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ABBREVIATIONS AND ACRONYMS

CIP	Carriage and Insurance Paid
CPA	Coalition Provisional Authority
CPA87	CPA Order No. 87 on Public Contracts (May 2004)
DFI	Development Fund for Iraq
ETPP	Emergency Textbook Provision Project
IAMB	International Advisory and Monitoring Board
ICB	International Competitive Bidding
ID	Iraqi Dinar
IFI	International Financial Institutions
IMF	International Monetary Fund
IRFFI	International Reconstruction Fund Facility for Iraq
IRRF	Iraqi Relief and Reconstruction Fund
ILO	International Labour Organization
ITF	Iraq Trust Fund
MA	Monitoring Agent
MIM	Master Implementation Manual
MDB	Multilateral Development Bank
MOF	Ministry of Finance
MOPDC	Ministry of Planning and Development Cooperation
NCB	National Competitive Bidding
NGO	Non-Governmental Organization
OGPCP	Office of Government Public Contract Policy
OPR	Operational Procurement Review
PDS	Public Distribution System
PFM	Public Financial Management
PIPA	Preliminary Iraqi Procurement Assessment
PMT	Project Management Team
SARR	Sulaymaniyah Agency for Reconstruction and Development
SBD	Standard Bidding Documents
SCC	Special Conditions of Contract
SOE	State Owned Enterprise
TAL	Transitional Administrative Law
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
USAID	United States Agency for International Development
WB	World Bank

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PREFACE

This is a first Operational Procurement Review (OPR) for Iraq, carried out by the World Bank (WB) during the period January-April 2005. In view of the volatility of the country's security situation and the state of transition of the country's policies, it was decided to carry out an assessment based on interviews of Iraqi officials in Amman, Jordan, complemented by a desk review of relevant documents and consultation with key stakeholders in Baghdad by a WB local procurement consultant. The review was carried out by a WB Team led by Task Team Leader Majed M. El-Bayya (Sr. Procurement Specialist, MNACS) and composed of Mr. Jean-Jacques Raoul (Consultant, former WB Procurement Advisor), Mr. Narayanaswami Viswanathan, (Consultant), and Ms. Nazaneen Ismail Ali, (local procurement consultant).

Due to the security conditions in Iraq and the restriction on travel to Iraq at the time of OPR preparation, Government participation in the OPR was limited to discussions during project launch and capacity building workshops, and during supervision missions conducted by the Task Team Leader in Amman, Jordan. The WB local procurement consultant inside Iraq also interacted with implementing agencies and with the private sector.

Objectives and Scope

The objectives of the OPR are: (i) to assess the evolving public procurement system at the time the transitional government is coming to power, based on recent experience with the new procurement regulations established by the Coalition Provisional Authority (CPA) through CPA Order No 87 on Public Contracts and with donor-funded activities, especially the Iraq Trust Fund (ITF); (ii) to identify generic procurement issues which need to be addressed to speed up implementation of ongoing projects; (iii) to draw lessons for procurement arrangements to be included in ongoing and future WB and ITF-financed projects; and (iv) to pave the way for a donor-coordinated dialogue with the Government for future improvements of the public procurement system, as part of wider reforms in budget processes and public financial management.

The report's Executive Summary indicates the key recommendations directed to each of these three audiences—the Government, the WB, and the donor community—within the immediate and longer timeframes. The OPR action plan at the end of the report also indicates the urgency of individual recommendations and designates the main actors.

OPR Process

To achieve these objectives, the WB Task Team prepared a concept note which was circulated to all WB teams working on the Iraq portfolio and discussed virtually through email communications.

The Ministry of Planning and Development Cooperation's (MOPDC) Legal Department and Contract Department were the prime Iraqi contacts for the WB team. During the Capacity Building Workshop on procurement and financial management held in Amman, Jordan, during April 17-23, 2005, extensive discussions took place on the legal framework, organizational structure, and procedures of the public procurement system in Iraq. To ensure wider participation of Iraqi civil

servants in the preparation of the OPR, the WB team also consulted with Project Management Teams from several Iraqi institutions such as the MOPDC, Ministry of Education, Ministry of Health, Ministry of Water Resources, Ministry of Municipalities and Public Works, Ministry of Higher Education, Ministry of Communication and Ministry of Trade. A list of persons met is provided in Annex 1.

The WB team also discussed issues related to procurement under ongoing WB-financed projects with concerned WB staff in a meeting held on May 11, 2005, and reviewed documentation on public procurement in Iraq as well as other relevant documents from the WB and other donor agencies. A list of documents reviewed is provided in Annex 2.

The OPR report was reviewed and discussed in a decision meeting headed by the Country Director on June 9, 2005, and was finalized in accordance with the decisions taken at the meeting. The report will be submitted to the Government by the end of June 2005 for their comments.

Acknowledgements

The WB team would like to express its full appreciation and thanks to the Ministry of Planning and Development Cooperation for the time they spent in discussions of the public procurement system and for providing the WB team with relevant information and documentation. The team also wishes to acknowledge the extensive cooperation of many government officials and private sector representatives in the discussion of the OPR.

Mr. Joseph Saba, Country Director, provided guidance and support throughout the process of this assessment. The Regional Procurement Manager, Mr. Nadjib Sefta, provided useful advice during the OPR preparation process. The team is very grateful for their valuable comments to the peer reviewers: Messrs. George Jadoun, Head, Regional Programmes and Management of Development Group, International Training Centre of the International Labour Organization, Italy; Shaun Moss, Regional Procurement Manager (WB-EAPCO); Pierre Prosper Messali, Sr. Financial Management Specialist (WB-MNACS); and Frederic Kranz, Procurement Specialist/Consultant (WB-MNACS). The team would like also to thank Mr. David Glyndwr Pugh, Consultant, SFRCF, and Ms. Francoise C. Bentchikou, Chief Counsel (WB-LEGPR), for their assistance in the preparation of the annex on insurance. The OPR report was edited and formatted by Ms. Suzanne Snell (WB Consultant).

EXECUTIVE SUMMARY

1. Iraq is at the early stage of emerging from a prolonged period of wars, United Nations sanctions, military occupation, transitional government, and instability and uncertainty. The country still faces an extremely difficult security environment that has major impacts on all aspects of life, including the efficiency, quality and economy of public procurement.
2. The WB portfolio, which is less than two years old and was funded until early 2005 by the Iraq Trust Fund (ITF), is in the early stages of implementation, but it is expected to expand substantially in accordance with the WB's Interim Strategy and with the request of the Iraqi government to the WB to provide US\$500 million on IDA terms. So far, disbursements have been slow, reflecting problems encountered with the procedures, low levels of project readiness for implementation, and the low capacity levels of the implementing agencies, all of which are continually adjusting to the new environment. Other donors active in Iraq since 2003 have so far mostly implemented their activities directly, with minimal reliance on Iraqi institutions; their activities have also faced operational difficulties associated with the emergency situation and security conditions.

Summary of Findings

3. The major issue facing public procurement is the current uncertainty of public procurement laws and regulations. In principle, all procurement regulations enacted under the former regime were suspended by the Coalition Provisional Authority (CPA), which eventually promulgated a new law for public procurement (CPA Order No. 87 on Public Contracts) in May 2004. This new law provides for the creation of an Office of Government Public Contract Policy (OGPCP) endowed with the overall responsibility for coordination of public procurement policy, including the issuance of implementing regulations and administrative instructions for the new law. However, OGPCP is not yet operative and the new law is not being enforced, due in part to lack of implementing regulations. The procuring entities continue to use pre-existing regulations that lack a clear legal basis. This situation of legal uncertainty and lack of adequate regulations creates opportunities for corruption and substandard practices in public procurement, which it will be most difficult to prevent without first clarifying the legal framework for procurement.
4. The 2004 CPA87 Order would generally provide for a simple and sound basis for a new public procurement system, with the outstanding exception of a provision on negotiated contracts that is not suitable to the Iraqi environment, and a few other shortcomings that may be addressed through implementing regulations (such as a lack of obligation to quantify evaluation criteria and acceptance of late bids under certain conditions).
5. The current procurement procedures and practices, which mostly reflect the regulations issued by the former regime (in spite of the fact that these have formally been suspended by the 2004 CPA87 Order), have a number of features that are not in line with generally accepted sound public procurement practice. These features include: (i) inadequate requirements for registration of suppliers and contractors that are obsolete and inefficient and may lead to lack of fairness; (ii) insufficiently transparent and fair debarment procedures; (iii) continued use of obsolete methods and procedures for procurement of goods and works and selection of consultants, (iv) undue

restrictions on access to bidding documents, (v) insufficiently transparent bid submission, opening and evaluation procedures, and contract award procedures, (vi) use of Kurdish language in the northern regions and Arabic language in the other parts of country; and (vii) lack of effective bid protest mechanisms and publicity on contract awards.

6. Risks related to poor contract administration practices and security concerns are a major issue, and may result in lack of interest from potential bidders, high cost increases and/or substantial performance/payment delays. Contract insurance requirements and liabilities also pose serious problems in a country where the insurance market is inadequate and the lack of security is widespread. Contractors will need to subcontract private protection services and the related costs will be substantial.

7. The process of reforming the public procurement environment will be challenging, because long-established procedures in the ministries and state-owned enterprises are likely to generate inertia and resistance to change. A major training effort and supporting leadership will be critical. The lack of adequate procurement audit practices, the absence of a code of ethics for procurement officers, and the widespread culture of bribe-taking constitute additional challenges. Strengthening records management requirements and practices for procurement is badly needed.

8. Given that the public procurement environment that prevailed in Iraq prior to hostilities was very different from sound international practice, that the current situation is unsettled, and that the transition to more open and transparent practices will take time and effort, public procurement will bear a very high level of risk in the near future. The risk lies essentially in the lack of effective laws and regulations and modern standard bidding documentation, and the habituation of procurement staff to obsolete procedures, which will take time to be changed.

Summary of Recommendations

Recommendations to the World Bank

9. In the short term, it is necessary that WB-financed projects be implemented under clearly specified procurement procedures, to be reflected in relevant provisions of the legal agreements and supported by a Project Implementation Manual for each project, derived from the Master Implementation Manual (MIM) prepared for Iraq in 2004. The 2004 MIM includes national standard bidding documents, evaluation report forms, progress reports, and filing requirements, along with specifically defined approval procedures, and steps and responsibilities for decisions are clearly assigned. The MIM could also be used by the procurement policy and enforcement body as a basis for development of national practices when preparing the new procurement implementing regulations. A detailed procurement plan should be prepared prior to project negotiations and updated frequently. A limited number of contracts should be considered, by grouping smaller contracts into larger contracts, and bidding documents should be prepared during project preparation for the first packages of the first year. The thresholds for prior review by the WB should be set at a low level so that WB staff will be able to provide hands-on training to staff in the executing agencies. A Project Launch Workshop should be held (in Arabic or with Arabic translation) systematically prior to the start of each project, in order to disseminate the Project

Implementation Manual and train the staff of the executing agency in procurement planning and processing, using the standard bidding documents.

Recommendations to the Government of Iraq

10. The most urgent action needed from Government is to clarify the legal framework for public procurement and enact the needed legal and regulatory instruments either through the existing CPA Order No. 87 or through a new law. The most practical solution in the short term would appear to be to enforce CPA87 by amending it and issuing adequate regulations. A solution more suitable for the medium term would be to prepare and enact an entirely new law and suitable regulations. The establishment of an adequately staffed procurement policy and enforcement body (OGPCP), to be endowed primarily with formulating the regulations and preparing the standard bidding documents that are so badly needed is therefore a very high priority. This set of urgent actions is critical to curtail corruption, as corruption is more likely to thrive in the absence of clear rules and standard procedures and documents.

11. Major shortcomings in current procurement practices, mostly inherited from the old regime, should also be addressed urgently by Government through (i) promulgation of new implementing regulations, to ensure that the Iraqi public procurement system is promptly aligned with internationally recognized best practice, and (ii) a major training effort to disseminate best practice through training of procurement staff in all procuring entities.

12. Most importantly, the Government needs to forcefully address the issue of the widespread culture of bribe-taking and corruption, through a coordinated process of communication and disseminating best practices, controls and audits, and sanctions. The feasibility of controls and audits requires a major improvement in recordkeeping and records management.

13. The focus of this report on improving procurement procedures is part of a wider picture of strengthening public financial management systems in Iraq. Reforms in areas such as budget preparation, accounting and reporting, internal control, internal audit and external audit are urgently required to increase the efficiency of budget transactions, improve transparency and reduce corruption. Institutional development and capacity building in all these areas are essential if the reforms of public procurement proposed in this report are to be fully effective; indeed, procurement needs to be regarded as a core component of a modernized system of accounting, control, reporting, audit and oversight. Since different government entities are responsible for the various components of public financial management, strong coordination between the Minister of Planning, the Minister of Finance, the President of the Supreme Board of Audit and other agencies will be required if these reform efforts are to have their full impact.

Recommendations to the Donor Community

14. The WB as well as other donors will need to provide support to Iraqi institutions for implementation of donor-financed projects and for the overall reform of public procurement in a well-coordinated manner. In the medium term, comprehensive reform and modernization of public procurement should be actively pursued, including (i) the preparation of implementation regulations and standard bidding documents, (ii) the adoption of standards recommended by the

Multilateral Development Banks in order to align Iraqi public procurement practices with internationally recognized best practice, (iii) the design of a training curriculum in public procurement to be delivered in Iraqi institutions, such as universities, and the retraining of Iraqi officials involved in public procurement, and (iv) the reform of State-Owned Enterprises involved in public procurement as contractors, suppliers and consultants, in order to create a level playing field between them and the private sector.

A. BACKGROUND

1. Country Information

1. Iraq is a land-locked country with an area of 438,317 sq. km, whose population of 25.8 million (UN 2004) is 75 percent Arab, 15 to 20 percent Kurdish, and 5 percent Turkman, Assyrian, and other ethnic groups. The official language is Arabic, with Kurdish being used as the official language in the Kurdish regions; Turkoman, Assyrian, and Armenian are also spoken. Ninety-seven percent of the population is Muslim, with Christian and other religions accounting for 3 percent. There are eighteen governorates in Iraq. GDP was estimated at US\$21 billion in 2004, with Gross National Income per capita reaching about US\$800. Consumer prices increased by more than 30 percent in 2004. The country's main natural resources are petroleum, natural gas, and phosphates.

