

Iraqi Procurement Processes Commentators

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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:

- I. Transparency/Predictability
- II. Work Statements
- III. Competition
- IV. Dispute Resolution
- V. Procurement Integrity/Ethics
- VI. 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

I. Transparency/Predictability

1. Transparency

Transparency is a central tenet of a functional and effective procurement regime. Transparency has been defined variously¹ 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 on 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 on 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

¹ 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).

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.

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 on 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.

2. 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.

3. 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.

A) Publication of tender notices

As an overarching comment, the Iraqi procurement statute should require that tender notices contain² 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 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.

² Elements need not be set forth verbatim, but may be incorporated by reference, if the elements so incorporated are *readily* available from the purchasing agency.

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 responsible³. 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, prequalified⁴, 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.

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

³ See footnote 5.

⁴ 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.

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.

B) 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.

C) 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. Tenderers 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.

D) 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.

E) 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.

F) 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.

II. Work Statements

1. 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 American Bar Association 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.

2. 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.

III. Competition

1. 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:

1. Use full and open competition to the maximum extent practicable.
2. Permit acquisitions without competition only when authorized by law.
3. Restrict competition only when necessary to satisfy a reasonable public requirement.
4. Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis.
5. Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).
6. State in the solicitation the bases to be used for evaluating bids and proposals and for making award.
7. Evaluate bids and proposals and make award based solely on the criteria in the solicitation and applicable law.

8. Grant maximum public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information, and personal privacy rights.
9. Insure that all parties involved in the acquisition process must participate fairly, honestly, and in good faith.
10. 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 responsible⁵ 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 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

⁵ 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).

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.”

2. 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 on 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.⁶ 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 on 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 on

⁶ 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 on 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.

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 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).

3. 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 offerors⁷.

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

⁷ 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.

adequately address the requirement that the solicitations advise offerors of the bases on which their offers will be evaluated. 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.

IV. 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 on 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.

1. 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.

2. 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.

3. 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.

V. 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.

1. 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 on 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 value⁸, 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 value⁹, including promise of employment

⁸ 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.”

⁹ See footnote 8.

- ✓ Seeking or obtaining information that is not available to all competitors and that gives the recipient an unfair competitive advantage¹⁰

2. 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 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

¹⁰ 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.

the procurement process. The Iraqi Procurement Processes do not necessarily anticipate the details of organization and allocation of responsibilities which 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

VI. 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 on 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 on 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?

1. 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 firms¹¹. 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 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.

¹¹ 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.

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.¹² 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.

2. 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

¹² 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.

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 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.

3. 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.

4. 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.