental war risk insurance from the commercial market and submitted its costs under the contract. USAID determined the supplemental insurance costs to be unallowable, prompting Abt’s appeal to the ASBCA. As of the date of this PAPER, this case had not yet been resolved.

## Audits & Investigations

In 2004, the U.S. Government dramatically increased the audit and investigation resources dedicated to uncovering improprieties in Iraq reconstruction contracting. This increased level of scrutiny shows that the Government will not “overlook” improper conduct merely because it occurs in a wartime environment. The Government is judging contractors by the same standards as would normally apply. Dr. Dov Zakheim, then-Under Secretary of Defense (Comptroller) stated in testimony before Congress in March 2004:<sup>80</sup>

Many contractors that have not had problems in performing their domestic DOD contracts are having difficulties in adjusting to the unique environment in Iraq and to their own firms’ influx of new business. We believe that contractor financial and internal control problems will resolve themselves, but in the meantime, we will take whatever actions are necessary to protect the Government’s financial interests. DOD has enforced and will continue to enforce the highest standards for contracts in Iraq and anywhere else.

In Public Law 108-106, Congress created the position of CPA Inspector General (CPA-IG).<sup>81</sup> The CPA-IG office became operational on January 21, 2004. The National Defense Authorization Act for Fiscal Year 2005 redesignated the CPA-IG as the Special Inspector General for Iraq Reconstruction (SIGIR).<sup>82</sup> The SIGIR reports to both the Secretaries of State and Defense and works closely with the inspectors general from other agencies, criminal investigators, and auditors. In addition, the SIGIR delivers quarterly reports to Congress outlining the key findings and progress to date, deficiencies, and corrective actions taken to improve reconstruction programs.

As of December 31, 2004, the SIGIR was operating with 12 auditors and contractor support and had achieved significant results, including initiating 23 audits and completing 15 final reports on the CPA’s financial management, procurement practices, and management controls, managing or coordinating 134 criminal investigations, and opening case files on 317 Fraud and Abuse Hotline contacts.<sup>83</sup>

Investigations into the use of General Services Administration schedule contracts in Iraq have also been initiated, the most notable being the information technology contract under which interrogation services were procured for Abu Ghraib prison.<sup>84</sup> In 1998, the GSA awarded CACI International, Inc., an IT contract with a \$500 million limit. The Army decided to use the CACI contract for hiring interrogators. Interrogation services, however, were not among the services within the contract’s scope of work. It was later determined that the relevant work orders should not have been awarded as part of the larger IT contract and were therefore “improper.”<sup>85</sup>



Finally, Custer Battles LLC, a security company operating in Iraq, has been suspended from doing business with the U.S. Government.<sup>86</sup> According to news reports, the company is accused of overbilling millions of dollars through a series of sham companies. The Air Force suspension is believed to be one of the first leveled by the Federal Government against a company for problems with its operations in Iraq. The company is also under investigation by the Federal Bureau of Investigations and the DOD Inspector General's Defense Criminal Investigative Services. The same company is also facing the first *qui tam* suit to come out of the Iraq reconstruction effort. The Justice Department has declined to join the suit.

## Additional Resources

Contractors seeking further information on pursuing business opportunities related to the Iraq reconstruction effort should consult the following resources:

(a) *Business Guide for Iraq*—This frequently updated document from the Department of Commerce discusses the following areas: (1) commercial environment in Iraq, (2) existing laws and regulations, (3) international trade issues, and (4) key industry sectors, including issues affecting agriculture, oil, transportation, telecommunications, health, and energy sectors. It can be accessed at [http://www.export.gov/iraq/bus\\_climate/businessguide\\_current.html](http://www.export.gov/iraq/bus_climate/businessguide_current.html).

(b) *Doing Business in Iraq FAQs*—This document issued by the Iraq Investment and Reconstruction Task Force of the U.S. Depart-

ment of Commerce answers questions regarding the following areas: (1) travel and security concerns, (2) health issues, (3) international trade and investment issues, (4) job opportunities, and (5) business counseling by federal agencies. It is available at [http://www.export.gov/iraq/pdf/iraq\\_faq\\_current.pdf](http://www.export.gov/iraq/pdf/iraq_faq_current.pdf).

(c) *IraqAlert*—The Iraq Investment and Reconstruction Task Force enables companies to register to receive e-mail alerts on commercial developments and potential opportunities in Iraq, according to industry sectors or activities of interest. Contractor may register at <http://ita-web.ita.doc.gov/iraqreg>.

(d) *PCO Website*—For information on more business opportunities, the PCO website has links to other Iraq resources at <http://www.rebuilding-iraq.net>. This site encourages vendors to register to receive more information by e-mail on requests for proposals for Iraq reconstruction projects.

(e) *Department of Commerce Iraq Reconstruction and Investment Task Force*—The Task Force can be contacted at the Iraq Business Outreach Hotline by telephone at 1-866-352-4727; by fax at 1-202-482-0980; by e-mail at [IraqInfo@mail.doc.gov](mailto:IraqInfo@mail.doc.gov); or at the website at <http://www.export.gov/iraq/>.

