

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
MAC International FZE) ASBCA No. 56355
)
Under Contract No. W914NS-04-D-0117)

APPEARANCES FOR THE APPELLANT: Sara Beiro Farabow, Esq.
Joshua C. Drewitz, Esq.
Seyfarth Shaw LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Tudo Pham, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICKINSON ON
THE GOVERNMENT’S MOTION FOR PARTIAL SUMMARY JUDGMENT OR,
IN THE ALTERNATIVE, TO DISMISS A PORTION OF THE APPEAL FOR
LACK OF JURISDICTION
AND APPELLANT’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

In this appeal MAC International FZE (MAC or appellant) seeks payment from the United States government under a contract between MAC and the Coalition Provisional Authority (CPA) in Iraq for: (1) Prompt Payment Act (PPA) interest to which MAC claims it is entitled for allegedly late payments made under 16 delivery orders which obligated United States government appropriated funds; and, (2) the contract price of \$4,944,500, plus PPA interest, for vehicles delivered by MAC and for which it is undisputed that it has not been paid under two delivery orders (Nos. 8 and 9) that were funded with Iraqi funds. The total amount of the claim is \$5,598,129.52. The government has filed a motion for partial summary judgment or, in the alternative, to dismiss the second portion of MAC’s appeal for lack of jurisdiction. MAC opposes the government’s motion, arguing that we have jurisdiction to decide both portions of its appeal and further moving that it is entitled to partial summary judgment in its favor as a matter of law on the merits of the second portion of the appeal. The record before us for purposes of the motions is comprised of the Rule 4 file, appellant’s supplemental Rule 4 file and the various documents submitted by the parties as exhibits to their motion filings. The parties also submitted a Joint Stipulation of Undisputed Material Facts (JSUMF).

On 13 September 2010 MAC submitted, without leave of the Board to do so, copies of two 2010 publications of the Special Inspector General for Iraq Reconstruction (SIGIR) and requested that the Board take judicial notice of the contents of the documents in support of MAC's previous filings on the motions now before us. The government objected to MAC's request on the basis that the contents of the documents do not present facts which are "not subject to reasonable dispute" because they are not "generally known within the territorial jurisdiction of the trial court" and are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The government further objects to the publications on the basis that they are irrelevant to the issues now before us on the motions. Upon examination of the two publications, we sustain the government's objection upon the ground of relevance and do not reach the question of whether the contents of the publications qualify for judicial notice.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 8 May 2003 the United States and the United Kingdom presented a joint letter to the United Nations Security Council announcing the creation of the CPA by coalition partners under the laws and usages of war to exercise governmental powers temporarily during the post-conflict period in Iraq (JSUMF ¶ 1).

2. On 6 May 2003 Ambassador Paul Bremer was appointed by President George W. Bush as Presidential Envoy to Iraq:

Ambassador Bremer will serve as the senior Coalition official in Iraq. In his capacity as Presidential Envoy, he will oversee Coalition reconstruction efforts and the process by which the Iraqi people build the institutions and governing structures that will guide their future. General Tommy Franks will maintain command over Coalition military personnel in the theater. Ambassador Bremer will report to Secretary of Defense Rumsfeld and will advise the President, through the Secretary, on policies designed to achieve American and Coalition goals for Iraq.

(App. reply, ex. 1) On 13 May 2003 Ambassador Bremer was designated by Secretary of Defense Donald Rumsfeld as head of the CPA and given the title of "Administrator" (app. reply, ex. 2; JSUMF ¶ 8). Pursuant to this authority, CPA Administrator Bremer promulgated various CPA regulations, memoranda, orders and public notices. All of the CPA's various regulations, orders and memoranda remain available to the public for historical purposes at <http://www.iraqcoalition.org>. *United States of America ex. rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 621 n.10 (E.D. Va. 2005) ("DRC

I'”), *rev'd in part on other grounds and remanded*, 562 F.3d 295 (4th Cir. 2009). Sir Jeremy Greenstock, the United Kingdom’s Special Representative in Iraq, was identified as Administrator Bremer’s CPA deputy (app. reply, ex. 3 (CRS Report for Congress) at CRS-4). He functioned as the head of the CPA in Administrator Bremer’s absence. *DRC I*, 376 F. Supp. 2d at 623 n.18.

3. On 16 May 2003 CPA Regulation Number 1 defined the powers of the CPA to temporarily govern Iraq under the laws and usages of war and provided for the continued application of existing Iraqi law. *DRC I*, 376 F. Supp. 2d at 621.

4. On 22 May 2003 the United Nations Security Council passed Resolution 1483 (UNSCR 1483), which “[r]eaffirm[ed] the sovereignty and territorial integrity of Iraq,” recognized the CPA (“the Authority”) as a temporary entity formed under applicable international law by the coalition partners as occupying powers under unified command (JSUMF ¶ 2) and which supported:

[T]he formation, by the people of Iraq with the help of the Authority and working with the [United Nations] Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority....

(Gov’t mot., ex. 2, ¶ 9) Resolution 1483 also acknowledged the establishment of the Development Fund for Iraq (DFI), and noted that DFI funds would be disbursed at the discretion of the CPA in consultation with the Iraqi interim government (IIG) (gov’t mot., ex. 2; JSUMF ¶¶ 2-3).

5. Between April and November 2003, Congress appropriated a “substantial majority of the CPA’s operating budget” recognizing the CPA as already existing under unified command and inviting other United Nations members to contribute personnel, equipment and other resources to the CPA.¹ The United Kingdom also provided “substantial funding” for the operation of the CPA between April 2003 and March 2004. *DRC I*, 376 F. Supp. 2d at 622-23.

¹ MAC argues that the appropriation of government funds to the CPA is evidence that the CPA is a component of the Department of Defense (DoD) (app. reply at 10). However, Congress actually appropriated the funds to the President of the United States, not directly to the CPA or the DoD (app. opp’n, ex. 2, Pub. L. No. 108-106; *see also* n.2 herein), and the funds were then assigned by the government in its role as a coalition partner to support the CPA.

6. By May 2003 when the CPA had begun to exercise civil governing authority in Iraq:

[It] was staffed with an assortment of civilians and military personnel from (i) various Coalition countries, (ii) Iraqi expatriates from the Iraq Reconstruction and Development Council, and (iii) temporary civilian hires and contractors. While the substantial majority of the positions in the CPA were filled by United States citizens, many of whom were also United States government employees, an average of 13% of CPA personnel came from other Coalition partners, including Australia, the Czech Republic, Denmark, Italy, Japan, Poland, Romania, Spain, the United Kingdom, Ukraine, and others. Also significant is that high level CPA positions were not filled solely with U.S. personnel; British, Australian, and Polish officials also served in high level CPA positions.

