

COALITION PROVISIONAL AUTHORITY ORDER NUMBER 87

PUBLIC CONTRACTS

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

Recognizing that public contracts laws should conform to international standards of transparency, predictability, fairness of treatment; provide for dispute resolution mechanisms; be free from corruption and undue influence; and create a system to procure goods and services at the best possible value for the government,

Noting that the concept of full, fair and open competition is of critical importance to the economy of Iraq and the goal of free trade among nations,

Building on the existing Iraqi laws in the field, including administrative instructions, and modernizing them in accordance with best international practice,

I hereby promulgate the following:

Section 1 Principles of Government Public Procurement

- 1) This Order applies to all procurements of goods, services, and construction services by the State of Iraq acting through Ministries or other federal agencies (collectively “agencies”); or governmental units including Regions; Governorates; and all other subdivisions of the State of Iraq (collectively “governmental units”) that may commit public funds. Procurement is the acquiring by contract with public funds of goods, services or construction services by and for the use of the government through purchase or lease. The State of Iraq through Ministries or other federal agencies; Regions; Governorates; and all other subdivisions of the State of Iraq shall commit public funds in accordance with the following basic principles:
 - a) To the maximum extent practicable, full, fair and open competitive public bidding procedures, including, but not limited to: effective tender publication; objective bid evaluation criteria; public bid opening; and, the use of electronic commerce methods.
 - b) International standards of transparency, predictability, fairness and equality of treatment;

- c) Procurement process integrity, minimum ethical standards and non-conflict of interest;
- d) Offeror's right to file tender protests and related appeals;
- e) Tender dispute resolution mechanisms and the timely resolution of such disputes.

Section 2

Office of Government Public Contract Policy

1) Establishment and Responsibilities

- a) There shall be established, within the Ministry of Planning and Development Cooperation, an Office of Government Public Contract Policy. The head of this Office shall report directly to the Minister of Planning.
- b) The Office of Government Public Contract Policy shall have responsibility for:
 - i) Coordination of government public contract policy for all ministries and public entities of the government, including, but not limited to, the issuance, after appropriate provision for notice to and comment by interested parties, of implementing regulations and administrative instructions in the Arabic and Kurdish languages, and such other languages as appropriate, in furtherance of this Order;
 - ii) Establishment and adoption of rules for an independent Administrative Tribunal to have jurisdiction over complaints and disputes arising under or relating to the award of public contracts by the government;
 - iii) Recommendations for amendments to this Order and related Iraqi laws, regulations and administrative instructions;
 - iv) Development and adoption of standard government public contract provisions; and
 - v) Training of government public contracting personnel for the proper application of this Order and its implementing regulations and administrative instructions.

2) Application

- a) Every governmental unit or agency described in Section 1.1 "government" shall designate a contracting office that shall be responsible for the contracting activities of the governmental unit or agency. For reasons of administrative convenience, a

governmental unit or agency may agree with another governmental unit or agency that the latter will be responsible for the contracting activities of the former.

- b) In addition to the standard contract provisions adopted for all governmental units or agencies, each individual governmental unit or agency, after concurrence by the Office of Government Public Contract Policy, may include standard contract provisions that are necessary for the particular objectives of said governmental unit or agency.
- c) This Order applies to Iraqi state-owned enterprises when awarding public contracts for the procurement of goods, services or construction services that are directly financed by government funds.

Section 3 Contracting Authority

- 1) The authority to obligate government funds, award and sign government public contracts, enter into and authorize material modifications to such contracts, and authorize the payment of invoices and claims, shall rest solely with a qualified government agency or a committee within each governmental unit or agency, duly appointed under the authority of this Order.
 - a) Agency and committee members shall not be political appointees or members of the office within the governmental unit or agency that requires or benefits from the contractor's performance under the contract to be awarded. Political appointees are Governing Council members and their deputies; ministers and deputy ministers; governors; judges; members of national commissions, deputy commissioners of such commissions, directors and equivalent officials within Iraqi commissions, boards or similar organizations; all elected members of the Iraqi Interim Government or Iraqi Transitional Government, including the national executive; and those individuals appointed by the public officials listed in this Section to advise them.
 - b) The individuals vested with the authority described in this Section shall not directly report to the official or office requiring or benefiting from the contractor's performance under the contract.
- 2) In all public contracts, there shall be a standard provision advising contractors of the public agency or committee that shall have this authority and the full scope of that authority. Included in that provision, there shall be reference to the fact that direction from the government to the contractor that affects the rights and liabilities of the parties to the contract from anyone other than the designated responsible public official shall not be authorized and shall not have any effect.

Section 4

Full and Open Competition

To the maximum extent practicable, government public contracts shall be awarded on a competitive basis. Prior to the competitive award of public contracts, the Contracting Authority, vested with the authority pursuant to Section 3 of this Order, shall state in writing the awarded contract price to be fair and reasonable under the prevailing facts and circumstances.

- 1) Exceptions – Public contracts may be awarded using other than full and open competitive public contracting procedures under the following conditions:
 - a) When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the goods or services to be purchased under the contract may only be manufactured or supplied by a particular entity or otherwise is available from a very limited number of entities.
 - b) When for reasons of extreme urgency brought about by events not attributable to the Contracting Authority, the public interest does not permit award on a fully competitive basis.
 - c) When the goods to be purchased are:
 - i) Required as a partial replacement for or addition to goods purchased under an existing or previous contract; or
 - ii) Required to be compatible or interchangeable with existing goods purchased from the original source who supplied the existing goods.
 - d) When the use of other than full and open competitive public contracting procedures is necessary to promote economic or institutional development among certain population sectors or geographic regions of the State of Iraq or of Iraqi state-owned enterprises. These regulations shall also indicate the circumstances where the use of other than full and open competitive public contracting procedures may be used to promote economic or institutional development among certain population sectors or geographic regions of the State of Iraq or of Iraqi state-owned enterprises.
 - e) When international agreements (bilateral, plurilateral, or multilateral) or treaties to which the State of Iraq is a party require the use of other than full and open competitive public contracting procedures, either by their explicit terms or by implication.

- f) If the anticipated value of the public contract is below certain monetary thresholds, as determined by regulations issued in accordance with Section 2, a streamlined procedure for the procurement of lower priced goods and services shall be used.
 - g) The Office of Government Public Contract Policy shall issue implementing regulations indicating, among other matters, those circumstances permitting other than full and open competition and specifying the streamlined procedures for awarding public contracts using other than full and open competitive public contracting procedures. These regulations shall require documentation previous to every occasion where other than full and open competitive public contracting procedures are used.
- 2) Prequalification - Prequalification of offerors, including required deposits or bonds, shall be implemented in such a manner that does not unreasonably limit competition. If a deposit is required as a condition for participating in a competitive tender, such deposit shall be reasonable in amount, based upon the value of the contract, and returned to an unsuccessful offeror. The use of bonds, as opposed to deposits, is encouraged.
- 3) Notice of Tenders - The Office of Government Public Contract Policy shall issue implementing regulations that address, but are not limited to, the following:
- a) The notice of tenders shall provide the maximum possible exposure of the proposed public procurement action. Notices shall be published at a minimum in the Arabic and Kurdish languages, as well as such other language as may be appropriate where it is anticipated that offers will be made from entities or individuals outside the State of Iraq.
 - b) The notice shall provide potential offerors with sufficient information, including but not limited to, standard terms and conditions, the statement of work and a delivery schedule, to reasonably respond to the tender. In this regard, all tenders shall also contain the factors upon which offerors shall be evaluated, and the failure of the government to evaluate an offer against the stated evaluation factors in the notice shall be a basis for filing a tender protest pursuant to this Order.
 - c) The notice shall provide potential offerors with sufficient time to reasonably respond.
 - d) The notice shall provide potential offerors the opportunity to request clarifications about the tender and for extensions of time to respond to the tender, if necessary.

- e) The notice shall provide a date by which responses to tenders shall be due, and provide those specific instances where late offers can be accepted.
- f) The implementing regulations to this Order shall provide for exceptional circumstances when the notice is not required.

Section 5 Negotiated Contracts

- 1) Authorization - Although competitive bidding is preferred in general, competitive negotiated contracts that comply with this Order are hereby specifically authorized and should be employed whenever the interests of the governmental unit or agency concerned will best be served by awarding the contract on a basis other than the lowest price.
- 2) Process
 - a) Tender notices for negotiated contracts shall specifically indicate that the contract shall be awarded on a basis other than the lowest price.
 - b) The notice shall state those factors, in addition to price, that will be evaluated and the relative importance of each of these factors (this is not an exhaustive list, and all of these factors, except price or cost, may not necessarily be required on all procurements):
 - i) The merit of the technical solution proposed to meet the government's requirements;
 - ii) The risk associated with the offeror's proposed approach as it relates to accomplishing the requirements of the tender;
 - iii) Past performance on recent and relevant government and commercial efforts;
 - iv) Experience of key personnel; and/or
 - v) Management structure.
 - c) The notice shall state the relationship between the price and the non-price factors in making an award (e.g., are the non-price factors more important, less important, or of equal importance to price).
 - d) The government shall have the right to enter into direct negotiations with offerors after their written response to the tender has been received by the government.

The purpose of entering into direct negotiations is to clarify offers, respond to questions, and negotiate price. At no time during the negotiation process (and after award) shall information, including price, about proposals from other offerors be discussed or made public. The price of the awarded contract shall be made public.

- e) If requested, offerors shall have the right to amend their offers after negotiations and prior to final evaluations.
- f) All members of procurement evaluation teams shall be bound by the principles stated in Section 8 of this Order on “Procurement Integrity and Conflicts of Interest”.

Section 6 Standard Public Contract Provisions

- 1) The Office of Government Public Contract Policy shall issue and publish implementing regulations that include standard public contract provisions. These provisions may include additional conditions not specifically required by, but otherwise consistent with this Order. These regulations may provide that certain conditions apply or do not apply depending on the value or type of the public contract.
- 2) The Office shall, in preparing the implementing regulations required by this Order, be guided by recognized and accepted international standards and best practices, such as those contained in the United Nations Commission on International Trade Law (UNCITRAL), “Model Law for Procurement of Goods, Construction, and Services”, Directives of the European Union, and the World Trade Organization Agreement on Government Procurement. Where appropriate, these regulations shall also apply generally accepted international commercial practices.

Section 7 Statements of Work, Contract Specifications, and Contract Types

- 1) Statements of Work and contract specifications must accurately reflect the government’s needs and must be written in such a way that they do not unduly restrict competition.
- 2) Proprietary features or brand names shall be avoided. If a brand name or proprietary feature is included in a specification, offerors must be notified of the features of the brand name and be advised that they may offer an equivalent or equal product.
- 3) The contract type has a direct effect on risk allocation in public contracts. Fixed-priced contracts are generally preferred over cost contracts, especially where a

reasonable price estimate can be made by the government and the contract anticipates a specific deliverable.

- a) A fixed-price contract provides for a price that is not subject to adjustment on the basis of the contractor's costs incurred in performing the contract. A fixed-price contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.
- b) A Cost-reimbursement contract provides for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of committing funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.

Section 8

Procurement Integrity and Conflicts of Interest

- 1) The Office of Government Public Contract Policy shall issue and publish implementing regulations that implement, at a minimum, the following ethical standards:
 - 2) No minister, official or consultant under contract to support the governmental unit or agency involved in any tender shall have a financial interest in the outcome of the tender.
 - a) All proprietary or competition sensitive information received by ministers, officials, or contractors during the tender process shall remain confidential.
 - b) The post-government employment of ministers and officials substantially involved in the government procurement process shall be restricted for a reasonable period of time in accordance with this Section. Those ministers and officials substantially involved in the following activities shall not seek nor accept employment with the offeror awarded the contract:
 - i) A particular tender;
 - ii) The administration of the contract awarded subsequent to a particular tender;
or
 - iii) The surveillance of the work performed under a particular contract.
- c) No offeror shall have a business interest that is in conflict with its ability to use its best efforts to satisfy the requirements of the contract.

Section 9
Exclusions from Participation

- 1) To ensure the integrity of the procurement process, entities and individuals may be excluded from competing for government public contracts in accordance with the following provisions.
 - a) As defined in the implementing regulations issued under the authority of this Order, misconduct, including but not limited to the following, shall be the basis for exclusion:
 - i) Willful violations of this Order or the implementing regulations issued under the authority of this Order;
 - ii) Willful failure to perform in accordance with one or more material terms of a public contract;
 - iii) Conviction of a criminal offense; or
 - iv) Other misconduct indicating a lack of business integrity or business honesty that seriously and directly affects the ability of the contractor to perform.
 - b) Responsibilities for ensuring the integrity of the procurement process shall be carried out by the Office of Government Public Contract Policy which shall issue implementing regulations that shall, at a minimum:
 - i) Provide standards for exclusion;
 - ii) Provide a fair, equitable and expeditious process with an opportunity to be heard before a determination for exclusion is made;
 - iii) Provide a method by which an excluded entity may apply for re-instatement;
and
 - iv) Provide that a public record be maintained and published of all excluded individuals and entities.

Section 10
Financial Requirements

- 1) No tender notice shall be published, nor any tender commenced, prior to a certification by the senior financial officer, or his official designee, of the

governmental unit or agency offering the tender that there are funds available sufficient to satisfy the government's estimated cost of any resulting contract.

- 2) No contract shall be awarded without a certification that sufficient funds are available and dedicated (i.e., may not be used for any other purpose) to the contract in an amount equal to the full contract price.
- 3) Regulations shall be issued and published providing for the right of any governmental unit or agency awarding a public contract to have access to and have the authority to audit a contractor's financial records related to the public contract that was awarded. This right to audit, together with any additional oversight responsibilities, shall be exercised by an office that is not responsible for tender issuance. The Office of Government Public Contract Policy may establish a central agency for public procurement audit services.

Section 11 **Termination for the Convenience of the Government**

- 1) The right of the government, acting through the Contracting Authority vested with the authority described in Section 3 of this Order, to terminate public contracts entered into under the authority of this Order, in whole or in part, when it is in the government's best interest, may be included in contracts awarded by the government.
- 2) If a contract is terminated for the convenience of the government, the rights, duties, and obligations of the parties, including compensation to the contractor, shall be in accordance with the procedures set forth in Section 12 of this Order on "Dispute Resolution".
- 3) The Office of Government Public Contract Policy shall issue implementing regulations describing the circumstances under which the government can terminate public contracts pursuant to the authority of this Order.

Section 12 **Dispute Resolution**

All interested parties, as defined below, to a government public contract tender process and those entities and individuals that have been awarded government public contracts have certain rights against the government that may include the ability to seek and obtain monetary relief against the government.

- 1) Tender Protests

- a) Right to File - Any offeror deemed to be an interested party, that believes it has not received fair treatment in the award of a government public contract, or believes that the provisions of a tender unfairly restrict full and open competition in a manner that inappropriately excludes it from competing, may file a tender protest with the Administrative Tribunal established pursuant to the authority of this Order.
 - i) An interested party is an actual or prospective bidder or offeror that has a reasonable chance for award and whose direct economic interest would be affected by the award of a public contract or by the failure to award such a contract.
 - ii) The Tribunal shall rule on the protest within the shortest period of time practicable and may, among other reasonable remedies, direct the contracting authority to take corrective action, including but not limited to, terminating the awarded contract, resoliciting tenders, reevaluating tenders received for consideration, award reasonable tender preparation costs, or take other actions necessary to comply with this Order and the implementing regulations promulgated under the authority of this Order.

- b) Results of Filing - Upon the filing of a tender protest after award, the governmental unit or agency that awarded the public contract shall immediately order the awarded contractor to cease working on the contract.
 - i) If a minister or the senior official responsible for contracting within governmental unit or agency awarding the contract determines the requirement being satisfied by the contract is of such importance to the public interest that ceasing work will unduly harm the public interest, such minister or official may, by written determination of such undue harm, and after notice to the Tribunal, order the governmental unit or agency to notify the contractor to proceed with the contract.
 - ii) The minister or official, in making this determination, shall also consider the likelihood of success of the protest.

- c) Effect of Grant of Protest - If the Tribunal sustains the tender protest and either directs the contracting authority to award the contract to the protestor or directs the contracting agency to take corrective action consistent with this Order or the regulations promulgated under the authority of this Order, the governmental unit or agency shall immediately terminate the contract with the originally awarded contractor, if that contractor is not selected for award following the corrective action ordered by the Tribunal. Such contractor may have certain rights against the government as discussed in Subsection 2 below.

- d) Additional Rights of Unsuccessful Offerors - There shall be notices published of all public contract awards. All unsuccessful offerors in a government public contract competition shall be notified by the authority offering the tender, and such unsuccessful offerors shall be entitled to receive a written explanation of the factors upon which it was not successful. Such explanations shall be provided promptly and with full consideration to the proprietary nature of the information provided to the government by the other offerors, including the awardee, of the tender. Decisions of the Tribunal may be appealed by either party to the appropriate Court with jurisdiction over the procurement.
- e) Implementing Regulations - The Office of Government Public Contract Policy shall issue implementing regulations published in conjunction with this provision that address, but are not limited to, the following:
 - i) The establishment of the independent Administrative Tribunal referred to in Section 2.1(b)(ii) of this Order;
 - ii) The rules of the Tribunal, including time and place requirements for filing protests, both before and after public contract award (including the effect on such time requirements if a request for explanation is made), and for issuing decisions;
 - iii) The time requirements for an unsuccessful offeror to request an explanation of the governmental unit or agency decision and for the governmental unit or agency to respond to that request;
 - iv) The nature of the relief that may be granted by the Tribunal; and
 - v) The legal bases upon which a tender protest may be filed.

2) Claims

- a) Right to File - A contractor has a right to make a claim to the authority awarding the public contract that a condition of the contract has not been followed or that it has otherwise been treated in an unfair way. This right to make a claim shall also apply to a contractor whose contract has been terminated as a result of a decision by the Tribunal hearing a tender protest to terminate its contract where it believes it is entitled to additional compensation for work under its terminated contract, but not yet paid.
- b) Process - A contractor seeking to exercise its rights under this Subsection must first seek a final written decision on the merits of its claim from the governmental

unit or agency that awarded the contract by submitting a written request to the contracting authority for that governmental unit or agency. This request shall specify that amount that the contractor believes it is owed and the basis for the request. This final decision must be prepared by the contracting authority and it must be issued within a reasonable period of time. If after a reasonable period of time, the contractor does not receive a final written decision from the appropriate authority, the contractor may deem this lack of a response as a denial of its claim.

- c) Appeal - If the contractor is dissatisfied with the final written decision of the governmental unit or agency, it shall have the right to file an appeal with the court having jurisdiction over disputes between the government and private parties (or such other Court granted jurisdiction to hear such cases), which shall render its decision within a reasonable period of time.
- d) Regulations - The Office of Government Public Contract Policy shall issue regulations in coordination with the Ministry of Justice implementing the claims process described in this subsection. The regulations shall include the following subjects and may include other subjects:
 - i) The office within the governmental unit or agency where claims may be filed;
 - ii) The time for filing claims with the governmental unit or agency and for its decision;
 - iii) The time for filing appeals and for decisions on such appeals;
 - iv) The scope of review, including but not limited to, whether to completely review all of the facts and circumstances of the claim or to review a narrow point of law, or whether a rational basis exists to support the contracting authority's decision;
 - v) The responsibility of the contractor to continue prosecuting the work under the contract while a claim or appeal is pending;
 - vi) The legal bases upon which claims may be filed including, but not limited to, claims concerning contract modifications and terminations; and
 - vii) Such additional rules and procedures consistent with the responsibilities and jurisdiction granted by this Order.
- e) The State of Iraq, acting through the Contracting Authority vested with the authority described in Section 3 of this Order, shall be able to make a claim in a court of proper jurisdiction against the contractor to enforce the government's

rights under the contract. The State of Iraq shall be represented in the court of proper jurisdiction by a representative designated by the Ministry of Justice.

- f) Alternative Dispute Resolution - In resolving all such disputes (*i.e.*, whether they are tender protests or claims during administration of a public contract), principles of alternative dispute resolution shall be used to the maximum extent possible, so long as both parties agree.

Section 13 **Effect on Present Iraqi Law**

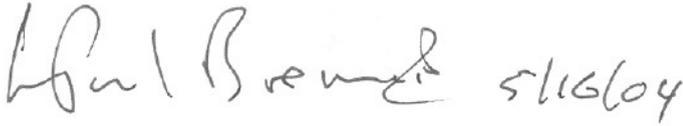
- 1) Tenders instructions (Outfitting and Buying) for State Agencies and the Social Sector, issued by the Legal Department/Planning Organization/Council of Ministers/Republic of Iraq, 2001 (Tender Instructions) are hereby suspended.
- 2) Instructions for Implementation and Follow up of Projects and Works of National Development Plan. Issued by the Legal Department/Ministry of Planning/Republic of Iraq, 1988 (Implementation Instructions) are hereby suspended.
- 3) Any provision of Iraqi law, including but not limited to, statutes, decrees, regulations, and instructions, that is inconsistent with this Order is hereby suspended to the extent of such inconsistency.

Section 14 **Implementation**

- 1) The Minister of Planning, through the Office of Government Public Contract Policy shall issue Administrative Instructions and regulations to implement this Order.
- 2) Until such time as regulations are promulgated by the Ministry of Planning and Development Cooperation under the authority of this Order, Coalition Provisional Authority Memorandum Number Four and its appendices, dated 19 August 2003 (CPA/MEM/19 August 2003/04) (“Memorandum Four”), shall serve as the implementing regulation for this Order.
- 3) In the event of an inconsistency between Memorandum Four and this Order, Memorandum Four shall be interpreted in a manner that is consistent with this Order.
- 4) Except as otherwise specifically provided by Coalition Provisional Authority Order Number 71, Local Governmental Powers, dated 6 April 2004 (CPA/ORD/6 April 2004/71), or other law or regulation, including other Coalition Provisional Authority orders, this Order shall apply to the federal and regional governments, Governorates, and municipal and local governments.

Section 15
Entry into Force

This Order shall enter into force upon signature.

Handwritten signature of L. Paul Bremer and the date 5/16/04.

L. Paul Bremer, Administrator
Coalition Provisional Authority