(f) *Export-Import Bank of the United States*—The website of the Ex-Im Bank at <http://www.exim.gov/iraqlinks.htm> provides links to sources of information on federal agencies, Iraqi organizations, and international organizations involved in Iraqi activities. Contractors may also register at this site to receive future notifications of export opportunities to Iraq.

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## GUIDELINES

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These *Guidelines* highlight some of the issues contractors should bear in mind with respect to competing for and performing U.S. Government contracts for the reconstruction of Iraq. They are not, however, a substitute for professional representation in any specific situation.

1. Understand that the structure of the Iraqi government, its leadership, and its

relationship with the U.S. are fluid and may not be settled for years to come. This political risk serves as the backdrop for performing reconstruction contracts in Iraq and should be considered as a significant factor in assessing the legal, practical, and business risks involved in these contracts.

2. Remember that contractors must provide their own security, generally on a subcontract

basis. Dozens of security companies have been established to meet these needs, and the reliability of the companies is wide-ranging. Special care should be taken in hiring a reputable security subcontractor, to maximize protection for the contractor's people and assets while minimizing the legal risks inherent in these activities.

3. Make sure when entering a contract to allocate the risks between the parties in a mindful way. Given the frequency of attacks on contractor personnel and assets, contractors should recognize and insure for their risk of loss for property, as well as for potential harm to third parties. Contractors may wish to negotiate a special clause identifying risks and expressly allocating them between the parties to avoid disputes later.

4. Be aware that the U.S. Government appears to be shifting more responsibility to contractors in the battlefield environment. Contractors should be aware of the out-of-the-ordinary tasks and obligations that they may take on by operating in a battlefield environment. Familiarity with "contractors on the battlefield" guidance is essential.

5. Keep in mind that contracts awarded by the Iraqi government are not governed by U.S. laws and regulations, but rather by nascent contracting rules established by the CPA before the transition of sovereignty. Those rules are skeletal in substance thus far, leaving the Iraqi government to add flesh to the system as it deems appropriate. Contractors must factor this legal landscape into their plans to seek contracts from the Iraqi ministries.

6. Remember that U.S. Government contractors operating in Iraq must meet the same high same standards of ethics and compliance as apply on U.S. soil. Auditors are questioning costs where supporting documentation is not available, and are less-than-receptive to claims that the hostile environment makes record-keeping difficult. Investigators are also looking for fraud at both the prime contract and subcontract levels, particularly with regard to labor records and travel and lodging expenses. To avoid costly audits later, contractors should be diligent in maintaining compliance with their accounting and recordkeeping systems.

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## Appendix

IRAQ RELIEF AND RECONSTRUCTION FUND - Spending Plan					
Millions of Dollars					
Category	Jan. 5, 2005 Allocation	Apportioned (as of Dec. 17)	Obligated (as of Dec. 29)	Actual Outlays (as of Dec. 29)	TOTAL
<b>Security &amp; Law Enforcement</b>	<b>5,045</b>	<b>5,045</b>	<b>3,159</b>	<b>1,026</b>	<b>5,045</b>
Law Enforcement	2,318	2,392	1,438	316	2,318
-- Police Training and Technical Assistance	1,824	1,889	1,206	276	1,824
-- Border Enforcement	441	450	206	33	441
-- Facilities Protection Service	53	53	26	7	53
National Security	2,640	2,566	1,690	710	2,640
-- Iraqi Armed Forces of which:	1,796	1,765	1,205	532	1,796
-- IAF Facilities	731	691	574	352	731
-- IAF Equipment	632	641	439	69	632
-- IAF Training and Operations	433	433	192	111	433
-- Iraqi National Guard of which:	675	682	418	159	675
-- Operations and Personnel	225	232	111	101	225
-- Equipment	92	92	72	58	92
-- Facilities	359	359	235	0	359
-- Iraqi Security Forces Quick Response Program	170	120	67	19	170
Commanders' Humanitarian Relief & Reconstruction	86	86	31	-	86
<b>Justice, Public Safety Infrastructure, and Civil Society</b>	<b>1,953</b>	<b>1,953</b>	<b>1,166</b>	<b>288</b>	<b>1,953</b>
-- Other Technical Investigative Methods	5	5	1	-	5
-- Witness Protection Program	40	40	25	-	40
-- Penal Facilities	100	100	59	1	100
-- Reconstruction and Modernization of Detention Facilities	137	137	80	2	137
-- Facilities Protection, Mine Removal, Fire Service, and Public Safety Facility and Equipment Repairs of which:	284	284	192	51	284
-- Facilities Repair	92	92	54	4	92
-- Fire Service	122	122	78	11	122
-- Demining	70	70	60	36	70
-- Public Safety Training and Facilities	220	220	96	18	220
-- National Security Communications Network	98	98	25	11	98
-- Rule of Law in Iraq	30	30	15	1	30
-- Investigations of Crimes Against Humanity	75	75	43	7	75
-- Judicial Security and Facilities	123	123	43	12	123

Source: U.S. Dept. of State, Section 2207 Report on Iraq Relief and Reconstruction 11-13 (Jan. 2005).