2. Political and Security Environment

2. Iraq is at the early stage of emerging from a prolonged period of wars, UN sanctions, military occupation, transitional government, instability and uncertainty. Major political changes took place in the last two years since the overthrow of the Baath Regime in April 2003. The Coalition Provisional Authority (CPA) was the temporary governing body that was designated by the United Nations to govern Iraq until the establishment of the Iraq interim government. The CPA governed Iraq from April 2003 to June 2004.

3. The Governing Council was chosen by the CPA on July 2003, a body composed of 25 persons representing the country's diverse religious and ethnic groups; its activities included appointing interim ministers and working with the CPA on policy and budget. One of the major responsibilities of the Council was to write a new constitution for Iraq called Transitional Administrative Law (TAL) to be the Supreme Law of Iraq during the transitional period. TAL provides a bill of rights for the Iraqi people and a roadmap leading to a permanent constitution in 2005. The TAL would expire once a government is elected under a permanent constitution and takes office. The transitional period consists of two phases: Phase 1 starting on June 30, 2004, the Iraqi Interim Government; and Phase 2 starting on January 1, 2005, the Iraqi Transitional Government.

4. The Governing Council dissolved itself at the end of June 2004, as part of the creation of the Interim Government to which all governmental authority was transferred. The CPA ceased to exist and since then, Iraqis have been governing their own affairs.

5. The Interim Government's primary responsibility was to administer Iraq's affairs, in particular by providing for the welfare and security of the Iraqi people, promoting economic development, and preparing Iraq for national elections. It was formed under the auspices of the Governing Council, the CPA and the UN, based on wide consultation with all Iraqi groups: political and religious leaders, professional and civic associations, trade unions, universities, and women's groups. Eventually candidates emerged for the posts of president, deputy presidents, prime minister, and the ministers to form the

Interim Government. Their most important task was to prepare Iraq for the elections, which took place on January 31, 2005.

6. Following the January 2005 election of a Transitional National Assembly, the Iraqi Transitional Government replaced the Interim Government. The Assembly is expected to prepare a permanent constitution for Iraq. Nationwide elections are to be held under this constitution to establish a permanent Iraqi government by the end of 2005.

7. Current security conditions in Iraq are extremely bad. The insurgency has been most intense in the center of Iraq, although attacks have occurred in all major cities, despite a state of emergency in force since November 2004. The criminal threat in Iraq has increased over the last year. Hundreds of kidnapping cases have been reported. Kidnappings for ransom and hostage-taking are common in Iraq and are in most cases fatal. A number of foreign nationals, including Arab nationals, have been taken hostage and several hostages were killed. Hostage-taking is likely to continue in the near future. A growing number of skilled Iraqis are leaving the country.

3. WB Portfolio

8. During the period leading up to the January 2005 election and since the elections, the WB has made considerable progress in advancing its work program for the country, which is guided by the WB's Interim Strategy Note of January 2004. The Interim Strategy aims to build Iraqi capacity; prepare and begin implementing emergency operations to generate employment and restore essential infrastructure and services; and lay the foundation for Iraq's medium-term economic transition program, through studies and policy advice.

9. The Interim Strategy depends on the WB Iraq Trust Fund (ITF) within the International Reconstruction Fund Facility for Iraq (IRFFI) for financing operations. As of February 2005, about US\$392 million of the amount pledged by donors to the ITF had been deposited, and US\$367 million had been allocated to nine approved projects.¹ Of these projects, the First Capacity Building Project was completed; the Emergency Textbook Provision Project, the first ITF-financed project to be implemented by Iraqi authorities, is well advanced; and seven more emergency projects approved during the second half of calendar year 2004 are under implementation.

10. The first phase of procurement is underway for five of the six recently approved projects, and procurement packages are nearly complete for the remaining one, following launch workshops organized in Amman to review implementation details, including

¹ The nine projects are the Emergency Textbook Provision Project (US\$40 million); Emergency Schools Rehabilitation and Construction Project (US\$60 million); Emergency Health and Rehabilitation Project (US\$25 million); Emergency Baghdad Water Supply and Sanitation Rehabilitation Project (US\$65 million); Emergency Water Supply, Sanitation, and Urban Development Project; the Emergency Community Infrastructure Rehabilitation Project (US\$20 million); Emergency Private Sector Development Project (US\$55 million); and the First and Second Capacity Building Project (US\$10 and US\$7 million) both executed by the WB.

procurement and financial management. However, in spite of intense efforts, disbursement has been slow, amounting to about US\$25 million as of May 31, 2005, reflecting problems encountered with the procedures and capacity constraints of the implementing agencies, all of which are adjusting to the new environment. Projects financing civil works had just started as of that date and had not yet reached the disbursement stage.

11. Implementation under current circumstances continues to face major challenges, due to extremely difficult security conditions. In late January 2005, the WB team working on Iraq met to draw lessons from WB experience in launching and implementing projects. The WB team recognized the competence, dedication, and commitment of their Iraqi counterparts, including nearly unparalleled attendance and concentration during project missions and workshops, while acknowledging the difficulties: slow project implementation due to unfamiliarity of implementing agency staff with basic modern methods and technology, caused by years of isolation and sanctions; and poor communications and difficulty of movement due to poor security, which seriously hamper reconstruction logistics.

4. Other Donor-funded Activities

12. At an October 2003 donors' conference in Madrid, donors pledged about US\$32 billion in grants and loans for the reconstruction of Iraq during 2003-2007. In accordance with agreements at the Madrid conference, an International Reconstruction Fund Facility for Iraq (IRFFI) was established as one channel for the reconstruction of Iraq.² It consists of two trust funds; one administrated by the WB (WB ITF) and the other one by the UNDP on behalf of all UN agencies (UNDG ITF). Under the UNDG Trust Fund, projects are implemented directly by UN agencies such as the UNDP and UNICEF. Donors have pledged about US\$658 million to the UNDG Trust Fund, of which about US\$573 million have been deposited.

13. The other channel for financing the reconstruction of Iraq is through bilateral agreements between donors and the Iraqi government. Implementation arrangements for bilateral donor-funded activities in Iraq initially left little for the Iraqi institutions to do. USAID, the largest single donor (US\$18.6 billion), has implemented its projects directly under the Iraq Relief and Reconstruction Fund (IRRF), and in many cases concerned ministries were not involved in the implementation of their projects. UK's Department for International Development also contracts directly. In the early stages of cooperation with Iraq, Danida signed direct contracts with suppliers, consultants and contractors. Gradually Iraqi involvement has increased, and currently the responsibility for contracting and implementation of some bilateral projects is entrusted to the respective Iraqi agencies (Shaiba Gas Filling Plant, General Company of Ports of Iraq and Umm Qasr Port Authority, and a number of other infrastructure activities in Southern Iraq). So far, lessons to be learned from other donors' experience in Iraq are limited and do not fully illustrate the capacity of Iraqi institutions to implement procurement.

² Detailed information on IRFFI operations is available on the website: www.irffi.org.

B. FINDINGS

PUBLIC SECTOR

1. *Legal and Regulatory Framework*

14. The public procurement system in Iraq is in a period of transition, like all other government functions and systems. Until 2003, public procurement was governed by regulations issued by the Ministry of Planning and Development Cooperation (MOPDC), Ministry of Finance, Ministry of Trade, and Central Bank of Iraq, and procedures set forth for their own operations by the various ministries and State-Owned Enterprises (SOEs). These specifically included (1) instructions for execution and follow-up of projects under the national development plans issued by the MOPDC; (2) instructions for civil works contracts; (3) instructions for purchasing of goods by government departments and socialist sectors dated 2001; (4) instructions for electrical, mechanical, and chemical works contracts; and (5) instructions for force account (amanah), all dated 2001.

15. After the fall of the Baath regime in April 2003, although in principle the ministries and SOEs continued to follow the previous regulations and procedures, the CPA enacted specific procurement procedures “applicable to vested and seized Iraqi property and funds in the Development Fund for Iraq,” and also specified that procurement contracts of “Iraqi governmental Ministries are subject to the contracting procedures of the Ministry or agency as set forth in applicable Iraqi laws and regulations, if the Administrator [CPA] determines that the contracting procedures are adequate.”³

16. On May 16, 2004, CPA Order No. 87 on Public Contracts (hereafter CPA87) was promulgated with the view of designing a general framework for a modern public procurement system. CPA87 has the following critical features:

- (i) reference to international standards of public procurement;
- (ii) provision of a dispute resolution mechanism (including bid complaints and contract claims);
- (iii) promotion of open competition as the favored method of procurement, with other methods as exceptions, the use of which must be duly justified;
- (iv) application to all government unit and agencies, including SOEs for contracts directly financed by government funds;
- (v) creation within the MOPDC of an Office of Government Public Contract Policy (OGPCP) endowed with overall responsibility for (a) coordination of public procurement policy, including the issuance of implementing regulations and

³ CPA Memorandum No.4 dated August 19, 2003.

administrative instructions for CPA87 in the Arabic and Kurdish languages, (b) establishment and adoption of rules for an independent Administrative Tribunal to have jurisdiction over complaints and disputes relating to the award of contracts, (c) recommendations for amendments to CPA87 and related Iraqi laws and regulations, (d) development and adoption of standard contract provisions, (e) training of government procurement personnel, (f) issuance of implementation regulations promoting appropriate ethical standards on conflict of interest, and (g) establishment of a central agency for public procurement auditing;

- (vi) provision for exclusions from participation for misconduct;
- (vii) suspension of the Tender Instructions (Outfitting and Buying) for State Agencies and the Socialist Sector issued by the former Iraqi regime in 2001, the Instructions for Implementation and Follow-up of Projects and Works of National Development Plan issued by the former Iraqi regime in 1988, and any provision of Iraqi law that is inconsistent with CPA87, and
- (viii) provision for CPA Memorandum No. 4 and its appendices to serve as the implementing regulation for CPA87 until appropriate administrative instructions and regulations to implement it are promulgated by MOPDC through the OGPCP.

17. CPA87 generally provides a simple and sound basis for a new public procurement system. The outstanding exception is Section 5 on Negotiated Contracts which stipulates that “although competitive bidding is preferred in general, competitive negotiated contracts ... are specifically authorized and should be employed whenever the interests of the governmental unit or agency concerned will best be served by awarding the contract on a basis other than the lowest price.” This provision in an otherwise rather sound procurement law is most unfortunate, as it deprives the contracting authorities of the benefits of full competition and selection of the economically most advantageous bid, in cases where competitive bidding would still be most appropriate to accommodate the use of non-price bid evaluation criteria without any pre-award contract negotiations. Nor does it recognize the specificity of intellectual services (consultants) for which the concept of Negotiated Contract would basically apply; instead, the use of short-listing and competition would be much preferable.

18. CPA87 has other shortcomings that need to be addressed through the implementing regulations yet to be issued by OGPCP, especially the requirements for bid evaluation criteria, which should be quantified in monetary terms whenever possible, and rejection of late bids.

19. As of late April 2005, the new procurement rules embodied in CPA87 were not being enforced, and the OPR team surmised that former procurement rules and practices are still in use in most ministries and SOEs, despite the lack of a clear legal basis during the ongoing period of transition. This surmise was confirmed by Iraqi staff during consultations in April 2005. This report therefore also identifies aspects of the past and/or current practices that might impact on the implementation of WB- and ITF-financed activities, and that might involve a special risk element, either because the regulations leading to such practices might still be applied, or because the inertia of administrative

practices would be such that changes introduced through new regulations might take some time to become effective.

20. The recent years of directive rule and economic decay, especially during the period under UN sanctions, had in many ways caused public procurement practices to deteriorate and move away from acceptable international standards. Furthermore, SOEs and ministries have adopted their own tailored procedures with often nominal reference to overriding regulations, making for a system that does not conform to any formal or universal set of regulations.

<u>Issues</u>
I-LRF1. A clear legal framework is lacking. CPA87 is not enforced whereas the old procurement regulations, which were legally suspended by CPA87, are de facto still in use.
I-LRF2. OGPCP is not fully operational, but has a key role to play in setting up a new modern public procurement system.
I-LRF3. CPA87 is deficient regarding Negotiated Contracts and Intellectual Services.
I-LRF4. CPA87 does not include critical requirements in order to ensure transparency in the procurement process.
<u>Recommendations</u>
R-LRF1. The legal framework for public procurement needs urgently to be clarified and aligned with best international practice. From a practical perspective, this may best be achieved in the short term by issuing implementing regulations as a matter of first priority that enforce CPA87 or a new law along the same format as CPA87. Alternatively, or in the medium term, an entirely new procurement law could be prepared.
R-LRF2. A procurement policy and enforcement body should be fully established (OGPCP or a similar body) with the capacity to fully develop (i) appropriate implementing regulations for the Public Procurement Law, including (ii) standard bidding and contract documents for the procurement of goods, works, and services, (iii) a proposal for creation of and rules for operation of an independent Administrative Tribunal to handle complaints and disputes relating to the award of contracts, (iv) training for government procurement personnel, (v) ethical standards, and (vi) public procurement auditing rules and practices.
R-LRF3. The procurement policy and enforcement body (to be created) should review CPA87 and make recommendations for amending it or issuing a new law along the same principles as CPA87.

R-LRF4. The implementing regulations to be issued by the procurement policy and enforcement body should include clear requirements for (i) bid evaluation criteria to be quantified in monetary terms whenever possible, and (ii) rejection of late bids.

2. Procedures and Practices

21. There is limited data available from first-hand assessments of actual procurement practices in Iraq, including under WB-financed activities, with the exception of the Development Fund for Iraq. The WB consultants who carried out the Preliminary Iraqi Procurement Assessment (PIPA) study in 2003 did not have formal access to government officials or procurement files. The information gathered during the PIPA study identified procurement practices that are at variance with generally accepted good practice; interviews conducted with Iraqi staff in Amman in April 2005 confirmed that many of these practices are still being used.

