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*The Coalition Provisional Authority (CPA): Origin,
Characteristics, and Institutional Authorities*

L. Elaine Halchin, Government and Finance Division

April 27, 2007

Abstract. After examining the origin of CPA, this report discusses three views on how the authority was established, reviews selected characteristics of the authority, identifies statutory reporting requirements concerning the authority and the reconstruction of Iraq, examines the implications of *U.S. v. Custer Battles* for CPA, explores several policy issues, and briefly describes post-CPA organizations.

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The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities

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April 27, 2007

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Summary

Responsibility for overseeing reconstruction in post-conflict Iraq initially fell to the Office of Reconstruction and Humanitarian Assistance (ORHA). Established in early 2003, ORHA was headed by Lieutenant General Jay M. Garner, U.S. Army (ret.). By June 2003, ORHA had been replaced, or subsumed, by the Coalition Provisional Authority (CPA), which was led by Ambassador L. Paul Bremer III. On June 28, 2004, CPA ceased operations.

Whether CPA was a federal agency is unclear. Competing, though not necessarily mutually exclusive, explanations for how it was established contribute to the uncertainty about its status. Some executive branch documents supported the notion that it was created by the President, possibly as the result of a National Security Presidential Directive (NSPD). (This document, if it exists, has not been made available to the public.) Another possibility is that the authority was created by, or pursuant to, United Nations Security Council Resolution 1483 (2003). Finally, two years after CPA was established, a Justice Department brief asserted that the then-Commander of U.S. Central Command (CENTCOM) had created CPA.

Given that its organizational status is uncertain, an examination of selected features of CPA might be instructive in assessing what type of organization it was. The authority was closely aligned with the Department of Defense (DOD); the Under Secretary of Defense designated the Secretary of the Army as executive agent for CPA. Other significant features of the authority included its Office of Inspector General (OIG, or IG), which was expected to work closely with the DOD and U.S. Agency for International Development (USAID) Offices of Inspector General; the extent of its procurement activities; its regulatory authority; and its Program Review Board. An undated organization chart provided some insight into the structure of the authority, although it did not include some key offices and positions, such as the Deputy Administrator, the OIG, and the legislative affairs staff. Provisions in several statutes included reporting requirements that bore directly or indirectly on CPA. These included Sections 2202(b), 2203, 2207, and 3001 of P.L. 108-106 (117 Stat. 1209), and Section 1203 of P.L. 108-136 (117 Stat. 1392).

Subsequent to the dissolution of CPA, the question of its status arose in a lawsuit filed against Custer Battles, LLC (CB), a company that performed work for CPA. Two former employees of CB alleged in a lawsuit filed under the False Claims Act (FCA) that the company had defrauded the federal government. (The case is *United States ex rel. DRC Inc. v. Custer Battles, LLC* (E. Va., No. CV-04-199-A).) Justice Department attorneys concluded that CPA was an instrumentality of the U.S. government for the purposes of the FCA, but the presiding judge determined, in his August 2006 opinion, that CPA was not an instrumentality. This report will be updated as events warrant.

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Introduction

The Coalition Provisional Authority (CPA or “the authority”) was established approximately one month after United States and coalition forces took control of Baghdad in Iraq on April 9, 2003.¹ The authority’s mission was “to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, (including by advancing efforts to restore and establish national and local institutions for representative governance) and facilitating economic recovery, sustainable reconstruction and development.”² Information provided on the CPA website indicated that “[t]he Governing Council and the Coalition Provisional Authority will be dissolved” by June 30, 2004, and that “[t]his will end the responsibilities of the Coalition as an occupying power as specified in the United Nations resolutions.”³

After examining the origin of CPA, this report discusses three views on how the authority was established, reviews selected characteristics of the authority, identifies statutory reporting requirements concerning the authority and the reconstruction of Iraq, examines the implications of *U.S. v. Custer Battles* for CPA, explores several policy issues, and briefly describes post-CPA organizations.

The Office of Reconstruction and Humanitarian Assistance and the Coalition Provisional Authority

Responsibility for providing humanitarian assistance and aiding in the reconstruction of postwar Iraq initially fell to the Office of Reconstruction and Humanitarian Assistance (ORHA). ORHA was established by National Security Presidential Directive (NSPD) 24, which was signed by the President on January 20, 2003. This document also gave DOD responsibility for post-war control of Iraq.⁴ NSPD 24 has not been released to the public. A news article stated that ORHA was tied to the Pentagon and that, while the U.S. Agency for International Development (USAID) would handle much of the humanitarian and reconstruction work, ORHA would be in charge of the funding.⁵ As early as February 12, it was reported that Lieutenant General Jay M. Garner, U.S. Army (ret.), had been selected to serve as the coordinator for humanitarian and reconstruction assistance, and that he would report to General Tommy R. Franks, then-commander of U.S. Central Command.⁶ Lieutenant General Garner was appointed by the Secretary of Defense, and his position description as head of ORHA stated:

¹ CRS Report RL32105, *Iraq: Foreign Contributions to Stabilization and Reconstruction*, by Christopher M. Blanchard and Catherine Dale.

² U.S. Office of Management and Budget, *Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (P.L. 108-11)*, June 2, 2003, p. 2.

³ Coalition Provisional Authority and Iraqi Governing Council, *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq*, available at <http://iraqcoalition.org/government/AgreementNov15.pdf>.

⁴ U.S. Department of Defense, Office of the Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington*, Report D-2004-057, March 18, 2004, p. 1, available at <http://www.dodig.osd.mil/Audit/reports/FY04/04057sum.htm>.

⁵ DeYoung and Morgan, “U.S. Plan for Iraq’s Future is Challenged; Pentagon Control, Secrecy Questioned,” p. A21.

⁶ Peter Slevin, “U.S. Military Lays Out Postwar Iraq Plan; Officials Brief Congress on Rebuilding Battered Economy, (continued...)”

This Office [ORHA] is established at the direction of the President of the United States, and is located for administrative purposes under Boards, Commissions and Task Forces, Washington Headquarters Services. This Office is under the supervision of the Under Secretary of Defense for Policy.⁷

Signed by the Office of the Under Secretary of Defense for Policy on February 11, 2003, this position description was not approved and certified by the Director, Administration and Management, Office of the Secretary of Defense, until March 5, 2003.⁸

As late as mid-April, it appeared that Lieutenant General Garner was still in charge of ORHA.⁹ However, a news report dated May 2 stated that President George W. Bush planned to name Ambassador L. Paul Bremer III as special envoy and civil administrator of Iraq, and that Lieutenant General Garner would report to Ambassador Bremer.¹⁰ On May 6, 2003, President Bush announced that he had appointed Ambassador Bremer as Presidential Envoy and that he would serve as the senior leader of the coalition. (Unlike his appointment as an ambassador earlier in his career, Senate confirmation was neither required nor sought.) The White House press release also stated:

In his capacity as Presidential Envoy, he will oversee Coalition reconstruction efforts and the process by which the Iraqi people build the institutions and governing structures that will guide their future.... Ambassador Bremer will report to Secretary of Defense Rumsfeld and will advise the President, through the Secretary, on policies designed to achieve American and Coalition goals for Iraq.¹¹

No mention was made of Lieutenant General Garner or ORHA in the press release.

On May 11, 2003, the *Washington Post* reported the existence of the Coalition Provisional Authority.¹² On May 13, 2003, the Secretary of Defense designated Ambassador Bremer as CPA Administrator.¹³ The first regulation issued by Ambassador Bremer, dated May 16, 2003, identified him as Administrator of CPA. The authority's Inspector General (IG) stated, in his initial report to Congress, that OHRA became CPA in May 2003.¹⁴ However, a March 2004 DOD IG report stated that the Deputy Secretary of Defense, in a June 16, 2003, memorandum, dissolved ORHA and shifted ORHA's functions, responsibilities, and legal obligations to CPA.¹⁵

(...continued)

Reshaping Society," *Washington Post*, February 12, 2003, p. A21.

⁷ U.S. Department of Defense, Office of the Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington*, p. 1.

⁸ Ibid.

⁹ Peter Baker, "U.S. Forces Will Redeploy into 3 Zones; Marines to Occupy Southern Iraq as Army Takes over North; General Will Oversee Capital," *Washington Post*, April 15, 2003, p. A31.

¹⁰ Mike Allen, "Expert on Terrorism to Direct Rebuilding," *Washington Post*, May 2, 2003, p. A1.

¹¹ White House, Office of the Press Secretary, "President Names Envoy to Iraq," May 6, 2003, available at <http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html>.

¹² Peter Slevin, "Reject Baath Party, U.S. Tells Iraqi Job Hopefuls," *Washington Post*, May 11, 2003, p. A22.

¹³ Donald Rumsfeld, Secretary of Defense, "Designation as Administrator of the Coalition Provisional Authority," memorandum, May 13, 2003.

¹⁴ U.S. Department of Defense, Office of the Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington*, p. 2.

¹⁵ Ibid.

Apparently, no official announcement was made at the time (that is, May or June 2003) that ORHA had been replaced, or subsumed, by CPA.

By June 18, Lieutenant General Garner no longer was the head of ORHA. A Department of Defense (DOD) news transcript dated June 18 identified him as the former director of ORHA, and indicated he had returned to the United States a couple of weeks earlier.¹⁶

Key CPA Personnel¹⁷

Ambassador Bremer's deputy was Richard Henry Jones, who was also the U.S. Ambassador to Kuwait. Ambassador Jones, who was on extended temporary duty (TDY) in Iraq, was assigned to the CPA position sometime in November 2003.¹⁸

Sir Jeremy Greenstock, the United Kingdom's Special Representative in Iraq, was referred to, in some news articles and documents, as a deputy to the CPA Administrator, or was identified as effectively serving as a deputy to Ambassador Bremer.¹⁹ A news bulletin produced by the U.S. Permanent Mission to the United Nations Office and Other International Organizations in Geneva identified Sir Jeremy as the CPA deputy.²⁰ Sir Jeremy's appointment as the United Kingdom's Special Representative was announced June 16, 2003, by the Prime Minister's official spokesman (PMOS). He replaced John Sawers.²¹

Other senior CPA officials included Rear Admiral David J. Nash, U.S. Navy (ret.), who was director of the Program Management Office (PMO), which had responsibility for monitoring contracts funded by the Emergency Supplemental Appropriations Act for Defense and the Reconstruction of Iraq and Afghanistan for FY2004 (FY2004 emergency supplemental).²² Rear Admiral Nash began his duties in July 2003. Major General Ronald L. Johnson, U.S. Army, was U.S. Deputy to the PMO, and also served as the commander of the Gulf Region Division of the Army Corps of Engineers. As of February 2004, Lawrence Crandall was the U.S. Agency for International Development (USAID) Deputy to the PMO. On January 20, 2004, Stuart W. Bowen

¹⁶ U.S. Department of Defense, "Secretary Rumsfeld Media Availability with Jay Garner," news transcript, June 18, 2003, available at <http://www.defenselink.mil/transcripts/2003/jun2003.html>.

¹⁷ For information on civilian personnel management under ORHA and CPA, see Special Inspector General for Iraq Reconstruction, *Iraq Reconstruction: Lessons in Human Capital Management*, January 2006, available at http://www.sigir.mil/reports/pdf/Lessons_Learned_Feb16.pdf.

¹⁸ Information provided by telephone by the Department of State country office for Kuwait and Bahrain to the author on March 1, 2004.

¹⁹ Ewen MacAskill, "Iraq after the War: Blair Envoy Warns Iran on Meddling," *Guardian*, October 23, 2003, p. 4; Philip Stephens, "Now Bush Can Make a Fresh Start," *Financial Times*, December 16, 2003, p. 23; Owen Bowcott and Brian Whitaker, "Trouble Looms after Coalition Tells Kurds Self Rule Can Stay," *Guardian*, January 6, 2004, p. 17; Anton La Guardia, "U.S. General Will Lead Iraqi Army," *Daily Telegraph*, March 11, 2004, p. 12; Patrick Cockburn, "Bremer Tries to Salvage Appointed-Government Plan Amid Shia Opposition," *Independent*, January 17, 2004, p. 13.

²⁰ Judy Aita, "U.N. Election Team at Work in Iraq," *Daily Bulletin*, February 10, 2004, p. 1, available at http://www.cpa-iraq.org/pressreleases/20040210_UN_back.html.

²¹ Prime Minister's Office, "Press Briefing: 11AM Monday 16 June 2003," available at <http://www.number-10.gov.uk/output/Page3924.asp>.

²² P.L. 108-106; 117 Stat. 1209.

Jr. was appointed as Inspector General by the Secretary of Defense. Rear Admiral Larry L. Poe, U.S. Navy (ret.), was the Deputy Inspector General.²³

Establishment of CPA

Detailed information that explicitly and clearly identifies how CPA was established, by whom, and under what specific authority, is not readily available. Instead, there are three alternative explanations for how it was established: one version suggests that the President established CPA; another alternative suggests that CPA was established pursuant to a United Nations (U.N.) Security Council resolution; and the third indicates that it was created by General Tommy Franks, U.S. Army, who was Commander of the U.S. Central Command (CENTCOM) from July 6, 2000, through July 7, 2003.²⁴ As will be discussed below, these three possibilities are not necessarily mutually exclusive.

From the inception of CPA in 2003 until April 2005, when a Department of Justice (DOJ) document stated that General Franks had created CPA, either of the first two alternatives presented here seemed to be the most likely explanations for the establishment of CPA. The Justice Department's statement would seem to answer the question of who established CPA. However, General Franks's role was not revealed publicly until April 2005, nearly two years after CPA was established, and it is not clear whether there are any written materials that document General Franks having established CPA and that predate his retirement. Also, the revelation of his role in CPA followed other, somewhat vague and sometimes contradictory explanations or comments about CPA's origin during its 13-month tenure. Therefore, some might suggest that either of the other two alternatives could still be a valid explanation for the origin of CPA.

National Security Presidential Directive

It is possible that the CPA, as the organization that succeeded ORHA, was established by NSPD 24. Another directive, NSPD 36, dated May 11, 2004, suggests how the President could have used this type of document to establish a temporary organization within the federal government.²⁵ One purpose of NSPD 36 was to establish organizations that would succeed the CPA: the Iraq Reconstruction Management Office (IRMO), within the Department of State, and the Project and Contracting Office (PCO), within DOD.²⁶ The President established both organizations pursuant to 5 U.S.C. § 3161.²⁷ This statutory provision addresses the employment and compensation of employees by temporary federal government organizations. Under Section 3161(a), a temporary organization is defined as

²³ Coalition Provisional Authority, Office of Inspector General, "Biographies," available from the author. Mr. Bowen's biography is still available on the agency website at <http://www.sigir.mil/about/leadership.aspx>.

