

**THE LAST SHALL BE FIRST: THE USE OF LOCALIZED
SOCIO-ECONOMIC POLICIES IN CONTINGENCY
CONTRACTING OPERATIONS**

MAJOR BRADLEY A. CLEVELAND*

*Goodwill is the only asset that competition cannot
undersell or destroy.*

— Marshall Field¹

*Competition has been shown to be useful up to a certain
point and no further, but cooperation, which is the thing
we must strive for today, begins where competition
leaves off.*

— Franklin D. Roosevelt²

*We have conducted a thorough assessment of our
military and reconstruction needs in Iraq, and also in
Afghanistan . . . [To] support our commitment to helping
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* Judge Advocate, U.S. Air Force. Presently assigned as an Instructor, The Judge Advocate General's School, Air Force Legal Operations Agency, Maxwell Air Force Base, Ala. LL.M., 2008, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va.; J.D., 2000, University of Tennessee at Knoxville; B.A., 1997, University of Tennessee at Knoxville; 1997, B.S., Park University, Parkville, Mo. Previous assignments include Trial Attorney, Air Force Material Command Law Office, Directorate of Contract Dispute Resolution, Wright-Patterson AFB, Ohio, 2005–2007; Area Defense Counsel, Air Force Legal Services Agency, Andersen AFB, Guam, 2004–2005; Chief, Military Justice, 36th Air Base Wing, Andersen AFB, Guam, 2003–2004; Ogden Air Logistics Center, Hill AFB, Utah (Chief of Separations, 2002–2003; Chief of Legal Assistance, 2001–2002). Member of the bar of the Supreme Court of Tennessee, the Air Force Court of Criminal Appeals, and the Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course, TJGLCS, Charlottesville, Va.

¹ Marshall Field, Marshall Field Quotes, <http://www.brainyquote.com/quotes/quotes/m/marshallf109041.html> (last visited on Mar. 10, 2008).

² Franklin D. Roosevelt, Franklin D. Roosevelt Quotes, <http://www.brainyquote.com/quotes/quotes/f/franklind404172.html> (last visited Mar. 10, 2008).

*stability of those nations, and therefore, to our own
security.*

— *President George W. Bush*³

I. Introduction

The current rebuilding effort in Afghanistan and Iraq is similar in many ways to the massive rebuilding effort conducted in post World War II Europe under the Marshall Plan.⁴ Like the Marshall Plan, an important aspect of the rebuilding effort in Afghanistan and Iraq is the goal to stabilize and stimulate their economies, as well as to build their capacity for future sustainability, by utilizing local goods, services, labor, and companies.⁵ In addition, like in Europe at the end of the World War II, the United States is striving to build goodwill in the geographically and resource important countries of Afghanistan and Iraq for the benefit and long-term security of the United States.⁶ The United States' desire to foster goodwill and rebuild Afghanistan's economy led to a dynamic and innovative new contracting program called "Afghan First."⁷ Under the

³ Everything2, President George W. Bush's Address to the Nation: Sept. 7, 2003, Sept. 8, 2003 [hereinafter Bush Address], http://www.everything2.com/index.pl?node_id=1490413.

⁴ See K.L. Vankan, *President Sign \$87.5 Billion Package for Iraq, Afghanistan*, AM. FORCES PRESS SERV., Nov. 6, 2003, <http://www.defenselink.mil/news/newsarticle.aspx?id=27830> (reporting that President Bush "called America's Investment in Iraq and Afghanistan the 'greatest commitment' since the Marshall Plan . . . [and] said the United States is 'engaged in a massive and difficult undertaking' and likened the situation to that of post World War II.").

⁵ See Press Release, Combined Forces Command–Afghanistan, Coalition Boosting Opportunities with 'Afghan First' (Apr. 11, 2006) [hereinafter Press Release, CFC–A], <http://www.cfc-a.centcom.mil> ("['Afghan First'] provide[s] opportunities for economic expansion, increased entrepreneurship and skills training for the people of Afghanistan."); ASSISTANT SEC'Y OF THE ARMY FOR ACQUISITION, LOGISTICS, AND TECH., A REPORT ON IRAQ RECONSTRUCTION, JAN. 2004–SEPT. 2006 (2006) [hereinafter IRAQ RECONSTRUCTION REPORT] ("PCO/GRD [Project Contracting Office/Gulf Region Division] has sought to maximize the use of Iraqi firms whenever possible to help restore Iraq's political and economic stability.").

⁶ Vankan, *supra* note 4 (reporting that President Bush "called America's Investment in Iraq and Afghanistan the 'greatest commitment' since the Marshall Plan. 'By this action we show the generous spirit of our country, and we serve the interest of our country, because our security is as (sic) stake.'").

⁷ See CFC–A, *supra* note 5 ("There's a new game in town for an ongoing Combined Forces Command–Afghanistan program designed to increase opportunities for Afghan economic development and expansion. The program is called 'Afghan First' . . . [and it is designed] to provide opportunities for economic expansion, increased entrepreneurship and skills training for the people of Afghanistan.").

Afghan First program, local nationals and companies generally receive favorable consideration in contract solicitation evaluations (evaluative preferences) when the United States procures goods and services in Afghanistan.⁸ The Afghan First program enjoyed immediate success and soon led to a similar program in Iraq called the “Iraqi First” program.⁹

The Iraqi First program is identical in purpose, scope, and practice to the Afghan First program.¹⁰ Each evaluates how well an offeror proposes to use local national labor and businesses.¹¹ Both programs achieved the same immediate success.¹² The programs provide a valuable and productive method of achieving local contracting needs while simultaneously helping the United States to achieve its short and long term strategic goals in Afghanistan and Iraq.¹³

Apart from the benefits of the programs, the intersection of policy and law that arises because of the Afghan First and Iraqi First programs

⁸ Joint Contracting Command–Iraq/Afghanistan, Acquisition Instruction (AI), pt. 26 (Oct. 26, 2007) [hereinafter JCC-I/A, 2007 AI].

⁹ Fact Sheet, Joint Contracting Command, Iraq/Afghanistan (JCC-I/A), Iraqi First Program (n.d.) (on file with author).

¹⁰ JCC-I/A, 2007 AI, *supra* note 8, pt. 26.3.

¹¹ *Id.*

¹² See generally John D. Bausiewicz, *NATO Takes Lead for Operations Throughout Afghanistan*, A.F. PRINT NEWS, Oct. 5, 2006 [hereinafter *NATO*], <http://www.af.mil/news/story.asp?id=123028498> (beginning fiscal year 2007, the “Afghan First” Program provided “hundreds of millions of dollars . . . to Afghan contractors and subcontractors” and work to approximately 20,000 Afghans.); Colonel Michael T. Luft, USAF, Contracting in Afghanistan, (n.d.) [hereinafter Luft Presentation] (PowerPoint Presentation, available at http://bishkek.usembassy.gov/uploads/images/2Qr5cr35YZRaYX1ihVE4B2/Contracting_inAfghanistan_DoD.pdf) (last visited Mar. 10, 2008 (during just a portion of fiscal year 2007, Afghan First procurements totaled 81% of all contract actions and 76% of \$577M of total contracting dollars.); Press Release, Multi-National Force–Iraq, MNF-I Iraqi First Program Surpasses \$1 Billion for Year (July 17, 2007), available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=12881&Itemid=128 (stating that since the implementation of the “Iraqi First” program, Iraqi businesses have captured \$2.9 billion in contract awards. Moreover, as of 17 July 2007, Iraqi First has assured that “42% of all contract dollars” which equates to over \$1 billion, were provided to Iraqi businesses.).

¹³ See CFC–A, *supra* note 5 (“It is the command’s intent to leverage . . . contracting activities and resources . . . [in order to] maximize our positive, long-term impact on local economies and the Afghan work force.”); Press Release, Combined Press Information Center, Signs of Progress Seen in Iraqi Security, Economy (May 3, 2007), http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=11741&Itemid=1 (explaining that Iraqi First seeks to “strengthen the Iraqi economy, enhance[] the security environment, give[] local workers a vested stake in the quality of finished products in their communities and increase[] local resources for future use”).

is worthy of critical examination. The United States must balance the policy to use programs like Afghan First and Iraqi First to rebuild Afghanistan and Iraq with government procurement law that mandates the use of full and open competition for government contracts.¹⁴ Procurement policy and government procurement law are at loggerheads with each other because it is unlawful to provide evaluative preferences to local workers and businesses in Department of Defense (DOD) contracts without a lawful exception.¹⁵ Consequently, the use of localized socio-economic programs, like Afghan First and Iraqi First, in contingency contracting environments, without a lawful exception, infringe upon the law that all government agencies, including DOD, shall use full and open competition when it contracts for goods and services.¹⁶ Nevertheless, the Afghan First and Iraqi First programs use of local businesses and workers is an important and necessary strategic tool in the current rebuilding efforts in Afghanistan and Iraq.¹⁷ The use of the programs also contributes to the overall stability of Afghanistan and Iraq and the short and long-term strategic needs of the United States.¹⁸ Congress recognized and acknowledged the benefits of the programs and legitimized them in the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008);¹⁹ however, this was approximately two years after the programs first use. The NDAA 2008 creates the lawful exception required for the continued use of the Afghan First and Iraqi First programs.²⁰ The NDAA 2008 is a good short-term measure, but

¹⁴ See Competition in Contracting Act of 1984, 10 U.S.C. §§ 2301–2306 (2000).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ Bush Address, *supra* note 3.

We have conducted a thorough assessment of our military and reconstruction needs in Iraq, and also in Afghanistan . . . [to] support our commitment to helping the Iraqi and Afghan people rebuild their own nations, after decades of oppression and mismanagement. We will provide funds to help them improve security. And we will help them to restore basic services, such as electricity and water, and to build new schools, roads, and medical clinics. This effort is essential to the stability of those nations, and therefore, to our own security.

Id.

¹⁸ *Id.*

¹⁹ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3 [hereinafter NDAA 2008] (providing “Enhanced Authority to Acquire Products and Services Produced in Iraq and Afghanistan,” which allows the Secretary of Defense to conduct procurements in Afghanistan and Iraq using other than full and open competition procedures under certain circumstances).

²⁰ *Id.*

Congress can do more. Congress should go further and create permanent legislation to allow Combatant commanders and procurement officials to utilize localized socio-economic programs in future wars, conflicts, and international emergencies. This article critically examines the Federal Acquisition Regulation's competition rules and the Competition in Contracting Act (CICA), including the act's legislative history.²¹ Next, the article will discuss the current rebuilding efforts in Afghanistan and Iraq and compare them to the United States' rebuilding efforts in post World War II Europe. The article will then explore the history, goals, application, and impacts of the Afghan First and Iraqi First programs and explain why the programs violated the full and open competition requirement. The article will then discuss why, despite their shortcomings, the programs are vitally important to the United States' efforts in the regions of Afghanistan and Iraq. Finally, the article will explain why congressionally authorized "enhanced contingency contracting authority"²² is vitally important for both today's contingency efforts and those that may arise in the future.

II. Competition in Federal Procurements

A. Contracting Commandments: The Federal Acquisition Regulation

1. *The Golden Rule in Government Contracting: Thou Shalt Conduct Full and Open Competitions*

The Federal Acquisition Regulation (FAR) both encourages and allows maximum flexibility in the procurement of goods and services.²³ In the FAR Part 1.102-4(e), procurement officials are given wide latitude for innovation for procuring goods and services.²⁴ However, within the

²¹ H.R. REP. NO. 98-369, at 1421 (1984) (Conf. Rep.), as reprinted in 1984 U.S.C.A.N. 2109.

²² NDAA 2008, *supra* note 19, § 886.

²³ See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.102-4 (July 2008) [hereinafter FAR].

