



## ABA IRAQ INITIATIVE



### ANALYSIS OF THE LAWS ON PROCUREMENT FOR THE REPUBLIC OF IRAQ

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*ABA Iraq Initiative*  
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AMERICAN BAR ASSOCIATION

Iraq Initiative

740 15th Street, N.W., 8th floor  
Washington, D.C. 20005-1022  
(202) 662-1742  
FAX: (202) 662-1755  
E-mail: rhorowitz@staff.abanet.org

**CHAIR**

Alfred P. Carlton, Jr.  
Kilpatrick Stockton LLP  
3737 Glenwood Ave.  
Suite 400  
Raleigh, NC 27612

**DIRECTOR**

Stephen N. Zack  
Boies Schiller & Flexner LLP  
100 SE 2nd Street  
Suite 2800  
Miami, FL 33131

**MEMBERS**

Don S. DeAmicis  
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**BOARD OF GOVERNORS LIAISON**

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Vienna, VA

**STAFF**

Robert Horowitz  
Washington, DC

March 18, 2004

Robert Charles  
Assistant Secretary  
Bureau for International Narcotics and Law Enforcement Affairs  
U.S. Department of State  
2201 C Street, N.W.  
Washington, DC 20520

Re: Assessment of Iraqi Procurement Law

Dear Mr. Charles:

I am delighted to submit a compilation of assessments of Iraqi Procurement Law. These assessments were conducted under the auspices of the ABA Iraq Initiative and as part of the ABA's larger effort to promote the rule of law. I am especially thankful for the contribution of several members of our Section of Public Contract Law, who pooled their expertise to provide a comprehensive assessment.

The ABA created its Iraq Initiative last year to assist in the legal reconstruction of Iraq. Toward this end we have undertaken several activities, with more in development. We have, for example, participated on a multinational legal assessment trip to Iraq in August, hosted a delegation of high-level Iraqi women for training on the role of women in Iraq, and convened three, week-long training programs in Bahrain and Jordan. These programs, attended by Iraqi judges, lawyers, advocates and policymakers, focused on developing a cadre of Iraqis who, in their communities, will educate and inform the local citizenry on the rule of law and the role of a constitution.

Several new projects are in the works. We will continue to focus attention on strengthening the judiciary, promoting human rights, helping to implement a new constitution, and expanding on our public education outreach.

Thank you for the opportunity to assess and comment on the status of procurement law in Iraq. If you have any questions on the assessment, or are interested in learning more about our efforts in Iraq, please feel free to contact the staff director, Robert Horowitz

Sincerely,

Alfred P. Carlton, Jr.

**Analysis of the Laws on Procurement  
for the Republic of Iraq**

## Table of Contents

Analysis of the Laws on Procurement for the Republic of Iraq .....	1
I. Introduction .....	1
II. Drafting Concerns .....	1
A. Vagueness.....	1
B. Structure.....	2
III. Lack of Transparency in Procurement Procedures .....	2
A. Tender Notices.....	2
B. Evaluation Criteria and Methods.....	3
C. Awards .....	4
D. Dispute Resolution .....	4
IV. Limitations on Full and Open Competition.....	5
V. Organizational Issues.....	6
A. Centralization vs. Decentralization.....	6
B. Oversight Mechanisms and Ethical Standards.....	6
VI. Conclusions.....	7
Comments Submitted by the Working Group on Iraqi Procurement Processes .....	Appendix A
Comments Submitted by Lisa Miller .....	Appendix B
Comments Submitted by William Carroll.....	Appendix C
Comments Submitted by Professor Don Wallace .....	Appendix D
Comments Submitted by R. Anthony Welch .....	Appendix E
Comments Submitted by Steve Schiffman .....	Appendix F
Comments Submitted by Timothy Richards .....	Appendix G
Iraqi Council of Ministers Procurement Laws .....	Appendix H
Instructions from Iraqi Ministry of Planning .....	Appendix I
Commentators Contributing to the Assessment .....	Appendix J

# Analysis of the Laws on Procurement for the Republic of Iraq

## Summary of Comments\*

### I. Introduction

While the Iraqi procurement laws clearly recognize some of the key challenges facing government procurement codes, in many instances the laws simply fall short of commonly accepted norms and standards.

Overall, there are several consistent themes running through the comments submitted to the ABA Iraq Initiative. Generally, the procurement procedures set forth in the laws are poorly drafted, incomplete, vague, and have minimal regard for transparency, accountability, full and open competition, and ethical standards. These conclusions are reached after comparing the Iraqi laws against both international and U.S. norms and standards, as embodied in the *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, the *ABA Model Procurement Code for State and Local Governments*, the *ABA Principles of Public Procurement*, and the *GAO Standards of Internal Control in the Federal Government*, as well as relevant documents from GATT, the World Bank, the World Trade Organization, and European Communities law.

### II. Drafting Concerns

Even allowing for translation issues, the Iraqi procurement laws are neither comprehensive nor clear enough to provide for an effective, fair, and transparent procurement process. Key terms and provisions are vague, and too much authority is delegated to procurement officials. Additionally, the laws should be either substantially restructured or entirely rewritten to make them more cohesive and accessible.

#### A. Vagueness

While ambiguity and lack of predictability are problematic in any law, in the procurement process it creates opportunities for bias and corruption. The Iraqi procurement laws would benefit greatly from more clarity both in their overall scope of application and in defining key terms and phrases. For example, in discussing the use of direct invitations, Article 1 makes reference to “a reputable and specialized company” with no definition of what constitutes such a company. Consequently, this clause opens the door to probable abuse of discretion and bribes. There are many similar examples throughout the laws.

Vague and poorly drafted provisions are even more problematic in light of the broad powers and discretion granted to procurement officials. In lieu of providing clear standards and procedures, the laws consistently allow procurement officials to make decisions with little to no guidance or

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\* Compiled by Simon R. Conté, Co-Director, Office of Rule of Law Research, American Bar Association – Central European & Eurasian Law Initiative (ABA-CEELI), Washington, D.C.; LL.M. in International and Comparative Law, Georgetown University Law Center, 1998; J.D., State University of New York at Buffalo, 1995; M.A. in Political Science, State University of New York at Buffalo, 1995; B.A. in Political Science and English, State University of New York at Binghamton, 1990.

accountability. At best, the decisions of procurement officials will lack uniformity and predictability. At worst, granting procurement officials too much discretion invites bribery and corruption.

While there are many instances of excessive discretion throughout the laws, one prominent example is in Article 8, regarding the blacklisting of contractors who engage in certain types of illegal actions. The article provides only nominal information on how the blacklisting procedure works, and it is effectively left to the discretion of a particular official as to whether a contractor is boycotted and for how long. The incentives to remain off the boycott are extremely high, so allowing a procurement official essentially unfettered discretion over these decisions merely encourages corruption.

Overall, the laws need to be redrafted to provide much greater specificity and to establish clear definitions and procedures that minimize discretion. In doing so, the procurement process will be more predictable and less susceptible to corruption.

## **B. Structure**

The Iraqi procurement laws would also benefit from being restructured to consolidate relevant information in a manner that is easily accessible. One possibility is to include:

1. General provisions governing the procurement process;
2. The various methods of procurement and the conditions under which each is to be used;
3. Procedures for all stages of the tender process, including the solicitation, submission, and evaluation of tenders, and the award of the contract; and
4. Procedures regarding the review of specific procurement proceedings.

While the laws touch upon several of these general themes, they do not do so in a cohesive manner. With regard to basic structure, the laws should be divided into clear sections with appropriate titles and distinct subsections. The interaction between the laws and any other relevant legislation or regulations should also be clarified.

A section of general provisions governing the procurement process is particularly important. The laws should state at the outset the scope of their application and make clear to which types of procurements the laws apply.

## **III. Lack of Transparency in Procurement Procedures**

### **A. Tender Notices**

Although the laws touch upon the concept of transparency by setting certain notice and publication requirements, clearer direction is needed in this area.

Generally, the Iraqi procurement laws should contain the following items to enhance transparency and predictability: full contact details of the procuring entity; the type of award procedure chosen (open, restricted, and negotiated); description of the goods and services to be provided, along with an objective description of the required quantity or duration; indication of

whether particular professions are required to perform the work (in the case of a service contract); place of delivery of goods or site of performance of service; time limits for delivery, completion, or duration; time periods for which the tenderer is required to keep tender open; deadlines for receipt of tenders; dates, hours, and places of tender opening; required letters of credit, deposits, or guarantees; economic or technical requirements, and criteria for evaluation of tenders.

While the process for tender notices recognizes the general need for transparency, certain provisions raise substantial concerns. For instance, as noted previously, the laws provide too much flexibility and discretion to procurement officials. Article 2 is one such provision, as it allows procurement officials to accept offers submitted after the closing date. Although this may seem advantageous if a late tender is particularly attractive, flexibility should be minimized in order to limit opportunities for corruption.

The use of direct invitations is also of concern. While certain urgent and compelling circumstances may require quick action, the procedures governing direct invitations are unclear. Since direct invitations are another mechanism subject to abuse, either due to corruption or simply bureaucratic expediency, the law should specifically list the limited circumstances when they may be used.

Finally, the advertising requirements specified in Articles 13 and 14 are an important component that should be expanded. The language will need to be adapted to include additional media and new public facilities, such as the Internet and libraries, where such tenders should be advertised. It is important that foreign contractors and non-local Iraqi contractors have a single well-publicized place to timely obtain information about upcoming procurements.

## **B. Evaluation Criteria and Methods**

Certain concerns regarding the evaluations of tenders already have been addressed with respect to the solicitation of tenders. Evaluation factors and subfactors and their relative weights should be set forth in the tender notice in order to establish a consistent basis for evaluation and award. In addition, the tender notice should set forth the basis for contract award – best value, cost technical tradeoff, lowest price/technically acceptable, etc. This is particularly important in light of Article 12, which permits procurement officials to look beyond the lowest offer in their evaluation.

While the law provides for an evaluation team, greater efficiency may result from having separate technical and price evaluation teams who separately report to a specified source selection authority on their independent areas of expertise. Having a set evaluation team that can rotate out every six (6) months (without stated conditions for rotation) may not be the most efficient method.

Where sealed bid tendering is used, the law should specify that the offeror name and tender price be read aloud at a pre-determined tender opening date and place and that, while clarification may be allowed, negotiations will not. Under negotiated procurements, the scope of permissible negotiations (or clarifications) should also be included in the law in order to promote government accountability as well as consistent treatment among offerors. Likewise, a “best-and-final-offer” type concept may be introduced. Regardless of the procurement type, the procuring agency should be required to prepare and maintain written documentation of the evaluations and reviews sufficient to support and provide an adequate basis for the contract award decision. The abbreviated evaluation

timing set forth in the law also should be reconsidered. Finally, unless commercial items are being procured, agency reliance solely on an offeror's catalog or like documents may not be a sufficient basis for an adequate evaluation and award decision.

### **C. Awards**

Articles 6 and 18 of the procurement laws demonstrate recognition that contract award decisions should be published and announced in different media channels. While Article 6 requires that the tender evaluation committee notify the winning tenderer, the losing contractors should also be notified. In the interests of transparency, a losing contractor should have the right to request an explanation for why it did not win the contract. This allows the losing contractor to assess whether the procurement rules have been followed, and helps the contractor learn how better to compete next time.

Finally, the rules should require the procuring agency to publish or otherwise make available to the public a copy of the contract once signed by the awardee and the procuring entity, unless a legitimate interest exists to withhold some information. The acceptable bases for withholding information should be clearly articulated in the law.

### **D. Dispute Resolution**

One of the most glaring omissions in the laws is the absence of provisions setting forth a contractor's right to redress, i.e., bid protest or contract dispute procedures. Very basically, in the procurement context, the laws should include a mechanism whereby bidders can challenge procurement documents (so-called pre-award bid protests) or procurement decisions (post-award bid protests). As an initial matter, such review may occur at the level of the procuring entity or approving authority. Procedures for subsequent administrative review (or possibly even judicial review) also should be implemented. The review process and relevant proceedings must be transparent. Absent such provisions, contractors will have no clear right to redress and procurement officials may go largely unchecked with respect to their actions. The right to review is a critical element in the development of an adequate procurement law.

Although the laws primarily address the procurement process rather than the contract performance process, they also touch upon performance-related matters, such as a brief mention of arbitration. Arbitration is a fine means of resolving contract disputes, but the laws need to go further in setting forth the manner in which such arbitrations can be commenced, how arbitrators are selected, the place of arbitration, which rules govern, what law governs, etc. Also, the laws need to establish what types of disputes may give rise to a cause of action and at which review level. It also should be considered whether review by the procuring entity or administrative or judicial review might be valid dispute resolution methods as well. Whatever dispute resolution mechanism ultimately is chosen, the proceedings must be open and transparent such that fairness and government accountability are the end goals.

#### IV. Limitations on Full and Open Competition

The Iraqi government will receive the best value in the procurement process by promoting and requiring full and open competition. Increased competition in the procurement process results in better quality goods and services, more efficient use of public money, and better protection against fraud and corruption.

While the Iraqi procurement process appears intended to solicit offers from a wide range of qualified companies, certain provisions contain serious limitations on the principle of full and open competition. For example, Chapter I implies that solicitation of non-domestic sources is an exception and that, generally, foreign sources are not allowed to compete. This runs counter to current international attempts to reduce domestic source restrictions.

As noted previously, sole-source procurement is mentioned in various sections, although the conditions for its use are not adequately explained and the risk of corruption and favoritism remains. The laws should provide clear parameters prescribing the circumstances under which the sole-source procurement method may be used. Full and open competition should be the preferred procurement vehicle whenever possible.

Another concern is raised by Articles 14 and 15, which seem to require prospective contractors to provide cash deposits for their tenders to be considered. Presumably, the intent of these deposits is to screen out vendors that lack the requisite financial resources. This requirement may unnecessarily limit competition to those contractors with large cash resources, particularly since it is unclear whether the deposits will be returned to the losing contractors.

The Iraqi procurement laws reflect a legitimate concern of restricting the procurement process to reputable contractors. Article 1 requires contractors to be “verified” before being permitted to compete, with the intent of screening out “unspecialized or false” contractors. Other articles also refer to evaluations of the contractor’s past performance. The use of “blacklists” mentioned in Articles 8 and 21, however, raises concerns. While these articles do list the various reasons for which a contractor can be blacklisted/boycotted, the overall process is extremely unclear and seems largely arbitrary. Clear standards and procedures are essential, including the right for a contractor to appeal the boycott.

Although the *UNCITRAL Model Law for Procurement of Goods, Construction and Services* provides for competitive tendering as the preferred method of procurement for goods or construction, alternative methods of procurement are permitted under certain conditions. When a decision is made to use a method of procurement other than competitive tendering, it must be supported in the record by a statement of the grounds and circumstances underlying that decision. Likewise, the *ABA Model Procurement Code* provides a variety of procurement methods if competitive bidding is not used. Requiring written justification of the decision to use an exceptional method of procurement rather than the preferred competitive method (i.e., tendering for goods or construction, or the principal method for procurement of services) makes the process transparent. It should not be made secretly or informally.

## **V. Organizational Issues**

### **A. Centralization vs. Decentralization**

While most of the Iraqi laws focus on the procurement process itself, more attention should be paid to the procurement organizational structure. The procurement process frequently involves choices between competing objectives. On one hand, limiting opportunities for bias and abuse is extremely important, as is reflected in much of the commentary in this report. At the same time, however, an effective and efficient procurement process is also strongly desirable. Organizational issues, addressed only in passing by the Iraqi procurement laws, play a prominent role in the balancing of these two goals.

The first and traditional approach is to pursue a centralized procurement structure, which promotes greater uniformity and predictability in the procurement process. This has the advantage of a single point of responsibility for purchasing, helping to ensure that the same standards are applied to all procurement decisions. Some studies report, however, that centralized systems are more prone to abuse and corruption.

A more recent approach is to decentralize the procurement process by pushing decision making to lower levels. This reportedly creates more efficient, flexible organizations that are better attuned to user needs and less prone to corruption. However, as responsibilities become less centralized, it becomes more difficult to ensure uniformity in the procurement process.

Finally, a hybrid approach is to use a centralized procurement agency that is spread out geographically amongst the using agencies. This attempts to harness the uniformity of a centralized system with the advantage of physically locating procurement officials in the using agencies. As such, the procurement officials gain the efficiency advantages of being in close coordination with the using agency.

In this particular situation, a centralized procurement structure may be more advantageous. A centralized organization allows for greater control over personnel, thereby facilitating training and quality control in the procurement process. Similarly, centralization is the most effective means of promoting and managing organizational change.

### **B. Oversight Mechanisms and Ethical Standards**

Two essential components of any fair and transparent procurement system are effective oversight and enforcement of ethical standards. The laws do well in including provisions prohibiting government officials from participating in certain procurements, but should go further by setting out clear all-out prohibitions in specified circumstances for former as well as current government personnel. The laws should also more fully detail organizational conflicts of interest and prescribe parameters for contractor participation on procurements in which they may have an unfair competitive advantage, etc. due to prior procurement efforts. This is an area that might be more appropriately addressed in subsequent regulations.

An independent oversight organization is another important facet for enforcing ethical standards and minimizing corruption. In the U.S. federal government, this is accomplished through the use of independent inspectors general attached to each major agency. The inspectors general are

charged with conducting audits and investigations, promoting economy and efficiency, preventing and detecting fraud and abuse, and reporting problems and deficiencies to the head of the agency and to Congress. The Iraqi procurement system should contain a similar independent oversight organization to help enforce ethical standards.

## **VI. Conclusions**

The Iraqi procurement laws touch upon several important procurement concepts, but do so either in too cursory a fashion or in a manner that is inconsistent or incohesive. These areas should be expanded or clarified. In addition, other key elements of an adequate procurement law should be addressed, such as greater transparency, the promotion of full and open competition, increased government accountability, and contractor right to redress. Absent such provisions, the adequacy of the procurement law and the risk of corrupt procurement practices will remain open issues.

## **Appendix A**

**Comments Submitted by the Working Group on Iraqi  
Procurement Processes**

**ABA Section of Public Contract Law**

## Preface

These comments on procurement processes in Iraq were prepared by a varied group of United States procurement practitioners, chaired by Michael K. Love. They are members of the Section of Public Contract Law of the American Bar Association (the "Section"). They responded to a request from ABA's Central European and Eurasian Law Initiative (CEELI) for assistance with a request of the United States Department of State, Bureau for International Narcotics and Law Enforcement, to assess the "Iraq Government Procurement Laws." This group analyzed the Iraqi Procurement Processes documents in the following 50 pages of comments.

The authors listed below drafted these comments but the comments also reflect the input of another much larger group of practitioners and Section members who reviewed and provided comments on the drafts, shared their insights into the Iraqi processes or otherwise contributed their expertise to this effort. These individuals work in private practice, corporations and in government agencies. The effort could not have been completed without all of this donated assistance.

The comments that follow reflect the consensus of the drafters named below. The views expressed are those of the drafters. **They have not been approved by the Section's governing Council or by the ABA House of Delegates or Board of Governors, and they thus should not be construed as representing the Policy of the American Bar Association.** They should also not be construed to represent the views of the drafters' firms, agencies, present or past clients or those of any entity of the American Bar Association.

March 15, 2004



Hubert J. Bell, Jr.  
Chair, Section of Public Contract Law

Smith Currie & Hancock LLP  
Suite 2600  
233 Peachtree St., NE  
Atlanta, GA 30303-1530

## Iraqi Procurement Processes Commentators

Michael K. Love, Chair  
Hunton & Williams LLP

Felicia Collins  
Unisys Corporation

Paul Debolt  
Venable LLP

Terry L. Elling  
Venable LLP

Susan Warshaw Ebner  
Buchanan Ingersoll PC

S. Jun Jin  
Smith, Pachter, McWhorter & Allen, P.L.C.

Brett Howard  
Howrey Simon Arnold & White LLP

James Kearney  
Womble Carlyle Sandridge & Rice PLLC

Stephen Knight  
Smith, Pachter, McWhorter & Allen, P.L.C.

Dismas Locaria  
Venable LLP

Karen L. Manos  
Howrey Simon Arnold & White LLP

James Pankovics, PE, CPCM, C.P.M.  
Architect/Engineer  
United States Postal Service

Patricia Wittie  
Oldaker Biden and Belair, LLP

## Table of Contents

I.	Introduction .....	1
II.	Transparency/Predictability .....	4
A.	Transparency .....	4
B.	Predictability .....	5
C.	Iraqi Procurement Processes Relating to Transparency and Predictability .....	6
1.	Publication of tender notices .....	6
2.	Statement of evaluation criteria and procedures .....	8
3.	Method of evaluation .....	8
4.	Publication of award .....	9
5.	Dispute resolution procedures .....	9
6.	Qualification and Blacklisting .....	10
III.	Work Statements .....	10
A.	Basic Purposes .....	10
B.	Drafting Guidance .....	11
IV.	Competition .....	13
A.	Full and Open Competition .....	13
B.	Limits on Full and Open Competition .....	15
C.	Full and Open Competition Processes .....	16
V.	Dispute Resolution .....	17
A.	Award Controversies .....	18
B.	Performance Controversies .....	19
C.	Blacklisting .....	20
VI.	Procurement Integrity/Ethics .....	21
A.	Accepted Principles .....	21
B.	Anti-Corruption .....	22
VII.	Organizational Issues .....	24
A.	Functional Separation .....	26
B.	Setting Procurement Policy .....	29
C.	Enforcement Organizations .....	30
D.	Structure and Organizational and Bureaucratic Change .....	31

# Comments of the Working Group on Iraqi Procurement Processes

## I. Introduction

We prepared the following comments for the use of ABA's Central European and Eurasian Law Initiative (CEELI) in responding to a request of the United States Department of State, Bureau for International Narcotics and Law Enforcement, for assistance in assessing the "Iraq Government Procurement Laws." The Department of State provided three documents for review, which we will collectively refer to as the "Iraqi Procurement Processes":

- Republic of Iraq, Council of Ministers, Planning Corporation, Legal Depart. Part 1 (herein "Chapter 1")
- Form Inside of Iraq, Chapter 2 (herein "Chapter 2")
- Ministry of Planning, Legal Office, Instructions for Implementation and follow up of projects national development plan (here in "MOPI")

The questions posed by CEELI were "whether the law is sufficient to prevent corruption in the government procurement process and whether it meets international standards." Our analysis was limited to the documents listed above. These documents are not sufficient to prevent corruption and do not meet international standards but they do provide a useful start for developing such procurement laws. These documents seem more like regulations or guidance. They also seem incomplete because they either do not address or only allude to other important elements of a sound procurement system. We also find a problem in that in most areas, when a definite rule is stated, it is followed by authority to deviate or make exceptions without documenting the reasons and with inadequate, if any, guidance on what the appropriate circumstances for a deviation might be or what the alternate process would be. Examples are cited in the following topic area discussions. We also believe the translation itself might be the source of ambiguities in the English language versions upon which our analysis is based.

We have organized our discussion around six fundamental elements of a sound procurement system:

1. Transparency/Predictability
2. Work Statements
3. Competition
4. Dispute Resolution
5. Procurement Integrity/Ethics
6. Organizational Issues

In these very high level discussions, we cite various sources of legislative language that can be considered for use in implementing these recommendations. It is our hope that the Iraqi

legislators, regulation writers, purchasing officials and their support personnel will find these comments useful. We also offer our services to follow up these efforts.

Because we are working from a translation and the recommendations are thematic, we generally refrain from addressing drafting issues. We do note, however, that the term “blacklisting” is used to denote a process by which firms are excluded from competing for contracts. In the US this is generally referred to as suspension or debarment. To many firms the term “blacklisting” may have connotations unintended by the Iraqi government, such as the firms on such a list will not be told they are on it or the reasons why, and there are no means available to challenge the listing. If that is current practice, it violates transparency and fairness principles. If it is not, the use of the term “blacklisting” could raise issues where there are none. Consequently while the following discussions will refer to “blacklisting” because the Iraqi Procurement Processes use the phrase, we would urge that phrase be changed to “exclusion” or some more neutral term.

We have cited a number of sources throughout the discussion. Attached you will find copies of some of those most prominently mentioned:

- American Bar Association, *The 2000 Model Procurement Code for State and Local Governments* (2000) (referred to as ABA MPC).
- ABA Sections of Public Contract Law and Urban, State and Local Government Law, *The Model Procurement Code for State and Local Governments - Recommended Regulations* (August 1980) (referred to as ABA MPC R).
- United Nations Commission On International Trade Law (UNCITRAL), *Model Law for Procurement of Goods, Construction and Services*, available in English, Arabic, French, Russian, Chinese and Spanish at the UNCITRAL Website <http://www.uncitral.org/> in the “Adopted Texts” area under “Public Procurement and Infrastructure Development”
- Principles of Public Procurement adopted by the American Bar Association:
  - Principles of Competition
  - Resolution of Controversies
  - Risk Allocation Principle

Available at <http://www.abanet.org/contract/admin/draftres.html>

- *Standards of Internal Control in the Federal Government*, GAO/AIMD-0021.3.1, page 9 (US GAO November 1999) available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=ai00021p.pdf&directory=/diskb/wais/data/gao>

Other resources include:

- General Agreement on Tariffs and Trade (GATT), *Agreement on Government Procurement*, 1988.
- World Bank, *Guidelines for Procurement under IBRD Loans and IDA Credits*, 1995. The World Bank internet site contains a wealth of research.
- Official Journal of the European Communities, Procurement Directives; and, International Trade Centre UNCTAD/GATT, *Improving Public Procurement Systems*, 1993
- *2002 Public Procurement Law Review No. 2*, “Special Issue: Drafting a Government Procurement Law: Lessons Learned from the United States” (2002) including:
  - Introduction: the Symposium “Drafting A Government Law”: Lessons Learned from the United States, Professor Steven L. Schooner,
  - Desiderata: Objectives for a System of Government Contract Law, Professor Steven L. Schooner,
  - Integrity: Maintaining a Level Playing Field, Rand L. Allen
  - Learning from the United States Procurement Law Experience: On “Law Transfer” and Its Limitations, Professor Joshua I. Schwartz
  - Lessons from the Commercial Marketplace, Carl L. Vacketta,
  - Enforcing the Bargain: Contract Administration, C. Stanley Dees,
  - Resolving Differences: Protests and Disputes, Frederick J. Lees,
  - Transnational Concerns: Domestic Preferences, Patricia H. Wittie,
  - World Trade Organization
    - The Proposed WTO Agreement on Transparency in Government Procurement—Doha and Beyond
  - European Communities
    - Proposed Adoption of Mandatory Common Procurement Vocabulary
    - New Standard Model Notices
    - Value of Thresholds under the Directives on Public Procurement Applicable from January 1, 2002

- European Court of Justice/Court of First Instance
  - Award Criteria under the E.C. Procurement Directives: a Note on the SAIC Construction Case
  - Abnormally Low Bids Criteria under the E.C. Procurement Directives: a Note on Joined Cases C-285/99 and 286/99
- United States
  - A Brief Survey of U.S. Procurement Reform in the E.U. Context

## II. Transparency/Predictability

### A. Transparency

Transparency is a central tenet of a functional and effective procurement regime. Transparency has been defined variously<sup>1</sup> but can be broadly defined as being or controlled by published rules and being done openly so that participants and the public may observe the process. Transparency is the focus of the World Trade Organization (through its Government Procurement Agreement), the United Nations (through its *UNCITRAL 1994 Model Law for Procurement of Goods, Construction and Services*), the European Community (through its 1999 draft agreement on transparency in government procurement), the American Bar Association (through its *Model Procurement Code for State and Local Governments*), the World Bank (through its numerous guidelines, programs, and publications on transparency and anti-corruption), and numerous other international organizations.

The Preamble to the *UNCITRAL Model Law for Procurement of Goods, Construction and Services* states as a main objective: “achieving transparency in the procedures relating to procurement.” The European Community states that “transparency is an essential element in the procurement process if a regime which safeguards the best interests of the procuring entity, as well as of suppliers, is to be achieved.”

A transparent procurement system fosters greater confidence with contractors seeking to conduct reliable and frequent business with the government. Greater confidence in a procurement system then leads to greater competition among a larger pool of tenderers. This greater competition then leads to increased government cost savings. Also, because public funds are at stake, transparency in procurement gives private citizens greater faith in the integrity, ethics, and fairness of the procurement system, serving socio-political goals of eliminating unlawful discrimination, corruption, cronyism, and undue influence. Even a fair and unbiased procurement action will be perceived as unfair and biased without transparency.

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<sup>1</sup> Extensive transparency principles have been developed by Asian-Pacific Economic Cooperation. See Leaders’ Statement to Implement APEC Transparency Standards (21 October 2003); Simon J. Everett & Bernard M. Hoekman, “Government Procurement, Market Access, Transparency, and Multilateral Trade Rules” (World Bank Working Paper January 2004).

The following practices and mechanisms are essential in achieving transparency in public procurement:

- Publication in all official Iraqi languages of all laws, rules, and regulations relating to government acquisition of goods and services for easy access by all parties potentially interested in competing for work - clarity, of course, is also important;
- Public announcement/advertisement of procurement opportunities and procedural requirements to all potential tenderers;
- Issuance of tender notices with detailed descriptions of award procedures, evaluation criteria (including, but not limited to price, technical, past performance, and tenderer responsibility) and methodology, deadlines, and points of contact to obtain further information;
- Limitation on the use of sole source procurements to the following circumstances when demonstrated in written justifications: extreme urgency caused by events unforeseeable to the procuring entity; national security; protection of patents, copyrights, or other exclusive rights; and absence of more than one responsive bid after attempted procurement efforts under full and open competition;
- Issuance of notices of award, including the contract price, and providing all tenderers and the public access to the contract between the awardee and procuring entity;
- Meeting with losing tenderers after award to explain the procuring entity's evaluation process, to show that the evaluation and selection of the winning tender were conducted fairly and in accordance with the laws, rules, regulations, and stated tender criteria and to provide the Government's view on weaknesses in the unsuccessful tender;
- Maintenance of proper records of meetings, proceedings, notes, and other documentation or recordings relating to individual procurements particularly documenting the reasons for exceptions or deviations (see *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Chapter 1, Article 11);
- Award controversies/performance disputes procedures so that losing parties, including foreign contractors, can seek formal, prompt, and well-documented review by an independent body, such as a court or administrative board, to review the procuring entity's award and determine whether the entity acted properly rather than arbitrarily or capriciously; and
- Independent oversight and monitoring of government procurement behavior and activities.

## **B. Predictability**

Another pillar of a successful procurement system's transparency is predictability. With a predictable procurement system, contractors and vendors receive notice regarding tender

opportunities and will submit tenders with greater confidence, knowing that their tenders will be evaluated on their merits in accordance with the laws, rules, and stated criteria and an award will be made to one of the competitors absent compelling circumstances.

In the context of disputes, predictability means a transparent and publicly conducted disputes process that gives a right of review to parties who may feel wronged by an apparent arbitrary or fraudulent determination. The resulting decision will fairly explain the facts, the pertinent material issues, and the reasons for how these issues are resolved. Similarly, contractors will be reassured if a predictable process exists to resolve a dispute arising during the performance of a government contract.

Predictability in public procurement consists of the following features:

- Evaluation of tenders in accordance with the criteria stated in the tender solicitation;
- Public opening of tenders immediately after stated deadlines in accordance with applicable laws and regulations regarding tender evaluation;
- Government commitment to keep confidential and proprietary contractor information out of the hands of competitors;
- Clear regulations regarding prequalification and blacklisting of tenderers to avoid arbitrariness or its appearance;
- Use of standard tender, contract documents, and procurement vocabulary to reduce ambiguity and increase clarity;
- Published requirements, that is, statutes or regulations, governing the use and required justification by procuring agencies of sole source or limited competition to prevent unlawful discrimination, cronyism or corruption (see *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Chapter 2, Articles 20 and 22);
- An independent tribunal to hear and decide disputes and protests of tender awards; and
- Publication of tender and procurement-related information in all official languages.

## **C. Iraqi Procurement Processes Relating to Transparency and Predictability**

As a general comment, the Iraqi legislature should consider consolidation of Chapters 1 and 2 into one chapter for ease of use and application.

### **1. Publication of tender notices**

As an overarching comment, the Iraqi procurement statute should require that tender notices contain<sup>2</sup> the following items to enhance transparency and predictability: full contact details

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<sup>2</sup> Elements need not be set forth verbatim, but may be incorporated by reference, if the elements so incorporated are

of the procuring entity; the type of award procedure chosen (open, restricted, and negotiated); description of the goods and services to be provided, along with an objective description of the required quantity or duration; indication of whether particular professions are required to perform the work (in the case of a service contract); place of delivery of goods or site of performance of service; time limits for delivery, completion, or duration; time periods for which tenderer is required to keep tender open; deadlines for receipt of tenders; dates, hours, and places of tender opening; required letters of credit, deposits, or guarantees; economic or technical requirements, and criteria for evaluation of tenders. See *UNCITRAL Model Law for Procurement of Goods*, Chapter 2, Articles 25-27 and Chapter 4, Articles 37-39 and ABA MPC R 3-202.03 for a detailed list of information suggested in a tender notice.

Chapter 1, Article 1, First and Second, provide a good general description of how tenders are to be advertised, including the use of technology such as the internet. Chapter 1, Article 2 contains many of the elements associated with transparent procurement systems; nevertheless, certain provisions provide too much discretion and flexibility to procuring entities resulting in a compromise to predictability, such as Chapter 1, Article 2, Third, which reads, “Concerned offices may have the right to accept offers submitted after date of close up for general tenders.”

Chapter 1, Article 2 contains language stating that tender provisions and invitations “shall include all the basic items of the tender so that the companies could [sic] have a clear overall picture, a bold offering system.” This language appears consistent with the spirit of transparency.

Based upon an understanding of the translation of Chapter 1, Article 1, Second, the use of “direct invitations” to specialized companies appears to run counter to the idea of transparency and full and open competition. Chapter 1, Article 1, Second, Paragraph C attempts to justify such direct invitations on the basis of excluding companies that are not responsible<sup>3</sup>. The procedures set out for foreign contractors to receive verification and accreditation “through commercial bureaus and embassies” (presumably of their home countries) could give rise to subjective and self-serving determinations by respective nations seeking to assist their own national contractors by requiring businesses to be listed on approved lists, that is, prequalified<sup>4</sup>, to win Iraqi contracts. Article 2 requires tenderers to submit a “certificate of expertise or any supporting acknowledgement” to prove the company has past relevant experience and the capability to perform. Use of a standardized form for this purpose would enhance predictability.

Chapter 2, Articles 13 and 14, also provide for transparency through advertising requirements, but the language will need to be adapted to present and future Iraq, with new media and the construction of new public facilities, including libraries, where such tenders should be advertised. It is important that foreign contractors and non-local Iraqi contractors have a single well publicized place to timely obtain information about upcoming procurements. Presumably, notice will also be provided via the Internet. Chapter 2, Article 14, also includes good general language about how tender provisions should detail the specifications and quantities of materials and services.

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*readily* available from the purchasing agency.

<sup>3</sup> See footnote 5.

<sup>4</sup> Prequalification can be a useful tool but one must recognize that until a concrete business opportunity is published, many competitors particularly those from outside Iraq, may not want to invest the resources in becoming prequalified.

Chapter 2, Articles 18 and 19, also include language regarding “direct invitations” and “urgent needs.” In public procurement, certain urgent and compelling circumstances require quick action that may not allow full and open competition. (See section on full and open competition). In certain circumstances only a single vendor might be able to supply the item due to patents or other issues. As a matter of transparency, the code should specifically list the limited circumstances when procuring entities may use other than full and open competition.

MOPI, Article 4, 3, requires tender notices for publication to include certain information relating to the tender. Article 4, 4 describes in adequate detail the mechanical instructions for preparing tenders for submission.

## **2. Statement of evaluation criteria and procedures**

Chapter 1 needs a provision requiring the procuring entity to include a full description of the evaluation criteria. See MPC R 3-207.06.2 for a list of possible criteria a procuring agency may consider, including a plan of performance, the general and specific experience of the tenderer, the personnel, equipment, and facilities available to perform the contract, and the tenderer’s record of past performance. Article 2, Fifteenth, states that “the office is not bound to accept the lowest prices” but does not state the basis on which award will otherwise be made.

Chapter 2, Article 12 sets out an important concept that the “[b]asic ground for purchasing or offering services are to obtain the best material and services as far as quality is concerned at the lowest prices and in the right time.” The best value for the government can only occur when transparency and predictability allow any qualified potential competitor to fully compete.

Although Chapter 2, Article 14, Sixth, states that “the concerned office is not obliged to accept the lowest offers,” Chapter 2 does not but should require that tender notices include certain evaluation criteria, for example, price, past performance/experience, and technical strengths, and the relative importance of each of these criteria to the award decision.

## **3. Method of evaluation**

Chapter 1, Article 4, First, states that each office (entity) shall form a committee to evaluate offers from technical, financial, commercial, and legal points of view. For purposes of predictability, this paragraph should also include language that evaluations will be performed “in accordance with the stated terms and criteria in the tender invitation.” See *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Chapter 3, Article 34; MPC R 3-203.16, for proposed language. Including such language helps to prevent a contracting entity from awarding contracts based on criteria different from those stated in the tender notice. This will engender greater trust in the predictability and fairness of the system. Article 4 also appears to allow the committee to give tenderers the opportunity to resubmit tenders not in full compliance with the tender notice. Article 4 needs to describe the circumstances under which resubmission of non-conforming tenders will be allowed and to limit those circumstances so that all tenderers have an equal opportunity and those tenderers submitting conforming tenders are not prejudiced.

Chapter 1, Article 4, Fourth and Fifth, run counter to the principles of predictability and transparency. Even if the procuring entity’s intent to “share the wealth” by awarding contracts to several tenderers is clearly stated in the tender notice, tenderers will not know what quantities they

may eventually need to provide under their respective contracts. As a result, tenderers may not submit their best bids due to the uncertainties of partial awarding of contracts. This would be true despite the fact that Article 4, Fifth provides that the price noted in the tenders submitted would not change regardless of the quantities actually purchased by the procuring entity. Tenders would likely base the price bid on the most expensive quantity to provide.

As with Chapter 1, Chapter 2, Article 17 calls for the creation of a tender evaluation committee. Article 17, Second appears to meet the requirement of transparency by stating that the evaluation committee shall examine the offers based on their compatibility with the tender notice. This paragraph also requires the evaluation committee to give a detailed written review along with its recommendation of the “best offer submitted.”

MOPI, Article 5, lays out a detailed procedure for opening of tenders by committee. This step-by-step procedure for analyzing offers gives contractors an understanding of the evaluation committee’s process. Additionally, the requirement for the committee to document its evaluation in a final report provides a good transparent record.

#### **4. Publication of award**

Chapter 1, Article 6, requires that the tender evaluation committee notify the winning tenderer. Article 6 should also require the committee to notify the losing contractors. Article 6 also needs language requiring the committee to publish a contract award notice. Furthermore, to increase transparency, upon request by a losing contractor, the committee needs to provide the reasons why that tenderer failed to win the contract. Through this formal procedural inquiry, the contractor can begin to assess whether it believes the procurement rules have been followed. It can also learn how better to compete next time. Finally, the rules should require the procuring agency to publish or otherwise make available to the public a copy of the contract once signed by the awardee and the procuring entity, unless a legitimate interest exists to withhold some information. The acceptable bases for withholding information should be clearly articulated in the law.

Chapter 2, Article 18, states that “systematic order of tenders is to be announced in different mass media channels.” The communications need to be published in all Iraqi official languages. See Law of Administration for the State of Iraq for the Transitional Period (8 March 2004) referred to below as “Iraq Interim Law”, Article 9. Although the translation leaves room for interpretation, Chapter 2 also needs language requiring the publication of award and notification to all tendering parties.

MOPI, Article 6, lays out the specific procedure for review and analysis of tenders. Article 6 does not but should specifically provide for publication and notice to all tendering parties, a key requirement for a transparency.

#### **5. Dispute resolution procedures**

For purposes of both transparency and predictability, the system needs a satisfactory dispute resolution procedure to deal with both protests of awards and contract performance disputes. Such a dispute resolution mechanism to challenge alleged arbitrary decisions by the procuring entity is necessary to guarantee transparency of the process. See ABA MPC 9-101, 9-506, and A9-506 for ABA proposed language on dispute resolution procedures. This dispute resolution procedure should

promote openness and access, particularly making information on protests available (see MPC R 9-101.06), allowing hearings on the merits (see ABA MPC R A9-506, Rule 9), and awarding protest costs in the event a party prevails in challenging the procuring agency's source selection determination (see MPC R9-101.07). Award controversies also provide another means to assure procurement rules are followed.

To the extent other areas of the Iraqi code do not provide predictable and transparent procedures to resolve the disputes relating to the performance of government contracts, the Iraqi legislature should also consider the creation of such a framework. See MPC 9-103 and A9-508.

## 6. Qualification and Blacklisting

*UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Chapter 1, Articles 6 and 7, provide suitable language to set up a prequalification regime to ensure that potential contractors are not unfairly excluded from competing and that the government does not deal with tenderers incapable of performing on the contract or lacking the integrity to honor their contracts.

Chapter 1, Article 8, and Chapter 2, Article 15, set forth a “blacklist” procedure which, although too discretionary, allows ministerial and non-ministerial offices to record contractors and suppliers for a period of time as blacklisted in cases of bribery, forgery, etc. The blacklist procedure is not explained here and reference to a boycott committee in Chapter 1, Article 9 is also unclear. These procedures should be published and stated clearly.

MOPI contains a more definitive set of rules dealing with blacklisted contractors. Chapter 1, Article 10 indicates that MOPI applies to Chapter 1. Although the procuring entities should ban certain contractors from selling to the government due to dishonest business practices as a matter of public policy, MOPI needs to provide a more transparent and predictable right of recourse to allow a contractor to challenge a blacklist determination. MOPI, Article 12, merely states that a contractor may submit an “objection request” to the minister of planning. The rules need to allow for a judicial review and appellate review of the blacklisting determination by an independent body. See MPC R 9-102, A9-507.

### III. Work Statements

#### A. Basic Purposes

The Statement of Work acts as a basis for the offers received and to measure the actual extent and cost of the work whether the work is for the construction of Iraqi public works projects or is for the purchase of goods and services from contractor or vendor inside and/or outside of Iraq. As UNCITRAL has explained:

It is essential that the contract precisely describe the works or portion of the works to be constructed.

See *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, Chap. 5 (Feb 1988). “Article 4: Project execution measures” in the MOPI Document likewise recognizes that a precise study of the work (or in other words a Statement of Work) is necessary. It

should also to be publicized to, and easily obtainable by, vendors in the market to ensure each vendor knows what the government wants.

The pre-award purpose of the Work Statement is to inform the market of the nature of an upcoming business opportunity. Given the global nature of trade, the assumption must generally be that for significant contracts, companies from outside Iraq will be interested in competing for the work. After the contract is awarded, the work statement is the measure against which the contractor's performance will be judged.

The work statement must not only reflect the user's needs, but it must also be written so that unnecessary requirements do not unduly restrict competition. Section 4-205 of the ABA Model Procurement Code states, "all specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the [State's] needs, and shall not be unduly restrictive."

Likewise, the *ABA's Principles of Competition in Public Procurements* provide that public procurement should "restrict competition only when necessary to satisfy a reasonable public requirement" and "provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis." *UNCITRAL's Model Procurement Law on Procurement of Goods, Construction and Services with Guide to Enactment*, Article 16 provides that work statements should not create obstacles to vendor participation. Proprietary features or descriptions should not be used unless necessary and the words "or equivalent" are appended. And standard industry-wide terms and criteria (rather than unique terms and criteria) should be used. The *ABA's Principles of Competition in Public Procurements* similarly state public procurements should "Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis." Under Federal Acquisition Regulation 11.104, 48 CFR 11.104, not only must "or equal" appear with any brand name description but those features of the brand name that an equivalent item must meet are also to be identified.

In conjunction with the contract terms and conditions, the work statement will allocate risks between the government and the contractor. To promote vigorous competition for Iraq's work at reasonable prices, the work statement should also be drafted in accordance with the *ABA's Principle for Risk Allocation in Formation of Public Procurements*:

In drafting public procurement contracts the parties should, to the maximum extent practicable, (i) clearly identify the risks of performance for both parties, and (ii) allocate those risks and the values exchanged in a commercially reasonable manner, consistent with the broader obligations of parties to public contracts.

## **B. Drafting Guidance**

Good drafting of work statements cannot be legislated. It requires effective managers directing efforts to meet legislated objectives, such as those stated above. But perhaps walking through how the process should proceed will be of assistance.

The first step is to determine:

What does the end user really intend to do?

One does not have to see the whole staircase; just the very first step; i.e., discuss with the end users what they want. Listen to what they say about what needs to be purchased. Determine not only what the users want but what is minimally required. What needs do they have as well as what do they think is necessary to satisfy those needs. This is the first step in what must be a collaborative effort between users and purchasing officials to draft the work statement.

In the course of these discussions note:

- how much and what kinds of risks are involved
- where is risk best placed; e.g., more risk on the contractor and less risk on the government or vice versa
- what contract type; e.g. fixed-price, unit price, variable price or cost reimbursable
- will the work statement be a performance or a design specification or a combination of both? That is, will it state exactly what is being purchased or describe the need the user has and let the offers provide solutions? A design specification fully specifies what needs are to be provided or supplied. On the other hand, a performance specification essentially makes the contractor responsible for ensuring the services or the product supplied meet user needs as expressed in the contract.
- how does this work fit in with other Iraqi long range strategic plans such as the “national development plan” referred to by the Iraqi Ministry of Planning in MOPI.
- when does the user want the work done or goods and services provided or delivered.
- what funding is available to cover the cost.

After, or concurrently with user discussions, the market will need to be investigated. This research should update existing knowledge, determine what alternative supplies or services can meet the users needs, ascertain whether those needs can be met with standard or commercially available supplies or services, disclose how long the procurement will take and reveal expected price levels. Information from the market may suggest the need for more user discussions. Among the information needed from the market is:

- the availability of these goods or services in the market
- estimated price or cost of the work or services to be purchased (based on market research of prices and costs of comparable or similar services)
- how are contracts priced in the market, fixed price, variable price or what?

- will foreign firms be interested in this size and type of work? If so, can the work statement ensure they are given a fair chance to compete?
- are there aspects to the user's stated needs that seem to be eliminating a group of companies that normally compete for this type of work? If so, can these aspects be changed?
- are the competing products so complex and different in significant ways from each other, that it may be necessary to obtain experts to draft the work statement, evaluate the tenders or both?

To encourage competition from among contractors and vendors the contracting agency may want to consider circulating in the market a draft of the solicitation including the draft work statement for comment, as well as holding a bidder's conference (sometimes called pre-proposal conference) where potential competitors can ask questions and learn more about the procurement. Make reasonable efforts to notify interested vendors of conferences and the availability of draft solicitations. Public information exchange almost always improves the procurement process.

Fixed price contracts are preferred and every reasonable effort should be made to define the work clearly and definitively enough to allow vendors to provide a fair fixed price. Be aware that vendors may submit tenders at fixed prices even when the work is ill-defined for any number of reasons, most of which have the potential of adversely affecting the government's interests. Examples are bidding in the expectation there will be claims for extras, bidding high to cover costs that may never be incurred, or bidding in ignorance of what the government really wants thus prompting performance disputes. Variable priced contracts, cost reimbursement contracts, phased contracts or combinations of these can avoid problems caused by using fixed price contracts inappropriately. But if a fixed price contract is not used, government accepts more risk and must manage the risk, including the contractor's performance, or face the consequences of estimates that turn out to understate significantly the ultimate cost of the work.

Often the work statement must reflect tradeoffs or business decisions made in order to provide the end user with the goods and services by the time requested or within budget. A customized product for example might be available that meets the needs completely but is too expensive or takes too long to special order. It may also be that while one or two vendors might be able to supply the custom product, many could meet the standard requirements, and the advantages to be gained by using a custom product are insufficient to justify limiting competition.

## **IV. Competition**

### **A. Full and Open Competition**

The Iraqi procurement system should promote and require full and open competition. Robust competition results in better quality goods and services for the citizens and more efficient use of public money and provides better protection against fraud and corruption. It is for those reasons that the *UNCITRAL Model Law on Procurement of Goods, Construction and Services* provides for competitive tendering as the preferred method of procurement. Similarly, the European Commission has adopted public procurement directives that require competitive tendering. The

American Bar Association has adopted the following *Principles of Competition in Public Procurements*, which may provide a useful outline for structuring the Iraqi procurement code:

- Use full and open competition to the maximum extent practicable.
- Permit acquisitions without competition only when authorized by law.
- Restrict competition only when necessary to satisfy a reasonable public requirement.
- Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis.
- Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).
- State in the solicitation the bases to be used for evaluating bids and proposals and for making award.
- Evaluate bids and proposals and make award based solely on the criteria in the solicitation and applicable law.
- Grant maximum public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information, and personal privacy rights.
- Insure that all parties involved in the acquisition process must participate fairly, honestly, and in good faith.
- Recognize that adherence to the principles of competition is essential to maintenance of the integrity of the acquisition system.

Several aspects of the Iraq Procurement Processes are consistent with the principle of full and open competition. Both Chapter 1 (Article 1, First, A; and Article 2) and Chapter 2 (Article 14) require procurement authorities to describe their requirements in sufficient detail to allow offerors to compete on an equal basis. Chapter 1 (Article 1, Second, A) and Chapter 2 (Article 13) also provide for a tendering process in which procurement authorities advertise their requirements through newspapers, public bulletin boards and other local and foreign media. In addition, Chapter 1 (Article 8) and Chapter 2 (Article 21) have provisions to ensure that offerors involved in the acquisition process participate fairly, honestly, and in good faith.

Full and open competition requires that all responsible<sup>5</sup> sources be permitted to compete. The Iraqi Procurement Processes appear intended to solicit offers from a wide range of qualified companies. Nevertheless, one of the potentially problematic features of these procedures is that they allow procurement authorities to make exceptions to the competition requirements without any

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<sup>5</sup> Responsible sources are those having the capacity, resources, reliability and integrity necessary to perform and otherwise qualified to successfully complete the work. See ABA MPC §3-101(6).

criteria as to when or why the exceptions may be made. For example, Chapter 1 permits the use of a “direct invitation” procedure instead of tendering. Even when tendering is used, Chapter 1 permits the Minister or head of the procurement office to accept a tender that arrives after the closing date. Chapter 1 also permits the opening committee to eliminate “illegal” offers without providing any guidance as to what makes an offer “illegal.”

## **B. Limits on Full and Open Competition**

In some circumstances, full and open competition may not be practicable or desirable. Statutes passed by the democratic institutions of Iraq should establish the nature and limits of the exceptions to competition requirements. Some suggested exceptions appear at the end of this Section. These exceptions should not be left solely to the discretion of the procuring officials. Procurement officials should only determine if the circumstances of a particular procurement meet statutory criteria.

For example, even though the *UNCITRAL Model Law for Procurement of Goods, Construction and Services* provides for competitive tendering as the preferred method of procurement for goods or construction, alternative methods of procurement are permitted under certain conditions.<sup>6</sup> A key condition is that a decision to use a method of procurement other than competitive tendering must be supported in the record by a statement of the grounds and circumstances underlying that decision. See *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Chapter 2, Article 18(4). Likewise the ABA MPC provides a variety of procurement methods if competitive bidding is not used. See ABA MPC §§3-201 - 3-207. Requiring written justification of the decision to use an exceptional method of procurement rather than the preferred competitive method (i.e., tendering for goods or construction, or the principal method for procurement of services) makes the process transparent. It should not be made secretly or informally. See *Guide to Enactment of UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Article-by-Article Remarks, Chapter II, Article 18, ¶ 2 discussing Article 18(4) of the Model Law.

Iraqi law should identify circumstances in which other than full and open competition is allowed because it is not possible or not prudent. This could include permitting limited competition in circumstances such as the following:

- a. When it is determined in writing that the supplies or services are available from only one or a limited number of sources, and no other services or supplies will satisfy the requirements (for example, when repair parts are available only from an original equipment manufacturer);
- b. When it is determined in writing that the need for the services or supplies is so unusual and urgent that Iraq would be seriously injured unless the number of sources from which bids or proposals are solicited is limited (for example, when services or supplies are needed immediately because of fire, earthquake, explosion, or other

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<sup>6</sup> These alternative methods include two-stage tendering, request for proposals, competitive negotiation, restricted tendering, request for quotations and single source procurement. *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Chapter 2, Articles 18-22 and the ABA MPC Article 3 have proposed language governing alternative source selection methods.

- disaster). In such circumstances competition should be sought from as many sources as practical;
- c. When it is determined in writing that it is necessary to award the contract to a particular source or sources to –
    - i. Keep vital facilities or suppliers in business or train them to be available in the event of a national emergency (for example, when limiting competition to items manufactured in Iraq would create or maintain a capability to produce critical supplies in Iraq), or
    - ii. Establish or maintain an essential engineering, research, or development capability in an Iraqi educational institution;
  - d. When the terms of an international agreement between Iraq and a foreign government or international governmental organization precludes or limits competition;
  - e. When Iraqi law expressly authorizes or requires that an acquisition be made through another Iraqi government agency or from a specified source;
  - f. When disclosure of the Iraqi government's needs would compromise its national or military security unless the acquisition is permitted from a sole source or limited number of sources (for example, when conducting a full and open competition could jeopardize military secrets); and
  - g. When a purchase is so small that it is not practical or cost effective to conduct a full and open competition (for example, when the value of the contract is below an amount of new Iraqi dinars specified by statute or regulation).

### **C. Full and Open Competition Processes**

The “deposits” required by Chapter 2, Article 14 may help screen out vendors that lack the requisite financial resources but may reduce competition too much. As we interpret this requirement, losing offerors would not get these deposits back. Where a solicitation includes requirements that reduce competition, there should be a reasonable basis for imposing the restrictive requirement. It may be reasonable to impose a deposit or bond requirement to ensure that only financially capable firms compete. However, there does not seem to be any reason to retain the deposit of the unsuccessful offerors<sup>7</sup>.

Full and open competition requires disclosure to all competitors and the public of the rules to be used to determine the winner. The Iraqi Procurement Processes should adequately address the requirement that the solicitations advise offerors of the bases on which their offers will be evaluated.

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<sup>7</sup> In some places, nonrefundable bid deposits may be used to pay procurement officials. It is better to have such officials paid a fixed salary only, but to the extent government revenues are insufficient to do so, such fees (not “deposits”) should be fixed, not be a percentage of the bid price and should be paid to a government office separate from the procurement office that will then pay procuring officials their wages out of the fees received.

For example, Chapter 1 of the existing procedures states that materials and services should be acquired at "... the lowest costs and the right time," but it also states that the procurement authorities are not bound to accept the lowest price. One interpretation would be that the solicitation need not disclose evaluation factors. In contrast, ABA MPC § 3-203(5) requires disclosure of evaluation factors and their relative importance. Moreover, the Iraqi Procurement Processes do not expressly require that the purchasing authority adhere to the disclosed criteria in making its award decision. In order for there to be meaningful competition, evaluation of tenders and contract award must be made in accordance with the evaluation factors set forth in the solicitation.

The Iraq Procurement Processes provide for tenders to be opened by a committee, but do not specifically require that the opening be public. The tender opening, evaluation and award process should be as public and transparent as possible, consistent with the need to protect offerors' proprietary information.

The Iraq Procurement Processes require (Chapter 1, Article 1, Second, C) that companies be "verified" before being permitted to compete. The system requires validation of companies to avoid "unspecialized or false" companies by requiring the submission of a certificate or expertise. See Chapter 1, Article 1, Second, C; Chapter 1, Article 2, Twelfth; Chapter 1, Article 3, Third. Similarly other supporting acknowledgments indicating past performance and committee reviews ensure the credibility of offerors. See Chapter 1, Article 1, Second, C; Chapter 1, Article 2, Twelfth; Chapter 1, Article 3, Third. Along the same lines, the system recognizes that maintaining a blacklist of "bad" companies can protect the government and public interest. See Chapter 1, Article 8, First – Eighth; Chapter 2, Article 21; MoPI Article 6 (6)-(7); MoPI Article 12. It is important that all of the parties involved in the acquisition process participate fairly, honestly and in good faith. While the existing procedures are a good first step, they lack clarity. Without the clear establishment by the democratic institutions of Iraq of the requirements for being a qualified supplier, and those for judging a "bad supplier" deserving blacklisting, there is no predictability how either will be determined. Unstated or vague criteria will not be applied evenhandedly to all competitors. In addition, there should be procedures in place to determine how long even a "bad" company will be blacklisted. These determinations should not be left to the sole discretion of the procuring authorities.

## **V. Dispute Resolution**

A successful government procurement system includes well-defined procedures for the resolution of controversies, and provides clear administrative and judicial remedies for the failure of either party to perform its legal or contractual obligations. These procedures and the availability of remedies encourage wide participation in government procurements by potential contractors, who are assured that the system is open and fair, and that their grievances will be addressed through an independent review of the issues. Without such procedures, neither potential contractors nor the public in general can have confidence that the procurement system is operating properly under the law. One could argue that without making remedies available to the party wronged by a breach of the rules, the rules become largely meaningless.

The American Bar Association (ABA) has adopted the following *Principles for Resolving Controversies in Public Procurement*.

1. Parties have an obligation to act fairly and in good faith to resolve controversies and exercise available remedies.
2. The contracting process should be sufficiently open and well-articulated so as to permit review of both the process and the reasonableness of decisions.
3. The parties have a responsibility to seek resolution of controversies informally by mutual agreement.
4. The parties may agree to resolve a controversy, at any time, through the use of an alternative dispute resolution process, through which differences may be resolved and doubtful questions settled according to such lawful terms as the parties may establish.
5. The parties must have available adequate administrative and judicial processes and remedies that provide for the independent, impartial, efficient, and just resolution of controversies.
6. To provide an adequate remedy when entering into a contract, a government waives sovereign immunity with regard to controversies arising under or related to such a contract, except in extraordinary circumstances.

These principles are consistent with the *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Articles 52-27; ABA MPC , Article 9; and General Agreement on Tariffs and Trade (GATT), *Agreement on Government Procurement*, Article XX (1988) which preceded the World Trade Organization.

## **A. Award Controversies**

In procurement, controversies may arise concerning award of the contract (“award controversies”) or concerning contract performance (“performance controversies”). Award controversies (often referred to as “pre-award controversies”, “bid protests” or simply “protests”) usually arise out of the failure, or perceived failure, of the government agency to follow all required procedures in soliciting offers, evaluating proposals, and awarding a contract. For example, the Iraqi Procurement Processes at Chapter 1, Article 1, Second, A, calls for public advertising by the governmental agency in order to solicit offers. If an agency fails to advertise, qualified contractors may not be aware of the solicitation and will be prevented from submitting proposals. Contractors who are excluded from the procurement process in this way should have a remedy, if they act quickly, to protest the government’s failure to follow its own procedures.

Similarly, the Iraqi Procurement Processes at Chapter 2, Article 2, Twelfth, requires offerors to submit evidence that they have the resources necessary to perform the work and have done similar work in the past. If a contract is awarded to an offeror who has not provided this information, other competitors who did provide the information will be prejudiced. Contractors who believe that they have been prejudiced in this manner should have a remedy to protest the government’s failure to insist on compliance with its stated procedures.

Many public procurement systems provide a remedy for award controversies. For example, the *Agreement on Government Procurement*, Article XX, requires all parties to the Agreement to “provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.” See Art. XX, ¶ 2. Such challenge procedures must provide for “rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities;” “an assessment and a possibility for a decision on the justification of the challenge;” and “correction of the breach ... or compensation for the loss or damages suffered...” See Art. XX, ¶. 7. The *ABA Model Procurement Code* also provides a “bid protest” remedy: “Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest...” See ABA MPC §§9-101(1). The available remedies for such disappointed bidders range from cancellation of the procurement to termination of an awarded contract or a directed award. See ABA MPC §§9-202, 9-203. See also, *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Art. 52-57.

## B. Performance Controversies

Performance controversies (sometimes referred to as “performance disputes”, “claims” or “breach actions”) may arise out of the breach of the awarded contract by either party or by a party’s non-compliance with other legal requirements related to performance of the contract. For example, a governmental agency may want to make a claim against its contractor for liquidated damages when the contractor fails to deliver on time, in accordance with the Iraqi Procurement Processes, Chapter 1, Article 2, Tenth. A contractor may want to make a claim against the procuring government agency if the agency fails to make payment in accordance with the terms of the contract.

Here again, most procurement systems have an established mechanism for resolving performance disputes and controversies. The ABA MPC, for example, gives authority first to a Chief Procurement Officer, then to an independent administrative tribunal, and then to relevant state courts, to render decisions on performance disputes. See ABA MPC §§9-103, 9-504, 9-510. At the federal level in the United States, the Contract Disputes Act, 41 U.S.C. §§601 and following sections, establishes a comprehensive system for resolving performance disputes, giving both administrative tribunals and the courts jurisdiction to resolve claims asserted by the government or by a contractor.

The Iraqi Procurement Processes addresses performance controversies at Chapter 1, Article 6, Third, I, which states that all awarded contracts must “specify dispute solutions [resolution?] according to valid Iraqi laws stressing on the office right to reclaim its debts according to governmental debts reclamation law No. 56 for 1977.” This provision appears to address and provide a remedy for claims by governmental agencies against their contractors, although the parameters of that remedy are unclear. However, it does not appear to address or provide a remedy for claims by contractors against governmental agencies. Moreover, there is no provision in the Iraqi Procurement Processes which permits an offeror to protest a solicitation or other conduct relating to contract award by the procuring agency.

The Iraqi Procurement Processes should specifically waive sovereign immunity for contractor claims and protests arising out of or relating to procurement contracts. In addition, the Processes should establish administrative and judicial processes and remedies that provide for the

independent, impartial, efficient and just resolution of both award and performance controversies. These processes should include administrative review by persons who are not directly involved in the procurement at issue; and judicial review within the independent Iraqi judicial system. The system should also permit public hearings and should require that the various tribunals publish their decisions in order to enhance transparency and to provide precedent for future disputes. Iraq should also consider specifically allowing or encouraging the use of informal or alternative dispute resolution methods, such as arbitration or mediation.

### **C. Blacklisting**

The Iraqi government should not do business with entities that have an unsatisfactory record of integrity, business ethics, or contract performance, or who have otherwise engaged in serious misconduct. It is equally important, however, that government agencies have objective standards for evaluation of allegations of contractor misconduct, so that contractors are not precluded from doing business with the Iraqi government based on rumor, unsupported innuendo, or the personal preferences of government employees.

The Iraqi Procurement Processes at Chapter 1, Article 8 and Chapter 2, Article 21 sets forth positive attempts to ensure that the Iraqi government contracts only with reputable, reliable companies. These provisions permit the “blacklisting” of contractors for a number of defined actions or inactions.

However, these provisions do not include objective standards to establish the level of proof that is needed to support the “suggestion” or proposal that a contractor be blacklisted. More significantly, the Processes should require that contractors be given an opportunity to present evidence or argument to oppose their own blacklisting. Absent objective standards and an opportunity for the contractor to rebut the allegations on which the proposed blacklisting is based, the blacklisting system is subject to substantial abuse.

The Processes should set forth the level of proof needed to establish that a contractor has committed one of the actions listed as a basis for blacklisting. In addition, the Processes should specify procedures that (a) require the government to notify contractors who have been proposed for blacklisting, (b) permit contractors to present evidence and argument to rebut any such accusation, and (c) provide for an appeal to the Iraqi courts. These simple safeguards provide system transparency, establish both formal and informal mechanisms to resolve controversies relating to blacklisting and provide companies procedural due process.

The blacklisting process should also recognize that organizations can change and correct the circumstances that in the past lead to prohibited conduct. The standard should be whether the organization currently is a responsible contractor. ABA MPC Section 3-101(16) defines a responsible bidder or offeror as one “who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” This is a complex and emotionally charged topic that the United States system still struggles with. In essence, we suggest that blacklisting not be viewed as a punishment for past wrongdoing but a measure used to protect the government in its future contracts. Thus, once an organization has demonstrated adequate corrective measures that have worked for some period of time, consideration should be given to removing that organization from the blacklist.

## VI. Procurement Integrity/Ethics

Few would disagree that the goal of procurement integrity should guide the organization and functioning of any public procurement system. But, making procurement integrity a realistic goal of a public procurement system depends not just on articulating standards of integrity, but also on the honesty of involved individuals, the quality of the procurement system as a whole, the existence of appropriate national government ethics rules and criminal laws governing the behavior of contractors and government employees, and oversight and enforcement mechanisms.

### A. Accepted Principles

Generally recognized and accepted principles of procurement integrity against which to assess the Iraq Procurement Processes can be found in the *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, 1994; *World Bank Guidelines for Procurement under IBRD Loans and IDA Credits*, 1995; *Official Journal of the European Communities, Procurement Directives*; and International Trade Centre UNCTAD/GATT, *Improving Public Procurement Systems*, 1993; ABA MPC § 1-101(2) and its Article 12. In addition, standards of public integrity applicable to the procurement function underlie several multilateral conventions to combat public corruption.

The basic standard of procurement integrity applicable to any public procurement system can be articulated as follows:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

Federal Acquisition Regulations, 3.101-1, 48 C.F. R. 3.101-1; see ABA MPC § 12-201 (“Public employment is a public trust.”). Procurement practices which are contrary to the goals of procurement integrity include the following:

- Improper actions by the government purchaser
  - Tailoring specifications to provide an advantage to a particular supplier
  - Restricting information about contracting opportunities
  - Claiming urgency or national security as an excuse to award contract to a specific contractor without any competition
  - Disclosing suppliers’ offers or other information to a favored supplier to give it a competitive advantage

- Using improper contractor qualification criteria, or improper disqualification tactics to exclude qualified vendors
- Asking for or taking bribes or something of value<sup>8</sup>, including promise of employment
- Improper actions by the supplier
  - Fixing bid prices through collusion
  - Promoting technical standards which unjustifiably discriminate
  - Intervening in the evaluation process
  - Offering bribes or something of value<sup>9</sup>, including promise of employment
  - Seeking or obtaining information that is not available to all competitors and that gives the recipient an unfair competitive advantage<sup>10</sup>

## B. Anti-Corruption

Combating corruption in procurement requires an approach that encompasses the whole procurement environment. Identifying the desired standard of procurement integrity, and knowing the practices which undermine that standard, are of little use without an overall public procurement system which functions based on principles of transparency, competition, economy, efficiency, fairness and accountability. A system that ignores these principles cannot hope to achieve integrity in procurement decisions. To create an environment in which standards of procurement integrity can be enforced, the Iraq Procurement Laws should be comprehensive and transparent, and should provide at a minimum for such rules as wide advertising of bidding opportunities, maintenance of records related to the procurement process, pre-disclosure of all criteria for contract award, equivalent access to material information, contract award based on those disclosed criteria, public bid opening, access to a bidder complaints review mechanism, and disclosure of the results of the procurement process. Therefore, deficiencies in the Iraq Procurement Processes identified in other comments regarding the transparency of the procurement system, work statements, the bidding and

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<sup>8</sup> Value clearly includes money but also includes gifts. It includes kickbacks, which in the United States denotes a bribe which is contingent on some completion of an act, often the improper award of a contract or subcontract. Iraqi legislators should also expressly address “baksheesh,” either recognizing it expressly so that it can be regulated and all persons are aware of the cost and pay the same or prohibiting it and establishing effective enforcement mechanisms. This is in accord with Article 18 of the Iraq Interim Law, which states, “There shall be no taxation or fee except by law.”

<sup>9</sup> See footnote 8.

<sup>10</sup> The United States found it necessary to enact the Procurement Integrity Act, 41 U.S.C. §423 prohibiting explicitly release of procurement sensitive information because government employees had improperly provided company representatives information that gave them an advantage in pending or upcoming competitions. The Federal Acquisition Regulation implements this act in sections 3.104 and following, 48 CFR 3.104. Nonetheless, exchange of information between the purchasing agency and competitors is essential. Thus care must be taken to ensure that rules to prevent the flow of information given a favored competitor do not unnecessarily restrict the proper exchange of information between the purchasing agency and competitors.

award procedures, and the availability of dispute mechanisms bear directly on the capabilities of the Iraq system to promote procurement integrity.

Also, the organization of the procurement system, and the delineation of functional responsibilities and accountabilities, will impact the achievability of integrity in the procurement process. The Iraqi Procurement Processes do not necessarily anticipate the details of organization and allocation of responsibilities that will affect integrity issues. However, there must be a clear definition of who has responsibilities for implementing procurement, such as preparation of bid documents and the contract award decision. With respect to the “buying activity”, there should be clear definition of who is accountable for applying the procurement rules. As discussed in the organizational comments, separation of functions is an important aspect of internal control. Nonetheless, the system must also ensure that the individual responsible for assuring compliance with procurement rules has authority to stop a procurement that is materially noncompliant. Obviously, there must be some means of enforcing procurement responsibilities and holding the responsible parties accountable through the application of sanctions.

To achieve a system with meaningful accountability structures, the organizational framework within which procurement takes place should differentiate between the functions carrying out procurement decisions and the functions with oversight responsibilities to ensure compliance with the law. Some agency or entity, separate from the procurement agency, should have the responsibility to set overall procurement policy formulation and authority to exercise oversight of the procurement agency. There must also be a clear mechanism for enforcement of the rules, including the right to audits by the government and a process for bidder and contractor complaints.

Moreover, procurement integrity cannot be achieved through the public procurement code alone. Procurement integrity is not separable from the cultural and historical values, or the overall national system of laws, of the country in which the public procurement system must operate. Procurement integrity in the United States, for example, depends not just on procurement statutes but also on ethics rules applicable to Government employees, and criminal statutes imposing sanctions for “improper” conduct of contractors, government employees and others involved in the procurement system. The combination of all of these laws and regulations, including rules set forth in the FAR, govern the following general areas of activities under the United States procurement system in order to ensure procurement integrity:

- Discussing future employment or business opportunities with procurement officials
- Offering or giving any gratuity or thing of value to a procurement official
- Soliciting or obtaining from agency officials any proprietary or source selection information related to a competitive procurement

A country's constitution establishes the basic liberties of its citizens and foundational protections to ensure against encroachment, just as the Iraq Interim Law does. See for example, Iraq Interim Law Articles 10,11,12, 13,14, 15, 16. The Iraq Interim Law at Article 7 (A) specifically identifies Islam as "a source of legislation" and nullifies laws that contradict "universally agreed tenets of Islam" and "principles of democracy." In light of the Iraq Interim Law, the Iraqi procurement system should ensure that contracting will be done in a manner that guarantees the

best offeror under the stated criteria is awarded the contract, without regard to cronyism or religious, ethnic, racial or national faction. See, e.g., Iraq Interim Law at Articles 4, 12, 13. Iraq's past problems include governance, religious and political favoritism, and discrimination against non-favored religious, ethnic, national and racial factions. Devising a procurement process, and using it, to ensure a level playing field for all persons and entities that want to conduct business with Iraq will help ensure these problems stay in the past.

Standing alone, without the support of statutory requirements mandating government ethics, and complementary criminal statutes, the ability of the Iraq procurement law to ensure procurement integrity is, however, limited. Thus, a combination of the Iraq procurement laws and other laws governing government ethics and criminal activity must send the following messages:

- That Iraq has clearly-articulated rules of proper procurement practices and that it intends to enforce these rules aggressively
- That violators will be prosecuted under the laws
- That corrupt government officials and employees will be dismissed from their jobs and prosecuted under the laws
- That bidders, contractors and others who violate the rules not only will be prosecuted under the laws, but could be “blacklisted” and barred from consideration for future contracts

## VII. Organizational Issues

The Iraqi government should thoroughly and carefully evaluate how to structure and organize procurements and procuring organizations to both limit opportunities for bias and abuse and allow efficient procurement. Achieving the best balance between these two often competing goals will require a discriminating assessment of the unique circumstances facing the new government. The following discussion will address some of the pertinent decisional factors. Before doing so, however, it must be acknowledged that the key to effective and fair procurement is competent and well trained officials. Procuring officials must view themselves as serving several clients or stakeholders: users of the supplies, services or construction being procured; the businesses providing or potentially providing these items; and the citizens and their representatives who place their trust in procuring organizations to ensure public procurements are conducted fairly and return the best value for the funds spent. The following organizational considerations will help these officials purchase effectively and provide the means through which the system can become and remain credible in the view of the public, potential contractors and elected representatives.

Governmental procurement is rightly viewed as differing from private buying decisions because public resources are being spent that both determines, which public needs will be addressed (and others put off or ignored) and, which businesses will benefit by being paid to address such public needs. Thus, contracting decisions should be rendered fairly and impartially – the dominant thrust of procurement codes enacted worldwide. For example, the ABA Model Code includes among its purposes increasing public confidence and ensuring fair and equitable treatment. See MPC § 1-101(2)(d) & (c). The Preamble to *UNCITRAL Model Law for Procurement of Goods, Construction and*

*Services* likewise states its purposes include “providing fair and equitable treatment . . . promoting integrity of, and fairness and public confidence in the procurement process.”

Organizational structure will have a significant effect on the ability to achieve these goals. As the United States General Accounting Office has observed:

A good internal contract environment requires that the agency’s organizational structure clearly define key areas of authority and responsibility and establish appropriate lines of reporting.

*Standards of Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1, page 9 (US GAO November 1999).

Human nature, organizational/bureaucratic culture, and the lack of the market’s self-correcting mechanism -- profit and revenue maximization -- suggest the importance of structural considerations in public procuring agencies.

It is human to ignore rules that might have long term or systemic benefits when such rules appear to be depriving the government of the “best” deal in the current transaction. To take a simple example, a tender arrives late but is lower than the lowest timely tender. If the tender is just a little late, the easy response is to accept it and get the best deal. However, by doing so the system may suffer without clear rules explaining the circumstances in which a late tender can be accepted. Accepting late tenders can give the appearance of favoritism and can also provide late offerors unfair advantages including more time to prepare tenders and better information about subcontractors, suppliers and the other competitors.

Likewise, existing organizational/bureaucratic culture can skew contracting decisions. To take the late tender example again, an organization that previously had no formal processes governing procurements, or worse, had processes that were routinely ignored, will likely not, on its own accord, enforce rules requiring unexcused, untimely tenders to be rejected. On the other hand, an organization historically run by a rigid set of rules providing little room for the exercise of discretion is unlikely to recognize or allow untimely tenders to be considered even when they should be because they fall into an express exception, for example, the tender is late because the government organization itself mishandled it, because invoking the exemption requires an exercise of discretion for which the official could be held accountable. A completely undisciplined organization will apply rules requiring rejection of late tenders unless the late tender is by a favored vendor. The rationale for the decision to accept or reject such a late tender should be articulated in writing and readily available for examination by interested parties. See *Standards of Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (U.S. GAO November 1999); *UNCITRAL Model Law for Procurement of Goods, Construction and Services*, Article 11. Not only will this help ensure compliance with the rules, but it will avoid the problem of having a proper decision become suspect simply because its rationale is not written and available to the public.

Complicating all efforts to achieve efficiency in public procurements is that governmental organizations do not face market competition. Agencies that do not make a profit (by minimizing costs) will not be automatically disciplined. Private companies in a market economy face extinction if revenues do not cover costs plus returning a reasonable profit.

In addition to establishing rules and goals to maximize the likelihood that government procurement will achieve economies fairly, as discussed in other sections, the legislature must consider how to best organize and structure public procurement. This involves considering at least the following issues:

1. Should procurement personnel report to, and be employed by a separate organization from the using organization?
2. Should procurement rules be made by the procuring organization, an administrative policy organization or solely by the legislature?
3. What oversight bodies can best be devised (or existing bodies utilized) to enforce procurement policy?
4. Do any existing organizational structures need to be changed to not only facilitate better procurement but also as a means to effectuate organizational/bureaucratic behavioral change?

### **A. Functional Separation**

Conducting government procurements efficiently and fairly is a learned skill. It also often requires taking the long view to promote systemic health rather than exclusive focus on short term gains. For instance, allowing a resident business (with its politically active owners) to revise its proposal to meet or beat foreign rivals or otherwise unfairly favoring a resident competitor might have short term appeal but the long term adverse consequences include depriving the government of higher quality and lower prices from more innovative competitors. When such unfair advantages are routinely given local firms, local firms will soon be the only vigorous competitors -- although they may be acting as intermediaries for foreign firms<sup>11</sup>. When local firms act merely as intermediaries, they often add no real value, increase cost and can seriously impair the procurement system's credibility.

The legislature should carefully consider how to structure its procurement organization to assist those individuals who want to make the proper decision to do so. Traditionally, for example, there has been a tendency to create centralized purchasing agencies that control contracting. The advantages of such a system include, a single point of responsibility for purchasing and an organization whose primary mission is purchasing (thus training, pay increases, promotion, recognition and other incentives are likely to flow to those who conduct procurements to achieve objectives furthering the long run health of the procurement system). Recent management theories and other studies, however, have suggested that decentralization and pushing decision making to lower levels creates more efficient, flexible organizations more attuned to user needs and may result in less corruption. See Robert D. Ebel and Serdar Yilmaz, *On The Measurement And Impact Of Fiscal Decentralization*, World Bank Working Paper (March 2002); Anwar Shah, *Balance, Accountability, and Responsiveness: Lessons about Decentralization*, World Bank Working Paper (Dec. 1998). But as

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<sup>11</sup> Article 14 of the Iraq Interim Law states that the government "within the limits of their resources and with due regard to their vital needs, shall strive to provide prosperity and employment opportunities to the people." Crafting procurement rules will require properly balancing the benefits of competition from foreign firms and the provision of employment to the Iraqi people. A complex set of issues that every country in the world faces.

responsibilities become less centralized, the harder it can be to ensure uniformity and likewise to ensure that goals essential to the health of the procurement system will not be sacrificed to short term gains.

To again use a simplistic example to illustrate -- consider a Police Department. The police cars are aging, the newest model has a better suspension system that increases control in high speed driving that the Department's current fleet lacks. The local dealer has a half dozen current year models with the improved suspension that the dealer offers to sell to the Department at bargain rates in anticipation of receiving next year's model. Until the dealer made this offer, the Department had only vague plans about when it would replace its vehicles. If the head of the Department has procurement authority, the Department head will decide how strictly to follow procurement rules in considering this deal. That decision will be affected by what records must be kept of the purchase, who will have access to them, who the other potential suppliers are, whether these potential suppliers are likely to learn of the deal while it is being negotiated or shortly after, and where these competitors can lodge their complaints. All these are important control aspects. See *Standards of Internal Control in the Federal Government* GAO/AIMD-0021.3.1, pages 12 - 16 (US GAO November 1999). The most important factors, of course, are the Department head's knowledge of, and training in, applicable procurement policies and his or her integrity and judgment.

Organizational factors also play an important part. Since the newer cars are safer, will help Department morale and might represent good value, the Department head is likely inclined to focus on these benefits rather than "mere compliance" with procurement policies because the Department head's performance is judged on how well the police perform and not how police cars are purchased.

On the other hand, if the Department can only get the cars if an authorized representative of the Purchasing Department signs the contract, procurement rules are more likely to be honored since that representative's primary responsibility is to the Purchasing Department and that Department's performance is judged on how well it buys police cars among other items. The Purchasing Department representative will also be more likely to be trained in procurement. Finally by bringing the Purchasing Department into the process, the process will become more transparent and difficult to subvert.

Counterbalancing this is some loss of efficiency due to the need to coordinate between the departments. With a separate Purchasing Department, the Police Department will blame the Purchasing Department for procurement problems while the Purchasing Department will fault the Police Department for inadequate planning etc., particularly in the initial stages of system implementation, because neither the Police Department nor the Purchasing Department may recognize the other's needs. But such public recrimination will help when it discloses real procurement abuses, shortcomings by a Purchasing Department addressing the real needs of using agencies, or using agencies' failure to work with the Purchasing Department to forecast or describe their needs to allow effective procurement. Complicating matters, however, is the finding in some studies that as bureaucracies become more centralized and less subject to local influence, they are more susceptible to corruption. See Anwar Shah, Balance, *Accountability, and Responsiveness: Lessons about Decentralization*, World Bank Working Paper (Dec. 1998)

Such separation of purchasing authority from program management is an application of the well known internal control principal of segregation of key duties and responsibilities among different people to reduce the risk of error and fraud. See *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1, page 14 (U.S. GAO November 1999). As GAO states, segregation “should include separating the responsibilities for authorizing transactions, processing and recording them, reviewing the transactions, and handling any related assets. No one individual should control all key aspects of a transaction or event.” Separation of duties among individuals only may be insufficient if all report to one manager, for example the police chief, whose performance evaluation is only marginally affected by how the Police Department purchases police cars.

Another aspect that the legislature should consider is whether to require physical location of Purchasing Department employees at the larger using agencies. This will give users access that can alleviate some of the inefficiencies that can arise when adopting a centralized Purchasing Department. Thus “centralized” does not necessarily mean geographically separated from the using agency but it does mean that contracting personnel are employed by the Purchasing Department. This decision may well be left to the Purchasing Department and using agencies to work out themselves.

The best type of organization will depend upon the legislature’s evaluation of the relevant circumstances. Some of the more important may be:

- Historically have government procurement rules been followed?
- Will those involved in government procurement in the past, also be involved in the future? Having the same people involved ensures a knowledge of, and interest in procurement. If this will be the case, then consider structuring the procurement organization to help break any existing bad habits. For instance, if all government purchasing was done through a centralized, unresponsive bureaucracy, the new system might establish purchasing offices within agencies manned by employees of the using agency but who will be bound to follow a common set of procedures. It may also be that the old system was so dysfunctional that allowing employees of the old procurement system to work in the new procurement system will be discouraged. With such an approach, recognize that not only institutional knowledge will be lost but training will be of great importance. A more centralized organization may allow for more control and focus on procurement training -- a need no matter the history of procurements.
- How comfortable with, and knowledgeable about, free market behavior are those who will be conducting government procurement? In economies unused to free markets, not versed in taking advantage of competition, and historically hostile to foreign businesses, a centralized organization could be best. This also can often be the most effective means of promoting organizational change.
- Will using agencies (for example, the Transportation Department) be less or more likely to be subject to political influence than a separate Purchasing Department? Whatever the structure, the focus must be on insulating those making contracting decisions from the influence of individuals seeking to direct contract awards to gain personally or politically.

- Can a purchasing office within certain using agencies be sufficiently large that it can have some independence? Are the procurements of certain using agencies unique? For example, military departments are large users that have unique needs so that it is infrequent that their procurements will be done by a totally independent Purchasing Department.<sup>12</sup> On the other hand, military purchasing offices in themselves can be maintained with permanent employees who bring independence to their decision making.
- Did past corruption arise through the using agencies or procuring activities? If there is a legislative consensus on this point, then perhaps it makes sense to centralize if the using agencies have abused contracting power in the past, or the reverse. If neither performed better, then either a centralized Purchasing Department or a split of authority between a Purchasing Department and the using agencies may be appropriate. With a centralized purchasing office, the legislature has one agency to oversee with a single overriding procurement mission. If authority is split between the Purchasing Department and Using Agencies, one will act as a check on the other. But because using agencies will treat procurement as a support function only, unless the using agency is large enough to support an independent purchasing organization, not having a separate purchasing organization might not be advisable.

## **B. Setting Procurement Policy**

The foundation of the procurement system should be a set of statutes enacted by the legislature. This baseline will serve to provide transparency and predictability as long as effective enforcement mechanisms exist. The difficult question is how much detail needs to be legislated. The legislature will need to assess how comfortable it is with administrative rules. Agencies in the United States function well using such rules but, nonetheless, United States procurement statutes provide much detail.

Because Iraq lacks much experience with either free markets or disciplined administrative systems, the procurement statutes may need to be detailed. While it may be necessary that such detailed processes allow for exceptions to meet emergencies, to address unanticipated circumstances or to seize opportunities, each and every significant deviation or exception should require appropriate levels of review, written documentation and public transparency. Otherwise a system of rules may appear to foster free competition but in practice only serve to hide how contracting is actually done.

Even detailed procurement statutes, however, cannot dictate all the rules that should apply to a given procurement. Administrative rules can fill these gaps but can become stifling if not kept current. If there are to be such rules, there are two logical places to vest rulemaking authority: (1) in the head(s) of the Purchasing Department(s) or (2) in a group composed of representatives of using

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<sup>12</sup> In the United States, the Army, Air Force and Navy each conduct their own procurements. But each have contracting offices whose principal mission is procurement. A development of note, however, is the burgeoning use by the military services of the General Services Administration's (a civilian procuring agency of the U.S. federal government) Federal Supply Schedule to purchase hundreds of millions of dollars worth of commercial supplies and services.

agencies and Purchasing Department(s). See ABA MPC § 2-101. The Procuring Department(s) generally should collaborate on providing one set of rules governing public procurement at the national level and should engage the using agencies in the process. A multitude of rules, even when written and publicly available, creates confusion, defeats transparency and inhibits competition. Some states in the United States have too great a variety of rules that change depending on which agency is contracting and what is being procured. Iraq also needs to recognize the tendency to make excessively detailed rules designed to restrain untrained or incompetent officials or to control the worst behavior. Rulemaking based on these premises should be avoided because it will stifle innovation and drive away the most talented individuals. Rules are also a poor substitute for training and can never overcome completely lack of competency or honesty.

Who is to write these rules? Vesting rulemaking power in a single group, for example the Central Purchasing Departments for the national government, can help assure rules will be written. On the other hand, such a concentration of power in the Purchasing Departments could mean legitimate using agency needs are ignored and the procurement process becomes overly bureaucratic. Also when the procuring activity makes the rules, competitor interests might be too easily ignored. Thus a rulemaking body that has representatives from using agencies that establishes rules only after allowing public comment has certain advantages. See ABA MPC Chapter 2.

### **C. Enforcement Organizations**

A right to legal redress is fundamental to fair governmental procurement. Thus, when the Government breaches contractual obligations Iraq should provide its contractors with legal redress equivalent to that available for breaches of private business contracts. In addition, there should be a reasonable means to protest violations of law or regulations in the solicitation or award of contracts. Those who protest should also have meaningful remedies. Competitors can bring to light errors and more serious departures that otherwise would go undetected.

An audit function is also essential. The audit function reviews the books and the methods used to account for money paid out and goods or services received to assure compliance by the contracting agency with the contract, fiscal controls and procurement policy. It also looks for signs of intentional misconduct or such gross negligence as amounts to culpable misconduct. In the United States federal government, each major agency has an independent inspector general who is charged with conducting audits and investigations, promoting economy and efficiency, preventing and detecting fraud and abuse and reporting problems and deficiencies to the head of the agency and Congress. See 5 U.S.C. App. 3; Pub. L. 96-88. The U.S. Department of Defense also has a separate audit agency, the Defense Contract Audit Agency, that performs audits of contractors for DoD agencies and also many other federal government agencies.

Having independent audit functions is also a hallmark of publicly traded corporations in the United States. Under the rules of the New York Stock Exchange, most companies traded there must hire independent auditors to review books and records of the company. These companies must also have committees on their boards of directors, composed of directors who are independent of company management, that oversee the work of the independent auditors. See NYSE Corporate Governance Rules, NYSE's Listed Company Manual § 303A.

Such independent oversight organizations provide important checks on the system and also provide employees who witness abuses a place to report outside normal chains of command, thus reducing the fear of retaliation.

### **D. Structure and Organizational and Bureaucratic Change**

Establishing and maintaining an open and fair Iraqi procurement system will require significant changes. Such dramatic change will meet resistance. In the United States, when such change is so dramatic that it requires the work force to change ingrained habits and ways of thinking, the problem is known as changing the “culture.”

Such fundamental change can only be accomplished through consistent, vigorous management over the long term coupled with enabling incentives (and disincentives) supported by highest management and the necessary training. Passing laws, issuing edicts and restructuring alone will not succeed in achieving such change.

Nonetheless, changing existing structures can assist by disrupting the old familiar ways to allow room for new habits and thought processes to take root. This in itself is not sufficient, but it can be of assistance.

## **Appendix B**

**Comments Submitted by Lisa K. Miller**

# MEMORANDUM



To: Simon R. Conte, Co-Director  
Office of Rule of Law Research  
ABA-CEELI

From: Lisa K. Miller

Date: March 8, 2004

RE: Assessment of Iraq Procurement Law

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This memorandum provides my comments as to the adequacy of the Iraqi procurement law and the Iraqi Ministry of Planning Instructions. While we do not have information as to the relationship between the law and the instructions, because the instructions seem to relate to the procurement process (and even address certain procurement principles not included in the law), these comments refer to provisions found in the law and/or in the instructions. Pursuant to your direction, this memorandum provides a thematic analysis identifying the key areas of the law that need to be strengthened rather than a provision-by-provision review, with a focus on whether the law is sufficient to prevent corruption in the government procurement process and whether it meets international procurement standards.

In general, the law should include sections setting forth: (1) general provisions governing the procurement process; (2) the various methods of procurement and the conditions under which each is to be used; (3) the tender process including the solicitation, submission and evaluation of tenders, and the award of the contract; and (4) procedures regarding the review of specific procurement proceedings, i.e., bid protest procedures. The inclusion of such provisions would promote competition, accord fair treatment to prospective contractors and enhance transparency and objectivity in order to foster a fair, efficient and economic procurement system under which the Government purchaser is held accountable for its procurement activities. While the law touches upon several of these general themes, such themes are not set forth in a cohesive manner and some are not addressed, i.e., provisions setting forth dispute resolution procedures. With regard to basic structure, the law should be divided into clear sections with appropriate titles and distinct subsections. The interaction between the law and the instructions also should be clarified.

The law should include general provisions governing the procurement process. Importantly, the law should state at the outset the scope of the application and make clear to which type of procurements the law applies. For example, the current law seems to apply to the procurement of goods and services from abroad as well as to purely domestic procurements (although the chapters governing domestic procurements seem to leave open the possibility that foreign persons or items might be utilized on same), while the instructions seem to apply in the context of consulting services procurements. Similarly, references to both national and provincial procurements are made but the scope of the law is not specified. Indeed, neither the law nor the instructions make clear the scope of

their applicability. Also, the law should include a definitions section defining key terms used in the law. The current law, by contrast, includes no such definitions and terms are used in an inconsistent manner (while certain inconsistencies may be the result of translations, the use of defined terms will help minimize such occurrences). Use of “must” versus “should” also should be clarified (although this may be a translation issue). The law also should provide for and make reference to agency-specific regulations governing procurements conducted on behalf of such agencies. Confidentiality also should merit more than virtual footnote status in the instructions.

While the law and instructions do touch upon the concept of transparency by setting certain notice and publication requirements, clearer direction is needed in this area. For example, there should be a specified international language used for notice and publication of tenders directed at, or which may include, foreign contractors. Also, a designated publication (such as the Commerce Business Daily (CBD) in the United States) should be specified for the printing of such notices. While the general requirement for publication in a “newspaper,” etc., acknowledges the need for transparency, it does not go far enough in that regard and also may not allow for full and open competition. The law also should be revised to make clear that all amendments to a solicitation also should be published. Similarly, clearer rules should be established with regard to procuring agency recordkeeping requirements concerning procurement proceedings and manner of communications, such as notices. In addition, the law should require public notice of contract awards to further promote transparency and Government accountability (and hopefully to minimize the risk of corruption).

The general provisions section also should include provisions regarding determination as to contractor qualifications/responsibility, as well as provisions regarding “blacklisting” of contractors currently found throughout the law and instructions in a rather incohesive manner. The grounds for “blacklisting” also should be revisited. For example, it is questionable whether a contractor “abstaining” from contract award or failure to perform should rise to the level of blacklisting. Also to be considered are graduated types of punishment for improper activities, such as contract termination, suspension and ultimately debarment. In the event of “blacklisting,” the law also should specify the manner in which “blacklisted” entities names are published (while touched upon in the instructions, it should be made more clear). Clearer procedures for contractor responses to blacklisting proceedings also should be included.

After the general procurement provisions are clarified, the law should focus on setting forth the methods and their conditions for use. The law and instructions do not include a clear delineation of the various methods that seem to be permissible under the law. For example, the law appears to address sealed bid tendering, suggests two-stage tendering, discusses negotiated procurement, refers to sole-source procurement and notes other procurement types.

The law and instructions should more clearly set forth the tender proceedings and process from solicitation to evaluation to award. With regard to the solicitation of tenders, in addition to the proposed revisions to the notice requirements noted above, the law’s provisions stating the purpose of the procurement should be included in the solicitation which also should include a scope of work provision in order to minimize the risk of ambiguity. The current law indicates that dates for submission should be set but leaves this door open for consideration of late submissions – this door should be closed. Other contents of the solicitation documents also should be more expressly

required. For example, contractors should be made aware of the evaluation criteria and basis for contract award (best value, lowest price, respective offer?). While the current law suggests that factors such as price, past performance, technical and other special conditions may be considered, the law does not provide that the solicitation must specify how these criteria will be weighed in the evaluation process. Setting forth such criteria (any subfactors) and their relative weights not only assists contractors in the bidding process but also creates a more transparent procurement by creating a standard upon which the contract award will be based (and minimizes the risk of arbitrary bases for award decisions). Further, no solicitation should be issued without prior Government authorization of funds for the procurement.

The solicitation also should include provisions stating up-front the payment methods to be utilized by the procuring agency, an area that presently is a bit vague in the law. If invoicing procedures are to be used, contractors should be made aware of same, possibly with some direction as to required format. Similarly, guidance should be provided to contractors as to pricing in the solicitation in order to provide a clear basis as to how to structure the pricing proposal, e.g., lump sum, fixed price, line item pricing, per-unit pricing, cost plus, etc. A specified currency for pricing of tenders also should be noted, as well as a way to determine the appropriate date for fixing exchange rates if tender in foreign currency is allowed.

The Government also may wish to consider including certifications a part of the tender process in order to aid in determining a contractor's responsibility and to provide a basis for review of alleged false statements down the road. Such certifications might relate to matters such as conflicts of interest or cost and pricing data, among other things

With regard to the submission of tenders, the language for submissions should be specified, the period of effectiveness should be required to be included per the solicitation, the basic tender format (pricing and evaluation proposals) should be followed in accordance with the solicitation, and the tender security or "deposit" or "guarantee" requirements should be clarified (only Iraqi banks?). The deposit provisions in particular do not seem to be consistently applied and may impose an onerous burden on contractors as presently drafted, especially if a tenderer is not permitted to withdraw its tender prior to contract award and runs the risk of forfeiting its deposit.

Certain concerns regarding the evaluations of tenders already have been addressed with respect to the solicitation of tenders. As noted, evaluation factors and subfactors and their relative weights should be set forth in the solicitation in order to establish a consistent basis for evaluation and award. In addition, the solicitation should set forth the basis for contract award – best value, cost technical tradeoff, lowest price/technically acceptable, etc. While the law provides for an evaluation team, greater efficiency may result from having separate technical and price evaluation teams who separately report to a specified source selection authority on their independent areas of expertise. Having a set evaluation team that can rotate out every six (6) months (without stated conditions for rotation) may not be the most efficient method.

Where sealed bid tendering is used, the law should specify that the offeror name and tender price be read aloud at a pre-determined tender opening date and place and that, while clarification may be allowed, negotiations will not be. Under negotiated procurements, the scope of permissible negotiations (or clarifications) also should be included in the law in order to promote Government accountability as well as consistent treatment among offerors. Likewise, a "best-and-final-offer" type

concept may be introduced. Regardless of the procurement type, the procuring agency should be required to prepare and maintain written documentation of the evaluations and reviews sufficient to support and provide an adequate basis for the contract award decision. The abbreviated evaluation timing set forth in the law also should be reconsidered. Furthermore, contract award decisions should be published. Finally, unless commercial items are being procured, agency reliance solely on an offeror's catalog or like documents may not be a sufficient basis for an adequate evaluation and award decision.

In addition to competitive tender procurements, sole-source procurement is mentioned in various sections of the law and instructions, however, the conditions for its use are not adequately explained and the risk of corruption/favoritism remains. The law should provide clear parameters prescribing the circumstances under which the sole-source procurement method may be used. Full and open competition should be the preferred procurement vehicle whenever possible.

Perhaps the most glaring omission in the law and instructions is the absence of provisions setting forth a contractor's right to redress, i.e., bid protest or contract dispute procedures. Very basically, in the procurement context, the law should include a mechanism whereby bidders can challenge procurement documents (so-called pre-award bid protests) or procurement decisions (post-award bid protests). As an initial matter, such review may occur at the level of the procuring entity (or approving authority). Procedures for subsequent administrative review (or possibly even judicial review) also should be implemented. The review process and relevant proceedings also must be transparent. Absent such provisions, contractors will have no clear right to redress and Government procurement officials may go largely unchecked with respect to their actions. The right to review is a critical element in the development of an adequate procurement law.

Although the law and instructions primarily address the procurement process rather than the contract performance process, they also touch upon performance-related matters, such as a brief mention of arbitration. Arbitration is a fine means of resolving contract disputes but the law needs to go further in setting forth the manner in which such arbitrations can be commenced, how arbitrators are selected, the place of arbitration, which rules govern, what law governs, etc. Also, the law needs to establish what types of disputes may give rise to a cause of action and at which review level. It also should be considered whether review by the procuring entity or administrative or judicial review might be valid dispute resolution methods as well. Whatever dispute resolution mechanism ultimately is chosen, the proceedings must be open and transparent such that fairness and Government accountability are the end goals.

Other contract performance-type issues also receive mention in the law and instructions. These also should be further clarified and perhaps should be the subject of separate procurement regulations. For example, more than mere mention should be made of "stop-work," contract termination and like issues. The law or subsequent regulations should specify the conditions under which the Government may stop work/suspend contract performance or terminate a contract. Such matters must be clearly set out in order to prevent procuring officials from simply acting on a whim. Likewise, the remedies and avenues of review available to a contractor under such circumstances must be specified.

The inclusion in the law and instructions of provisions regarding the issuance of contract modifications/changes demonstrates an awareness of key procurement principles. The law or

subsequent regulations, however, should go further to make clear that such modifications must be signed by both parties, specify the types of modifications that are prohibited (e.g., material changes to scope of work), elaborate on the manner of pricing modifications, and further clarify the contractor's right to seek additional time and/or money as the result of a modification. The timing for contractor requests set forth in the law also should be expanded. In short, while the law makes a start in this area, more should be done to adequately address this important issue.

Another significant issue touched upon in the law and instructions which should be set out in a more cohesive manner is the matter of conflicts of interest. The law does well in including provisions prohibiting government officials from participating in certain procurements but should go further by setting out clear all-out prohibitions in specified circumstances for former as well as current Government personnel. The law also should consider organizational conflicts of interest (it does touch upon these) and prescribe parameters for contractor participation (whether as a prime or subcontractor) on procurements in which they may have an unfair competitive advantage, etc. due to prior procurement efforts. This is another area that might be more appropriately addressed in subsequent regulations.

Subcontracting is another area that should be addressed in the law or subsequent regulations. Contractors and subcontractors need to be aware of the legal and regulatory framework in which they will be working and need to know what requirements will flow down to subcontractors, or conversely which risks might flow-up to prime contractors (e.g., will a prime contractor be liable for false statements of a subcontractor? – a question that might be of particular concern to foreign contractors subcontracting to local firms they do not know well). The law also seems to favor contracting with local firms who might subcontract to foreign firms but the structure is not clear. This area might also provide an opportunity for inclusion of a time-limited “national preference” type provision which would encourage full participation in the tender process while creating an opportunity, for a specified period of time, for local contractors to take advantage of the “national preference” either as prime contractors or subcontractors.

Another area in the law and instructions that could use clarification involves the frequent (albeit somewhat scattered and inconsistent) discussion of “fines” and “penalties” which seem in some cases to really mean liquidated damages. While the concept of such damages is not itself objectionable, there should be clearer explanations as to the circumstances under which they may be imposed (now there are just vague generalities) as well as review procedures afforded to contactors who may object to the assessment of such damages in a particular instance. The basis for the liquidated damages percentages set forth in the instructions also is unclear. This is another area that should be further reviewed and clarified in any revised law or regulation that may be subsequently promulgated.

In summary, the law and instructions touch upon several important procurement concepts but do so either in too cursory a fashion or in a manner that is inconsistent or incohesive. These areas should be expanded or clarified. In addition, other key elements of an adequate procurement law should be addressed, such as greater transparency (e.g., publication and the establishment of set evaluation criteria, their relative weights and the basis for contract award), the promotion of full and open competition (e.g., use of certain procurement methods), increased Government accountability (e.g., review mechanisms, conflicts of interest, documentation of process and record-keeping), and

contractor right to redress (e.g., bid protest and dispute resolution procedures). Absent such provisions, the adequacy of the procurement law and the risk of corrupt procurement practices will remain open issues.

## **Appendix C**

### **Comments Submitted by William Carroll**

# Comments on Republic of Iraq Council of Ministers Procurement System

William H. Carroll  
Dykema Gossett PLLC  
1300 I Street, N.W., Suite 300 W  
Washington, DC 20005  
Tele.: 202-906-8608  
E-mail: wcarroll@dykema.com

Adjunct Professor (Government Contracts)  
Washington College of Law  
American University  
Washington, DC

## A. Domestic Source Restriction

Chapter I implies that solicitation of non-domestic sources is an exception and that, generally, foreign sources are not allowed to compete. This runs counter to current international attempts to reduce domestic source restrictions.

## B. General Concerns

Chapter 1, Article 9 — Under what conditions are boycotts announced? Generally, boycotts run counter to U.S. anti-boycott laws.

## Specific Issues

### Basis for Award

Chapter 1, Article 2, Fifteenth  
Chapter 2, Article 19, Sixth

Each provides that the concerned office is not obliged to accept lowest offer.

Criteria that would be used to accept other than the lowest offer are not identified. To assure fair competition, solicitations should state whether award will be based only on price or on price and other factors. If award is to be based on price and other factors, the factors should be identified and their importance relative to one another and to price should be specified.

### Pay to Play

Chapter Two, Article 14, Fifth; Article 15

It appears that prospective contractors must provide cash deposits in order to have their tenders considered. This requirement will limit competition to those entities which have large cash resources, particularly because it is not clear that deposits will be returned. This requirement will also

cause entities which are willing to make a deposit to raise their prices in order to cover the cost of this money and the contingency of it not being refunded.

### Pre-qualification

Chapter 1, Article 1, First, B, C:  
Chapter 1, Article 18

Direct invitations may go to certain parties in urgent or other undefined circumstances. No process is identified for parties to go through in order to become eligible for receipt of direct invitations. Pre-qualification of products is generally established through testing and is a relatively stable process. Pre-qualification of producers requires periodic review to assure that party maintains production facilities, technical and managerial skills and financial resources. Pre-qualification must be monitored to preclude unjustified selection of favored parties.

### Blacklisting

Chapter 1, Article 8  
Chapter 2, Article 21

Concerned ministerial offices can recommend blacklisting and legal measures simultaneously. There is no stated standard of evidence required for the concerned ministerial office to assert that a contractor committed bribery or forgery or provided false information. Beyond these causes, which are general considered criminal in nature, blacklisting is allowed for conduct that is frequently disputed matters of contract interpretation, such as whether or not the contractor was committed to the technical specifications or exaggerated its offer. Similarly, blacklisting would be an unduly harsh response to an offer that was submitted with the intention of further bargaining.

## **Appendix D**

**Comments Submitted by Professor Don Wallace**

## Iraq Tender Instructions

Don Wallace, Jr,  
Georgetown University Law Center and  
International Law Institute  
February 24, 2004

1. Responding to the February 13 inquiry of Simon Conte, ABA/CEELI, for the ABA Iraq Initiative

2. As I have mentioned to Mr Conte, the law is not very good, certainly in terms of the 'international standards' he mentions. Of course without knowing more about how it was administered and implemented, whether there are further regulations, forms and procedures, and how experienced and competent personnel have been, what entities have been covered, how decentralized administration has been( there are references to ministerial approvals; there is no reference to a central tender board, procurement policy unit or similar body) and procurement budgeting procedures, it is unfair to give any real judgement as to its effectiveness. Is audit of the procurement process by procurement professionals or others? Moreover, the (rather poor)translation into English may do a further injustice; by contrast the English of the second (Ministry of Planning) document reads much better; incidentally, as noted by Mr Conte, its relationship to the law(ie the "Instructions") is unclear. My remarks must be brief as I have been traveling and away from the office; here are a few points.

3. Scope: the division between chapters 1(imports) and 2(domestic) is rather straightforward, although the reference to 'offerers inside...Iraq' in chapter 1's Article 3, Second, B is a bit unclear(and note the possibility of imported spare parts in Article 14, Seventh of the domestic chapter); incidentally such a division always raises problems of what are the 'source and origin' of particular goods and services; moreover, it is not wholly clear why the division was made(different solicitations, different personnel?). To what entities(eg the oil sector?), levels of government does the law apply?

4. From a more technical view, the failure to clearly distinguish the methods used for 'materials' and 'services' is most problematic; incidentally where do civil works(construction) fit? There is not a clear distinction between formal competitive bidding(ie tendering) and lowest price awards for goods and construction('materials?') versus more negotiated (2 envelope) methods for services(where 'value for money' is not always at the lowest price' ie you do not want the cheapest engineer, but rather the best that you can afford). Rather the term 'tender' is used for the entire law(and see Article 12 reference to lowest prices), it is not clear that lowest price would not also be applied to services, and a reference to '2 envelopes'(Article 2, Fifth, 'separate parts') is not limited to services. It is not clear whether 'materials' procurement would include commodities which are often procured by methods different from capital goods(equipment) and construction. Electronic procurement is not mentioned; nor concessions.

5. More problematic is the fact that lowest prices are not obligatory(Article 2, Fifteenth; Article 14, Sixth); it is not clear how and by what standards the discretion to not be bound to the lowest price is exercised. Indeed, the law seems to give discretion in many places; another is Article 4, Fourth and

Fifth, allowing the government to change and shift bidders' bid quantities during the bidding process; this is rather bad practice( such uncertainty leads bidders to pad prices etc).

6. There does not appear to be provision for bid protests or challenges.

7. There are of course many other, more specific points one could make; including many drafting ones; references to socialist sectors are now presumably an anachronism

8. As for preventing corruption of which Mr Conte inquires, the face of a law cannot provide a sure answer; the several references to blacklists are interesting. Troublesome, however are the instances of discretion already mentioned(and there are many others), the absence of challenge(a unhappy bidder can be the best policer of corruption) and a requirement for records open to public, media and parliamentary opposition!; and as noted audit and control provisions are not stated.

## **Appendix E**

**Comments Submitted by R. Anthony Welch**

## MEMORANDUM

TO: CEELI

FROM: R. Anthony Welch

Re: Review of Iraq Procurement Laws

My review of the documents I received, including the procurement law and the instructions, was limited due to the amount of time I could allot to the effort and to the realization that a detailed analysis is not the best approach to correcting the problems contained within that law. The results of my review are set forth below in two parts. The first part addresses obvious systemic problems while the second part simply delineates problems within the law that make it susceptible to corruption.

### Systemic Problems

The documents reviewed do not contain any semblance of a procurement system.<sup>1</sup> It is impossible to determine what laws apply to purchase of supplies and materials from inside or outside of Iraq. It seems that the only rational approach to correcting the procurement law is to replace it with a new comprehensive enactment that integrates procurement of materials, supplies and construction contract laws, that does away with any extrinsic instructions and that contains clearly defined terms applicable to all forms of contracting.<sup>2</sup>

The procurement law needs to create a cadre of trained career procurement officers. Bidding processes often create disputes and protests. Trained procurement officers are less likely to make mistakes during the process and therefore tend to cause fewer disputes and protests. Under current procurement law, the “concerned officials” decide what needs to be purchased and through one of a number of means invites suppliers to submit bids. Bids are submitted to an Article 3 committee. That committee provides the opened offers to the Article 4 offers study and analyzing committee. That committee recommends “...submission of best offers and accreditation of best convenient tenders as far as prices, payment conditions and quality to the concerned minister, non-minister or authorized person.

There are no clear guidelines on qualifications for members of the committees. It is only necessary that they exist. More problematic is that the membership of both the Article 3 committee and the Article 4 committee cannot remain constant. The procurement law says that Article 3

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<sup>1</sup>The procurement law consists of two chapters. Chapter one of the law applies to “Purchasing and supplying state offices and private sector with materials and services from outside Iraq.” Chapter two applies to “Purchasing and supplying state offices and socialists sector with materials services from inside Iraq.” For the purposes of this review I have assumed that the spelling, grammar, and illogical sentences structures contained within the documents are a result of translation errors. Where a quote from one of the documents is used within this memorandum, it is set forth as written within the documents reviewed.

<sup>2</sup> It should be noted that Article 22 of the procurement law states “Regulations and instructions of projects and works of national development plan implementation should be applied to what has not been termed in these instructions.” (Emphasis added) That indicates that the instructions provided for review may be applicable to the procurement law or they may not be applicable. This creates some confusion because Article 11 refers to the procurement law as instructions, making any distinction between law and instruction difficult to discern.

committee members should be changed periodically and that Article 4 committee membership can be changed every six months. Under that arrangement it is difficult to see how any committee can gain necessary expertise.

### Potential for Corruption

The procurement law leaves ample room for corruption in the government procurement process. For example:

Article 1 provides that direct invitations shall go to no less than three companies “...excluding in cases otherwise approved by the concerned minister or non ministerial party.” It does not provide any standard under which the decision maker can make the determination that less than three companies may receive a direct invitation. It provides an opportunity for the decision maker to direct contracts to friends or companies that are otherwise friendly to the decision maker.

Article 3 provides that offers should be submitted either inside a tender’s box or mailed or other communications systems such as fax or Internet. However, the law does not appear to provide protection for a company’s proprietary information, such as pricing, which can easily be transmitted to a competitor. That competitor can then re-price its offer or if it has not already submitted its offer can simply undercut the first company’s offer. The law should include provisions for protection of company proprietary information; particularly where information contained within the offer is subject to patent or describes technical matters, pricing methods or business systems.

Article 8 states that a “Concerned ministerial and non ministerial offices may suggest to ministers council to record contractors or suppliers, for a period he decides, in black list and take the legal measures if he committed certain actions including “Proved non committed to supplying conditions and technical specifications.” Combined with the utter lack of any appeal process, such vague standards for blacklisting provide the decision maker ample opportunity to demand a bribe in exchange for keeping a contractor off the black list or for recommending a short term for any blacklisting

Iraq’s procurement law does not provide for many things that tend to prevent corruption. For example, it does not provide for:

- Bid protests to challenge improper or illegal contract awards.
- An appellate process to challenge arbitrary and capricious actions of a decision maker on matters such as contractor qualifications, award grants, contract changes, imposition of fines or blacklisting and conflicts of interest, release of contractor information
- Whistleblower protection for both governmental and contractor employees.
- Provisions against contracts with governmental employees or companies or organizations owned or controlled by them or their families.
- Provisions for retention of records by both the government and the contractor and for governmental rights to audit such records.

- Provisions against use of the expertise of a potential bidder in designing the contracts scope of work or technical requirements.

### Conclusion

The procurement law of Iraq so bad that little benefit can come from a detailed section-by-section analysis of it. It will be easier to draft a new procurement law than to attempt to fix the existing one.

## **Appendix F**

**Comments Submitted by Steve Schiffman**

# Analysis of Iraqi Procurement Law

By Steve Schiffman, MA, JD, LLM

1823 East 13<sup>th</sup> Street  
Brooklyn, NY 11229  
WTOLawyer@aol.com  
1 718 382 6075

## Caveat to Report

The English-language translation of the Iraqi Procurement law is very poor. It was not possible to find out what the original law, in Arabic, said or meant. Thus, the comments are based on the translation, and not first-hand from the original source.

The law should be examined on its own merits and not with respect to any other document that sought to give instructions relating to its implementation.

## General Observations

The law, as given, lacks key definitions of words and phrases it uses. In many instances, the wording is vague and subject to manipulation;

The law allows too much ‘discretion’, which opens the door to cronyism, corruption, and non-transparency.

The law should be totally re-written to ensure that it reflects integrity as well as accountability in case of violations.

The law, as written, encourages the use of bribes and other “favor-granting” mechanisms.

## Specific Examples of Bribe Temptations

### Article 1:

“Import of materials and services plan should be approved by the concerned offices in accordance with funds and financial instructions”. Which instructions? Codified? Discretionary rules?

“No offer would be accepted following the date of tenders close up *unless approved by the concerned minister or head of the office* provided that it must be considered before opening of offers”. This is an open invitation to bribes.

“Number of the invited companies should not be less than (3) excluding in cases otherwise approved by the concerned minister or non ministerial party.” Can be less if approved-- This is an open invitation to bribes.

“Direct invitations must include the general conditions of the tender itself *unless otherwise directed to a reputable and specialized company*.” There is no definition of what constitutes such a company. Consequently, this clause opens the door to probable abuse of discretion and bribes.

**Article 2**

“Concerned offices may have the right to accept offers submitted after date of close up for general tenders. But for direct invitations, *offers could be accepted* before decision when approved by concerned minister provided that they are reasonably justified.” This is an open invitation to bribes.

“Standard execution guarantees should be decided according to material or service classification and importance of not less than 2% and not more than 10% of contract value.” This is too much discretion and opens the door for bribes to lessen the amount.

“The concerned part *should* nominate a neutral side for testing and checking of material classification and decides on the check to be carried out.” *Should* is discretionary; not obligatory; Who defines “neutral side”? What legal criteria? What enforcement in case NOT neutral? This is an open invitation to bribes

“It should be stated that the office is not bound to accept the lowest prices.” Law must stipulate when such is allowed; otherwise, bribes!

**Article 3**

“A committee for opening offers should be set up...” Who sets up the committee? What about conflicts-of-interest? This asks for bribes by those in charge!

**Article 4**

“A committee should be set up in every office ( as required) to study and analyze offers...” Same issues as in Article 3.

“The concerned ministerial or non ministerial office *has the right to give and return offers* to the rest of the tenderers according to type of material specifically...” This seemingly allows for the circumvention of the original bids.

“Concerned Ministerial or non ministerial sides *may have to increase or decrease quantities or distribute them to more than one tenderer...*” There is too much discretion for abuse. Law must stipulate when such is allowed. Why have tender if losing parties can still be included?

**Article 6**

“ Guarantees, bails and procedures which insure the office rights should be decided. The office can reduce in the light of execution in such a way that insures maintaining the office rights and determines delaying fines...” There is too much discretion for abuse. Law must stipulate when such is allowed.

“Specify dispute solutions according to valid Iraqi laws stressing on the office right to reclaim its debts according to governmental debts *reclamation law No. 56 for 1977*.” What law is this? What does it provide?

“Any additional conditions should be stated to guarantee safe execution, especially by adopting 100% payment procedure...” The law should elaborate that legal process when payments paid in full at time of delivery.

### **Article 8**

“Concerned ministerial and non ministerial offices may suggest to ministers council to record contractors or suppliers, for a period he decides, in the black list.” This is an open door to corruption and pay-offs.

“Proved committed *forgery and alteration* actions in any of the offers or tender’s documents.” It is important to legally define what constitutes forgery and alteration for purposes of this law.

“Noncompliance with profession manners by pursuing illegal methods of competition.” The law is totally vague on what constitutes such “illegal methods of competition”.

### **Article 9**

“Concerned offices must comply with the decisions of the *boycott committee*”. This clause goes against “public policy” of the “new democratic Iraq” and needs to be totally eliminated!

### **Article 14**

“A mount of delaying find should not be less than 5% and not more than 15% from the total amount of the contract. If percentage exceeded that average the concerned office may have to complete after having informed him within a period of time not more two that weeks...” There is too much discretion for abuse. Law must stipulate procedures and criteria for such fines, etc.

“State office and socialist sector will not be included in the initial and final deposits.” This is totally discriminatory vis-à-vis ‘private sector’ businesses. This clause should be eliminated as against public policy.

## **Appendix G**

**Comments Submitted by Tim Richards**

## Iraqi Procurement Law Assessment

Dear Simon,

First, my apologies for not getting back to you earlier. Aside from having a number of high priority projects at the office, frankly, the legislation you were given is very difficult to interpret and a great deal depends on the status of the second document, which has more defined and useful rules than does the one on the left. This may be partly due to translation problems. In any case, the following provides a few comments which you can share with State.

The following comments relate to a document entitled "Tenders Instructions" and another document from the Ministry of Planning Legal Office entitled "Instructions for implementation and follow-up of project's national development plan." (to be referenced as "Implementation Document"). Between them, these documents on public procurement give tremendous discretion to government officials and provide little protection against corruption (although Tenders instructions, Article 8, First does allow a minister to blacklist a bidder for bribery). Under the terms of these two documents, officials could, among other things:

- o Limit competition to a set of favored companies
- o Award a contract even before the deadline for bid submission
- o Award contracts without specifying the basis for the award.

There is also a strong emphasis in both documents on identifying imports that would occur under the tender, and explicit preferences for Iraqi and Arab suppliers.

In providing advice to governments on World Trade Organization rules covering government procurement, the international business community has developed the following six fundamental principles of transparent and fair public procurement:

- Adequate notice of procurement opportunities must be given so potential bidders have time to submit competitive bids
- Neutral standards must be used so as not to disadvantage foreign bidders.
- Objective criteria must be established in advance for evaluating bids, to minimize political discretion in selecting winning bidders.
- Public Bid Opening must be a regular practice, to ensure transparency.
- Contract Awards must be made to the most highly rated compliant bidder on the basis of the published objective criteria.
- Dispute Settlement procedures must be independent and provide adequate remedies for non-compliance with these principles.

The two Iraqi documents do not appear to satisfy any of these six principles.

**Adequate Notice:** both documents include some requirements for alerting potential bidders to procurement opportunities (see Article 1, Second A of the Tenders instructions). However, neither document provides any detail on how much time must be provided to ensure that potential bidders have an opportunity to participate in the tender. Note that under the Tenders instructions, Article 1, First, A, a minister may, in fact, approve acceptance of a bid after the tender deadline.

**Neutral Standards:** the Tenders instructions state in Article 6, Third, A that international classification marks must be included in the contract. However, there is no mention of the need to avoid discrimination through the selection of standards.

**Objective Criteria:** Evaluation criteria other than price are not mentioned in the description of bid evaluation procedures contained in the Implementation Document, Article 6.

**Public Bid Opening:** Although the two documents reference bid opening committees (Implementation Document, Article 5 and Tenders Instructions, Article 4), neither document states that the bid opening must take place in public. The Implementation Document does require that the bid opening committees follow an agenda.

**Award to Most Highly Rated Compliant Bidder:** This concept does not appear in the two documents. The Tenders Instructions state that Iraq is not obligated to award the contract to the lowest priced bid (Article 2, Fifteenth, but there is no indication of what alternative basis would form the basis for an award.

**Dispute Settlement:** Article 12, 6 permits a blacklisted company to submit an objection to the Minister involved. There are no other dispute settlement procedures.

-- Tim Richards

## **Appendix H**

### **Iraqi Council of Ministers Procurement Laws**

**Chapter 1 “From Out of Iraq”**

**Chapter 2 “From Inside of Iraq”**

Republic of Iraq

from out of

Council of Ministers

Iraq

Planning Corporation

Legal Dept.

### **Tenders instructions**

Purchasing and supplying “state offices and socialist sector departments”.

### **Chapter 1**

Purchasing and supplying state offices and private sector with materials and services from outside Iraq.

-----

### **Article 1**

#### **First:**

**A:** Concerned authorities must decide their need for materials and services to be imported from abroad associated with a plan provided that this plan includes full details and description of the material and services required and the right amounts to cover purchase them as to prevailing prices .

**B:** Import of materials and services plan should be approved by the concerned offices in accordance with funds and financial instructions.

**Second:** Import of materials and services should be restricted to goods of highly liable qualitative specifications and / at the lowest costs and right time according to the following procedures:-

**A:** Tenders document (paper) must be ready to be advertised through local and foreign and media means. Part of the advertisements should be sent to Iraqi embassies and diplomatic missions abroad for announcement. In case that was impossible, telex, fax, internet could be used for communications. Tender’s date, initial deposits, date of offers’ validity must be determined. No offer would be accepted following the date of tenders close up unless approved by the concerned minister or head of the office provided that it must be considered before opening of offers.

**B:** Direct invitation to specialized offices and companies trusted by the concerned parties made through means of telex, fax, and internet should be supported by specifications and conditions of the material needed to be imported. Number of the invited companies should not be less than (3) excluding in cases otherwise approved by the concerned minister or non ministerial party.

**C:** Direct invitations must include the general conditions of the tender itself unless otherwise directed to a reputable and specialized company. That is just to accelerate execution of contracts in the best and right order and avoid any participation of unspecialized or false companies. Companies should be clearly verified before being accredited through commercial bureaus and embassies of the concerned states, or by catalogues, industrial chambers, as mentioned in article (2) of these instructions.

## **Article 2**

Tenders provisions and invitations to be announced must be prepared in details as to clarify the aim for which the tender is announced. These conditions shall include all the basic items of the tender so that the companies could have a clear overall picture, a bold offering system. Once advertising announcement is approved, it shall be in the following order:-

### **First:**

Quantity and service needed must be precisely defined. Concerned parties can add a term stating (Quantities are liable to increase and decrease) and classification of materials is termed unless otherwise approved by the concerned minister.

### **Second:**

Materials and services needed to be imported should be precisely described and specified. This process could be done through a special order of samples and catalogues to guarantee liability and standard specifications of the offer before having approved.

### **Third:**

Date of tender close up and expiration should be appointed and compulsory for both sides. Concerned offices may have the right to accept offers submitted after date of close up for general tenders. But for direct invitations, offers could be accepted before decision when approved by concerned minister provided that they are reasonably justified. Date of tender close up could be extended in accordance with the conditions of the tender by agreement of both sides.

### **Fourth:**

Place of origin of needed materials must be define.

### **Fifth:**

Place and office to which offer will be submitted must be nominated. If sent by mail, it should be enveloped and stamped carrying name of the tender provided that it arrives at the exact date or before close up. Offers may have to be presented in two separate parts, on technical and the other commercial.

### **Sixth:**

Prices should be estimated in the light of place (destination) of arrival, cost of freight, or else.

**Seventh:**

Conditions of payment must be determined according to classification of material and methods of funding.

**Eighth:** Date, transportation roads, specifications of shipping must be mentioned and procedures of loading and wrapping.

**Ninth:**

Periods of supply should be given.

**Tenth:**

Fines should be decided in light of contracting provisions (freight delay fines, delay of arrival, etc.).

**Eleventh:**

Standard execution guarantees should be decided according to material or service classification and importance of not less than 2% and not more than 10% of contract value.

**Twelfth:**

Tenderers are demanded to submit certificate of expertise or any supporting acknowledgment which proves that the company possesses factories and has already executed likewise work similar to the services needed.

**Thirteenth:**

The concerned part should nominate a neutral side for testing and checking of material classification and decides on the check to be carried out.

**Fourteenth:**

The recipient party of materials at arrival in Iraq should be nominated to determine quantity and liability.

**Fifteenth:**

It should be stated that the office is not bound to accept the lowest prices.

**Sixteenth:**

Concerned ministerial or non ministerial offices can add any provisions to guarantee safe arriving of materials to final destination.

**Seventeenth:**

Any other provisions could be included according to nature and type of tender.

**Article 3****First:**

A committee for opening offers should be set up at the concerned office provided that it should be changed periodically. On other committee for tender advertisement and direct invitations as far as type of work is concerned. This committee should be headed by an official not less than “Director” and 4 members not less than a clerk as well as the secretary of the committee.

**Second:**

offers should be submitted either inside a tender’s box or mailed through different communication systems like telex, fax, internet or personally handed to a opening committee against a receipt of two copies . One copy for the bearer of the offer, and the second kept to a concerned party provided that the following information should be started down in a register book:

- A. Name and No. of tenders fixed in papers.
- B. Name and address of offerers inside and outside Iraq.
- C. Names of offers, bearer address and signature.
- E. Any additional annexes attached to offers.

**Third:**

Offers opening committee must meet at first hour of the working day following tenders close up date to carry on opening process and make sure of tenders and offers credibility in order to eliminate the illegal ones. This committee shall sign all offers, documents and prepare a detached agenda, raised to head of the office to refer them to study and analysis committee.

**Article 4****First:**

A committee should be set up in every office ( as required) to study and analyze offers from the technical , financial, commercial and legal point of view and a number of specialized technicians. This committee can seek support of specialized and experienced parties in this tender. Head of the office has the right to change the committee periodically every six months according to type of work.

**Second:**

The committee has to present detailed repertory contains ( name of offering company – nationality – service offered – origin – quantities – specifications – wrapping – freight – price – destination – way of ) payment and any other point not compatible to tender provision ( or any other information). The committee must recommend submission of best offers and accreditation of best convenient tenders as far as prices, payment conditions and quality.

**Third:**

The committee may have to order any technical or additional information to finalize some companies offers as restricted as possible to enhance tender's accreditation and not renounced.

**Fourth:**

The concerned ministerial or non ministerial office has the right to give and return offers to the rest of the tenderers according to type of material specifically those of big quantities. This is aimed at contracting with more than one party and increasing supply origins.

**Fifth:**

Concerned Ministerial or non ministerial sides may have to increase or decrease quantities or distribute them to more than one tenderer provided that it must not cause any direct increase or indirect in prices or basic change in the provisions of the tender.

**Sixth:**

Concerned Ministerial or non ministerial sides, in urgent cases, may have to commit one of the companies or sides specialized in offering individually to execute works of a specialized nature.

**Seventh:**

Offers studying and analyzing committee must accomplish its mission earlier to expiration date. It is also possible to contact suppliers to extend their offers expiration period after approval of concerned minister or whoever authorized.

**Article 5**

The commitment would not be valid unless approved by concerned ministerial or non ministerial sides or whoever is authorized.

**Article 6****First:**

As offers study and analyze process is concluded and best offers are chosen by authorized side, the supplier should be informed through different communication means with convenient period and invited to sign the contract within a period not more than 15 days up from date of notification of commitment.

**Second:**

If contract terms advance payment to supplier after signing the contract the office should demand supplier to introduce a letter of credit as to authorize the office to reclaim this payment or automatically reduced as compatible with execution average to be completed when supplier carries out his commitment.

**Third:**

The contracts should be arranged by the office in association with the legal departments in the office provided that it incorporates the items given in the tender provisions plus additional conditions to be agreed on by both parties to guarantee safe execution. The contract must include, as well as to what is mentioned in article (2) of these instructions the following:-

**A:** Name of contract, contracted on material, quantity, number of order, international classification mark, period of supply, origin certificate, examine certificate, (check) final destination of arrival.

**B:** No. of contract and date of issue.

**C:** Guarantees, bails and procedures which insure the office rights should be decided. The office can reduce in the light of execution in such a way that insures maintaining the office rights and determines delaying fines.

**D:** Name and address of both contracting parties (1<sup>st</sup> party buyer – 2<sup>nd</sup> party sellers).

**E:** Specify price of measurement unit or service (in written and in No.) and final destination of arrival.

**F:** Specify the total value of the contract (in written and in No.) and kind of currency.

**G:** Specify means and conditions of payment that guarantees the rights of the office. Final due amounts should not be stated on unless the contractor presents taxes quit claim certificate.

**H:** Specify freight manifests.

**I:** Specify dispute solutions according to valid Iraqi laws stressing on the office right to reclaim its debts according to governmental debts reclamation law No. 56 for 1977.

**J:** Names and addresses of the two parties who are authorized to sign.

**K:** Any additional conditions should be stated to guarantee safe execution, especially by adopting 100% payment procedure when materials arrive at the right sites inside Iraq as liable to specifications and conditions.

**L:** Supplier is not allowed to waive from due rights to him by effect of executing the contract or the credit allocated to cover execution without prior written approval from the contracting office or the crediting bank.

**Fourth:**

Concerned office is authorized to fix up contracting through different communication systems and incorporate all contract conditions in the letter of committal as a contract.

### **Article 7**

#### **First:**

**A:** After contract is signed and supplier is got informed, the concerned office must take the necessary measures to open the documentary credit through mediation of Iraqi bank according to the relevant bank form. This form should contain all financial conditions related to supplying process that embrace nature of the irrefutable credit (fixed – unfixed) exchangeable – or not – rotary).

If credit covers services only then it will be non documentary credit (simple). Here choice of determining the notified bank for credit will be the responsibility of the Iraqi bank. Summarized specifications of material should be taken in consideration and conditions which contradict the nature of relationships between all parties participating in the credit should be avoided. On the contrary, it should be compatible with all rules and conventions of the documentary credits.

**B:** Import license should be attached in order to enable the supplier executing the contract and shipping the material and services.

#### **Second:**

Concerned offices have to follow up open of letter of credit and expiration time and shipment of material and services according to scheduled time. The office would have to make amendments on credit or extend period of shipping and expiration where required and demanded by the company.

#### **Third:**

Specialized department in the concerned office will have to follow up the material shipping and arriving and get relevant offices informed in order to be ready for custom clearance without any delay .clearance offices at entrance point should be supplied with all information about the goods (quantity- name and number of shipping means –expected date of arrival to be safely received).

#### **Fourth:**

specialized departments in the office will have to issue material suitability and make sure if presented services are corresponding to conditions and specifications fixed in the contract after arrival in Iraq .it has to carry out the technical, laboratory, physical tests and check ups and operate them in order to check their liabilities .they should be received in right quantities and weights .the company is demanded to compensate any damage or loss in material or services. Material and services should be received according to documentary systems.

### **Article 8**

Concerned ministerial and non ministerial offices may suggest to ministers council to record contractors or suppliers, for a period he decides, in the black list and take the legal measures if he committed the following actions:

**First:**

Bribery, bribing one of the state, socialist sectors' officials or cooperating with him.

**Second:**

Proved committed forgery and alteration actions in any of the offers or tender's documents.

**Third:**

Providing false information concerning the work he won as to inflict damage in public interest.

**Fourth:**

Proved none committed to supplying conditions and technical specifications.

**Fifth:**

Noncompliance with profession manners by pursuing illegal methods of competition.

**Sixth:**

Refrain from signing contracting procedure after being accredited.

**Seventh:**

Exaggeration in offering or submitting false offer.

**Eighth:**

Stating precautionary measures in the offers deliberately in order to force the office, after opening the offers to enter negotiation with them with aim of achieving some benefits at the account or other offerers.

**Article 9**

Concerned offices must comply with the decisions of the boycott committee.

**Article 10**

Instruction terms of national development plans and projects' followed and execution should be applied or what was not termed in these instructions.

## From inside of Iraq

### *Chapter two*

Purchasing and supplying state offices and socialist sector with materials services from inside of Iraq.

#### **Article 11 :**

##### **First :**

Provisions of these instructions shall be applied on deals of materials purchased and offered to all state offices and socialist sector from inside Iraq.

##### **Second :**

There should be a demand to supply the concerned office with materials services . These demands should be prepared the concerned office with full description .

##### **Third :**

There should sufficient allocation for purchasing materials. These allocation should be approved and passes by the concerned department at the office.

##### **Forth :**

Purchasing or offering services should be approved in accordance with what is termed in items (second and third) of this article according to granted authority vis-à-vis financial instructions.

##### **Fifth :**

Purchase of state offices socialist sector should be made directly (direct purchase).

#### **Article 12 :**

Basic ground for purchasing or offering services are to obtain best material and services as for as quality is concerned at lowest prices and in the right time.

To achieve the target the following procedure should be adopted.

**First :** General studies.

**Second :** Direct invitation .

**Third :** Purchases committees .

**Fourth :** Direct purchasing

**Article 13 :**

After tender documents are prepared and approved, they should be advertised through advertising channels available for those interested to participate in it (press – Tv. S. In case it was announced through press it should be one Iraqi newspaper issued in Baghdad or through advertisements publications issued by ministry of finance at least one time copies of advertisement should be put at advertising board provided that it should contain last date specified for offering and place of submitting, purchase price and date of expiration.

**Article 14 :**

Provisions of the tender to be advertised for should be prepared in details that clarify the aim of the announcement and all other essential issues the material specifications and required date to supply or execution it should also contain details delay fines and demanded deposits as follows:

**First :**

Detailed specifications of material and service should be completely prepared to cover precisely the requirements with reference to No. of these specifications where possible.

**Second :**

Total or partial period required for supplying should be specified as far as place, period of offering and validity are concerned.

**Third :**

Procedures and details of due amount payment should be decided in one payment after execution or in numerous ones during period of execution. Particular percentage may be retained to be paid after a specific time of supplying provisioned in the tender conditions.

**Fourth :**

Delay fines conditions should be stated in case material is not supplied within the night period in the contract, or delay in execution the amount of the contract if he refused to execute the work. Delay fine is specified with a certain amount of every delaying day, or amount of by certain percentage of the contract amount. A amount of delaying fine should not be less than 5% and not more than 15% from the total amount of the contract. If percentage exceeded that average the concerned office may have to complete after having informed him within a period of time not more than two weeks.

Administrative stevedoring should be determined as 1st party commitment of 2nd percentage not exceeding actual cost of obligation and should be fixed in the contract.

**Fifth :** Deposits shall be in two types :

Initial deposits :

Offered during participation in tender to insure tenderers trust in participations. This would be reclaimed just refrained from signing after commitment . Its amount should be determined by a percentage of 3% from the after values stated in the tender announcement . It should also regarded as part of the final deposits for whom being accredited until date of actual signing . As for the rest of tenders, their deposits would be retained , specifically the first two following the accredited one.

Final deposits shall be offered during contracting as amount as 5% from contract value to guarantee standard execution of contract . The office may have to cut all what it own to the contractor or from his other money as deposit are not sufficient to cover the rights of the office . Concerned office may retain the deposits or part of the total amount of the contract if terment for maintenance. Percentage of  $\leq$  15% from payments for the purpose of income tax. Contractor's account to the concerned office will not be settled unless he submitted what could prove tax corporation clearance.

Deposits could be in cash or letter of credit or bank cheques from Iraqi bank or loan bond issued by Iraqi government. State office and socialist sector will not be included in the initial and final deposits.

**Sixth :**

Tender provisions could contain a provision stating that the concerned office is not obliged to accept the lowest offers .

**Seventh :**

If supplied material requires spare parts to be imported , the office may demand the supplies to insure supplying these spare parts within a definite period with an agreed competitive price.

**Eight :**

In case experts or specialists are required from abroad , foreign exchange regulations adopter by central band should termed in the contract. This process will regulate system of conducting of foreign currency and method of salary payment and wages.

**Article 15 :**

Every tenderer participating in the tender must buy the offer according to the price decided by the office as an refundable . Initial deposits should be offered personally or the legal partner only associated with a letter from taxes corporation proves his quit-claim :

Any documents prove his financial efficiency or ex-executed works should be provided to the concerned office.

**Article 16 :****First :**

A committee for opening the offers should be set up in the concerned office, either permanent or to be changed periodically . This committee should be headed by an employee (official) not less than director and four members not less than clerk or secretary.

**Second :**

Offers should be submitted either inside the relevant box of the concerned office or to be handed to secretary of offer's opening committee again two copies recite , one for bearer of offer , and the second kept the concerned party provided that the following information should be registered in private record :

Name and number of tender as specified in documents.

Name of offerer and address inside and outside Iraq.

Name and address of offer's bearer and signatures .

Date and time of hounding the offer.

Addition attachments sent with offers.

**Third :**

Committee of offer's opening must meet the next day to the specified date of tender close up and star opening process. Offers and documents attached should carefully examined and offers of repugnant provision should indicated and excluded . The committee shall sign offer's documents and prepare details list of offers to be raised for head of the office where it will be referred to analysis and study of offers committee.

**Article 17 :****First :**

A committee for analyzing and studying offers from financial technical commercial and legal should set up head by official not less than director and number of specialists . Head of the office is authorized to change this committee every six months as nature of work is required.

**Second :**

Analyzed study of offer's committee shall undertake examining the offers from being compatible to tender provisions point of view and give detailed review associated with recommendation of the best offer submitted.

**Third :**

Tender reference will not be considered in case of participation of one tenderer in the first announcement . That may be possible in the second announcement after advertisement in one of the local newspaper is confirmed and required deposits are given.

**Fourth :**

Submitted initial deposits will be retained as tenderer refrained from signing contract or he will come under any other penalty .

**Fifth :**

The committee should fulfill mission with in a right period before offer's expiration.

**Sixth :**

Reference of tender should presented before the concerned minister or who ever authorized to be approved .

**Article 18 :**

Systematic order of tenders is to announce for in different mass media channels. Direct invitation procedure should be accredited in urgent need for parching any material or service of specific status. That is because to avoid participation of unspecialized parties in supplying or implanting the service. This system includes the following :

Direct in vitations should be given to offices, persons , bureaus , factories specialized in providing the commodity or service provided that they are not less than three.

Invitation should be sent inside stamped enveloped by the concerned sides against signed recite provided that it arrives before tender close up.

In general tender same regulations and procedures will be accredited.

**Article 19 :**

Purchase committees not less than three must be set up in the concerned office to carry out purchasing in normal cases to meet the urgent needs of the office. Head of those committees should be not less than a clerk. This committee practices its mission in the light of the valid financial and administrative instruction and should replaced within a period of time not exceeding six months.

Current balance implement instructions should be applied on offices centrally financed , where as for self-financed companies and offices , instructions issued by the concerned minister or non-ministerial offices should be applied.

**Article 20 :**

Purchase from concerned party in the office should be made in the light of valid financial and administrative instructions.

**Article 21 :**

Concerned minister may propose to secretaries of ministerial council to black list the contractor or supplier as aw to take the right legal measure when committed the following acts :

Bribed or bribes any of the governmental officials or collaborates with him.

Commits alteration or forgery in any of the offers or their documents.

Providing false information concerning the work accredited to him with the aim of inflicting damage in the public interest .

Inconsistency with the provisions of supplying or the technical specifications contracted on , or no actions taken to repair or compensate the supplied materials un liable to specifications.

Breaking ethics of profession rule by adopting the illegal competition's procedures.

Refrain from signing contracting accord after being notified of committal.

Exaggeration in offering (false offer).

**Article 22 :**

Regulations and instructions of projects and works of national development plan implementation should be applied to what has not been termed in these instructions.

## **Appendix I**

# **Procurement Instructions from Iraqi Ministry of Planning**

Ministry of planning  
Legal office.

Instructions for implementation and follow up of project's national development plan

Article1- : consultant's selection

- = 2- economic and technical feasible study
- = 3- project
- = 4- Implementation procedures
- = 5- offering and delivery
- = 6- study of offers and contracts procedures
- = 7- deposits and cash cuts
- = 8- delay penalties
- = 9- Loan basis for machines, equipments and materials
- = 10-works alteration
- = 11- information provided by authorized auth.
- = 12-black listing conditions
- = 13-miscellaneous items
- = 14-instructions expiration

## Article 1

### Consultant's selection

- 1- consultants shall be selected from Iraqis first, Arab countries second, then other countries taking into consideration the following
  - a- Foreigners should not be assigned except in necessary cases, and if foreigners are to be assigned, Iraqi specialized expertise has to be mobilized as actively as ever possible.
  - b- Any work should not be referred to consultants only if the governmental and technical departments failed to carry out.
  - c- Governmental offices members are not authorized, unless legally, to effect contracting for personal benefit or accomplish works of consultancy services concerning developmental projects.
  - d- Works of formerly similar design and specification should be excluded from consultancy assignment. Executing Ministries have to seek assistance of governmental and technical institutions to carry out these works.
  - e- Consultant should not be the contractor who carries out the project that he had already setout its designs, except he could accomplish the project according to the ready-made process (key). In this condition contracting will be made according to instruction related to the method
- 2- Consultants shall be selected by special order to not less than 3 consultants registered in Iraq according to laws and instructions valid in the country. Concerned ministry has to invite not less than three.
- 3- Inviting consultants shall take into consideration the following.
  - A- Summarized description of the project. With details of consultancy services required.
  - B- Basic conditions of contract to be bound with the consultant and procedures of wages payment, cuts and allowances to be reclaimed should be common between parties concerned.
  - C- Place and date of offer submission should be defined.
  - D- Relevant designs and maps and specifications demanded by consultant should be clearly stated excluding private cases agreed on by the concerned Minister. Consultant should refrain from passing any information related to the project before having an authorization from concerned Ministry.
  - E- Consultant should point out the qualifications of the technical staff and specialists in his office those free and engaged.
  - F- Consultant is demanded to point out analysis of consultancy services stages cost.
- 4- Executing party after consultants deliver their offers, the office has to study these offers and give its recommendations very clearly to the decision maker authority indicating the consultant name to be contracted with associated with reasons of this choice.
- 5- Contracting parties with consultant should determine delay penalties and charges of contracts concluded with consultants.
- 6- Executing parties should not oblige consultants to offer initial credit and deposits or fulfill any commitments. This condition would not be applicable to letter of credits they offer to cover the cash advance loan.

### Article 2 : Economic and technical profit reports.

Executing sides have to carry out the right studies on economic and technical benefit of projects according to items of instructions No (1) 1984 and appendixes issued by (dissolved) planning

board.

**Article3:**

**Procedures of projects execution:**

- 1- Projects should be carried out by the following methods
  - A- General tender: all interested are invited to participate in the project.
  - B- Direct invitation-not less than 3 contractors, companies, institutions, known for their potentiality and efficiency are invited directly
  - C- Direct execution-Done according to instructions and authority of direct execution issued by planning board (dissolved)
  - D- Credible execution- done according to accountant instructions related to works to be executed on credibility basis issued by instructive corporation at planning board (dissolved)

**Article 4: Projects execution measures**

- 1- Executing side, before starting the executive stages has to consider the following requirements:
  - A- Precise study on the estimated cost of the project or the work in order to use them as a scale for offers analysis.
  - B- Allocations of project or work should be made available in the investment project provided that the time of starting work should be defined according to annual allocations
  - C- Approval of economic and technical benefit report of project or work from authorized side.
  - D- Conditions and specifications and quantity calculation schedules and maps should be made available where necessary to avoid any changes or additions during execution stage.

Instructions as to ready-made project (key in hand).

- E- Approval of concerned sides on site and the required land for project or work should be completed.
  - F- Legal or material workshops should be removed from project site.
  - G- Site should be ready for work partially or completely according to time program previously decided.
- 2- Every group of tender documents price should be determined competitively as to its importance and preparation cost.
  - 3- Advertisement in newspapers should include the following information
    - A- Name and No. of tender.
    - B- Place and date of selling documents of tenders
    - C- Amount of initial deposits.
    - D- Date of tender closing date.
    - E- Price of tender documents is nonrefundable
    - F- Required contractor classification.
  - 4- Offering instructions should include the following:
    - A- Offers should be personally signed and enveloped (endorsed) containing the name of

- tender and its number as mentioned in documents along with the name and address of the concerned ministry
- B- Certificates and documents to be attached with the offer should be provisional in the contract conditions.
  - C- Offering process should be stated in number and written provided that the price of every unit and item as stated in the quantity calculation schedules shall be with out any change or amendment. All pages of quantity calculation schedules should be signed by the offering side.
  - D- Offering side should not omit any of the tender's documents provisions or make any amendment what so ever it was
  - E- Offering side has to point out the address at which he could be corresponded. In case it was submitted by his agent, it should be associated with official authorization according to the legal orders.

Details about other contracts accredited to contractor at the time of offering indicating time and dates of start and finish.

- 5- Governmental officials are not allowed to participate in the tenders directly or indirectly.
- 6- During tender advertisement omit or addition or amendment in any provision or item in tender documents is not allowed except where necessary by approval of the issuing side, provided that appendixes should be issued and sent to all participants in the tender earlier to last date of offers delivery.
- 7- Executing side has to prepare register for tenders during advertisement period containing specifically the following:

A-Name and No. of tender as mentioned in the documents papers and closing date. Names and address of sides who obtained tender papers

- 8- Any information should not be passed to any authority on names and addresses of tenders during advertisement period.
- 9- Advertisements and papers of tenders passed by the authorized side inside Iraq should be sent to the concerned side. If advertisement made outside Iraq representatives there to be advertised and sold on be half of executing side.
- 10- Tenders documents can be sent through postage to which it may concern, provided that he should bear fees and charge of mail as well as their right price.
- 11- Diplomatic corps representatives can be supplied wit a copy of the tender documents in Baghdad at request free of charge provides that they are marked with the word (free of charge) by the executing side. This copy should not be provided for participation purposes
- 12- Tenderers invited directly should be supplied with tender documents free of charge provided that executing side has to bear fees and charges of mail and dispatching.

**Article 5: Reception and open of offers measures:**

A committee at every ministry should be set up for opening the offers headed by an employee not less than Director-General and representatives from the legal and financial departments as members as well as to an engineer and representative from the executing side and senior employment secretary with two reserve members.

- 2- Subordinate departments of the ministry may set up other committees to open the offers provided that these committees should be setup according to what have been mentioned above in the previous item.
- 3- In every province a committee should be set up headed by the governor or his deputy and departments chiefs as well as to a secretary not less than supervisor degree to open the offers announced at the governorate.
- 4- Offers should be submitted either through offers box or to be handed over to the secretary of the offers opening committee against a receipt of two copies one with offer owner and the other kept to the concerned side provided that the following in formatting should be stated in a special register:
  - a- Name and No. of tender as stated in its papers
  - b- Name and address of offerer inside and outside Iraq.
  - c- Name and address of bearer and his signature
  - d- Date and time of offer delivery.
  - e- Any additional attached papers( if any)
- 5- Offers may be sent through registered mail at the right time before close up, provided that the secretary of the committee should register these offers once received according to Para (4) of this item
- 6- Secretary of the committee must deliver the offers deposited inside the box or directly received to the head of the committee at the final date of tender close up. Any offer and amendment after that date would be rejected.
- 7- Concerned minister has the right to accept the offers sent through registered mail after the closing date of tenders and before referring them to the examining committee according to the agents referred to in Para (q) (b) from this item if this offer was sent at the specified date.
- 8- Offers opening committee must hold a meeting after the final date of close up directly and start opening process. This process should be carried out by an agenda provided that the following points should be considered:
  - a- Check the stamps on envelopes of offers.
  - b- No initial advances offers will be neglected.

Concerned Minister is authorized to accept offers with initial advances of effective damage in the budget if rejected, provided that expenses of the advances should be added to the offers during analysis.

- c- Offers based on percentage reduction or cut a mount must be rejected. Any reduction would not be possible after tender close up date.
- d- State Number of papers of every offer.
- e- Any scratch or omission should be marked in the priced quantities chart associated with signature of head and members of the committee.
- f- No priced item should be underlined in the quantities chart unless associated with signature of head and members of the committee.
- g- Make sure every page of the priced quantities chart contained the signature of contractor.
- h- Any points and preservations should be indicated.
- i- Samples attached with offers should be checked with full description to their specifications.

- j- Mark all pages of the offers with the committee stamp and all pages of priced quantities chart should bear signature of all members of the committee.
  - k- Any information not given should be indicated clearly.
  - l- Opening of offers should be done at the same session unless possible.
9. When offers opening finish according to Para (8) of this item the chief of the committee must do the following:
- a- Names of tenderers must be announced at the advertising board , full concentration on prices estimation and analysis
  - b- Offers and annexes should be referred to offers examining and analyzing committee to be contracted

#### **Article 6: Review and analysis of offers process**

- 1- Executing side must setup a committee to overtake examining and evaluation of offers for each tender.
- 2- Analysis process of offers must be carried out as soon as possible .final report should be submitted to the authorized at least one month before offers date expiry.
- 3- Offers must not be sent abroad to be analyzed but consultants got to send their representatives to Iraq to made the necessary analysis where required, otherwise approval of the concerned minister should be obtained o sending out Iraq.
- 4- Examining and analyzing of offers process should consider the following:
  - a- Check the prices from the accountant point of view. That includes partially and generally estimation and the right amendments if any.
  - b- Percentage reduction or cuts amount is made the reserve amounts fixed in the priced quantity chart should be neglected.
  - c- Offers prices should be calculated on unified basis.
  - d- Written price is considered first in case it differs from the price stated in numbers. Unit price is also considered first if the item amount is not true.
  - e- Any item against which no price is stated in the offer, the cost of this item would be covered by the price of the other items as far as the quantities are concerned.
  - f- Any disagreement between analyzers of the offers, nature of dispute should be stated down in the final report.
  - g- At conclusion of analyzing process detailed chart of offers must be arranged containing relevant details with comparison as far as the technical, legal and financial matters are concerned.
  - h- Tenderer's name should be given and on what basis he is nominated for this contracting.
  - i- To approve that the prices of the tenderers nominated for contracting are balanced and harmonious with the estimated cost given in Para (1-9) of Article 4 from these instructions. Execution period should be acceptable.
- 5- a- Executing side, if necessary may request any clarifications from tenderers and seek some technical investigations and inquiries to complete study and analysis of offers.
- b- Executing side, by approval of the concerned minister, has the right to enter negotiation with

any of the tenderers when required provided that information should be kept confidential.

- 6 -Executing side should contact companies' registrar (for foreign companies) for advice before submitting the tender.
- 7- Executing sides have to verify the contractor's technical and financial capabilities and his similar accomplished works before submitting the tender.
- 8- Executing side has the right to release the initial advances (deposits) request to offerers that are unexpected to be submitted before expiration date provided that the deposits of the first three tenderers who are nominated for submission should be maintained.
- 9- Executing side has the right to release the initial advances (deposits) to tenderers after offer's date of expiration unless the tenderer wanted an extra time.
- 10- Executing side has to inform tenderer who has been submitted the tender within 15days from the date of the tender's submission and at the same time get the other tenderers informed to refund their advances deposits except the second tenderer whose deposits will be refunded after contract signing by the first one.
- 11- If tenderer refrained from contracting after being notified of submission, the executing side has to keep the initial deposits and carry out the work on his account according to contract terms without notification or legal measures to be taken. Work should be accredited to the second tenderer if the first abstained.
- 12- Contracts are to be organized of two original copies, the first one given to the executing side and the other for the contractor. Copies of the contracts are also to be supplied the legal and financial offices and other sides where could necessary.
- 13- Executing side must inform the ministry of planning –central bank-central statistic corporation-retirement department-companies registrar-taxes board about the name of the contractor and his address, amount of the contract and the period it takes.

#### **Article 7: Deposits and cash cuts:**

1. Deposits are not accepted unless they were cash amounts or letter of credits or endorsed bank checks issued from Iraqi bank or loan bonds issued by Iraqi government.
2. Initial deposits determined with cut off amounts ranges between 2% to 5% of the estimated cost of the project provided that importance of the work should considered in this limitation. It should not determine on the basis by percentage of the offer amount.
3. final deposits are determined , to insure the right execution, according to the following rates of the contract amount plus the reserve amount of the contract:  
8% for the first half million.  
6% for the second half.  
5% for the second million  
4% for the third million and above.
4. Government institutions and socialist sector are excluded from giving the initial and final deposits termed on in these instructions
5. Terms given in the contract conditions should be considered as far as the cash loan and cuts are concerned.
6. Cash cuts are nonrefundable against letter of credit.

**Article 8- Delay fines and management impositions**

## 1- delay fines

a- delay fines are determined by the executing side provided that they don't exceed totally 5% and not more than 10% of the contract amount. The executing side had to fix that percentage in the second part of the contract conditions when preparing the tender documents.

The executing side, before reaching this level, has the right to take the necessary measures to accelerate conducting the project and set up a committee represented by the contractor as well to cover spending for the rest of works or suspend them according to contracts conditions.

B.Executing side has the right to charge fines or continue imposing delay fines or stop them as work is suspended accordingly.

## 2. Management impositions

Management impositions percentage is decided as contractor starts implementing his commitments by a rate not more than 20% of the actual cost. Executing side must fix that percentage in the second part of the contract conditions.

**Article 9. Credits basis for machines and equipments**

Terms of credits basis for machines and equipments given in the contracts should be considered

**Article 10 works and additional works alteration.**

1- Contracted works must not be changed. Additional works should not be enforced except where necessary. This change must be strictly limited at the following conditions only:

- a. When discharged causing delay of work and inflicting great damage as far as the economic and technical matter is concerned.
- b. Any change could turn contract works not useful.
- c. When it effects saving big amounts of money beyond what the delay damage caused by this change.
- d. If the change does not effect basic replacement in services or production capacity set for the work or project.

2- All correspondences related to alteration orders or additional activities of correspondences are considered of urgent priority. Concerned authorities must react with no more than two weeks.

3- A- Any additional work or change must not be initiated with out written order from the responsible engineer, containing brief description about the work; its specification quantities, prices and the additional period required to be added to contract period.

B- In private conditions, the contractor can be assigned executing, after approval of the minister, additional works provided that price and period have to decide as early as possible before issue of reception certificate.

- 4- Supervising engineer must indicate the changes and additions required to be done on the contract as early as possible provided that disaffecting work program
- 5- Authorized side must decide on the additional and changes within a period of two weeks. Responsible engineer should get the contractor informed of the authorized side decision immediately considering what came over Para (3-b) from this article.
- 6- Additional works must be priced according to terms of the contract.
- 7- In case of adding other items of no similar ones in the contract valid market prices must be accredited as a base for pricing plus management expenses and profits.
- 8- In case the contract was extended ( period) by effect of additional work or changes the following should be considered unless stated contrary in the contract terms:
  - A- Period of additional work and original period of contract should be proportional according to nature of additional work and original contract works
  - B- Extension period must not be interrelated with other periods granted to the contractor.
  - C- Any additional period of change works must not be given when contractor informed to implement before hand. Provided that it does not affect the works of the contract, otherwise the contractor has to request an additional period within one month from the date of notification, explaining reasons and period required.
- 9- Copy of extra time decisions would have to be sent to the concerned department at the ministry of planning.
- 10- Executing sides must obtain written statement from contractor for non compensation demands to this effect.

#### **Article 11- Information to be provided by the authorized office.**

All concerned offices, while seeking any decision from the authorized side have to point out specifically the following information according to nature of every business.

- 1- Consultants selection
  - a- Names and addresses of consultants to be invited, expertise and qualifications for each of them.
  - b- Brief description of the projects with consultant details required to be provided.
  - c- Raft contract which will be concluded with the consultants, explaining the way by which the wage will be paid
- 2- Economic and technical benefit study.

Study of economic and technical benefit should be applicable to instructions No (1)1984 and annexes issued by planning board (dissolved)
- 3- Preparations for projects and works implementation.
  - a- Measures termed in article (4) from these instructions should be completed and stressed.
  - b- Locations where the tender will be advertised

- 4- Ownership requests.
  - a- Name and site of the project and date of implementation.
  - b- Map sketches and tresses of states and lands to be occupied supported by copies of their registration containing. Nature and class of these estates and estimated cost.
  
- 5- Additional works and changes.
  - a- Brief description for suggested additional works and changes, with details of items given in the contract required to be changed
  - b- Necessity for additional work or changes ad justified reasons to be carried out according to terms of article (10)of this instructions
  - c- Approve no items of the contract permits carrying out additional works
  - d- Way of determining prices of works to be changed or added
  - e- Additional period required for carrying out additional works and changes and the procedure of calculation, expected date of initiation and completion.
  - f- If additional works and changes mentioned in the maps of the work and not fixed in the quantities chart of the contract, date of maps hand over to contractor must be announced.
  
- 6- contracts period extension
  - a- Original application submitted by contractor for extension and reasons behind.
  - b- Statement to engineer about the request and his recommendations with clear indication to contract terms supported by no interrelation between the required period and the actual period of the contract or extension given before.
  - c- Details of extension given before.
  - d- Events and incidents caused delay supported by documents from official side.
  - e- Statement of the executing side about the request and about statement of the engineer and recommendations
  - f- The amount by which the contract is passed and the actual period for completion, delay fine with date of initiation of work and expected date of accomplishment.
  - g- When delay is due to executing side, then it must indicate reasons for delay and measures taken against negligent
  
- 7- Compensation and arbitration requests.
  - a- Name and address of the contractor and name of projects and its location.
  - b- Contract cost that affected these requests and dated of initiation and completion of work.
  - c- Origin of request and details of amounts claimed.
  - d- Supervising engineer statement about each of the contractor's requests and his recommendation for them
  - e- Statement of the executing side and its recommendation with reference to terms of contract or law.
  
- 8- assignment of non Iraqis engineer and experts or prolong their contracts
  - a- obligating reasons for employment and its extension
  - b- Name and nationality of engineer and expert, qualifications and previous expertise.
  - c- Project to be employed in and business he is going to undertake with a copy of the contract by which he will be employed
  
- 9- suspension, postponement or cancel of work
  - a- reasons behind the request
  - b- accomplished an remaining works

- c- amount spent and remaining amounts
- d- details of materials and machines stationed at work site and their estimated value
- e- Additional cost current expenditures and compensations to be paid to contractor according to contract terms.

10- change of site

- a- reasons and justification led to a band on the site
- b- economic and technical characteristics of the new site
- c- Outcomes resulted from changing the site and cost as well as a mounts spent on the old site.
- d- Maps for both sites for comparison.

11- increase of costs

- a- reasons and justifications of costs increase
- b- amount spent and stage of work
- c- effect of cost increase on annual allocations

12 – Money transference and allocations increase

- a- work stage and progress, amounts spent for accomplished works, amounts to be spent for works expected to be accomplished till the end of the financial year.
- b- Reasons behind shortage of allocations and amounts required to be moved to cover expenses of work supported by details of this movement to ensure these amounts.
- c- Non affected work implementation should be approved and reasons of increase in its allocations

13-ministry of planning (concerned corporation) must be reported with all statements and in formations related to matters termed in this article in cases where the ministry is authorized to decide.

14- Issues submitted for planning corporation supervision or for the counsel of ministers should contain complete explanation about the subject initiation, provided that it must specifically contain all statements and information termed in this article according to nature of every case.

15- Executing side , seeking their issues to be referred to planning corporation or counsel of ministers must consider the following:

- a- request should be sent to planning corporation of 20 copies provided that it is signed by concerned minister or his approval
- b- chapter , act, item and serial should be clearly indicated as far as the invest balancers concerned
- c- decisions previously issued for the case to be submitted must be clearly indicated
- d- executing ministry opinion and recommendations on matters to be submitted should be clearly indicated

16- Resolution of counsel of ministers and planning corporation must be implement able. Any subject previously determined by the above mentioned parties must not be resubmitted

unless justified.

- 17- Concerned corporation at planning ministry has to study the matter quite deeply and prepare detailed report concerning the suggested recommendations. This report must be concluded with its clear recommendations on all the matter elements. It may demand this matter to be submitted for the planning corporation attention where necessary.

#### **Article 12 Conditions of blacklisted contractors.**

- 1- Minister of planning, on recommendation from concerned from concerned minister or executing side, has the right to black list any contracting company or contractor for a period not more than two years in cases mentioned in Para(3) of this article. As the company or contractor is black listed they will be demoted one degree for two years upward from date of putting his name in the blacklist. When a company or contractor are reblack listed, his Iraqi contractors registration identity card will be reclaimed and his registration will be cancelled apart from preventing him from undertaking any contracting works as well. These measures are applicable to all contracts and works like wise
- 2- All governmental offices should prepare special register to record names of persons and companies who are due to be blacklisted.
- 3- Company, contractor names will be blacklisted in the following conditions:
  - a. Dealing with foreign boycotted companies.
  - b. Bribery any of the government officials or collaboration with him
  - c. Providing information or unreal matters about the work submitted to him.
  - d. Attempts of forging offers or any of the contract documents or papers with the aim of inflicting damage in the public interest.
  - e. Breaking terms of the contract and the technical specifications, contracted on. With the aim or causing damage.
  - f. Breaking profession moral rules by adopting illegal contest styles.
  - g. Reject signing contract agenda after notification.
- 4- executing side , incases termed on in Para(3) of this article must check and make sure of the events attributed to the contracting company or contractor through special committee to undertake investigation and suggest period to stop dealing with the contracting company or contractor. It must also ask the authorized side to put his name in the black list for the suggested period with out violating the terms and periods stated in the instructions of dealing with persons and boycotted companies. The executing party has to take the right measures to refer the company or contractor for trial according to terms of the valid laws.
- 5- When company name is blacklisted the authorized side has got to take the decision immediately by the following :

- a- inform the concerned governmental authorities about blacklisting the company or contractor and halt dealing with him for the determined periods
  - b- Company or contractor should be informed with the decision of black listing.
- 6- The contacting company or contractor when blacklisted may submit an objection request to minister of planning through the implementing ministry within a period of two weeks from date of notification. Minister of planning may study the objection in the light of the reasons given by the objector. This objection should not halt measures to be taken.
- 7- If blacklisted company name is associated with halting work ,the executing side must take the following measures:
- a. Notify the banks to transfer quantities amounts submitted by the company or contractor to insure implementing their commitments.

- b. Inform the contracting company or contractor if work entrusted to Him is cancelled and should be accomplished at his own account on the basis of trust or obligation where required.
  - c. Machines and equipments stationed at worksite must by controlled and prevent the contracting company or contractor from usage and transfer.
  - D. orders the company or contractor to personally come or send his representative to approve the organized statements of the inventory bills of materials. On the contrary the schedules will be prepared by the right court
- Accomplished works should be measured.

8-black listed company or contractor has to submit a request to registration committee, after expiry of black listing period, to consider canceling the order

9-black listed company or contractor name should be lifted from black list after decision from minister of planning taken according to Para (8) of this article

#### Article13 miscellaneous terms

- 1- Executing side should consider instructions and decisions mentioned in annex No. (1) Of this instructions when preparing the tender documents executing side must modernize the annex according to any decisions issued or amended instructions
- 2- The executing side, during setting out the tender documents and approving any of the contract concerning engineering, electrical and chemical works , should consider the right amendments on those conditions in the second part to be compatible with required execution methods
- 3- Executing side is authorized to practice the rights given in the signed contracts with contractors except what excluded by concerned authorities
- 4- These instructions are applicable to works of contracts- except supply contracts-taking in to account possibility of changing the concluded tender conditions in contracts signed with contractors before these instructions were issued.

All executing parties should abide by their commitments very precisely and enforce payment of monthly loans at the right dates. Measurement committees must be set up once work started and complete this mission within a period not more than two months after receiving the work.

- 5- Executing side must provide the spare parts to operate contracted projects and made the right maintenance to systems and equipments. These terms should be included in the contracts provisions.

Specifically the following

- a. oblige the contractor to submit detailed bills explaining the complete specifications of machines and equipments and their spare parts with addresses of the actual producers
  - b. actual producers of spare parts should give and specification, ownership of machines and equipment as well as part No. for each material to be recognized.
  - c. make available all lists of spare parts needed for machines for the period the executing side consider appropriate for operating these machines (constant movable instruments)
6. concerned side as authorized must commit to total cost (contract amount or statements plus 2% for supervision and observation and 7% for general reserve of every project (or work) and the annual allocations accredited for projects.
7. application of these instructions terms on works and projects should be based on economic and technical agreements and annexed protocols bound between Iraq and other countries
  8. All concerned sides must commit to these instructions. Any of these instructions items that disagree with provisions of the contract should not be accredited.
  9. Concerned authorities must keep all communications relevant secret.
  10. Decisions of ministers' concerned planning corporation should be kept confidential. Concerned sides should be informed with the items they are interested in only
  11. Breaking these instructions would be regarded neglectful in his duties and business and accordingly would be subjected to state officials' disciplinary law. That will not enforce and other penalties termed by laws at the time of crime

#### **Article 14 Instructions expiration**

These instructions are valid up from 1\2\1988. Instructions passed according planning board (dissolved) No. 14 dated 19\1\1975 shall be active

Subject	Date	Decision No.	Issue auth.
Foreign comp. personnel accommodation	28\3\1977	376	1.rev.command
Foreign companies, Iraqi ones, contractors and socialist sector offices must be prevented from digging the road side walks and neutral areas of	26\11\1984	1413	counsel

roads unless obtained approval of concerned authorities ( Baghdad municipality) electricity, water and sewerage) foreign companies executing development projects in Iraq will be exempted form paying taxes and fees.	1\10\1987	767	
Printing machines with the contracting side.	27\1\1981	9.6	2.presidency Diwan (office)
Instructions of foreign comp. registration , working in Iraq	11\6\1981		
Iraqi currency abroad and contracting with foreign comp.	1\7\1987		
Providing of lands for annual development plan Depts.	1\9\1981 17\10\1982		

Subject	Date	No.	Issue auth.
Employment of middle staff in the foreign companies	23\12\82	15452	=
a. increase of local currency in new contracts	31\5\1983	7030	=
b. foreign experts and employees at foreign comp. travel should obligatory on Iraq' airways	23\8\84	19205	=
open of offers with participation of Governors	14\10\84	23926	=
tenders accreditation	31\10\84	25596	=
Instruction of general conditions of contracts (communicated corresponded .in Eng. Arabic. with economic and technical benefit.	10\2\85	4632	=
Basis of benefit studies and sub sequent evaluation of development projects	17\2\85	5575	=
Negotiation with comps. To reduce costs and improve contract conditions	26\2\85	6598	
Control of financial relations resulted from contract implementation by companies	13\3\85	8424	
Military neutralized zones	24\6\85	19220	
Contacting regulation between ministries			

Subject	Date	Decision No.	Issue auth.
Employment of middle Iraqi staff to foreign comp. Sites should be at riverside.	20\7\85	23392	=
	11\8\85	25013	=
Employment of Iraqi personnel in foreign companies.	3\11\85	36387	=
Ministries must stress usage of thermo stone and flint coat stone and cement blocks.....usage of stones and sand produced by the relevant installation.	28\11\85	38091	=
	31\5\86	19709	=
			=
Foreign comp. , Iraqi contactors (final pay-obligation relieve certificate)			=
Dealing with foreign, Arab companies individually, contracts must be subjected to secret tenders	18\5\80	20754	
	26\7\89	27149	
Regulations and instructions of involving foreign companies			

Properties imported on temporary Custom transit	25\8\86	21556	
Final report of civil defense and industry security in vital productive projects in Iraq.	15\9\86	24389	
Limitation of block usage and alternatives	27\1\87	3852	
	13\1\87	1728	

Subject	Date	Decision No.	Issue auth.
Company disposables ad scrabs.	14\2\87	6588	=
Projects execution ;	16\4\87	16222	=
Periodical reports on work styles			
Resident engineer supervision			
Usage of custom transit cars			
Regulation for committees			
Setup for initial and final work reception			
Employment of Iraqi staff to foreign companies.	23\4\87	17480	
Any project should not be referred to presidency office as a whole unless distributed in to items	3\6\87	23640	=
National center for constructional laboratories cooperation with implementing authorities	14\6\87	25409	
Equipment and instruments to be imported for the accredited projects related to ministries or national companies, Iraqi side will be tasked to manufacture what could be possible.	23\7\87	21910	=
Employment of Iraqi staffs to foreign companies.	23\7\87	21977	=
Customs tariffs should not be defined in advance.	5\8\87	35191	

Subject	Date	Decision No.	Issue auth.
Instructions related to dealing with foreign companies system in Iraq	13\10\87	44173	=
1. supplies should be logical			
2. goods manifests should be checked			
3. supplies should be unloaded at projects sites			
4. contractor must prepare depots			
5. Supervision of equipment movement.			
6. Equipment and machines handling procedures.			
7. determine actual need for custom transit vehicles			
8. traffic licenses of custom transit			

vehicles should not be renewed unless concerned minister approved that	18\10\87 1\6\83	11228 0437	Deputy prime minister office
buildings designs measures and regulations of delayed payment agreements	18\11\85	11228	
Iraqi cement	28\5\74 25\7\84 18\9\81 10\9\75	5 session15 7 = 15 9 = 11 24=16	Planning board = = directive corporation
Building materials prices Management charges Gypsum materials Negotiation with more than one company and Iraqi side rights should quarantined.			

Subject	Date	Decision No.	Issue auth.
Implementation of resolution 51 sessions 15 at 28\7\7\74 Should be considered.	13\2\85	114	Directive. Corporation chairman
Accountancy instructions to organize the basis by which spent amount can be calculated as to apply the national development plan	29\12\77	177	Planning board
Instructions for carrying out presidency office directive No. 12895 at 17\10\1982 concerning depts. Of negligent contractors	14\5\83	939	Legal Dept. planning Minist
Resigned and retired should not be invited 10 tenders announced by offices they were formerly employed at.			

## **Appendix J**

### **Commentators Contributing to the Assessment**

## Commentators Contributing to the Assessment

The ABA Iraq Initiative gratefully acknowledges the expertise provided by the following commentators, without whom this report would not have been possible. In particular, the working group comprised of members from the ABA Section of Public Contract Law, led by Michael Love, provided extensive and in-depth consultations on the Iraqi procurement laws.

William Carroll  
Dykema Gossett PLLC

Felicia Collins\*  
Unisys Corporation

Paul Debolt\*  
Venable LLP

Terry L. Elling\*  
Venable LLP

Susan Warshaw Ebner\*  
Buchanan Ingersoll PC

S. Jun Jin\*  
Smith, Pachter, McWhorter & Allen, P.L.C.

Brett Howard\*  
Howrey Simon Arnold & White LLP

James Kearney\*  
Womble Carlyle Sandridge & Rice PLLC

Stephen Knight\*  
Smith, Pachter, McWhorter & Allen, PLC

Dismas Locaria\*  
Venable LLP

Michael K. Love\*  
Hunton & Williams LLP

Karen L. Manos\*  
Howrey Simon Arnold & White LLP

Lisa K Miller  
Gadsby Hannah LLP

James Pankovics, PE, CPCM, CPM\*  
Architect/Engineer  
United States Postal Service

Tim Richards  
General Electric Corporation

Steve Schiffman  
Attorney-at-Law

Professor Don Wallace  
Georgetown University Law Center and  
International Law Institute

R. Anthony Welch  
Acting Secretary of Justice  
Federated States of Micronesia

Patricia Wittie\*  
Oldaker Biden and Belair, LLP

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\* Working Group on Iraqi Procurement Processes,  
ABA Section of Public Contract Law