²⁴ U.S. Department of Defense, American Force Information Service, "Abizaid Set to Supplant Franks as CENTCOM Commander," July 2, 2003, available at http://www.defenselink.mil/news/Jul2003/n07022003_200307025.html.

²⁵ The document itself is unnumbered. However, an e-mail message from the State Department's Bureau of Legislative Affairs to the author on February 22, 2005, identified the May 11, 2004, directive as NSPD 36.

²⁶ U.S. President (G.W. Bush), "United States Government Operations in Iraq," National Security Presidential Directive (unnumbered), May 11, 2004.

²⁷ P.L. 106-398 (Division A, Title XI, Sec. 1101(a)), Floyd D. Spence National Defense Authorization Act, FY2001; 114 Stat. 1654, at 1654A-308.

a commission, committee, board, or other organization that (1) is established by law or Executive order for a specific period not in excess of three years for the purpose of performing a specific study or other project; and (2) is terminated upon the completion of the study or project or upon the occurrence of a condition related to the completion of the study or project.

It bears noting that none of the organizations mentioned here—CPA, IRMO, and PCO—was established by executive order or statute. However, NSPD 36 addressed this issue in the concluding paragraph:

This NSPD shall be effective immediately, shall constitute an Executive order solely for purposes of 5 U.S.C. 3161, and shall not be subject to Executive order 11030 of June 19, 1962, as amended.²⁸

It is possible that the language found in NSPD 36 had been used in NSPD 24 to establish OHRA, and eventually the CPA, to oversee the reconstruction of Iraq.²⁹

In January 2006, the Special Inspector General for Iraq Reconstruction (SIGIR) issued a report on civilian personnel management under ORHA and CPA. By confirming that 5 U.S.C. § 3161 was used to hire some of the civilian personnel for ORHA and CPA, the report suggests that the Administration established an organization using this provision of the *U.S. Code*. An excerpt from the relevant section of the report follows:

The primary statutory provision that was used for employing civilians in Iraq was Title 5, Section 3161 of the U.S. Code. The 3161 provision enables temporary organizations to acquire staff through temporary appointments to the excepted service of the Civil Service. *ORHA and CPA used 3161 extensively to hire civilian personnel* for periods of up to one year (with the possibility of renewal)... According to a former CPA personnel specialist, the 3161 hiring authority had long existed under 5 CFR 213.3199, but it had been typically used to fill boards or commissions. The provision was useful for rapid hiring because it allowed appointments from outside government without the usual competition required under formal job classifications. The use of 3161 to staff the temporary stabilization and reconstruction organizations in Iraq appears to have been unprecedented.³⁰

It is possible to infer, from the following excerpt from a report to Congress provided by the Office of Management and Budget (OMB), on behalf of the President, that the President may have played a role in creating the authority.³¹ Of particular interest are the statements that the CPA

²⁸ U.S. President (G.W. Bush), “United States Government Operations in Iraq,” p. 3. Executive Order 11030 governs the preparation, presentation, filing, and publication of executive orders and requires that executive orders be published in the *Federal Register*. (3 C.F.R. 610-612 (1962).)

²⁹ The legislative history concerning temporary organizations began in 1944, with the enactment of Public Law 359 during the 78th Congress (31 U.S.C. § 1347). Section 213 of this statute prohibits the use of appropriated funds for, or by, any agency or entity established by executive order and “in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it.” Section 1347 of P.L. 97-258 codified this provision in Title 31 of the *U.S. Code*. However, 5 U.S.C. § 3161 supersedes both of these statutes because it was enacted at a later date.

³⁰ Special Inspector General for Iraq Reconstruction, *Iraq Reconstruction: Lessons in Human Capital Management*, p. 10. (Italics added for emphasis.)

³¹ The report responds to a requirement in Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (P.L. 108-11; H.R. 1559).

Administrator oversees all non-military federal government programs and activities in Iraq, and that the President vested the authority with executive, legislative, and judicial authority.

The Administrator of the Coalition Provisional Authority (CPA) reports to the President through the Secretary of Defense. He oversees, directs and coordinates all U.S. Government (USG) programs and activities in Iraq, except those under the command of the Commander, U.S. Central Command (CENTCOM).

The CPA exercises powers of government temporarily in order to provide for the effective administration of Iraq, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, ... and facilitating economic recovery, sustainable reconstruction and development.

The CPA is vested by the President with all executive, legislative and judicial authority necessary to achieve its objectives, exercised consistent with relevant U.N. Security Council resolutions, including [U.N. Security Council] Resolution 1483,³² and the laws and usages of war. The CPA Administrator has primary responsibility for exercising this authority.³³

The clearest statement that the U.S. government played a part in establishing the authority is found in a letter submitted to the President of the United Nations Security Council by the Permanent Representatives of the United States and the United Kingdom. Dated two days after Ambassador Bremer was appointed by President Bush as the Presidential Envoy to Iraq, the letter stated, in part:

In order to meet these objectives and obligations [disarming Iraq and providing for the humanitarian needs of Iraqis] in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.³⁴

While this excerpt can be viewed as an acknowledgment that the United States (and the United Kingdom) established CPA, it does not explain how the authority was established, nor does it resolve the question of its organizational agency status.

Government documents supporting the notion that CPA was a federal entity (which suggests, in turn, that it was created by the President) include two presidential memoranda. A May 6, 2003, memorandum, as amended by a December 5, 2003, memorandum, stated, in part:³⁵

³² U.N. Security Council Resolution 1483, which was adopted by the United Nations Security Council on May 22, 2003, "lifted civilian sanctions and provided for termination of the Oil-for-Food Programme within six months, transferring responsibility for the administration of any remaining activity to the Authority representing the occupying powers." (United Nations, Office of the Iraq Programme Oil-for-Food, available at <http://www.un.org/Depts/oip/background/scrsindex.html>. U.N. Security Council Resolution 1483 is available at this website.)

³³ U.S. Office of Management and Budget, "Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (P.L. 108-11)," June 2, 2003 (letter), available at <http://www.whitehouse.gov/omb/legislative>.

³⁴ Sir Jeremy Greenstock, Permanent Representative of the United Kingdom, and John D. Negroponte, Permanent Representative of the United States, letter to the President of the Security Council, May 8, 2003, available at <http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm>.

³⁵ The December 5, 2003, memorandum directed that any references in the May 6, 2003, memorandum to the Office of (continued...)

In accordance with Presidential direction relating to Iraq relief and reconstruction, multiple agencies are deployed with the Coalition Provisional Authority (CPA) and are serving as implementing partners or executing agents for programs and projects. These agencies will identify funding requirements for such programs and projects through CPA. OMB will work with CPA to transfer funds to the appropriate implementing agency.³⁶

The authority's intimate involvement in the funding process for work done by federal government agencies in Iraq further suggests that the CPA is a federal entity.

Language in the FY2004 emergency supplemental also stated that the CPA was part of the federal government. In describing how the apportionment of \$18.649 billion was to be carried out, P.L. 108-106 stated:

Funds appropriated under this heading [Iraq Relief and Reconstruction Fund] shall be apportioned only to the Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government), the Department of State, the Department of Health and Human Services, the Department of Treasury, the Department of Defense, and the United States Agency for International Development ...³⁷

According to this excerpt, the authority was an entity of the federal government.

Information provided by CPA itself indicated that its sector program management offices (SPMOs) were part of the federal government. (The CPA's PMO was supported by six SPMOs.) In a written response to a question asked at a January 21, 2004, pre-proposal conference on contracting opportunities, the CPA stated that "the Sector Program Management Office (SPMO) is a Government entity."³⁸

Yet another organization related to CPA is on record as stating that "the U.S. government created CPA...."³⁹ The Special Inspector General for Iraq Reconstruction included this statement in its January 2006 report on civilian personnel management under ORHA and CPA.

Nonetheless, questions remain regarding how CPA was established, who established it, the precise nature of its relationship to DOD (including DOD components) and other federal entities, and whether CPA was a federal agency or some other type of government organization. Another

(...continued)

Reconstruction and Humanitarian Assistance or ORHA be replaced by "Coalition Provisional Authority" and "CPA," respectively.

³⁶ U.S. President (G. W. Bush), "Memorandum on Delegation of the Functions of the President under the Heading 'Iraq Relief and Reconstruction Fund' in the Emergency Wartime Supplemental Appropriations Act, 2003," *Federal Register*, May 9, 2003, vol. 68, no. 90, p. 25275; U.S. President (G. W. Bush), "Transfer of Funds Appropriated to the President under the heading Operating Expenses of the Coalition Provisional Authority, and Delegation of the Functions of the President under the heading Iraq Relief and Reconstruction Fund, in the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004," *Federal Register*, January 9, 2004, vol. 69, no. 6, p. 1645.

³⁷ 117 Stat. 1225.

³⁸ Coalition Provisional Authority, "List of Questions and Answers Compiled from a Pre-Proposal Conference Held on January 21, 2004," p. 20.

³⁹ Special Inspector General for Iraq Reconstruction, *Iraq Reconstruction: Lessons in Human Capital Management*, p. 36.

unanswered question concerns the scope of CPA's authority when it was functioning in its capacity as an entity of the U.S. government.

United Nations Security Council Resolution 1483

A second possibility is that United Nations Security Council Resolution 1483 (2003) was instrumental in creating the authority, a view supported by several documents released by the executive branch. A solicitation issued by the Pentagon Renovation Office, on behalf of CPA, for procuring PMO support services, stated in the "overview": "The CPA was enacted by the United Nations Security Council under Resolution 1483 (2003)."⁴⁰ Other government documents, including the President's proposed budget for FY2005 and P.L. 108-106, stated that the authority was established pursuant to Resolution 1483.⁴¹ This statement does not necessarily contradict the language found elsewhere in the FY2004 emergency supplemental stating that CPA is an entity of the U.S. government, for the reason discussed above.

Nevertheless, repeated references to Resolution 1483 might be viewed by some as implying that the resolution alone authorized or established a coalition-based organization in Iraq, or might contribute to confusion about the organizational status of the authority. Relevant portions of the resolution are as follows:

*The Security Council, ... Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"), ... Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own future.*⁴²

While recognizing the responsibility to be borne by the United States and the United Kingdom in restoring security and stability in Iraq, this resolution did not establish, or authorize the creation of, a specific organization to carry out this responsibility. In the words of a former Administrator of the Office of Federal Procurement Policy, the resolution "noted and recognized, but did not establish CPA."⁴³

Lending support to the notion that the authority was not a federal agency, but instead was an amorphous international organization, are statements by the Department of the Army. In 2003, two protests were filed with the General Accounting Office (GAO; this agency was renamed the Government Accountability Office in 2004) by Turkcell Consortium, which challenged CPA's

⁴⁰ Pentagon Renovation Office, solicitation W914NS-04-R-0001, January 6, 2004, p. 2.

⁴¹ U.S. Office of Management and Budget, *Budget of the United States Government—FY2005, Appendix* (Washington: GPO, 2004), pp. 958-959; P.L. 108-106; 117 Stat. 1226.

⁴² United Nations Security Council, *Resolution 1483 (2003)*, S/RES/1483(2003), May 22, 2003, p. 2, available at http://www.un.org/Docs/sc/unsc_resolutions.html. (Italics in original.)

⁴³ Angela B. Styles, "Seller Beware: Assessing the Risks of Iraq Reconstruction Contracting," *Federal Contracts Report*, January 20, 2004, vol. 81, no. 2, p.65.

issuance of licenses for mobile telecommunications services in Iraq. GAO dismissed both protests without having to rule on the status of CPA.

In a letter submitted to GAO during the protest process, the U.S. Army Legal Services Agency was unequivocal in its argument that CPA is not a federal agency:

The CPA is not a Federal agency. Rather, as the HCA [CPA's Head of Contracting Activity] explains: The Coalition Provisional Authority (CPA) is a multi-national coalition that exercises powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development. CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority is exercised by the CPA Administrator.

The GAO does not have jurisdiction over this protest because CPA is not a Federal agency.... The CPA is an organization comprised of members from a coalition of countries.... CPA is analogous to an organization such as NATO's [North Atlantic Treaty Organization's] Stabilization Force (SFOR) in Bosnia and Croatia. The SFOR has its own contracting organization, the Theatre Allied Contracting Office (TACO), which may utilize the services of United States military personnel. Like the TACO, CPA is not a federal agency. Like NATO and SFOR, CPA is composed of an international coalition.... UN Security Council Resolution 1483 (2003) recognizes CPA as "the Authority" to govern Iraq and grants the CPA discretion to disburse funds in the Development Fund for Iraq ("DFI").⁴⁴

While the CPA did employ individuals from coalition countries, there were at least two significant differences between CPA and SFOR. The SFOR is overseen by a multinational organization, the North Atlantic Treaty Organization (NATO), and it was authorized by United Nations Security Council Resolution 1088 (1996).⁴⁵ The Security Council's resolution explicitly authorized the establishment of SFOR (as it also did for the precursor entity, the Implementation Force (IFOR)):

The Security Council ... authorizes the Member States ... to establish for a planned period of 18 months a multinational stabilization force (SFOR) as the legal successor to IFOR under unified command and control....⁴⁶

Given that P.L. 108-106 and other government documents stated that CPA was a U.S. government entity, the Army's response raises questions. Arguably, the Army was concerned that some would assume, precisely because of references to the authority as a government entity, that CPA was a federal agency. Another possibility is that the Army, as the executive agent for the authority (discussed below), assumed responsibility for certain procurement activities and tasks, such as responding to protests, and thus argued strongly for excluding CPA from the GAO protest process.

⁴⁴ Maj. Frank A. March, Department of the Army, United States Army Legal Services Agency, "Protest of Turkcell Consortium, B-293048," correspondence to U.S. General Accounting Office, October 21, 2003, pp. 2-4.

⁴⁵ North Atlantic Treaty Organization, "History of NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina," no date, available at <http://www.nato.int/sfor/docu/d981116a.htm>.

⁴⁶ United Nations Security Council, Resolution 1088 (1996), December 12, 1996, S/RES/1088, available at <http://www.nato.int/ifor/un/u961212b.htm>.