²⁴ *Id.* pt. 1.102-4(e). "[If] a policy or procedure, or a particular strategy or practice, is in the best interest of the government and is not specifically addressed in the FAR, nor prohibited by law . . . [then procurement officials] should not assume it is prohibited." *Id.* "Rather, absence of direction should be interpreted as permitting . . . [procurement officials] to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority." *Id.*; accord *id.* pt.1.102-4(a) ("[T]he contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies . . .").

realm of contract competition, the FAR makes clear that competition is a priority.²⁵ In fact, all of FAR Part 6 is dedicated to the full and open competition and the exclusions and exceptions to the full and open competition requirements.²⁶ The import of FAR Part 6 is clear: DOD awards contracts based on full and open competition²⁷ and any competition that is not full and open is unlawful unless Congress explicitly allows a specific exception.²⁸

The FAR provides limited exceptions to the full and open competition requirement, but admonishes that “[c]ontracting without providing for full and open competition or full and open competition after exclusion of sources is a violation of statute, unless permitted by one of the [enumerated] exceptions.”²⁹ The exceptions to full and open competition include full and open competition after exclusion of sources,³⁰ and, in limited cases, other than full and open competition.³¹ The use of an exception requires the contracting officer to cite to the specific exception and prepare a written document to justify the exception.³² “Full and open competition after exclusion of sources” is the first legal exception to full and open competition the FAR addresses.³³ Full and open competition after exclusion of sources generally consists of exceptions designed to carry out Congress’s domestic socio-economic policies.³⁴

²⁵ See generally *id.* pt. 6.000 (prescribing “policies and procedures to promote full and open competition in the acquisition process and to provide for full and open competition”).

²⁶ *Id.*

²⁷ *Id.* pt. 6.101(a) (“10 U.S.C. 2304 and 41 U.S.C. 253 require, with certain limited exceptions[,] . . . that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.”).

²⁸ See *id.* pt. 6.001 (stating that the competition requirements apply to all government acquisitions unless a specific exemption or exception exists.)

²⁹ *Id.* pt. 6.301.

³⁰ *Id.* pt. 6.2.

³¹ *Id.* pt. 6.3.

³² *Id.* pt. 6.301(b). See generally *id.* pt. 6.303-1 (stating that the contracting officer must “reference to a specific authority” for the exception used. Additionally, he must “[j]ustif[y] . . . the use of . . . [the] action in writing; certif[y] the accuracy and completeness of the justification; and obtain[] [appropriate] approval . . .”).

³³ *Id.* pt. 6.2.

³⁴ See *id.* (showing that five of the exceptions listed in FAR pt. 6.2 relate directly to small businesses and disabled veterans, and one exception benefits local businesses in areas affected by an emergency).

2. *An Exception to Golden Rule: Domestic Socio-Economic Policies that Allow Full and Open Competition after Exclusion of Sources*

Socio-economic programs are not novel in government contracting. Congress recognized that certain businesses and groups deserve different treatment in contract competitions and created specific exceptions to full and open competition requirements for them.³⁵ Specifically, Congress recognized the need to favor small business concerns,³⁶ Section 8(a) businesses³⁷ and historically underutilized business zone (HUBZone)³⁸ small business concerns.³⁹ The FAR also allows an exception to accommodate the socio-economic concerns of certain members of society.⁴⁰ Apart from individual businesses and certain members of society, Congress also created an exception to full and open competition based solely on the location of businesses in relation to major disasters or emergencies under the Stafford Act.⁴¹ These examples emphasize that Congress decides who qualifies for a preference in government

³⁵ *See id.* (allowing procurement officials to exclude sources from contract competitions to accommodate specific statutorily created socio-economic policies of Congress.)

³⁶ *Id.* pt. 6.203 (“To fulfill . . . statutory requirements relating to small business[es], . . . Contract officers may set aside solicitations to allow only such business[es] . . . to compete.”).

³⁷ *Id.* pt. 6.204 (“To fulfill statutory requirements relation to section 8(a) of the Small Business Act, . . . contracting officers may limit competition to eligible 8(a) contractors . . .”).

³⁸ *Id.* pt. 6.205 (“HUBZone means a historically underutilized business zone that is in an area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation.”).

³⁹ *Id.* (“To fulfill the statutory requirements relating to the HUBZone Act of 1997 . . . contracting officers . . . may set aside solicitations to allow only qualified HUBZone small business[es] . . . to compete.”).

⁴⁰ *See id.* pt. 6.206 (“[C]ontracting officers may set-aside solicitations to allow only service-disabled veteran-owned small business concerns to compete.”).

⁴¹ *See id.* pt. 6.207 (“[C]ontracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete.”); *see id.* pt. 26.202.

When awarding emergency response contracts during the term of a major disaster or emergency declaration by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act . . . preference shall be given, to the extent feasible and practicable, to local firms. Preference may be given through a local area set-aside or an evaluation preference. [Moreover,] [t]he contracting officer may set aside solicitations to allow only local firms within a specific geographic area to compete

Id.

contracting, not procurement officials. The bottom line for government contracting is simple: use full and open competition unless Congress says otherwise. Put another way, any contracting practice that limits competition to local contractors requires Congress to authorize a statutory exception to the full and open competition.⁴² The strict competition rules of today are a direct result of DOD's wasteful past practice of using non-competitive procurement methods to procure goods.⁴³

B. It Is Good to Compete: The CICA

1. *Know Thy Past to Know Thy Future: History of the CICA*

The FAR's competition requirements promulgate federal law found in the CICA.⁴⁴ Congress designed the CICA to address the widespread, expensive practices of government procurement officials, especially DOD procurement officials, of limiting competition or awarding government contracts with no competition at all.⁴⁵ The CICA's legislative history records Congress's concerns over limited or no competition in government contracting.⁴⁶ Specifically, Senator Quayle commented on two newspaper articles (one appearing in the *Washington Post* and the other in the *New York Times*) that discussed the use of sole-source contracts in the military's procurement of spare engine parts for aircraft.⁴⁷ In the *Washington Post* article, the author discussed a DOD inspector general report that found "in 1982 the Air Force paid \$17.59

⁴² See HAP Constr. Inc., Comp. Gen. B-280044.2, Sept. 21, 1998, 98 CPD ¶ 76 (discussing a procurement carried out under the Stafford Act).

[T]he agency . . . provide[d] for an evaluation preference to be given to local firms [,] . . . [in which] offerors were to be given evaluation credit under two evaluation factors, for proposing to subcontract with local firms and for being local themselves. Since it does not appear that utilization of local contractors is otherwise related to any need of the agency, these preferences reflect, in effect, a form of limitation on full and open competition

Id.

⁴³ See 98 CONG. REC. 18,606-07 (1983).

⁴⁴ Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000).

⁴⁵ See, 98 CONG. REC. 18,606-07 (1983).

⁴⁶ *Id.*

⁴⁷ *Id.* 18,606.

for a bolt that costs \$0.67 in 1980.”⁴⁸ The article noted that the “Pentagon virtually guarantees high prices by purchasing most spare parts with ‘sole source,’ non-competitive contracts.”⁴⁹ Showing his disdain for the lack of competition in the DOD’s procurement of spare parts, Senator Quayle exclaimed:

I can assure my colleagues in the Senate as well as the leaders in the Pentagon that there had better be a very drastic turnaround in the way spare parts are bought. Competition is so obviously needed in this area that if a drastic change is not seen by the time of next year’s authorization bill, I intend to propose some drastic changes in the law which will force the Pentagon to move away from sole source contracting.⁵⁰

The use of limited competition in contracting by DOD, and other federal agencies, and the resultant inefficiencies and waste produced, ultimately spurred Congress into action and led to the passage of the CICA.⁵¹

The CICA “embodies a strong commitment [by Congress] to achieving the benefits of competition in government procurement.”⁵² The CICA’s history helps illuminate Congress’s meaning and intent behind the definition of competition and it definitively lays out the level of competition Congress expects in government contracting.⁵³ The CICA’s legislative history also shows Congress’s intent to limit noncompetitively awarded contracts to a minimum.⁵⁴ Congress took special care to define “‘competitive procedures’ to mean procedures under which an executive agency enters into a contract pursuant to full and open competition, thereby permitting all responsible sources to *compete*.”⁵⁵ To ensure all interested and responsible⁵⁶ sources would

⁴⁸ *Id.* (quoting Fred Hiatt, *Auditors Report Pentagon Spending Too Much on Parts*, WASH. POST, July 12, 1983).

⁴⁹ *Id.*

⁵⁰ 98 CONG. REC. 18,606 (statement of Sen. Quayle).

⁵¹ Competition in Contracting Act of 1984, 10 U.S.C. §§ 2301–2306 (2000).

⁵² *ATA Def. Indus. Inc. v. United States*, 38 Fed. Cl. 489, 499 (1997).

⁵³ See H.R. REP. NO. 98-369, at 1421, 1431 (1984) (Conf. Rep.), as reprinted in 1984 U.S.C.C.A.N. 2109, 2119.

⁵⁴ See *id.* at 1425 (“The Senate Amendment shifts the emphasis from having to justify the use of negotiation, . . . to concentrate on those contract[s] which are negotiated noncompetitively, thereby restricting sole-source to when it is truly necessary.”).

⁵⁵ *Id.* at 1422 (emphasis added).

have the opportunity to compete for federal procurement dollars, the committee rejected a proposed Senate amendment to “establish ‘effective’ competition as the standard for awarding federal contracts for property or services.”⁵⁷ The Senate amendment wanted to define “effective competition . . . [as] a market-place condition which results when two or more contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the Government’s business.”⁵⁸ Instead, the conference committee opted for a more stringent competition standard and elected to use “‘full and open’ competition as the required standard in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement.”⁵⁹ “The conferees strongly believed that the procurement process should be open to all capable contractors who want to do business with the government.”⁶⁰ As indicated in the *Congressional Record*, full and open competition is the rule in government contracting.⁶¹ To maintain that standard, Congress intentionally limited exceptions to the rule.⁶²

The legislative history of CICA clearly depicts Congress’s negative opinion of any exceptions to CICA’s high competition standard. As the Court of Claims noted, “Congress’ strong commitment to competition is apparent from the narrow breadth of the exceptions to the general mandate to secure full and open competition.”⁶³ Specifically, the “Senate amendment [only provided for] . . . six exceptions to competitive procedures which parallel the conditions which the Comptroller General has historically recognized as legitimate conditions for awarding contracts on a sole-source basis, . . . thereby restricting sole-source contracting to when it is truly necessary.”⁶⁴ Unsatisfied with the Senate’s amendment, the conferees insisted on the possibility of

⁵⁶ See FAR, *supra* note 23, pt. 9.104-1 (explaining that responsible means “a prospective contractor” has the financial resources and the ability to complete the contract. Responsible also means the contractor has performed satisfactorily in the past and is ethical, and is “otherwise qualified and eligible . . . under applicable laws and regulations”).

⁵⁷ H.R. REP. NO. 98-369, at 1422.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *id.* at 1425 (discussing that only six “exceptions to competitive procedures” were proposed “thereby restricting sole-source contracting to when it is truly necessary”).

⁶³ ATA Def. Indus. Inc. v. United States, 38 Fed. Cl. 489, 500 (1997).