DRC I, 376 F. Supp. 2d at 622-23.

The CPA teams [sic] acts as the nucleus of Iraq's administrative apparatus, involves the Iraqi people in advising on and administering their country, and maximizes contributions from other governments and organizations. The team relies on coalition partners, consultants, contractors and non-governmental organizations (NGOs). The CPA is identifying appropriate persons in Iraq to reestablish key ministries and providing ministry advisors and logistical support. At the President's direction, the Departments of State, Treasur[y], Defense, and Justice and 13 other executive branch agencies are providing personnel and support.

(JSUMF ¶ 8)

7. In May 2003 the Secretary of the Army was assigned the authority and responsibility to provide acquisition and program management support to the CPA and any successor entity. This included contract awards, contract administration and oversight of all contracts, grants, and other acquisition actions as well as applicable financial management. (App. reply, ex. 3 at CRS-15) We conclude that the Army performed these functions within the CPA Contracting Activity which was specifically

referenced in MAC's contract as the office responsible for procurement and contract administration through June 2004.

8. On 15 June 2003 the Program Review Board (PRB) was established by CPA Regulation Number 3 as a CPA entity:

The Board shall report directly to the Administrator of the CPA ("Administrator"). The Board shall carry out its responsibilities, as defined in this Regulation, in a manner consistent with the CPA's obligation to ensure that funds available to the CPA for providing relief to, and the recovery of Iraq are managed in a transparent manner and consistent with applicable law, for and on behalf of the Iraqi people. In addition, the Board shall, when and to the extent appropriate, consult the Iraqi interim administration referred to in paragraph 9 of Resolution 1483 (2003), and shall seek every opportunity to further the CPA's objective of gradually transferring to the Iraqi interim administration the responsibility of budgeting Iraq's financial resources. This Regulation establishes the procedures applicable to the Board's operations.

(Gov't mot., ex. 3, § 1; JSUMF ¶ 5) The membership of the PRB was comprised of eleven (11) voting members, including six (6) CPA officials and authorized representatives of:

Commander of Coalition Forces
Iraqi Ministry of Finance
United Kingdom
Australia
Chairman, Council for International Coordination;

and, nine (9) non-voting members, including three (3) CPA officials and authorized representatives of:

U.S. Office of Management and Budget
U.S. Office of the Secretary of Defense
International Monetary Fund
World Bank
U.N. Special Representative of the Secretary General for Iraq
International Advisory and Monitoring Board.

Further:

- a. When taking action on any matter directly relating to the disposition of funds appropriated by the U.S. Congress, the voting membership of the Board also shall include authorized representatives of the U.S. Department of Defense, U.S. Department of Treasury and U.S. Department of State. With approval of the Administrator, a CPA Director who serves as a voting member may serve concurrently as an authorized representative of the U.S. Departments of Defense, Treasury or State.
- b. The authorized representatives of the Iraqi Ministry of Finance, United Kingdom, Australia and Chairman, Council for International Coordination, who otherwise serve as voting members of the Board, shall serve as nonvoting members when the Board is taking actions as described in subsection 4(1)(a), above.

(Gov't mot., ex. 3, § 4; *see also* app. reply, ex. 3 at CRS-22-24)

In proposing funding plans for the relief and recovery of Iraq, the [PRB] shall be responsible for recommending disbursements of:

- a. Funds appropriated for such purposes by the U.S. Congress;²
- b. Iraqi [vested funds];
- c. Iraqi state- or regime-owned cash, funds, realizable securities, or other state- or regime-owned movable property seized in Iraq consistent with the laws and usages of war;

² Congress appropriated \$18.649 billion to President Bush specifically to support the reconstruction of Iraqi infrastructure (Pub. L. No. 108-106 [app. opp'n, ex. 2]) (JSUMF ¶¶ 30, 32; SOF ¶ 5).

d. The Development Fund for Iraq [DFI].³

(*Id.* § 6.3; JSUMF ¶¶ 5, 51)

9. Before a contract could be awarded using DFI funds:

[A] funding request from Iraqi Ministries had to be approved by the PRB, which recommended an allocation of funds to the CPA Administrator.... [O]nce the CPA Administrator approved the allocation, no approval was needed from the DoD or from the OMB.... Also, the management and accounting for the DFI Account did not involve the Army or its STANFINS system. Instead, the CPA's DFI Manager, appointed by Ambassador Bremer, was responsible for maintaining and updating the DFI Account records.

Contracts were awarded by CPA Contracting Officers in accordance with the allocations approved by the CPA Administrator. Then, invoices were submitted to the DFI Manager for approval. The DFI Manager determined the form of payment, whether wire transfer, check, or cash, and executed the disbursement.

DRC I, 376 F. Supp. 2d at 629. The PRB's recommendations to the CPA Administrator of allocations of funds to particular acquisitions were apparently in the form of numbered funding plans as referenced throughout the record here. It appears from the record before us that "PRB 695" was such a funding plan. (*See, e.g.*, R4, tabs 31, 33-34, 39) The parties have not disputed that funding plan "PRB 695" allocated DFI funds. Wire transfers were made upon the DFI Manager's instructions to the Federal Reserve Bank of New York. Cash or check payments were made from the Central Bank of Iraq. *DRC I*, 376 F. Supp. 2d at 629.

10. The CPA issued contracts obligating both Iraqi funds and government appropriated funds which had been contributed in support of the CPA (JSUMF ¶ 9). With respect to the CPA's contracting authority:

³ The Development Fund for Iraq (DFI) is a bank account created by the CPA and held by the Central Bank of Iraq at the Federal Reserve Bank of New York, pursuant to the Federal Reserve Bank's authority to maintain accounts of foreign central banks under 12 U.S.C. § 358(14)(e) (2006). *Laudes Corp. v. United States*, 84 Fed. Cl. 298, 302 (2008) ("*Laudes I*").

Given the exigencies and difficulties attendant to awarding contracts in a war zone, it is not surprising that aspects of U.S. government contracting procedures were integrated into the CPA's contracting procedures, including the use of U.S. government standard forms and contracting officers who were also employed by the United States and other Coalition countries. Nonetheless, early on, the CPA set out its own very explicit contracting procedures in the form of a Memorandum that were [sic] followed and incorporated into CPA contracts. *See* CPA Memo. No. 4.

Unless otherwise exempt, all contracts obligating ... DFI Funds, were required to be awarded through a competitive bidding process and authorized by a person appointed as a CPA "Contracting Officer." *See* CPA Memo. No. 4 (detailing CPA contracting procedures). To the extent practicable, the CPA was to confer the title and authority of a CPA Contracting Officer on officers already holding Coalition government contracting warrants. *See* CPA Memo. No. 4 § 4. **Yet, the holder of a Coalition government contracting warrant could not award a CPA contract unless the CPA Head of Contracting Authority or his or her designate explicitly conferred this authority on the officer.** *See id.*

...[M]any contracting requirements essentially similar to the competition, transparency, and accountability standards applicable to federally funded U.S. contracts were also set forth in Appendix B to CPA Memorandum No. 4, which provided the "Standard Terms and Conditions" for contracts in excess of \$5,000. Memorandum No. 4 further required that these standard terms be incorporated into each CPA contract....