Legislative language might contribute to questions about the status of the authority. The FY2004 emergency supplemental referred to CPA as “an entity of the United States Government.”⁴⁷ In the National Defense Authorization Act for FY2004, Section 1203(b)(1) mentioned “civilian groups reporting to the Secretary [of Defense], including” ORHA and CPA.⁴⁸ Section 1203(b)(3) referred to the “relationship of Department of Defense entities, including” ORHA and CPA.⁴⁹ The House report accompanying H.R. 1588 (P.L. 108-136), the National Defense Authorization Act for FY2004, in its comments on the section that became Section 1203, mentioned “Department of Defense (DOD) civilian and military activities in post-conflict Iraq.”⁵⁰ Eschewing the word “agency” in favor of “entity,” “group,” and “activities” in legislation and congressional documents could be a reflection of the Administration’s approach, an acknowledgment that CPA’s status was uncertain, or a sign that Congress agreed that CPA was not an agency.

Documents produced by the Administration and the CPA do not state precisely how this organization was established. In the preface to the first regulation of the CPA, dated May 16, 2003, Ambassador Bremer stated: “Pursuant to my authority as Administrator of the Coalition Provisional Authority (CAP), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war ...”⁵¹ In a December 2003 memorandum on contracting procedures for the reconstruction of Iraq, Deputy Secretary of Defense Paul Wolfowitz wrote: “The Coalition Provisional Authority (CPA) has been established to promote the welfare of the Iraqi people.”⁵² Neither statement identifies by whom, or under what authority, CPA was established.

General Franks

General Tommy Franks’s role in the creation of CPA was revealed in a brief prepared by Justice Department attorneys in April 2005 in the matter of *United States ex rel. DRC Inc. v. Custer Battles, LLC* (E. Va., No. CV-04-199-A). Custer Battles (CB) had done work for CPA in Iraq, and former employees of CB alleged in a lawsuit filed under the False Claims Act (FCA; 31 U.S.C. §§ 3729-3733) that the company had defrauded the federal government. Attorneys for Custer Battles responded, in part, that CPA was not a federal agency, so the FCA was not applicable. Initially, the presiding judge invited the Justice Department to state the government’s position on whether the FCA applied to CPA. Then, in response to a second order from the judge, Justice Department attorneys addressed the question, in a supplemental brief, of whether CPA was a U.S. government entity, agency, or instrumentality, and they concluded that it was an instrumentality. (See below for more details.)

In their supplemental brief, which was also filed in April 2005, the Justice Department attorneys also offered an explanation of who established CPA:

⁴⁷ 117 Stat. 1225.

⁴⁸ P.L. 108-136; 117 Stat. 1392 at 1648; H.R. 1588.

⁴⁹ Sec. 1203(b)(1)-(3) of P.L. 108-136.

⁵⁰ U.S. Congress, House Committee on Armed Services, *National Defense Authorization Act for Fiscal Year 2004*, H.Rept. 108-106, 108th Cong, 1st sess., May 16, 2003 (Washington: GPO, 2003), p. 359.

⁵¹ Coalition Provisional Authority, “Coalition Provisional Authority Regulation Number 1,” May 16, 2003, available at <http://www.iraqcoalition.org/regulations/index.html#Regulations>. (Italics in original.)

⁵² Paul Wolfowitz, Deputy Secretary of Defense, “Determination and Findings,” December 5, 2003, p. 1, available from author.

The CPA was created by the Commander of the Coalition Forces in Iraq, General Tommy Franks, United States Army, who was also the Commander of the U.S. Central Command. The establishment of the CPA by the Coalition was formally recognized by UNSCR [United Nations Security Council Resolution 1483]. Since the Coalition Forces had established and exercised actual authority over the territory of Iraq, under the laws of war and occupation, the authority of the defeated Iraqi regime of Saddam Hussein passed into the hands of the Coalition Forces. General Franks established the CPA under the laws of war to perform civil government functions in liberated Iraq during the brief occupation.⁵³

This statement by the Justice Department may not settle the question of how CPA was established, by whom, and under what authority.⁵⁴ The fact that CPA had a predecessor in ORHA raises questions about the Justice Department's explanation for the origin of CPA. Although ORHA and CPA were responsible for essentially the same mission in Iraq, and although CPA subsumed, or succeeded, ORHA, the origins of these two organizations apparently differed. ORHA was established by the President, through NSPD 24;⁵⁵ CPA was established (according to the Justice Department) by the Commander of CENTCOM, "under the laws of war."⁵⁶ (As noted above, the CPA IG stated that ORHA became CPA in May 2003,⁵⁷ while the DOD IG indicated that the Deputy Secretary of Defense dissolved ORHA and shifted ORHA's functions, responsibilities, and legal obligations to CPA.⁵⁸) It is unclear why two different methods were used to create these organizations, and why, with ORHA already in place and functioning under NSPD 24, it was necessary for the CENTCOM Commander to establish another, new organization.

While the statement that "the authority of the defeated Iraqi regime of Saddam Hussein passed into the hands of the Coalition Forces"⁵⁹ may be accurate, and while it suggests why General Franks established CPA, the statement appears to overlook the existence of ORHA. As noted above, ORHA had been created in January 2003, two months prior to the fall of Baghdad. The authority that passed into the Coalition Forces' hands when they invaded Iraq presumably would have been accorded to ORHA. The supplemental brief apparently fails to mention not only that CPA was preceded by ORHA, but also that ORHA apparently was still in existence when CPA was established.

As noted above, it appears that the Justice Department's supplemental brief represents the initial disclosure of the then-CENTCOM Commander's role in creating CPA. However, the legal brief does not include a source for this statement, and it does not otherwise indicate that there is any written documentation of this action. It is not known how General Franks established CPA, or

⁵³ Supplemental Brief of the United States in response to the court's invitation at pp. 6-7, *United States ex rel. DRC, Inc. and Robert Isakson v. Custer Battles, LLC*, et al. (E.D. Va. 2004) (No. CV-04-199a).

⁵⁴ Justice Department attorneys noted in their supplemental brief that the discussion involving CPA "is solely for the purpose of answering the Court's question with respect to the FCA, and not for any other purpose." (*Ibid.*, p. 2.) Nevertheless, this statement does not change the fact that the attorneys unequivocally claimed that CPA was established by General Franks.

⁵⁵ U.S. Department of Defense, Office of the Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington*, p. 1.

⁵⁶ Supplemental Brief of the United States at pp. 6-7.

⁵⁷ U.S. Department of Defense, Office of the Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington*, p. 2.

⁵⁸ *Ibid.*

⁵⁹ Supplemental Brief of the United States in response to the court's invitation at pp. 6-7, *United States ex rel. DRC, Inc. and Robert Isakson v. Custer Battles, LLC*, et al. (E.D. Va. 2004) (No. CV-04-199a).

whether he prepared and signed any document to create CPA. Nevertheless, a CENTCOM document that appears to be a leaflet that was developed for distribution to the Iraqi people mentions General Franks's role in establishing CPA.⁶⁰ This document, titled "Freedom Message to the Iraqi People," dated April 16, 2003, and attributed to General Franks (his name is included at the end of the message), includes the following statement: "... I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction."⁶¹ The complete text of this document is at the appendix.

Despite the text included in the April 16, 2003, leaflet, DOD does not appear to have issued any statement in 2003 documenting General Franks' decision to establish CPA.⁶² The lack of a document that implemented or authorized the creation of CPA also was noted by the federal judge presiding in *United States v. Custer Battles*, who wrote: "This proclamation [the April 16, 2003, leaflet] was not followed by any formal document or order establishing the CPA or defining its legal responsibilities."⁶³ Additionally, no mention was made of General Franks' role in creating CPA during a ceremony at the White House on December 14, 2004, when he, Ambassador Bremer, and George Tenet, the former Director of Central Intelligence, were awarded Presidential Medals of Freedom by the President.⁶⁴ The apparent lack of publicly available documentation about the creation of CPA by CENTCOM, and the fact that disclosure of CPA's origins was made by the Justice Department and did not occur until spring 2005, might lead some to question whether this explanation of CPA's creation accurately reflects what occurred in May or June 2003.

Selected Characteristics of CPA

The asserted lack of clarity concerning authorizing authority and establishment of the CPA arguably extended to its status within the executive branch. It is not clear whether the authority was a federal agency, or could be treated as such. What is known is that the CPA was neither an executive department nor a government corporation. Executive departments are identified by statute, and government corporations are "corporation[s] owned or controlled by the Government

⁶⁰ In its "lessons learned" report on contracting, the Office of the Special Inspector General for Iraq Reconstruction (SIGIR) refers to General Franks's message as an "order." The SIGIR report did not repeat or affirm General Franks's claim that he created CPA; rather, SIGIR noted that "CPA initially was *recognized* as a discrete organization in a CENTCOM order" issued by General Franks. (Special Inspector General for Iraq Reconstruction, *Iraq Reconstruction: Lessons in Contracting and Procurement*, July 2006, available at http://www.sigir.mil/reports/pdf/Lessons_Learned_July21.pdf, p. 23.) (italics added) It appears, however, that General Franks's "Freedom Message to the Iraqi People" is not consistent with DOD's definition of an "order." "Order" is defined as "a communication, written, oral, or by signal, which conveys instructions from a superior to a subordinate." (Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, April 12, 2001 (as amended through April 14, 2006), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf, p. 395.) The text of Franks's message is included in the appendix.

⁶¹ General Tommy R. Franks, Commander of Coalition Forces, "Freedom Message to the Iraqi People," April 16, 2003, available from the author. This document (and an Arabic-language version) were provided electronically by U.S. Central Command, Legislative Liaison, to the author, July 13, 2005.

⁶² Ambassador Bremer's appointment as Presidential Envoy to Iraq was the subject of a White House press release in May 2003.

⁶³ *U.S. v. Custer Battles*, 376 F. Supp 2d 617 (E.D. Va. 2005) at 620.

⁶⁴ White House, Office of the Press Secretary, "President Presents Medal of Freedom," news release, December 14, 2004, available at <http://www.whitehouse.gov/news/releases/2004/12/print/20041214-3.html>.

of the United States.”⁶⁵ If the authority was a federal government entity, it may have been an independent establishment, which is defined as “an establishment in the executive branch (other than the United States Postal Service or the Postal Rate commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.”⁶⁶ If it is determined that the authority was an independent establishment, CPA also would be considered an executive agency.⁶⁷ Other possibilities are that CPA was a component of DOD, or that it was not a federal government entity. Due to its unusual status, this examination of certain of its characteristics or features might be instructive.

CPA’s Relationship to the Department of Defense

While it is clear that, ultimately, the CPA Administrator answered to the President, it is also clear that the Administrator reported to the Secretary of Defense as well.⁶⁸ Administratively, Ambassador Bremer and the authority fell under the Department of the Army. For Ambassador Bremer, this meant that his salary, Executive Level III, was paid by the Army.⁶⁹ A report prepared by the Office of Personnel Management (OPM), dated March 10, 2004, showed that 558 federal government employees were detailed to CPA. The largest contingents were from the Department of Defense (455) and the Department of State (85). Other agencies contributing personnel included the Department of Transportation (2), the Department of the Treasury (6), the Naval Criminal Investigative Service (1), OPM (1), the U.S. Navy (2), and unknown (6). Three detailees were ambassadors, 65 were from the Foreign Service, 411 were identified as “federal civilian workers,” and the remaining 79 were members of the Senior Executive Service (SES).⁷⁰ (CPA also employed individuals from coalition partner countries.)⁷¹ A document available on the Army Civilian Personnel On-Line (CPOL) website indicated that all CPA civilian employees were realigned in 2003 to Army rolls.⁷²

In 2003, the Secretary of the Army was designated the executive agent for ORHA, and, subsequently, CPA, in memoranda issued by the Deputy Secretary of Defense.⁷³ Neither memorandum is publicly available, but a third memorandum, issued by the Deputy Secretary of

⁶⁵ 5 U.S.C. §§ 101 and 103.

⁶⁶ 5 U.S.C. § 104(1).

⁶⁷ An “‘executive agency’ means an Executive department, a Government corporation, and an independent establishment.” (5 U.S.C. § 105).

⁶⁸ White House, Office of the Press Secretary, “President Names Envoy to Iraq,” U.S. Office of Management and Budget, *Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (P.L. 108-11)*.

⁶⁹ Information provided by telephone by the DOD Office of Legislation Liaison to the author on February 5, 2004.

⁷⁰ Letter from Kay Coles James, Director, Office of Personnel Management, to Hon. C. W. Bill Young, Chairman, House Committee on Appropriations, March 10, 2004. Section 599C of P.L. 108-199 requires the OPM to submit a report to the House and Senate Committees on Appropriations on the number of employees, by agency, that are detailed to CPA. The initial report was due February 1, 2004, and quarterly updates were also required.

⁷¹ Information provided electronically by CPA’s legislative affairs office to the author on April 21, 2004.

⁷² Army Civilian Personnel On-Line, “FY03: The Year in Review,” no date, available from the author.

⁷³ “Army Assigned Responsibility for Acquisition and Program Management Support for CPA,” *Federal Contracts Report*, January 27, 2004, vol. 81, no. 3, p. 80. This article stated that the memorandum dated May 21, 2003, designated the Secretary of the Army Executive Agent for the Office of Reconstruction and Humanitarian Assistance and that the memorandum dated June 21, 2003, did the same for CPA.

Defense and dated January 14, 2004, addressed acquisition and program support for the authority and confirmed the existence of the previous memoranda:

Pursuant to Section 113 of Title 10, United States Code, the Secretary of the Army is hereby assigned the authority and responsibility for the provision of acquisition and program management support to the CPA (Iraq and Washington, DC) and any successor entity. The Secretary of Defense shall determine and prioritize the requirements to be supported pursuant to this assignment of responsibility, as necessary.

For purposes of this memorandum, acquisition support is intended to include the award, administration and oversight of all contracts, grants, and other acquisition actions in direct support of the CPA and any successor entity. Program management support comprises all aspects of project oversight, including planning, scheduling and execution, as may be required by the scope of work, directed timelines, and applicable financial management regulations.