⁶⁴ H.R. REP. NO. 98-369, at 1425.

competition, even within the recognized exceptions, and “require[d] agencies to obtain competition under the second and sixth exception to the maximum extent practicable.”⁶⁵ Based on the legislative history of CICA, it is clear that the intent of the act was to “set forth [a] broad defense procurement policy which, first and foremost, directs the Department of Defense, [and] the military services . . . to use full and open competitive procedures in acquiring property and services.”⁶⁶ President Ronald Reagan made Congress’s efforts to strengthen competition standards in government contracting law by signing the CICA on 18 July 1984.⁶⁷

2. Off the Straight and Narrow Path of Full and Open Competition: The Permanent Exceptions to Full and Open Competition Under CICA

As Congress intended, CICA mandates, except in limited circumstances, that agencies use “full and open competition through the use of competitive procedures”⁶⁸ when they procure goods and services. As noted, Congress recognized that narrow and limited exceptions to full and open competition were necessary.⁶⁹ These limited exceptions addressed unusual or emergency situations: only one contractor could meet the government’s needs, unusual circumstances existed, a national emergency occurred, certain expertise is required, an international agreement prohibited competition, national security required it, or the public interest was at stake.⁷⁰ Congress also allowed for full and open competition after the exclusion of certain sources to carry out its domestic socio-economic policies.⁷¹

The statutory exceptions to full and open competition drive home the point that Congress must explicitly provide authority to exclude sources from competition and use anything less than full and open competition.⁷²

⁶⁵ *Id.* (discussing the second and sixth exceptions, which are unusual and compelling circumstances found in FAR pt. 6.302-1 and national security found in FAR pt. 6.302-6.).

⁶⁶ *Id.* at 1431.

⁶⁷ President’s Statement on Signing the Deficit Reduction Act of 1984, 20 WKLY. COMP. PRES. DOC. 29 (July 18, 1984).

⁶⁸ Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (2000).

⁶⁹ *See id.* § 2304(b), (c).

⁷⁰ *Id.* § 2304(c).

⁷¹ *Id.* § 2304(b).

⁷² *Id.* § 2304; *see also id.* § 2304(e) (emphasizing that full and open competition is the default rule and to limit the use of “other than full and open,” the law requires procurement officials to “request offers from as many potential sources as is practicable

Thus, the full and open competition rule, (like every other procurement law, regulation, or rule), applies anywhere and everywhere DOD procures goods or service, regardless of the circumstances or contingency the procurement(s) is made under unless Congress permits otherwise. Prior to the passage of the NDAA 2008, Congress provided only two contingency exceptions.

3. *Sanctioned Transgressions: Contingency (Temporary) Exceptions to Full and Open Competition*

a. *Commander's Emergency Response Program*

To address the challenges of battlefield and contingency contracting, Congress provided only two exceptions to the full and open competition mandate: the Commander's Emergency Response Program (CERP)⁷³ and the contingency exception to the Commercial Item Test Program.⁷⁴ These exceptions are significant because Congress passed legislation that explicitly allowed procurement personnel to procure items without adhering to the stringent full and open competition requirement.

The CERP allows procurement officials to use operation and maintenance funds, "notwithstanding any other provision of law . . . for the purpose of enabling military commanders . . . to respond to urgent humanitarian relief and reconstruction requirements . . . by carrying out programs that will immediately assist the Iraqi people, and . . . the people of Afghanistan."⁷⁵ To use the exception, Congress required the Secretary of Defense to "provide quarterly reports . . . to the congressional defense committees regarding the source of funds and the allocation and use of funds."⁷⁶ Subsequently, Congress amended the CERP authorization. The new amendment only required the Secretary of Defense to provide a waiver "of any provision of law . . . that would (but for the waiver)

under the circumstances" and except for specific reasons listed in the statute, the "contracting officer for the contract [must] justif[y] the use of such procedures in writing and certif[y] the accuracy and completeness of the justification").

⁷³ NDAA 2008, *supra* note 19, § 1205.

⁷⁴ FAR, *supra* note 23, pt. 13.5.

⁷⁵ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1215 (2003). The "notwithstanding any other provision of law" language is important because it represents Congress's explicit and unambiguous exception that is required to conduct less than full and open competition.

⁷⁶ *Id.*

prohibit, restrict, or otherwise constrain the exercise of that authority.”⁷⁷ Congress renewed the CERP authorization through 2009 in the NDAA 2008.⁷⁸

b. Commercial Items Test Program for Contingency Operations

The second contingency contracting exception to the full and open competition mandate allowed by Congress is the “Test Program for Certain Commercial Items” (Test Program) found in the FAR, subpart 13.5.⁷⁹ Under the Test Program exception, procurement personnel may use simplified acquisition procedures⁸⁰ for acquisitions that do not exceed “\$11 million . . . [when t]he acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation.”⁸¹

The CERP and the Test Program are the only contingency exceptions Congress allowed to CICA’s full and open competition requirement; that

⁷⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2078 (2004). Memorandum from Gordon England, Deputy, Office of the Sec’y of Defense, to Secretaries of the Military Dep’ts et al., subject: Waiver of Limiting Legislation for Commanders’ Emergency Response Program (CERP) for Fiscal Years 2006 and 2007 (Mar. 27, 2006) (on file with author) (stating that the Secretary of Defense provided the waiver for the 2006 and 2007 fiscal years on 6 January 2006).

⁷⁸ NDAA 2008, *supra* note 19, § 1205.

⁷⁹ FAR, *supra* note 23, pt. 13.5; *cf.* Supplemental Appropriation Act for Fiscal Year 2008, Pub. L. No. 110-252 § 9104 (providing \$1.2 billion in CERP funds, available until 30 September 2008, “for the purpose of enabling military commanders in Iraq, Afghanistan, and the Philippines to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi, Afghan, and Filipino people”).

⁸⁰ *Id.* pt. 13.104 (explaining that simplified acquisition procedures only require the contracting officer to “promote competition to the maximum extent practicable . . . [and to] consider solicitation of at least three sources to promote competition to the maximum extent practicable.”).

⁸¹ *Id.* pt. 13.5. A contingency operation is

a military operation that (1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (2) Results in the call or order to, or retention on, active duty of members of the uniformed services . . . during a war or during a national emergency declared by the President or Congress.

Id. pt. at 2.1.

is until the NDAA 2008. These specific exceptions highlight the important, overlooked point that Congress is aware of the challenges of contingency contracting and the potential benefits, strategic or otherwise, that contingency contracting exceptions to full and open competition can have on the military's mission in contingency operations. Congress chose to address the challenges and pursue the potential benefits through these limited exceptions. Congress's circumspect action makes clear that any other limitations on competition are unacceptable and are a clear infringement on the unwavering competition requirements of the CICA.

C. Old Habits Die Hard: Lack of Competition in Government Contracting is Still a Concern of Congress

A lack of competition in government contracting is not, unfortunately, a problem relegated to the 1980's when limited competition and sole source contracts were the norm.⁸² Despite the clear, unambiguous language of the CICA and the competition requirements of the FAR, a lack of competition in government contracts continues to raise the ire of Congress.⁸³ Last year produced much commentary and disgust from two congressmen and the Office of Federal Procurement Policy.⁸⁴ In May 2007, Representative Henry Waxman, from the 30th District of California, delivered a speech on federal contracting and noted that “[s]pending on no-bid and other forms of noncompetitive contracts has more than doubled over the last six years. Competition protects the taxpayers by driving prices down and quality up.”⁸⁵ Likewise, in November 2007, Senator Joseph Lieberman, in a press release concerning “Legislation to Combat Waste, Fraud, and Abuse in Federal Contracting,” observed that “[t]he dollar amount of federal

⁸² See Press Release, Senator Joseph Lieberman, Lieberman, Collins Probe Federal Contracting Weaknesses: Lack of Accountability Leads to “Infuriating” Levels of Waste, July 17, 2007 [hereinafter Lieberman, Lack of Accountability], http://hsgac.senate.gov/index.cfm?FuseAction=PressReleases.Detail&Affiliation=C&PressRelease_id=1502&Month=7&Year=2007 (providing a general discussion of Congress's present day concerns about a lack of accountability and competition in government contracting).

⁸³ See Representative Henry Waxman, Committee on Oversight and Government Reform, *Chairman Waxman Delivers a Speech on Federal Contracting*, May 14, 2007, <http://oversight.house.gov/story.asp?ID=1318>; Press Release, Senator Joseph Lieberman, U.S. Senate Approves Sens. Collins', Lieberman's Legislation to Combat Waste, Fraud, and Abuse in Federal Contracting, Nov. 8, 2007 [hereinafter Lieberman, Waste, Fraud, and Abuse], <http://lieberman.senate.gov/newsroom/release.cfm?id=287079>.

⁸⁴ Waxman, *supra* note 83; Lieberman, Waste, Fraud, and Abuse, *supra* note 83.

⁸⁵ Waxman, *supra* note 83.

contracts has nearly doubled since the year 2000, but the number of contracts that were awarded following a full and open competition has fallen below 50 percent.”⁸⁶ Senator Lieberman’s press release also discussed the “Accountability in Government Contracting Act of 2007,” designed in part to “strengthen competition in federal contracting.”⁸⁷ In addition to Congress, an Office of Federal Procurement Policy memorandum reiterated, “[c]ompetition is the cornerstone of our [federal government] acquisition system. The benefits of competition are well established. Competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results.”⁸⁸ The strict competition requirements espoused by the CICA and the FAR, as well as the clear concerns of Congress, apply to the Afghan First and Iraqi First programs. Thus, in light of present Congressional concerns about a lack of competition in violation of the CICA, contingency socio-economic programs such as Afghan First and Iraqi First deserve heightened scrutiny.

III. Socio-Economic Programs in Contingency Contracting

A. Help Yourself by Helping Others: The United States Interests in Rebuilding Afghanistan and Iraq

1. Post-War Reconstruction Needs

Afghanistan and Iraq are vitally important to the United States for its present and future security and its strategic requirements in the Middle East.⁸⁹ Thus, it seems clear that the United States must create western

⁸⁶ Lieberman, Waste, Fraud, and Abuse, *supra* note 83.

⁸⁷ *Id.*

⁸⁸ Memorandum from Adm’r of the Office of Fed. Procurement Policy, to Chief Acquisition Officers and Senior Procurement Executives, subject: Enhancing Competition in Federal Acquisition (May 31, 2007), available at http://www.whitehouse.gov/omb/procurement/memo/competition_memo_053107.pdf.

⁸⁹ See generally U.S. GOV’T ACCOUNTABILITY OFFICE, AFGHANISTAN RECONSTRUCTION: DESPITE SOME PROGRESS, DETERIORATING SECURITY AND OTHER OBSTACLES CONTINUE TO THREATEN ACHIEVEMENT OF U.S. GOALS, GAO-05-742 (2005) [hereinafter GAO REPORT 2005], available at <http://www.gao.gov/new.items/d05742.pdf> (“The U.S. goal is to firmly establish Afghanistan as a democratic nation inhospitable to international terrorism and drug trafficking and cultivation . . . and able to provide its own internal and external security.”); IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 3 (“The foundation of democracy in Iraq is dependent on a functioning infrastructure that provides essential services to the people of Iraq.”); Bush Address, *supra* note 3.

friendly, democratic governments in both Afghanistan and Iraq. To do so, it is also clear that the United States must rebuild Afghanistan and Iraq to a level that allows them to achieve long-term stability and economic independence.⁹⁰

a. Rebuilding Afghanistan

“The security and well-being of the trans-Atlantic community depend on successfully stabilizing Afghanistan so that it will not be a source of narcotics or a haven for terrorist.”⁹¹ Stabilization can only come from a successful rebuilding effort, which in turn will provide a normalization process in which democracy can flourish. The job of rebuilding Afghanistan, however, is “easier said than done.” The post-war reconstruction of Afghanistan began “[i]n 2001, when U.S. and coalition forces removed the Taliban regime from power in Afghanistan.”⁹² After the liberation of Afghanistan, the United States found that the approximate “quarter century of war and years of drought had destroyed Afghanistan’s government, judicial, economic, and social institutions and its transportation, health, and other infrastructure.”⁹³ Afghanistan was literally “a place where the basic structure of a nation-state had been obliterated.”⁹⁴ To meet the enormous rebuilding

In Iraq, we are helping the long suffering people of that country to build a decent and democratic society at the center of the Middle East. Together we are transforming a place of torture chambers and mass graves into a nation of laws and free institutions. This undertaking is difficult and costly—yet worthy of our country, and critical to our security.

