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FEATURE COMMENT: Iraq Reconstruction— Significant Contracting And Legal Issues

The massive rebuilding efforts in Iraq are in full swing and provide widespread opportunities for private-sector participation. In early January 2004, the U.S. Government issued solicitations to redevelop Iraq's electric, oil, public works and water, security and justice, transportation and communications, and public building sectors. While the solicitations are based largely on U.S. federal procurement principles, there are significant contracting and legal differences that contractors and subcontractors must understand to compete effectively and avoid pitfalls in this process.

"The state of the Iraqi infrastructure is a reflection of years of neglect by a totalitarian regime that focused on only a few. Under a free Iraq, the reconstruction process will involve the input of the Iraqi people and their governmental ministries in the development of projects and products that will reinvigorate the country for self-sufficiency in the future. . . . The urgency of this requirement will require an innovative acquisition strategy . . ."

Statement of Objectives for Coalition Provisional Authority Program Management Office and Sector Program Management Offices, Jan. 6, 2004.

The White House estimates that Iraq will need between \$50 billion and \$75 billion in total reconstruction funds. Congress has supported this undertaking by appropriating \$18.6 billion in Public Law 108-106, and significantly more is expected in the coming year. Much of these funds will flow to private contractors performing the work.

The newly-commissioned Iraq Infrastructure Reconstruction Program Management Office (PMO)

of the Coalition Provisional Authority (CPA) is leading the reconstruction effort. Working with public and private experts in construction contracting, the PMO has sought to develop "the most efficient and effective method of accomplishing a program of this magnitude and at the same time maximizing realistic competition." The contracting process for rebuilding Iraq is burgeoning.

During the first week in 2004, solicitations were issued for ten major Iraq reconstruction contracts and seven program management service contracts. Those solicitations will produce contracts valued at approximately \$5 billion. See 46 GC ¶ 17. It is anticipated that, all told, the \$18.6 billion appropriation will result in the award of between 15-20 prime contracts with substantial subcontracting opportunities and requirements.

While the solicitations are based largely on U.S. federal procurement principles, the PMO's acquisition approach in this wartime environment is unique. This article describes this contracting landscape.

Framework of the Reconstruction Effort—

The CPA—a coalition of Nations—is the temporary governing body designated by the United Nations as the lawful government of Iraq. From its inception, the CPA was designed to function in that role until Iraq is sufficiently stable, politically and socially, to assume its sovereignty. In addition to protecting Iraqi territorial integrity and working to provide security to the Iraqi people, the CPA has committed itself to rebuilding all aspects of Iraqi infrastructure so that, upon turnover, the democratically elected Iraqi government can assume authority over a country ready, both internally and externally, to function economically, to provide basic services to its citizens, to provide for its own defense, and to play a responsible role in the community of nations.

Iraq reconstruction contracts are being awarded primarily by two groups: the CPA and the U.S. Government. (Although the Iraqi ministries are also awarding a limited number of contracts, these are not the focus of this article.) The CPA awards contracts funded by the Development Fund for Iraq,

comprised of proceeds of oil and gas sales, frozen Iraqi assets, the UN oil-for-food program, and contributions from the United Kingdom, Japan, the World Bank, and others. U.S. Government agencies award contracts funded by U.S. appropriations.

The \$18.6 billion reconstruction appropriation in Public Law 108-106 was provided to the Office of the President. On Dec. 5, 2003, President Bush transferred those funds to the Defense Department to manage the reconstruction efforts and the CPA's operating expenses. While certain of those funds may be provided directly to the CPA for the award of some contracts, all of the present solicitations using these appropriated funds have U.S. Government agencies serving as the contracting entities.

The CPA's PMO was commissioned in November 2003, to oversee and direct the contracting process. With offices in Baghdad and Washington, D.C., the PMO provides oversight, management, and execution of the infrastructure reconstruction efforts in Iraq. In broadest terms, the PMO is responsible for all of the program's activities, projects, assets, construction, and financial management. The PMO's "strategic objectives" are to restore Iraq's political and economic stability by means of infrastructure development, and to transition to host-nation support within two years.

Although the PMO's functions and objectives are well-defined, its legal status and future role are less clear. The PMO reports to the Pentagon and is staffed primarily with U.S. contracting personnel, but it is part of the CPA, not the U.S. Government. While the PMO will survive the planned dissolution of the CPA in June 2004, its legal status following the transition has not yet been determined. The impact of this circumstance on contractors is uncertain.

The fact that certain high-level legal issues have not yet been resolved in the context of the Iraq reconstruction process may be discomfiting, but it is not surprising. The U.S. has always used civilian contractors to support military actions. The Government, however, has only recently begun to focus on the legal and policy implications of this paradigm. See Major Brian H. Brady, "Notice Provisions for United States Citizen Contractor Employees Serving With The Armed Forces of The United States In The Field: Time To Reflect Their Assimilated Status In Government Contracts," 147 Mil. L. Rev. 1, 19-36 (1995) (historical overview of

contractors on the field, from supplying George Washington's army through the first Iraq war).

The situation in Iraq—the most ambitious program of nation-building since the Marshall Plan, with the most diverse involvement of private contractors in a military-based objective—has elevated these concerns and made them more immediate. For many contractors, the legal issues have appeared voluminous and daunting. This situation has created a perceived risk which, by itself, has kept some businesses on the sidelines.

The legal landscape was partially cleared when reconstruction officials decided to have U.S. agencies, and not the CPA, award the bulk of the contracts funded directly by U.S. appropriations. This decision was initially made for practical reasons—the CPA and PMO simply did not have the contracting mechanism in place to handle the volume of work—but the legal ramifications are more significant.

All of the solicitations issued in early January 2004 identify the contracting agency as either the U.S. Army Corps of Engineers (USACE) or the Pentagon Renovation Program (PENREN) of the Office of the Secretary of Defense. Having USACE and PENREN award and administer the contracts brings nearly unparalleled construction contracting expertise to the Iraq reconstruction process. It also avoids issues relating to:

- Succession of contracts when the CPA is dissolved;
- Determining whether U.S. laws, the Federal Acquisition Regulation, and other legal requirements apply to the contract, as opposed to an uncertain combination of U.S. and Iraqi laws;
- The ability of contractors to protest improper solicitation or award activities. While one might assume that U.S. bid protest processes would apply even to contracts issued by the CPA, this jurisdictional issue was the focus of one early case brought before the General Accounting Office. See *Turkcell Consortium*, Comp. Gen. Dec. B-293048, 2003 CPD ¶ 196, 45 GC ¶ 478. Counsel for the U.S. Army in that case argued, among other things, that the GAO lacked jurisdiction because the CPA was not part of the U.S. Government. GAO ultimately dismissed the case on other jurisdictional grounds without deciding this issue; and
- The applicable process for resolving contract disputes.

Thus, USACE, PENREN, and other U.S. agencies will award and administer U.S. funded contracts, and the PMO will manage the effort. The PMO also has subordinate Sector PMOs (SPMO)

that are aligned with certain commodities and that mirror the current structure of the Iraqi ministries. The SPMOs are responsible for defining specific projects, establishing priorities, managing design and construction, and commissioning projects. In this role, the SPMOs will coordinate with the U.S. contracting agencies and Iraqi ministries, other coalition partners, and contractors to guide the reconstruction efforts.

The Solicitations and Contracts—The solicitations published in early January 2004 are for seven program management service contracts and ten major Iraq reconstruction contracts. The total value of the current solicitations is approximately \$5 billion, and contract awards are expected by March 2004.

The program management solicitations, issued by PENREN, are anticipated to result in seven contracts. One contract will be for program management support to the PMO, facilitating overall program coordination and management. The remaining six contracts will be for SPMO support, with contractors playing a significant role in managing the reconstruction efforts.

The construction solicitations were issued by USACE and will be coordinated through its Transatlantic Program Center. They are anticipated to result in ten design-build, cost-type, indefinite-delivery, indefinite-quantity (ID/IQ) prime contracts for a two-year base period with three one-year options. The bulk of the funds will be spent on quality-of-life projects. The estimated total dollar values of the current reconstruction solicitations are:

- Electrical—\$5.6 billion
- Public Works/Water—\$4.4 billion
- Security/Justice/Safety—\$0.6 billion
- Transportation/Communication—\$0.5 billion
- Oil—\$1.9 billion
- Building/Health—\$1.2 billion

The ten design-build construction contracts will be divided by discipline or by region, depending on the requirements within each sector. Each scope of work included in a solicitation is general in its description, providing types of tasks, minimum standards, and administrative functions. Task orders will be issued as projects are identified by the SPMOs.

Awards will be made to the best overall (i.e., best value) proposals that are determined to be most beneficial to the Government, based on the evaluation of technical, management, past performance, and cost factors. Each cost proposal will be based upon a contract cost model with various labor rates, and a

sample task order representing a hypothetical project. The contractor will complete a cost reimbursement cost estimate based on the facilities and assumptions included in the relevant scope of work and technical requirements. The Government does not plan to conduct discussions with offerors prior to contract award.

Once a contract is awarded for a particular discipline or region, that contractor will receive all of the task orders within that discipline/region. Certain lawmakers have criticized this approach as creating monopolies within each discipline/region. They wish to see competition conducted on a project-by-project basis. See Letter from Congressmen Waxman and Dingell to Secretary Rumsfeld, Dec. 18, 2003. Nevertheless, this is the approach chosen by the Administration.

To ensure that the selected contractor can perform in this indefinite circumstance, the solicitations are geared toward large, sophisticated companies with demonstrated expertise and experience. It is clear that the reconstruction procurement officials intend to rely heavily on their prime contractors to manage this work. One consequence of the large ID/IQ prime contracts is substantial subcontracting opportunities. Prime contractors may subcontract up to 88%, and must subcontract at least 10%, of the total contract value. The overall subcontracting goal is 23%, and offerors will be evaluated by this standard.

While the subcontracting opportunities seem limitless, most subcontractors have encountered difficulty identifying opportunities and aligning themselves with prime contractors. The Government is taking a hands-off approach to this process. The list of potential prime contractors is considered source selection information and will not be released. This leaves most subcontractors searching for ways to participate, and often turning to consultants (with varying levels of expertise and contacts) for assistance.

In addition to the current program management and reconstruction solicitations, contracts for the balance of the current \$18.6 billion appropriation will be for a variety of other needs and are expected to be solicited over the next two years. In fact, the PMO anticipates approximately \$5 billion in procurement actions for goods and services unrelated to construction. The prime contract vehicles, therefore, will provide diverse opportunities for contractors and subcontractors.

Selected Legal and Practical Issues—The contracts awarded by U.S. agencies are governed by federal procurement laws and regulations. There are, however, significant Iraq-specific issues of which potential prime and subcontractors should be aware.

- *Cost-Type Contracts.* The design-build contracts are cost-type because, according to the solicitations, anticipated technical and performance risks can only be mitigated through such contract vehicles. Fixed-price task orders may be used at a later date, if technical, cost, and schedule risks diminish sufficiently.

- *Eligible Participants.* Although the Competition in Contracting Act (CICA) generally requires full and open competition for federal procurements, it provides seven exceptions to this requirement. See 10 U.S.C.A. § 2304(c); FAR 6.302-7. One such exception exists “when the agency head determines that it is not in the public interest in the particular acquisition concerned.” See FAR 6.302-7. The Iraq solicitations rely upon this “public interest exception” to limit the competition for prime contractors to sources from eligible countries (i.e., United States, Iraq, Coalition partners, force contributing nations, and Canada). Furthermore, the offeror cannot be a subsidiary (wholly-owned or otherwise) of a parent that is organized under the laws of a non-eligible country. This restriction does not apply to subcontractors at any level.

The Pentagon’s decision to limit the “eligible” prime contractor to supporting countries was announced in December, frustrating countries that opposed the war such as France, Russia, and Germany. See *Determination and Findings*, Deputy Secretary of Defense, Dec. 5, 2003, available at www.rebuilding-iraq.net/pdf/D_F.pdf; see also Douglas Jehl, “U.S. Bars Iraq Contracts for Nations That Opposed War,” *N.Y. Times*, Dec. 9, 2003 and 45 GC ¶ 516. Nevertheless, the “public interest exception” is available by statute and regulation. As long as the procedural requirements for applying the exception are met (i.e., a written determination for each solicitation in accordance with FAR 1.704 and timely notification of Congress), the decision to apply the exception will not be set aside unless it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Varicon International v. OPM*, 934 F.Supp. 440, 445 (D.D.C. 1996).

- *Accounting Systems.* Potential prime contractors generally will be required to have accounting sys-

tems that comply with the FAR Part 31 cost principles and the Cost Accounting Standards, and that will support the submission of cost and pricing data under the Truth-In-Negotiations Act, 10 U.S.C.A. § 2306a, 41 U.S.C.A. § 254b. (TINA certifications will not be required.) These requirements will also apply to many subcontractors, although the use of commercial-item subcontracting is permitted and would eliminate these accounting system requirements, for qualifying contracts.

- *Secondary Arab Boycott of Israel.* By submitting an offer, a contractor certifies that it does not comply with the Secondary Arab Boycott of Israel, and will not take actions with respect to that boycott in violation of 50 U.S.C. App. 2407(a).

- *Choice of Law and Forum.* The contractor must agree to waive any rights to invoke the jurisdiction of local national courts where the contract is performed. It must also agree to accept the exclusive jurisdiction of the United States Armed Services Board of Contract Appeals and the United States Court of Federal Claims for the hearing and determination of any and all disputes that may arise under the Disputes clause of the contract. While this provision is not surprising, it highlights the fact that subcontracts should contain a clear flow-down provision and a choice of law/forum clause designed to allow the prime contractor to avoid inconsistent rulings, to the extent possible.

- *Alternative Dispute Resolution.* The solicitations require offerors to agree to use non-binding alternative dispute resolution techniques, as well as time period “guidelines” for resolving disputes. The available ADR methods include mediation, early neutral evaluation, mini-trials, and the use of an Executive Dispute Resolution Committee or a Dispute Resolution Board.

- *Bid Protests.* Although it is now clear that normal bid protest procedures and jurisdiction will apply to the current solicitations, the Government has indicated its intent to override any stay of contract performance pending resolution of the bid protest.

- *Contract Direction.* The Government is advising that prime contractors should take direction only from the U.S. agency contracting officers. The PMO, however, will be managing the projects, and the Iraqi ministries will most likely have input into some issues. This fact—combined with common command and control issues in a wartime environment—could create constructive changes, i.e., ju-

dicially-recognized, compensatory changes that often result from conflicting directives.

- *Origin Requirements.* The Buy American Act, 41 U.S.C.A. §§ 10a through 10d, does not apply to procurements of “products or services for use outside the United States,” so it will have limited applicability to these contracts. However, certain “Little Buy American Act” domestic preferences are included in the solicitations, e.g., DFARS 252.225-7012, 252.225-7016, and 252.225-7030.

- *Real Estate.* Many contractors will need to establish an office in the Middle East. To date, U.S. contractors working in Iraq have favored Dubai, Abu Dhabi, Amman, and Kuwait City, all of which have commercial real estate laws developed to varying degrees. Those planning to move into Iraq will find a real estate market in the process of a massive transformation. A land rush in Baghdad is just beginning, and prices around the projected sites for the SPMOs are skyrocketing.

- *Iraqi Participation.* A swift transition of the reconstruction effort to Iraqi management and control is one of the principal objectives of the contracts. To that end, contractors are expected to involve local Iraqi firms and individuals in significant roles in order to facilitate future transfer of knowledge, skills, and abilities. Contractor efforts to maximize Iraqi participation in the reconstruction effort will be a significant part of the award fee evaluation. The contractors will be required to provide training to the Iraqi workforce on the operation and maintenance of all infrastructure facility components, and to have bilingual (English and Arabic speaking) representatives to serve as translators and trainers.

- *Construction Standards.* British construction standards form the basis for Iraqi standards and, therefore, will apply to these reconstruction contracts. Project-specific standards will be included in the task orders.

- *Export Controls.* While the United Nations’ embargo against Iraq has been lifted and the U.S. embargo against Iraq has been suspended, U.S. companies that plan to do business in Iraq should be aware that U.S. laws continue to control the export to Iraq of goods, software, technology and services.

For example, while a laptop may not require a license for export to Iraq, software programs containing encryption that are loaded on the laptop require a license for export to Iraq. Similarly, a com-

pany may export from the U.S. to Iraq “dual-use” (e.g., non-military items or items with military and commercial applications) commodities, software, and technology that are “decontrolled” by the Department of Commerce Bureau of Industry and Security (BIS). However, a license from the Department of Treasury Office of Foreign Assets Control (OFAC) is required to export from the U.S. to Iraq those dual-use goods that are considered “controlled” by BIS.

Although the myriad rules pertaining to exports to Iraq are quite complex, compliance is critical. Violations can result in civil and criminal monetary penalties; imprisonment; a prohibition against exporting from the U.S.; and/or debarment from U.S. Government contracts. Companies that wish to export goods, software, or technology or provide services destined for or occurring in Iraq should consult with the Department of Commerce Bureau of Industry and Security, the Department of State Office of Defense Trade Controls, and/or export control counsel.

- *Associate Contractors.* Contractors will be required to cooperate with each other across sectors, “to ensure that contractors accomplish their assigned tasks in the most cost effective and expedient manner, while maintaining an overall program perspective.”

- *Security.* Contractors must provide security for their personnel, equipment, and material in coordination with the military units in Iraq. As weekly news reports indicate, attacks on contractor personnel and equipment in Iraq have not ceased with the end of major combat operations. Injuries to contractor personnel and theft of equipment are common in this environment. Private security forces, however, have stepped up to meet this requirement. (The author represents the contractor providing security to both USAID officials in Iraq and the recruiting and training efforts of the new Iraqi military.)

- *Insurance.* Contractors must maintain adequate insurance, including general commercial liability, workers’ compensation, and War-Hazard Insurance coverage. All U.S. and major foreign national firms must provide Defense Base Act coverage to all employees, including foreign national subcontractors and host nation employees. Many contractors and subcontractors interested in Iraq reconstruction contracts, however, have found that their current insurance companies have refused to is-

sue, or have substantially increased premiums for, insurance coverage related to activities in a war zone.

- *Indemnification.* To date, the U.S. Government has granted indemnification coverage in a very limited number of Iraq reconstruction contracts. While the solicitations include FAR clause 52.250-1, “Indemnification Under Public Contract Law,” offerors may not condition their proposals on the assumption that the Government will grant indemnification. Successful offerors will have the opportunity to submit requests for indemnification after contract award. For comprehensive guidance on the coverage of P. L. No. 85-804 and the procedures for requesting relief, see Kevin Mullen, “Extraordinary Contractual Relief Under Public Law 85-804,” Briefing Papers No. 02-13 (Dec. 2002).

- *“Contractors On The Battlefield” Issues.* Although this subject is not the focus of this article, a brief overview of the topic and the relevant primary sources of guidance is helpful. This area includes a collection of legal and practical topics: 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.

While many of the topics in this area are usually governed by a Status of Forces Agreement, there is no SOFA between the U.S. and Iraq. Instead, the CPA has issued regulations, orders, and memoranda covering such issues as local licensing/registration requirements and the application of Iraqi laws and legal process to contractor personnel. See CPA Official Documents, available at www.cpa-iraq.org/regulations/index.html.

The current solicitations attempts to address other issues. For example, DFARS 252.228-7003, “Capture and Detention,” is incorporated to cover detention benefits to a captured person. A special contract requirement entitled “Contractors Accompanying the Force” governs compliance with combatant command orders, contractor personnel administration, clothing and equipment issue, vehicle

and equipment operation, passports, visas, and customs.

Additionally, guidance published by the Department of Defense and the Military Departments can assist contractors working in Iraq, whether they are actually accompanying military forces or otherwise. For example, The Joint Chiefs of Staff published Joint Publication No. 4, “Doctrine for Logistics Support of Joint Operations,” in April 2000. A draft DOD Directive entitled “Management of Contractor Personnel in Support of Joint Operations and Declared Contingencies” was developed in March 2003, just as the war in Iraq was about to begin. See also “Air Force General Counsel Guidance Document Deploying With Contractors: Contracting Considerations,” Nov. 2003; “Army Contractors Accompanying the Force Guidebook,” Sept. 2003; Draft Army Regulation 715-9, “Contractors Accompanying the Force,” Feb. 2003; Field Manual 3.100-21, “Contractors on the Battlefield,” Jan. 2003.

- *Organizational Conflicts of Interest.* The solicitations for PMO and SPMO program support strongly caution offerors about potential conflicts of interest that could result from performance of these functions in relation to other contracting opportunities in Iraq. To avoid obvious OCIs, the successful offeror for the PMO support contract will not be awarded any prime contracts for SPMOs or any design-build construction contracts. In addition, the successful offeror for an SPMO support contract cannot be awarded a design-build construction contract within that SPMO sector.

- *De-Baathification.* Contractors may not employ or subcontract with any persons determined under procedures promulgated by the Iraqi Governing Council to be full members of the Baath Party or certain other affiliated organizations. See CPA Order No. 1, *De’Baathification of Iraqi Society*, May 16, 2003, and the corresponding implementation plan and delegations of authority, available at <http://cpa-iraq.org>.

- *Legal Compliance In This Politically-Charged Environment.* Most Government contractors have programs in place to ensure compliance with procurement laws and regulations. Nevertheless, the amount of money being spent in Iraq has created an environment ripe with opportunities for malfeasance. Criminal and civil violations are occurring—intentionally or otherwise. For businesses that generally prefer not to see their names on the front

page of the newspaper or in a press release from Capitol Hill, participating in Iraq reconstruction contracts requires special attention paid to this area.

Iraq contracts bring an elevated level of scrutiny, from investigations and increased audits to harmful speculation from those attempting to gain publicity. For example, Pentagon auditors alleged that Kellogg Brown & Root (KBR) allowed a Kuwaiti subcontractor to overcharge the Government by at least \$61 million. USACE officials investigated and concluded that KBR's prices were "fair and reasonable." Nevertheless, the initial allegation brought intense press scrutiny. See, e.g., Richard A. Oppel, Jr., "Army Official Backs Halliburton on Fuel Price," N.Y. Times, Jan. 7, 2004.

On the heels of those newspaper articles, a routine internal audit by KBR found overcharging and a kickback scheme in another of its Iraq subcontracts. The company fired the responsible employees, reported the matter to the DOD Inspector General, and immediately paid the government \$6.3 million to cover potential overcharging. See Jackie Spinner, "Halliburton Suspects Overbilling, Pays U.S.," Wash. Post, Jan. 24, 2004 and 46 GC ¶ 43(a), this issue. In this highly-charged political atmosphere, contractors must effectively manage not only their compliance programs, but the public relations aspects of the situation, as well.

Beyond these significant legal and contracting issues, contractors and subcontractors should expect the customary U.S. procurement practices to be modified based on security concerns, geopolitical influences, and the unpredictable wartime environment.

Conclusion—The private sector is playing an unprecedented role in Iraq. The reconstruction of Iraq is among the largest rebuilding efforts in history, and contractors are involved in almost every aspect of this endeavor. Businesses accustomed to U.S. procurement standards will have a unique competitive advantage, if they can remain flexible and stay on top of the still-evolving contracting process.



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