All addressees [listed on the memorandum] shall provide support to the Secretary of the Army, as the Secretary of the Army considers necessary, to carry out this assignment of responsibility. Services and supplies provided to the CPA in furtherance of this memorandum shall be made available in accordance with DoD Instruction 4000.19 and applicable financial management regulations. My memoranda of May 21, 2003, designating the Secretary of the Army as Executive Agent for the Office of Reconstruction and Humanitarian Assistance, and June 16, 2003, providing for the exercise of that responsibility in support of the CPA, are modified accordingly.⁷⁴

The following description of a DOD executive agent indicates that executive agents are assigned responsibility for DOD missions, activities, or tasks:

The Head of a DoD Component to whom the Secretary of Defense or the Deputy Secretary of Defense has assigned specific responsibilities, functions, and authorities to provide defined levels of support for operational missions, or administrative or other designated activities that involve two or more of the DoD Components. The nature and scope of the DoD Executive Agents responsibilities, functions, and authorities shall ... be prescribed at the time of assignment [and] ... remain in effect until the Secretary of Defense or the Deputy Secretary of Defense revokes or suspends them.⁷⁵

This definition would arguably cast CPA as a DOD component. A broad interpretation, though, might allow the Secretary, or Deputy Secretary, to appoint an executive agent for a non-DOD entity or even a non-governmental entity. DOD's policy governing the use of executive agents leaves open this possibility.

4.1. The DoD Executive Agent designation shall be conferred when: 4.1.1. No existing means to accomplish DoD objectives exists. 4.1.2. DoD resources need to be focused on a specific area or areas of responsibility in order to minimize duplication or redundancy, or 4.1.3. Such designation is required by law, Executive order, or Government-wide regulation.⁷⁶

⁷⁴ Paul Wolfowitz, Deputy Secretary for Defense, "Assignment of Responsibility for Acquisition and Program Management Support for the Coalition Provisional Authority," memorandum, January 14, 2004.

⁷⁵ Department of Defense Directive 5101.1, *DoD Executive Agent*, September 3, 2002 (certified current as of November 21, 2003), p. 2, available at <http://www.dtic.mil/whs/directives/>.

⁷⁶ *Ibid.*, p. 3.

Aside from the question of whether an executive agent can be assigned to a non-DOD or non-governmental entity, it appears that item 4.1.1, item 4.1.2, or both might have applied to the circumstances surrounding DOD and CPA. It seems likely that item 4.1.3 would not have applied, because no law, executive order, or government regulation had been enacted, issued, or produced that required or authorized the Army to serve as executive agent. No mention is made in the Deputy Secretary's January 14, 2003, memorandum of which rationale applied to the authority.

Deputy Secretary of Defense Wolfowitz did note that Department of Defense Instruction Number 4000.19 applied to the provision of supplies and services to the CPA. This document provides guidance for intragovernmental and interservice support, which are defined as follows:

Intragovernmental support is support provided by a DoD activity to a non-DoD Federal activity and vice versa—[it] does not include support provided to or received from foreign governments.

Interservice support is support provided by one DoD activity to a DoD activity of another Military Service, Defense Agency, Unified Combatant Command, Army Reserves, Navy Reserves, Air Force Reserves, Marine Corps Reserves, Air National Guard, or Field Activity.⁷⁷

Deputy Secretary Wolfowitz's memorandum did not indicate whether the authority received support from the Army under an interservice or an intragovernmental agreement, which leaves unanswered the question of whether CPA was part of DOD, or simply attached to it for the purposes of facilitating coordination with, and receiving support from, the Department of the Army. Nevertheless, DOD Instruction 4000.19 clarifies that a non-DOD entity may receive support from DOD. In either case, intragovernmental or interservice agreement, documentation is required.

Broad areas of recurring interservice and intragovernmental support and cooperation that do not require reimbursement should be documented with a memorandum of agreement (MOA) or memorandum of understanding (MOU). Recurring interservice and intragovernmental support that requires reimbursement shall be documented on a DD [Department of Defense] Form 1144, "Support Agreement"... , or similar format that contains all the information required on DD Form 1144. Support that benefits a receiver without creating additional cost to the supplier (e.g., gate guards, fire protection) may be included on a DD Form 1144, but must be identified as non-reimbursable. Provision of a single item or one time service, sales of Defense Business Operations Fund (DBOF) mission products and services, and intragovernmental sales specifically directed or authorized by law may be accomplished on the basis of an order or requisition without preparing a support agreement.⁷⁸

Apparently, documentation was required for the support agreement between the Army and CPA. If an applicable document exists and is available to the public, it might clarify what type of agreement existed between the Army and the authority.

⁷⁷ Department of Defense Instruction Number 4000.19, *Interservice and Intragovernmental Support*, August 9, 1995, p. 15, available at <http://www.dtic.mil/whs/directives/corres/pdf/400019p.pdf>.

⁷⁸ *Ibid.*, p. 4.

CPA Office of Inspector General

An Office of the Inspector General was established for CPA by Title III of the FY2004 emergency supplemental.⁷⁹ The Secretary of Defense, in consultation with the Secretary of State, appointed the Inspector General, and the Inspector General reported to the CPA Administrator.⁸⁰ As of March 20, 2004, the Office of Inspector General (OIG) employed 58 persons and had obtained the services of an auditing and accounting firm.⁸¹

In addition to having the duties, responsibilities, and authorities outlined in the Inspector General Act of 1978 (5 U.S.C. Appendix),⁸² the CPA Inspector General (IG) was authorized to “conduct, supervise, and coordinate audits and investigations of the treatment, handling, and expenditure of appropriated funds by the Coalition Provisional Authority in Iraq.”⁸³ This involved, for example, monitoring obligations and expenditures, reconstruction activities, contracts, and transfers of funds and associated information between and among the CPA and other departments, agencies, and entities of the federal government.⁸⁴ It seems that the CPA IG was to be treated the same as any federal agency’s OIG. The CPA office was to coordinate with the DOD and USAID Offices of Inspector General.⁸⁵ Additionally, any federal department or agency that was asked to provide information or assistance to the CPA OIG was to do so.⁸⁶ In his statement on the emergency supplemental, the President apparently placed some restrictions on CPA’s OIG. He noted that the Inspector General was to:

refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counterintelligence matters, ongoing criminal investigations by other administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitute a threat to national security. The Secretary of Defense may make exceptions to the foregoing direction in the public interest.⁸⁷

The CPA IG was to terminate its operations six months after the “authorities and duties” of CPA “cease to exist,” which occurred June 28, 2004.⁸⁸ Instead, Section 1203 of P.L. 108-375, which amended Title III of P.L. 108-106, redesignated the CPA IG as the Special Inspector General for Iraq Reconstruction (SIGIR) and made termination of the office contingent upon the obligation of appropriated funds.⁸⁹ SIGIR is to cease operations

⁷⁹ P.L. 108-106; 117 Stat. 1209, at 1234.

⁸⁰ Sec. 3001(c) and (e) of P.L. 108-106.

⁸¹ Coalition Provisional Authority, Office of Inspector General, *Message from the Inspector General of the Coalition Provisional Authority*, p. 13.

⁸² P.L. 95-452, Sec. 1; October 12, 1978; 92 Stat. 1101.

⁸³ Sec. 3001(f)(1) and (g) of P.L. 108-106.

⁸⁴ Sec. 3001(f)(1) of P.L. 108-106.

⁸⁵ Sec. 3001 (f)(4) and (5) of P.L. 108-106.

⁸⁶ Sec. 3001(h)(4) of P.L. 108-106.

⁸⁷ U.S. President (G. W. Bush), “Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004,” *Weekly Compilation of Presidential Documents*, vol. 39, November 6, 2003, p. 1549.

⁸⁸ Sec. 3001(o) of P.L. 108-106.

⁸⁹ For additional information on SIGIR, see <http://www.sigir.mil>.

10 months after the date, as determined by the Secretary of State and the Secretary of Defense, on which 80 percent of the amounts appropriated or otherwise made available to the Iraq Relief and Reconstruction Fund by chapter 2 of title II of this Act have been obligated.⁹⁰

During the 109th Congress, the SIGIR's term initially was shortened, but then was extended. Section 1054(b) of P.L. 109-364, the John Warner National Defense Authorization Act, FY2007, stated that the Inspector General would terminate on October 1, 2007. Subsequently, P.L. 109-440 changed the termination date so that

[t]he Office of Inspector General shall terminate 10 months after 80 percent of the funds appropriated or otherwise made available to the Iraq Relief and Reconstruction Fund have been expended.... For purposes of calculating the termination of the Office of the Inspector General under this subsection, any United States funds appropriated or otherwise made available for fiscal year 2006 for the reconstruction of Iraq, irrespective of the designation of such funds, shall be deemed to be amounts appropriated or otherwise made available to the Iraq Relief and Reconstruction Fund.⁹¹

The Special Inspector General for Iraq Reconstruction reports to both the Secretary of Defense and the Secretary of State.

Procurement Activities

Appropriated Funds for the Reconstruction of Iraq

The Emergency Wartime Supplemental Appropriations Act for FY2003,⁹² which was the first supplemental to provide funds for the reconstruction of Iraq, was signed on April 16, 2003, prior to the announcement that Ambassador Bremer would be the Administration's Presidential Envoy to Iraq. Accordingly, there was no mention of CPA (or ORHA) in this statute. The \$2.475 billion appropriated to the President for the reconstruction of Iraq could be apportioned only to USAID and the Departments of Defense, Health and Human Services (HHS), State, and the Treasury.⁹³

The FY2004 emergency supplemental, which was signed by the President on November 6, 2003, included CPA in the list of organizations to which the Iraq Relief and Reconstruction Fund could be apportioned.⁹⁴ The other five organizations in the list were the ones included in the first supplemental.

While the authority was eligible to receive funds for the reconstruction of Iraq, apparently it did not award any contracts funded by the FY2004 emergency supplemental. Deputy Secretary Wolfowitz's December 5, 2003, memorandum identifying countries whose companies were eligible to compete for contracts funded by the FY2004 emergency supplemental also stated that

⁹⁰ Sec. 1203(o) of P.L. 108-375.

⁹¹ Sec. 2 of P.L. 109-440.

⁹² P.L. 108-11; 117 Stat. 559, at 573.

⁹³ "Apportion" refers to a procedure whereby the President, through OMB, distributes appropriated funds to executive agencies. (31 U.S.C. § 1513(b)(1). Outside the executive branch, "the official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government ... shall apportion the appropriation in writing." (31 U.S.C. § 1513(a).)

⁹⁴ 117 Stat.1225.

the construction and services contracts funded by the supplemental “are to be awarded by the Coalition Provisional Authority (CPA) and by the Department of Defense, on behalf of CPA.”⁹⁵ Solicitations for the major design/build construction contracts were issued by the U.S. Army Corps of Engineers, the U.S. Army Communications-Electronics Command (CECOM), and the Naval Facilities Engineering Command. Proposals were to be submitted to the office that issued the solicitation. Offerors⁹⁶ also were required to submit copies of their proposals to the Iraq Reconstruction Contracting Office, which was located in Alexandria, Virginia. The Pentagon Renovation Office issued the solicitations for support for the CPA’s Program Management Office (PMO) and sector PMOs. Proposals were to be submitted to the Pentagon Renovation Office, but there was no requirement for proposals for the program management office PMO and sector program management offices (SPMOs) contracts to be submitted to the Iraq Reconstruction Contracting Office. Solicitations were issued on January 6, 2004, and by March 26, 2004, all 17 contracts were awarded.⁹⁷

Apparently, no official explanation as to why the CPA did not issue these solicitations was offered. A possible factor in the decision to decentralize the solicitation, evaluation, and award processes might have been the scheduled termination of the CPA. Knowing that the CPA would terminate operations by June 30, 2004, Administration officials might have chosen the route they did in order to maintain continuity. Another possible reason why CPA was limited to monitoring contracts may be that government officials ascertained that the authority did not have enough personnel, or enough personnel with sufficient experience in the types of work to be done in Iraq, to develop solicitations and evaluate proposals for seven major sectors, the PMO, and the SPMOs. The fact that CPA needed contractor support for its PMO and SPMOs tends to support the notion that it did not have enough resources to perform all of the necessary procurement tasks. A third consideration might have been the possibility of protests, particularly the possibility that a contractor would file a protest with GAO challenging the authority’s actions or decisions concerning the award of a contract. As discussed below, a few companies did file protests with GAO concerning CPA decisions. Perhaps the U.S. government wanted to avoid the possibility that additional protests targeting CPA would be filed with GAO. (As noted below, CPA’s own

⁹⁵ Paul Wolfowitz, Deputy Secretary of Defense, “Determination and Findings,” available from the author. In this document, the Deputy Secretary used the “public interest” exception (see FAR 6.302-7) to full and open competition as the authority for limiting competition for reconstruction contracts to firms “from the United States, Iraq, Coalition partners and force contributing nations.” (Ibid.) It bears noting, however, that the Deputy Secretary of Defense did not, and does not, have authority to use or apply this exception. Under FAR 6.302-7(c), only the Secretary of Defense, the Secretaries of the Air Force, Army, and Navy, the Secretary of Homeland Security for the Coast Guard, the Administrator of the National Aeronautics and Space Administration, and the head of any other executive agency may exercise this authority, which may not be delegated.

⁹⁶ An offeror is a business that submits a proposal in response to a government solicitation.

⁹⁷ The contracts were awarded to AECOM (PMO support, \$21.6 million), CH2M Hill/Parsons (public works and water SPMO support; \$28.4 million), Berger/URS (transportation/communications SPMO support, \$8.4 million; security/justice SPMO support, \$8.4 million; buildings/education/health SPMO support, \$10.7 million), Iraq Power Alliance Joint Venture (electrical services SPMO support, \$43.3 million), Foster Wheeler (oil SPMO support, \$8.4 million), Fluor AMEC LLC (power generation facilities, \$500 million; public works and water—northern region, \$600 million; public works and water—southern region, \$500 million), Washington International Inc. and Black and Veatch (water resources, \$600 million), Washington International Inc. (electricity—northern region, \$500 million), Perini Corp. (electricity—southern region, \$500 million), Contrack/AICI/OCI/Archirodon Joint Venture (transportation, \$325 million), Lucent Technologies World Services, Inc. (communications, \$75 million), and Parsons Delaware (buildings, education, and health, \$500 million; security, justice, and safety, \$900 million). (Coalition Provisional Authority, Program Management Office, “Another Contract in Place to Continue Construction in Iraq,” press release, April 2, 2004, available from the author.

contracting procedures applied only to non-appropriated funds, and only allowed for protests to be filed with CPA officials.)

The former Administrator of the Office of Federal Procurement Policy, in writing about contracting with the authority, offered another possible explanation of why government officials chose to have DOD components issue solicitations and award contracts for the reconstruction of Iraq:

The CPA is *not* the United States government. Accordingly, if one enters into a contractual relationship with the CPA, one is not entering into a contractual relationship with the United States. The rights and remedies available to parties contracting with the United States will not be available in a contractual relationship with the CPA. The remedies available to an aggrieved contracting party will be determined in part by the source of the money through which the contracting party is paid.⁹⁸

Government officials may have considered the question of the CPA's organizational status and the possibility that a contract with the authority would not be a contract with the U.S. government. These considerations might have contributed to a determination that it would not be appropriate for CPA to enter into contracts funded by appropriated funds.

There is some question as to whether the authority used appropriated funds for projects involving the reconstruction of Iraq. In a letter it submitted to GAO on the matter of the Turkcell Consortium protest (see below), the United States Army Legal Services Agency stated: "The funds CPA is using for contracts are not appropriated funds.... Even if this action [issuing licenses for mobile telecommunications] was a procurement that involved the use of funds, CPA would use DFI [Development Fund for Iraq] funds, not U.S. appropriated funds for its CPA mission."⁹⁹ This letter was written a few weeks before the FY2004 emergency supplemental was enacted, so possibly the Army was commenting only on conditions at the time. If so, then the Army's assertion in the Turkcell Consortium bid protest might not have applied to subsequent procurement actions.

Other evidence suggests that CPA used appropriated funds for reconstruction activities. A news article that mentioned the activities of the CPA's Program Review Board (see below) indicates the authority spent appropriated funds:

From minutes published by the CPA's Program Review Board, it appears that the CPA has the power to shift monies between appropriated funds accounts and the Development Fund of Iraq (which contains funds from both Iraqi and foreign donated sources): "#352, Restore Iraqi Infrastructure, \$711M. [million] The Board considered the request from Task Force RIO [Restore Iraqi Oil] for changing the funding source from appropriated funds to the Development Fund of Iraq a previously approved request (#352, total amount approved \$962M). \$251M was already provided from the Natural Resource Risk Remediation Fund (NRRRF), an appropriated funds account. TF RIO indicated that \$711M is outstanding and required but of that amount \$466M was immediately required to complete projects under Phase I. The Board identified \$500M as remaining available from two appropriated accounts—the Iraq Reconstruction and Relief Fund (IRRF) and the NRRRF and therefore

⁹⁸ Angela B. Styles, "Seller Beware: Assessing the Risks of Iraq Reconstruction Contracting," *Federal Contracts Report*, January 20, 2004, vol. 81, no. 2, p. 65. (Italics in original.)

⁹⁹ Maj. Frank A. March, Department of the Army, United States Army Legal Services Agency, "Protest of Turkcell Consortium, B-293048," correspondence to U.S. General Accounting Office, October 21, 2003, pp. 3 and 4.

the requirement was approved to come from the appropriated funds. A new vote may be required for the remaining amount \$211M but this was deferred.

Agenda Item #398 ('Police equipment - Of the \$90M authorized (funding source to be either appropriated or DFI), the CPA's Ministry of Interior team needs an immediate disbursement of \$5M. This request is for the reprogramming of \$5M from appropriated or DFI (to be determined) to vested funds. The request was recommended for approval.¹⁰⁰

The latter passage also shows that CPA might have reprogrammed funds among the various funding sources available to it (see below).

CPA Solicitations

CPA issued solicitations, which means it also awarded contracts, for some time. In early March 2004, the list on CPA's website included solicitations for aerators, AK-47 assault rifles, sand bags, portable X-Ray units, battery cells, vehicles, berets, turbine parts, a police records management system, information technology products, agricultural equipment, satellite data communications, and railroad equipment, parts, and services.¹⁰¹ It is unknown what funds CPA used to purchase items and services listed in its solicitations. If CPA used Iraqi funds, then CPA Memorandum Number 4 applied. Iraqi funds were defined in this memorandum as:

Funds under the control of the [Coalition Provisional] Authority consisting of (a) proceeds from Iraqi state-owned property that has been vested or seized in accordance with applicable law and made available to the CPA to assist the Iraqi people and assist in the reconstruction of Iraq; and (b) funds in the Development Fund for Iraq, the establishment of which is noted in Resolution 1483 (2203). As used in this Memorandum, "Iraqi Funds" do not include funds provided through the appropriations process of Coalition member governments (for example, funds provided directly to the CPA by the governments of the United States or the United Kingdom).¹⁰²

If CPA used appropriated funds, it would seem reasonable for authority personnel to have followed the *Federal Acquisition Regulation* (FAR), which governs federal agency procurement activities. A review of three CPA solicitations showed that two (sand bags and information technology) included numerous references to the FAR (sand bags and information technology products). The third solicitation, for berets, included only one reference to the FAR. Without additional, detailed information about the authority's contracting activities, it is difficult to ascertain the source of funds and the guidance used for each procurement. The former Administrator of the Office of Federal Procurement Policy (OFPP) has stated that "no rules [are] in place for contracting by the CPA with U.S. appropriated funds."¹⁰³ In the absence of a clear statement on the organizational status of the CPA, however, this assessment may or may not be accurate.

¹⁰⁰ Christopher R. Yukins and Mohab Khattab, "Iraq Reconstruction Awards Should Not Be Immune from Review," *Federal Contracts Report*, November 18, 2003, vol. 80, no. 18, p. 512.

¹⁰¹ The list is no longer available on the CPA website.

¹⁰² Coalition Provisional Authority, "Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq," Coalition Provisional Authority Memorandum Number 4, pp. 3-4.

¹⁰³ Styles, "Seller Beware: Assessing the Risks of Iraq Reconstruction Contracting," p.65.

Program Review Board

Ambassador Bremer established, through Coalition Provisional Authority Regulation Number 3, a Program Review Board (PRB), which reported directly to him. The board's general duty was to be "responsible for recommending expenditures of resources from the Development Fund for Iraq and other resources identified" elsewhere in the regulation. In developing funding plans, the PRB recommends disbursements of appropriated funds, "Iraqi property lawfully vested in the U.S. Treasury," funds, cash, or other financial instruments owned by Iraq or the (former) regime, and the Development Fund for Iraq. A news article asserted that the PRB "really controls only the Iraqi money."¹⁰⁴ However, as noted above, a news article indicated the PRB was involved in spending appropriated funds. The board was also responsible for proposing "principles and standards for expending funds for the relief and recovery of Iraq in a fair, consistent and transparent manner, through contracts or otherwise."¹⁰⁵

The board consisted of a chairman, who was appointed by the CPA Administrator; the directors of economic policy, civil affairs policy, the USAID—Iraq mission, operations, and security affairs (all of whom apparently were CPA personnel); and authorized representatives of the commander of coalition forces, the Iraqi Ministry of Finance, the United Kingdom, Australia, and the chairman of the Council for International Coordination. If the PRB took action on any matter relating to the disposition of appropriated funds, then the voting membership was also to include authorized representatives of DOD, and Departments of the Treasury and State. Additionally, the status of the authorized representatives of the Iraqi Ministry of Finance, the United Kingdom, Australia, and Council for International Coordination shifted from voting to nonvoting on the disposition of appropriated funds. Others who were permitted to attend board meetings as nonvoting members included the CPA Comptroller and General Counsel; Program Coordinator of the board; and authorized representatives of OMB, the Office of the Secretary of Defense, the International Monetary Fund, the World Bank, the United Nations Special Representative of the Secretary General for Iraq, and the International Advisory and Monitoring Board.¹⁰⁶

Protests

Protests challenging the authority were filed with GAO. On October 14, 2003, GAO received a bid protest from Turkcell Consortium, which challenged the award of mobile telecommunications licenses in Iraq by CPA. This was the first protest filed that involved the authority. The protest was dismissed because it was based on speculation, not factual grounds, that errors occurred in the award process.¹⁰⁷ Turkcell Consortium filed a second protest on October 27, 2003, which was also dismissed by GAO because the procurement did not involve "the provision of property or services to the federal government."¹⁰⁸

¹⁰⁴ Jackie Spinner and Ariana Eunjung Cha, "U.S. Decisions on Iraq Spending Made in Private," *Washington Post*, December 27, 2003, p. A15.

¹⁰⁵ Coalition Provisional Authority, "Coalition Provisional Authority Regulation Number 3, Program Review Board," June 18, 2003, p. 7, available at http://www.cpa-iraq.org/regulations/20030619_CPAREG_3_Program_Review_Board_.pdf.

¹⁰⁶ *Ibid.*, pp. 3-4.

¹⁰⁷ Melanie I. Dooley, "GAO Dismisses Turkcell Protest of Iraq Telecom Licenses; Turkcell Files New Protest after Receiving Debriefing," *Federal Contracts Report*, BNA, Inc., October 28, 2004, vol. 80, no. 15, p. 405.

¹⁰⁸ Melanie I. Dooley, "GAO Dismisses Turkcell's Second Protest of Iraq Telecom Licenses but Leaves Door Open," *Federal Contracts Report*, November 18, 2003, vol. 80, no. 18, p. 507.

While CPA was the organization that awarded the contract for mobile telecommunications licenses, GAO's second bid protest decision identified the cognizant agency as "Department of the Army, for the agency."¹⁰⁹ Reportedly, the U.S. Army was also listed as the cognizant agency on GAO's docket for the first protest, and the solicitation number was listed as "unknown."¹¹⁰ Citing a dismissal request submitted by the Army, GAO stated, in its decision on the second protest: "The Department of the Army argued that our Office lacks jurisdiction to hear this protest because the CPA is not a 'federal agency.'"¹¹¹ Due to the fact that both protests were dismissed on other grounds, there was no need for GAO to resolve the question of "whether the CPA is a federal agency for purposes of our [GAO] bid protest jurisdiction under CICA [Competition in Contracting Act of 1984]."¹¹² In its second decision on this case, however, GAO explained its authority to decide bid protests and described circumstances under which it could have jurisdiction to handle bid protests concerning CPA:

The authority of our Office to decide bid protests is based on the Competition in Contracting Act of 1984 (CICA) ... and encompasses "a written objection by an interested party to a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services." Our jurisdiction does not turn on whether appropriated funds are involved ... or on whether the competition requirements of CICA apply.

We note ... that even if we ultimately determine that the CPA is not a federal agency, we may well assume jurisdiction if the challenged procurement is conducted on the CPA's behalf by an entity that is a federal agency (such as the Department of the Army).... In any event, we would also consider a request by the CPA for our Office to consider protests outside the framework of CICA.¹¹³

CPA's award of a contract to Nour USA to equip the Iraqi armed forces and the Iraqi civil defense corps also was the subject of protests. A solicitation was issued on November 11, 2003, and CPA (which was explicitly identified as the contracting activity in the press release) received 19 bids.¹¹⁴ In a press release dated January 31, 2004, CPA announced that it had awarded a contract for \$327 million to Nour USA.

In mid-February, it was reported that two companies, Cemex Global Inc. and Bumar Group, had filed separate protests, which were combined by GAO into one protest, challenging the awarding of this contract to Nour USA. Among their concerns were (1) the relatively low cost of the Nour USA proposal, which was \$231 million lower than the Bumar Group's proposal; (2) the fact that Nour's president was A. Huda Faouki, who allegedly is a friend of Ahmad Chalabi, who had been a member of the Iraqi Governing Council; and (3) the belief that Nour USA, which apparently was established in May 2003, had no experience in performing the work necessary to fulfill the terms of the contract.¹¹⁵ Subsequently, four additional protests were filed with GAO. In each of

¹⁰⁹ U.S. General Accounting Office, Turkcell Consortium bid protest, file B-293048.2, November 12, 2003, p. 1.

¹¹⁰ Melanie I. Dooley, "GAO Dismisses Turkcell Protest of Iraq Telecom Licenses; Turkcell Files New Protest after Receiving Debriefing," *Federal Contracts Report*, October 28, 2003, vol. 80, no. 15, p. 405.

¹¹¹ U.S. General Accounting Office, Turkcell Consortium bid protest, p. 2.

¹¹² *Ibid.*, p. 1; 31 U.S.C. §§ 3551-3556.

¹¹³ U.S. General Accounting Office, Turkcell Consortium bid protest, pp. 2-3.

¹¹⁴ Coalition Provisional Authority, Program Management Office, "U.S.-Iraqi-Polish Group Receives Security Equipment Contract," press release, January 31, 2004.

¹¹⁵ Joe Harper, "Polish Arms Company Challenges CPA Award to U.S. Firm, Alleges Bid Evaluation Unfair," *Federal Contracts Report*, February 24, 2004, vol. 81, no. 7, p. 199; Melanie I. Dooley, "Coalition Provisional Authority to Review Nour, Other Offerors to Equip Iraq Army," *Daily Report for Executives*, March 5, 2004, no. 43, p. A-24.

the six protests, the Department of the Army was listed as the cognizant agency and the solicitation number (FY5866-04-R-0001) was included.¹¹⁶ Reportedly, CPA indicated on March 3 that it would reevaluate all timely proposals and make a new source selection decision.¹¹⁷ In light of the government's decision to reevaluate proposals, GAO dismissed all protests.¹¹⁸ In a March 5, 2004, press release, the CPA PMO briefly described plans for rectifying the situation, which involved the Army, but not CPA:

Today the Army announced it will terminate its contract with Nour, USA, to equip the New Iraqi Army. Protests were filed subsequent to the award to Nour. Protests are part of a transparent and fair procurement process. As a result of an internal review, the Army has determined there were irregularities in this specific contract action, and took appropriate measures to assess the validity of the protests.

The Army will conduct a complete re-solicitation; schedule release of the solicitation is to be determined. The Army wants to ensure the process is transparent, fair and conduct in an expeditious manner.¹¹⁹

Reportedly, control of the procurement process transferred from CPA to the Army Materiel Command.¹²⁰

No explanation was provided as to why the Army terminated the contract when the press release that announced the award of a contract to Nour identified CPA as the contracting activity (see above). A possible question could be posed, for example, why CPA, if it was the organization that awarded the contract initially, did not cancel the contract. While the Department of the Army provided support to CPA, particularly in the area of acquisition, it is unclear how, why, or under what circumstances, a federal agency might cancel a contract awarded by another entity and assume responsibility for subsequent procurement activities.