Id.

⁹⁰ See GAO REPORT 2005, *supra* note 89 (“The U.S. goal is to firmly establish Afghanistan as a democratic nation inhospitable to international terrorism and drug trafficking and cultivation . . . and able to provide its own internal and external security.”); IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 3 (“The foundation of democracy in Iraq is dependent on a functioning infrastructure that provides essential services to the people of Iraq.”).

⁹¹ Bureau of Int’l Info. Programs, U.S. Dep’t of State, *Stable Afghanistan Vital to Central Asia, Europe, United States: Long-Term, Comprehensive Approach Needed* (2007), available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=September&x=20070926145609cpataruk0.3264429>.

⁹² GAO REPORT 2005, *supra* note 89.

⁹³ *Id.*

⁹⁴ Press Release, The White House, *Rebuilding Afghanistan* (n.d.) [hereinafter *Rebuilding Afghanistan*], <http://www.whitehouse.gov/infocus/nationalsecurity/rebuilding-afghanistan.html> (last visited Mar. 10, 2008).

challenges the “United States and its European allies have contributed \$26.8 billion to Afghanistan since 2001, enabling the country to make large strides in providing better lives for its people.”⁹⁵

b. Rebuilding Iraq

The reconstruction challenge in Iraq was similarly daunting. Like Afghanistan, the country of Iraq had experienced years of neglect, war, and waste that created Herculean reconstruction challenges for the United States and its allies.⁹⁶ Based on the total state of disrepair within Iraq, the Iraqi Reconstruction effort proved to be “the largest and most complex reconstruction program undertaken in a single country.”⁹⁷ In addition, like Afghanistan, a stable and thriving Iraq is important to the security of the United States and its allies. The enormous expense and

⁹⁵ Phillip Kurata, *Stable Afghanistan Vital to Central Asia, Europe, United States: Long-Term, Comprehensive Approach Needed*, AMERICA.GOV (Sept. 27, 2007), <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=September&x=20070926145609cpataruk0.3264429>; see also Rebuilding Afghanistan, *supra* note 94 (reporting that the United States alone has “erected 74 bridges and tunnels, . . . has repaired or constructed 205 schools, . . . [has] rehabilitated 141 health clinics, . . . [and] has established more than 175 projects that support Afghan women.”).

⁹⁶ See IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 7.

After the fall of Baghdad in April 2003, U.S. engineers . . . close[ly] inspect[ed] Iraq’s infrastructure and found the capacity for electrical power generation, oil production, water purification and sewage handling greatly diminished. Power plants were antiquated and poorly maintained, while looters had stripped substations of copper cables and other valuable assets. Oil production was inefficient at best and sewage backed up into many streets. Iraqi banks were almost non-existent, government and police protection had disappeared, commerce was moribund and people were growing desperate for food and clean water. Iraq was ‘a completely failed state’ . . .

Id.

⁹⁷ *Id.* at 3; see also U.S. ARMY CORPS OF ENG’RS, 1 GWOT RECONSTRUCTION REPORT 7, at 3 (2007), available at <http://www.grd.usace.army.mil/news/releases/GWOT.pdf> (describing the enormity of Iraq’s reconstruction needs, considering that since reconstruction began in Iraq, the United States has erected “26 400kv and 132kv Substations, 68 33/11kv Substations” that provide up to fourteen hours of electricity a day, “85 . . . Primary Healthcare Centers,” “16 . . . hospital rehabilitation projects,” “810 . . . schools providing classrooms for 324,000 students,” “4 Training Academy Projects, 96 Fire Station Projects, 265 Border Forts,” “38 . . . Village Road Projects,” “97 Railway Station Renovations, 14 . . . Aviation Projects”).

time invested in rebuilding Afghanistan and Iraq in the hopes of gaining long-term strategic benefits is warranted based on the results of the United States' previous reconstruction efforts in Europe after World War II.

2. *Present Day Marshall Plan*

The United States' reconstruction efforts in Afghanistan and Iraq look very similar to the United States' monumental reconstruction efforts in post-World War II under the Marshall Plan.⁹⁸ Post-World War II Europe suffered massive damage to its infrastructure, its economies, and its political systems.⁹⁹ To rebuild Europe, and Germany in particular, the United States embarked upon a massive reconstruction effort as envisioned by U.S. Secretary of State, George C. Marshall.¹⁰⁰ There are several similarities between the Marshall Plan and the current rebuilding efforts in Afghanistan and Iraq and *three* major differences. The differences are that in the present reconstruction efforts the United States is still in a state of war,¹⁰¹ the United States is trying to employ military

⁹⁸ See U.S. DEP'T OF STATE, THE MARSHALL PLAN, REBUILDING EUROPE 1 (2007) [hereinafter REBUILDING EUROPE], available at <http://usinfo.state.gov/products/pubs/marshallplan/>; see also IRAQ RECONSTRUCTION REPORT, *supra* note 5 (comparing the Marshall Plan within the larger context of the Iraqi reconstruction effort); Robert Nichols, *Iraq Reconstruction: Government Contracts Year In Review*, in YEAR I REVIEW CONFERENCE BRIEFS (2004), available at http://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLE_831.pdf.

The reconstruction of Iraq is the most ambitious program of nation-building since the Marshall Plan in 1947. The CPA, IIG, and U.S. Government agencies have awarded over 4000 reconstruction prime contracts in 2003-04. While the large-dollar contracts have been awarded primarily to established, proven U.S. contractors, Iraqi companies have won the majority of prime contracts. Additionally, the large U.S. prime contracts are expected to result in approximately 15,000 subcontracts, involving a wide range of contractors in the reconstruction process.

Id.

⁹⁹ See REBUILDING EUROPE, *supra* note 98, at 7 (describing that the war badly damaged the economic and political systems throughout Europe and brought about widespread food and basic resources shortages, inflation, poverty, and worker demoralization).

¹⁰⁰ *Id.* at 10.

¹⁰¹ See *id.* at 7 (“Although V-E Day brought the struggle against Nazi Germany to an end, the peace still had to be won, and this required, above all, the reconstruction of economic and political systems badly damaged by World War II.”). Unlike in Europe at the end of

aged people so they do not take part in insurgent activities,¹⁰² and the current procurement laws did not exist.¹⁰³

The first similarity between the Marshall Plan and the reconstruction efforts in Afghanistan and Iraq is the amount of money spent on the rebuilding efforts.¹⁰⁴ Under the Marshall Plan, the United States' total "assistance to Germany [alone] is almost \$1.4 billion in current year dollars."¹⁰⁵ As in post-World War II Europe, the funding efforts in Afghanistan are similarly massive in size and scope. "The U.S. government . . . provided more than \$3.7 billion since September 2001 to programs and activities throughout Afghanistan."¹⁰⁶ The thrust of the rebuilding efforts are "revitaliz[ing] agriculture, provid[ing] security, expand[ing] educational opportunities, improv[ing] basic health, build[ing] effective government, and encourag[ing] citizen participation in the democratic process."¹⁰⁷ The level of assistance to Iraq is, likewise, substantial¹⁰⁸ with "[n]early 40% of total funding, roughly \$11.5 billion, . . . aimed at restoring economically critical infrastructure,

World War II, the U.S. is still engaged in hostilities in Afghanistan and Iraq while the reconstruction process is taking place.

¹⁰² See *Joint Contracting Command—Iraq/Afghanistan: Providing Responsive, Full-Spectrum Contracting Support to U.S. Military Forces*, 6 COMMUNICATOR: NEWS FOR DCMA PROFESSIONALS 3, at 24, 26 (Summer 2006) [hereinafter DCMA], available at <http://www.dema.mil/communicator/summer06/contents.htm#>.

¹⁰³ See Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000) (depicting that CICA's (signed into law in 1984) requirements for full and open competition was not a concern for procurement officials carrying out the Marshall Plan); FAR, *supra* note 23, *foreword* ("The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984 . . .").

¹⁰⁴ NINA SERAFINO ET AL., CONG. RESEARCH SERV. REPORT, U.S. OCCUPATION ASSISTANCE: IRAQ, GERMANY AND JAPAN COMPARED, RL33331, at CRS-4 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL33331.pdf> ("The entire amount of Marshall Plan aid is usually considered economic reconstruction funding . . .").

¹⁰⁵ *Id.*

¹⁰⁶ See Rebuilding Afghanistan, *supra* note 94.

¹⁰⁷ *Id.*

¹⁰⁸ See SERAFINO ET AL., *supra* note 104, at CRS-6.

U.S. assistance to Iraq appropriated from FY2003 to FY2006 totaled some \$28.9 billion. All of it is grant assistance. While most funds were appropriated to a special Iraq Relief and Reconstruction Fund (IRRF, \$21 billion) and an Iraq Security Forces Fund (\$5.7 billion), additional sums from the budgets of DOD and other agencies have been used for reconstruction purposes.

Id.

including airports, roads, bridges, railroads, seaports, electric power, water and sanitation, telecommunications, and essential buildings. Another \$6.2 billion . . . has been allocated to assist democratization”¹⁰⁹ Beyond vast amounts of U.S. money, another critical ingredient in the reconstruction process is active participation by local citizens.

Another similarity between the current reconstruction efforts in Afghanistan and Iraq and the reconstruction efforts in post-World War II Europe is the level of participation provided by the countries undergoing reconstruction. The Marshall Plan focused on “a joint European-American venture, one in which American resources were complemented with local resources [and] one in which the participants worked cooperatively toward common goals of freedom and prosperity.”¹¹⁰ Particularly, the venture provided the local populations with opportunities to participate fully in the reconstruction of their respective country.¹¹¹ Likewise, the reconstruction efforts in Afghanistan and Iraq, vis-à-vis the Afghan First and Iraqi First programs, emphasize a cooperative approach that utilizes local resources, businesses, and public works like programs to the maximum extent possible.¹¹²

The use of localized labor, businesses, and resources is just as imperative today as it was during post World War II for three basic and obvious reasons. The Afghan First and Iraqi First programs inject local pride and ownership in the reconstruction process.¹¹³ Moreover, idle

¹⁰⁹ *Id.*

¹¹⁰ REBUILDING EUROPE, *supra* note 98, introduction.

¹¹¹ *See id.* at 16 (“In Italy, they [counterpart funds] were earmarked . . . for a public-works program to absorb part of the large pool of unemployed labor.”).

¹¹² *See* Press Release, Combined Forces Command–Afghanistan, Coalition boosting opportunities with ‘Afghan First’ (Apr. 11, 2006), available at <http://www.cfc-a.centcom.mil> (explaining that through the Afghan First program, “more than 11,000 Afghan laborers, interpreters, and construction workers” and “contracting office and procurement specialist . . . [are] looking for new ways to purchase required supplies and services from local vendors and help develop local workers as often as possible” to help rebuild their country.); IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 11 (stating that under the Iraqi First program, the Public Contracting Office/Gulf Region Division (PCO/GRD) “has sought to maximize the use of Iraqi firms whenever possible to restore Iraq’s political and economic stability”).

¹¹³ The author’s recent professional experiences at JCC-I/A, from May 2006 to Sept. 2006 is the basis for this assertion (recalling that local national participation and assistance in reconstruction efforts generally increased job site security and led to increased productivity on contracts and, conversely, decreased acts of violence, sabotage, and theft. Moreover, local participation contributes to the proud Middle Eastern culture that prizes self-sufficiency.).

hands are the devil's workshop; if the local populace is fully engaged in reconstruction efforts they will be less likely to engage in nefarious activities aimed at sabotaging the reconstruction efforts and democratization goals of the United States.¹¹⁴ Finally, by utilizing the local population, the United States has the ability to infuse desperately needed liquidity into the economies of Afghanistan¹¹⁵ and Iraq.¹¹⁶

An important collateral goal to the United States' commitment to rebuilding Europe in post-World War II was to ensure long-term peace and stability throughout Europe and the world and, to a smaller extent, to counter "popular discontent upon which the Communists were capitalizing."¹¹⁷ Secretary Marshall clearly understood what the long-term benefits and risks were if the United States failed to act: democracy, world economic health, political stability, and peace.¹¹⁸

¹¹⁴ See DCMA, *supra* note 102, at 26 (explaining that one of the recognized benefits of "[e]ffects based contracting" measures like Afghan First and Iraqi First is the ability to "put military-aged males to work so they won't join the insurgents").

¹¹⁵ See generally Afghanistan Coalition Press, *Afghan Bottling Plant Wins Contract to Supply Water to Coalition Troops*, E-ARIANA, Oct. 10, 2006, available at <http://www.e-ariana.com/ariana/ariana.nsf/be77f8366cbd693387256b790077e1df/913de13582f24bfd87257203003dcd7f?OpenDocument> ("[Afghan First] aims to stimulate the local economy [of Afghanistan] and develop skill sets for local workers that can be used in the private market place); NATO, *supra* note 12 (discussing that because of Afghan First, "[e]ach year . . . contractors pay more than \$45.5 million in salaries for Afghan laborers.").

¹¹⁶ See Memorandum from Commander JCC-I/A, to JCC-I/A PARC'S, subject: JCC-I Implementation of the Iraqi First Program (1 June 2006) [hereinafter JCC-I/A June 2006 Memo] (on file with author) ("Every dollar contracted to an Iraqi firm assists . . . [Iraq] in its economic recovery. A dollar infused into the Iraqi economy circulates up to seven times.").

¹¹⁷ REBUILDING EUROPE, *supra* note 98, at 7.

¹¹⁸ See *id.* at 3–4.

Aside from the demoralizing effect on the world at large and the possibilities of disturbances arising as a result of the desperation of the people concerned, the consequences to the economy of the United States should be apparent to all. It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation, and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this government may render in the future should provide a cure rather than a mere palliative. Any government that is willing to assist in the task of recovery will find full cooperation, I

Similarly, the United States is seeking long-term peace and stability in the Middle East and is striving to defeat terrorists who have a long record of capitalizing on public discontent and misery for their own political and religious agendas.¹¹⁹ Based on the lessons of history in post-World War II Europe, I propose that the success of the United States' endeavors in Afghanistan and Iraq depend not on the amount of money and resources that it injects into these countries. Instead, the level of goodwill and cooperative assistance the United States fuses together with its money and resources is what will ultimately forge unbreakable bonds of trust and friendship. The United States attains its national goals and ideals through programs like Afghan First and Iraqi First. It seems evident that through the use of these localized socio-economic programs, the United States is imparting its ideals, customs, and philosophies, as well as building long-term business and national relationships from the ground up. Like the benefits and security the United States reaped because of its reconstruction efforts in Europe after World War II, the long-term success of the reconstruction of Afghanistan and Iraq (and the goodwill and mutual respect gained through programs such as "Afghan First" and "Iraqi First") is incalculable to the long term security and benefit of the United States.

am sure, on the part of the United States government. Any government which maneuvers to block the recovery of other countries cannot expect help from us. Furthermore, governments, political parties, or groups which seek to perpetuate human misery in order to profit there from politically or otherwise will encounter the opposition of the United States.

Id.

¹¹⁹ See Kurata, *supra* note 95 ("The security and well-being of the trans-Atlantic community depend on successfully stabilizing Afghanistan so that it will not be a source of narcotics or a haven for terrorists U.S. and European officials say."); Bush Address, *supra* note 3.

In Iraq, we are helping the long suffering people of that country to build a decent and democratic society at the center of the Middle East. Together we are transforming a place of torture chambers and mass graves into a nation of laws and free institutions. This undertaking is difficult and costly—yet worthy of our country, and critical to our security.

Id.

B. The Last Shall be First: The Afghan First and Iraqi First Programs

1. *Genesis of Afghan First and Iraqi First*

To understand and fully appreciate the emphasis and importance placed upon the Afghan First and Iraqi First programs it is important to understand the history behind the programs. The Afghan First program, established on 25 March 2006,¹²⁰ “applies to civilian and military organizations across the command [Combined Forces Command-Afghanistan].”¹²¹ The Afghan First program represents “the command’s intent to leverage . . . [its] contracting activities and resources to provide opportunities for economic expansion, increased entrepreneurship and skills training for the people of Afghanistan . . . [in order to] maximize our [the Command’s] positive, long-term impact on local economies and the Afghan workforce.”¹²² Based on the immediate success and positive mission impact of the Afghan First program, the Iraqi First program quickly materialized.

In mid-April 2006, shortly after the Combined Forces Command—Afghanistan implemented Afghan First, the Commander, Multi-National Force—Iraq, (MNF-I) requested the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A)¹²³ to “provide set-asides on USG [United States Government] contracts for Iraqi owned firms.”¹²⁴ Acting upon MNF-I’s request, JCC-I/A “kicked-off the ‘Iraqi First

¹²⁰ Luft Presentation, *supra* note 12.

¹²¹ Press Release, CFC—A, *supra* note 5.

¹²² *Id.*

¹²³ See generally *On Iraq Reconstruction and Contracting Before the S. Comm. on Armed Forces*, 109th Cong. 3 (Feb. 7, 2006) (statement of The Honorable Claude M. Bolton, Jr.).

In October 2004, the U.S. Central Command designated the Army as the lead component for contracting for Operation Enduring Freedom in the Combined Joint Operations Area, Iraq and Afghanistan, and the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) was established. JCC-I/A provides contracting support . . . to both the Iraq reconstruction effort and to . . . combatant commanders in Iraq and Afghanistan. The JCC-I/A is headed by a two-star General Officer who has been designated . . . as HCA for Iraq and Afghanistan. This joint command has over 160 people in two theatres of war who are working in dangerous and difficult conditions.

Id.

¹²⁴ Iraqi First Program, *supra* note 9.

Program,’ modeled after ‘Afghanistan First’”¹²⁵ through an implementation memorandum on 1 June 2006.¹²⁶ Iraqi First had the same goals as the Afghan First program: provide U.S. contracts to local businesses and employ local workers.¹²⁷

The JCC-I/A’s implementation memorandum gave special emphasis to Iraqi First and “challenge[d] . . . [all members of the Command] to make every reasonable attempt to use Iraqi Businesses to the maximum extent possible in support of the Iraqi First Program.”¹²⁸ The memorandum went on to state that “[a]ll contracting efforts will be directed to support the Iraqi First Program as our major contribution to the Campaign Plan. This will have long term payoffs in developing Iraq’s economic capacity on their journey to prosperity.”¹²⁹ Finally, the memorandum reiterated that the desired “end-state . . . [was] to award at least 75% of our contracting dollars to Iraqi Host Nation business.”¹³⁰ On 12 July 2006, approximately a month after JCC-I/A actually put Iraqi First into practice, MNF-I provided official support for the Iraqi First program and voiced its “intent to leverage all of . . . [the] command’s activities and resources, including contracting, to provide increased opportunities for economic expansion, entrepreneurship, and skills training for the people of Iraq.”¹³¹ The JCC-I/A published a subsequent Iraqi First implementation memorandum in September 2006¹³² ostensibly to retract the 75% end state goal.¹³³ Multi-National Force–Iraq renewed its official support of the Iraqi First policy in March 2007 upon a change of command.¹³⁴ As even the most inexperienced procurement professional can see, the rationale for creating the Afghan First and Iraqi

¹²⁵ *Id.*

¹²⁶ JCC-I/A June 2006 Memo, *supra* note 116.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Memorandum from Commander, Multi-National Force–Iraq, to MNF-I, subject: Iraqi First Program (12 July 2006) (on file with author).

¹³² Memorandum from Commander, JCC-I/A, to JCC-I/A PARC’S, subject: JCC-I Implementation of the Iraqi First Program (24 Sept. 2006) [hereinafter JCC-I/A Sept. 2006 Memo] (on file with author).

¹³³ See Iraqi First Program, *supra* note 9 (“In September 2006, the Department of the Army decided that JCC-I/A needed to revamp the Iraqi First Program to further separate it from what could be viewed as a set-aside program. JCC-I/A removed the 75% goal from the program . . .”).

¹³⁴ Memorandum from Commander, Multi-National Force–Iraq, to MNF-I, subject: “Iraqi First” Program (28 Mar. 2007) (on file with author).

First programs is directly tied to helping the United States achieve its broad strategic goals, as well as directly helping Afghanistan and Iraq.

2. Goals of the Afghan First and Iraqi First Programs

The Afghan First and Iraq First programs (Programs) are an excellent example of using government procurements in a new, nontraditional way; they play a direct role in the United State's overall mission accomplishment in Afghanistan and Iraq.¹³⁵ These Programs help achieve the United State's overall goals by accomplishing the "Economic" element of the "DIME" paradigm.¹³⁶ They effectively accomplish the Economic element¹³⁷ because they are able to inject large amounts of capital into the local economies, (villages and towns), of

¹³⁵ See Phillip Kao, *Into Africa*, ARMED FORCES J., (Jan. 2008), available at <http://www.armedforcesjournal.com/2008/01/2902120> ("The post-9/11 ethos and largesse of defense budgets has allowed the U.S. military to task itself substantially with more nontraditional defense missions."); Luft Presentation, *supra* note 12 (noting that the Afghan First program is designed to carry out JCC-I/A's vision for contracting in Afghanistan which is to "maximize economic effects and support campaign plans to defeat terrorism within Afghanistan"); JCC-I/A Sept. 2006 Memo, *supra* note 132, at enclosure 1: Interim Command Guidance on Implementation of the Iraqi First Program (discussing that the goal of the Iraqi First program is to "significantly contribute to the Campaign Plan" of the Coalition Forces.).

¹³⁶ See U.S. Joint Forces Command, Joint Forces Command Glossary, <http://www.jfcom.mil/about/glossary.htm#D> (last visited Mar. 10, 2008) (explaining that DIME represents "[a]reas of national power that are leveraged in 'effects-based' operations against an adversary's vulnerabilities identified by Operational Net Assessment, and targeted against his will and capability to conduct war"); Austin Bay, *The Dime Ballet*, STRATEGY PAGE, May 24, 2005, http://www.strategypage.com/on_point/2005524.aspx ("The acronym . . . 'DIME' . . . [is] a quick verbal coin for the four elements of national power: 'Diplomatic,' 'Information,' 'Military' and 'Economic' . . .").

¹³⁷ Discussion with Lieutenant Colonel Ralph Tremaglio, Professor, Contract and Fiscal Law Dep't, TJAGLCS, in Charlottesville, Va. (Feb. 26, 2008) (teaching that although the "Economic" element is solely discussed, arguably the Programs indirectly apply to the other DIME elements as well. For example, under the "Diplomatic" and "Information" elements, the Programs provide the U.S. with significant credibility and stature in the world community and create a powerful incentive to other nation's to support our efforts in the war on terrorism in Afghanistan and Iraq. In addition, under the "Military" element, the Programs contribute by engaging military-aged men and women in honest work, thereby taking them out of the fight. Concomitantly, the Programs generate tremendous good will in the town and villages. As a result, the threat level against our forces diminishes and lowers the need to engage in kinetic warfare.).