DRC I, 376 F. Supp. 2d at 629-30 (emphasis added).

If CPA used Iraqi funds, then CPA Memorandum Number 4 applied.... If CPA used appropriated funds, it would seem reasonable for authority personnel to have followed the [FAR].... The former Administrator of the Office of Federal Procurement Policy (OFPP) has stated that "no rules [are] in

place for contracting by the CPA with U.S. appropriated funds.”

(App. reply, ex. 3 at CRS-22)

11. CPA Memorandum Number 4, “CONTRACT AND GRANT PROC[E]DURES APPLICABLE TO...THE DEVELOPMENT FUND FOR IRAQ,” was promulgated by the CPA Administrator on 20 August 2003. In Section 1, PURPOSE, the Memorandum provides that:

Iraqi Funds are not subject to the same laws and regulations that apply to funds provided to the [CPA] directly from coalitions [sic] governments....

(Gov’t mot., ex. 4 at 1-2, 13) Memorandum Number 4 included detailed contracting procedures for acquisitions obligating Iraqi funds, as well as procedures for the appointment and supervision of CPA contracting officers. The officials authorized to appoint CPA contracting officers included “Senior Iraqi Ministry Advisors, in coordination with the interim Iraqi Ministers.” Further, officials appointing CPA contracting officers were instructed to:

[C]onsider the training and experience of prospective appointees and shall, to the extent practicable, confer Contracting Officer authority on those officers already holding Coalition government contracting warrants and/or experience as contingency contracting officers or field ordering officers.

(Gov’t mot., ex. 4 at 5) Memorandum Number 4 also included the following appendices: APPENDIX A, CONTRACT FILE REQUIREMENTS; APPENDIX B, STANDARD TERMS AND CONDITIONS FOR SOLICITATIONS AND CONTRACTS IN EXCESS OF \$5,000; APPENDIX C, GUIDANCE FOR ISSUING GRANTS; and, APPENDIX D, FREQUENTLY ASKED QUESTIONS. (Gov’t mot., ex. 4 at 14-31; JSUMF ¶ 6) It is undisputed for purposes of the parties’ motions that CPA Memorandum Number 4 was neither referenced by nor incorporated into the IDIQ contract or any of the delivery orders or modifications now before us (JSUMF ¶ 22).

12. Memorandum Number 4, APPENDIX B, STANDARD TERMS AND CONDITIONS FOR SOLICITATIONS AND CONTRACTS IN EXCESS OF \$5,000, included the following:

16. **Disputes.** This contract is not subject to the Contract Disputes Act of 1978, as amended (41 U.S. Code, Sections 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the United States Federal Acquisition Regulation Clause 52.233-1, Disputes, which is incorporated herein by reference except that appeals from final decisions of a Contracting Officer may only be appealed to the U.S. Armed Services Board of Contract Appeals (ASBCA). The decision of the ASBCA shall be final. The contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

....

40. **Source of Funds.** The obligation under this contract is made with Iraqi Funds, as defined in CPA Memorandum Number 4, dated 19 August 2003. No funds, appropriated or other, of any Coalition country are or will be obligated under this contract.

(Gov't mot., ex. 4 at 20, 23; JSUMF ¶ 22)

13. Memorandum Number 4, APPENDIX D, provided:

What special rules apply for contracts with Iraqi Funds?

Obligations under contracts with Iraqi Funds will be satisfied only with Iraqi Funds. A special clause is included in the contract to put all parties on notice of this important issue.

....

“This contract/grant is entered into under the authority of the Administrator as head of the Coalition Provisional Authority (CPA), which is temporarily exercising governmental authority in Iraq pursuant to the law and usages of war and relevant United Nations Security Council Resolutions, including

Resolution 1483 (2003) (“Coalition”) and by
_____ (“Contractor”)

Coalition Provisional Authority: In order to clearly stat[e] the authority upon which the contract is being entered into, the clause set forth above must be included in each contract.

The CPA’s authority is of limited duration and will terminate upon the establishment of an internationally recognized, representative government of Iraq....

(Gov’t mot., ex. 4 at 30)

14. On 24 April 2004 indefinite delivery/indefinite quantity (IDIQ) commercial item Contract No. W914NS-04-D-0117 was awarded by the CPA to MAC⁴ for the delivery of specified General Motors vehicles in Iraq, for a not-to-exceed amount of \$122,213,569.00, subject to the availability of funds. The contract contemplated that vehicles would be supplied subject to individual delivery orders (DOs). The physical contract and subsequent delivery orders were printed on government Standard Form (SF) 1449. (JSUMF ¶¶ 15-17, 24, 65) Block 9 of the Solicitation identified “CPA – CONTRACTING ACTIVITY” in Baghdad, Iraq, as the entity the contract was “Issued By” (R4, tab 1) and the contract identified the same entity in Block 6 as “Issued By” and in Block 7 “Administered By” (R4, tab 2; app. supp. R4, tab 87). The only other party identified was MAC (*id.*).

15. The contract included FAR clause 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2003), which states at paragraph (d) that the contract was subject to the Contract Disputes Act of 1978 (CDA) and, at paragraph (g)(2), the Prompt Payment Act (31 U.S.C. § 3903) (JSUMF ¶¶ 21, 23). The contract, as awarded, also specifically provided that:

⁴ MAC is organized under the laws of the United Arab Emirates and operated in Iraq with support offices in Dubai. “MAC and its affiliated companies are engaged in the business of importing, distributing and retailing General Motors (“GM”) products. Since 2003, MAC has been the official distributor of GM products in Iraq...[and] has sold and delivered approximately 30,000 trucks and passenger vehicles into the Iraqi market.” MAC maintained inventories of “hundreds of vehicles to provide the flexibility to deliver vehicles into Iraq on short notice” and also provided parts, repair services and retrofitting of vehicles to meet the special needs of its customers. (App. opp’n at 9-10)

Contract Administration will be retained by the procuring contracting office of the CPA – Contracting Activity, Rm S106B, Republican Presidential Compound, Baghdad, Iraq APO AE 09335. In July 2004 contract administration will be transferred from the CPA to the Program Management Office (PMO), Baghdad, Iraq.

Invoices are to be submitted to the contracting officer for approval and submission to the DFAS Indianapolis-Vendor Pay Office in conjunction with the receiving report (DD Form 250).