Neither CPA nor DOD disclosed why the Department of the Army, and not the authority, was listed on GAO's bid protest docket for protests involving contracting actions apparently undertaken by CPA. As for reconstruction contracts funded by the FY2004 supplemental, the fact that DOD components, such as the Army Corps of Engineers and the Naval Facilities Engineering Command, were the contracting activities would seem to preclude the possibility that an offeror would file a protest with GAO challenging CPA. Considering the Department of the Army's assertion, during the protest by Turkcell Consortium, that CPA was not an agency, it suggests that there might have been some (unknown) advantages to shielding CPA from protests.¹²¹ Without further information about CPA's procurement process and organizational status, it is unclear whether any advantages existed, and, if so, what they might have been.

It is unknown whether any offerors filed protests under the provisions of Coalition Provisional Authority Memorandum Number 4, which, as noted above, provided procurement rules for what

¹¹⁶ The file numbers assigned by GAO to these protests were B-293676.001 through B-293676.006.

¹¹⁷ Dooley, "Coalition Provisional Authority to Review Nour, Other Offerors to Equip Iraq Army," p. A-24.

¹¹⁸ Ibid.

¹¹⁹ Coalition Provisional Authority, Program Management Office, "U.S. Army Terminates Contract to Equip New Iraqi Army," March 5, 2004.

¹²⁰ Abby Bowles, "Army Materiel Command Put in Charge of Resoliciting Iraq Army Equipment Contract Awarded to Nour," *Federal Contracts Report*, March 16, 2004, vol. 81, no. 10, p. 279.

¹²¹ March, "Protest of Turkcell Consortium, B-293048," pp. 2-4.

may be referred to collectively as Iraqi, or non-appropriated, funds. The paragraph on protests stated:

A contractor wishing to object to the terms of a solicitation, the termination of a solicitation, the award of a contract, or the termination of the award of a contract, shall present the matter to the Contracting Officer for an initial decision. The contractor shall state to the Contracting Officer the basis for the protest. If the contractor does not agree with the Contracting Officer's initial decision, the Contractor may appeal the initial decision to the Head of Contracting Activity, CPA, for resolution. The decision of the Head of Contracting Activity, CPA, shall be the final decision in the matter.¹²²

Not only did this provision fail to provide for any sort of external, independent review or adjudication process (such as provided by GAO), it also omitted any requirements or procedures for CPA personnel to respond in a timely fashion, or to provide an explanation for their decision.

Appropriated Funds for the Operating Expenses of CPA

The FY2004 supplemental (P.L. 108-106) appropriated \$933 million to the President for the authority's operating expenses. Expenses could have included "personnel costs, transportation, supply, equipment, facilities, communications, logistics requirements, studies, physical security, media support, promulgation and enforcement of regulations, and other activities needed to oversee and manage the relief and reconstruction of Iraq and the transition to democracy..."¹²³ These funds are "to remain available until September 30, 2005: *Provided*, That the appropriation of funds under this heading shall not be construed to limit or otherwise affect the ability of the Department of Defense to furnish assistance and services, and any other support, to the Coalition Provisional Authority."¹²⁴ In a memorandum dated December 5, 2003, the President transferred these funds to the Secretary of Defense:

The funds appropriated to the President under the heading Operating Expense of the Coalition Provisional Authority in the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 (P.L. 108-106), or in any subsequent appropriation under this heading, are transferred to the Secretary of Defense, for an account designated Operating Expenses of the Coalition Provisional Authority, International Reconstruction and Other Assistance, Army.¹²⁵

Information is not available to explain whether the CPA Administrator had access to these funds, or if he relied on the Secretary of Defense for purchasing supplies and equipment needed by CPA.

¹²² Coalition Provisional Authority, "Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq," p. B-3.

¹²³ 117 Stat. 1226.

¹²⁴ Ibid.

¹²⁵ U.S. President (G. W. Bush), "Transfer of Funds Appropriated to the President under the heading Operating Expenses of the Coalition Provisional Authority, and Delegation of the Functions of the President under the heading Iraq Relief and Reconstruction Fund, in the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004," *Federal Register*, January 9, 2004, vol. 69, no. 6, p. 1645.

Regulatory Authority

The CPA Administrator exercised rule-making authority, which apparently was derived from the executive authority invested in CPA by the President. Unlike the heads of federal agencies, however, the Administrator did not follow the Administrative Procedure Act (APA), which governs informal and formal rule making.¹²⁶ For example, the authority did not announce any proposed, interim, or final regulations in the *Federal Register*.

The first regulation issued by CPA outlined the Administrator's authority in issuing regulations, memoranda, orders, and public notices:¹²⁷

In carrying out the authority and responsibility vested in the CPA, the Administrator will, as necessary, issue Regulations and Orders. Regulations shall be those instruments that define the institutions and authorities of the CPA. Orders are binding instructions issued by the CPA. Regulations and Orders will remain in force until repealed by the Administrator or superseded by legislation issued by democratic institutions of Iraq. Regulations and Orders issued by the Administrator shall take precedence over all other laws and publications to the extent such other laws and publications are inconsistent. The Administrator may also from time to time issue Public Notices.... The Administrator may issue Memoranda in relation to the interpretation and application of any Regulation or Order.¹²⁸

Enacting a regulation, order, memorandum, or public notice was accomplished by the Administrator signing off on, or approving, the document. Subjects of these documents included:

- Regulations: Development Fund for Iraq, Program Review Board, Governing Council of Iraq, Council for International Coordination, Iraq Property Claims Commission, and International Donor Assistance;
- Orders: Penal Code, Management and Use of Iraqi Public Property, Prohibited Media Activity, Regulation of Oil Distribution, Creation of a New Iraqi Army, and Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors;
- Memoranda: Criminal Procedures, contract and Grant Procedures, Implementation of De-Baathification Order No. 1, Implementation of Weapons Control Order 3, and Appointment of Deputy Ministers;
- Public notices: Managing Financial Resources, Regarding a Responsible Iraqi Media, Regarding the Council for International Coordination, Regarding Public Incitement to Violence and Disorder.¹²⁹

¹²⁶ 5 U.S.C. §§ 551-559; 60 Stat. 237. See CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland.

¹²⁷ A list of CPA regulations, orders, memoranda, and public notices is available at <http://www.iraqcoalition.org/regulations/index.html>, visited February 24, 2005.

¹²⁸ Coalition Provisional Authority, "Coalition Provisional Authority Regulation Number One," p. 2.

¹²⁹ Coalition Provisional Authority, "CPA Official Documents" website, available at <http://www.cpa-iraq.org/regulations/index.html#Regulations>, visited February 24, 2005.

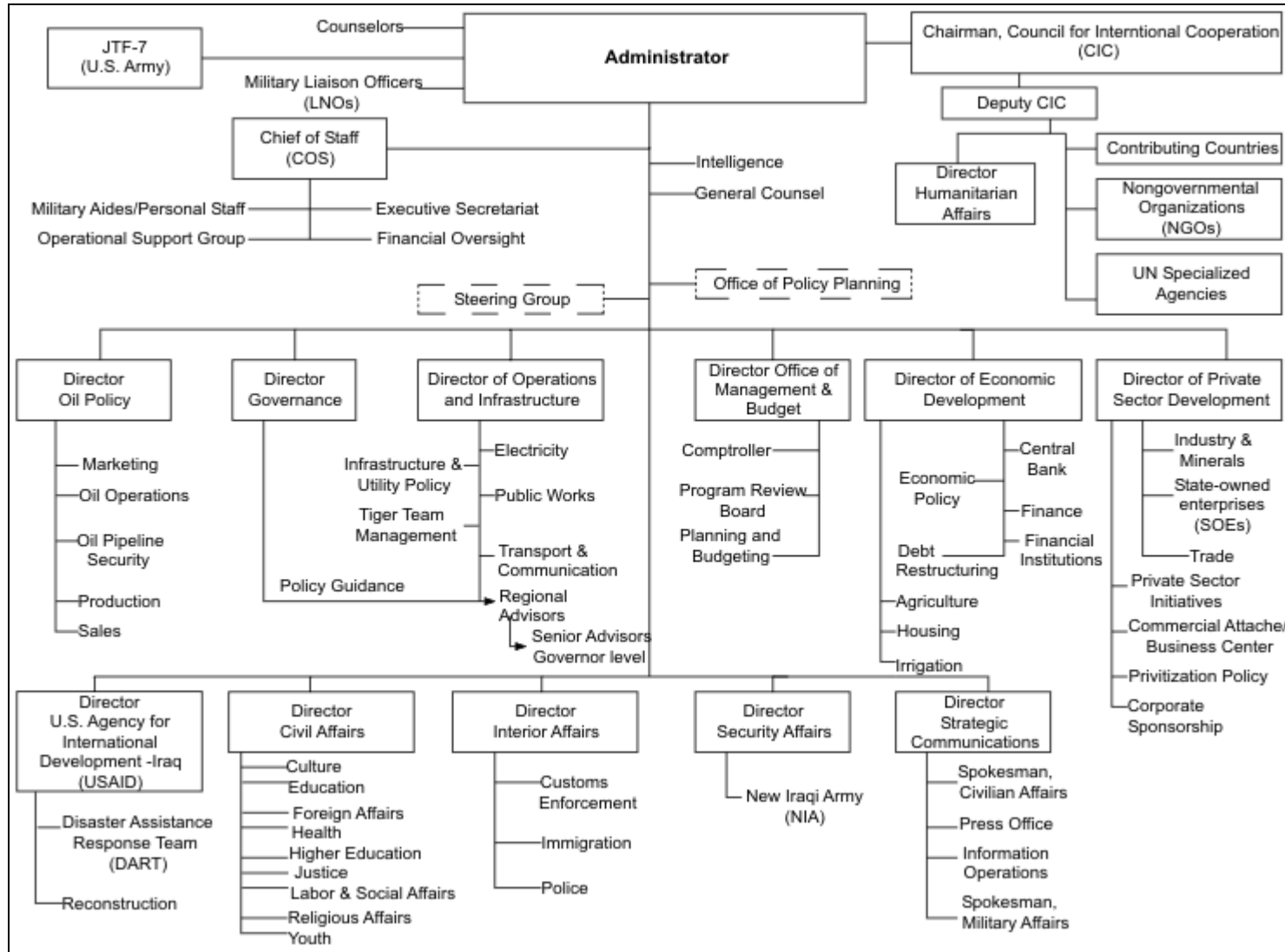
CPA Organization Chart

An undated CPA organization chart is shown in **Figure 1**.¹³⁰ While several sub-units are missing, and it is possible that the actual organization varied from this depiction, the chart provides insight into the authority's chain of command and organizational scope. Organizational subunits and positions not shown on the chart include the Deputy Administrator, Office of Inspector General, Program Management Office and Sector Program Management Offices, legislative affairs staff (which was located in the Washington, DC, metropolitan area), and contracting offices (apparently, there were two contracting offices, one each in Iraq and the Washington, DC, metropolitan area).

<http://wikileaks.org/wiki/CRS-RL32370>

¹³⁰ Organization chart provided electronically by CPA's legislative affairs office to the author on February 24, 2004.

Figure I. Coalition Provisional Authority



Statutory Reporting Requirements Concerning CPA and the Reconstruction of Iraq

Even prior to the inception of the CPA, Congress established reporting requirements concerning efforts to reconstruct Iraq. **Table 1** lists significant reporting requirements concerning this effort and, in particular, CPA.

<http://wikileaks.org/wiki/CRS-RL32370>

Table I. Statutory Reporting Requirements Concerning the CPA and the Reconstruction of Iraq

Statute (date of enactment)	Responsible Official or Office	Recipient(s)	Deadline(s)	Summary of Content of Report
P.L. 108-11, Sec. 1506(a) (April 16, 2003)	President	House and Senate Committees on Appropriations	Not later than 45 days after date of enactment.	<ol style="list-style-type: none"> 1. Description of duties, roles, and responsibilities of U.S. government agencies, foreign governments, and international organizations. 2. A strategy for coordinating the activities of these entities. 3. Cost estimates associated with such activities and a strategy for distributing responsibility for paying costs associated with reconstruction activities.
P.L. 108-11, Sec. 1506(b) (April 16, 2003)	President	House and Senate Committees on Appropriations	Not later than 90 days after date of enactment and every 90 days thereafter until Sept. 30, 2004.	<ol style="list-style-type: none"> 1. Separate lists of reconstruction activities that are anticipated, or were initiated or completed. 2. Cost estimates for conducting proposed activities and source of funds. 3. Updated list of financial pledges and contributions made by foreign governments or international organizations.
P.L. 108-106, Sec. 2202(b) (Nov. 6, 2003)	CPA Administrator, or agency head	<ol style="list-style-type: none"> 1. House Committees on Appropriations, Government Reform, and International Relations 2. Senate Committees on Appropriations, Government Affairs, and Foreign Relations 	Not later than seven calendar days before the award of a contract under other than full and open competition procedures. [Sec. 2202(b) does not include an expiration date.]	Justification of the use of other than full and open competition procedures, a description of the scope of the contract, a description of the process the agency used in identifying and soliciting offers, the amount of the contract, and justification and approval documents.

<http://wikileaks.org/wiki/CRS-RL32370>

Statute (date of enactment)	Responsible Official or Office	Recipient(s)	Deadline(s)	Summary of Content of Report
P.L. 108-106, Sec. 2203 (Nov. 6, 2003)	CPA Administrator ,or agency head	Publish in the <i>Federal Register</i> and post on the CPA website.	Not later than seven days before the date on which a contract is entered into for contracts awarded under other than full and open competition procedures. [Sec. 2203 does not include an expiration date.]	Amount and scope of the contract, how contractors were identified and solicited, justification and approval documents.
P.L. 108-106, Sec. 2207 (Nov. 6, 2003)	Director, OMB, in consultation with CPA Administrator and the House and Senate Committees on Appropriations	House and Senate Committees on Appropriations	Not later than January 5, 2004. Updated reports are to be submitted to the committees every three months. Sec. 2207 expires on October 1, 2007.	<ol style="list-style-type: none"> 1. Proposed uses of funds for Iraq relief and reconstruction 2. Distribution of duties and responsibilities regarding reconstruction projects among U.S. government agencies 3. Funds provided by foreign governments and international organizations 4. Foreign assets seized or frozen.
P.L. 108-106, Sec. 2215(a) (Nov. 6, 2003)	CPA Administrator	<ol style="list-style-type: none"> 1. House and Senate Committees on Appropriations 2. Post on CPA's website 	Initial report due within 30 days after date of enactment. Subsequent reports due on a monthly basis until September 30, 2006.	Iraqi oil production, oil revenues, and uses of oil revenues.
P.L. 108-106, Sec. 3001(i)(1) and (4), (j) (Nov. 6, 2003)	CPA Inspector General	<ol style="list-style-type: none"> 1. Senate Committees on Appropriations, Armed Services, and Foreign Relations 2. House Committees on Appropriations, Armed Services, and International Relations 3. Post on CPA website 4. CPA Administrator 	Not later than March 30, 2004, and every calendar quarter thereafter. [Apparently, this requirement will continue until OIG expires, which will happen six months after CPA is dissolved. (Sec. 3001 (o).)]	A detailed statement of all obligations, expenditures, and revenues associated with reconstruction and rehabilitation activities in Iraq (including the operating expenses of CPA and a discussion of how CPA used other than full and open competition procedures).

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Statute (date of enactment)	Responsible Official or Office	Recipient(s)	Deadline(s)	Summary of Content of Report
P.L. 108-106, Sec. 3001(i)(3) and (4), (j) (Nov. 6, 2003)	CPA Inspector General	<ol style="list-style-type: none"> 1. Senate Committees on Appropriations, Armed Services, and Foreign Relations 2. House Committees on Appropriations, Armed Services, and International Relations 3. Post on CPA website 4. CPA Administrator 	Not later than June 30, 2004, and semiannually thereafter. [Apparently, this requirement will continue until OIG expires, which will happen six months after CPA is dissolved. (Sec. 3001(o).)]	Summary of the activities of the OIG in the previous six months (for example, significant problems, abuses, and deficiencies, and OIG's recommendations for corrective action).
P.L. 108-136, Sec. 1203 (Nov. 24, 2003)	Secretary of Defense	Congress	Not later than 90 days after date of enactment.	Range of infrastructure reconstruction, civil administration, humanitarian assistance, interim governance, and political development activities undertaken in Iraq by DOD officials and those civilians reporting to the secretary. A A required element is a discussion of the evolution of the organizational structure of the civilian groups (ORHA and CPA) reporting to the Secretary.
P.L. 108-199, Sec. 599C (Nov. 25, 2003)	OPM	House and Senate Committees on Appropriations	Initial report due February 1, 2004. Subsequent reports due every quarter until May 2005.	Number of detailees, by agency, that are detailed to CPA.

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Status and Characteristics of CPA as Related to the False Claims Act (FCA)

A lawsuit filed under the False Claims Act (FCA; 31 U.S.C. §§ 3729-3733), and unsealed in 2004, revealed that, as part of its defense, Custer Battles, LLC (CB), contended that CPA was not a federal agency. Because the FCA applies only to the submission of false or fraudulent claims to the government, Custer Battles argued that if CPA were not part of the government, the FCA would not apply. (CPA has been identified as the contracting agency for two contracts awarded to Custer Battles involving the Baghdad International Airport (BIAP) and the Iraqi Currency Exchange (ICE).)¹³¹ In *United States ex rel. DRC Inc. v. Custer Battles, LLC* (E. Va., No. CV-04-199-A), two former employees of CB alleged “that security contractor Custer Battles (CB) submitted \$50 million in fraudulent contract claims” to the federal government.¹³² Custer Battles argued that CPA was not part of the U.S. government and that it (CB) was paid with seized funds and DFI funds, which meant, therefore, that the U.S. government was not involved in these contracting activities and U.S. government funds were not expended.

Although some may concur with the judge’s 2006 analysis of the status of CPA (see below), arguably the significance of *Custer Battles*, aside from the outcome, may have more to do with the insight provided by Department of Justice attorneys and Judge T.S. Ellis, III.¹³³ In a brief dated April 1, 2005, and submitted to Judge Ellis, DOJ attorneys examined two issues related to financial transactions involving Custer Battles and the BIAP and ICE contracts:

Thus, the specific issue to be determined is whether the money which defendants [Custer Battles] requested from the CPA via their invoices under these two contracts was to be paid out, provided or approved by the United States Government. The answer lies in the nature of the funds used to fund these two contracts. The second issue is whether the claims were presented to U.S. Government officials.¹³⁴

The Department of Justice determined that the U.S. government possessed, controlled, and/or administered the funds used to pay Custer Battles; the U.S. government paid out, approved, or provided these funds; and Custer Battles had presented claims for funds to “an officer or

¹³¹ Brief of the United States in response to the court’s invitation at p. 19, *United States ex rel. DRC, Inc. and Robert Isakson v. Custer Battles, LLC*, et al. (E.D. Va. 2004) (No. CV-04-199a).

¹³² Martha A. Matthews, “District Court Sets February 10 Hearing on Whether FCA Reaches Coalition Provisional Authority Contracts, Development Fund for Iraq Monies,” *Federal Contracts Report*, January 11, 2005, p. 24. In addition to the lawsuit filed by two former employees, the Air Force suspended Custer Battles effective September 30, 2004. (Excluded Parties List System, available at <http://www.epls.gov/>.) As reported in the *Legal Times*, the Air Force suspension memorandum stated that the company had “purchased cabins, trucks, and equipment and created false leases between CB and the sham companies, making it appear that the sham companies were leasing the goods to the CPA through CB. The scheme allowed CB to lease the goods to the CPA at prices exceeding the original cost of the goods.” (Jason McLure, “How a Contractor Cashed in on Iraq,” *Legal Times*, February 28, 2005, p. 13.)

¹³³ The Department of Justice (DOJ) is permitted to join a suit filed under the FCA, but it has been reported that the department declined in 2004 to join the lawsuit filed against Custer Battles. (McLure, “How a Contractor Cashed in on Iraq,” p. 13.) Subsequently, in December 2004, Judge T. S. Ellis III, who heard the case in the U.S. District Court for the Eastern District of Virginia, invited the federal government “to file ... a brief setting forth the government’s position with respect to whether the FCA [False Claims Act] applies to false claims made or presented to the CPA....” (McLure, “How a Contractor Cashed in on Iraq,” p. 13.)

¹³⁴ Brief of the United States at p. 27.

employee of the United States Government or to a member of the Armed Forces of the United States.”¹³⁵ Following from these determinations, the Justice Department attorneys concluded that

Custer Battles’s claims presented to the CPA under the BIAP and ICE contracts would violate FCA if the claims are shown to have been knowingly false because those claims were for funds in which the U.S. had an interest or exercised certain dominion and were to be paid out, provided or approved by the United States and they were ultimately presented to an officer or employee of the United States government.¹³⁶

In response to an order from the U.S. district court, dated April 12, 2005, Justice Department attorneys filed a supplemental brief that addressed the question of whether CPA was a U.S. government entity, agency, or instrumentality for the purposes of the FCA. In their supplemental brief, the attorneys emphasized several times that determining the status of CPA was unnecessary, yet they did present a set of criteria for determining whether CPA was part of the U.S. government for the purposes of the False Claims Act.¹³⁷ Their criteria and excerpts from their responses follow:

How and under what circumstances was the entity created? The CPA was created by the Commander of the Coalition Forces in Iraq, General Tommy Franks, United States Army, who was also the Commander of the U.S. Central Command. The establishment of the CPA by the Coalition was formally recognized by UNSCR [United Nations Security Council Resolution] 1483.

Is the entity subject to the general supervision and direction of the Executive Branch? Is its head appointed by the President and confirmed by the Senate? The CPA Administrator was subject to the direction of the President. Administrator Bremer served as Presidential Envoy and reported to the President through the Secretary of Defense.

Is the entity’s funding or its capital formed or replaced out of the public treasury? And are any gains returned to the public treasury? The CPA’s operating funds were appropriated by Congress.

Are all of the entity’s officers and other personnel employees of the United States? Many if not most officers and employees of the CPA were employees of the United States. Others were employees of other member states of the Coalition.

Are there close budgetary, auditing and fiscal controls that resemble those imposed on the ordinary government agency? While Congress initially imposed no close budgetary, auditing and fiscal controls over the CPA operations with regard to the DFI [Development Fund for Iraq] that resemble those imposed on the ordinary government agency ... , Congress created the Office of Inspector General for the CPA to perform those types of oversight functions.

Is the structure of the entity simply an administrative device established for the purpose of carrying out a federal program with public funds? The CPA was the administrative device

¹³⁵ Brief of the United States at pp. 28-30, 34-35, 37, 39.

¹³⁶ *Ibid.*, p. 40.

¹³⁷ As reported in the *Washington Post*, “The briefs came after multiple requests from [Judge] Ellis, who chided the Justice Department ... for only reluctantly weighing in on the case. Ellis said it may be because the government doesn’t want to expose itself to liability for the CPA’s actions. [Justice Department attorney Michael F.] Hertz acknowledged that the government had written its briefs in the case ‘as narrowly as [it] could’.” (Griff Witte, “Judge Considers Whistle-Blowers’ Iraq Contracting Suit,” *Washington Post*, May 13, 2005, p. E3.)

that the Coalition created under the laws and usages of war to perform civil government functions in liberated Iraq during the brief period of occupation. As an active member of the Coalition, the United States played an important role in, and had certain responsibilities for, the occupation, which it chose to fulfill through creation of and participation in the CPA. The CPA's structure was not established by Congress, and thus, the structure is not the typical congressionally created administrative device to fulfill a government function.¹³⁸

In reaching their determination that CPA was an instrumentality of the U.S. government, the Justice Department attorneys wrote:

... two factors tip the scale in favor of the conclusion that the CPA should be deemed to be an instrumentality of the United States for purposes of the False Claims Act. First is the nature of the appointment and supervision of Ambassador Bremer as Presidential Envoy and Administrator of the CPA. All authority of the CPA rested in the Administrator, and Ambassador Bremer was employed by the United States, served at the pleasure of the President, and was under the supervision of the President and the Secretary of Defense. Second, coupled with the status of Ambassador Bremer, is the fact that all of the money used for the two contracts at issue in this case was spent only on the authority and control of an officer or employee of the United States or a member of the Armed Forces of the United States.... Thus, while we emphasize again that the answer to the Court's latest question on the nature of the CPA is not necessary to determine whether or not defendants violated the FCA when they presented claims to the CPA under the two contracts at issue in this litigation, we nevertheless conclude that the CPA is an instrumentality of the United States for purposes of the False Claims Act.¹³⁹

In July 2005, Judge Ellis issued an opinion noting first that, if CPA had been a U.S. government agency, the question of whether the FCA applied to CPA contract actions "would be largely resolved."¹⁴⁰ However, the judge went on to note that "the essential nature of the CPA is shrouded with ambiguity ... the CPA's origins are difficult to pin down, as there is no formal document—whether statute, United Nations Security Council resolution, or other organic document—that plainly establishes the CPA or provides for its formation."¹⁴¹ Near the end of his opinion, the judge suggested that the question of CPA's status might need to be addressed again at some later date: "Although it initially appeared otherwise, it now appears unnecessary to reach and decide at *this time* whether the CPA is an instrumentality of the United States.... [T]he dispute as to the nature of the CPA may ultimately prove to be material..."¹⁴²

Judge Ellis then turned to the question of the source and ownership of the three funds in question—vested funds, seized funds, and the Development Fund for Iraq (DFI)¹⁴³—and determined that the FCA applies to vested and seized funds, but it does not apply to the DFI.¹⁴⁴

¹³⁸ Supplemental Brief of the United States at pp. 6-12.

¹³⁹ *Ibid.*, pp. 13-14.

¹⁴⁰ *Custer Battles*, 376 F. Supp. 2d at 620.

¹⁴¹ *Ibid.*

¹⁴² *Custer Battles*, 376 F. Supp. 2d at 620 and 649. (Italics in original.)

¹⁴³ Vested funds are "Iraqi funds [that were] confiscated by the President and vested in the Department of the Treasury." Seized funds are "Iraqi state assets, primarily in the form of currency and negotiable instruments, [that were] seized by the Coalition Forces occupying Iraqi territory." The Development Fund for Iraq includes proceeds from the U.N. "Oil for Food" program, revenues from the sale of Iraqi oil and gas, international donations, and repatriated Iraqi assets. (*Custer Battles*, 376 F. Supp. 2d at 623 and 626.)

¹⁴⁴ *Ibid.*

Specifically, he ruled that “any request submitted to the CPA for payment from Seized or Vested Funds constitutes a ‘claim’ within the meaning of the FCA. Requests for payment from funds in the DFI, however, were requests for Iraqi funds and thus did not constitute an FCA ‘claim.’” Judge Ellis’s ruling permitted the case against Custer Battles to go forward—because vested and seized funds were used to pay the BIAP contract, and seized funds were used, in part, to pay for the ICE contract—and, in March 2006, it was reported that a jury found that CB had “submitted \$3 million in false claims against funds seized by the United States”¹⁴⁵ However, in August 2006, Judge Ellis issued a second opinion in response to Custer Battles’ request for a directed judgment overturning the jury’s verdict. He ruled in favor of Custer Battles, noting that the “relators did not prove that the claims were presented to the United States.”¹⁴⁶

In crafting his 2006 opinion, which addressed the Iraqi Currency Exchange project, Judge Ellis concluded that it was necessary to address the question of CPA’s status.¹⁴⁷ After revisiting the analysis of CPA included in his 2005 opinion, the judge wrote:

... [T]he result of that analysis is clear—although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government. *See Rainwater*, 356 U.S. at 592-54. In fact, the evidence clearly establishes that it was created through and governed by multinational consent....¹⁴⁸

Judge Ellis ruled on the claim involving Custer Battles’ Baghdad International Airport contract in early 2007. He determined that Custer Battles had not “fraudulently induced Iraq’s Coalition Provisional Authority (‘CPA’) to award it a contract to perform security services for the Baghdad International Airport (‘BIAP’) by representing that it would provide 138 security personnel.”¹⁴⁹ Specifically, Judge Ellis noted the following:

In summary, undisputed facts manifestly demonstrate that Relators cannot establish a fraudulent inducement claim under the FCA because they have failed to show (i) that Custer Battles made a false statement regarding fixed security personnel staffing levels; (ii) that Custer Battles knowingly made this allegedly false statement; and (iii) that this allegedly false statement was material to the CPA’s decision to award the BIAP contract to Custer Battles.¹⁵⁰

Except for a summary of what transpired previously in this case, the judge did not re-visit the issue of the status of CPA in his 2007 opinion.

¹⁴⁵ Martha A. Matthews, “Jury Finds Custer Battles Made \$3M in False Claims under One Iraq Contract,” *Federal Contracts Report*, vol. 85, no. 10, p. 283.

¹⁴⁶ U.S. v. Custer Battles, No. 04-199, 2006 U.S. Dist. LEXIS 58217 at *2 (E.D. Va. August 16, 2006). The term “relator” refers to a private individual who may “bring a lawsuit on behalf of the United States, where the private person has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States.” (U.S. Department of Justice, “False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits,” n.d., available at <http://www.usdoj.gov/usao/pae/Documents/fcprocess2.pdf>, p. 1.)

¹⁴⁷ “[O]n January 30, 2006, the BIAP contract claims were severed from the ICE contract claims ... because the claims involved wholly separate factual and legal issues.” (U.S. v. Custer Battles, No. 04-199, 2007 U.S. Dist. LEXIS 8473 at *9 (E.D. Va. February 2, 2007).)

¹⁴⁸ U.S. v. Custer Battles, 2006 U.S. Dist. LEXIS 58217 at *31.

¹⁴⁹ U.S. v. Custer Battles, 2007 U.S. Dist. LEXIS 8473, at *2.

¹⁵⁰ *Ibid.*, at *40-41.

Custer Battles has yielded two views of the status of CPA: DOJ attorneys determined, for the purposes of the FCA, that it was an instrumentality of the U.S. government, but Judge Ellis reasoned that it was not. Additionally, at least one alternative explanation still exists regarding the creation of CPA, which was discussed above. That is, the President may establish an organization under 5 U.S.C. § 3161. However, without access to NSPD 24, which apparently created, or authorized the establishment of, ORHA, and which also may have been the instrument under which CPA was created, it is difficult to ascertain whether this could be a valid alternative explanation, or the definitive explanation.

Yet another possibility is that CPA was a hybrid organization, meaning that it had multiple origins. Perhaps, then, the seemingly contradictory explanations actually are a reflection of the organization's hybrid status. Furthermore, if CPA was a hybrid organization, could this mean that it was part U.S. government organization and part multinational organization? If so, how might this arrangement have affected how CPA operated, what would the implications have been for CPA's activities, and to whom was CPA accountable?

The differing interpretations offered by Justice Department attorneys and Judge Ellis and the questions surrounding NSPD 24 highlight the difficulties inherent in attempting to discern the true origins of CPA. Thus, it appears that the question of how CPA was established, by whom, and under what circumstances remains unanswered, at least for some.

Discussion of CPA

The status of this organization remains open to question. A letter exists that states that the United States, and the United Kingdom, created the authority; in 2005, Justice Department attorneys identified General Franks as the individual who established CPA; and the possibility exists that the organization's origins are to be found in NSPD 24. No explicit, unambiguous, and authoritative statement has been provided that declares how CPA was established, under what authority, and by whom, and that clarifies the seeming inconsistencies among alternative explanations for how CPA was created.

Perhaps this ambiguity allowed the authority to perform multiple roles, each with its own chain of command, stakeholders or constituents, funding, and accountability policies and mechanisms. A statement in the FY2004 emergency supplemental—"in its [CPA] capacity as an entity of the United State government"—suggested that U.S. government entity is only one of CPA's roles. Other roles might have included temporarily aiding in the governing of Iraq and serving as part of a coalition. Possibly, the mix of arrangements allowed CPA to operate with greater discretion and more authority, and have access to more resources, than if it had been solely a federal agency, or an arm of the United Nations.¹⁵¹ CPA personnel also might have been able to work more

¹⁵¹ In a briefing on contracting programs in Iraq, Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs, stated: "We're in a war, we're in a global war on terror. We have—many of the restrictions on how money is appropriated and spent are based on rules and statutes that have developed over a course of time that was not a period of war. So we've got a certain disconnect between the need to spend money quickly now, and we've got certain funds available to do that—the CERP [Commanders Emergency Response Program] is a pot of money that's got fewer restrictions, relatively speaking, attached to it. It is certainly understandable that a military commander who just knows if he had \$10 million he can address some issues, isn't going to necessarily be the one who's patient enough to sort through all the peacetime restrictions on the use of funds. That's somebody else's job; people are doing that. These restriction are real, they were put in place for a very good reason. But they're restrictions that bear some scrutiny now that we're trying to address a problem that is real time; and it's not only a real-time problem, it's a real-time (continued...)"

efficiently and effectively under this mix. By operating under more than one set of laws, regulations, and policies, CPA possibly could have expanded the scope and reach of the organization's authority beyond what it would be otherwise. For example, the CPA Administrator drafted the regulations, orders, memoranda, and public notices that applied to Iraq; and the Program Review Board had jurisdiction over four funding sources, including appropriated funds. An advantage of having the CPA treated as part of the Department of Defense is that the chain of command ran through the executive branch, which would not have been the case if CPA were purely an international organization or coalition.

Billing itself as an international coalition, while eschewing the label "federal agency," might be construed as an effort to make the organization more palatable, at least symbolically, to Iraqis and others. For example, the CPA website address ended ".com" and the PMO website ended ".net." United States government website addresses typically end ".gov." Furthermore, the Iraqi flag is the only flag that appeared on the two websites. No flags from coalition countries were displayed.

Potential drawbacks of this arrangement were that the lines of authority and accountability could have become tangled, or even obscured. CPA personnel possibly could have found it difficult to understand and delineate clearly—on a daily basis—the organization's different roles and associated funds, laws, and rules.¹⁵² Personnel might have been hampered by this tangle of resources, laws, and documents, and could have found themselves engaging in questionable, and perhaps unethical or criminal, activities. This scenario also could have proven challenging for organizations that attempted to monitor CPA and its activities. When the authority made a decision or expended funds, it might not have been clear to external parties under what authority it was acting. Without transparency, the CPA might have given the appearance of shifting funds, personnel, and tasks among different roles. Further compounding the problem, oversight initiatives might have been met with the response that the activity in question was carried out under an authority over which the oversight body—Congress—had no jurisdiction.

While greater transparency possibly could have helped to clarify CPA's role(s), knowing how CPA was established and under what authority would go a long way in helping to determine whether it was a federal agency, the scope of its authority, and the forms, types, and mechanisms of accountability to which it was subject. These questions remain relevant even after CPA's

(...continued)

problem where people are being killed.... But I can tell you that the people who are responsible, who have that more—who have that broader view of how this money is allocated and what those restrictions are, are working through the problem in a very aggressive way—Ambassador Bremer, General Abizaid, General Sanchez.... We have a lot of restrictions on the way some money can be spent, fewer restrictions on the way other money can be spent, and we're trying our best to kind of make those determinations all the time." (Rear Admiral David J. Nash (ret.), Director, CPA Program Management Office, and Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs, "Briefing on Contracting Programs," news transcript, March 10, 2004, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2291>.)

¹⁵² In testimony provided to the Senate Committee on Homeland Security and Governmental Affairs, the Special Inspector General for Iraq Reconstruction suggested that the multitude of procurement rules was problematic. Under the heading "Policy and Process Key Lessons," he advised: Establish a single set of simple contracting regulations and procedures that provide uniform direction to all contracting personnel in contingency environments. The contracting process in Iraq reconstruction suffered from the variety of regulations applied by diverse agencies, which caused inconsistencies and inefficiencies that inhibited management and oversight. (U.S. Congress, senate Committee on Homeland Security and Governmental Affairs, statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction, unpublished hearing, 109th Cong., 2nd sess., August 2, 2006, available at http://hsgac.senate.gov/_files/080206Bowen.pdf.)

dissolution on June 28, 2004, for questions remain about what it did, how it spent money, and what it accomplished.

While information gleaned from CPA personnel would be potentially useful in the near future, it also could be useful in the long-term in informing any future efforts to provide aid to countries faced with similar problems.

Post-CPA Organizations

Iraq Reconstruction Management Office (IRMO) and Project and Contracting Office (PCO)

On June 28, 2004, the Coalition Provisional Authority ceased operations and the United States established diplomatic relations with the Iraqi government.¹⁵³ Two organizations were established by National Security Presidential Directive (NSPD) 36, dated May 11, 2004, to carry on some of the work of the CPA: the Iraq Reconstruction Management Office (IRMO), within the Department of State; and a Project and Contracting Office (PCO), within DOD.¹⁵⁴ IRMO is responsible for “facilitat[ing] the transition in Iraq.”¹⁵⁵ The PCO

manages the \$18.4 billion appropriated by the U.S. Congress [P.L. 108-106] to support the reconstruction of Iraqi infrastructure. This office is responsible for all activities associated with program, project, asset, construction and financial management of that portion of the reconstruction effort undertaken by the U.S.¹⁵⁶

Office for Reconstruction and Stabilization

In 2004, the Department of State established the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) pursuant to Section 408 (Division D) of P.L. 108-447, the FY2005 Consolidated Appropriations Act. The office is responsible for, among other things, monitoring and inventorying the non-military resources and capabilities of executive agencies, monitoring unstable situations around the world, and planning for response efforts to crises in other countries or regions.¹⁵⁷

Conclusion

The Coalition Provisional Authority represented a multinational effort to rebuild Iraq, restore stability, and aid in establishing an interim Iraqi government. While its mission statement was

¹⁵³ U.S. Mission Iraq, International Press Center, Office of Strategic Communications, “Ambassador Negroponte Arrives in Baghdad,” news release, June 28, 2004, received by email, June 28, 2004.

¹⁵⁴ U.S. President (G.W. Bush), “United States Government Operations in Iraq,” p. 3.

¹⁵⁵ *Ibid.*, pp. 2-3.

¹⁵⁶ Iraq Project and Contracting Office, “About PCO,” n.d., available from the author.

¹⁵⁷ For additional information, see CRS Report RS22031, *Peacekeeping and Post-Conflict Capabilities: The State Department’s Office for Reconstruction and Stabilization*, by Nina M. Serafino and Martin A. Weiss.

fairly clear, other aspects of the authority were more obscure, particularly how it was established, under what authority, and by whom (within the U.S. government). Available information about the authority found in materials produced by the Administration alternatively (1) denies that it was a federal agency; (2) states that it was a U.S. government entity or instrumentality; (3) suggests that it was enacted under United Nations Security Council Resolution 1483; (4) refers to it, and OHRA, as “civilian groups ... reporting to the Secretary [of Defense]”;¹⁵⁸ (5) states that it was created by the United States and United Kingdom; and (6) asserts that it was established by the then-Commander of CENTCOM. Without a clear, unambiguous statement that declares the CPA’s organizational status, clarifies what its relationship was with DOD and other federal agencies, and addresses the competing explanations for how it was created, various questions are left unanswered, including whether, and to what extent, CPA might be held accountable for its programs, activities, decisions, and expenditures.

<http://wikileaks.org/wiki/CRS-RL32370>

¹⁵⁸ Sec. 1203 of P.L. 108-136.

Appendix.

This is the text of the document issued by General Tommy R. Franks on April 16, 2003, to the Iraqi people. The heading or title of the message is “Freedom to the Iraqi People.”

Peace be upon you. Coalition Forces in Iraq have come as liberators, not as conquerors. We have come to eliminate an oppressive and aggressive regime that refused to comply with UN Security Council resolutions requiring the destruction of weapons of mass destruction. The Coalition is committed to helping the people of Iraq heal their wounds, build their own representative government, become a free and independent people and regain a respected place in the world. We will ensure that Iraq’s oil is protected as a national asset of and for the Iraqi people. Iraq and its property belong to the Iraqi people and the Coalition makes no claim of ownership by force of arms. Coalition forces respect the Iraqi people, their religious practices, history and culture, and will safeguard Iraq’s unity and territorial integrity.

We are working with the international community to ensure the delivery of humanitarian assistance and to promote law and order so that Iraqis can live in security, free from fear. We are establishing the stability that will allow early progress toward political freedom and economic prosperity. Our stay in Iraq will be temporary, no longer than it takes to eliminate the threat posed by Saddam Hussein’s weapons of mass destruction, and to establish stability and help Iraqis form a functioning government that respects the rule of law and reflects the will, interests, and rights of the people of Iraq. Meanwhile, it is essential that Iraq have an authority to protect lives and property, and expedite the delivery of humanitarian assistance to those who need it. Therefore, I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction. To facilitate these objectives, I proclaim the following:

Members of the armed forces and security organizations shall lay down their arms, stay away from their weapons, and remain in place. They shall obey the orders of the nearest Coalition military commander. All other Iraqi should continue their normal daily activities; officials should report to their places of work until told otherwise. All those engaged in the delivery of essential services should return to their jobs. The Arab Socialist Renaissance Party of Iraq (Hizb al-Ba’th al-Arabi al-Ishtiraki al-Iraqi) is hereby disestablished. Property of the Ba’th Party should be turned over the Coalition Provisional Authority. Saddam Hussein’s intelligence and security apparatus, the Al-Mukhabarat al-Iraqiyya, is hereby deprived of all powers and authority. All Iraqis are not free to express their views without fear of retribution. At an appropriate time, free elections will make Iraqis self-governing in local, regional, and soon, national affairs. All parties and political groups may participate in Iraq’s political life, except those who advocate or practice violence. Iraqis must not seek revenge. There will be a just legal process that will safeguard the honor and dignity of the Iraqi people. The Coalition Provisional Authority will seek a fair and prompt solution to the problem of displaced persons and refugees. There will be a legal, organized process to address restitution of homes that have been seized by the former regime. The Coalition will work with Iraqis to set up a commission to deal with such claims. I call upon Iraqis to inform Coalition Forces regarding the location of weapons of mass destruction or related materials, facilities where such weapons are made, and individuals connected to weapons of mass destruction. All records concerning these activities should be preserved. Iraqis should not pass weapons of mass destruction to terrorists or terrorist organizations. I call upon Iraqis to inform Coalition Forces regarding the location of: foreign fighters and terrorists; members of the regime’s security apparatus; and individuals who have perpetrated crimes against humanity or war crimes. All records concerning these activities should be preserved. Rewards may be provided for especially important information on these matters. All barriers to free movement of people and goods, including illegal roadblocks and checkpoints, must

come down. We will work with regional leaders, entities, and governments that are committed to peace and democracy to integrate them into the Coalitions' activities. Coalition Forces are here to ensure safety and security, and to help the people of Iraq create a better future for their country. We pledge our support to all Iraqis who seek Iraq's freedom and prosperity, and the blessings of peace and security.

16 April 2003
General Tommy R. Franks
Commander of Coalition Forces¹⁵⁹

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<http://wikileaks.org/wiki/CRS-RL32370>

¹⁵⁹ General Tommy R. Franks, Commander of Coalition Forces, "Freedom Message to the Iraqi People," April 16, 2003, available from the author.