22. The current procedures and practices are a combination of those that prevailed under the old regime and those introduced by CPA. Although CPA87 calls for suspension of old regulations, new regulations have yet to be issued to replace them. In fact, MOPDC has drafted a note that was forwarded for approval by the cabinet requesting that the old regulations be formally reinstated to fill the gap that CPA87 created when it suspended them.⁴

23. The OPR team did receive pertinent information regarding the management of the Development Fund for Iraq (DFI). Following the dissolution of the CPA in late June 2004, responsibility for the DFI was transferred to the Government of Iraq. An audit for the second half of 2004 commissioned by the International Advisory and Monitoring Board for DFI identified a number of issues with procurement conducted by the Iraqi ministries, including: (i) use of requests for proposals to procure goods in lieu of open bidding; (ii) use of high fees to be paid by bidders in order to be allowed to participate; (iii) undocumented contract award criteria and bid analysis; (iv) lack of documentation to justify use of non-competitive methods of procurement; (v) lack of enforcement of contractual provisions on performance security; (vi) lack of documentation of contract performance, including contract status and completion, and (vii) internal audits that do not cover bidding and contract award processes.⁵

24. Specific current procurement procedures and practices are discussed below, including those which are not in line with generally accepted sound public procurement practice.

⁴ As of April 23, 2005, it had not been approved.

⁵ The audit was carried out by KPMG and the report is publicly available at <http://www.iamb.info/dfiaudit.htm>

Requirements for Registration and National Preference

25. Registration of national suppliers by the Chamber of Commerce and of contractors by the MOPDC was a routine practice under the former regime and appears to have been maintained. Contractors are classified and ranked against criteria including experience, performance and financial status. The ratings run from first (highest) to tenth (lowest) for civil works contracting firms, from first to fifth for electrical and mechanical contracting firms, and from third to tenth for individual Iraqi contractors. According to the classification criteria, a contracting firm would be classified at first rank if its capital is at least ID3,000,000 (about US\$2,000). The financial requirement decreases with rank to ID250,000 (about US\$170) for tenth rank.

26. Registration may take one to four months to be completed and is valid for five years for contracting firms and three years for individual contractors. A contracting firm or individual would need to stay at least one year in rank before being upgraded to the next level. Private sector consultants are also required to register with the Iraqi Engineering Union or syndicate relevant to their field of expertise and must obtain a permit for establishing a consulting office, subject to annual renewal. Non-Iraqi firms may register and obtain Iraqi Engineering Union membership if 50 percent of their employees are Iraqi.

27. No contractor may participate in bidding without a valid Iraqi contractor registration, and a procuring entity may limit an invitation to bid for works contracts to certain classes of contractors. In exceptional cases, the minister could award a contract to a contractor that ranked one level below that required, providing the contractor was deemed capable to perform the contract. The minister also could, on an exceptional case, award a contract to a non-registered contractor, providing the contract is for works in a remote area. Subcontracting of more than ID1,000,000 (about US\$680) is not allowed if the subcontractor is not registered.

28. Foreign contractors have done little work in Iraq, except in the oil sector. There is virtually no experience with foreign contractors in other sectors, and they may not be interested in competing at the moment, as a consequence of the current security situation. The practice for foreign bidders to have a local agent is widespread, although not formally required.

29. Suppliers are not classified but must register. However, specific pre-qualification may also be used at the discretion of the procuring entity, based on the size and complexity of the goods or services being procured. International advertising of bidding opportunities would only be done in case goods are not available in Iraq.

30. In selecting consultants, priority is given to Iraqis and if there are no qualified Iraqis, then to consultants from Arab countries, over those from foreign countries.⁶ Each

⁶ CPA87 provides that invitation for bids be published in the Arabic and Kurdish languages (Kurdish prevails in the northern part of the country), and “such other language as may be appropriate” when foreign entities are likely to be interested.

ministry and SOE maintains lists, records and profiles of consultants engaged in the past or that might be called on in future. Such lists and records are also filed with the MOPDC.

Debarment Procedure

31. Contractors may be debarred (blacklisted) by decision of the MOPDC, based on recommendations from the sector ministries or the executing entity.⁷ Firms may be debarred for a number of reasons, including dealing with boycotted or excluded countries or companies (secondary boycott), or for bribery, forgery, and providing false information, or refusing to sign a contract after notification of acceptance of its bid. The first time a firm is debarred, the debarment period may usually not exceed a period of two years. The contractor classification would also be decreased by one level for two years following the end of the debarment period. If the contractor happened to be debarred again, it would lose its registration permanently and would not be allowed to participate in contracts.

32. A similar procedure applies for suppliers through recommendations by the concerned minister to the ministers' cabinet. For consultants there is no mention anywhere in the regulation of procedures for debarment.

Bidding Methods

Procurement of Goods

33. For the purchase of goods, materials and equipment, two main types of procurement are in use, as detailed in the instructions for purchasing of goods to government departments and socialist sectors No 191 (2001) issued by the MOPDC.

(i) For local purchasing

- There are four methods for procurement of goods from inside Iraq: (a) open competitive bidding (or national competitive bidding, NCB); (b) limited competitive bidding; (c) using purchasing committees and (d) direct purchase.
- Purchasing from socialist sectors or state offices is through direct purchasing procedures.
- Purchases with a value of ID50,000 (about \$34) or less may be implemented through direct purchase (single source) by a single authorized individual.
- Purchases with a value above ID50,000 up to ID1 million (from about \$34 to \$780) may be implemented through direct purchase (single source), with approval of the Purchasing Committee.
- Purchases with a value above ID1 million up to ID5 million (from about \$780 to \$ 3,400) may be implemented with approval of the Purchasing Committee, and the general rule, not consistently followed, is that at least three quotations

⁷ Clause 12 of the Instructions for executing and follow-up of projects under the national development plans.

must be sought and submitted for evaluation to the Analysis and Study Committee.

- Purchases with a value above ID5 million must be implemented by open bidding or invitation, with approval by the responsible director general and/or minister, subject to delegation of authority within the procuring ministry.

(ii) For foreign purchasing

- Foreign purchases are generally implemented using limited competitive bidding through invitation issued to selected foreign suppliers (at least three suppliers; however, a minister could issue an exception to invite less than three suppliers), provided that the required funds and foreign currency are available before executing the contract.
- Open bidding is also used; however, limited bidding is preferred, reportedly to ensure quality of the suppliers and goods.

Procurement of Works

34. There are four selection methods permitted in the old regulations: (a) open competitive bidding (NCB); (b) restricted bidding; (c) direct execution; and (d) execution “amanah”, the Iraqi form of force account. A new method was recently added in CPA87: (e) negotiated competition. Restricted bidding follows the same procedure as open competitive bidding except that there is no advertisement; instead, a direct invitation is sent to at least three pre-selected bidders.

35. Direct execution is conducted through state departments. The department would use their own staff and hire needed workers, technical personnel, and subcontractors to complete the work. It would also procure goods and materials needed for the work either directly from state offices or from the private sector in accordance with the regulations.

36. Execution “amanah” is conducted by forming a committee of at least three persons (an engineer, an accountant, and a committee head) that is assigned to execute the project. A budget would be allocated for this committee and an account would be opened in its name. The committee would procure materials and goods and hire subcontractors, workers, and technical workers to complete the work.

Selection of Consultants

37. The instructions state that it is recommended and preferable to award consultancy assignments to government design offices, rather than to Iraqi private consulting firms or individuals. Non-government consultants are invited to participate in the selection process only when government bodies are deemed not capable of performing the assignment. The order of priority is to call for consultants from Iraqi government bodies, Iraqi universities, the Iraqi private sector, foreign Arab consultants, and lastly from other foreign consultants. When consultancy assignments are to be performed by a foreign

consultant, it is required that resident Iraqi experts in the field covered in the assignment be included in the foreign consultant's proposal.

38. Most ministries involved in executing projects have in-house design entities, which provide consultancy services to their ministry as well as to other ministries and SOEs. Universities also provide consultancy services through their in-house bureaus for consulting activities, through which university staff are made available for consulting. University-based consultants are preferred over private consultants.

39. The regulations and instructions specify that at least three consultants (government bureaus, companies or individuals) with demonstrated relevant experience must be invited to submit proposals. Local or foreign private-sector consultants may be invited for assignments, subject to approval by senior management of the procuring entities. Requests for proposals may be advertised in local newspaper or television, in which case the Evaluation Committee will review and make recommendations as to the qualification of the candidates and will rank the proposals on technical merit and cost. Alternatively, the Iraqi Engineering Union may be requested to identify suitable consultants for a given consulting opportunity.

Bidding Procedures

Sale of Bidding Documents

40. According to the regulations under open competitive bidding, bidding documents are to be sold to potential bidders for a price that reflects the importance of the bidding document and the cost of preparing it, in order to ensure that only serious bidders are participating. Some ministries sell bidding document to only potential bidders who show proof of certain registration documents designated in the advertisement, such as classification of contractor.

Treatment of late bids and confidentiality of bids

41. A bid may be submitted by email, through the mail, and in person. It may be accepted even if it is received after the closing date, provided that the bid was mailed within a reasonable time before closing date, it is received before the bids are evaluated, and it is judged that including the late bid would be to Government's benefit, subject to approval by the minister.

42. Bid openings, contract awards, and procurement-related documents are not subject to public disclosure. Bid opening may occur several days after the deadline for bid submission, and may be completed in more than one session and over more than one day.

Bid Evaluation Criteria and Contract Award

43. There is no requirement for fully spelling out bid evaluation criteria in the bidding documents, either in the former Iraqi or in the more recent CPA87. For works contracts, the bidding documents do not list the bidders' qualification requirements if pre-qualification was not conducted. Instead, implementing agencies rely on the classification

of contractors conducted by the MOPDC in lieu of qualification. Contract award is not exclusively based on lowest price bid evaluation, and quality and timeliness are usually ranked higher in the evaluation criteria. However, in practice, the lowest price bid is often selected. When a bid other than the lowest one is selected, negotiations, which must be authorized by higher authorities such as the minister, take place with the preferred bidder in an effort to persuade it to lower its price to match the lowest price bid, or any other price the committee has in mind that it deems to reflect market prices. The bid evaluation committee may also call for bid clarifications, and negotiate with one or more bidders, subject to approval by the minister.

44. A two-envelope system, consisting of using a sequential successive opening and evaluation of technical and financial bids, used to be permitted and was regularly practiced, and even considered mandatory in many procuring entities under the former regime. However, this practice appears to be diminishing, and a single-envelope process is more often used, whereby all bids (technical and financial) are opened and evaluated in one stage.

Bid Protests and Appeals

45. Bidders do not have adequate access to administrative or judicial review and appeal processes. Although civil courts have jurisdiction over civil and commercial matters, access to them is not deemed adequate by participating bidders, and the administrative review and court systems are not operating adequately under current circumstances. Implementation of the relevant provisions of CPA87 would improve the situation, as they provide for certain rights to parties interested in a bidding process vis-a-vis the procuring entity, including the right to file a protest with the Administrative Tribunal (to be created on the basis of implementing regulations to be issued by the OGPCP) and seek redress.

Contract Administration

46. Changes in scope and terms often occur during contract execution through variation orders or purchase order amendments. Due to the current security conditions and to shortcomings in project preparation in an emergency situation, it is reported that delays in supplies and suspension of works occur frequently under the IRRF program, which has required increased operating flexibility. Adjustments have included (i) providing for increased security costs, (ii) reliance on community-building and job-creation initiatives, and (iii) financing of operation and maintenance costs to compensate for shortfalls in Iraqi Ministries. Under the Emergency Textbook Provision Project, substantial delays in payments to printers have occurred as a result of delays in acceptance of the textbooks. The risks of losses and theft of procured goods during in-country transit are also substantial.

Issues
I-PP1. Lack of detailed implementing regulations for procurement results in continued use of obsolete regulations and practices.

I-PP2. Procuring entities require training in the use of new Procurement Law and Regulations.
I-PP3. Registration requirements for suppliers, and registration/classification requirements for contractors, may not be fair, transparent, or efficient, especially as thresholds are very low. Access to foreign bidders and in particular foreign consultants appears to be excessively restricted.
I-PP4. Up-to-date, transparent and fair exclusion (debarment) procedures are lacking, as the reasons for debarment are very diverse and may be used selectively to discriminate against certain bidders.
I-PP5. Access to bidding documents may be unfairly restricted especially though the use of registration and payment of high fees.
I-PP6. Bid evaluation criteria are not spelled out fully in bidding documents.
I-PP7. Bid submission procedures allow acceptance of late and/or unsealed bids. Bid opening is not made in public. Bid opening, evaluation and contract award procedures do not guarantee transparency and integrity.
I-PP8. The use of Kurdish language in northern part and Arabic language in other parts of country may be detrimental to participation of bidders unfamiliar with the language used.
I-PP9. Effective bid protest and appeal mechanisms are lacking, along with lack of publicity on contract awards.
I-PP10. There is a high risk of cost increases and loss of goods during contract performance, especially under the current security conditions, which also make supervision of contracts very difficult.
<u>Recommendations</u>
R-PP1. The procurement policy and enforcement body (to be created) should prepare implementing regulations (detailed regulations on how to conduct procurement procedures, public bid opening, treatment of late bids, disclosure of bid evaluation criteria expressed in monetary terms, standard documents).
R-PP2. Implementing regulations should be extensively disseminated, and procurement entities and procurement staff should be trained in their use.
R-PP3. Registration requirements and procedures for bidders should be reviewed and updated.

R-PP4. The procurement policy and enforcement body (to be created) should prepare regulations for exclusion from participation in accordance with the Procurement Law.
R-PP5. Implementation Regulations should specify open access to bidding documents under open competitive bidding, for a nominal reasonable fee (and the fee should be the only condition).
R-PP6. Implementation Regulations should specify all bidding procedures in accordance with internationally recognized principles of transparency and fairness. It should require that bid evaluation criteria be spelled out fully in the bidding documents and that bid evaluation be conducted in strict compliance with the criteria specified in the documents.
R-PP7. Adoption of dual language (Kurdish and Arabic) should be required for procurement in the northern part of country for open national competitive bidding (NCB).
R-PP8. The procurement policy and enforcement body (to be created) should prepare regulations for the establishment and the operating rules of an Administrative Tribunal in accordance with the Procurement Law, including rules on publication of contract awards supporting a bid protest mechanism.
R-PP9. Contracting mechanisms and/or provisions should be adopted that would reduce the risk of cost increase, such as recourse to CIP-Place of destination (Carriage and insurance paid to place of destination) for the supply of goods, accelerated payment terms, and recourse to community-based implementation for rehabilitation of community-scale infrastructure.