Accounting and appropriation data will be cited on each individual delivery order.

(R4, tab 1 at 4; JSUMF ¶¶ 17, 19) The DFAS pay office referenced in the contract was later changed by contract modification to the U.S. Army Corps of Engineers (USACE) Finance Center in Tennessee (R4, tab 2; JSUMF ¶ 26). The identification of a paying office did not identify the source of funds from which payment was to be made. Payments under the contract were authorized to be made to MAC by electronic funds transfer (JSUMF ¶ 19).

16. Between 26 April 2004 and 5 January 2005 the CPA issued DO Nos. 1-12 and the Project and Contracting Office (PCO)⁵ issued DO Nos. 13-18 and 20 under the subject contract. DO Nos. 5 and 10 were cancelled. DO No. 19 was never signed by a contracting officer and was replaced by DO No. 21, issued by the Joint Contracting Command-Iraq Contracting Activity (JCC-I/A)⁵ after 5 January 2005. (R4, tabs 74, 75) It is undisputed that between 12 June 2004 and 6 June 2005 MAC delivered a total of 7,602 vehicles at a total modified contract price of \$125,600,751.00. It is further undisputed that all the delivered vehicles were inspected and received on behalf of either the CPA or the IIG by U.S. government personnel who completed a DD Form 250 for each delivery. (Gov't mot. at 9, 10; JSUMF ¶¶ 36-47, 67)

17. DO Nos. 8 and 9, both dated 16 June 2004, identified the CPA and MAC as the contracting parties (R4, tabs 29, 36; app. supp. R4, tabs 98, 99) and indicated in Block 25 of each DO that the accounting and appropriation data was "PRB 695" (JSUMF ¶¶ 5, 50, 58). The DOs also indicated in Block 18a that DFAS in Indiana was the paying office which was later changed by contract modification to the USACE Finance Center (R4, tab 2 at 14, tabs 29, 36; JSUMF ¶¶ 54, 60; SOF ¶ 15). All the rest of the DOs issued under this contract contained government appropriated fund cites in Block 25 which were

⁵ See SOF ¶ 23.

each comprised of 50 or more characters (R4, tabs 4-5, 8-9, 12, 15-16, 22, 25, 46, 49, 51, 55, 60, 70, 76, 80; app. supp. R4, tabs 111, 113). MAC submitted invoices under DO Nos. 8 and 9 as follows:

Invoice Date	Invoice #	DO #	Delivery Dates	Amount	Paid
8 Nov 2004	200400104	9	13 Sep – 6 Nov 2004	1,425,600.00	*
15 Nov 2004	200400103	8	13 Sep – 9 Nov 2004	432,000.00	*
20 Feb 2005	2005000023	8	4 Feb 2005	896,115.00	
20 Feb 2005	2005000029	9	4 Feb 2005	162,930.00	
20 Feb 2005	2005000038	8	4 Feb 2005	570,255.00	
20 Feb 2005	2005000041	9	5 Feb 2005	325,860.00	*
5 Apr 2005	2005000103	9	5 Apr 2005	14,400.00	*
2 May 2005	200500128	8	17 Apr 2005	1,447,295.00	
2 May 2005	2005000132	8	21 Apr 2005	1,089,728.00	
2 May 2005	2005000134	8	1 May 2005	17,027.00	
7 Jun 2005	2005000160	9	6 Jun 2005	761,150.00	

(R4, tabs 30, 37; app. supp. R4, tabs 119-120, 129, 135, 144, 147, 170, 183, 187, 189, 197; JSUMF ¶¶ 48-49, 56, 62-64) It is undisputed that MAC has received payments under DO Nos. 8 and 9 as shown by asterisks in the table above. It is also undisputed that the remaining balances of \$4,020,420.00 under DO No. 8 and \$924,080.00⁶ under DO No. 9 have not been paid. (Gov’t mot. at 10-11, 15-16; JSUMF ¶¶ 56, 63-64) The record provides documentation to indicate that MAC received payment under DO Nos. 8 and 9 by electronic funds transfer (EFT), but does not indicate what paying office made the payments, nor the source or type of the funds from which they were made (*see, e.g.*, app. supp. R4, tab 201).

18. On 8 June 2004, the United Nations Security Council adopted Resolution 1546 which provided that upon the CPA’s dissolution, DFI funds would be “disbursed solely at the discretion of the Government of Iraq” and “utilized...to satisfy outstanding obligations against the [DFI].... [On] 15 June 2004, Administrator Bremer notified the Federal Reserve Bank of New York that his authority over all Central Bank of Iraq accounts, including the DFI, would terminate as of 30 June 2004” and that authority would be assumed by the Governor of the Central Bank of Iraq. *Laudes I*, 84 Fed. Cl. at 302.

⁶ The parties have stipulated that MAC submitted six invoices under DO No. 9 (JSUMF ¶ 63) but the record contains only five and the total of the two shown as unpaid in the table above equals the remaining balance of \$924,080.00 that MAC seeks under DO No. 9.

19. On 15 June 2004 CPA Memorandum Number 15, “AMENDMENT TO [CPA] MEMORANDUM 4”, was promulgated:

Pursuant to my authority as Administrator of the [CPA], and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003) and 1546 (2004),

Noting that the [CPA] will dissolve on June 30, 2004 and that full governance authority of Iraq will transfer to the Iraqi Interim Government on that date,

Recognizing that on June 30, 2004 the [IIG] will assume control over all funds placed into the Development Fund for Iraq [DFI],

Acknowledging that the [CPA] has entered into contracts on behalf of the people of Iraq and that many of these contracts require continued performance and payment from the [DFI] after June 30, 2004,

Understanding that continued performance and payment of sums due under these contracts after June 30, 2004 are critical to the redevelopment and reconstruction of Iraq,

Desiring to amend [CPA] Memorandum 4, Contracts and Grant Procedures, ..., to provide for the orderly transition of authority over the [DFI] from the [CPA] to the [IIG],

I hereby promulgate the following:

Section 1
Powers of Iraqi Interim Government

Section 4 of [CPA] Memorandum 4, ... is amended to read as follows:

- (5) The Minister of Finance may designate the Director, Program Management Office of the Coalition Provisional Authority, or, following the transfer of full governance authority to the [IIG], the Chief of Mission of the United States Embassy, Baghdad and/or the

Commander of the Multi-National Force-I, with responsibility to monitor and confirm performance, certify and/or make payments, and otherwise administer contracts or grants funded with monies from the [DFI] that:

- (a) were entered into on or before June 30, 2004 by the [CPA] or the Multi-National Force-Iraq in accordance with United Nations Security Council Resolution 1483 and implementing regulations;
 - (b) require the continued performance and/or payment of money from the DFI past June 30, 2004; and
 - (c) are not the subject of a fully funded letter of credit intended to otherwise ensure performance under the contract or grant.
- (6) Designees appointed under paragraph 5 shall be required to coordinate their activities with relevant officials from the [IIG] and, consistent with U.N. Security Council Resolution 1546 (2004), to satisfy outstanding obligations against the [DFI]. Designees appointed under paragraph 5 also shall be required to assist in the termination, amendment, or novation of contracts or grants at the direction of the [IIG].
- (7) Designees appointed under paragraph 5 above shall account for all disbursements made on behalf of the [IIG] on the books of the sub-account entitled “Central Bank of Iraq/Development Fund for Iraq/Transition,” established pursuant to CPA Regulation 11, Amendments to [CPA] Regulation 2...and No. 3..., or otherwise, in accordance with internationally recognized auditing and accounting standards.
- (8) Designees appointed under paragraph 5 shall maintain records of all disbursements made on behalf of the [IIG] and shall submit reports of all expenditures, payments, and outflows as directed by the Ministry of Finance.
- (9) To facilitate the ability of Designees to carry out their responsibilities under this Memorandum, an account in

the Central Bank of Iraq, Rafidain Bank, and/or Rasheed Bank shall be established. Designees appointed under paragraph 5 shall have the authority to disburse funds from this account in order to carry out their duties so long as the procedures set forth in paragraphs 6, 7, and 8 are followed. The Minister of Finance may (at his discretion) transfer funds from the [DFI] into this account from time to time.

- (10) Designees appointed under paragraph 5 above may (if expressly authorized in writing by the [IIG]) further delegate all powers, privileges, rights, and authorities provided herein.

(Gov't mot., ex. 5; JSUMF ¶ 7)

20. Also on 15 June 2004, in compliance with Memorandum Number 15, the Iraqi Minister of Finance delegated to the director of the CPA PMO the authority to administer certain contracts funded with DFI funds and to disburse DFI funds. This delegation further specified that on 30 June 2004 the delegation was transferred to the Chief of Mission of the U.S. Embassy, Baghdad, and the Commander of the Multi-National Force-I. The delegation expired on 31 December 2004 but could be extended in writing.⁷ (Gov't mot., ex 6; JSUMF ¶ 27-28) The delegation of authority specified that only the IIG had the authority to “terminate, amend or novate any contracts” and that the PMO was “to exercise all powers and privileges...in coordination with relevant officials from the (IIG) and, consistent with [United Nations] Resolution 1546” (gov't mot., ex. 6).

21. On 18 June 2004 Administrator Bremer promulgated CPA Regulation Number 11 which stated that on 30 June 2004 “all responsibilities, duties, powers, and authorities granted to the Administrator and the Coalition Provisional Authority...shall transfer to the Prime Minister of the Iraqi Interim Government...” *Laudes I*, 84 Fed. Cl. at 304.

22. The CPA was dissolved 28 June 2004 and the United States established diplomatic relations with the Iraqi government (JSUMF ¶¶ 29-30). On that date all authority, responsibilities and obligations were transferred to “the Interim Government of Iraq, which governed Iraq until an elected Transitional Government of Iraq assumed this responsibility.” *DRC I*, 376 F. Supp. 2d at 623. By virtue of this transfer, the IIG assumed control over all DFI funds including those due and payable under contracts awarded prior to the transfer (JSUMF ¶¶ 7, 29). Administrator Bremer's 28 June 2004

⁷ The delegation was later extended to 31 December 2006 (gov't mot. at 12 n.10).

Order Number 100, TRANSITION OF LAWS, REGULATIONS, ORDERS, AND DIRECTIVES ISSUED BY THE COALITION PROVISIONAL AUTHORITY, provided:

[A]ppropriate revisions to laws, regulations, orders, memoranda, instructions and directives to the Iraqi Interim Government on 30 June 2004. The Order seeks to ensure that the Iraqi Interim Government and all subsequent Iraqi governments inherit full responsibility for these laws, regulations, orders, memoranda, instructions and directives so that their implementation after the transfer of full governing authority may reflect the expectations of the Iraqi people, as determined by a fully empowered and sovereign Iraqi Government. This is the final Order of the CPA, which will dissolve on 30 June 2004, after the transfer of full governing authority to the Iraqi Interim Government.

<http://www.iraqcoalition.org>. (See also SOF ¶ 2; app. reply at 16-17) Among the revisions contained in Order Number 100 was the following revision to Memorandum Number 4:

Appendix (B)(16) shall be rescinded in its entirety and replaced with the following: “Disputes. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the laws of Iraq. The contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.”

<http://www.iraqcoalition.org>.

23. On 28 June 2004, upon the dissolution of the CPA, the CPA PMO was succeeded by the Project and Contracting Office (PCO) which oversaw the expenditure of U.S. government funds appropriated to support the reconstruction of Iraqi infrastructure⁸ (JSUMF ¶¶ 30-31; gov’t reply, encl. 1). In October 2004 the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) was established to provide contracting support, led by the Army, for both the Iraqi reconstruction effort begun under the CPA and

⁸ MAC’s argument that its contract was “transitioned” to the PCO and not the IIG is factually incorrect (app. reply at 16). It was the *administration* of MAC’s contract that was delegated to the PCO by the IIG after 28 June 2004 (SOF ¶¶ 19-20).

continued by the IIG, as well as Operation Enduring Freedom military efforts in Iraq and Afghanistan (JSUMF ¶ 33). By virtue of the specific delegation of authority and responsibility from the Iraqi Minister of Finance (SOF ¶ 20), both the PCO and JCC-I/A provided contracting support of CPA contracts existing on 28 June 2004 and transferred to the IIG (JSUMF ¶¶ 28, 34-35, 89).

24. There is no dispute that, as of 13 August 2004, the Iraqi funds for DO Nos. 8 and 9 were certified as available (gov't mot. at 11). Nor is it disputed that on 27 November 2004 the Iraqi Minister of Interior acknowledged and concurred with a spreadsheet listing unpaid DFI liabilities and stated that “[c]ontinuing payments should be made against the outstanding liabilities...of \$396,459,846.31” (R4, tabs 31, 32). In 2006 and 2007 the Administrative Contracting Officer made numerous attempts to assist MAC in getting payment from the Iraqi government for DO Nos. 8 and 9 (R4, tabs 33-35, 40-41; JSUMF ¶¶ 68-71, 74-80). In January 2007 the Head of the Customer Services Unit of the Trade Bank of Iraq (TBI) advised the Procuring Contracting Officer that “the outstanding amounts [for DO Nos. 8 and 9 were] returned to the account of the DFI...and no new payment can be made on those files” (R4, tab 42; JSUMF ¶¶ 81-82). The record contains no explanation for the return of funds. The Procuring Contracting Officer resubmitted the payment packages for DO Nos. 8 and 9 on 26 March 2007 (R4, tab 42 at 260; JSUMF ¶¶ 83-85). It is undisputed that contracting personnel continued their attempts to assist MAC in getting payment from the DFI through at least 30 July 2007 (R4, tabs 35, 43; JSUMF ¶¶ 68-71, 74-87).