Afghanistan and Iraq.¹³⁸ The Programs create jobs for vast numbers of local workers, put wages in their pockets, and provide constructive alternatives to terrorist activities, which provide greater security to the regions.¹³⁹ Through the injection of capital and providing work to locals, the Programs directly contribute to the overall stabilization and economic development of Afghanistan and Iraq.¹⁴⁰ In furtherance of achieving the “Economic” element of the DIME, the execution of the Programs are designed to ensure that every DOD contract awarded in Iraq and Afghanistan has at least some nexus to local Afghani or Iraqi businesses respectively.¹⁴¹

¹³⁸ See Press Release, CFC-A, *supra* note 5 (explaining that the Afghan First program “directs CFC-A [Combined Forces Command-Afghanistan] units to hire Afghan workers and purchase Afghan products and services whenever it is possible to do so.”); *NATO*, *supra* note 12 (stating that the Afghan First program “provide[s] work on a daily basis for some 20,000 Afghan citizens, with hundreds of millions of dollars flowing to Afghan contractors and subcontractors”); JCC-I/A Sept. 2006 Memo, *supra* note 132 (noting that Iraqi First “leverage[s] contracting operations to stimulate and mature the local Iraqi economy . . .” which arguably achieves the DIME’s “Economic” element).

¹³⁹ See Memorandum from Commander, JCC-I/A, to JCC-I/A, subject: Host Nation Business Plan Guidance (26 Apr. 2007) (explaining that the Programs are designed to “establish and cultivate economic development in the local economies of Iraq and Afghanistan in an effort to increase employment of the host nation populations thereby affecting a decrease of opportunistic cooperation with insurgents”) (on file with author); *NATO*, *supra* note 12 (“[Afghan First] contractors . . . increasingly employ skilled Afghan labor forces, who will put their abilities to work in furtherance of national economic development.”); Specialist Carl N. Hudson, Combined Press Info. Ctr., *Signs of Progress Seen in Iraqi Security, Economy*, OPERATION IRAQI FREEDOM, May 3, 2007, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=11741&Itemid=1 (noting that the Iraqi First program effectively “put[s] Iraqis to work by procuring construction supplies, services and other commodities from local Iraqi contractors, . . . [which] . . . helps strengthen the Iraqi economy, enhances the security environment, gives local workers a vested stake in the quality of finish products in their communities”).

¹⁴⁰ See Luft Presentation, *supra* note 12 (noting that Afghanistan has a “40% unemployment rate” and its dependence on Opium accounts for “33% of [Afghanistan’s] GDP [gross domestic product]”); Kurata, *supra* note 95 (“The security and well-being of the trans-Atlantic community depend on successfully stabilizing Afghanistan so that it will not be a source of narcotics or a haven for terrorist.”); *NATO*, *supra* note 12 (linking security with development and points out that “[i]n Afghanistan there can be no development without security . . . and there will be no long-term security without development”); Memorandum from Commander, Multi-National Force—Iraq, to MNF-I, subject: “Iraqi First” Program (28 Mar. 2007) (on file with author) (“Increasing opportunities for Iraqi businesses and individuals yields great benefits to the Coalition mission to stabilize and support Iraq.”).

¹⁴¹ JCC-I/A, 2007 AI, *supra* note 8, pt. 26.1 (directing “contracting officers . . . to make every effort to seek out capable Iraqi/Afghan businesses . . . [and to] use the most practical tools and methods to support the Iraqi/Afghan First Program in contracts”).

3. Execution of the Afghan First and Iraqi First Programs

The method chosen by JCC-I/A to ensure that procurement personnel carry out the Programs is to recommend that every solicitation for goods and services issued within theater consider, to some extent, either Afghan First or Iraqi First evaluation criteria.¹⁴² The level of support contracting officer's are required to afford Afghan First or Iraqi First primarily depends on whether the proposed contract is above the simplified acquisition threshold of \$1 million¹⁴³ or not and whether the solicitation is for a contract in Afghanistan or Iraq. The following section will address and examine each variation and review actual solicitations issued in the Afghanistan and Iraqi theaters of operation.

For procurements over the simplified acquisition threshold, procurement officials "will consider potential benefits of using a socio-economic factor," (either Afghan First or Iraqi First).¹⁴⁴ For these acquisitions, the JCC-I/A acquisition instruction (Instruction) provides "recommended" language for the solicitation's Sections L and M¹⁴⁵ that accomplish the intent of the Programs.¹⁴⁶ The Section L language requires the offerors to explain whether they are a local business or how they will affect the local workforce.¹⁴⁷ The Section M language then notifies offerors how source selection officials will evaluate the

¹⁴² *Id.* (providing discretion to not use a socio-economic evaluation factor at all as long as the decision is documented in the contract file and the Division Chief approves of the decision).

¹⁴³ *Id.* (explaining that for procurements under the 1 million dollar simplified acquisition threshold, normal simplified acquisition procedures generally apply. The Instruction only suggests that "[w]here opportunities present themselves and it makes sense under the circumstances, the contracting officer should create a best value approach to evaluate and use the offerors' socio-economic programs as a factor in awarding the contract.").

¹⁴⁴ *Id.*

¹⁴⁵ FAR, *supra* note 23, 15.204-5 (explaining that Section L includes "[i]nstructions, conditions, and notices to offerors or respondents" that "guide offerors or respondents in preparing proposals or responses to requests for information . . ." Section M includes the "[e]valuation factors for award" which "[i]dentify all significant factors and any significant subfactors that will be considered in awarding the contract and their relative importance . . .")

¹⁴⁶ *See id.* pts. 26.2–26.3; *see also id.* pt. 26.1 (stating that the socio-economic evaluation factor "should be weighted equally with the highest factor whether non-cost or cost alike in a descending order of importance").

¹⁴⁷ *Id.* pt. 26.2 (providing the following recommended language: "Offeror shall describe its plan to maximize the employment of, training of, and transfer and knowledge to the Iraqi/Afghan workforce.").

evaluation factor.¹⁴⁸ The Instruction also recommends specific language for the solicitations' statements of work.¹⁴⁹ Afghanistan solicitations, however, require more than these general requirements.

For solicitations in Afghanistan, the Instruction also includes additional language for the solicitation's statement of work and requires specific representations and certifications.¹⁵⁰ For example, the statement of work must indicate how the offeror will provide training to Afghans as it relates to the work required by the contract.¹⁵¹ The Instruction also requires offerors to certify the number of Afghan workers and third country nationals that they will employ.¹⁵² Finally, an Afghan owned business must present a certification from the Afghanistan government that it is an actual Afghan owned business with its proposal.¹⁵³ Beyond the guidance and requirements of the Instruction, the application of the Programs is where the real threat of something other than full and open competition lies.

¹⁴⁸ *See id.* pt. 26.3 (“Proposals will be evaluated on the planned utilization and training of, and transfer of knowledge, skills and abilities to the Iraqi/Afghan workforce; and proposed utilization of both Iraqi/Afghan companies and personnel in the performance of statement of work requirements.”).

¹⁴⁹ *See id.* pt. 26.5 (“The Contractor shall maximize the employment of, training of, and transfer of knowledge, skills and abilities to the Iraqi/Afghan workforce. The Contractor shall maximize utilization of Iraqi/Afghan subcontractors and businesses. The offeror shall maximize utilization of material of Iraqi manufacture.”).

¹⁵⁰ *Id.* pt. 26.6.

¹⁵¹ *See id.*

An important mission factor is the hiring and training of the Afghan workforce. Offeror will identify in the solicitation Section K their company's Afghan employment numbers. Offeror will submit their training plan with details of how they will provide training to their Afghan workers as it relates to the main effort described in this SOW. This plan could be on-the-job, classroom, or a mixture of techniques. The plan should discuss training frequency, measures of success, location, supplies, and instructor qualifications. This information is required with proposal submittal, and throughout the life of the contract.

Id.

¹⁵² *Id.*

¹⁵³ *Id.*

4. Application of the Afghan First and Iraqi First Programs

Actual requests for proposals, source selection plans, and contract award decisions depict how the Programs are actually applied. As often happens, a concept seems good in theory, but often falls short in its execution. The Programs as administered by JCC-I/A and the Combatant commanders allow contracting officers to go beyond the concept of assisting local businesses and workers and into an area of impermissible sole source contracting while utilizing the specific Sections L and M recommended in the Instruction. As a result, some contracting officers have gone too far.

In Afghanistan, employment of Afghans appeared to be mandatory in a solicitation for a fixed-price construction contract. In the solicitation, the Afghan socioeconomic plan evaluation factor required contractors to “provide the information requested in [the solicitation’s] Addendum.”¹⁵⁴ Subsequently, the Addendum required contractors to “submit evidence of Afghan employee training through a contracting data requirements list (CDRL),” as well as the “total projected number of Afghans and Foreign citizens that will be directly employed in the performance of this contract.”¹⁵⁵ Arguably, the Afghan First program, as applied in this example, is either all or nothing without any gradation possibilities between proposals. This becomes important when determining eligibility for award. Misapplication of the Programs was not limited to Afghanistan, it also occurred in Iraq.

In an Iraq solicitation, the contracting officer approached the Iraqi First socio-economic evaluation by using a percentage of Iraqis employed system.¹⁵⁶ In this particular solicitation, an excellent rating

¹⁵⁴ Solicitation for Commercial Items, Bagram Regional Contracting Center, Afghanistan, to offerors, subject: Renovate Building 455, Bagram Airfield, Afghanistan, Solicitation No. W91B4N-08-R-0009 (13 Jan. 2008), available at <http://www.militarycontracting.com/AfghanSolDetail.asp?id=1544>.

¹⁵⁵ *Id.*

¹⁵⁶ Source Selection Plan, Joint Contracting Command-Iraq/Afghanistan, to Contracting Officials, subject: Perform Service for Combustor Inspection (CI) General Electric Frame 5 Combustion Turbine Unit One at Shaubia Power Plant and PTCH Power Plant, Solicitation No. W91GXY-06-R-0101 (9 Aug. 2006) [hereinafter Shaubia Source Selection Plan] (on file with author); Solicitation for Commercial Items, Joint Contracting Command-Iraq/Afghanistan, Iraq, to Offerors, subject: Perform Service for Combustor Inspection (CI) General Electric Frame 5 Combustion Turbine Unit One at Shaubia Power Plant and PTCH Power Plant, Solicitation No. W91GXY-06-R-0101 (17 Aug. 2006) [hereinafter Shaubia Solicitation] (on file with author) (showing that the Iraqi

required the offeror to show that it would “employ a minimum of 85% of their employees as Iraqi personnel (direct or subcontractors) OR [sic] [show that it] is an Iraqi-owned business/joint venture with an Iraqi-owned business.”¹⁵⁷ Under this example, the contracting officer went beyond what the Instruction recommends or requires. By doing so, he effectively restricted competition to Iraqi centric businesses. These examples depict what happens when a great concept goes awry in its execution: full and open competition is threatened and only local businesses have a realistic opportunity to compete. Beyond a misapplication by procurement officials, the Programs inherently and systemically fail to achieve full and open competition.

IV. Competition Lost: Afghan First and Iraqi First Inhibit Full and Open Competition Required by the CICA

A. The Last Shall Not Be First: Afghan First and Iraqi First Are Akin to Set-Asides

Although the overall goals and policy aims of Afghan First and Iraqi First are commendable, logical, and “the right thing to do,”¹⁵⁸ unfortunately they simply do not meet the level of full and open competition that is required by the CICA.¹⁵⁹ The Programs have created Afghan and Iraqi set-aside programs that closely resemble the small business, Section 8a, women, or minority owned business set asides found in the FAR.¹⁶⁰ The important distinction between the Programs and the set-asides found in the FAR is that Congress allows the latter whereas JCC-I/A emplaced, used, and touted the former to the world without any Congressional authority; that is until the NDAA 2008.

The proposition that the Programs are being applied as socio-economic set aside programs stem from the initial goals and command

First socio-economic factor evaluated the ownership of the offeror’s company, the amount of “Iraqi contract performance,” the “[a]pproximate number and/or percentage of Iraqi and non-Iraqi personnel who are direct-hire employees of the offeror who will work under the resultant contract,” and the “[a]pproximate number and/or percentage of Iraqi and non-Iraqi personnel who will hired (sic) as sub-contractors/subcontractor employees who will work under the resultant contract”).

¹⁵⁷ Shaubia Source Selection Plan, *supra* note 156; Shaubia Solicitation, *supra* note 156.

¹⁵⁸ JCC-I/A Sept. 2006 Memo, *supra* note 132.

¹⁵⁹ See Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000).

¹⁶⁰ See FAR, *supra* note 23, pt. 9.000.

policy JCC-I/A designed the Programs to meet.¹⁶¹ On their face, the Programs sound very much like the FAR's small business set-aside programs because their intent is to award contracts to local Afghani and Iraqi businesses.¹⁶² Even if the intent of the Programs are to simply assist local businesses and not an endorsement of or a creation of a localized socio-economic set-aside program, the perceived purpose of the Programs by procurement officials in the field belie that intent.

If there is any doubt that the Programs are not set-asides, a person only has to read some of the publications that discuss the Programs. For example, an article from the Bagram Regional Contracting Center stated that its "primary missions[] . . . [is to] enhance strategic partnerships with Afghan communities through integration of the Afghan First Program, which *provides contracting preferences to locals.*"¹⁶³ A similar misinterpretation occurred regarding the correct use of the Iraqi First program. A unit's mission briefing noted that the Iraqi First program's goal is to have "75% of funds awarded to Iraqi firms."¹⁶⁴ The unit created the presentation approximately six months after JCC-I/A's 24 September 2006 memorandum, yet it still referenced the 75% "end-state" goal.¹⁶⁵ Based on these examples, it is evident that procurement officials view the Programs as local socio-economic set-aside programs for Afghani and Iraqi businesses. In addition to perceiving the Programs as set-aside programs, some procurement officials apply them as such.

On 8 May 2007, approximately eight months after JCC-I/A's 24 September 2006 memorandum eliminated the "end-state [goal] . . . to award at least 75% of our contracting dollars to Iraqi Host-Nation business,"¹⁶⁶ the perception that the Programs are set-asides became a

¹⁶¹ See Iraqi First Program, *supra* note 9 (stating that the Commander, MNF-I, requested the JCC-I/A to "provide set-asides on USG [United States Government] contracts for Iraqi owned firms."); JCC-I/A June 2006 Memo, *supra* note 116 ("[The desired] end-state . . . [was] to award at least 75% of our contracting dollars to Iraqi Host Nation business.").

¹⁶² FAR, *supra* note 23, pt. 19.2.

¹⁶³ Master Sergeant Smith, *Coalition Construction Management Section News*, 1 BAYONET FORWARD 13, at 6 (2007) (emphasis added).

¹⁶⁴ Terry Edwards, Air Force Ctr. for Env'tl. Excellence: Engineering & Construction Programs (30 Mar. 2007) (PowerPoint Presentation), *available at* <http://www.same.org/files/members/DOD2007edwardsAFCEE.pdf>.

¹⁶⁵ JCC-I/A June 2006 Memo, *supra* note 116.

¹⁶⁶ JCC-I/A Sept. 2006 Memo, *supra* note 132.

reality.¹⁶⁷ On that day, a New Jersey business,¹⁶⁸ Glendale Industries, was unable to compete for and sell ceremonial gloves to a military honor guard unit because of the perception that the Iraqi First program required a local Iraqi business set-aside.¹⁶⁹ The business owner received a letter from the honor guard unit in Iraq that stated, “Due to the new ordering process we must order from Iraqi vendors first instead of your company like we would rather do. Thanks for your understanding and support of our operations here in Iraq.”¹⁷⁰ *The Record*, a North Jersey Media Group newspaper, discussed the business owner’s inability to compete for the contract in an article entitled “‘Iraqi first’ policy hurts N.J. firm.”¹⁷¹ The article reported that “a new policy that forces the U.S. military in Iraq to support that country’s economy by purchasing . . . from Iraqi companies is hurting a supplier 6,000 miles away”¹⁷² The business owner “learned that under the Iraqi First program, she would have to go through some new ‘middlemen’—Iraqi vendors—if she wanted to continue doing business in the war-torn country.”¹⁷³ In the article, the company’s operations manager stated that the Iraqi First program was “making it a little more labor intensive for us [the company] and, possibly, more expensive for the military.”¹⁷⁴ Regardless of whether the Iraqi First program has or will impact Glendale Industries’ overall business, the contracting officer’s application of the Iraqi First program denied it the opportunity to engage in full and open competition for a government contract. Aside from creating impermissible set-asides for local businesses, the Programs’ evaluation criteria also precludes obtaining full and open competition.

¹⁶⁷ See Justo Bautista, ‘Iraqi first’ Policy Hurts N.J. firm, RECORD, Aug. 11, 2007, available at <http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3danFIZUVFeXk1NSZmZ2JlbDdmN3ZxZWVFRXI5NzE4MDI5MCZ5cmlyeTdmdmNzE3Zjd2cWVIRUV5eTM=>.

¹⁶⁸ Telephone Interview with Wendy Lazar, Owner, Glendale Industries, in Bergen County, N.J. (Dec. 10, 2007) (explaining that Glendale Industries is a small women-owned business that specializes in ceremonial equipment used by military units, police departments, and fire departments).

¹⁶⁹ See Letter from 447th Honor Guard Sather AB, Iraq, to Glendale Indus., Bergen County, N.J. (May 8, 2007) (on file with author).

¹⁷⁰ *Id.*

¹⁷¹ Bautista, *supra* note 167.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

B. The Afghan First and Iraqi First Evaluation Schemes Stifle Full and Open Competition

Typically, the “contracting agency has broad discretion in choosing evaluation factors and their relative importance.”¹⁷⁵ Courts or boards will not usually “object to the absence or presence of particular factors or an evaluation scheme so long as the factors used reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests.”¹⁷⁶ Unfortunately, under the Programs, the localized socio-economic evaluation criteria apply to some degree even if there is no Afghani or Iraqi business that can perform the contract.¹⁷⁷ The evaluation schemes convey that the agency can never satisfy its needs in Afghanistan and Iraq unless local Afghani/Iraqi businesses and/or workers are involved in every contract awarded (or at least considered).¹⁷⁸ How is it possible that every individual contract awarded in Afghanistan and Iraq requires the relative importance of a local business or local worker nexus? It is a long stretch and logically implausible.¹⁷⁹

On the other hand, there is little doubt that the use of Afghan First and Iraqi First socio-economic evaluation factors satisfies the overall strategic, host-nation building, or effects-based contracting needs of the

¹⁷⁵ *Consol. Bell, Inc.*, B-228566, 1987 U.S. Comp. Gen. LEXIS 18, at *5 (Dec. 29, 1987).

¹⁷⁶ *King Constr. Co., Inc.*, B-298276, 2006 U.S. Comp. Gen. Lexis 114, at *6 (July 17, 2006).

¹⁷⁷ JCC-I/A, 2007 AI, *supra* note 8, pt. 26 (advising that for procurements under the simplified acquisition threshold, contracting officers should “create a best value approach to evaluate and use the offerors’ socio-economic programs as a factor in awarding the contract.” For procurements over the simplified acquisition threshold, the Instruction recommends that contracting officers include the Afghan First and Iraqi First socio-economic evaluation factors in the solicitation.).

¹⁷⁸ *See id.* pt. 26.1 (stating that for acquisitions over the simplified acquisition threshold contracting officers are required to consider the Programs as a socio-economic evaluation factor).

¹⁷⁹ *See King Construction Co., Inc.*, 2006 U.S. Comp. Gen. Lexis 114, at *6.

When a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility to establish that the specification is reasonably necessary to meet its needs. . . . The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny.

Id.

U.S. military in Afghanistan and Iraq.¹⁸⁰ However, the ends cannot justify the means. Procurement officials must tailor each individual contract's evaluation criteria to meet the agency's needs on that particular contract.¹⁸¹ Contrarily, it is unacceptable to have whole groups of unrelated contracts contain an evaluation factor simply to meet the agency's generalized needs.¹⁸²

The use of the Programs' evaluation schemes in every contract is overbroad. The socio-economic benefits of the Programs cannot logically relate to every individual contract awarded in Afghanistan and Iraq. Moreover, since the evaluative schemes are overbroad and do not meet the specific needs of the agency in every individual contract, their inclusion unnecessarily inhibits competition. Thus, even though "competition" occurs for contracts awarded in Afghanistan and Iraq, full and open competition is lost. It is lost because the evaluation schemes make it practically impossible for an equally capable, non-local business to fairly compete on a level playing field for any contract in Afghanistan or Iraq unless they utilize local workers. Instead, the Programs only provide *adequate* competition. For example, assume on any given contract that a non-local offeror with no local workers was fully capable of performing the work at a competitive cost to the government; it would not receive the same full and equal consideration that a local company or a business that proposes the use of local workers would receive. This is "adequate competition" as opposed to full and open competition and it fails to comply with Congress' definition of "competitive procedures."¹⁸³ A Congressional conference committee rejected a proposal to "establish 'effective' competition as the standard for awarding federal contracts for

¹⁸⁰ See DCMA, *supra* note 102, at 24.

¹⁸¹ See *Sea-Land Serv. Inc.*, B-278404.2, 1998 U.S. Comp. Gen. LEXIS 41, at *12 (Feb. 4, 1998) (citing FAR, *supra* note 23, pt. 15.605(a) (June 1997)) ("A solicitation's evaluation factors and subfactors must be tailored to the acquisition in question."); *accord id.* pt. 15.304 ("The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition." Moreover, the evaluation criteria chosen must "[r]epresent key areas of importance and emphasis to be considered in the source selection decision.").

¹⁸² *Id.*

¹⁸³ See *Prisoner Transp. Serv. L.L.C.*, B-292179, 2003 Comp. Gen. LEXIS 95, at *7 (June 27, 2003) ("Contrary to the agency's assertion, the CICA mandate for full and open competition is not satisfied by the agency's view that 'adequate' competition has been obtained.").

property or services” as opposed to full and open competition.¹⁸⁴ In short, denying a business the opportunity to compete at all and conducting the evaluation in a manner that overwhelmingly favors local businesses/workers simply presents a “distinction without a difference”;¹⁸⁵ neither promotes *full and open* competition.

C. Voices We Have Heard on High: Congress’s Response to the Afghan First and Iraqi First Programs

1. Senator Jack Reed: Congressional Action Is Needed to Support the Afghan First Program

While Congress, commanders, and contracting officials recognize the benefits of the Programs, at least one Senator recognized that the Programs’ failed to pass muster under the CICA.¹⁸⁶ Senator Jack Reed recognized that “*Afghan First* which encourages the United States government and private international companies to give contracts and jobs to Afghanis, thus improving their skills, increasing entrepreneurship and provide opportunities for Afghan economic expansion”¹⁸⁷ is one of “several projects which have the potential to achieve great success in winning the hearts and minds of the Afghan people.”¹⁸⁸ However, he also recognized that “[a]ccommodation of U.S. contracting regulations in DoD and civilian agencies should be made to promote *Afghan First* in order to accelerate the acceptance and investment of the Afghan people in a central government rather than the Taliban.”¹⁸⁹ Congress took this to heart by creating the long needed exception to the full and open competition requirement for the Programs and legalized them by providing explicit authority for the Programs in the NDAA 2008.¹⁹⁰ Finally, after almost two years of use, Congress provided enhanced contracting authority to use the Afghan First and Iraqi First evaluative schemes in awarding contracts despite the Programs transgressions on

¹⁸⁴ H.R. REP. NO. 98–369, at 1422 (discussing that the congressional conference committee rejected a proposed Senate amendment to “establish ‘effective’ competition as the standard for awarding federal contracts for property or services”).

¹⁸⁵ L-3 Commc’ns Corp., ASBCA No. 54920, 2006-2 B.C.A. ¶ 33,374.

¹⁸⁶ SENATOR JACK REED, TRIP REPORT: PAKISTAN, AFGHANISTAN, AND IRAQ (Oct. 3–9, 2006), at 7, available at <http://www.reed.senate.gov/documents/Trip%20Reports/trip-report%20oct06%20final.pdf>.

¹⁸⁷ *Id.* at 4 (emphasis in the original).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 7 (emphasis in the original).

¹⁹⁰ NDAA 2008, *supra* note 19, § 886.

full and open competition.¹⁹¹ The congressional exception is section 886 of the NDAA 2008 and it allows DOD procurement officials to use “other than competitive procedures” and to provide “a preference . . . for products or services that are from Iraq or Afghanistan.”¹⁹²

2. *The NDAA 2008 Section 886 Enhanced Contracting Authority*

It is rare that Congress embraces and approves a DOD contracting practice that infringes on full and open competition. Normally, Congress is in the habit of criticizing and legislating to ensure more competition in government contracting.¹⁹³ Ironically, however, section 886 goes well beyond simply embracing the Afghan First and Iraqi First socio-economic evaluation schemes. Instead, it provides JCC-I/A even more authority to limit full and open competition in favor of local businesses, workers, and products.¹⁹⁴ Seemingly, subsection (a)(3) of Section 886, which allows “a preference . . . for products or services that are from Iraq or Afghanistan,”¹⁹⁵ is sufficient authority for JCC-I/A’s continued use of the current Programs. However, Congress allowed even more authority to limit competition by allowing DOD, and JCC-IA, to restrict competition geographically to either Iraq or Afghanistan by limiting “competition . . . to products or services that are from Iraq or Afghanistan.”¹⁹⁶ Congress also, arguably, allowed DOD to avoid using competitive procedures whatsoever and use “procedures other than

¹⁹¹ *See id.*

¹⁹² *Id.*

¹⁹³ *See generally* Representative Henry A. Waxman, *Democratic Truth Squad Introduces “Clean Contracting Act”* (Sept. 13, 2006), <http://oversight.house.gov/story.asp?ID=1103> (“In response to these widespread abuses in federal contracting, the Democrats’ Waste, Fraud, and Abuse Truth Squad is introducing the ‘Clean Contracting Act of 2006[.]’” which intends to promote, among other things, more competition in the award of contracts.); Lieberman, *Lack of Accountability*, *supra* note 82 (“Homeland Security and Governmental Affairs Committee Chairman Joe Lieberman, ID-Conn., and Ranking Member Susan Collins, R-Me., Tuesday searched for ways to strengthen accountability and competition in the federal government’s \$415 billion-a-year acquisition process”); Lieberman, *Waste, Fraud, and Abuse*, *supra* note 83 (“The U.S. Senate has unanimously approved the bipartisan ‘Accountability in Government Contracting Act of 2007[.]’ (SIC) authored by Senator Susan Collins (R-ME) and Joe Lieberman (ID-CT). The bill will strengthen competition in federal contracting, add transparency to the process, and help curtail waste, fraud, and abuse of taxpayers’ money.”).

¹⁹⁴ NDAA 2008, *supra* note 19, § 886.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

competitive procedures . . . to award a contract to a particular source or sources from Iraq or Afghanistan.”¹⁹⁷

While Section 886 of the NDAA 2008 is “commendable, logical, and the right thing to do,”¹⁹⁸ it does not go far enough. Yes, it embraces JCC-I/A’s innovative localized socio-economic policies and provides additional contracting authority to maximize the benefits and impact of the Programs.¹⁹⁹ However, despite Congress’s best efforts to legitimize and support the Programs, the proposed enhanced authority falls short of what is truly required for contingency contracting operations: permanent enhanced contingency contracting authority for any declared contingency.

Providing permanent enhanced contingency contracting authority to support the “Economic” element of the “DIME” is not a new or novel idea. Congress previously created authority for contracting during “major disaster[s] or emergency assistance activities” under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.²⁰⁰ Congress could and should create a similar permanent exception for contracting in contingency operations. The on-going rebuilding efforts in Afghanistan and Iraq are not unique in either place or time. Future wars will take place that will require, in the least, future rebuilding efforts; and perhaps, even a need to win the local populaces’ hearts and minds as in Iraq and Afghanistan. Either way, the job of the military is no longer just “killing

¹⁹⁷ *Id.*

¹⁹⁸ JCC-I/A Sept. 2006 Memo, *supra* note 132.

¹⁹⁹ NDAA 2008, *supra* note 19, § 886.

²⁰⁰ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.S. § 5121, 5150 (2005). Providing that

In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.

This section shall not be considered to restrict the use of Department of Defense resources in the provision of major disaster assistance under this chapter.

Id.

people and breaking things.”²⁰¹ In today’s conflicts, as well as in future conflicts, “killing people and breaking things has given way to feeding people and fixing things.”²⁰² New permanent legislation would only require minimal effort to create. Like in the Stafford Act, Congress could require the President, or the Secretary of Defense, to declare a contingency operation in order to trigger an enhanced contracting authority exception to the full and open competition requirement. The language of the permanent statute could easily come from Section 886.

A solution could be found in a new permanent authority²⁰³ that would require the President, or preferably the Secretary of Defense, to declare that a contingency operation is presently taking place and to identify the country, countries, or region(s) in which the operation is occurring. This would require defining a contingency operation as war, military operations, or stability operations (including security, transition, reconstruction, and humanitarian relief activities) to capture most of the duties the military is currently performing. The new permanent authority would accommodate any contingency operation. A product, service, or source would qualify under the permanent authorization if it emanates from the area(s) declared by the President, or Secretary of Defense. To prevent abuses and to provide oversight, Congress could require DOD wait for a determinate amount of time (perhaps thirty days) before it utilizes the enhanced contingency authority and require quarterly reports and/or renewed declarations by either the President or Secretary of Defense. Through these measures, Congress can voice its disapproval and maintain fiscal control either before DOD uses the enhanced contingency authority or at any time during the declared contingency.

Permanent legislation would allow commanders and contracting officials the freedom and authority to immediately control the battle space and win the hearts and minds of the local population as soon as a war, conflict, or foreign emergency arises. Without permanent enhanced contingency contracting authority, two alternatives exist for future conflicts. Procurement officials may take it upon themselves to utilize localized socio-economic policies that infringe upon full and open competition despite a lack of Congressional authority. Alternatively,

²⁰¹ Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 11 (2001).

²⁰² *Id.*

²⁰³ See Appendix for the complete text of the proposed permanent enhanced contracting authority.

battlefield commanders may not receive the proven benefit of effects based contracting actions that quickly and effectively utilize localized socio-economic programs to affect their battle space.

V. Conclusion

A critical examination of the competition requirements in federal procurements and the execution, application, and impacts of the Afghan First and Iraqi First programs leaves no doubt that, but for the NDAA 2008, the Programs violate the law of full and open competition. Several key facts support and prove this conclusion. First, the Programs application only realistically allows local business, or businesses that hire local workers, to compete for DOD contracts in Afghanistan and Iraq. Second, procurement officials in the field perceive and use the Programs as localized set-aside programs; procurement officials refer to the Afghan First program as a local business preference program and continue to apply the 75% end goal. Moreover, a procurement official in Iraq would not even allow an American company to compete for a contract because of a maligned application of the Iraqi First program. Third, the Programs are overbroad because the Programs' requirement for local businesses cannot logically relate to every contract awarded in Afghanistan or Iraq. Finally, Congress's specific acknowledgement and acquiescence of the Programs in the NDAA 2008 is incontrovertible evidence that the Programs violate the CICA. Why would Congress even bother if the Programs were legal? In spite of the fact that Afghan First and Iraqi First violate the CICA and the FAR, the Programs are vitally important to the United States' efforts in Afghanistan and Iraq.

Like in post World War II Europe, these Programs are helping to forge long-term strategic alliances in economically, politically, and militarily decisive areas of the world by utilizing local businesses and labor in the rebuilding efforts. The Programs are successful for two simple reasons: using local businesses and labor puts dollars directly into the economies of Afghanistan and Iraq, and employing military aged men and women reduces the chance that they will join in the insurgency. Because of the obvious benefits provided by the Programs, Congress should look beyond the current contingencies in Afghanistan and Iraq. They should provide permanent enhanced contingency contracting authority for future contingency operations. Permanent enhanced contingency authority will allow Combatant commanders to factor this type of effects-based contracting into the early stages of their mission planning.

Appendix

Section 886 of the 2008 National Defense Authorization Act appears below in subsection (a). Subsection (b) of Appendix A contains the proposed permanent enhanced contingency contracting authority.

Sec. 886. ENHANCED AUTHORITY TO ACQUIRE PRODUCTS AND SERVICES PRODUCED IN IRAQ AND AFGHANISTAN.

(a) In General.--In the case of a product or service to be acquired in support of military operations or stability operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities) for which the Secretary of Defense makes a determination described in subsection (b), the Secretary may conduct a procurement in which--

(1) Competition is limited to products or services that are from Iraq or Afghanistan;

(2) Procedures other than competitive procedures are used to award a contract to a particular source or sources from Iraq or Afghanistan; or

(3) A preference is provided for products or services that are from Iraq or Afghanistan.

(b) Determination.--A determination described in this subsection is a determination by the Secretary that--

(1) The product or service concerned is to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan; or

(2) it is in the national security interest of the United States to limit competition, use procedures other than competitive procedures, or provide a preference as described in subsection (a) because--

(A) Such limitation, procedure, or preference is necessary to provide a stable source of jobs in Iraq or Afghanistan; and

(B) Such limitation, procedure, or preference will not adversely affect--

(i) Military operations or stability operations in Iraq or Afghanistan; or

(ii) The United States industrial base.

(c) Products, Services, and Sources from Iraq or Afghanistan.--For the purposes of this section:

(1) A product is from Iraq or Afghanistan if it is mined, produced, or manufactured in Iraq or Afghanistan.

(2) A service is from Iraq or Afghanistan if it is performed in Iraq or Afghanistan by citizens or permanent resident aliens of Iraq or Afghanistan.

(3) A source is from Iraq or Afghanistan if it--

(A) is located in Iraq or Afghanistan; and

(B) offers products or services that are from Iraq or Afghanistan.

PROPOSED PERMANENT ENHANCED CONTINGENCY
CONTRACTING AUTHORITY

(a) In General.--In the case of a product or service to be acquired in support of a Contingency Operation as declared under subsection (b) and for which the Secretary of Defense makes a determination described in subsection (c), the Secretary of Defense may conduct a procurement in which--

(1) Competition is limited to products or services that are from the area in which the Contingency Operation is conducted;

(2) Procedures other than competitive procedures are used to award a contract to a particular source or sources within the area where the Contingency Operation is conducted; or

(3) A preference is provided for products or services that are from the area where the Contingency Operation is conducted.

(b) The President of the United States, delegable to the Secretary of Defense, shall declare an action a Contingency Operation and specifically identify the geographic area(s) in which the Contingency Operation is taking place. An action may qualify as a contingency operation if it constitutes a declared war, a military operation, and/or a stability operation (including but not limited to, security, transition, reconstruction, and humanitarian relief activities.)

(c) (1) The product or service concerned is to be used only by the military forces, police, or other security personnel of countries in which contingency operation is conducted; or

(2) It is in the national security interest of the United States to limit competition, use procedures other than competitive procedures, or provide a preference as described in subsection (a) because

(A) Such limitation, procedure, or preference is necessary to provide a stable source of jobs in the areas in which the contingency operation is conducted; and

(B) Such limitation, procedure, or preference will not adversely affect--

- (i) Military operations or stability operations in the area(s) in which the contingency operation is conducted;
- or
- (ii) The United States industrial base.