-- Democracy Building Activities	832	832	581	180	832
-- U.S. Institute of Peace (USIP)	10	10	6	5	10
<b>Electric Sector</b>	<b>4,369</b>	<b>3,627</b>	<b>2,772</b>	<b>554</b>	<b>4,369</b>
-- Generation	1,668	1,710	1,571	366	1,668
-- Transmission	1,300	783	580	144	1,300
-- Network Infrastructure	1,254	987	507	24	1,254
-- Automated Monitoring and Control System	97	97	66	2	97
-- Security	50	50	48	18	50
<b>Oil Infrastructure</b>	<b>1,701</b>	<b>1,701</b>	<b>977</b>	<b>107</b>	<b>1,701</b>
-- Infrastructure	1,650	1,650	926	103	1,650
-- Emergency Supplies of Refined Petroleum Products	51	51	51	4	51
<b>Water Resources and Sanitation</b>	<b>2,279</b>	<b>1,373</b>	<b>875</b>	<b>29</b>	<b>2,279</b>
Public Works Projects	1,866	1,156	770	25	1,866
-- Potable Water	1,600	891	562	21	1,600
-- Water Conservation	31	31	22	1	31
-- Sewerage	214	213	165	3	214
-- Other Solid Waste Management	21	21	21	-	21
Water Resources Projects	413	218	105	4	413
-- Pumping Stations and Generators	123	124	80	3	123
-- Irrigation and Drainage Systems	38	7	5	-	38
-- Major Irrigation Projects	54	22	9	-	54
-- Dam Repair, Rehab, and New Construction	86	39	10	1	86
-- Umm Qasr to Basra Water Pipeline and Treatment Plant	111	25	1	-	111
-- Basra Channel Flushing	0.1	0	-	-	0
<b>Transportation &amp; Telecommunications Projects</b>	<b>513</b>	<b>513</b>	<b>316</b>	<b>25</b>	<b>513</b>
-- Civil Aviation	115	115	40	2	115
-- Umm Qasr Port Rehab	45	40	33	6	45
-- Railroad Rehab and Restoration	192	197	152	12	192
-- Iraqi Telecom and Postal Corporation	20	20	3	1	20
-- Iraqi Communications Systems	46	46	10	2	46
-- Consolidated Fiber Network	70	70	70	-	70
-- Iraqi Communications Operations	25	25	8	2	25
<b>Roads, Bridges, and Construction</b>	<b>360</b>	<b>355</b>	<b>175</b>	<b>28</b>	<b>360</b>
-- Public Buildings Construction and Repair	127	127	104	21	127
-- Roads & Bridges	233	228	71	7	233

Source: U.S. Dept. of State, Section 2207 Report on Iraq Relief and Reconstruction 11-13 (Jan. 2005).

<b>Health Care</b>	<b>786</b>	<b>786</b>	<b>508</b>	<b>24</b>	<b>786</b>
-- Nationwide Hospital and Clinic Improvements	439	439	300	15	439
-- Pediatric Facility in Basra	50	50	50	-	50
-- Equipment Procurement and Modernization	297	297	158	9	297
<b>Private Sector Employment Development</b>	<b>843</b>	<b>843</b>	<b>327</b>	<b>69</b>	<b>843</b>
-- Expand Network of Employment Centers	8	8	7	-	8
-- Vocational Training	94	94	75	20	94
-- Business Skills Training	37	37	29	15	37
-- Micro-Small-Medium Enterprises	44	44	35	34	44
-- Institutional Reforms	100	100	73	-	100
-- Agriculture	100	100	61	-	100
-- Market-Based Reforms	100	100	47	-	100
-- Iraq Debt Forgiveness	360	360	-	-	360
<b>Education, Refugees, Human Rights, Democracy, and Governance</b>	<b>379</b>	<b>379</b>	<b>171</b>	<b>42</b>	<b>379</b>
-- Migration & Refugee Assistance	175	175	28	8	175
-- Property Claims Tribunal	10	10	1	1	10
-- Governance	40	40	30	-	40
-- Banking System Modernizations	30	30	18	12	30
-- Human Rights	15	15	3	-	15
-- Education	99	99	81	15	99
-- Civic Programs	10	10	10	6	10
<b>Administrative Expenses</b>	<b>213</b>	<b>29</b>	<b>29</b>	<b>29</b>	<b>213</b>
-- USAID	29	29	29	29	29
-- Administrative Expenses for U.S. Mission to Iraq	184	-	-	-	184
<b>GRAND TOTAL</b>	<b>18,439</b>	<b>16,603</b>	<b>10,475</b>	<b>2,221</b>	<b>18,439</b>

Source: U.S. Dept. of State, Section 2207 Report on Iraq Relief and Reconstruction 11-13 (Jan. 2005).

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