25. On 14 February 2008 MAC submitted a certified claim to the JCC-I/A for \$5,598,129.52 and requested a contracting officer's final decision (R4, tabs 82, 83; JSUMF ¶ 88). The claim included: (1) Prompt Payment Act (PPA) interest to which MAC claims it is entitled for allegedly late payments made under 16 delivery orders which obligated United States government appropriated funds; and, (2) the contract price of \$4,944,500, plus PPA interest, for vehicles delivered by MAC and for which it is undisputed that it has not been paid under two delivery orders (Nos. 8 and 9) that were funded with Iraqi funds.

26. On 22 February 2008 Contracting Officer Smith acknowledged MAC's certified claim and advised MAC:

Please consider this response as a “deemed denial” since I do not have authority to make a Contracting Officer Decision on this claim.

The undersigned does not dispute the facts that MAC...was not paid for services provided as documented in the claim.... Unfortunately, the US Government is not liable for the

balance owed. The contract was funded using Development Funds for Iraq (DFI) funds and the services provided were exclusively for the Government of Iraq. The U.S. Government acted only within the limits of the administrative authority given by the Government of Iraq, which expired on 31 December 2007.

The DFI funds belong to the Government of Iraq and the Ministry of Finance, in its capacity as the Iraqi authority in charge of DFI funds, is solely responsible for approving DFI funded invoices for payment. All outstanding MAC...invoices have been reviewed, and certified as valid invoices by the Commanding General (CG) of the Joint Contracting Command (JCCI) – Iraq. These invoices were turned over to the Ministry of Finance by 31 December 2007, the expiration date for JCCI-s [sic] administrative authority, with the recommendation that they be approved for payment. JCCI continues to advocate for payment of all outstanding DFI invoice packages.

Because JCCI does not have any administrative authority, I can no longer make any Contracting Officer related decisions on behalf of the Government of Iraq. I encourage you to contact the Ministry of Finance directly to obtain payment for the services provided.

(R4, tab 84; JSUMF ¶ 89)

27. On 18 March 2008 MAC appealed from the “deemed denial” (JSUMF ¶ 91). The appeal was docketed as ASBCA No. 56355.

DECISION

Both the government and MAC have asserted that the material facts as to DO Nos. 8 and 9 are undisputed and each party further asserts that it is entitled to partial summary judgment on the basis of those undisputed facts. The government’s motion is also styled, in the alternative, as a motion to dismiss for lack of subject matter jurisdiction. We must address the subject of our jurisdiction before we may consider the merits of the parties’ motions for partial summary judgment.

A. Jurisdiction

The government contends that we do not have jurisdiction to consider MAC's appeal as to the amounts sought by MAC under DO Nos. 8 and 9 because:

(i) the CPA is not an "executive agency" within the meaning of the Contract Disputes Act; (ii) the delivery orders originally issued by or transferred to the CPA became delivery orders between the Appellant and the sovereign government of Iraq (in accordance with the transition of authority from the CPA to the Iraqi Interim Government on June 28, 2004); and (iii) appropriated funds cannot be used to pay any judgment entered in connection with the delivery orders ... funded with Iraqi funds.

(Gov't mot. at 1-2)

1. CDA jurisdiction

The CDA is a statute waiving sovereign immunity and must be strictly construed. *Winter v. Floorpro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009). Appeals may be taken under the CDA only by contractors who are parties to contracts entered into by an "executive agency" of the U.S. government. 41 U.S.C. §§ 601, 602(a).

The contract at issue clearly identified on its face that the only contracting parties were the CPA and MAC (SOF ¶ 14). The delivery orders at issue in the parties' cross-motions for partial summary judgment, DO Nos. 8 and 9, also specifically identified the CPA as the only party with whom MAC contracted (SOF ¶ 17). There was no reference to the U.S. government as a contracting party in Block 6 of either the IDIQ contract or the individual DOs.

Nevertheless, MAC argues that the party with whom it contracted was an executive agency of the government. This is so, MAC contends, because the physical contract was on a U.S. government SF 1449, was signed by a U.S. government contracting officer, and obligated U.S. government appropriated funds (app. opp'n at 1; app. reply at 15).

First, contrary to MAC's arguments, this was not a standard DoD contract except in basic format. First and foremost, the contracting party identified in Block 6 was clearly the CPA and not the U.S. government or DoD. MAC is correct that the contract and DOs were printed on a SF 1449 cover page (R4, tab 4; JSUMF ¶ 65) and contract modifications were printed on SF 30 (R4, tabs 2, 3; JSUMF ¶ 66). The use of these

standard forms, however, cannot overcome the very obvious identification on the face of the documents that MAC and the CPA (not the U.S. government or DoD) were the only two contracting parties identified in the contract. To find otherwise would literally and incorrectly elevate form over substance. Likewise, the reference to a DFAS paying office in the contract and DO Nos. 8 and 9 is insufficient to convert the CPA contract into a government contract.⁹ MAC also argues that there was nothing to alert it that it was contracting with a party other than the government or that non-government funds would be used (app. opp'n at 2, 10-11). We are not persuaded that MAC: (1) did not notice, or should not have noticed, that on the cover page of the contract and all DOs issued under the contract the only identified contracting party was the CPA, not the U.S. government; (2) should not be held responsible for its apparent failure to perform due diligence in making sure it knew with whom it was contracting before executing a \$122,000,000 contract for thousands of vehicles being delivered into a war zone; and (3) can have received and performed DO Nos. 8 and 9 without investigating the fund cite of "PRB 695" on those delivery orders which was obviously very different from the fund cites of more than 50 characters on the rest of its DOs.

Second, while MAC is correct that the contract was signed by an individual who apparently possessed a U.S. government contracting officer's warrant (JSUMF ¶¶ 13-14), neither party has disputed that it was the possession of that warrant that qualified the person to also be designated as a CPA contracting officer with authority to contract on behalf of the CPA when Iraqi funds were obligated (SOF ¶¶ 10-11).