3. Organization and Resources

47. Procurement activities are highly centralized in each procuring entity. Each major department within the ministries and SOEs has its own procurement organization, function, resources, and procedures. The Ministry of Municipality and Public Works provides a significant illustration of the Iraqi public procurement system. It has offices in 252 municipalities with more than 43,000 employees; a Directorate General provides administrative, financial, and technical support to the governorates and the municipalities, which are responsible for supervision of water distribution, sewage, refuse collection and municipal roads. Procurement is carried out by each directorate with delegated authority by special procurement committees up to ID500 million (about \$340,000). Procurement activities in excess of this threshold are all administered at the ministry's headquarters.

48. In a typical SOE, the Commercial Department (or other department assigned procurement responsibilities) is divided into two separate sections, one for foreign contracts, consultancies and purchases, and another for local contracts, consultancies and

purchases. Commercial Departments within procuring entities also have a stores or supply section to cater for the specific needs of the given entity.

49. Each ministry and SOE has separate Committees for Bid Opening, and for Bid Analysis and Study, which are most often standing committees with members having six-month appointments. The Bid Opening Committee opens and tabulates the bids. The Analysis and Study Committee evaluates the bids and recommends selection of a preferred bidder; it then negotiates with the preferred bidder, and if negotiations are successful, it seeks approval from management, before the Commercial Department signs the contract. The operations of these committees are made especially difficult, subjective and non-transparent by the lack of clear laws and regulations, and the lack of standard documentation is most critical. Moreover, some ministries may inflate committee size with a large number of non-specialized staff, which slows down the whole process.

50. Most ministries and SOEs have procurement staff that are already knowledgeable in procurement and could therefore be trained to carry out procurement according to WB guidelines and procedures, as well as new public procurement procedures to be enacted by OGPCP, and selected staff could become trainers of additional Iraqi procurement staff.

Procurement in Northern Iraq

51. The two Kurdish regions of northern Iraq have been governed and administered separately from the rest of Iraq since 1991. Both the Erbil Region and the Sulaymaniyah Region have created central procurement agencies to handle procurement on behalf of their different ministries. The Sulaymaniyah Agency for Redevelopment and Reconstruction (SARR) was established in 2003 and expanded in April 2004 to comprise three departments: (a) a tendering department, responsible for advertisement, bidding documents, bid opening and bid evaluation, (b) a technical department, responsible for review of the technical drawings, bills of quantities, and specification; and (c) a supervision department which administers and manages contracts. A similar unit responsible for centralized procurement was established in June 2004 within the Erbil governorate, with responsibility for advertisement, bid opening and evaluation. These centralized procurement agencies report directly to their respective regional Council of Ministers and Prime Ministers.⁸

52. The OPR found that procurement is carried out in a more efficient and transparent manner in these regions, where practices have been positively influenced by the presence of the UN organizations during the 1990s. As a result, a strong human resource base is available to the central agencies. For example, SARR has a workforce of around 120 trained staff with engineering, legal, financial and other backgrounds. Most of the agency staff are former UN employees who worked for the Oil for Food Program. The agency uses the Kurdish language as its official language and English as a second language.

⁸ Each region has its own prime minister and council of ministers.

53. Implementation of projects under WB-administrated Trust Funds is not progressing in the Kurdish area at this stage, as the implementation mechanism is not clear in the project documents.

Issues
I-OR1. Long-established procedures in ministries and SOEs are likely to generate inertia and resistance to change against new laws and regulations.
I-OR2. Procurement staff needs to be trained to implement new procedures.
I-OR3. The WB has not gathered much information on public sector practices in the Kurdish regions, and has yet to agree with the central government on implementation mechanisms to be established under donor-financed projects for the Kurdish regions.
I-OR4. Bidding documents under open competition procedures for work to be carried out in the Kurdish regions are currently issued in the Kurdish language.
Recommendations
R-OR1. The procurement policy and enforcement body (to be created) should prepare regulations and follow up on their enforcement by ministries and SOEs through periodic audits.
R-OR2. Training modules should be prepared for procurement staff, based on the new law and regulations, focusing especially on procedures and documentation. Capacity for potential training of trainers should be identified within the ministries, and a major training program initiated to disseminate procedures and bid documents.
R-OR3. As part of project preparation, if projects will be implemented in the Kurdish regions, an agreement on implementation mechanism should be reached between the central government and the senior political leaders in these areas. In each project, the assessment of agency capacity to implement procurement should also include the Kurdish regions.

4. Audit and Anti-Corruption Measures

54. Both the MOPDC, which is responsible for issuing procurement-related regulations, and the Ministry of Finance, which is responsible for issuing financial-related regulations, have oversight responsibility and investigative powers.

55. The CPA and the Interim Iraqi Governing Council took a number of initiatives in early 2004 to combat corruption, creating: (i) an independent Inspector General's office

within individual Iraqi ministries to perform a variety of functions involving both internal audit and control and the investigation of corruption-related cases; (ii) a Commission on Public Integrity; and (iii) a revitalized Supreme Audit Board. However, these institutions, especially the internal IGs and the Commission on Public Integrity, have not yet taken root and their future impact is uncertain at this stage.

56. Each major procuring entity has an independent Inspector General's department that reports to the relevant minister and to the Commission on Public Integrity. The Supreme Audit Board has authority to audit the financial aspects of public procurement. However, auditing is focused on the regularity of the procedure and does not take into consideration value-for-money aspects. In the absence of a clear legal and regulatory framework, it is questionable on what basis the Supreme Audit Board and the Commission on Public Integrity may be able to assess the regularity of the public procurement procedure. The capacity of the Inspector General departments and the Supreme Audit Board to handle procurement reviews and audits will need to be strengthened when the new regulations are enacted and enforced.

57. There is no published code of ethics applicable to procurement officers, nor any consistently applied conflict of interest rules; however, CPA87 does specify conflict-of-interest prohibitions, while specifying that the OGPCP will be responsible for issuing implementing regulations.

58. The former Iraqi Penal Code covered all civil and economic crimes and violations, including fraud and corruption of civil servants, and stipulated that any person who offers or promises to offer any civil servant a bribe or favor shall be subject to punishment in the same manner as the civil servant who accepts or solicits the bribe or favor. This provision has not prevented the development of widespread "gift-taking" by public officials in their procurement-related duties, especially during the UN sanction period from 1991 onwards, when economic conditions were very bad and government salaries very low. Corruption and bribe-taking are currently alleged to be widespread in all sectors that implement projects.

59. Iraq is ranked poorly on Transparency International's Corruption Perception Index, the lowest of all countries in the Region. There are reports from the auditors of the US Government Accountability Office and the auditors of the Office of the Commission on Public Integrity (published in the media) that significant amounts of money cannot be accounted for at all, and that other reported spending could not be backed up with sufficient documentation. The audit also found that its efforts were hampered by rampant disorganization and sloppy bookkeeping and that contract files were "unavailable, incomplete, inconsistent and unreliable."

Issues
I-AAC1. Procurement audit practices are inadequate.

I-AAC2. There is no code of ethics for procurement officers.
I-AAC3. Procurement risk is heightened due to corruption.
Recommendations
R-AAC1. The capacity of auditors at the Supreme Audit Board, Inspector General departments, and the Commission on Public Integrity for procurement activities needs to be strengthened.
R-AAC2. A code of ethics should be issued, disseminated, and enforced by the procurement policy and enforcement body.
R-AAC3. Leadership is required in conducting the fight against corruption and in enforcing anti-corruption regulations.

5. Public Sector Management Performance

60. MOPDC estimated its investment plan for 2005 at ID7,550 billion (about US\$5.27 billion), about 21.4 percent of the Government's general budget.⁹ In the 2004 general budget, about US\$5 billion was allocated for the Public Distribution System (PDS), including purchasing, handling, and distribution of food to all Iraqi citizens as a subsidy from Government.¹⁰ Information on past volumes of public procurement at any level of government is unavailable. Based on the estimated cost of Iraq's reconstruction and the Government's investment budget, the volume of public procurement can be expected to be extremely high over the next few years.

61. Before a ministry may initiate procurement, the rule, which may not always be followed, is that the Ministry of Finance must first attribute a budget allocation in accordance with a plan prepared by the concerned ministry and vetted by MOPDC. The concerned ministry prepares the bidding documents, including the design and drawings and specifications, preferably with the assistance of consulting offices attached to government agencies or Iraqi universities. According to regulations, before any implementing agency proceeds in implementing any project, the implementing agency should ensure that (i) a feasibility study is completed and endorsed by the relevant agency; (ii) there is a detailed cost estimate of the project to be used for comparison with bids; (iii) there is an allocation in the investment budget for that project; (iv) the design, drawings, specifications and bill of quantities are ready; (v) there is an approval from the relevant agency on the project site and allocation of the required land for the project; (vi)

⁹ Activities and experience in year 2004, MOPDC, February 2005.

¹⁰ The PDS procurement system suffers from the same problems as the public sector procurement system generally, and from additional difficulties due to the large numbers of bids received (hundreds in some cases), and to the inability of some local suppliers to deliver after signing contracts.

there are no legal or physical problems on the project site; and (vii) the project site is partly or completely ready.

62. In February 2005, the WB and IMF carried out a preliminary review of the public financial management (PFM) system in Iraq.¹¹ In addition, the WB is currently preparing a Fiduciary Assessment Report for Iraq that would be finalized in June 2005. In the interim, and reflecting the findings of the DFI audit and WB/IMF reports,¹² the WB has introduced additional control measures to WB-administrated projects. Project financial resources will be managed within the framework of Iraqi government systems, with all payments subject to the controls, rules and regulations of the Government, but also supplemented by the following rules and controls:

- (a) The project management teams (PMTs) will verify and authorize payments under the projects and will verify justification for variation orders.
- (b) The PMTs will maintain accounting systems for the projects and retain project records and supporting documents.
- (c) Ministers will designate internal auditors from the internal audit departments to track and verify project financial transactions.
- (d) Disbursements by the WB will be made primarily through direct payments and reimbursements supported by full documentation.
- (e) A Fiduciary Monitoring Agent will be assigned to review project expenditures and Withdrawal Applications.
- (f) The internal audit departments will maintain separate ledger accounts for each contract to track all payments made against each contract and to avoid overpayment.
- (g) A simple computerized system using spreadsheet applications will be put in place to record all project expenditures, track project commitments in real time during the project implementation period, and provide the data needed for generating project reports.
- (h) External audit will be carried out by an independent auditor.

63. Actions are being taken by the WB and IMF with the Government to implement the recommendations of the March 2005 joint report on PFM in accounting and cash management, budget classification, government financial management information system, public debt management, internal control and internal audit, human resources and payroll management, and external audit (with the SBA). Such reforms are urgently required to increase the efficiency of budget transactions, improve transparency and reduce corruption. Institutional development and capacity building in many of these areas are essential if the reforms of public procurement proposed in this OPR report are to be

¹¹ Enhancing Sound Public Financial Management: Short- to Medium-Term Reforms, WB & IMF, March 2005.

¹² PFM shortcomings include: (i) budget: fragmentation of the budget process, inefficiency of the budget as a resource allocation mechanism or tracking tool for spending, exclusion of donor funds from the budget; (ii) accounting: lack of a coherent accounting framework, deficient budget classification system and chart of accounts, lack of information on government bank accounts, poor cash management; (iii) control system: weakness in control of disbursement, payroll, procurement, lack of independence and transparency of the Supreme Audit Institution, lack of a clear role for the Inspector General.

fully effective; indeed, procurement needs to be regarded as a core component of a modernized system of accounting, control, reporting, audit and oversight. Strong coordination between the Minister of Planning, the Minister of Finance, the President of the Supreme Board of Audit and other institutions will be required if these reform efforts are to have their full impact, since each has responsibility for designated areas of PFM.

Issues
I-PSM1. Adequate record-keeping requirements are lacking.
I-PSM 2. Procurement needs to be integrated into the overall public financial management system.
Recommendations
R-PSM1. Regulations on record-keeping requirements for procurement activities need to be issued, disseminated, and enforced. Recourse to electronic record-keeping should be actively pursued in the short to medium term.
R-PSM2. Given the extremely large volume of public procurement activities carried out in Iraq, both for infrastructure reconstruction and investment activities and for the Public Distribution System, it is essential that public procurement be viewed as a critical component of the overall public financial management system.

6. General Risk Assessment

64. Given that the procurement environment that prevailed in Iraq during the last two decades differed greatly from good international practice, that the current situation is volatile due to legal and regulatory changes introduced by the CPA, and that the transition to more open and transparent practices will necessarily take time, it is prudent to consider that public procurement will bear a **high** level of risk in the near future. The risk lies essentially in the lack of effective laws and regulations and the absence of modern standard documentation practices, and in the obsolete procedures that procuring entities have become accustomed to follow, which will take time to be changed.

65. One habitual practice that requires prompt attention is the participation in procurement by a number of SOEs and government entities who have enjoyed privileged status in the public procurement system as suppliers, contractors and service providers, and are likely to expect to continue to do so. This practice is in clear violation of WB Procurement Guidelines, which exclude such government entities from competition for WB-funded contracts, and it does not provide a level playing field for the private sector to compete for public contracts. In the transition phase, recourse to force account may be considered in order not to have to exclude such entities from participating in the

execution of WB-funded projects, especially when there are no private sector entities able to provide adequate competition.

66. On the positive side, Iraq has a wealth of procurement and engineering staff that may be retrained relatively rapidly to operate a reformed procurement system, and to use new procurement documents and tools as they become available.

PERFORMANCE IN WB-FINANCED PROJECTS

67. In April 2005, the WB Iraq Country Unit hired a consultant to conduct an independent review of the WB's portfolio in Iraq, including the eight projects financed under the Iraq Trust Fund administrated by the WB.¹³ Since all these projects, except the Textbook Provision Project, were only recently approved, and most of the projects were effective in December 2004, not much progress had been achieved in implementation at the time of the portfolio review, and thus the review deals mostly with the quality of project preparation and design.

68. This April 2005 portfolio review gives an overall ranking for each project, and also ranks individual areas of concern; all projects were rated satisfactory with regards to fiduciary aspects. Overall, one project was rated satisfactory, four projects were rated moderately satisfactory, one project was rated marginally unsatisfactory, and one project was rated unsatisfactory. The analysis of risk assessment in the technical annexes of project documents was rated highly satisfactory by the reviewer for all projects.

69. Project implementation arrangements are based on a Project Management Team (PMT) within the Iraq implementing agency, supplemented by consultants for needed expertise. All PMTs have a procurement officer dedicated fulltime to the WB project. In three of the seven projects, the procurement officer is a consultant. In one project, the PMT was not fully in place by the date of effectiveness and had been established only recently, and this delay had hampered implementation progress.

70. The procurement risk was rated **high** for all projects. For each project, a capacity assessment of the implementing agency for procurement was carried out, based on a generic assessment prepared by WB-MNACS procurement unit. All projects have detailed initial procurement plans as well as a procurement monitoring tool to monitor the plans' implementation. To help build capacity in procurement, there is a plan to recruit an international procurement consulting firm for some projects. So far only the Ministry of Education (MOE) has negotiated a contract with such a firm, which has not yet been signed, and the proposed cost for this capacity-building support is well above the initial estimated cost at the time of project preparation. Other implementing institutions have yet to issue the Request for Proposals for this support. As part of its Terms of Reference, the consulting firm would establish a procurement management and monitoring system in each ministry.

71. The WB also provided the Government with a Master Implementation Manual (MIM) on procurement and financial management, available in both English and Arabic, which was discussed with the MOPDC and will be used for implementation of all WB-financed/administrated projects in Iraq.

¹³ Iraq: Review of World Bank Project Portfolio, April 2005.

72. Considerable delays are being experienced in procurement activities, compared to the initial procurement plans. Total WB disbursements as of May 2005 were about US\$29 million, mostly for the Emergency Textbooks Provision Project, the only project with completed contracts. Other projects are just beginning to issue bidding documents or to sign contracts for civil works.

73. For all seven projects, a project launch workshop was conducted where procurement training was a major activity. All PMT members as well as selected ministry staff from the 18 governorates, including the two Kurdish governorates, attended these workshops. Based on WB experience in working with the PMT members and other staff involved in project implementation, there are a number of skill shortages: (i) lack of familiarity in working with computers, word processing and Excel software, (ii) limitations in English language proficiency; (iii) lack of exposure to WB Procurement Guidelines and sound international procurement practices.

74. In addition to launch workshops and hands-on training during implementation, the WB has so far conducted three stand-alone workshops on procurement, project implementation, and financial management for some 150 Iraqi staff, with assistance from the ILO-ITC, Turin. Iraqi and ILO participation in these workshops was financed from the Iraq Trust Fund under Capacity Building Projects I and II. Procurement training was delivered mainly in Arabic using teaching materials in English.

75. ICB is being planned for all large works and goods contracts. No ICB works contract has been tendered so far on any project. NCB is widely planned for procurement of other works, since international contractors may not be interested in bidding under the current security conditions. Thresholds for NCB for works vary from one project to another (generally less than US\$3 million). Thresholds for procurement of goods using NCB procedures vary from US\$100,000 to 1,500,000. The highest value was in the Emergency Textbook Provision Project for about four lots, now completed. Shopping has been set at less than US\$100,000 for works and goods. Consultants are selected mainly using Quality and Cost-Based Selection and Consultants' Qualifications. Shortlists composed entirely of national firms for contracts of US\$200,000 or less are widely used because security conditions deter international consultants. Consulting bureaus attached to Iraqi universities were also shortlisted. The prior review threshold is set low: US\$250,000 for works, US\$100,000 for goods and consulting firms, and US\$50,000 for individual consultants.

76. No post-review has been conducted so far, since not much procurement has taken place, and almost all contracts at this stage have been subject to prior review. Under the Emergency Textbook Provision Project, the WB hired a local Iraqi consulting firm to conduct physical inspection on the delivery of all contracts for reprinting of textbooks. Their report is expected in late June 2005 and will shed light on MOE performance in project implementation and contract management.

Recommended Supervision Plan and Acceptable Practices

77. In the absence of a clearly established legal and regulatory framework for public procurement in Iraq, and given the widespread continuation of former procurement practices currently lacking a legal basis, including practices which are not acceptable to the WB, it is most critical that WB-financed projects be implemented under clearly specified procurement procedures. This can be achieved through the use of Project Implementation Manual for each project derived from the MIM prepared for Iraq in 2004. The Project Implementation Manuals will be adapted to the particular circumstances of each project and executing agency. It will include standard procurement documents, evaluation report forms, progress reports, filing requirements, and specifically defined approval procedures and steps, and it will assign responsibilities for decisions. These documents could additionally be used by the procurement policy and enforcement body as a basis for development of national practices when preparing the new procurement implementing regulations.

78. A detailed procurement plan will be prepared by project negotiation and updated frequently. A limited number of contracts will be considered by grouping smaller contracts into larger contracts, and bidding documents will be prepared for the first packages in the first year during project preparation.

79. In the short term, the thresholds for prior review by the WB should remain low, which will allow WB staff to provide hands-on training to staff of the executing agencies.

80. An extended three-week Project Launch Workshop should continue to be held (in Arabic or with Arabic translation) systematically prior to the start of each project, in order to disseminate the Project Implementation Manual and train the staff of the executing agency in procurement planning and processing, using the standard bidding documents, including explanation on use of INCOTERMS, Letters of Credit, and other instruments. All staff that will be involved in implementation should attend the workshop and it will be most critical that this staff be appointed in time to attend.

81. Implementation of project activities by communities should be considered in Iraq, as this would likely reduce the security risks incurred by contractors. Recourse to Community-based Implementation is therefore an option to be considered whenever possible.

82. There should be a systematic, ongoing procurement capacity building program for Iraqi procurement staff. This may be implemented through hiring an international consulting firm or a UN agency such as ILO-Turin for a year to deliver three to four training workshops on procurement in Arabic. Such efforts would supplement WB staff efforts in delivering training on procurement as part of project preparation and supervision. Efforts should be coordinated with other players in the donor community such as UNDP in order to coordinate capacity-building activities in the procurement sector.

83. Under the WB-administrated ITF, an independent monitoring agent (MA) would be hired to monitor procurement contracts for goods, works and services that have been recommended for payment through approval of withdrawal applications by the implementing agencies. The MA would also monitor all other ITF expenditures to ensure that funds are disbursed only for the purposes for which they have been provided and in accordance with the WB's Procurement Guidelines. The MA would also monitor financial management aspects, including acceptable accounting, reporting, budgeting, planning, staffing, and auditing as per the arrangements described in the relevant technical annexes. The previous selection process of the fiduciary MA was terminated and the WB is currently in the process of selecting an MA.

84. In the medium term, a comprehensive reform and modernization of public procurement should be pursued, to include: (i) the preparation of implementation regulations and standard documents, (ii) the adoption of a procurement law and regulations fully based on standards recommended by the Multilateral Development Banks, (iii) the design of a training curriculum in public procurement to be delivered in Iraqi institutions, such as universities, and the retraining of Iraqi officials involved in public procurement, and (iv) the reform of SOEs involved as contractors, suppliers and consultants in public procurement, in order to create a level playing field between them and the private sector.

85. The following provisions should be included in the WB Legal Agreements in respect to NCB:

- (i) Standard bidding documents included in the Project Implementation Manual approved by the WB shall be used.
- (ii) Invitations to bid shall be advertised in at least one widely circulated national daily newspaper, and bidding documents shall be made available to prospective bidders at least 28 days prior to the deadline for the submission of bids.
- (iii) Bids shall not be invited on the basis of percentage premium or discount over the estimated cost.
- (iv) Bidding documents shall be made available, by mail or in person, to all who are willing to pay the required fee (which should be set at a nominal level).
- (v) Foreign bidders shall not be precluded from bidding and no preference of any kind shall be given to national bidders.
- (vi) Qualification criteria (in case pre-qualifications were not carried out) shall be stated in the bidding documents, and if a registration process is required, a foreign firm determined to be the lowest evaluated bidder shall be given reasonable opportunity of registering, without any hindrance (i.e. a foreign firm should not be judged ineligible to bid for lack of prior registration).

- (vii) Bidders may deliver bids, at their option, either in person, by courier service, or by mail.
- (viii) Bids shall be opened in public in one place, preferably immediately, but no later than one hour, after the deadline for submission of bids.
- (ix) Evaluation of bids shall be made in strict adherence to the criteria disclosed in the bidding documents, in a format, and within the specified period, agreed with the WB.
- (x) Bids shall not be rejected solely on the basis of a comparison with an official estimate without the prior concurrence of the WB.
- (xi) Split award or lottery in award of contracts shall not be carried out. When two or more bidders quote the same price, an investigation shall be made to determine any evidence of collusion, following which: (a) if collusion is determined, the parties involved shall be disqualified and the award shall then be made to the next lowest evaluated and qualified bidder; (b) if no evidence of collusion can be confirmed, then fresh bids shall be invited after receiving the concurrence of the WB.
- (xii) Contracts shall be awarded to the lowest evaluated bidders within the initial period of bid validity so that extensions are not necessary. Extension of bid validity may be sought only under exceptional circumstances.
- (xiii) Extension of bid validity shall not be allowed without the prior concurrence of the WB (a) for the first request for extension if it is longer than eight weeks; and (b) for all subsequent requests for extensions irrespective of the period.
- (xiv) Negotiations shall not be allowed with the lowest evaluated or any other bidders.
- (xv) Re-bidding shall not be carried out without the WB's prior concurrence and all contractors or suppliers shall provide performance security as indicated in the contract documents. A contractor's or a supplier's performance security shall apply to the specific contract under which it was furnished.

Recommendations
R- WBP1. In the short term, WB-financed projects should be implemented under clearly specified procurement procedures, defined in a Project Implementation Manual for each project derived from the Master Implementation Manual.
R- WBP2. Specific provisions for NCB (as exceptions to some current procurement practices) should be included in the Legal Agreements.

R- WBP3. In the short term, the thresholds for prior review by the WB should continue to be set at a low level: US\$250,000 for works, US\$100,000 for goods and consulting firms, and US\$50,000 for individual consultants.
R- WBP4. Recourse to Community-based Implementation of activities for community infrastructure especially is an option to be considered whenever possible, as this would reduce the implementation risk.
R- WBP5. A Project Launch Workshop should be held (in Arabic or with Arabic translation) systematically prior to the start of each project, in order to disseminate the Project Implementation Manual and train the staff of the executing agency in procurement planning and processing.
R-WBP6. A detailed procurement plan will be prepared by project negotiation and updated frequently. A limited number of contracts will be considered by grouping smaller contracts into larger contracts, if feasible, and bidding documents will be prepared for the first packages in the first year during project preparation.
R- WBP7. In the medium term, WB and other donors should provide assistance to Iraq for continued modernization of public procurement to include: (i) the upgrading of laws and regulations based on standards recommended by the MDBs, (ii) the design of a training curriculum in public procurement to be delivered in Iraqi institutions, such as universities, and the retraining of Iraqi officials involved in public procurement, and (iii) the reform of SOEs involved as contractors, suppliers and consultants in public procurement, in order to create a level playing field between them and the private sector.

PRIVATE SECTOR

86. There were until recently few opportunities for discussion of public procurement issues between Government and the business community in Iraq. Foreign investment was prohibited in the past, with the exception of Arab investments, and private sector concessions, whether local or foreign, were not permitted. However, the CPA87 repealed laws restricting or prohibiting foreign investments. The private sector, local and foreign, may now participate without facing these former restrictions in public procurement for goods and services. SOEs are also allowed to compete, and as most of them are dependent agencies of a ministry, they are seen as being favored for procurement conducted by that ministry.

1. **Competitiveness and Participation in Public Procurement**

87. Foreign companies are required by law to register with the Companies Registrar in the Ministry of Trade and obtain a license prior to signing a contract with Government or SOEs, or even prior to becoming a subcontractor on such contracts. Under Regulations No. 5, Branch and Offices of Foreign Economic Establishments (1989), foreign companies were also required to open a branch office in Iraq for the duration of their contract. The branch office was to be liquidated within 60 days of the completion of the contract for which it was established, through application to the Companies Registrar. The process of liquidation was cumbersome, with a series of “no objection” letters required from the company’s government client, the tax office, and other entities.

88. The Iraqi Engineering Union is the organization that represents and registers private consulting firms in the country. It comprises more than 600 consulting firms in eight sectors; civil engineering, architecture, electrical, mechanical, and chemical engineering, oil engineering, studies bureaus, and industrial engineering. Most firms are micro-enterprises, registered as sole proprietorships and employing three to five employees.¹⁴ The Iraqi Union groups the consulting firms in three categories according to experience: practiced, licensed, or consultant. There are more than 150 firms registered within the Union as consultants but only 52 had kept their registration current as of mid-2004.

89. Private consulting firms interviewed for this OPR assessment expressed their dissatisfaction with the lack of instructions regarding the procurement of consulting services and related qualification requirements, and the lack of recognition of the specificities of this kind of procurement.¹⁵ They also resent having to provide with their proposal a bank guarantee of 3 to 5 percent of contract value which has a high cost to

¹⁴ The Union’s *Instructions for Creation Of Consulting Firms*, published in 1984 and approved by the Minister of Housing and Construction, stipulates that a firm can be established if one or more members is registered by the union as a licensed engineer.

¹⁵ Iraqi consultants appreciate the principles of the WB Guidelines for Selection of Consultants, which recognize the differences between selection of consultants and procurement of goods and works.

them. In addition they expressed a low level of confidence in the fairness and transparency of public procurement.

90. The Iraqi Contractors' Federation is a professional organization that represents and registers private contractors and contracting companies based on the Ministry of Planning contractor's classification.¹⁶ The Federation comprises more than 21,000 contractors and contracting companies, with 120 companies registered as Class 1. Registration with the Federation is not mandatory in principle, but most government authorities request for evidence of such registration before awarding a contract.

91. Members of the Federation have expressed a very low level of confidence in the public procurement system. More specifically, they perceive a lack of fairness and transparency of procedures, and complain about (a) insufficient time allowed to obtain the bidding documents, and prepare and submit bids, (b) the fact that the place and time of bid submission are not clearly identified in the advertisement, and (c) the practice of negotiation of contract before award. In addition, they have complained to Government about the high cost of bid securities (which they would like to be lower than the usual 2 to 5 percent), and of performance securities and retention monies.¹⁷ They have asked the Government to support the Iraqi contracting industry through loans or lease schemes for importing new equipment and machinery to replace that damaged from years of neglect. They would also like the contractors' classification thresholds to be revised to reflect the high level of inflation.

2. Commercial Practices and Public Procurement

92. Due to the weakness of the banking sector, firms bidding on public contracts face major difficulties in obtaining bid and performance securities and advance payment securities. In the medium term, the private banking system is expected to develop rapidly, and more adequate services should become available. Also, a Trade Bank was set up recently to provide trade credit and payment guaranties to private operators for import-export activities. Nonetheless, the capacity of the banking system to provide required services to suppliers and contractors, such as securities, credit, and letters of credit, should be monitored, and interim provisions may need to be adopted if such services are not available.

Insurance and Physical Security Issues

93. Prior to the issuance of international sanctions in 1991 following the first Gulf War, Iraq had a fairly modern and robust insurance environment, although substantially

¹⁶ The Federation was founded in June 10, 1984 based on Order no. 657, Law-Iraqi Contractors Federation. The order was revised once in 1988

¹⁷ Performance security is currently set at 5 percent of contract amount (Execution of Major Projects Law No. 60 of 1988 as amended) and retention money is 10 percent. The contractors requested Government (a) to accept performance securities of 5 percent for the first billion ID (about \$680,000), 4 percent for the second billion, and so on, and (b) to reduce retention money from 10 percent to 5 percent of each payment up to a maximum of 5 percent of contract amount.

controlled by the Government. Obtaining insurance coverage in Iraq is currently quite difficult, due in large part to the current security conditions in the country. While the local law requires that coverage be placed in Iraq with Iraqi insurers, the Government is not enforcing the law at this time¹⁸.

94. The OPR team identified two state-owned insurers, National and Iraq, a state-owned reinsurer, Iraq Re, and four privately owned insurers. As of February 2005, both National and Iraq were found to be practically moribund, and the status of the four private insurers is unknown. With sanctions, Iraq Re lost its capability to access international reinsurance markets. Maximum limits for General Third Party Liability insurance is said to be ID10,000,000 (about US\$6,800). These findings, together with significant devaluation of the Iraqi Dinar, imply a very limited capacity to absorb risk. It will therefore be some time before there is a functioning local insurance market.

95. The possible exception to this is automobile liability. Automobile insurance is compulsory under the Road Traffic Act, with unlimited liability for bodily injury. Premiums are paid via a levy on gasoline, so theoretically all vehicles are insured. These premiums are handed over to the National Insurance Company, which administers claims. Clarification is needed as to whether this system is functional and to what extent coverage is considered applicable if an individual is killed or injured in an insurgency incident. Property damage limits are unknown.

Insurance under WB-financed projects

96. The WB normally requires that foreseeable risks of damages to property and injuries to persons (both contractor's personnel and third parties) arising out of procurement of goods and works and consulting services for WB-financed projects should be appropriately and adequately covered by insurance policies. Consequently when events or risks covered by the policies occur, the Implementing Agencies should be able to repair or replace the damaged goods or works and pay indemnities to injured persons, and proceed with the completion of the implementation activity, using the financial resources provided under the insurance policies. This requirement ensures that the project objectives are realized in an efficient manner with the least delay.

97. Due to the lack of an adequately functioning local insurance market, large projects and other works will therefore be dependent upon foreign insurers. Costs are likely to be high and coverage restricted until the overall law-and-order situation has substantially improved.

98. Proposed insurance options for WB-financed contracts for goods, works, and consulting services are detailed in Annex 3 of this report, taking into consideration the WB's requirements, the current security situation, and the state of the insurance industry in Iraq.¹⁹

¹⁸ A new Insurance Business Regulation Act was enacted in 2005 while the OPR report is finalized.

¹⁹ Further details on insurance to be taken out by suppliers, contractors and consultants under WB-financed contracts in Iraq is provided in a note prepared by the WB which may be found in the WB Iraq OPR file.

<u>Issues</u>
I-IPS1. The local insurance market is inadequate.
I-IPS2. Ongoing security conditions may be invoked abusively as creating a force majeure situation, in order to limit the liability of the contractor or supplier.
<u>Recommendations</u>
R-IPS1. Allow for adequate flexibility in obtaining contract insurance and recourse to foreign insurers, and adopt appropriate trade terms.
R-IPS2. Define specifically in contracts for works what constitutes a force majeure situation and closely monitor performance.

Physical Security Issues

99. The prevailing security situation in Iraq has been a matter of serious concern in contracts for reconstruction and rehabilitation projects in Iraq. As it is a matter of life or death for contractors' personnel, security is the first priority, and contractors must hire security firms to ensure their protection.²⁰ Ensuring security of contractors' personnel and project staff in general is likely to remain a major concern in Iraq in the short and medium term. Contractors should be requested to include the cost of security in their bid and contract price, including the cost of provision of private security services.

<u>Issues</u>
I-IPS3. Security costs will form a significant portion of the contract price.
I-IPS4. Project costs and cost estimates for individual contracts will have to factor in the security costs.
<u>Recommendations</u>
R-IPS3 The procurement plan and the financing plan for the projects should cover the security costs, both at the project level and the individual contract level.
R-IPS4. Provision of physical security services will be a responsibility of the contractor under the contracts.

²⁰ A review of USAID-funded contracts has found that of US\$673.8 million spent, US\$70.8 million went for security. The share of security spending grew as time went on: from March 2003 to February 2004, it was 4.2 percent, then climbed to 22.3 percent for the rest of 2004.

R-IPS5. Use of electronic facilities for bid advertising, bidding document submission to potential bidders and dissemination of minutes of bid opening and contract awards should be considered in the medium term to make it safer for bidders to participate, enhance transparency, and facilitate record-keeping.

C. RECOMMENDED ACTION PLAN

100. An Action Plan for discussion with Government, the WB, and other development partners is presented below, based on the findings, issues and recommendations formulated in this OPR. The proposed action plan also recapitulates recommendations for the design and supervision of procurement arrangements in WB-financed activities.

Recommendations to the World Bank

101. In the short term, it is necessary that WB-financed projects be implemented under clearly specified procurement procedures, to be reflected in relevant provisions of the legal agreements and supported by a Project Implementation Manual for each project, derived from the Master Implementation Manual (MIM) prepared for Iraq in 2004. The 2004 MIM includes national standard bidding documents, evaluation report forms, progress reports, and filing requirements, along with specifically defined approval procedures, and steps and responsibilities for decisions are clearly assigned. The Project Implementation Manuals and MIM could also be used by the procurement policy and enforcement body as a basis for development of national practices when preparing the new procurement implementing regulations. A detailed procurement plan should be prepared prior to project negotiations and updated frequently. A limited number of contracts should be considered, by grouping smaller contracts into larger contracts, and bidding documents should be prepared during project preparation for the first packages of the first year. The thresholds for prior review by the WB should be set at a low level so that WB staff will be able to provide hands-on training to staff in the executing agencies. A Project Launch Workshop should be held (in Arabic or with Arabic translation) systematically prior to the start of each project, in order to disseminate the Project Implementation Manual and train the staff of the executing agency in procurement planning and processing, using the standard bidding documents.

Recommendations to the Government of Iraq

102. The most urgent action needed from Government is to clarify the legal framework for public procurement and enact the needed legal and regulatory instruments either through the existing CPA Order No. 87 or through a new law. The most practical solution in the short term would appear to be to enforce CPA87 by amending it and issuing adequate regulations. A solution more suitable for the medium term would be to prepare and enact an entirely new law and suitable regulations. The establishment of an adequately staffed procurement policy and enforcement body (OGPCP), to be endowed primarily with formulating the regulations and preparing the standard bidding documents that are so badly needed is therefore a very high priority. This set of urgent actions is critical to curtail corruption, as corruption is more likely to thrive in the absence of clear rules and standard procedures and documents.

103. Major shortcomings in current procurement practices, mostly inherited from the old regime, should also be addressed urgently by Government through (i) promulgation of new implementing regulations, to ensure that the Iraqi public procurement system is promptly aligned with internationally recognized best practice, and (ii) a major training effort to disseminate best practice through training of procurement staff in all procuring entities.

104. Most importantly, the Government needs to forcefully address the issue of the widespread culture of bribe-taking and corruption, through a coordinated process of communication and disseminating best practices, controls and audits, and sanctions. The feasibility of controls and audits requires a major improvement in recordkeeping and records management.

105. The focus of this report on improving procurement procedures is part of a wider picture of strengthening public financial management systems in Iraq. Reforms in areas such as budget preparation, accounting and reporting, internal control, internal audit and external audit are urgently required to increase the efficiency of budget transactions, improve transparency and reduce corruption. Institutional development and capacity building in all these areas are essential if the reforms of public procurement proposed in this report are to be fully effective; indeed, procurement needs to be regarded as a core component of a modernized system of accounting, control, reporting, audit and oversight. Since different government entities are responsible for the various components of public financial management, strong coordination between the Minister of Planning, the Minister of Finance, the President of the Supreme Board of Audit and other agencies will be required if these reform efforts are to have their full impact.

Recommendations to the Donor Community

106. The WB as well as other donors will need to provide support to Iraqi institutions for implementation of donor-financed projects and for the overall reform of public procurement in a well-coordinated manner. In the medium term, comprehensive reform and modernization of public procurement should be actively pursued, including (i) the preparation of implementation regulations and standard bidding documents, (ii) the adoption of standards recommended by the Multilateral Development Banks in order to align Iraqi public procurement practices with internationally recognized best practice, (iii) the design of a training curriculum in public procurement to be delivered in Iraqi institutions, such as universities, and the retraining of Iraqi officials involved in public procurement, and (iv) the reform of State-Owned Enterprises involved in public procurement as contractors, suppliers and consultants, in order to create a level playing field between them and the private sector.

Proposed Action Plan				
No.		Reference in Section B	By Whom	Short (S) or Medium (M) Term
	Public Procurement Law and Regulations			

1.	The legal framework for public procurement needs urgently to be clarified and aligned with best international practice. From a practical perspective, this may best be achieved in the short term by issuing implementing regulations as a matter of first priority that enforce CPA87 or a new law along the same format as CPA87. Alternatively, or in the medium term, an entirely new procurement law could be prepared.	R-LRF1	GOI	S
2.	Establish procurement policy and enforcement body (OGPCP or a similar body) with the capacity to fully develop (i) appropriate implementing regulations for the Public Procurement Law, including (ii) standard bidding and contract documents for the procurement of goods, works, and services, (iii) a proposal for creation of and rules for operation of an independent Administrative Tribunal to handle complaints and disputes relating to the award of contracts, (iv) develop training for government procurement personnel, (v) ethical standards, and (vi) public procurement auditing rules and practices.	R-LRF2.	GOI	S
3.	The procurement policy and enforcement body (to be created) should review CPA87 and make recommendations for amending it or issuing a new law along the same principles as CPA87.	R-LRF3.	GOI	M
4.	The procurement policy and enforcement body to issue implementing regulations to include clear requirements for: (i) bid evaluation criteria to be quantified in monetary terms whenever possible, (ii) rejection of late bids, and (iii) detailed regulations on how to conduct procurement procedures, public bid opening, bid evaluation in accordance with internationally recognized principles of transparency and fairness, including open access to bidding documents under open competitive bidding, against payment of nominal reasonable fee (which should be the only condition to fulfill).	R-LRF4, R-PP1, R-PP5, R-PP6.	GOI	S
5.	The procurement policy and enforcement body to prepare and issue national standard bidding documents to be used in public procurement by all procuring entities. These standard documents could be based on those provided in the Master Implementation Manual	R-PP1	GOI	S

	(MIM).			
6.	Review and update registration requirements and procedures for bidders.	R-PP3.	GOI	M
7.	The procurement policy and enforcement body to prepare regulations for exclusion from participation (in accordance with principles stated in CPA87).	R-PP4.	GOI	M
8.	Adoption of dual language (Kurdish and Arabic) in northern part of country for open national competitive bidding (NCB).	R-PP7.	GOI	S
9.	The procurement policy and enforcement body to prepare regulations for the establishment and the operating rules of an Administrative Tribunal in accordance with the Procurement Law, including rules on publication of contract awards supporting a bid protest mechanism.	R-PP8.	GOI	S
Capacity Building				
10	In coordination with relevant government agencies, the procurement policy and enforcement body and procuring entities to conduct systematic dissemination of the implementing regulations and train procurement entities and procurement staff on how to use them.	R-PP2.	GOI	S
11.	The procurement policy and enforcement body to prepare training modules for procurement staff, based on new law and regulations, focusing especially on procedures and documentation; identify potential training of trainers within Ministries; implement a major training program to disseminate procedures and bid documents.	R-OR2.	GOI	S/M
Public Sector Management				
	Public procurement must be viewed as a critical component of the overall public financial management system given the extremely large volume of public procurement activities carried out in Iraq, both for infrastructure reconstruction and investment activities, and the Public Distribution System,	R-PSM2	GOI	M
Monitoring, Audit and Anti-Corruption				

12.	The procurement policy and enforcement body to follow-up on enforcement of procurement laws and regulations by Ministries and SOEs through periodic audits.	R-OR1.	GOI	S/M
13.	Strengthen the capacity of auditors at the Supreme Audit Board, Inspector General departments, and the Commission on Public Integrity for procurement activities.	R-AAC1.	GOI	M
14.	The procurement policy and enforcement body to issue Code of ethics, to be disseminated/enforced.	R-AAC2.	GOI	S
15.	Leadership required in conducting fight against corruption and enforcement of anti-corruption regulations.	R-AAC3.	GOI	S/M
16.	Issue, disseminate, and enforce regulations on record keeping requirements for procurement activities. Recourse to electronic record keeping should be actively pursued in the short/medium term.	R-PSM1.	GOI	S
	Design of Procurement Arrangements in WB-Financed Projects			
17.	The procurement plan and the financing plan for the projects should cover the security costs both at the global level (i.e. project level) and the individual contract level.	R-IPS3	GOI/ WB	S
18.	Provision of physical security services will be a responsibility of the contractor under the contracts.	R-IPS4.	GOI	S
19.	Use of electronic facilities for bid advertising, bidding document submission and dissemination of minutes of bid opening and contract awards should be considered in the medium term to make it safer for bidders to participate, enhance transparency, and facilitate record keeping.	R-IPS5.	GOI/ WB	M
20.	Contracting mechanisms and/or provisions should be adopted that would reduce the risk of cost increase, such as recourse to CIP- Place of destination (Carriage and insurance paid to Place of destination) for the	R-PP9.	GOI/ WB	S

	supply of goods, accelerated payment terms, and recourse to community based implementation for rehabilitation of community scale infrastructure.			
21.	Allow for adequate flexibility in obtaining contract insurance and recourse to foreign insurers, adopt appropriate trade terms.	R-IPS1.	GOI/ WB	S
22.	Define specifically in contracts what constitutes a force majeure situation and closely monitor performance.	R-IPS2.	GOI/ WB	S
23.	In the short term, WB-financed projects should be implemented under clearly specified procurement procedures, defined in a Project Implementation Manual derived from the Master Implementation Manual.	R-WBP1.	GOI/ WB	S
24.	Specific provisions (as exceptions to some current procurement practices) should be included in the Legal Agreements in respect to National Competitive Bidding.	R-WBP2.	WB	Ongoing
25.	In the short term, the thresholds for prior review by the WB should continue to be set at a low level: US\$250,000 for works, US\$100,000 for goods and consulting firms, and US\$50,000 for individual consultants.	R-WBP3.	WB	Ongoing
26.	Recourse to Community implementation of activities for community infrastructure especially is an option to be considered whenever possible.	R-WBP4.	WB/ GOI	S/M
27.	A Project Launch Workshop should be held (in Arabic or with Arabic translation) systematically prior to the start of each project, in order to disseminate the Project Implementation Manual and train the staff of the executing agency in procurement planning and processing.	R-WBP5.	WB	Ongoing
28.	In the medium term, WB and other donors should provide assistance to Iraq for continued modernization of public procurement to include: (i) the upgrading of laws and regulations based on standards recommended by the Multilateral Development Banks, (ii) the design of a training curriculum in public procurement to be delivered in Iraqi institutions, such as universities, and	R-WBP6.	Don ors/ GOI	M

	the retraining of Iraqi officials involved in public procurement, and (iii) the reform of SOEs involved as contractors, suppliers and consultants in public procurement, in order to create a more level playing field between them and the private sector.			
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Annex 1: List of Persons Met

Ministry of Planning and Development Corporation:

1. Kasim Enayat Ferez – PMT Financial Manager / Inspector General office
2. Ahmed Mehdi Salih – PMT Procurement officer / Foreign Investment Promotion Department
3. Ghassan Adnan Mahmud - PMT Technical Coordinator / Foreign Investment Promotion Department
4. Enas Hameed Majeed – PMT Assistant / Foreign Investment Promotion Department
5. Majeda Mohamed Abdulla – Legal Department
6. Mukdad Abdul Sahib Mosa - Inspector General office
7. Muhannad Rdheem Mhaisen – Contracts Department
8. Eman Abdul Ridha Sharif – Central Statistics Board
9. Huda Abed Almalik Alaani – General Manager / ISRB
10. Lemia Dizaye – Deputy / ISRB
11. Sadia Khadem – General Manager / Legal Department

Ministry of Trade:

12. Eman Adil – Export Promotion Department.
13. Muna Musli Al-Nakshbandi – General Manager / Grain Department
14. Alia Hussien Fakhri – General Manager / Commercial Department

Ministry of Education:

15. Subhi Noori Flayih – PMT Financial Manager
16. Khalil Wali Ismail – PMT Procurement Officer
17. Rahim Hassan Shehab – PMT Engineer / General Directorate for Schools
18. Ehsan Ali Hayder – PMT Engineer / Karakh Education Directorate
19. Samira Jaafer Baquir – PMT Accountant
20. Aida Ammry Saleem – PMT Accountant
21. Iman Ogood Khadir – PMT Auditor
22. Azhar Hamodi – Planning Department / Karbala Education Directorate
23. Namir Warid Hassan – PMT Chief Engineer
24. Haleem Kashkol – PMT Engineer

Ministry of Communication:

25. Ahlam Ali Umran – PMT Procurement Officer / Commercial Department
26. Abdul Hasan Faysel Kmeen– Financial Department
27. Nagham Rasheed Barbooti– Financial Department
28. Jamal Abdul Ameer Kadhim– Engineer / Commercial Department

Ministry of Health:

29. Dr. Ayad Neama Al- Dahwi – PMT Director / General Manager
30. Mohamed Raef Abdul Rahman – PMT Procurement Officer
31. Futuh Jasem Al-Zubaydi – PMT Architect / Buildings Department
32. Jamal Hasan Abdullah – PMT Pharmaceutical specialist / KIMADIA

33. Ghada Yousif – PMT Financial Manager
34. Jalal Tareq Hassan – PMT Accountant

Ministry of Higher Education:

35. Ali Abdul M. Hassan – PMT Director / General Manager
36. Sherien N. Yaba – PMT Deputy
37. Abdu Al Elah N. Sheel – PMT Financial Manager / Financial Department
38. Ebtisam Hamed Madi – PMT Procurement officer / Commercial Department

Ministry of Water Resources:

39. Nihad Merza - PMT Financial Manager / Financial Department / General Manager
40. Albeer Monir – PMT Accountant / Financial Department
41. Mohamed Hassan Radi – PMT Director / Strategic Planning Department
42. Ali Mahdi – PMT Procurement officer / Strategic Planning Department

Ministry of Municipalities and Public Works:

43. Abdul Amie Mehdi – Engineer
44. Faris Abed Naeem – Engineer
45. Ali Yehya Abed – Engineer
46. Salih Jab'bar Abbas- Engineer

Ministry of Finance - Kurdistan Region:

47. Khalid Omar Mohyeddin
48. Abdullah Hamed Ameen.
49. Shairzad Beer Dawood
50. Kadhim Namik Ahmed.

Ministry of Education – Kurdistan Region – Sulaymaniyah

51. Ako Rasheed.- Planning Department / General Manager
52. Ardalan Jalal – Planning Department / Chief Engineer

Agency of Reconstruction and Redevelopment- Kurdistan Region - Sulaymaniyah

53. Twana Kamal Jalal – Head of Tendering Department
54. Nabaz Ahmed Mohammed – Engineer

Ministry of Education – Kurdistan Region – Erbil

55. Sabah Saeed AbdoAllah – Supply Department
56. Abu Baker Taher – Planning Department

Ministry of Municipalities – Kurdistan Region – Erbil

57. Mariwan Aaez Aldeen – Engineer

Iraqi Engineering Union:

58. Yassin Al- Aani – Administration Department
59. Walid El- Ramadani – Consulting Firms Department
60. Muazaez Al-Turcoman – Secretary

Iraqi Contractors Federation:

61. Adnan Al-Khassab – Secretary General
62. Sabah Sediq – Member

Iraqi Consulting firms:

63. Ahmed Rasheed – Dar Al- Rasheed
64. Mohammed Al-Imam – Imam & Partners
65. Ghassan Jasim - Imam & Partners
66. Safaa Al-Samarai – INANA
67. Wameed Shamash - Al-Bayati Bureau

Iraqi Contractors:

68. Faris Jameel – Al-Nahar Contracting Company
69. Sabah Sedeq – Al- Nukhba Contracting Company
70. Kareem Abbas – Al- Nukhba Contracting Company
71. Mohammed Al-Azzawi – Al-Azzawi Contracting Company
72. Imad Hussien – Al-Aahed Al-Jadeed Contracting Company

World Bank:

73. Joseph Saba- Country Director (MNC02)
74. Kathryn Funk-Lead Country Officer (MNC02)
75. A. Amir Al-Khafaji-Consultant (MNSIF)
76. Antonio Cittati-Sr. Procurement Specialist (MNACS)
77. Zeina Samara-Disbursement Officer (LOAG2)
78. Jane Sansbury-Sr. Operations Officer (MNC02)
79. Peter Buckland-Sr. education Specialist (MNSHD)
80. Celine Gavach-Operation Analyst (MNSHD)
81. Khaled Lahlo-(MNC02)
82. Sanaa Nimer-Sr. water Specialist (MNSIF)
83. Mario Zelaya-Consultant (MNSHD)

Donors:

84. David Wall (USAID)
85. John Acree (USAID) by phone

Annex 2: List of Background and Supporting Material

CPA Official Documents

Document no.	Title	Date
Order 12	Trade Liberalization Policy	26 Feb. 2004
Order 18	Measures to ensure the independence of the central bank of Iraq	07 Jul. 2003
Order 20	Trade bank of Iraq	17 Jul. 2003
Order 34	Amendment to Coalition Provisional Authority order no. 2	13 Sep. 2003
Order 37	Tax strategy for 2003	19 Sep. 2003
Order 38	Reconstruction Levy	04 Apr. 2004
Order 39	Foreign Investment	20 Dec. 2003
Order 46	Amendment of CPA order 39 on Foreign Investment	20 Dec. 2003
Order 47	Amendment of CPA order 38 on Reconstruction Levy	04 Apr. 2004
Order 49	Tax Strategy for 2004	20 Feb. 2004
Order 56	Central Bank Law	06 Mar 2004
Order 57	Iraqi Inspectors General	10 Feb. 2004
Order 77	Board of Supreme Audit	25 Apr. 2004
Order 87	Public Contracts	16 May 2004
Order 94	Banking law of 2004	07 Jun. 2004
Mem. 04	Contract and Grant procedures	18 Jun. 2004
Mem. 13	Appointment of Inspector General to the Baghdad City Council	02 Jun. 2004

Iraqi Legislation

Law no.	Title	Year
40	The Civil Code Law No	1951(as amended)
30	Trade Law	1984
21	Private Companies Law	1997
22	General Companies Law	1997
62	Arab Investments Law	2002
20	Law for Organizing Trade	1970 (as amended)
4	Agency Registration	1999
51	Law for Organizing Commercial Agency	2000
Regulation (5)	Branch and Offices of Foreign Economic Establishment	1989
3	Law for The General Authority of Free Zones	1998
60	Execution of Major Projects Law No	1985 (as amended)
23	Customs Law	1984 (as amended)
113	Income Tax Law	1982 (as amended)

14	Discipline of Governmental Staff Law	1991
71	Labour law	1987 (as amended)
80	Transport Law	1983
83	Civil Legal Procedure Law	1969 (as amended)
107	Evidence Law	1979 (as amended)
45	Attachment Law	1980 (as amended)
111	Iraqi Penal Law	1969 (as amended)
83	Civil Legal Procedures	1969 (as amended)

Instructions from Ministry of Planning and the Ministries Council for Public Sector

Title	Issued by	Year
Conditions of Civil work contracts– Part 1 and 2	Legal Department – Planning Institution - The Ministries Council	
Condition of Electrical, Mechanical, and Chemical works contracts– Part 1 and 2	Legal Department – Planning Institution - The Ministries Council	
Settlement Instructions for Projects Executed through Trust (amanat)	Legal Department – Ministry of Planning	2001
Accounting Instructions	Legal Department – Planning Institution - The Ministries Council	2001
Direct Contracting Instructions	Legal Department – Planning Institution - The Ministries Council	2001
Classification of Foreign Contractors	Legal Department – Ministry of Planning	2005
Instructions of Public Contracting – Purchase and Supply	Legal Department – Planning Institution - The Ministries Council	2001
Instructions – Registration of Iraqi Contractors	Legal Department – Planning Institution - The Ministries Council	1997
Instructions - Execution of Major Projects	Legal Department – Ministry of Planning	1988

Publications by the Iraqi Engineering Union and Iraqi Contractors Federation for Private Sector

Title	Issued by	Year
Engineering Consulting Services Contract	Iraqi Engineering Union	1985
Instructions – Creation of Engineering Consulting Bureaus	Iraqi Engineering Union	1984
Iraqi Engineering Union	Iraqi Contractors Federation	1984 (amended 1988)

Annex 3: Proposed Insurance Options for WB-financed Contracts

1. This Annex addresses the application of the provisions relating to insurance prescribed in the WB's (i) Procurement Guidelines and the Standard Bidding Documents relating to procurement of goods and works and (ii) Consultants Guidelines and Standard Request for Proposals (which includes the Conditions of contract) for selection and employment of consultants, under WB-financed projects in the light of the current security situation and weak insurance infrastructure obtaining in Iraq. Boxes 1-7 provide useful definitions and recommendations.

Procurement of Goods

2. In regard to procurement of goods under ICB contracts, bid prices should be obtained on CIP basis (Carriage and Insurance Paid to the place of destination) for all goods manufactured abroad, and EXW (ex works, ex factory, or off-the-shelf) plus cost of inland transportation and insurance to the place of destination for goods manufactured or assembled in Iraq. Also bids offering goods manufactured abroad that have already been imported should provide their prices on CIP basis. The WB's recent experience with the Emergency Textbook Procurement Project (ETPP) shows that no problem has been experienced so far in this regard. This would ensure full compliance with the WB's policy on insurance. In regard to procurement of goods under NCB contracts, Project Implementing Agencies are encouraged to obtain bid prices on CIP (Carriage and insurance paid to the place of destination) for all goods manufactured abroad.

Procurement of Works

3. For procurement of works under ICB procedure, specifications should be made for insurance of contractor's risks (i.e. (i) loss of or damage to (a) the Works, Plant, and Materials, (b) Contractor's Equipment, and (c) property (except the Works, Plant, Materials, and Equipment) in connection with the Contract; and (ii) personal injury or death to contractor's employees and other people). It is proposed that the following specifications should be made for insurance of contractor's risks in the SCC of the bidding documents. The minimum insurance cover will be the sum of

(a) the Works, together with materials, Plant, and other supplies for incorporation therein, to the *full replacement cost* (the term "cost" in this context shall include profit), and

(b) *an additional sum to cover any additional costs of and incidental to the rectification of loss or damage including professional fees and the cost of demolishing and removing any part of the Works and of removing debris of whatsoever nature* (expressed by FIDIC as 15 percent of the full replacement cost, while the WB leaves it open-ended in the suggested clause, to be determined on a case-by-case basis).

Type of Contractor's Risk to be covered	The minimum insurance cover shall be:	The maximum deductibles shall be:
(a) loss of or damage to the Works, Plant, and Materials;	115% of the Original contract value.	US\$10,000
(b) loss of or damage to Equipment;	115% of the full replacement cost of Equipment.	2 % of the cost
(c) loss of or damage to property (except the Works, Plant, Materials, and Equipment) in connection with the Contract.	(i) 115% of the full replacement cost for ICB and NCB contracts with an estimated cost of US\$200,000 or more. (ii) NCB contracts with an estimated cost of less than US\$200,000 – Not applicable.	(i) 2 % of the cost for ICB and NCB contracts with an estimated cost of US\$200,000 or more. (ii) NCB contracts with an estimated cost of less than US\$200,000 – Not applicable.
(d) Personal injury or death. (i) For contractor's employees. (ii) Other People	(i) Reimbursement of Medical Expenses and Death benefit of 3 years salary as a common guideline. Emergency evacuation expenses for foreign staff. (ii) US\$20,000 per occurrence.	(i) Not applicable (ii) Not applicable

For procurement of works under NCB procedure, Project Implementing Agencies are encouraged to make specifications for insurance of contractor's risks using the above as a guideline.

4. A Clause on "Force Majeure" should be included in the General Conditions of Contract (GCC), for procurement of goods, works and consulting services, keeping in mind the provision on "Force Majeure" under the applicable law, if any.

5. In the event the Contractor, having obtained the contract that contains the above insurance provisions, does not provide any of the policies and certificates required in the signed contract, then the Employer (Implementing Agencies) may obtain/purchase the insurance which the Contractor should have provided and recover the premiums the Employer has paid from payments otherwise due to the Contractor.

6. It may be found, during preliminary examination and evaluation of the bids received for works contracts, that none of the bidders are able to comply with the requirements as to provision of insurance. In such an event, should all the bids submitted for works be non-complying with regard to the insurance provisions, then in terms of the WB's procurement policies and practices, the non-complying bids/proposals can be evaluated and a recommendation made for award of contract. Also in such a situation, as the bid prices submitted or the proposals prices submitted would not include insurance coverage, the Employer should take over responsibility for insurance and provide the indemnities required, either through the creation of an "escrow account" or by including a "provisional sum" in the contract. In such an event, the WB would provide an appropriate

waiver from the provisions contained in paragraph 2.26 of the WB's Guidelines: Procurement under IBRD Loans and IDA Credits (May 2004).

7. It is also possible that, prior to the submission of bids and/or during the pre-bid meetings, some or all of the contractors who are potential bidders may inform the Employer that it is nearly impossible to obtain the insurance coverage as per the terms of the bidding documents in the market at a fair price. Should this happen, the Employer should review the matter and may, if considered appropriate, issue an amendment to the bidding documents, advising the potential bidders that they (bidders) should submit bids on the basis that the contractor's risks detailed in the bidding documents would be covered either by the Employer effecting the insurance for the stated contractor's risks.

8. Under contracts with consulting firms, the consultants should take out and maintain at their own cost, insurance against the risks specified below. In this regard, the following provisions should be specified in the SCC appended to the Request for Proposal (RFP).

- (a) Third Party motor vehicle liability insurance in respect of motor vehicles operated in the Government's country by the Consultant or its Personnel or any Sub-Consultants or their Personnel, with a minimum coverage of US\$60,000.
- (b) Third Party liability insurance, with a minimum coverage of US\$60,000.
- (c) Employer's liability and workers' compensation insurance in respect of the Personnel of the Consultant and of any Sub-Consultants, with respect to such Personnel, any such life, health, accident, travel or other insurance as may be appropriate; US\$60,000 for professional personnel and US\$10,000 for others²¹.
- (d) Insurance against loss of or damage to (i) equipment purchased in whole or in part with funds provided under this Contract, (ii) the Consultant's property used in the performance of the Services, and (iii) any documents prepared by the Consultant in the performance of the Services (115 percent of the full replacement cost).
- (e) Professional liability insurance, with a minimum coverage to be specified on a case-by-case basis, as a multiple of contract value.

9. Generally speaking, only some types of consultants' contracts give rise to prescription of professional liability insurance, depending on the scope of services and outputs required from the consultants. In contracts that give rise to prescription of professional liability insurance, the minimum insurance to be prescribed should be the contract price (i.e. multiplier of one) or a multiple thereof. If the Borrower desires to increase its cover, they are encouraged to secure insurance for potential risks above these limits. Further, since professional liability insurance, where required, will usually be provided by the Consultant's home country or by a foreign country, the security and insurance issues of

²¹ These figures for compensation reflect the differential in the level of remuneration received by professional personnel and other non-professional personnel working under consultant contracts. There is no implication that the life of a professional is more precious than the life of a support staff.

Iraq would have no significant bearing on its issuance or availability. It is recommended that the question of establishing the Consultants professional liability be dealt with *on a case by basis* at the time of issuance of the RFP to the shortlisted consultants.

Box 1. Marine Transit Insurance for Goods Imported into Iraq

SFRCF has advised that for Marine Transit Insurance, many insurers will only grant coverage to the Iraq border or Umm Qasar Port. In certain cases coverage to destination (e.g. Baghdad or Kirkuk) is available including War on land, Terrorism, Strikes etc. It will be necessary to carefully review all supply contracts to ensure that coverage is in place to final destination. In certain cases therefore, it may be necessary to request that whoever is to receive the Goods, should arrange for Inland Transit Insurance coverage from the border or port to the final destination. Loss adjusting abilities within Iraq are extremely limited.

Box 2. War, Hostilities and Civil Unrest

The legal definitions of these and other similar terms can vary substantially by Country. Similar terms could include Riot, Strike, Civil Commotion, Insurrection, Rebellion, Civil War, Malicious Damage etc. Care will need to be taken to ensure that any coverage obtained is as broad as possible and that Contractors are fully aware that they are responsible if their insurance proves deficient. External monitoring of such insurances is not practicable at reasonable cost. It is possible that some suppliers/contractors will take a robust position on "war risk" and insist that the implementing agency holds harmless and indemnifies the supplier/contractor from any damage or injury resulting from such risk. While it would not be unreasonable for implementing agencies to accept such a position as long as there is adequate financing available to replace insurance as an indemnification system, such requests should be resisted.

Box 3. Risk Factors for Construction/reconstruction of Physical Assets in Iraq

(i) **Workers Compensation:** Where the Contractor is from a country other than Iraq, care will need to be taken to ensure that their Social Security or Workers Compensation programs extend coverage to staff in Iraq. In any event, additional Personal/Travel Accident coverage is desirable, as is appropriate Medical Expense and Evacuation arrangements.

(ii) **Inland Transit:** Insurance currently only available where insurers review and accept the security arrangements. Given that Contractors will almost inevitably be moving some items from off-site locations, transport from the border or port can be included as necessary. (See Procurement of Goods above).

(iii) **Construction All Risks:** Deductibles are likely to be high and, depending upon the financial stability of the Contractor, it may be advisable to establish some form of Escrow account for insurance type losses, the balance of which would be returned at contract termination (subject to all losses being settled). Capacity for Contracts in excess of US\$50,000,000 may be quite difficult. (This is a theoretical issue at the present moment, as under WB-financed projects in Iraq, there will be only one large contract for US\$40 million which would supply, install and commission telecommunication equipment).

(iv) **General Third Party Liability:** the minimum limit should be US\$60,000. Large contracts may justify

much higher limits such as US\$1,000,000. Up to US\$50,000,000 is said to be available.

(v) Contractors Plant and Equipment: It is possible that Contractors may decide not to repatriate equipment taken into Iraq. This will affect the contract price and may also affect the need to insure such plant during construction. Assuming that the contractor has the clear financial ability and contractual responsibility to replace damaged equipment such insurance can be considered optional.

(vi) Medical Expenses/Emergency Evacuation Expenses: These concerns should be supplemented by a requirement that staff working in Iraq have suitable Personal/Travel Accident insurance. A Death Benefit of three years salary is a common guideline.

(vii) Kidnap & Ransom: The decision to procure this insurance should be left to individual contractors (and is always very confidential information).

(viii) Political and Credit Risk (including Nationalization, Contract Frustration etc.): The need for such insurance may be alleviated in the context of a WB Contract, but the WB should take into account the possibility of something happening, given the current volatile political situation.

Box 4 Force Majeure

Force Majeure clauses work in favor of suppliers/contractors but for good reason. WB-funded standard bidding documents contracts include force majeure or release from performance clauses, which in specified events, relieve the supplier/contractor from inter alia:

Performance of the contract within fixed delivery dates.

Liquidated damages for delay.

Performance of the contract at all.

Events of force majeure include items such as "outbreak of war". Under The Hague Convention the term "war" is defined by reference to formal declarations of war, which would not automatically apply to many heightened security situations. Specific consideration should always be given to the list of the events that the parties wish to be regarded as force majeure. From the supplier's perspective rather than the word "war", perhaps the word "conflict" would be seen as more appropriate or "hostilities (whether war be declared or not)" or "civil unrest". Other clauses take a more broad approach by using phrases such as "any event outside the reasonable control of the supplier" and/or which renders performance impossible" or a combination of these approaches. Whichever approach is taken the security situation may arguably constitute a "force majeure" before the contract has even started. Therefore, the parties may wish to specify levels of security alert which trigger "force majeure" clauses to be confirmed by a third party body (e.g. Commander of the Iraqi security forces in the particular area of the works). Alternatively force majeure clauses sometimes exclude "any event which a diligent party could reasonably have been expected to both a) take into account at the time of the conclusion of the contract and b) avoid or overcome in carrying out its obligations under the contract."

Where possible implementing agencies should seek to control the force majeure procedure by making it a condition of applicability that the project manager must send a written notice of confirmation to the supplier/contractor that force majeure applies. This is likely to be resisted by suppliers/contractors, but in any event a system of mutual written notice procedures should at least be agreed to minimize uncertainty as to whether force majeure is being claimed/applicable in any given situation.

The parties should also consider on a case-by-case basis when preparing the contract, the implications of termination of the contract in the event of force majeure. They may wish to specify who is liable for the work, what happens to the insurances, retention moneys, performance securities and other duties under the Contract. Clauses could include a right for the implementing agencies to dispose of contractor's equipment if abandoned for more than a specified period and provisions dealing with how much the contractor can recover in winding-up costs. However, to avoid precipitous terminations, a right of suspension for an agreed period could be built into the force majeure provisions so that both parties can assess the prevailing security conditions.

It should be borne in mind that in most civil law countries the doctrine of force majeure applies in any event (notwithstanding the express terms of the contract) so that where exceptional or unforeseen events threaten excessively onerous loss to one of the parties, the law itself may excuse performance or limit the loss. Where the governing law of the contract is the law of Iraq, legal advice should be sought from Iraqi lawyers as to whether this type of doctrine of force majeure would be applicable and/or whether the contract is subject to any Iraqi law similar to "frustration" or "impossibility" which could also excuse a supplier from performance.

Box 5. Governing Law and Jurisdiction

The WB's standard contract models assume that contracts will be governed by the borrowing country law and this should be the starting point. Given uncertainty or lack of confidence international suppliers/contractors may seek alternative governing law. In circumstances where key international sources are necessary the concession may be necessary but such demands should be treated with caution, given the need for contract review/advice to be from lawyers specialized in the governing law.

With regard to jurisdiction supplier/contractors are likely to insist on the referral of disputes to arbitration (for example in accordance with ICC, UNCITRAL or LCIA rules). With regard to the location of such arbitration, international supplier/contractors are unlikely to agree to arbitration in Baghdad (quite apart from the security and logistical problems, Iraq is not yet a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958). The parties may wish to consider agreeing to hold arbitration in Jordan, which is a signatory to the New York Convention; this would provide a relatively cost effective alternative with easy access for the parties and Iraqi legal experts.

Box 6. Procurement of Consultants and other Vendors

For standard WB Vendor contracts, the goals of the Insurance Requirements is to protect both the WB and the Vendor, and the Requirements are based on the country of origin of the vendor and not the country where they may be working. Vendors are responsible to ensure that their subcontractors are adequately insured. The WB does not have the capability of monitoring such compliance but it is expected that the subcontractor will have insurances equal to those imposed on the Vendor, even if their origin is a different country unless a waiver is specifically requested. This includes protection for the Vendors' employees via Workmen's Compensation/Social Security and Employers Liability. In many developing countries these benefits are minimal at best and may therefore be supplemented by a requirement to purchase Personal/Travel Accident cover.

For national Iraqi Vendors, only the following requirements would technically/theoretically be applied. The current actual situation is unclear.

Workers Compensation: There is no legislation as such, but employees are covered for loss of wages under Social Security. Expatriates are covered but the limits are very low so they should have coverage appropriate for their country of origin

Employers Liability: not required

Personal/Travel Accident: Minimum Death Benefit 3 x Annual Salary. It is unclear whether the local insurers have the reinsurance capacity to insure foreign workers.

General Third Party Liability: Minimum limit US\$60,000.

Professional Liability/Errors & Omissions: Coverage is virtually unknown in Iraq and even Doctors/Hospitals do not purchase. This situation is likely to change in due course and the WB should endeavor to get a minimum of US\$25,000 in limits, but be prepared to waive the requirement in early contracts. (NB Iraqi vendors only). Limits for foreign vendors will depend upon their country of origin and the nature of the contract. The value of the contract should not be used as a guideline to the appropriate

limit. As with the case of General Third Party Liability, the extent of the potential damage should be the guideline.

Box 7. Auto Liability

Compulsory under the Road Traffic Act with unlimited liability for Bodily Injury. Premiums are paid via a levy on gasoline so theoretically all vehicles are insured. These premiums are handed over to the National Insurance Company which administers claims. Clarification is needed as to whether this system is functional and to what extent coverage is considered applicable if an individual is killed or injured in an insurgency incident. Property Damage limits are unknown but the WB should endeavor to get a minimum of \$25,000.