

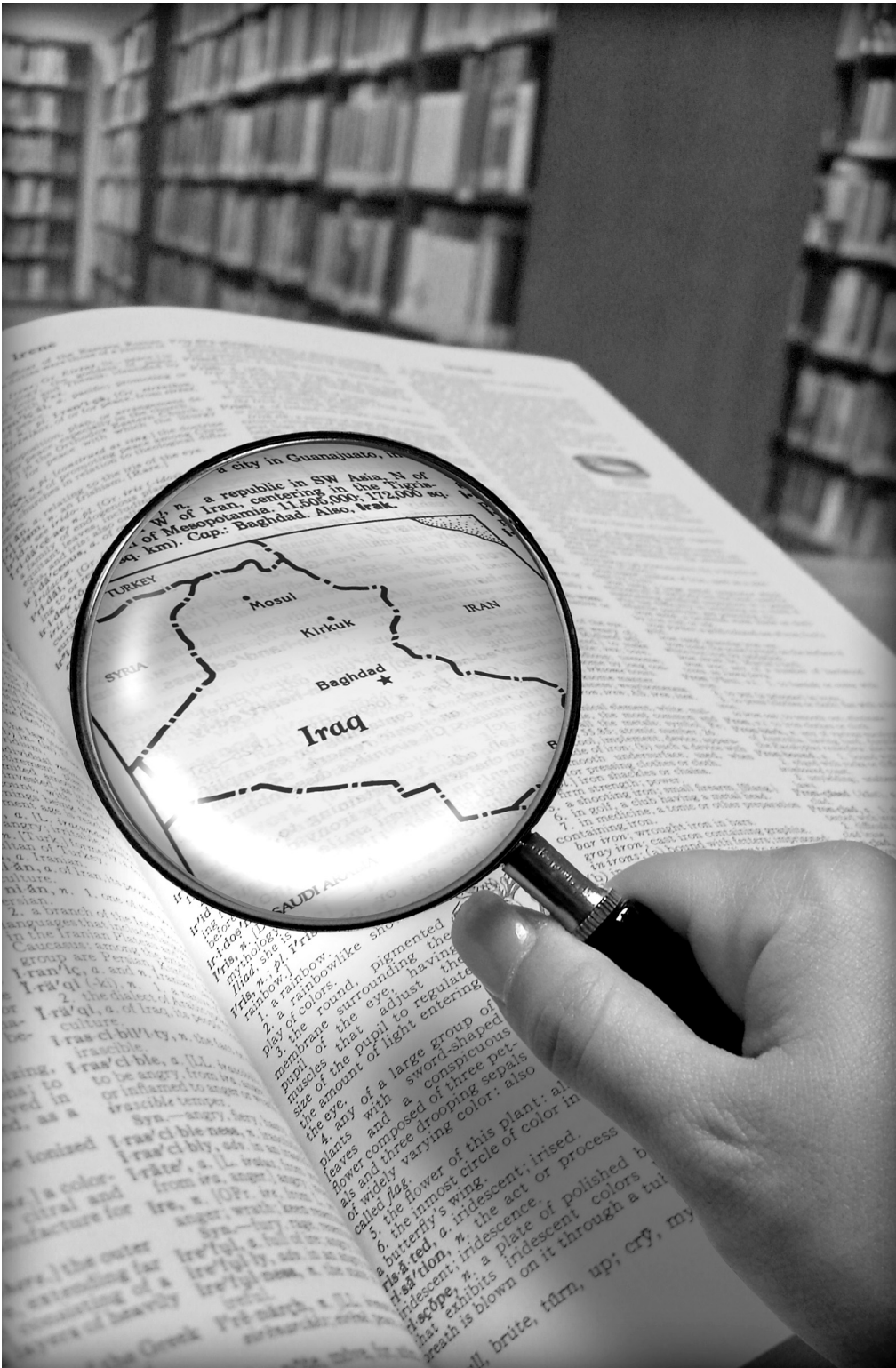


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TRANSFORMING THE PROCUREMENT SYSTEM OF IRAQ

Bruno Wengrowski

The Department of Defense has been in transformation since 2001. Four major areas of emphasis for transformation are: major systems acquisition; joint planning for military operations; planning, programming, and budget execution; and the rewrite of the Defense Supplement to the Federal Acquisition Regulation. After the cessation of hostilities with Operation Iraqi Freedom, a transformation process began to occur in that country, which is critical for the economic development and progress of Iraq. One transformation event is the creation and sustainment of a new procurement and contracting process. This transformation must create an environment for a public process that is built on fairness, best value, and competition.

In the aftermath of World War II, provisional governments were implemented in Germany and Japan. Many American institutions were used as a template for creating capitalist business practices and processes. Due to the success of the Marshall Plan in Germany and the efforts of General MacArthur in Japan, each country prospered and became an economic giant in world commerce. In the period of time before World War II, these two countries operated a fascist system, which transitioned in the post-war period to a capitalist system. During Saddam Hussein's regime between 1979 and 2003, Iraq was also using a fascist economic model, and during this period, major infrastructure investment had not occurred.

Even though Iraq has the potential to be the world's second largest producer of oil and energy products, the Hussein regime did little other than to focus on military development and modernization. Roads, electrical grids, telecommunications, internet operations, and many other infrastructure support mechanisms were in need of replacement or repair. Following Operation Iraqi Freedom, the Coalition Provisional Authority (CPA) was set in place to establish political and economic stability. The CPA quickly set in place a number of orders and memoranda to

establish structure for a future Iraqi central government and economy. A major effort to institute infrastructure, banking, commercial, social and political systems was undertaken.

The United States and its coalition partners realized in order for Iraq to be a viable, competitive player in the world economy, many types of transformation had to occur. One critical transformation is the public procurement and contracting process. Iraq did not have a functional, organized procurement and contracting system, with regulations and an established process.

During the initial stages of post-war Iraq, Ambassador L. Paul Bremer, CPA Administrator, prioritized a need for the United States to set up a framework and process for an Iraqi procurement and contracting system. After the military combat period, the American Army was the largest military component in Iraq and had an operational contracting staff present. The Acting Director of the Army Contracting Agency, Mr. Mark Lumer, SES, and his staff aggressively implemented the establishment of a contracting process and framework for Iraq. The involvement of Brigadier General (RES) Scott Castle, Head of Contract Law, Colonel Anthony “Tony” B. Bell, Head of Contracting Activity, and Lieutenant Colonel Andrew “Andy” Hughes, Chief of Contract Operations, was critical to the success of this effort. Since the coalition process required the cooperation and agreement of thirty countries, this was a significant challenge.

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On August 19, 2003, CPA Memorandum Number 4, *Contract and Grant Procedures Applicable to Vesterd and Seized Property and the Development Fund for Iraq*, was signed by Ambassador Bremer. The term *vesterd* was a contribution of the British and Australian lawyers and is not a common term of art in our legal system. *Vesterd* applied to existing Iraqi assets within country when the hostilities ceased, while seized property was external to that country. The 31-page document, subtitled *Implementation of Regulation Number 3, Program Review Board*, created a framework for implementing a new regulation and policy process. This memorandum largely parallels the Federal Acquisition Regulation (FAR), which became effective April 1, 1984 for the American contracting process. The Iraqi Memorandum Number 4 consists of 13 sections and four appendices. This document contains procedural and operational guidance for contracts and grants.

On May 16, 2004, CPA Order Number 87, titled *Public Contracts*, was signed by Ambassador Bremer. This document identified the Ministry of Planning and Development Cooperation to promulgate contracting policy. The Office of Government Contract Policy was responsible for issuing administrative instructions and regulations. Order Number 87 was identified as the superior regulation; any inconsistencies would be resolved with deference to the Order. This Order has 14 operational sections and a total of 15 pages. To contrast with the American federal guidance, the Iraq contracting regulations consisting of the Order and Memorandum total 46 pages, while the FAR has 53 sections and 1,972 pages.

Sovereignty for Iraq was turned over to an interim government on June 28, 2004, and the CPA was dissolved. The final CPA Memorandum 15 issued that month was an amendment to Memorandum Number 4. The Contracts and Grants Procedures memorandum of August 19, 2003, was amended to permit continuation of the earlier implemented Order Number 87. This document recognized that consistent policy in the use of the Development Fund for Iraq (DFI) must exist. The DFI is used to satisfy outstanding obligations of the Iraqi government as promulgated by United Nations (UN) Security Council Resolution 1546. Sales of oil and other energy products overseas form the basis for the DFI. Thus, the Minister of Finance controls revenues, the contracts, and grants the procurement process.

TRANSFORMING THE IRAQI CONTRACTING PROCESS

Since the United States and UN Security Council directly impacted the public contracts process for Iraq, the following tenets provide the backbone of the Iraqi policy:

1. Conformance to international standards of transparency, predictability, and fairness of treatment;
2. Provision for dispute resolution;
3. Freedom from corruption and undue influence;
4. Creation of a best value system for procurement of goods and services;
5. Full and open competition, a critically important factor for the economy of Iraq and international free trade; and
6. Advancement and modernization of administrative instructions in accordance with best international practices.

Each of these tenets will be sequentially addressed below, with some comparison between the FAR, UN, and Iraqi procurement and contracting regulations.

CONFORMANCE

Conformance is addressed in UN policy documents and the terms transparency, predictability, and fairness of treatment are invoked. In light of the business practices in place in Iraq since the 1970s, these attributes require significant cultural and institutional change and acceptance within the country. Section 6 of CPA Order Number 87, *Standard Public Contract Provisions*, is guided by recognized international standards and best practices. In addition to the generally accepted international commercial practices of the UN Commission on International Trade Law (UNCITRAL), directives of the European Union and World Trade Organization on Government Procurement are referenced to promote transparency, predictability, and fairness of treatment. The FAR language is consistent with the foregoing.

***Dispute resolution has two dimensions:
bid protests and claims.***

DISPUTES

Dispute resolution has two dimensions: bid protests and claims. The FAR-based process uses the Government Accountability Office (GAO) for protests before and after contract award. The United Nations Development Programme (UNDP) Procurement Manual, published in 2003, also has a bid protest process in Chapter 13. In the FAR-based process, after a contract has been awarded, claims made by the contractors are adjudicated through an arbitration process or by a Board of Contract Appeals (BCA). The American contract disputes process is addressed in FAR Part 33. The UNDP Procurement Manual does not have an established procedure for post award claims. For Iraq, Order Number 87 in Section 2 establishes an independent Administrative Tribunal that has jurisdiction over complaints, disputes, or claims arising under the award of public contracts. Section 12 of Order Number 87 closely parallels FAR Part 33 for the adjudication of protests and claims. The Iraqi transformation to the Administrative Tribunal will require a significant adjustment period, since there is no existing organization or agency to use as a pattern.

CORRUPTION AND INFLUENCE

The third tenet of the Iraqi regulation, which addresses freedom from corruption and undue influence, is perhaps the most daunting impediment to Iraq's transformation. The recent history of this country, in addition to prevailing business practices in the region, creates a stiff challenge to implementing a system that would create public confidence. Many of the existing business practices are exclusionary, rather than competitive. Bribes, kickbacks, favoritism, and gratuities are common

commercial practices. The term “collusion” is understood in Middle Eastern countries to be cooperation, and is considered a positive business arrangement. Commercial practices favor family ties and relatives. Creation of new enterprises is very difficult, especially in light of the fact that the banking system is not yet functional. Cash transactions are the norm for payments. There is no loan program in existence. A new system for public service must be created, free of corruption and undue influence. Reduction and removal of corruption may take the longest amount of time to occur, since these practices have been institutionalized in Iraq’s business culture for centuries as acceptable behavior.

BEST VALUE

Traditional contracting relies on awarding to the *lowest price, technically acceptable*, qualified firm. Best value contracting does consider price, but also permits consideration of other factors such as past performance, quality, delivery, management expertise, technical approach, experience of key personnel, management structure, and risk. Best Value contracts awarded under the FAR use Part 15 as a guide, and use the aforementioned factors for evaluation to determine which offeror proposed the best value approach. Chapter 6 of the UNDP Procurement Manual also provides guidance on best value and source selection. For Iraq, Section 5 of Order Number 4 specifically addresses the process determining the best value. In addition to price or cost, some suggested evaluation criteria that can be used are merits of technical solution, risk, past performance, experience, and management structure. Order Number 4 also requires that the relationship between price and non-price factors be ranked.

COMPETITION

The next precept is the vital importance of competition to Iraq’s economy and for multi-lateral trade. Though Order Number 87 closely parallels the content of the FAR and has similar language, the current reality is that competition exists only on a very limited scale. Iraq does not have a significant middle class or a broad industrial base. Wealth is concentrated in the hands of a few individuals favored by the Hussein regime. The industrial base has many companies that were formerly government-owned or -subsidized. Existing companies in Iraq will also need to develop business relationships with foreign companies. Initially, the foreign companies may act as prime contractors and the Iraqi firms as subcontractors or suppliers. The Iraqi contracting regulations require that tenders (solicitations) be issued in Arabic and Kurdish languages, as well as other appropriate languages, where it is anticipated that offers will be made from entities or individuals outside of Iraq. Likely, the other language will be English. Order Number 87 requires sufficient information, including but not limited to standard terms and conditions, a statement of work/specification, and delivery schedule to be included in the tender. The tender shall include enough time for vendors to reasonably respond and provide them with the opportunity to request clarification.

With regard to limited competition, the Iraqi regulation has a close parallel to FAR Part 19, which has preferences for certain types of businesses. The FAR has unique set asides for small businesses, including economically disadvantaged, minority-owned, disabled veteran-owned, and others. When these preferences are invoked, large business cannot participate in the process for a specific solicitation. In Part 6 of Memorandum Number 4, the Iraqi regulation states that if two responsible and responsive Iraqi-based vendors are available, competition would be available to them only. Non-Iraqi sources would not have a basis for a bid protest if two or more qualified Iraqi sources can be solicited for the requirement.

MODERNIZATION AND BEST INTERNATIONAL PRACTICES

The last principle is to build on and modernize administrative instructions in accordance with best international practices. Section 7 of Memorandum Number 4 requires posting and dissemination of requirements in excess of \$10,000. Methods used to encourage and foster competition include advertising in local media, posting on electronic bulletin boards, the World Wide Web, and other sources. Section 2 of Order Number 87 also permits, for reasons of administrative convenience, a governmental unit or agency could agree with another to designate which unit would be responsible for contracting actions. This administrative accommodation is similar to the Economy Act of the United States, which would allow, for example, the Environmental Protection Agency to contract on behalf of the Department of Agriculture. Best international business practices in the UNDP Procurement Manual include competition, best value and ethics; the same is true for the FAR. Modernization will be achieved with a paperless contract, a payment process, and a Web-based system of advertising business opportunities, solicitations, and awards.

COMPARISON BETWEEN THE FEDERAL ACQUISITION REGULATION AND IRAQ REGULATIONS

The Iraqi regulations are less specific and are not as inclusive as the FAR. The FAR is also a product of politics and includes more subject matter than the Iraqi regulations. Table 1 is used to cross reference the Topics as listed in the FAR with the corresponding Iraqi Order 87 and Memorandum 4.

GRANTS

Section 3 of Memorandum 4 defines a *contract* as “a written agreement whereby the CPA or Coalition Forces acquired goods, services, or construction from a person or entity under prescribed terms and conditions, for the purposes of assisting the Iraqi people or assisting in the recovery of Iraq.” The same section defines a *grant* as “a written instrument that transfers Iraqi Funds from the CPA or Coalition forces to a recipient grantee, in order to carry out a program that directly benefits the

TABLE 1: COMPARISON BETWEEN THE FAR AND IRAQ REGULATIONS

(Note: N/A designates not addressed or covered in the respective regulation.)

TOPIC	FAR PART Number	ORD. 87 Sec. Number	MEMO. 4 Sec. Number
Regulation Systems	1	1 & 2	2 & 5
Definitions	2	N/A	3
Improper Business Practices	3	8	6
Administrative Matters	4	N/A	Appendix A
Publicizing Contract Actions	5	4	7
Full and Open Competition	6	4	6
Acquisition Planning	7	N/A	N/A
Required Sources of Supply	8		
Vendor Qualifications	9	9	N/A
Market Research	10	N/A	N/A
Describing Agency Needs	11	4	3 & Appendix B
Acquisition of Commercial Items	12	N/A	N/A
Micro and Small/Simplified Purchases	13	7	7
Sealed Bids	14	5	7
Negotiated Contracts and Evaluation Factors	15	5	7 & Appendix D
Types of Contracts	16	7	N/A
Special Contracting Methods	17	N/A	N/A
Small Business Program	19	N/A	N/A
Labor Laws	21	N/A	N/A
Environment, Safety, and Drug-free Workplace	23	N/A	N/A
Protection, Privacy, and Freedom of Information	24	5	12
Foreign Acquisitions	25	N/A	N/A
Other Socioeconomic Programs	26	N/A	N/A
Patents, Data, and Copyrights	27	N/A	Appendix B
Bonds and Insurance	28	N/A	Appendix B
Taxes	29		Appendix B
Cost Accounting Standard Administration	30	N/A	N/A
Contract Cost Principles and Procedures	31	10	N/A

(continued)

**TABLE 1: COMPARISON BETWEEN THE FAR
AND IRAQ REGULATIONS (continued)**

(Note: N/A designates not addressed or covered in the respective regulation.)

TOPIC	FAR PART Number	ORD. 87 Sec. Number	MEMO. 4 Sec. Number
Contract Financing	32	10	10
Protest, Disputes, and Appeals	33	12	Appendix B
Major System Acquisitions	34	N/A	N/A
Research and Development Contracting	35	N/A	N/A
Construction and Architect Engineer Contracts	36	N/A	Appendix B
Service Contracting	37	N/A	N/A
Federal Supply Schedule Contracting	38	N/A	N/A
Acquisition of Information Technology	39	N/A	N/A
Acquisition of Utility Services	41	N/A	N/A
Contract Administration and Audit Services	42	N/A	N/A
Contract Modifications	43	N/A	Section 7
Subcontracting Policies and Procedures	44	N/A	N/A
Government Property	45	N/A	N/A
Quality Assurance	46	N/A	N/A
Transportation	47	N/A	N/A
Value Engineering	48	N/A	N/A
Termination of Contracts	49	11	Appendix B
Extraordinary Contractual Actions	50	N/A	N/A
Use of Government Sources by Contractors	51	N/A	N/A
Solicitation Provisions and Contract Clauses	52	6	Appendix B
Forms	53	N/A	N/A
Grants	N/A	N/A	2, 9, & Appendix C

Note: Parts 18, 20, 22, and 40 of the Federal Acquisition Regulation are reserved and not used.

Iraqi people or assists in the recovery of Iraq.” The key distinction is that a contract usually results in the acquisition of goods, services, or construction with a defined completion or end product. A grant typically benefits the public good and is often used for education and health care programs. Contracts are typically awarded to profit-motivated business entities, whereas grants are used for universities or non-profit organizations or individuals. The FAR does not address grants, however, but guidance is published in the Department of Defense Grant and Agreement Regulatory System (DGARS) directives.

Though the Iraqi regulations do specify a preference for a sealed bid with a public opening process, the use of negotiations will likely be the norm. The FAR has many more types of contracts, agreements, and special methods than the Iraqi counterpart. One interesting observation is that the FAR has a statutory prohibition against awarding a cost-plus-percentage-of-cost contract. The obvious reason for the proscription is due to the lack of disincentive for a contractor to control costs, since the longer the meter runs, more profit is earned without any risk. Similar to the FAR, the UNDP Procurement Manual in Chapter 13 discourages the use of percentage contracts, since they are open-ended. It would be prudent for the Iraqi regulations to also exclude a cost-plus-percentage-of-cost arrangement.

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The Iraqi regulations are silent on the following areas: acquisition planning, market research, acquisition of commercial items, labor, environment, safety, freedom of information, foreign acquisitions, patents and technical data, bonds, insurance and taxes, major systems, construction and architect-engineer contracts, service and utility contracts, contract modifications, subcontract policies and procedures, quality assurance, government-furnished property, transportation, value engineering, extraordinary contractual actions, and use of government sources by contractors. The FAR-based system has a more complex and broad agenda, which is impacted by Executive Orders and statutes. Our social program is more comprehensive and our business practices are more sophisticated than those of other nations.

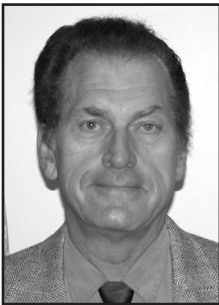
CONTINUING THE TRANSFORMATION OF CONTRACTING IN IRAQ

What are the next courses of actions necessary to insure success of a free and competitive contracting system for Iraq? The Iraq central government will need to

formalize a program to establish a system for public service employment, perhaps similar to the American civil service. Next, the various ministries could determine which ministry/agency would take the lead as a prototype organization for contracts. Next, for consistency and continuity, standardized, multi-lingual forms need to be developed for purchase requests, procurement packages (to include statement of work/specifications), source selection and evaluation guides, tenders (solicitations), contract awards, and contract modifications. Many of these forms could use the FAR Part 53 samples. The Defense Acquisition University could develop a course to train local national Iraqi civil servants on proper policy and procedures. Once trained, the Iraqis could be employed at the Project and Contracting Office in Baghdad.

CONCLUSION

Just as the United States discovered that it is easier to win battles than to maintain internal peace in Iraq, the transition and transformation process to implement a viable contracting system will take time. The existing Order 87 and Memorandum 4 provide an excellent initial framework for a contracting process based on a market economy. The 46 pages of regulations have essential and substantive content to permit a system to effectively and efficiently function and create public confidence. A more critical challenge for transformation is to change the old system based on favoritism and business practices, which are pervasive in the Middle East.



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