Third, the IDIQ contract contained no funding appropriation information at all, but stated only in Block 25, Accounting and Appropriation Data, "SUBJECT TO AVAILABILITY OF FUNDS." It did not specify the use of either U.S. government appropriated funds or Iraqi funds. As specified in the contract's express terms (SOF ¶ 15), only the individual DOs would contain specific funding information and the two DOs at issue in the motions presently before us contained funding information on their face in Block 25 referencing "PRB 695." This information was not hidden and was obviously very different from the funding information on the other 16 DOs that contained fund cites of approximately 50 characters (SOF ¶¶ 16, 17). MAC also argues that the government "switch[ed]" the appropriation code without informing it or "apparently assigned the wrong funding type" (app. opp'n at 1-3, 24-26). We find no evidence in the

⁹ MAC argues that the apparent inconsistency between the fund cite "PRB 695" reference to DFI funds and the identification of DFAS as the payment office, necessarily must be resolved by concluding that the "PRB 695" reference was in error (app. opp'n at 24-25). However, it is equally plausible that the inconsistency could be resolved by concluding that the DFAS payment office reference was in error. In either case, the inconsistency is not dispositive.

record to support these last two bare assertions and, indeed, MAC does not direct us to any.

We have previously held that extensive involvement by the U.S. government in the form of personnel, contract forms, oversight and even funding is insufficient to establish CDA jurisdiction where the government was not a party to the contract. *See, e.g., CDK Contracting Co.*, ASBCA No. 44997, 93-3 BCA ¶ 26,068. As the Court of Federal Claims held recently, and specifically as it relates to CPA contracts and U.S. government support of the CPA:

[E]ven extensive involvement by the United States in administering the... contract cannot overcome the lack of privity of contract between the [contractor] and [the government].... Even extensive, de facto control of the contract cannot create a contract where no privity exists.

Laudes Corp. v. United States, 86 Fed. Cl. 152, 165 (2009).

It is undisputed that the IDIQ contract between the CPA and MAC stated that the CDA was applicable (SOF ¶ 15). However, the mere invocation of the FAR 52.212-4(d) Disputes clause by non-government parties in their contracts is insufficient to invoke our jurisdiction under the CDA. “Only Congress can grant waivers of sovereign immunity,” *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1294 (Fed. Cir. 2002), and “[n]o agreement by non-USG parties can make the [CDA] applicable to their contracts,” *The Boeing Co.*, ASBCA No. 30404, 86-3 BCA ¶ 19,314 at 97,672.

A further significant weakness in MAC’s argument that its contract was with an executive agency of the U.S. government is that it completely ignores the well-documented participation and contributions of funding, personnel, equipment and services by the other coalition partners (SOF ¶¶ 1-2, 4-6, 8). MAC’s position ignores the United Nations Security Council’s recognition of the CPA as an international entity established under international law and the laws and usages of war (SOF ¶ 4). MAC’s position also ignores the important role of Iraqis and other coalition partners and nations in CPA contracting decisions and the funding of those contracts (SOF ¶¶ 4, 6, 8-9, 11).

On the basis of the foregoing, it is apparent to us that the CPA was an international entity and was not an entity of any of the member nations of the CPA, including the U.S. government. We find the district court’s logic in *DRC I* in this regard persuasive:

[T]here is no dispute that the CPA was not established by Congress. Instead, as described in a letter to the United Nations, the CPA was an entity created by the United States,

United Kingdom, and its Coalition partners “acting under existing command and control arrangements through the Commander of Coalition Forces.” Moreover, the United Nations recognized the CPA, not as an instrumentality of the United States, but as an entity through which the Coalition nations acted “as occupying powers under unified command.” UNSCR 1483. And while the substantial majority of the CPA staff was comprised of United States employees, a significant portion-13%-hailed from other Coalition partners [*see* SOF ¶ 6]. Thus, the CPA may also be described as an international body formed by the implicit, multilateral consent of its Coalition partners, which would not be subject to the specific laws of its member states,... Given the fluid nature of the conflict in Iraq and the challenges of establishing a new government in a war zone, it is not surprising that the organization of the CPA appears at times to have been ad hoc and to have relied heavily on the resources of its largest contributing member. Thus it would seem that, like NATO or any other international organization created by the multilateral consent of multiple member nations, whether by treaty or otherwise, the CPA is not an instrumentality of each of its members [*sic*] states, distinctly subject to the laws of all of its members, but a wholly distinct entity that exercises power through a structure agreed to by its member states and that is subject to the laws of war and to its own laws and regulations.

DRC I, 376 F. Supp. 2d at 650. In *DRC I*, the district court did not need to decide whether the CPA was a U.S. government entity in order to rule on the contractor’s motion for summary judgment then before it. *Id.* However, it became necessary for the district court to decide the issue in *United States of America ex. rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 684 (E.D. Va. 2005) (“*DRC II*”), *rev’d in part on other grounds and remanded*, 562 F.3d 295 (4th Cir. 2009).

In short,...the deferred question of the CPA’s status can no longer be avoided. Fortunately, the issue was fully briefed and argued on summary judgment and was extensively discussed and analyzed in *DRC I*, which analysis is instructive....

...And, indeed, the result of that analysis is clear-although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control

required to qualify as an instrumentality of the U.S. government. *See Rainwater*, 356 U.S. at 592-94, 78 S. Ct. 946. In fact, the evidence clearly establishes that it was created through and governed by multinational consent. This result is as compelling now as it was on summary judgment.

DRC II, 444 F. Supp. 2d at 688-89. The district court in *DRC II* held further, on the basis that the CPA was not a government entity, that government employees who were detailed to the CPA were not working in their official capacity as employees or officers of the United States government for purposes of the presentment element of the False Claims Act. *Id.* at 689; *see also United States of America ex. rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 791-92 (“*DRC III*”), *aff’d*, 562 F.3d 295 (4th Cir. 2009). As discussed below, this second holding of *DRC II* was reversed on appeal.

MAC argues that the holdings of the District Court in *DRC I*, *DRC II* and *DRC III* are inapplicable to the situation before us because those decisions were reversed on appeal to the 4th Circuit Court of Appeals (app. opp’n at 8-9; app. reply at 14). However, the issues raised on appeal in the DRC cases did not include the district court’s holding as to the status of the CPA as an international entity and not a U.S. government entity. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 301 (4th Cir. 2009) (“*DRC IV*”). The Court of Appeals reversed and remanded the district court’s grant of judgment as a matter of law in *DRC II* on the basis that the district court was in error when it held that U.S. government employees, while detailed to the CPA, were not government employees or officers *for the limited purposes of presentment under the False Claims Act*.¹⁰ *Id.* at 306-08. However, the 4th Circuit Court of Appeals affirmed the district court’s grant of summary judgment in *DRC III*, a decision in which the district court specifically incorporated and quoted its holding in *DRC II* that “the CPA was an international entity, not a U.S. entity.” *DRC III*, 472 F. Supp. 2d at 791-92.

We find the U.S. government’s role in the CPA, as reflected in the record before us and in existing case law, to be entirely consistent with its role as a coalition partner

¹⁰ In its reply, MAC misstates the holding of the 4th Circuit to be that the contractor’s alleged false claims were presented to the U.S. government (app. reply at ii). However, the Court took great pains in its decision to explain that it based its holding on the specific language of various sections of the False Claims Act and that the Act required presentment *to an officer or employee* of the U.S. government. *DRC IV*, 562 F.3d at 305-08. On that basis, the Court held that, even while detailed to the CPA and acting on its behalf, government personnel were still officers or employees of the government *for the limited purposes of presentment under the False Claims Act*. *Id.* at 306-07.

who made very significant contributions of money, personnel and expertise.¹¹ The use by the government of its various agencies, including the Department of Defense and Department of State, among others, as part of the United States' contribution (SOF ¶ 6) is entirely consistent with its role as a coalition partner in the CPA. The government's appointment of the Army to have lead responsibility to provide support to the CPA in the areas of contract awards, administration and financial management is also entirely consistent with its role as a coalition partner. This conclusion is further supported by the express delegation of authority by the IIG for continued contract administration by the Army through the PMO, PCO and JCC-I/A after the dissolution of the CPA (SOF ¶¶ 19, 20, 23, 24).

The government did not become the CPA (nor did the CPA become the government) by virtue of the government's use and contribution of its resources in its role as a coalition partner. And we do not find it surprising, nor at all inappropriate, that the government would want U.S. government-led oversight of the significant contribution of appropriated funds it had made to the CPA. Further, the government's resources were not the only significant contributions made by coalition partners to the CPA. More than ten other coalition partners and nations (SOF ¶ 6) also contributed money, personnel and expertise. This is all consistent with the CPA's status as an international entity and consistent with the government's status as one of many coalition partners. To hold otherwise would be to ignore or nullify the significant contributions of the multi-national coalition partners other than the U.S. government and we decline to do so.

In our view, therefore, the CPA was an international entity and not a government entity. As a result, the CPA is not an executive agency for purposes of the CDA and there is no basis for jurisdiction to consider this appeal under the CDA. Further, because the U.S. government was not a party to either the IDIQ contract or DO Nos. 8 and 9, we need not address the arguments of the parties on the subjects of U.S. government sovereign acts, U.S. government sovereign immunity or the NAFI doctrine.

2. Jurisdiction under the contract or by directive.

In addition to jurisdiction under the CDA, our charter provides for jurisdiction:

(b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative,

¹¹ The fact that the government (DoD, Army, Department of State, etc.) paid the wages and salaries of the government personnel while they worked in support of the CPA (including Administrator Bremer) is entirely consistent with it making a contribution of those wages and salaries in its role as a coalition partner.

or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department or their authorized representative has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure....

DoD FAR Supp. Appx. A, 48 C.F.R. § 271, Appx. A (2007).¹²

We find no contract provisions (other than those referencing the CDA and addressed above) in either the IDIQ contract or DO Nos. 8 and 9, nor have the parties directed us to any, which would meet the requirements of our charter and provide us with jurisdiction over any contract disputes between the CPA and MAC, *regardless of the type of funding used* in individual DOs. Likewise, neither party has directed us to any directive, as defined in our charter, which provides for our jurisdiction over contract disputes between the CPA and MAC.

While neither party has directed us to any contract provision or directive providing for our jurisdiction to consider contract disputes (other than references to the CDA already addressed above), both devote portions of their various filings to CPA Memorandum Number 4 (SOF ¶¶ 10-13) and passing references to CPA Order 100 (SOF ¶ 22) (gov't mot. at 4-5, 30-31; app. opp'n at 12-13; gov't reply at 11; app. reply at 15-17).

It is undisputed that CPA Memorandum Number 4 and its Appendix B, ¶ 16, Disputes clause stated that the CDA did not apply to contracts obligating Iraqi funds and also specifically provided that this Board had sole jurisdiction over any disputes arising under or relating to contracts obligating Iraqi funds (SOF ¶ 12). However, it is also undisputed that Memorandum Number 4 was not incorporated into either the IDIQ contract or DO Nos. 8 and 9 (JSUMF ¶ 22; SOF ¶ 11). The parties have not raised the issue of whether CPA Memorandum Number 4 must be read into the contract and/or DO Nos. 8 and 9 by operation of law as necessary to CPA acquisitions involving Iraqi funds and we need not address this issue *sua sponte* because, even if Memorandum Number 4 had been incorporated into the contract or the subject of a directive under our charter, in the final analysis it would not change our decision here.

While Memorandum Number 4 purported to give this Board jurisdiction over disputes under CPA contracts obligating Iraqi funds as of 20 August 2003 (SOF ¶¶ 11-12), CPA Order 100, the last CPA order issued by Administrator Bremer

¹² The Board's previous charter, in effect at the time of contract award, was identical with respect to the sources of our jurisdiction.

(SOF ¶ 22), revoked that jurisdiction as of 28 June 2004 and directed sole jurisdiction over CPA contracts obligating Iraqi funds thereafter to the Iraqi courts.¹³

On June 28, 2004, Ambassador Bremer issued CPA Order Number 100 (“Order 100”) to facilitate the transfer of power from the CPA to the IIG on June 30, 2004.... Among other things, Order 100 amended CPA Memorandum 4 regarding contract procedures to replace any references to the CPA with the Iraqi Ministry of Finance, and any references to Iraqi Funds with Public Funds.... Order 100 also rescinded in its entirety the disputes clause for contracts in excess of \$5,000 contained in Appendix B and replaced it with the following:

Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the laws of Iraq.

Laudes I, 84 Fed. Cl. at 305. As a result of this series of events, even if Memorandum Number 4 had been in the contract and/or DOs or the subject of a valid directive under our charter, we would have been without jurisdiction again long before MAC delivered vehicles under DO Nos. 8 and 9 in September 2004 through June 2005, long before it presented invoices for payment from November 2004 through June 2005, and certainly long before MAC submitted its certified claim to the government on 14 February 2008 (SOF ¶¶ 20, 25).

We therefore have no jurisdiction under our charter to consider MAC’s appeal as it relates to DO Nos. 8 and 9. We need not consider the government’s further arguments as to lack of jurisdiction.

B. The Parties’ Motions for Partial Summary Judgment

As we have held that we do not have jurisdiction over the disputes under DO Nos. 8 and 9, we do not reach the merits of the parties’ motions for partial summary judgment.

¹³ As further explained below, it is unnecessary for us to consider whether Administrator Bremer had the authority to either grant jurisdiction to this Board or to later revoke jurisdiction.

CONCLUSION

The government's motion to dismiss for lack of subject matter jurisdiction is granted as to the portion of MAC's appeal that pertains to DO Nos. 8 and 9.

Dated: 29 October 2010

DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56355, Appeal of MAC International FZE, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals