

*Draft & never signed*



**DATED AS OF 26<sup>th</sup> JULY 2003**

**MANAGEMENT AND OPERATIONAL AGREEMENT**

**The General Company For Port Of Iraq  
(The Iraq Port Authorities)**

**And**

**Maersk Iraq Ltd.**

**Relating to**

**Khor - Al Zubayr Port**



**THIS AGREEMENT** is made this 23rd July 2003

**BY AND BETWEEN: -**

- (1) The General Company For Port Of Iraq, (The Iraq Port Authorities), an Iraqi governmental statutory authority (hereinafter referred to as "IPA") and;
- (2) Maersk Iraq Ltd. a company being incorporated in Iraq under the authority of CPA-Southern Region (hereinafter referred to as the "Operating Company").

Hereinafter jointly referred to as the "Parties".

**WITNESSETH:**

**WHEREAS**, IPA as owner of the Khor Al Zubayr Port (hereinafter referred to as the "Facility") wishes to confirm the appointment of the Operating Company as the/an operator and manager of the Facility with responsibility for the day to day management and operation of the Facility under the authority of IPA, with the powers and subject to the limitations hereinafter described;

**NOW THEREFORE** in consideration of the mutual benefits to be derived and the terms, conditions, promises, representations, covenants and warranties herein contained, and intending to be legally bound hereby, the Parties agree as follows:

**ARTICLE 1: APPOINTMENT**

IPA hereby appoints the Operating Company to be solely responsible for the day to day management and operation of the Facility, in accordance with the terms and conditions of this Agreement and the Operating Company hereby accepts such appointment upon such terms and conditions.

**ARTICLE 2: DURATION OF AGREEMENT**

This Agreement shall take effect the 19<sup>th</sup> day of July 2003 ("Effective Date") and shall, unless terminated or extended, continue in force for a period of five (5) years (the "Contract Period") following the Effective Date.

**ARTICLE 3: PROVISIONS OF AGREEMENT**

- (A) In the performance of its duties and services hereunder, the Operating Company shall conform to and carry out the provisions of this Agreement to operate the Facility in accordance with Good International Practices. Subject to the provisions

herein, the Operating Company shall have all necessary powers to represent and act for IPA in connection with the proper performance of such duties and services.

(B) The Operating Company shall be responsible for managing the provision of the services set out below:

1. bill and collect all service fees, port tariffs and dues for use of the Facility and related services payable including marine related charges. In cases where marine charges are collected on behalf of IPA, i.e. charges not specifically related to the use of the Facility, the Operating Company shall pay IPA as stipulated below;
2. provide continued marketing and promotional activity for the Facility;
3. undertake new developments, including, without limitation, the upgrading of equipment and the implementation of any operating system design refinements as approved by IPA;
4. manage the operation of the Facility with a view to optimizing utilization, including; the establishment of an efficient management structure and workforce; the implementation of a scheduled maintenance program; and the implementation of special or extraordinary maintenance and repairs of the Facility, including infrastructure, as required;
5. be responsible for the staffing and training of personnel required to operate the Facility in accordance with this agreement;
6. be responsible for the maintenance of the cargo handling equipment, buildings, tractors, vehicles and other assets subject to other provisions in this Agreement;
7. maintain the Operating Company's books and records conforming to International Accounting Standards relating to the financial condition and results of operation of the Facility;
8. cooperate with local authorities and police as necessary;
9. cooperate with Customs officials who are performing their official functions pursuant to the Laws of Iraq and, in particular, observing all customs rules and regulations of Iraq;
10. disseminate necessary information and instructions to vessels and vessel operators making use of the Facility;
11. abide by the Laws of Iraq, including applicable port rules and regulations;

12. manage the Facility in an open and competitive commercial environment, such that no practices are adopted by the Operating Company or IPA which would discourage competition among potential users;
13. provide monthly financial reports to IPA setting forth the turnover in cargo volumes and income with respect of payments to IPA;
14. prepare an annual budget which shall include details on expected volumes of cargo, turnover and payments to IPA;
15. prepare periodic reports on current and projected berth usage and capacities of the Facility to assist IPA to base a decision on the timing and commitment of future phases of quay berths and Equipment procurement and installation as and when needed;
16. provide IPA with advice and recommendations on the layout of the Facility from the viewpoint of optimizing its utilization and profitability;
17. ensure that the Facility is operated in a manner as to minimize the risks of injury, death, loss or damage to 3<sup>rd</sup> parties, IPA and the Operating Company;
18. arrange the necessary office facilities and other supporting functions to ensure the running of the Facility in accordance with the provision in this Agreement.
19. involve IPA in contract negotiations with customers as and when relevant;
20. arrange for all accounting and other legal or professional support in connection with the Facility's operation;
21. operate with appropriate procedures to minimize any adverse effect on the environment;

(C) IPA shall be responsible for managing the provisions of the following:

1. participate in the marketing and promotion of the Facility;
2. uninterrupted provision of all public utilities to the Facility hereunder:
  - a. sufficient power capacity;
  - b. data and telephone lines in sufficient number and capacity;
  - c. radio frequencies for radio voice and data communications;



- d. potable water;
- e. (sewage; Deleted from the Agreement)
- f. (drainage; Deleted from the Agreement)
- g. road connections;
- h. rail connections;

IPA will endeavor to provide the abovementioned items but IPA will not be held responsible for circumstances out of IPA's control such as if electricity, water, phone lines not being provided by the relevant bodies, electricity suppliers, water suppliers, phone company, etc.

IPA shall bill the Operating Company for consumable services at cost and the Operating Company shall pay accordingly. The Operating Company may charge the users of the Facility for the consumption of such services, e.g. electricity, water, telephones etc.;

3. hand over to the Operating Company at the commencement date of the Agreement as they are in their present condition:

- a. all existing port equipment (cranes, forklifts, tractors, chassis etc.);
- b. bollards;
- c. fenders;
- d. crane rails;
- e. crane cable recesses;
- f. lighting;
- g. reefer plugs;
- h. navigational aids;
- i. offices, warehouses, maintenance and repair facilities and other buildings;

- (D) The Operating Company shall not be held responsible for any payment or compensation the employees and the companies and their employees who have dealt with the port or IPA prior the date of this agreement.

IPA shall be responsible for the following during the duration of the Agreement:

1. approach channel, turning basin and near the berths dredging to maintain, at all times, an effective useable water depth of minimum 12 meters at MLW.
2. in the event that the Operating Company, at any point during the Contract Period, requires an approach channel depth or a turning basin depth or an alongside berth depth in excess of this depth, IPA will seek to accommodate this against proper payment from the Operating Company;

- (E) Notwithstanding the above, the Parties recognize that the Facility has not been operational for some time and that repairs may have to be carried out with respect to getting the basic infrastructure back to a working condition. The Operating Company agrees to undertake, arrange for and pay for repairs of such basic infrastructure required to operate the terminal up to a limit of USD one million (USD 1,000,000) in the event IPA is unable to arrange such within the terms of this Agreement.

Any additional investments in repairing existing infrastructure shall be borne by IPA.

- (F) All the quays, berths, warehouses, buildings, navigational aids, cranes, roads, rails, cargo handling systems and other facilities existing at the Facility at the commencement date shall continue to be owned by IPA throughout the duration of this Agreement and whereas the Operating Company is responsible for maintaining the facilities as stipulated in this Agreement, the Operating Company shall not be responsible for any damages or losses to such facilities caused by force majeure.

The Operating Company may bring in additional cargo handling equipment and other moveable assets. The Operating Company shall retain ownership of all such assets and shall be entitled to remove such assets upon the expiry of this Agreement. IPA shall not be responsible for any damages or losses for such equipment howsoever caused except as otherwise specified in this Agreement.

#### **ARTICLE 4: EXCLUSIVITY**

The Facility shall comprise all berths and all areas lying within the marked box in red on the illustration in Attachment 1. The exclusivity is limited to the confined area within the red box marked in Attachment 1, and IPA shall be allowed to plan and construct new port facilities in the vicinity but yet outside the red box marked in Attachment 1.

The Operating Company shall have the full and exclusive use of the Facility, however, shall allow IPA to make use of the berths for IPA operated vessels provided these do not carry out any commercial activities. The Operating Company will not be liable for any cost in this connection.

#### **ARTICLE 5:       REPORTING**

Supplemental to the reports referenced in Article 3 above, the Operating Company shall provide such other reports as IPA may from time to time reasonably require. IPA shall keep the Operating Company apprised of all policies, plans and decisions of IPA of relevance to the duties to be performed and services provided by the Operating Company hereunder.

#### **ARTICLE 6:       CONFIDENTIALITY**

Neither Party shall either during the period of or following the expiration or termination of this Agreement, except in the proper course of its duties hereunder, or except to the extent that the information is already in the public domain, or as may be required in any court or arbitral proceeding, divulge any information relating to the Facility or the business of the other Party to any person, firm or company whatsoever and shall use all reasonable endeavors to prevent the publication or disclosure of any information relating to the dealings, transactions or affairs of the other Party or the Facility obtained through the provision of its obligations hereunder. Notwithstanding the above, the Operating Company may – to companies within the A.P. Moller Group - divulge such information which is reasonably required.

#### **ARTICLE 7:       REMUNERATION OF IPA**

The Operating Company shall collect all monies from vessels and cargo using the Facility including vessel related charges as stipulated in the tariff. The Operating Company shall pay IPA the following royalty:

1.     for full containers handled over the quay IPA to receive 7% of the container handling charges as well as storage and auxiliary charges collected;

2. for vehicles IPA to receive 7% of the handling charges, as well as storage and auxiliary charges collected;
3. for bulk and break-bulk cargo IPA to receive 7% of the cargo handling charges, as well as storage and auxiliary charges collected;
4. for any services which are performed wholly by IPA (such as pilotage and tugs) the Operating Company shall pay IPA 95% of the charges collected by Operating Company;
5. for any fees (such as dues, taxes or similar outside the tariff) collected by the Operating Company on behalf of IPA, the Operating Company shall pay IPA 95% of the monies collected, as long as the operation/service takes place within the Facility;

The payment from the Operating Company to IPA shall be paid in USD. The Operating Company shall, by the 15<sup>th</sup> of each month, make monthly statements of the previous month income and the payments due to IPA. Such payments and fees shall be paid to IPA within 30 days of such statements. In case The Operating Company delay payments to IPA beyond 7 days, the Operating Company shall pay penalty of 5 % per month.

#### **ARTICLE 8:       TARIFF**

The Operating Company and IPA shall establish a tariff covering the use of the Facility. This tariff shall be compatible with the tariff applicable for Umm Qasr, however, shall be adjusted to reflect the differences in services and facilities provided. The tariff may be adjusted from time to time. The tariff shall be in the currency of USD and the invoicing and collection of fees and dues from the users of the Facility shall also be made in USD.

#### **ARTICLE 9:       DIVISION OF COSTS**

Within, and subject to, the provisions of this Agreement each Party shall be responsible for the following cost item:

(A) The Operating Company shall bear the following cost items:

1. all costs for labor, gate personnel, security, including office staff and blue collar staff, associated pension payments, sick leave and vacation;
2. all costs for fuel for the cargo handling equipment and vehicles;
3. all costs for utilities, telephone, postage, office cleaning and similar costs;
4. all costs for repair and maintenance of the Facility and all cargo handling equipment, cranes, reefer plugs and other equipment, subject to the provision below;

5. all costs for repair and maintenance of buildings, fences, lighting and other such infrastructure;
6. all costs for consultants hired by the Operating Company;
7. insurance costs for coverage as stipulated in this Agreement.
8. all other costs of maintenance, repair and operation that are not mentioned above and which is related to the Operating Company's scope of responsibility shall be born by the Operating Company.

(B) IPA shall bear the following cost items:

1. all maintenance and running cost of the waterside facilities such as navigational aids and maintenance dredging;
2. *all refurbishment cost of, and/or re-investment in, assets as mentioned in Article 3 above not handled by the Operating Company;*
3. *insurance cost for coverage as stipulated in this Agreement.*

Where otherwise specified in this Agreement, that a Party shall bear a cost or accept a liability, such shall remain applicable even if not specified in this Article.

#### **ARTICLE 10: RECORDS**

- (A) The Operating Company shall keep such records that are necessary to reflect material transactions and business conducted by the Operating Company in the performance of its duties and provision of services hereunder (including all data and information created, maintained and stored electronically or otherwise by way of computer) and such records shall be available for inspection by IPA or other authorized officers of IPA. Such records shall be preserved and maintained throughout the Contract Period hereof and records pertaining to a calendar year shall be kept for a period not less than five (5) years from said calendar year.
- (B) Upon the expiration or termination of this Agreement for whatever reason the Operating Company shall forthwith upon the request of IPA in writing deliver to IPA all documents, accounting records and any other records or papers (including all data and information created, maintained and stored electronically or otherwise by way of computer) which may be in its possession or control arising from the performance of its services hereunder and which relate to the business of IPA, or the Facility other than those records which also relate to its own affairs and which the Operating Company is required by Law to maintain (copies of which will be made available by the Operating Company to IPA as may be reasonably required from time to time).

#### **ARTICLE 11: SUBCONTRACTING**

The Operating Company may subcontract part of the services contained in this Agreement to a 3<sup>rd</sup> party, with the consent of IPA which shall not be unreasonably withheld.

## **ARTICLE 12: LABOR**

The Operating Company shall employ employees of IPA for the port operation. The Operating company will also employ experts for training, management or not exceeding 15 % of the entire workforce. As far as stevedores the Operating Company will endeavor to employ IPA staff and/or other Iraqi staff.

The Operating Company will pay for the salaries and all other direct related remuneration cost, including severance payment.

## **ARTICLE 13: INDEMNITY**

- (A) IPA will indemnify and hold harmless, and keep indemnified and hold harmless, the Operating Company and its agents, directors, officers, employees and independent contractors from and against any and all costs, claims, liabilities, damages, charges and expenses of whatsoever nature arising out of any claim made by any third party or any liability to any third party in connection with any act or omission of the Operating Company, its agents, directors, officers, employees or independent contractors under or in relation to this Agreement or the performance or exercise (or failure to perform or exercise) its rights and obligations hereunder. Notwithstanding the foregoing, IPA shall not be liable under this Article in respect of any matter which results from the willful default, fraud or dishonesty of any of the Operating Company, its agents, directors, officers, employees or independent contractors. PROVIDED THAT nothing in this Article shall be construed so as to limit the rights of IPA against the Operating Company in respect of any breach of this Agreement or in respect of any negligence on the part of the Operating Company.
- (B) In respect of any claim arising under any indemnity in favor of the Operating Company contained in this Agreement, the Operating Company shall:
1. as soon as reasonably possible give to IPA, in writing, notice of the claim, the circumstance or matter ("the Claim") against which the Operating Company is claiming to be indemnified and all details of the Claim from time to time in the actual knowledge or possession of the Operating Company; and
  2. where the Claim relates to a claim by any third party against the Operating Company, not without the prior written consent of IPA (which shall not be unreasonably withheld or delayed) admit liability or make any offer,

promise, compromise or settlement with a third party in respect of the Claim; and

3. where the Claim relates to a claim by any third party against the Operating Company, at the request of IPA and at IPA's cost, cooperate with IPA or its insurers, in the defense, settlement and/or counter claim of the third party's claim.

#### **ARTICLE 14: ASSIGNMENT**

Neither Party shall have the right to assign or otherwise transfer its rights, interests or obligations under this Agreement without the prior written consent of the other Party and an assignment or transfer in breach of this Article shall be of no effect and void. Without limiting its own obligations hereunder, and subject to and pursuant to Article 3(B) the Operating Company may engage subcontractors to carry out specialist services to support the Operating Company's obligations hereunder, where desirable or necessary, with the consent of IPA. Of Notwithstanding the above the Operating Company may assign this Agreement (including all rights and obligations) to one or more companies within the A.P. Moller - Maersk Group, with the consent of IPA.

The Operating Company may from time to time accept 3<sup>rd</sup> party partners in as part owners of the Maersk Iraq Ltd. (or another A.P. Moller – Maersk company to which Maersk Iraq Ltd. has assigned this Agreement in accordance with the above). However, such partner(s) may not hold more than 49% of the shares. The Operating Company shall inform IPA in writing of such changes in the owner structure of the Operating Company. All such above always in accordance with Iraqi law, and any such companies, 3<sup>rd</sup> party partners, or subcontractors which are not accepted by Iraqi law shall not be accepted.

#### **ARTICLE 15: TERMINATION**

The expiration or termination of this Agreement shall be without prejudice to the accrued rights and liabilities of the Parties in respect hereof as at the date of such expiration or termination or which may thereafter accrue in respect of any act or omission prior to such expiration or termination and shall be without prejudice to any provisions of this Agreement which are expressed to remain in force thereafter.

In case of privatization of ports in Iraq or as required by law, IPA may terminate this contract after its has been in effect for three (3) years, giving 6 months written notice and by paying the associated penalty. The penalty for terminating this Agreement shall be:

- a) terminated year 3: USD five (5) million
- b) terminated year 4: USD three (3) million

## **ARTICLE 16: FIRST RIGHT OF REFUSAL**

In the event that the Khor Al Zubayr, or part hereof, is privatized or the IPA assets of the Facility are privatized, it is agreed that the Operating Company shall have the first right of refusal to participate in such privatization and/or acquire such assets. In the event that the Operating Company acquire the assets under the privatization mentioned under Article 15, the conditions and penalties mentioned in Article 15 shall be null and void.

## **ARTICLE 17: EVENTS OF DEFAULT**

- (A) The following shall constitute Operating Company's Events of Default under this Agreement:
1. Abandonment by the Operating Company at any time during the Contract Period;
  2. A material adverse change in the financial condition of the Operating Company which affects its ability to perform all of its material obligations under this Agreement;
  3. Suspension by the Operating Company of payment on all or any class of its debts, or its announced intention to do so, or a moratorium is declared in respect of any of its indebtedness or the Operating Company is unable to or admits its inability to pay its debts as they fall due or a resolution is passed to wind up or liquidate the Operating Company whether involuntary or compulsory (other than for the purpose of reorganization or consolidation with reference to Article 14);
  4. Failure by the Operating Company to observe and perform any term or condition of this Agreement, including but not limited to, any breach of a representation, warranty or covenant contained herein.
- (B) The following shall constitute IPA's Events of Default under this Agreement:
1. Abandonment by IPA at any time during the Contract Period.
  2. Failure by IPA to observe or perform any term or condition of this Agreement, including but not limited to, any breach of a representation, warranty or covenant contained herein.
- (C) Upon the occurrence of any Event of Default (in this Agreement meaning an Operating Company Event of Default or a IPA Event of Default under Article 17(A) or (B)), the Party not in default as appropriate shall give written notice of



the Event of Default to the defaulting Party. Such notice shall set forth, in reasonable detail, the nature of the Event of Default and, where known and applicable, the steps necessary to cure such Event of Default. Following the giving of such notice of default, the Parties shall consult for a period of up to thirty (30) Days (or such longer period as they may agree) (except in relation to Articles 17(A)(1) or 17(B)(1) where there will be no time to cure the Event of Default) as to what steps shall be taken with a view to curing or mitigating the consequences of the relevant Event of Default having regard to all the circumstances. Failure to reach agreement on any Event of Default shall give both Party the right to refer the Defaulting Event(s) to arbitration as described under Article 23. Failure to reach an agreement on Events of Default under Articles 17 (A) (1) or 17 (B) (1) shall give rise to a right of termination by the non-defaulting Party.

#### **ARTICLE 18: INSURANCE OBLIGATIONS**

(A) IPA shall at its own cost, during the term of this agreement:

1. take out and maintain with insurers of international standing all such insurances and insure against such risks and for such sums as would normally be taken out by a prudent port owner. Such coverage shall include liability to vessels berthing at the terminal with a limit of not less than USD 500,000 per incident, liability to cargo to cover damages in accordance with the Haag Visby rules and general 3rd party liability of not less than USD 1 million per incident;
2. IPA may elect to self insure all infra- and superstructure of the Facility including berths, quays, cranes, warehouses, rails, buildings and all other such constructions that IPA owns;
3. provide evidence of currency of insurance coverage upon The Operating Company's request.

(B) The Operating Company shall at its own cost, during the term of this agreement:

1. take out and maintain with insurers of international standing all such insurances and insure against such risks and for such sums as would normally be taken out by a prudent terminal operator. Such coverage shall include liability to vessels berthing at the terminal with a limit of not less than USD 500,000 per incident, liability to cargo to cover damages in accordance with the Haag Visby rules and general 3rd party liability of not less than USD 1 million per incident;
2. take out and maintain coverage of its own equipment to the full value;

3. provide evidence of currency of insurance coverage upon The Operating Company's request.

#### **ARTICLE 19:      FORCE MAJEURE**

Neither Party shall be liable to the other Party for any failure or delay in the performance of any obligation herein due to events beyond its reasonable control, and events considered by law as Force Majeure.

#### **ARTICLE 20:      WAIVER**

In case one of the Parties do not execute his duty and the other Party do not call for the exercise of this or other duties initially, this will not mean that the other Party have waived it's right for having the duty or rectified or executed in the future.

No failure to exercise and no delay in exercising any right, power or privilege arising hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

If at any time the provisions of this Agreement are or become invalid, illegal or unenforceable in any respect under the law of any jurisdiction, neither the validity, legality nor enforceability of such provisions under the law of any other jurisdiction shall be in any way impaired thereby and such invalidity, illegality or unenforceability under the law of any jurisdiction shall not affect or impair the validity, legality or enforceability of other provisions hereof under the law of such jurisdiction or any other jurisdiction.

#### **ARTICLE 21:      AUDIT**

Upon reasonable notice to the Operating Company, IPA, at its expense, may audit the income of the Operating Company as well as payments of fees and expenses paid by the Operating Company to IPA, by an auditor of IPA's choice, and the Operating Company will cooperate with all such audits and provide to the auditors such supports and other relevant documents requested by them.

#### **ARTICLE 22:      NOTICES**

Any notice, request or demand will be in writing in the English language and considered given:

- a)      when delivered in person or by messenger, or

- b) seven (7) days after being sent by an internationally recognized express courier addressed as follows (or to such other address and contact details as may be notified from one Party to the other from time to time):

To IPA: The General Company for The Ports of  
Iraq.  
(Address) Maqil  
Basra  
Iraq

Attn: Director General  
Mr. Abdul Razzaq Qate'i Hassan

To the Operating Company: Maersk Iraq Ltd.  
(Address) c/o Maersk Kuwait Co. WLL  
Al Fares Commercial Building  
7<sup>th</sup> Fl. Ali Al Salim Street  
P.O. Box 29376, Safat 13154  
Kuwait

Attn: (b)(6)  
Country Manager

#### **ARTICLE 23: DISPUTES**

- (A) Any and all claims, disputes, controversies or differences between the Parties hereto arising out of or in relation to or in connection with this Agreement or any breach thereof which cannot satisfactorily be settled by negotiation among the Parties shall be referred to arbitration in London conducted pursuant to the *Rules of the International Chamber of Commerce* (the "ICC Rules").
- (B) The arbitration shall be conducted by a single arbitrator.
- (C) The costs of the arbitration shall be borne by the Parties in such manner as the arbitrator may determine.
- (D) The arbitrator shall not have authority to award punitive damages.
- (E) No arbitrator appointed pursuant to this Article shall be a national of the jurisdiction of either Party to the arbitration nor shall any such arbitrator be an employee, agent, consultant or former employee, agent or consultant of any such person.
- (F) The Parties hereby represent and warrant they can each respectively, validly and unconditionally consent to the arbitration agreement contained in this Article.

- (G) The award rendered by the arbitrator shall be final and conclusive on the Parties and shall be subject to forced execution in any court of competent jurisdiction.

**ARTICLE 24: ENTIRE AGREEMENT**

This Agreement together with attachments constitutes the entire agreement between the Parties relating to the subject matter thereof, superseding all prior agreements or undertakings, oral or written. Each of the Parties confirms that, in entering into this Agreement, it has not relied on any statement, warranty or other representation made or information supplied by or on behalf of the other.

**ARTICLE 25: GOVERNING LAW**

This Agreement shall be governed by and construed in accordance English law. At such time satisfactory Iraqi legislations is established the Parties may, subject to mutual agreement, amend this agreement to be subject to Iraqi law.

**ARTICLE 26: CLAUSE HEADINGS**

The clause headings in the Agreement are for convenience of reference only and shall not form part of this Agreement nor shall they constitute a priority of clauses.

**ARTICLE 27: LANGUAGE**

This Agreement shall be translated into the Arabic language, however such shall be for convenience only even though such document may be signed by the Parties. The Agreement in the English language shall be the governing agreement.

**ARTICLE 28: WARRANTY**

By signing this Agreement the Parties hereby warrant that the execution of this Agreement and the performance of their obligations hereunder do not contravene or conflict with the terms of any agreement to which they or either of them are a party.

**Article 29: MODIFICATION**

No Party can modify, change, or adjust this agreement with out the written consent of the other Party.

**IN WITNESS WHEREOF** this Agreement has been duly executed by the Parties as of the day and year first above written.

**SIGNED for and on behalf of Maersk Iraq Ltd.:**

\_\_\_\_\_

\_\_\_\_\_  
**Witnessed by**

\_\_\_\_\_  
**Name in print**

\_\_\_\_\_  
**Name in print**

\_\_\_\_\_  
**Title**

\_\_\_\_\_  
**Title**

**SIGNED for and on behalf of The Iraq Port Authorities:**

\_\_\_\_\_

\_\_\_\_\_  
**Witnessed by**

\_\_\_\_\_  
**Name in print**

\_\_\_\_\_  
**Name in print**

\_\_\_\_\_  
**Title**

\_\_\_\_\_  
**Title**

There is no money to pay for these future  
obligations in March.

H. R. 3289—31

TITLE IV—GENERAL PROVISIONS, THIS ACT

SEC. 4001. No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.

SEC. 4002. The amounts provided in this Act are designated by the Congress as an emergency requirement pursuant to section 502 of H. Con. Res. 95 (108th Congress).

SEC. 4003. For purposes of computing the amount of a payment for an eligible local educational agency under section 8003(a) of the Elementary and Secondary Education Act (20 U.S.C. 7703(a)) for school year 2003–2004, children enrolled in a school of such agency who would otherwise be eligible to be claimed for payment under section 8003(a)(1)(B) of such Act, but due to the deployment of both parents or legal guardians, or a parent or legal guardian having sole custody of such children, or due to the death of a military parent or legal guardian while on active duty (so long as such children reside on Federal property as described in section 8003(a)(1)(B)), are no longer eligible under such section, shall be considered as eligible students under such section, provided such students remain in average daily attendance at a school in the same local educational agency they attended prior to their change in eligibility status.

This Act may be cited as the “Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004”.

*Speaker of the House of Representatives.*

*Vice President of the United States and  
President of the Senate.*

(b)(6)

(GS-14)

**From:** (b)(6) (O-6)  
**Sent:** Monday, December 15, 2003 9:27 AM  
**To:** (b)(6) (GS-14)  
**Subject:** FW: IPA Contracting

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Wednesday, December 03, 2003 10:00 PM  
**To:** (b)(6) (O-6)  
**Cc:** (b)(6) (O-5); Castle, Edwin S. (SES-2 General Counsel)  
**Subject:** RE: IPA Contracting

COL (b)(6)

The answer to your questions concerning the Request for Proposals published by the Iraq Port Authority are as follows:

- Under Iraqi law, the Iraq Port Authority has the authority to publish an RFP for terminal operators who wish to invest in Iraqi ports. This authority, however, is subject to any guidance issued by the Minister of Transportation.
- The IPA cannot legally bind the future government of Iraq to a contract term of 10 years. Under Occupation Law, the Coalition Provisional Authority lacks the authority to bind the future government of Iraq. The interim Iraqi government draws its authority from the CPA. As such, the authority of the Iraqi Interim Ministries cannot exceed the authority of the CPA.
- The USAID contractor, SSA, has been operating the port. Its contract expires at the end of March 04 and is not likely to be extended. If a new contractor began performing this function, coordination with the current contractor would be advisable. Bechtel has also done about \$40 million of infrastructure work at Um Qasr. This work will be completed around the end of January. (This information courtesy of (b)(6) of USAID.)
- Under the laws and usages of war and CPA Order Number 1 and consistent with UN Security Council Resolutions, the Administrator of the CPA has the authority to direct that the Iraqi Port Authority withdraw or cancel the RFP.
- While it does not require specific approval of contracts, CPA Regulation 6 requires the Governing Council to coordinate on all matters involving the temporary governance of Iraq.
- The mandate that the IPA fund its own operations beginning in January 04 appears to have been a budget decision to discontinue payments to the IPA from the General Budget. During Coalition occupation, the CPA acts as the administrator of public buildings and is entitled to make use of them without making payment under the Hague Regulations, Article 55.

I understand from (b)(6) that he has not raised the issue with the Port Authority, but he recommends that the Port Authority's process be halted. This might be most easily accomplished through informal coordination with the Ministry of Transportation.

I hope this answers your questions to your satisfaction. Please let me know if I can be of further assistance.

12/15/2003

COL (b)(6)

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Tuesday, December 02, 2003 10:55 AM  
**To:** (b)(6) (O-6)  
**Subject:** RE: IPA Contracting

(b)(6) 1330 in Rm M234A works for me. Thanks. (b)(6)

COL (b)(6)  
Chief of Staff, DirOpsl

(b)(6)

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Tuesday, December 02, 2003 10:40 AM  
**To:** (b)(6) (O-6)  
**Subject:** RE: IPA Contracting

Sometime this afternoon would be fine. Do you have space? If so tell us where to come and when. Let's say after 1300. (b)(6)

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Tuesday, December 02, 2003 10:37 AM  
**To:** (b)(6) (O-6)  
**Subject:** RE: IPA Contracting

What time did you have in mind?

COL (b)(6)  
Chief of Staff, DirOpsl

(b)(6)

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Tuesday, December 02, 2003 8:24 AM  
**To:** (b)(6) (O-6)  
**Subject:** FW: IPA Contracting

(b)(6) I am working this issue, but it involves questions of Iraqi law and is somewhat complicated. We are also working on another issue concerning one of the ports. I would like to meet with you and several of my attorneys to discuss. Are you available today?

COL (b)(6)

-----Original Message-----

**From:** Castle, Edwin S. (SES-2 General Counsel)  
**Sent:** Monday, December 01, 2003 11:28 PM  
**To:** (b)(6) (O-6)

12/15/2003



**Cc:** (b)(6) - COL - G1  
**Subject:** FW: IPA Contracting

(b)(6) Here's the **Point of Contact** for the Port Authority contracting matter.  
(b)(6) Colonel (b)(6) is our contracting expert, and the action officer for this one. Many thanks, Scott

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Monday, December 01, 2003 4:55 PM  
**To:** Castle, Edwin S. (SES-2 General Counsel)  
**Subject:** IPA Contracting

**Sir: As discussed yesterday. Appreciate your review of the Iraq Port Authority contracting authorities. Standing by. Thanks. VR,** (b)(6)

COL (b)(6)  
Chief of Staff, DirOpsI

(b)(6)

12/15/2003

Discussion re John Goughan his letter 22<sup>nd</sup> MR  
12/11

IPB said they were very much worried by what they  
their terms.

IPB says Barts stole passport & gave it to Maerkl

"At the head of CPB South was Danish named OLSON &  
Rosenberg worked for OLSON. PAID TO COMING TO  
1000) it was reported Rosenberg worked for Maerkl  
- Goughan didn't talk to Rosenberg but others who  
talked to Rosenberg said Rosenberg denied  
INVOLVEMENT."

~~BARTS II~~

LTC told Goughan this happened.

LTC Nugie the CO of 40<sup>th</sup> Reg was uncomfortable  
with the Rosenberg signing the contract is  
a British officer but he was directed  
by a phone call from Rosenberg that CPB South  
approved the contract."

Goughan says speculation is LTC Nugie was still uncomfortable &  
had MAJORS sign.

Goughan says he never was asked for anything from 1000's

with SSF has competition & minutes earlier & only 100  
under SSF are port revenues go into port account  
FOR Port Authority & SSF only got a few hundred  
thousand that's all

\* Maerkl is getting 50% tariffs. & Maerkl was not competition but

The undecayed is American want to  
run all ports & John R is trying to  
throw a wrench into Marsh getting this

John R here until 22<sup>nd</sup>

(b)(6) (GS-14)

**From:** (b)(6) (GS-14)  
**Sent:** Wednesday, January 28, 2004 1:22 PM  
**To:** (b)(6) (O-6)  
**Subject:** RE: MAERSK

Col. my thoughts are as follows:

- o On the issue of sole source, if we send Maersk a letter simply saying that there is no binding agreement but don't invite them to come in and talk and negotiate a sole source then what? Presumably, Maersk would stop working and the port is in danger of not operating. If that is unacceptable and if contracts can get the requirements folks to say there is an urgent and compelling need for the services and Maersk is in the best position to provide the service since they are already there, then why couldn't they award a contract to Maersk at least until contracts can solicit and award a contract based on full and open competition. However, given that there are only 5 months until Iraq becomes sovereign I wonder if there is time to do other than a sole source for 5 months. That would be a question for contracts.
- o However, If contracts intends to award a contract using appropriated funds on a sole source basis, as you mentioned this morning, there would be possible congressional notification requirements depending upon the dollar value of the contract.
- o The way I read (b)(6) letter is that she is inviting Maersk to discuss entering a new contract not telling them to come in and talk about getting paid.
- o I would not advise her to send the letter unless she has the urgent and compelling justification for a sole source award, but under the FAR, an urgent and compelling justification could be prepared after the fact.
- o If (b)(6) can justify an urgent and compelling justification and no congressional notification is necessary, then I would still recommend some changes to the letter and I have provided them on the attached draft letter. In particular, there should be no mention of repudiation because there is no contract to repudiate.

Vr

(b)(6)

-----Original Message-----

**From:** (b)(6) (O-6)  
**Sent:** Tuesday, January 27, 2004 6:12 PM  
**To:** (b)(6) (GS-14)  
**Subject:** FW: MAERSK

(b)(6) My thoughts are:

Unless we have already justified sole source, we should not be talking with them about continuing.

Didn't we decide that we would need DFI or DOHA to pay them for any work that they have done? If

1/28/2004

so, I disfavor telling them to come in to talk about being paid.

I think we should put the ball back into their court and see what they do.

What do you think?

(b)(6)

-----Original Message-----

**From:** (b)(6) (GS-13)

**Sent:** Tuesday, January 27, 2004 5:11 PM

**To:** (b)(6) (O-6); (b)(6) (GS-14)

**Subject:** MAERSK

Hello

I am forwarding the attached letter for your review and comment.

Thank you in advance.

(b)(6)

Contracting/Agreements Officer  
CPA Contracting Activity  
Republican Presidential Compound  
Baghdad, Iraq  
APO AE 09335  
Cell (b)(6)  
Office (b)(6)

1/28/2004



سلطة الائتلاف المؤقتة  
Coalition Provisional  
Authority

January 27, 2004

Maersk Kuwait Company  
Attn: (b)(6) c/o Maersk Iraq Ltd.  
Ali Al Salen Street  
Building Al Fares Commercial Complex, 7<sup>th</sup> Floor  
Kuwait City

SUBJECT: Repudiation of Maersk Management and Operational Agreement Relating to Khor-  
Az Zubayr Port

Dear (b)(6)

This is to advise you that subject Agreement executed on 26 July 2003 by you (for Maersk) and the Coalition Forces, 40th Regiment Royal Artillery, is not binding as the a valid contract. As a result, the Agreement is hereby repudiated based on the following:

- The contract signatories did not have the authority to enter into that agreement on behalf of bind the Coalition Provisional Authority or the US Government. Further, as a contracting officer I am not ratifying this agreement.
- As a matter of law, the Coalition Provisional Authority (CPA) cannot bind the future sovereign government of Iraq. The terms included in the Agreement are not enforceable should the future sovereign government choose not to honor same.
- The contract does not comply with U.S. federal acquisition law.

As a result of the above, we would like very much to meet with you to discuss mutually agreeable terms and conditions appropriate for a new legally binding contract and allow you to submit a proposal to continue uninterrupted performance through 30 June 2004. We recognize both your status as a world class port operator and the effort and monies invested by your firm as a result of being a party to the invalid Agreement. As a result, we would like to settle this matter expeditiously and with as little inconvenience to you as is possible.

Request your response to the above as soon as possible. Questions regarding this letter may be directed to the undersigned, telephone (b)(6) or email (b)(6)

Sincerely,

(b)(6)

Contracting Officer



(b)(6) (GS-14)

---

**From:** (b)(6) (O-6)  
**Sent:** Tuesday, January 27, 2004 6:12 PM  
**To:** (b)(6) (GS-14)  
**Subject:** FW: MAERSK

(b)(6) My thoughts are:

Unless we have already justified sole source, we should not be talking with them about continuing.

Didn't we decide that we would need DFI or DOHA to pay them for any work that they have done? If so, I disfavor telling them to come in to talk about being paid.

I think we should put the ball back into their court and see what they do.

What do you think?

(b)(6)

-----Original Message-----

**From:** (b)(6) (GS-13)  
**Sent:** Tuesday, January 27, 2004 5:11 PM  
**To:** (b)(6) (O-6); (b)(6) (GS-14)  
**Subject:** MAERSK

Hello

I am forwarding the attached letter for your review and comment.

Thank you in advance.

(b)(6)

Contracting/Agreements Officer  
CPA Contracting Activity  
Republican Presidential Compound  
Baghdad, Iraq  
APQ AE 09335  
Cell (b)(6)  
Office (b)(6)

1/28/2004





(b)(6) (GS-14)

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**From:** (b)(6) (GS-13)  
**Sent:** Tuesday, January 27, 2004 5:11 PM  
**To:** (b)(6) (O-6); (b)(6) (GS-14)  
**Subject:** MAERSK

Hello  
I am forwarding the attached letter for your review and comment.

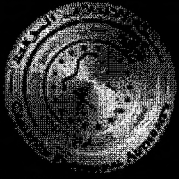
Thank you in advance.

(b)(6)

(b)(6)

Contracting/Agreements Officer  
CPA Contracting Activity  
Republican Presidential Compound  
Baghdad, Iraq  
APO AE 09335  
Cell (b)(6)  
Office (b)(6)

1/28/2004



سلطة الائتلاف المؤقتة  
Coalition Provisional  
Authority

January 27, 2004

Maersk Kuwait Company

Attn: (b)(6) c/o Maersk Iraq Ltd.

Ali Al Salen Street

Building Al Fares Commercial Complex, 7<sup>th</sup> Floor

Kuwait City

SUBJECT: Repudiation of Maersk Management and Operational Agreement Relating to Khor-Az Zubayr Port

Dear (b)(6)

*Two individuals purporting on behalf*  
This is to advise you that subject <sup>Document</sup> ~~Agreement~~ executed on 26 July 2003 by you (for Maersk) and the Coalition Forces, 40th Regiment Royal Artillery, ~~is not a valid contract~~. As a result, the Agreement is hereby repudiated based on the following: *REPRESENTS AN UNAUTHORIZED COMMITMENT AND IS NOT A VALID CONTRACT.*

- The contract signatories did not have the authority to bind the Coalition Provisional Authority or the US Government.
- As a matter of law, the Coalition Provisional Authority (CPA) cannot bind the future sovereign government of Iraq. The terms included in the Agreement are not enforceable should the future sovereign government choose not to honor same.
- The contract does not comply with U.S. federal acquisition law.

As a result of the above, we would like very much to meet with you to discuss mutually agreeable terms and conditions appropriate for a new legally binding contract and allow you to submit a proposal to continue uninterrupted performance through 30 June 2004. We recognize both your status as a world class port operator and the effort and monies invested by your firm as a result of being a party to the invalid Agreement. As a result, we would like to settle this matter expeditiously and with as little inconvenience to you as is possible.

Request your response to the above as soon as possible. Questions regarding this letter may be directed to the undersigned, telephone (b)(6) or email (b)(6)

Sincerely,

(b)(6)

Contracting Officer

(b)(6) (O-6)

**From:** (b)(6) (O-6)  
**Sent:** Saturday, December 27, 2003 7:40 PM  
**To:** (b)(6) (O-6)  
**Cc:** Castle, Scott, Mr, DoD OGC; (b)(6) (GS-14); Trent Darrell (SES-6)  
**Subject:** Maersk Unauthorized Commitment

(b)(6)

- The Maersk unauthorized commitment cannot be ratified if appropriated funds would be used as the funding source for the following reasons:
  - The contract contains an **unlimited indemnification** clause. Such clauses are considered to violate the **Anti-Deficiency Act**.
  - Although a matter for the contracting officer's discretion, indications are that the price is not fair and reasonable.
  - There remains a **concern** whether the individual who authorized the signing of the agreement had a financial conflict of interest.
  - The file also contains allegations that inappropriate gratuities (trips to Dubai & Oman) were given to Iraqi Port Authority employees in order to buy their acquiescence in this deal.
  - Note also that the contract has a five-year term. As a matter of law, neither the CPA nor the Interim Iraqi government can bind the future sovereign. This does not render the contract illegal, but renders the term unenforceable if a future sovereign chooses not to honor it.
  - The contract fails to comply with US federal acquisition law. For example, the contract disputes clause makes binding the decision of an English arbitrator and the contract states that it is to be construed under English law.
  - The contract purports to bind the Iraqi Port Authority to perform certain tasks and to bind the Iraqi Port Authority to conditions to which it did not agree. The paperwork is signed by officers purporting to act on behalf of Coalition forces.
- If you believe that the Iraqi people have received a benefit from work done by Maersk, you could submit a funding request to the Program Review Board (in accordance with CPA regulation 3) to pay Maersk using Iraqi funds the reasonable costs of the work it has completed. Under provision of the United Nations Security Council Resolution 1483, the Development Fund for Iraq "shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued

12/27/2003

disarmament and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.”

- As an additional consideration, the Principle Maritime Advisor to the Ministry of Transportation, Mr. (b)(6) has indicated that the Iraqis are very unhappy with this arrangement and have described it in terms of Coalition Forces having stolen their port. The political consequences should be considered as a matter of policy.
- The contractor may attempt to pursue a remedy at the Defense Office of Hearing and Appeals. Information about this process can be found at <http://www.dodgc.mil/dodgc/doha/claims>.

POC is Mr. (b)(6)

(b)(6)

COL, JA

CPA – Office of General Counsel

12/27/2003

(b)(6) (O-6)

**From:** (b)(6) (O-6)  
**Sent:** Monday, November 17, 2003 12:09 PM  
**To:** (b)(6) (USA)  
**Cc:** (b)(6) Gaughan John (SES); (b)(6) (O-6)  
**Subject:** RE: Maersk Report

(b)(6)

Have seen this. When, I was done in Basrah last time, we discussed and my understanding from Maj (b)(6) is that CPA South had chopped supposedly by (b)(6). However, he denied it when asked. It appears that shipping firm and IPA have not come into agreement. What are the alternatives being discussed? We can execute contract if someone has the funding.

Believe Maersk has grounds for a claim.

Next, informed today that there is a contract awarded by MoHC that is to take place at Khor Al-Zubayr that is being denied access by Maersk.. Can you please check it out.

(b)(6)

Will send you other message.

S (b)(6)

(b)(6)

COL, AC  
 Head of Contracting Activity-  
 Coalition Provisional Authority

-----Original Message-----

**From:** (b)(6)  
**Sent:** Monday, November 17, 2003 10:05 AM  
**To:** (b)(6) (O-6)  
**Cc:** (b)(6) Gaughan John (SES)  
**Subject:** Maersk Report

Sir,

I don't know if you have already seen this...very interesting reading.

V/r

(b)(6)

LT SC USNR  
 Ordering Officer  
 CPA South  
 Mobile: (b)(6)

11/17/2003



UNCLASSIFIED  
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ARMY

Headquarters  
20<sup>th</sup> Armoured Brigade  
OPERATION TELIC 3  
Allsopp Lines  
British Forces Post Office 647



Mobile: (b)(6)  
Email: (b)(6)

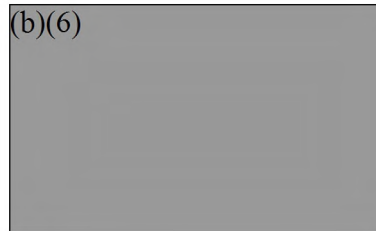
Date:  
15 Nov 03

File Reference:  
G3 Ops Sp/GST/Trade

See Distribution

**MINUTES OF THE MEETING – MAERSK IRAQ/20 ARMD BDE – 13 NOV 03, 1310 HRS**

Present: Managing Director Maersk Iraq  
Comd 20 Armd Bde  
CO 40 Fd RA  
SO1 Ops Sp, 20 Armd Bde  
POLAD, 20 Armd Bde  
CPA (S) GT – Trade & Industry



Item (a)	Issues Raised (b)	Action (c)
Opening Remarks	1. The Comd welcomed the MD of Maersk Iraq to the Basrah Palace and after Initial introductions invited him to give a description about his company and their involvement in the Iraqi Port of Al Zubair (AZB).	
Maersk - Action Points	2. The MD gave a background brief on Maersk Iraq and it's parent company, AP Moller/Maersk UK, highlighting that it is the largest shipbuilder in the UK and the third largest container port operator worldwide. He went on to confirm the timelines of Maersk involvement with AZB this year, as follows:  a. Apr 03 - Initial visit to AZB in Apr 03.  b. Early Jun 03 - Met with Comd 7 Armd Bde - Brig Bradshaw (CPA involved).  c. 5 days later - Surveyed AZB port.  d. Concurrent activity - CPA met IPA and discussed numerous contractual issues raised by IPA.  e. 26 Jul 03 - Coalition/IPA give Maersk the go ahead and the contract is signed.	

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Item	Issues Raised	Action
(a)	(b)	(c)
	3. The MD, using a hard copy of a Power Point presentation, gave a detailed briefing on the poor state of the infrastructure, prior to Maersk involvement, @ AZB. He then described the Maersk current level of commitment at that location, explaining that in the region of \$600k had been already invested, with a further \$1.4k allocated.	
	4. He explained that during the period of concurrent activity the CPA had tasked the Director IPA to negotiate the contract. However, in the month leading up to the 26 Jul the IPA continually changed and re-changed the contract <sup>1</sup> .	
	5. The MD highlighted that fact that AZB requires dredging, which needs to be completed urgently, and that they are expecting the first container ship in 2 weeks time. He mentioned that the US military, in the near future, are expected to have a major increase in container shipping requirements.	
	6. He described the current and potential local employment opportunities as being currently 100 LECs, with an immediate requirement to increase this to 250, plus a further 250 local service providers. In a number of weeks, this would increase to 650-700 and by contract year 2, the figure would be expected to be approximately 2000. He emphasised that the contract was economically sound.	
	7. The MD stated that Maersk would actively support the Business Advice Centre at the port of Umm Qasr in order to encourage investment in Iraq.	Maersk
	8. The MD gave an assurance that the founder of his company, Mr Moller, had advise him to make it clear that Maersk had no wish to profit from the War in Iraq and that the IPA would receive 60% of the profit made (whether this is gross or net was not established).	Maersk
Comd 20 Armd Bde – Action Points	9. Comd 20 Armd Bde stated that his intention was to keep Maersk "in the game", explaining that if they were to leave it would have a major impact on the Coalition's aim of revitalising the Iraqi economy by encouraging investment in the country from abroad. He said that CPA Baghdad must understand that if Maersk were to withdraw it would have a huge detrimental effect.	GT – Trade & Industry
	10. He went on to outline how he would like to see an inclusive way forward, understood by both the CPA and IPA, with the IPA having ownership of the task. He highlighted the fact that it was vital that all concerned pulled together in order to tie-up the loose ends of the existing contract. He requested that GT – Trade & Industry assist in the coordination of the task, with initial meetings between the CPA Baghdad Senior Maritime Adviser to the Ministry of Transport - Capt John Gaughan, the Governate Coordinator (GC) - Henry Hogger, and the CPA Senior Contracts Negotiator - John Nugee.	SO1 Ops Sp GT – Trade & Industry  CPA Baghdad/ CPA (S)
	11. SO1 Ops Sp suggested that in the first instance he should meet with the Director IPA, Mr Rafsat in order to bring the IPA into	SO1 Ops Sp GT – Trade &

**UNCLASSIFIED  
COMMERCIAL IN CONFIDENCE**

Item	Issues Raised	Action
(a)	(b)	(c)
	the fold and he asked that GT – Trade & Industry to set this up ASAP. (Afternote: GC CPA (S), Mr Hogger, has indicated that he is keen to meet Mr Rafsat as well.)	Industry GT – Trade & Industry
	12. Comd 20 Armd Bde stated that the MD, Maersk Iraq, must be kept in the picture at all times. He went on to emphasise that Maersk would be supported by the 20 Armd Bde and that the CPA (S) GC must be briefed to that effect.	SO1 Ops Sp GT – Trade & Industry
AOB	13. The MD Maersk Iraq made a final point of confirming that Ballcrest, the company currently responsible for the perimeter security of AZB, were pulling out of AZB and that Maersk would takeover this important function in a seamless transition.	Maersk
	14. With no further points the meeting was ended at 1405 hrs.	

Note 1. This may explain the deletion of the IPA signature box and insert of 40 Fd RA on the signed contract.

*(Original signed)*

(b)(6)

for SO1 Ops Sp

Distribution:

External:

Action:

Maersk Iraq  
CPA Baghdad – for attention Senior Maritime Advisor and Senior Contracts Negotiator  
CPA (S) - Governate Coordinator  
CPA (S) GT – Trade & Industry

Information:

HQ 20 Armd Bde – for attention Comd  
CPA (S) – Regional Coordinator (RC) – for attention Sir Hilary Synnott  
MND (SE) J3 Ops Sp  
CO 40 Fd RA  
CPA (S) – GC  
CPA (S) – Head of Trade & Industry  
CPA (S) – GT - COS

Internal:

Action:

SO1 Ops Sp

Information:

POLAD



# GT – TRADE & INDUSTRY

## CPA (SOUTH)

9 Nov 03

(b)(6)

### MAERSK/AL ZUBAIR (AZB) - SITUATION REPORT

#### BACKGROUND

1. The background to the Maersk/AZB situation as I currently believe it to be is as follows:
  - At some time in Jun 03 discussions took place between 40 Fd Regt RA, in particular a Maj Mark Pullen and a Maj from the attached US Army Civil Affairs unit, the Iraqi Port Authority (IPA) and the Danish Shipping firm, Maersk. The idea was to get the port of AZB up and running with investment from Maersk.
  - It was known that under the former regime the IPA had received illegal income from the smuggling of contraband and in particular, from Uday, Saddam's youngest son. In order to 'placate' the IPA it was suggested that a lump sum (figure not known) would be paid to the IPA by Maersk. However, at some point after this the director of the IPA (only known as RAFSAT) said that there were other 'interested parties' who would like some 'bakeesh' in the form of a 2 week holiday to Denmark. At this point Maersk almost withdrew from discussions.
  - However, the CO of 40 Fd Regt RA encouraged Maersk to continue discussions, and the company offered visits to Maersk in Dubai and Oman. A contract was drawn up (encl. 1), shown to CPA (South); to whom is unclear, but it was apparently endorsed and in Jul 03 the contract was signed by the 2 Majors on behalf of 7 Armd Bde (With Brig Bradshaw's approval) and Maersk.<sup>1</sup> However, it should be noted that the contract at encl.1 is between Maersk and the IPA. I have contacted Hans Peter at Maersk and asked him to email me a copy of the covering page and signatures of the actual signed contract.
  - However, the IPA subsequently complained about the contract to CPA – Baghdad who, it is believed, thought the contract to be illegal.<sup>2</sup>
  - Since Jul 03 Maersk have provided infrastructure support to AZB, commenced refurbishment of certain areas of the facility, and provided the external perimeter security. They have invested \$500k and provided \$1.0m worth of equipment.<sup>3</sup>
  - On the 8 Nov 03 I received a copy of an IPA Invitation to Tender (ITT) (encl. 2) requesting local and international companies to submit quotes for the investment in Iraqi ports, including AZB. As a result, Maersk are now threatening to withdraw all their facilities and infrastructure at AZB.
  - Why CPA – Baghdad consider the contract to be illegal is not clear, although there has been a certain amount of speculation.<sup>4</sup> (b)(6), the CPA – Baghdad Senior Maritime Advisor to the Ministry of Transport and whom is based in Umm Qasr, probably holds the answer to that question. I have his contact details, but as yet have been unable to make contact with him.

1. Source - CO 26 Fd BG.

2. Source - See encl. 3.

3. Source - (b)(6)

4. Source - Encl. 3.

## KEY ISSUES

2. The key issues are as follows:

- (b)(6) (CPA – South, Contracts) confirmed that CPA – South had not signed any contract with Maersk. The previous CPA – South COS, (b)(6) is a director of Maersk, and was fully aware of the risks of becoming too involved. However, at the time he was the only Subject Matter Expert (SME) available and he did participate in discussions at a professional level at some stage.<sup>5</sup> It is possible that he reviewed the contract, although this is only speculation.
- If Maersk withdraw, it could be embarrassing for the Coalition in a number of ways, not least due to potential litigation from Maersk. Also, any international tendering process leading to contract award could take as long as 18 months, and if Maersk withdraw during this period there would be a security vacuum, especially if 26 Fd were unable to fill it. This would leave the port vulnerable to the resumption of smuggling activities.

## THE WAY FORWARD

3. I concur with (b)(6) conclusion (see encl. 3.) in that (b)(6) and (b)(6) should broker a revised contract with Maersk at the earliest opportunity. It is inevitable that an element will have to include an IPA 'bakeesh' package. Maersk are not adverse to this, but they would want the CPA to endorse this in order to give it some form of legitimate status.<sup>6</sup>

4. I believe that there will be a meeting on Thursday 14 Nov 03 at 1300 hrs between Comd 20 Armd Bde and (b)(6) the regional director of Maersk. I think that it would be of benefit if I attended that meeting and in the meantime I will continue to try to make contact with J(b)(6) and RAFSAT, the director of the IPA.

(b)(6)

GT \_ Trade & Industry

(b)(6)

Enclosures:

1. Maersk/7 Armd Bde contract.
2. IPA ITT.
3. Email Alderson/Synnott dated 1636 hrs 31 Oct 03.

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<sup>5</sup> Source: (b)(6)  
<sup>6</sup> Source: (b)(6)



COALITION PROVISIONAL AUTHORITY  
BAGHDAD

INFO MEMO

October 30, 2003

FOR: Ambassador Darrell Trent

THROUGH: (b)(6)

FROM: (b)(6)

SUBJECT: The Way Forward on Khawr Az Zubayr (KAZ)

- I met at length last Sunday with (b)(6) Commanding Officer of the 40<sup>th</sup> Regiment (UK) encamped at the port complex in KAZ. It was a candid (and occasionally spirited) discussion of the past, current, and future situation related to the operating and management agreement in place between Coalition Forces and Maersk Kuwait for the Iraq Port Authority (IPA) port complex at KAZ.
- (b)(6) detailed the timeline of events which led up to the signing of the agreement as provided by Maersk (I do not have a copy of the document). Without rehashing the events, the one "disconnect" remains the actual review process and under whose authority the agreement was signed.
- (b)(6) indicated that as a military officer he did not proceed until he was given direction to do so by CPA South, that direction came in a phone call from CPA South and there is no hard copy of the direction. The issue of the prior legal review was not addressed at our meeting. It was agreed by both of us that whatever the history, it was imperative to seek a mutually agreeable "way forward."
- It is readily apparent that the lack of communications capabilities between Baghdad and Basrah have increased the difficulty of reconciling the differing approaches to how best to deal with the emerging Iraqi government and how best to resolve this problem. Additionally skepticism about the motivations of key individuals now involved in the controversy tends to color the discussion.



- A number if specified issues were addressed at the meeting:
  - a. The Iraq Ministry of Oil complaint that Maersk had refused to allow it to inspect and potentially operate an emergency fuel transfer facility at fuel berth's 10-12 (for which they were negotiating with the IPA) was rejected as a force protection issue due to health and safety fears raised by the close proximity of a 600 personnel tent camp.
  - b. The complaint by the Iraq Ministry of Finance that it was denied entry to the free trade zone adjacent to the port was refuted as a port security issue. It is still not clear to me how Maersk came to be involved in the free trade zone and what if any role it has to play in a business center being discussed by CPA South for the future.
- A discussion of the agreement revealed a number of points in dispute; the length of the contract, the unbalanced terms (under normal commercial practice); the ability of the parties to bind the IPA to conditions to which it had not agreed; the threat of legal action by Maersk if the agreement was found to be invalid.
- The sub-context of the points in dispute was the situation "on the ground" at the time of signing and the perceived authority of CPA South vis-a vis CPA Baghdad. This later point must be resolved lest it become a real distraction to the efforts of both to stabilize Iraq.
- As a potential way ahead I proposed and (b)(6) agreed that a "pro forma" agreement along accepted commercial lines be created (by disinterested third parties) and presented to the parties (Maersk and IPA) for their consideration, in the absence of movement elsewhere to resolve the current controversy. It was acknowledged that compromises by all would be needed to be successful with this approach.<sup>1</sup>
- There may well be other approaches to resolve the issue but neither I nor (b)(6) were able to devise one more acceptable than the other one proposed.
- Again, I seek your decision, advice, and council.

Prepared By: (b)(6), Principle Maritime Advisor

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Subsequent to our discussion, IPA Deputy Director General Mohammed indicated that Maersk and the IPA were "close" to agreement on a revised contract and that the IPA had issued a "RFP" for all ports. I do not know any details on either point.

(b)(6)

O5

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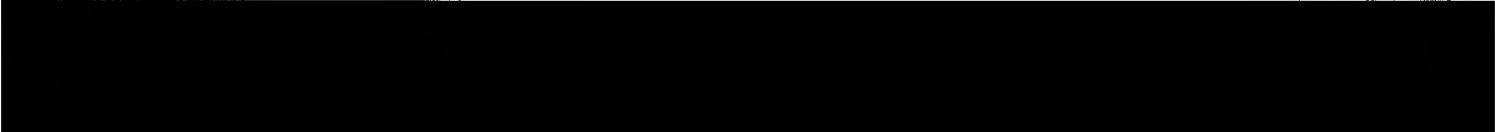
**From:** (b)(6) O5  
**Sent:** Friday, September 19, 2003 9:47 AM  
**To:** Willis Franklin K. (SES)  
**Subject:** Management and Operational Agreement

I have reviewed the M&O Agreement that you delivered to me yesterday. On its face, there is no indication that the persons signing as "Coalition Forces" had the ability to enter into this agreement on behalf of the Iraqi Port Authorities. As a result, in my opinion, the above agreement is invalid. If you wish to enter into a new agreement, I recommend that you coordinate with the contractor and take appropriate action.  
If you have further questions, please advise.

Regards,

(b)(6)

10/26/2003



(b)(6)

O5

**From:** (b)(6) (CIV)  
**Sent:** Thursday, September 18, 2003 5:14 PM  
**To:** (b)(6) O5  
**Subject:** FW: Maersk / AP Moller

-----Original Message-----

**From:** (b)(6) (CIV)  
**Sent:** Wednesday, September 17, 2003 11:22 PM  
**To:** (b)(6)  
**Subject:** FW: Maersk / AP Moller

(b)(6) and (b)(6)

Attached is a request by A.P. Maersk/Moller Group. They would like to schedule a meeting in Baghdad to discuss their interest in becoming involved with reconstruction efforts – particularly within the oil sector.

Would you please review and follow-up as appropriate, particularly with regard to scheduling meetings?

Thank you for your help.

(b)(6)

-----Original Message-----

**From:** (b)(6) CIV, OSD  
**Sent:** Tuesday, September 09, 2003 2:37 PM  
**To:** (b)(6) (CIV)  
**Subject:** FW: Maersk / AP Moller

(b)(6)

Resending, per your request. Let me know if this *doesn't* work. Or if I can do anything more for you....

(b)(6)



AP  
ler-Maersk.pdf (613)

-----Original Message-----

**From:** (b)(6) (CIV) (b)(6)  
**Sent:** Tuesday, September 09, 2003 2:12 AM  
**To:** (b)(6) CIV, OSD  
**Subject:** RE: Maersk / AP Moller

(b)(6)

Would you please resend with the attachments? For some reason they didn't make it to me.

Thx

(b)(6)

(b)(6)

Policy Advisor, Private Sector Development  
Coalition Provisional Authority (CPA)

(b)(6)

<http://cpa-iraq.org>

-----Original Message-----

**From:** (b)(6) CIV, OSD (b)(6)  
**Sent:** Tuesday, September 09, 2003 4:32 AM  
**To:** (b)(6) CIV, OSD; (b)(6) (CIV)  
**Cc:** (b)(6) CIV, OSD-POLICY  
**Subject:** RE: Maersk / AP Moller

(b)(6) your help on this would be much appreciated. (b)(6)

-----Original Message-----

**From:** (b)(6) CIV, OSD  
**Sent:** Monday, September 08, 2003 3:26 PM  
**To:** (b)(6) (CIV)  
**Cc:** (b)(6) CIV, OSD  
**Subject:** FW: Maersk / AP Moller

(b)(6)

We received the attached some time ago from Policy. We would like to support this, if at all possible.

Can you assist in getting this in to the right hands in CPA?

Please advise what the way forward is / what progress is made so that I can check the box with both (b)(6) and the policy folks.

Thanks,

(b)(6)

-----Original Message-----

**From:** (b)(6) CIV, OSD  
**Sent:** Tuesday, September 02, 2003 10:02 AM  
**To:** (b)(6) CIV, OSD  
**Subject:** Maersk / AP Moller

(b)(6)

Attached is the meeting request and introduction of Maersk - AP Moller.

Per our conversation with Policy and in light of the support we have received in the past, we would like the appropriate people in CPA to have this meeting.

I believe you wanted to forward this on to (b)(6) for his follow up.

Regards,

(b)(6)

**CPA Representative Office**  
Special Assistant  
Phone: (b)(6)

(b)(6)

<< File: AP Moller-Maersk.pdf >>

The A.P. Moller - Maersk Group is by far the largest Danish company with 60,000 employees worldwide and offices in more than 100 countries and is one of the largest shipping companies in the world. Besides shipping, the A.P. Moller - Maersk Group is engaged in exploration for and production of oil and gas, shipbuilding, aviation, industry, supermarkets and IT services. More information about the company is given in the enclosed, brief fact-sheet.

The company is interested in participating in the reconstruction efforts in Iraq, especially within the oil sector, and would like to meet with relevant officials within the CPA and the Iraqi Ministry of Oil. A request for meetings has initially been made by the Embassy through DoD.

The people from Maersk that would travel to Baghdad for the meetings are the following:

(b)(6) Executive Vice President, A.P. Moller  
(b)(6) Chief Executive Officer, West and Central Asia Area (Dubai)  
(b)(6) Owners Representative, Iraq (Kuwait)  
(b)(6) Senior Vice President, Maersk Oil

**A.P. Moller - Maersk Group provided shipping to the US forces free of charge in connection with the Gulf war and waived its contractual right to raise shipping fees in connection with the war in Iraq - thereby saving the US government millions of dollars.**





### Oil and Gas Exploration and Production

Maersk Oil og Gas AS (Maersk Oil) is an independent oil company in the A.P. Moller/Maersk Group. Maersk Oil was established in 1962. Maersk Oil is the operator of oil and gas distribution in Denmark, Qatar and Kazakhstan of some 700,000 barrels of oil equivalent per day. Exploration and development activities are ongoing in Denmark, Qatar, Algeria, Oman, the UK and a number of other countries. In Algeria, Maersk Oil participates with US oil company Anadarko in the 500,000 barrels per day Berkine Basin Development.

### Key Achievements

- In Denmark, production from tight and difficult reservoirs today amounts to 500,000 barrels of oil equivalent per day.
- In Qatar, production from similar tight reservoirs amounts to 200,000 barrels per day.
- In Qatar, commercial oil production was established with two years of commencing activities in the country.
- In Qatar and Denmark, some of the world's longest horizontal wells have been drilled by Maersk Oil.

### Expertise

- Strong position in advanced seismic processing.
- Long tradition for advanced integrated subsurface modeling.
- World leader in horizontal well drilling and completion.
- Masters advanced production enhancement technologies.
- Strength in fast track and step-wise developments.
- Advantages from low cost operation and low overheads.

### Role in the Reconstruction and Further Development of Iraq

On the basis of Maersk Oil's expertise and experience including its extensive activities in the Middle East, Maersk Oil is able and willing to offer the following as operator of projects with oil field rehabilitation and further development:

- Fast track rehabilitation and upgrade of production.
- Drilling of additional, high productivity, cost efficient wells, including advanced horizontal wells as applicable.
- Identification of scope for further development including enhanced recovery technology.
- Fast track and cost efficient implementation of new developments.
- Safe and cost efficient production and maintenance operations.
- Integration of Iraqis into the Maersk Oil organization, as well as Maersk Oil developing into a good citizen in Iraq.
- Platform construction, supply transportation, and oil tanker services provided by Maersk sister companies.



### Terminal Operations

APM Terminals is the world's third largest terminal operator with over 25 years of terminal operations experience. We have both the resources and experience needed to meet your demands and deliver outstanding service to our clients. Today, we have terminal operations at over 30 terminals on 5 continents. We currently operate 13 terminals in the United States including Pier 400 in Los Angeles – the largest terminal in the world. We continue to actively seek new opportunities in port and terminal development.

### IT Services

Maersk Data offers IT solutions including development of E-services and communication systems as well as IT infrastructure development, security, outsourcing, hosting, support and service.

### Key Achievements since 9/11/01

Maersk Sealand was the first carrier to support the Operation Enduring Freedom by establishing regular ocean service to Afghanistan.

August 6, 2002 – The Military Sealift Command awarded Maersk Line, Limited a five-year contract to operate eight Large Medium Speed Roll-on / Roll-off (LMSR) vessels.

- September 6, 2002 – Maersk Line, Limited purchased a 35,000 DWT tanker and registered it under U.S. flag as the *Maersk Rhode Island*

September 25, 2002 – Maersk Line, Limited announces the purchase of four modern G-Class container vessels and registers the vessels under U.S. flag over a four-month phase-in period. The vessels are deployed to provide direct U.S. flag service between the U.S. East Coast and the Middle East in support of growing military requirements.

November 8, 2002 – The U.S. Defense Logistics Agency awards a contract to Maersk and Danish Camp Supply to construct a container terminal. The terminal is currently operated and managed by Maersk Logistics.

- December 2002/April 2003 – Maersk Line, Limited participates in several classified Joint Planning Advisory Group meetings with the U.S. Military in support of military operations in the Middle East.  
February 6, 2003 – To support the U.S. military's urgent requirements, Maersk Line, Limited deploys the U.S. flag *Sealand Motivator* to provide feeder service between Middle East ports. This deployment, in conjunction with the previous deployment of four G-class container vessels, provides the only regularly scheduled full U.S. flag "fort-to-foxhole" service from the U.S. to Kuwait.

### Role in the Reconstruction and Further Development of Iraq

The A.P. Moller Group is interested in immediately establishing facilities and an organization in Iraq dedicated to serving in support of the reconstruction and rehabilitation of the country. Fully capitalizing on our expertise and experience, including our extensive presence and services already established in the theater, we stand ready to implement the full scope of services outlined in the above brief to include turnkey construction, operation and management as required.



## **A.P. Moller Group**

In 1904, the A.P. Moller Group began providing high quality ocean shipping services. Today, with nearly 100 years of experience, the A.P. Moller Group continues to provide world-class ocean shipping and related transportation services, as well as other services such as oil and gas exploration and production. We are a multi-billion dollar global organization with an international workforce that excels in the world marketplace, and particularly in developing areas. Our expertise and capabilities include:

- International ocean and intermodal cargo transportation
- Ocean terminal construction, operation and management  
Logistics services, including supply chain management, logistics solutions, freight forwarding, customs clearance, warehouse construction and management, and stand-alone and integrated e-distribution systems
- Trucking and trucking management
- Shipping container manufacturing, maintenance, and fleet management
- Oil and gas exploration and production (Maersk Oil)
- Software development for transportation and logistics applications

### **International Ocean and Intermodal Transportation**

The Maersk family of companies offers a full menu of international ocean and intermodal transportation services to every corner of the globe:

**Maersk Sealand** offers regularly scheduled "door-to-door" service through an extensive intermodal network consisting of dozens of terminals, hundreds of ships, nearly a million containers, and robust information systems to provide the necessary integration

**Maersk Line, Limited** – a U.S. citizen company with a special security arrangement – is the largest commercial operator of U.S. flag vessels, currently with a diverse fleet of 50 container, breakbulk, tanker, and other vessels that are deployed primarily to support U.S. military, humanitarian, and reconstruction operations and projects. Maersk Line, Limited participates in the Maritime Security Program (MSP), and has committed more intermodal capacity to MSP's related Voluntary Intermodal Sealift Agreement than any other MSP participant.

**Maersk Tankers** provides ocean transportation for liquid cargoes in bulk

**Maersk Bulk** provides ocean transportation for rolling stock and dry bulk cargoes

### **Logistics**

**Maersk Logistics** is a recognized leader in the international logistics market, offering customized, integrated logistics solutions on a global basis for over two decades. With over 200 offices in 70 countries, we offer supply chain management, warehousing and distribution, and sea and airfreight transport. Our proven track record, global facilities, and local representatives offer certainty of our care and commitment.

**DATED AS OF 26<sup>th</sup> JULY 2003**

**MANAGEMENT AND OPERATIONAL AGREEMENT**

**The General Company For Port Of Iraq  
(The Iraq Port Authorities)**

**And**

**Maersk Iraq Ltd.**

**Relating to**

**Khor - Al Zubayr Port**

**THIS AGREEMENT** is made this 23rd July 2003

**BY AND BETWEEN: -**

- (1) The General Company For Port Of Iraq, (The Iraq Port Authorities), an Iraqi governmental statutory authority (hereinafter referred to as "IPA") and;
- (2) Maersk Iraq Ltd. a company being incorporated in Iraq under the authority of CPA-Southern Region (hereinafter referred to as the "Operating Company").

Hereinafter jointly referred to as the "Parties".

**WITNESSETH:**

**WHEREAS**, IPA as owner of the Khor Al Zubayr Port (hereinafter referred to as the "Facility") wishes to confirm the appointment of the Operating Company as the/an operator and manager of the Facility with responsibility for the day to day management and operation of the Facility under the authority of IPA, with the powers and subject to the limitations hereinafter described;

**NOW THEREFORE** in consideration of the mutual benefits to be derived and the terms, conditions, promises, representations, covenants and warranties herein contained, and intending to be legally bound hereby, the Parties agree as follows:

**ARTICLE 1: APPOINTMENT**

IPA hereby appoints the Operating Company to be solely responsible for the day to day management and operation of the Facility, in accordance with the terms and conditions of this Agreement and the Operating Company hereby accepts such appointment upon such terms and conditions.

**ARTICLE 2: DURATION OF AGREEMENT**

This Agreement shall take effect the 19<sup>th</sup> day of July 2003 ("Effective Date") and shall, unless terminated or extended, continue in force for a period of five (5) years (the "Contract Period") following the Effective Date.

**ARTICLE 3: PROVISIONS OF AGREEMENT**

- (A) In the performance of its duties and services hereunder, the Operating Company shall conform to and carry out the provisions of this Agreement to operate the Facility in accordance with Good International Practices. Subject to the provisions

herein, the Operating Company shall have all necessary powers to represent and act for IPA in connection with the proper performance of such duties and services.

(B) The Operating Company shall be responsible for managing the provision of the services set out below:

1. bill and collect all service fees, port tariffs and dues for use of the Facility and related services payable including marine related charges. In cases where marine charges are collected on behalf of IPA, i.e. charges not specifically related to the use of the Facility, the Operating Company shall pay IPA as stipulated below;
2. provide continued marketing and promotional activity for the Facility;
3. undertake new developments, including, without limitation, the upgrading of equipment and the implementation of any operating system design refinements as approved by IPA;
4. manage the operation of the Facility with a view to optimizing utilization, including; the establishment of an efficient management structure and workforce; the implementation of a scheduled maintenance program; and the implementation of special or extraordinary maintenance and repairs of the Facility, including infrastructure, as required;
5. be responsible for the staffing and training of personnel required to operate the Facility in accordance with this agreement;
6. be responsible for the maintenance of the cargo handling equipment, buildings, tractors, vehicles and other assets subject to other provisions in this Agreement;
7. maintain the Operating Company's books and records conforming to International Accounting Standards relating to the financial condition and results of operation of the Facility;
8. cooperate with local authorities and police as necessary;
9. cooperate with Customs officials who are performing their official functions pursuant to the Laws of Iraq and, in particular, observing all customs rules and regulations of Iraq;
10. disseminate necessary information and instructions to vessels and vessel operators making use of the Facility;
11. abide by the Laws of Iraq, including applicable port rules and regulations;

12. manage the Facility in an open and competitive commercial environment, such that no practices are adopted by the Operating Company or IPA which would discourage competition among potential users;
13. provide monthly financial reports to IPA setting forth the turnover in cargo volumes and income with respect of payments to IPA;
14. prepare an annual budget which shall include details on expected volumes of cargo, turnover and payments to IPA;
15. prepare periodic reports on current and projected berth usage and capacities of the Facility to assist IPA to base a decision on the timing and commitment of future phases of quay berths and Equipment procurement and installation as and when needed;
16. provide IPA with advice and recommendations on the layout of the Facility from the viewpoint of optimizing its utilization and profitability;
17. ensure that the Facility is operated in a manner as to minimize the risks of injury, death, loss or damage to 3<sup>rd</sup> parties, IPA and the Operating Company;
18. arrange the necessary office facilities and other supporting functions to ensure the running of the Facility in accordance with the provision in this Agreement.
19. involve IPA in contract negotiations with customers as and when relevant;
20. arrange for all accounting and other legal or professional support in connection with the Facility's operation;
21. operate with appropriate procedures to minimize any adverse effect on the environment;

(C) IPA shall be responsible for managing the provisions of the following:

1. participate in the marketing and promotion of the Facility;
2. uninterrupted provision of all public utilities to the Facility hereunder:
  - a. sufficient power capacity;
  - b. data and telephone lines in sufficient number and capacity;
  - c. radio frequencies for radio voice and data communications;

- d. potable water;
- e. (sewage; Deleted from the Agreement)
- f. (drainage; Deleted from the Agreement)
- g. road connections;
- h. rail connections;

IPA will endeavor to provide the abovementioned items but IPA will not be held responsible for circumstances out of IPA's control such as if electricity, water, phone lines not being provided by the relevant bodies, electricity suppliers, water suppliers, phone company, etc.

IPA shall bill the Operating Company for consumable services at cost and the Operating Company shall pay accordingly. The Operating Company may charge the users of the Facility for the consumption of such services, e.g. electricity, water, telephones etc.;

3. hand over to the Operating Company at the commencement date of the Agreement as they are in their present condition:

- a. all existing port equipment (cranes, forklifts, tractors, chassis etc.);
- b. bollards;
- c. fenders;
- d. crane rails;
- e. crane cable recesses;
- f. lighting;
- g. reefer plugs;
- h. navigational aids;
- i. offices, warehouses, maintenance and repair facilities and other buildings;



(D) The Operating Company shall not be held responsible for any payment or compensation the employees and the companies and their employees who have dealt with the port or IPA prior the date of this agreement.

IPA shall be responsible for the following during the duration of the Agreement:

1. approach channel, turning basin and near the berths dredging to maintain, at all times, an effective useable water depth of minimum 12 meters at MLW.
2. in the event that the Operating Company, at any point during the Contract Period, requires an approach channel depth or a turning basin depth or an alongside berth depth in excess of this depth, IPA will seek to accommodate this against proper payment from the Operating Company;

(E) Notwithstanding the above, the Parties recognize that the Facility has not been operational for some time and that repairs may have to be carried out with respect to getting the basic infrastructure back to a working condition. The Operating Company agrees to undertake, arrange for and pay for repairs of such basic infrastructure required to operate the terminal up to a limit of USD one million (USD 1,000,000) in the event IPA is unable to arrange such within the terms of this Agreement.

Any additional investments in repairing existing infrastructure shall be borne by IPA.

(F) All the quays, berths, warehouses, buildings, navigational aids, cranes, roads, rails, cargo handling systems and other facilities existing at the Facility at the commencement date shall continue to be owned by IPA throughout the duration of this Agreement and whereas the Operating Company is responsible for maintaining the facilities as stipulated in this Agreement, the Operating Company shall not be responsible for any damages or losses to such facilities caused by force majeure.

The Operating Company may bring in additional cargo handling equipment and other moveable assets. The Operating Company shall retain ownership of all such assets and shall be entitled to remove such assets upon the expiry of this Agreement. IPA shall not be responsible for any damages or losses for such equipment howsoever caused except as otherwise specified in this Agreement.

#### **ARTICLE 4:           EXCLUSIVITY**

The Facility shall comprise all berths and all areas lying within the marked box in red on the illustration in Attachment 1. The exclusivity is limited to the confined area within the red box marked in Attachment 1, and IPA shall be allowed to plan and construct new port facilities in the vicinity but yet outside the red box marked in Attachment 1.

The Operating Company shall have the full and exclusive use of the Facility, however, shall allow IPA to make use of the berths for IPA operated vessels provided these do not carry out any commercial activities. The Operating Company will not be liable for any cost in this connection.

#### **ARTICLE 5:       REPORTING**

Supplemental to the reports referenced in Article 3 above, the Operating Company shall provide such other reports as IPA may from time to time reasonably require. IPA shall keep the Operating Company apprised of all policies, plans and decisions of IPA of relevance to the duties to be performed and services provided by the Operating Company hereunder.

#### **ARTICLE 6:       CONFIDENTIALITY**

Neither Party shall either during the period of or following the expiration or termination of this Agreement, except in the proper course of its duties hereunder, or except to the extent that the information is already in the public domain, or as may be required in any court or arbitral proceeding, divulge any information relating to the Facility or the business of the other Party to any person, firm or company whatsoever and shall use all reasonable endeavors to prevent the publication or disclosure of any information relating to the dealings, transactions or affairs of the other Party or the Facility obtained through the provision of its obligations hereunder. Notwithstanding the above, the Operating Company may – to companies within the A.P. Moller Group - divulge such information which is reasonably required.

#### **ARTICLE 7:       REMUNERATION OF IPA**

The Operating Company shall collect all monies from vessels and cargo using the Facility including vessel related charges as stipulated in the tariff. The Operating Company shall pay IPA the following royalty:

1.     for full containers handled over the quay IPA to receive 7% of the container handling charges as well as storage and auxiliary charges collected;

2. for vehicles IPA to receive 7% of the handling charges, as well as storage and auxiliary charges collected;
3. for bulk and break-bulk cargo IPA to receive 7% of the cargo handling charges, as well as storage and auxiliary charges collected;
4. for any services which are performed wholly by IPA (such as pilotage and tugs) the Operating Company shall pay IPA 95% of the charges collected by Operating Company;
5. for any fees (such as dues, taxes or similar outside the tariff) collected by the Operating Company on behalf of IPA, the Operating Company shall pay IPA 95% of the monies collected, as long as the operation/service takes place within the Facility;

The payment from the Operating Company to IPA shall be paid in USD. The Operating Company shall, by the 15<sup>th</sup> of each month, make monthly statements of the previous month income and the payments due to IPA. Such payments and fees shall be paid to IPA within 30 days of such statements. In case The Operating Company delay payments to IPA beyond 7 days, the Operating Company shall pay penalty of 5 % per month.

#### **ARTICLE 8:           TARIFF**

The Operating Company and IPA shall establish a tariff covering the use of the Facility. This tariff shall be compatible with the tariff applicable for Umm Qasr, however, shall be adjusted to reflect the differences in services and facilities provided. The tariff may be adjusted from time to time. The tariff shall be in the currency of USD and the invoicing and collection of fees and dues from the users of the Facility shall also be made in USD.

#### **ARTICLE 9:           DIVISION OF COSTS**

Within, and subject to, the provisions of this Agreement each Party shall be responsible for the following cost item:

(A) The Operating Company shall bear the following cost items:

1. all costs for labor, gate personnel, security, including office staff and blue collar staff, associated pension payments, sick leave and vacation;
2. all costs for fuel for the cargo handling equipment and vehicles;
3. all costs for utilities, telephone, postage, office cleaning and similar costs;
4. all costs for repair and maintenance of the Facility and all cargo handling equipment, cranes, reefer plugs and other equipment, subject to the provision below;

5. all costs for repair and maintenance of buildings, fences, lighting and other such infrastructure;
6. all costs for consultants hired by the Operating Company;
7. insurance costs for coverage as stipulated in this Agreement.
8. all other costs of maintenance, repair and operation that are not mentioned above and which is related to the Operating Company's scope of responsibility shall be born by the Operating Company.

(B) IPA shall bear the following cost items:

1. all maintenance and running cost of the waterside facilities such as navigational aids and maintenance dredging;
2. *all refurbishment cost of, and/or re-investment in, assets as mentioned in Article 3 above not handled by the Operating Company;*
3. *insurance cost for coverage as stipulated in this Agreement.*

Where otherwise specified in this Agreement, that a Party shall bear a cost or accept a liability, such shall remain applicable even if not specified in this Article.

#### **ARTICLE 10: RECORDS**

- (A) The Operating Company shall keep such records that are necessary to reflect material transactions and business conducted by the Operating Company in the performance of its duties and provision of services hereunder (including all data and information created, maintained and stored electronically or otherwise by way of computer) and such records shall be available for inspection by IPA or other authorized officers of IPA. Such records shall be preserved and maintained throughout the Contract Period hereof and records pertaining to a calendar year shall be kept for a period not less than five (5) years from said calendar year.
- (B) Upon the expiration or termination of this Agreement for whatever reason the Operating Company shall forthwith upon the request of IPA in writing deliver to IPA all documents, accounting records and any other records or papers (including all data and information created, maintained and stored electronically or otherwise by way of computer) which may be in its possession or control arising from the performance of its services hereunder and which relate to the business of IPA, or the Facility other than those records which also relate to its own affairs and which the Operating Company is required by Law to maintain (copies of which will be made available by the Operating Company to IPA as may be reasonably required from time to time).

#### **ARTICLE 11: SUBCONTRACTING**

The Operating Company may subcontract part of the services contained in this Agreement to a 3<sup>rd</sup> party, with the consent of IPA which shall not be unreasonably withheld.

## **ARTICLE 12:                   LABOR**

The Operating Company shall employ employees of IPA for the port operation. The Operating company will also employ experts for training, management or not exceeding 15 % of the entire workforce. As far as stevedores the Operating Company will endeavor to employ IPA staff and/or other Iraqi staff.

The Operating Company will pay for the salaries and all other direct related remuneration cost, including severance payment.

## **ARTICLE 13:                   INDEMNITY**

- (A) IPA will indemnify and hold harmless, and keep indemnified and hold harmless, the Operating Company and its agents, directors, officers, employees and independent contractors from and against any and all costs, claims, liabilities, damages, charges and expenses of whatsoever nature arising out of any claim made by any third party or any liability to any third party in connection with any act or omission of the Operating Company, its agents, directors, officers, employees or independent contractors under or in relation to this Agreement or the performance or exercise (or failure to perform or exercise) its rights and obligations hereunder. Notwithstanding the foregoing, IPA shall not be liable under this Article in respect of any matter which results from the willful default, fraud or dishonesty of any of the Operating Company, its agents, directors, officers, employees or independent contractors. PROVIDED THAT nothing in this Article shall be construed so as to limit the rights of IPA against the Operating Company in respect of any breach of this Agreement or in respect of any negligence on the part of the Operating Company.
- (B) In respect of any claim arising under any indemnity in favor of the Operating Company contained in this Agreement, the Operating Company shall:
1. as soon as reasonably possible give to IPA, in writing, notice of the claim, the circumstance or matter ("the Claim") against which the Operating Company is claiming to be indemnified and all details of the Claim from time to time in the actual knowledge or possession of the Operating Company; and
  2. where the Claim relates to a claim by any third party against the Operating Company, not without the prior written consent of IPA (which shall not be unreasonably withheld or delayed) admit liability or make any offer,

promise, compromise or settlement with a third party in respect of the Claim; and

3. where the Claim relates to a claim by any third party against the Operating Company, at the request of IPA and at IPA's cost, cooperate with IPA or its insurers, in the defense, settlement and/or counter claim of the third party's claim.

#### **ARTICLE 14: ASSIGNMENT**

Neither Party shall have the right to assign or otherwise transfer its rights, interests or obligations under this Agreement without the prior written consent of the other Party and an assignment or transfer in breach of this Article shall be of no effect and void. Without limiting its own obligations hereunder, and subject to and pursuant to Article 3(B) the Operating Company may engage subcontractors to carry out specialist services to support the Operating Company's obligations hereunder, where desirable or necessary, with the consent of IPA. Of Notwithstanding the above the Operating Company may assign this Agreement (including all rights and obligations) to one or more companies within the A.P. Moller - Maersk Group, with the consent of IPA.

The Operating Company may from time to time accept 3<sup>rd</sup> party partners in as part owners of the Maersk Iraq Ltd. (or another A.P. Moller – Maersk company to which Maersk Iraq Ltd. has assigned this Agreement in accordance with the above). However, such partner(s) may not hold more than 49% of the shares. The Operating Company shall inform IPA in writing of such changes in the owner structure of the Operating Company. All such above always in accordance with Iraqi law, and any such companies, 3<sup>rd</sup> party partners, or subcontractors which are not accepted by Iraqi law shall not be accepted.

#### **ARTICLE 15: TERMINATION**

The expiration or termination of this Agreement shall be without prejudice to the accrued rights and liabilities of the Parties in respect hereof as at the date of such expiration or termination or which may thereafter accrue in respect of any act or omission prior to such expiration or termination and shall be without prejudice to any provisions of this Agreement which are expressed to remain in force thereafter.

In case of privatization of ports in Iraq or as required by law, IPA may terminate this contract after its has been in effect for three (3) years, giving 6 months written notice and by paying the associated penalty. The penalty for terminating this Agreement shall be:

- a) terminated year 3: USD five (5) million
- b) terminated year 4: USD three (3) million

#### **ARTICLE 16: FIRST RIGHT OF REFUSAL**

In the event that the Khor Al Zubayr, or part hereof, is privatized or the IPA assets of the Facility are privatized, it is agreed that the Operating Company shall have the first right of refusal to participate in such privatization and/or acquire such assets. In the event that the Operating Company acquire the assets under the privatization mentioned under Article 15, the conditions and penalties mentioned in Article 15 shall be null and void.

#### **ARTICLE 17: EVENTS OF DEFAULT**

- (A) The following shall constitute Operating Company's Events of Default under this Agreement:
1. Abandonment by the Operating Company at any time during the Contract Period;
  2. A material adverse change in the financial condition of the Operating Company which affects its ability to perform all of its material obligations under this Agreement;
  3. Suspension by the Operating Company of payment on all or any class of its debts, or its announced intention to do so, or a moratorium is declared in respect of any of its indebtedness or the Operating Company is unable to or admits its inability to pay its debts as they fall due or a resolution is passed to wind up or liquidate the Operating Company whether involuntary or compulsory (other than for the purpose of reorganization or consolidation with reference to Article 14);
  4. Failure by the Operating Company to observe and perform any term or condition of this Agreement, including but not limited to, any breach of a representation, warranty or covenant contained herein.
- (B) The following shall constitute IPA's Events of Default under this Agreement:
1. Abandonment by IPA at any time during the Contract Period.
  2. Failure by IPA to observe or perform any term or condition of this Agreement, including but not limited to, any breach of a representation, warranty or covenant contained herein.
- (C) Upon the occurrence of any Event of Default (in this Agreement meaning an Operating Company Event of Default or a IPA Event of Default under Article 17(A) or (B)), the Party not in default as appropriate shall give written notice of

the Event of Default to the defaulting Party. Such notice shall set forth, in reasonable detail, the nature of the Event of Default and, where known and applicable, the steps necessary to cure such Event of Default. Following the giving of such notice of default, the Parties shall consult for a period of up to thirty (30) Days (or such longer period as they may agree) (except in relation to Articles 17(A)(1) or 17(B)(1) where there will be no time to cure the Event of Default) as to what steps shall be taken with a view to curing or mitigating the consequences of the relevant Event of Default having regard to all the circumstances. Failure to reach agreement on any Event of Default shall give both Party the right to refer the Defaulting Event(s) to arbitration as described under Article 23. Failure to reach an agreement on Events of Default under Articles 17 (A) (1) or 17 (B) (1) shall give rise to a right of termination by the non-defaulting Party.

#### **ARTICLE 18: INSURANCE OBLIGATIONS**

(A) IPA shall at its own cost, during the term of this agreement:

1. take out and maintain with insurers of international standing all such insurances and insure against such risks and for such sums as would normally be taken out by a prudent port owner. Such coverage shall include liability to vessels berthing at the terminal with a limit of not less than USD 500,000 per incident, liability to cargo to cover damages in accordance with the Haag Visby rules and general 3rd party liability of not less than USD 1 million per incident;
2. IPA may elect to self insure all infra- and superstructure of the Facility including berths, quays, cranes, warehouses, rails, buildings and all other such constructions that IPA owns;
3. provide evidence of currency of insurance coverage upon The Operating Company's request.

(B) The Operating Company shall at its own cost, during the term of this agreement:

1. take out and maintain with insurers of international standing all such insurances and insure against such risks and for such sums as would normally be taken out by a prudent terminal operator. Such coverage shall include liability to vessels berthing at the terminal with a limit of not less than USD 500,000 per incident, liability to cargo to cover damages in accordance with the Haag Visby rules and general 3rd party liability of not less than USD 1 million per incident;
2. take out and maintain coverage of its own equipment to the full value;



3. provide evidence of currency of insurance coverage upon The Operating Company's request.

#### **ARTICLE 19:       FORCE MAJEURE**

Neither Party shall be liable to the other Party for any failure or delay in the performance of any obligation herein due to events beyond its reasonable control, and events considered by law as Force Majeure.

#### **ARTICLE 20:       WAIVER**

In case one of the Parties do not execute his duty and the other Party do not call for the exercise of this or other duties initially, this will not mean that the other Party have waived it's right for having the duty or rectified or executed in the future.

No failure to exercise and no delay in exercising any right, power or privilege arising hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

If at any time the provisions of this Agreement are or become invalid, illegal or unenforceable in any respect under the law of any jurisdiction, neither the validity, legality nor enforceability of such provisions under the law of any other jurisdiction shall be in any way impaired thereby and such invalidity, illegality or unenforceability under the law of any jurisdiction shall not affect or impair the validity, legality or enforceability of other provisions hereof under the law of such jurisdiction or any other jurisdiction.

#### **ARTICLE 21:       AUDIT**

Upon reasonable notice to the Operating Company, IPA, at its expense, may audit the income of the Operating Company as well as payments of fees and expenses paid by the Operating Company to IPA, by an auditor of IPA's choice, and the Operating Company will cooperate with all such audits and provide to the auditors such supports and other relevant documents requested by them.

#### **ARTICLE 22:       NOTICES**

Any notice, request or demand will be in writing in the English language and considered given:

- a)     when delivered in person or by messenger, or

- b) seven (7) days after being sent by an internationally recognized express courier addressed as follows (or to such other address and contact details as may be notified from one Party to the other from time to time):

To IPA: The General Company for The Ports of  
Iraq.  
(Address) Maqil  
Basra  
Iraq

Attn: Director General  
Mr. Abdul Razzaq Qate'i Hassan

To the Operating Company: Maersk Iraq Ltd.  
(Address) c/o Maersk Kuwait Co. WLL  
Al Fares Commercial Building  
7<sup>th</sup> Fl. Ali Al Salim Street  
P.O. Box 29376, Safat 13154  
Kuwait

Attn: (b)(6)  
Country Manager

#### **ARTICLE 23: DISPUTES**

- (A) Any and all claims, disputes, controversies or differences between the Parties hereto arising out of or in relation to or in connection with this Agreement or any breach thereof which cannot satisfactorily be settled by negotiation among the Parties shall be referred to arbitration in London conducted pursuant to the *Rules of the International Chamber of Commerce* (the "ICC Rules").
- (B) The arbitration shall be conducted by a single arbitrator.
- (C) The costs of the arbitration shall be borne by the Parties in such manner as the arbitrator may determine.
- (D) The arbitrator shall not have authority to award punitive damages.
- (E) No arbitrator appointed pursuant to this Article shall be a national of the jurisdiction of either Party to the arbitration nor shall any such arbitrator be an employee, agent, consultant or former employee, agent or consultant of any such person.
- (F) The Parties hereby represent and warrant they can each respectively, validly and unconditionally consent to the arbitration agreement contained in this Article.

- (G) The award rendered by the arbitrator shall be final and conclusive on the Parties and shall be subject to forced execution in any court of competent jurisdiction.

**ARTICLE 24: ENTIRE AGREEMENT**

This Agreement together with attachments constitutes the entire agreement between the Parties relating to the subject matter thereof, superseding all prior agreements or undertakings, oral or written. Each of the Parties confirms that, in entering into this Agreement, it has not relied on any statement, warranty or other representation made or information supplied by or on behalf of the other.

**ARTICLE 25: GOVERNING LAW**

This Agreement shall be governed by and construed in accordance English law. At such time satisfactory Iraqi legislations is established the Parties may, subject to mutual agreement, amend this agreement to be subject to Iraqi law.

**ARTICLE 26: CLAUSE HEADINGS**

The clause headings in the Agreement are for convenience of reference only and shall not form part of this Agreement nor shall they constitute a priority of clauses.

**ARTICLE 27: LANGUAGE**

This Agreement shall be translated into the Arabic language, however such shall be for convenience only even though such document may be signed by the Parties. The Agreement in the English language shall be the governing agreement.

**ARTICLE 28: WARRANTY**

By signing this Agreement the Parties hereby warrant that the execution of this Agreement and the performance of their obligations hereunder do not contravene or conflict with the terms of any agreement to which they or either of them are a party.

**Article 29: MODIFICATION**

No Party can modify, change, or adjust this agreement with out the written consent of the other Party.

IN WITNESS WHEREOF this Agreement has been duly executed by the Parties as of the day and year first above written.

SIGNED for and on behalf of Maersk Iraq Ltd.:

(b)(6)



COALITION FORCES, 40 REGT RA

SIGNED for and on behalf of The Iraq Port Authorities:

(b)(6)



DRAFT

Col,

1. Subj: "Management and Operation Agreement The General Company For The Port of Iraq (The Iraq Port Authorities) and Maersk Iraq Ltd. Relating to Kohr-Al Zubaya Port"

2. Recommendation: I recommend tThe Maersk agreement:

- not be considered valid
- not be ratified pursuant to Federal Acquisition Regulation (FAR) section 1.602-3
- not be recommended for approval under FAR part 50 Extraordinary Contractual Actions

3. Background:

- Agreement calls for Maersk to be responsible for the day to day management and operation of the Port for 5 yr.
- Cover states it is an agreement between The Iraq Port Authority (IPA) and Maersk,
  - signature page was not signed by either the IPA or by a Coalition Provisional Authority Contracting Officer.
    - The typed signature line reads "signed for and on behalf of The Iraqi Port Authorities:" with the typed words "The Iraq Port Authorities" crossed through and replaced by "Coalition Forces, 40 Regt RA" and signed by a UK and US Major
- Issues raised by Principle Maritime Advisor:
  - length of the contract <
  - unbalanced terms (under normal commercial practice)
  - ability of the parties to bind the IPA to conditions to which it had not agreed
  - threat of legal action by Maersk if the agreement found invalid.

○ CPA attorney (b)(6) wrote:

Can you explain - does this equate to not fair & reasonable

not fair & reasonable

IPA says we are giving the port away

- no indication persons signing as "Coalition Forces" had ability to enter the agreement;
- opinion agreement is invalid;
- recommends if Mr. (b)(6) wishes to enter new agreement he coordinate with contractor and take appropriate action.
- Maersk/AL Zubnair(AZB)-Situation Report dtd 11/9/03 from GT-Trade & Industry CPA (South) (b)(6)
  - States IPA sought "bakeesh" in the form of 2 week holiday and lump sum in exchange for agreement and although there is no suggestion this was given, document states Maersk offered visits to Maersk in Dubai and Oman.
- Contracting Officer wrote:
  - There is a denial that CPA south chopped on the agreement
  - Believes Maersk has grounds for a claim
  - Principle Maritime Advisor told Counsel:
    - He was told CPA employee who worked for Maersk prior to coming to CPA called and authorized the agreement be signed. That employee is reportedly no longer with CPA.

#### 4. LEGAL ISSUES AND ANALYSIS:

- Issue: Is this a valid agreement?
  - ~~Suggested Answer:~~ No.
    - Rationale: Individuals signing on behalf of Coalition Forces, 340 Regt. RA were neither CPA contracting officers nor representatives of the IPA.
- Issue: Can the Head of the Contracting Authority (HCA) of the Coalition Provisional Authority (CPA) ratify this agreement?
  - ~~Suggested Answer:~~ No.

- **Rationale:** Federal Acquisition Regulations (FAR) 1.602-3 state an unauthorized commitment may be ratified only when:

- o ratifying official has authority to enter into a contractual commitment;
- o resulting contract would otherwise have been proper if made by an appropriate contracting officer;
- o contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
- o contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
- o Funds are available and were available at the time the unauthorized commitment was made
- o ratification is in accordance with any other limitations prescribed under agency procedures.

- **This is a 5 yr. agreement.** Since the CPA will cease to exist in less than a year, a Contracting Officer would have no authority to ratify an agreement that would bind the future Iraqi Government after the CPA ceases to exist within a year. Thus this agreement would not have been otherwise proper if made by an appropriate contracting officer.

- The individual who reportedly authorized the signing of the agreement from CPA south reportedly come from Maersk before joining CPA South. If this is true, it at the least raises concerns about the arms length nature of the transaction.

- The notes of the Principal Maritime Advisor indicate concern that the agreement contains unbalanced terms under normal commercial practices. If this is true, it indicates the prices are not fair and reasonable and thus the agreement should not be ratified.

- The agreement contains what amounts to an unlimited liability with regards to indemnifying Maersk as there is no clause which states the agreement is subject to the availability of funds. Thus I do not see how the Contracting Officer could not state that



Funds are available and were available at the time the unauthorized commitment was made.

- The Situation Report by (b)(6) indicating the IPA sought Bakeesh and Maersk offered trips in exchange for the agreement raise concerns whether the agreement would be considered "proper" and thus ratifiable under the FAR.
  - Even If FAR ratification procedures do not directly apply, for example if this were to be funded with other than appropriated funds, the agreement should nevertheless not be ratified based on the same reasoning that the agreement should not be ratified under the FAR.
- **Issue 3. Should the agreement be recommended for approval under FAR part 50 Extraordinary Contractual Actions**
    - **Suggested Answer: No.**
    - The FAR FAR)1.602-3 states that cases that are not ratifiable may be subject to resolution as recommended by the GAO under its claim procedure (GAO Policy and Procedure Manual For Guidance of Federal Agencies, title 4, Ch. 2) or as authorized by FAR part 50.
      - For FAR Part 50 **Extraordinary Contractual Actions FAR:**
        - Provides that under certain circumstances informal commitments may be formalized to permit payment to persons who have taken action without a formal contract: for example, when a person, responding to an agency official's written or oral instructions, and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor without formal contractual coverage. The FAR states formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they



will be treated fairly and paid expeditiously.

- Authority to act on FAR part 50 requests to obligate the government in excess of \$50,000 may not be delegated below the secretarial level.
- Limitations on exercise of authority under FAR Part 50 include:
  - No authority for providing for other than full and open competition for award of contract
  - No contract may be made except within the limits of the amounts appropriated and the statutory contract authorization.
- Because the Maersk agreement was entered into without full and Open competition and the ultimate amount of liability for a five year agreement is unknown I believe the above limits on the exercise of authority under FAR Part 50 would prevent formalizing the commitment. Further, although not addressed in Part 50, I do not believe a 5 year agreement could be formalized to bind the new Iraqi government which will take power reportedly much sooner than 5 years. Finally, unless appropriated funds are involved it is doubtful that FAR part 50 is even applicable in this instance.
- However, if Maersk submits a request under FAR part 50.303-1 the contracting officer would arguably process the request in accord with DFARS 250.303 and all of the above arguments against payment could be made.
- **Issue 4. Could Maersk succeed in having the agreement enforced by the GAO under its claim procedure (GAO Policy and Procedure Manual For Guidance of Federal Agencies, title 4, Ch. 2) as stated in the FAR?**

- **Suggested Answer:** No. Although the FAR still refers to the GAO claims settlement authority, Congress transferred claims settlement functions to the Office of Management and Budget which further delegated settlement authority for the Department of Defense and this authority now resides at the Claims Division at the Defense Office of Hearings Appeals. (DOHA) (see <http://www.defenselink.mil/dodgc/doha/claims>)

- When a government employee without contracting authority requests a vendor provide something DOHA reviews such claims under the theory of quantum meruit or quantum valebant. See. In Re: GettyOne Midwest, Inc., Claims Case No. 02092001 dtd Jan. 30, 2003. Four criteria for payment under this theory are:

- o Determination that the goods or services at issue would have been a permissible procurement had the proper procedures been followed;
- o U.S. government must have received and adopted a benefit;
- o Entity seeking payment must have acted in good faith
- o The amount to be paid must not exceed the reasonable value of the benefit received. See In Re: REDACTED, Claims Case No. 011211301 dtd May 28, 2003

- I believe Maersk may have difficulty succeeding before the DOHA on the basis that the goods or services would have been a permissible procurement. This is because the terms of the agreement are impermissible for reasons such as the agreement cannot be for five years binding the future Government of Iraqi and the government cannot accept unlimited liability under the indemnity provisions of the contract.

*Also price not  
fair  
reasonable*

**5. Documents Reviewed and Conversation.** The above recommendations are based upon review of the following summarized documents and summary of conversation with the John Gaughan, Principal Maritime Advisor.

- Document Entitled "Management and Operation Agreement The General Company For The Port of Iraq (The Iraq Port Authorities) and Maersk Iraq Ltd. Relating to Kohr-Al Zubaya Port" dated 26 July 2003-12-22
  - calls for Maersk to be responsible for the day to day management and operation of the Port.
  - cover shows this to be an agreement between The Iraq Port Authority (IPA) and Maersk, however the signature page shows it was not signed by either the IPA or by a Coalition Provisional Authority Contracting Officer.
    - The typed signature line reads "signed for and on behalf of The Iraqi Port Authorities:" with the typed words "The Iraq Port Authorities: crossed through and replaced by Coalition Forces, 40 Regt RA" and signed by a UK Major Mark Pullan and a Major James Thorpe (P) Civil Affairs U.S. Spec. Ops CMD.
  - Terms of agreement I find of particular concern:
    - 5 year agreement
    - IPA is responsible for dredging
    - Maersk agrees to pay for repairs of facility up to limit of \$1M and additional investments in repair shall be by the IPA
    - Maersk has exclusive use of the Facility except the IPA can use berths for IPA operated vessels provided they do not carry out any commercial activities
    - Maersk receives all monies collected from vessels using the facility and pays IPA royalties of only:
    - 7% of container handling charges as well as storage and auxiliary charges
    - 7% of handling charges for vehicles
    - 7% of cargo handling
    - for services performed wholly by IPA, IPA receives only 95% of charges collected

- for any fees collected by Maersk on behalf of IOPA Maersk pays 95% of the monies collected to IPA
  - Maersk shall employ employees of the IPA for the port operation. Experts not to exceed 15% of the workforce and will endeavor to employ IPA staff as stevedores. Maersk will pay salaries and other direct costs
  - Indemnity. IPA will indemnify Maersk against any and all costs, claims, liabilities damages, charges and expenses arising out of any third party claim in connection with any act or omission of Maersk other than matters resulting from willful default, fraud or dishonesty. The clause does not limit the rights of the IPA against Maersk "in respect of any negligence on the part of the Operating Company"
  - Termination. In case of privatization of ports IPA may terminate after 3 years by paying penalty of \$5M; after 4 years by paying \$3M
  - Default. Upon default as well as for claims, disputes or differences, the matter will go to Arbitration in London and the Agreement shall be governed by English law.
- E-mail dtd 9/18/03 from (b)(6) to (b)(6) subj: Maersk/ Ap Moller
    - o Forwards e-mail from (b)(6) to (b)(6)
    - Attaching request from A.P. Moeller/Maersk Group for meeting in Baghdad to discuss their interest in becoming involved with reconstruction efforts -particularly w/i oil sector.
  - E-mail dtd 9/19/03 from CPA attorney (b)(6) to (b)(6)
    - o Says no indication persons signing as "Coalition Forces" had ability to enter the agreement on behalf of the IPA;
    - o Gives opinion agreement is invalid;

- Recommends if (b)(6) wishes to enter new agreement he coordinate with contractor and take appropriate action.
- INFO MEMO For Ambassador Trent from (b)(6) subj: The way Forward on KAZ.
  - States disconnect remains the actual review process and under whose authority the agreement was signed.
  - (b)(6) commanding Officer of the 49<sup>th</sup> Regiment "indicated that as a military officer he did not proceed until he was given direction to do so by CPA South, that direction came in a phone call from CPA South..."
  - The points in dispute:
    - The length of the contract
    - The unbalanced terms (under normal commercial practice)
    - The ability of the parties to bind the IPA to conditions to which it had not agreed
    - The threat of legal action by Maersk if the agreement was found to be invalid.
- Maersk/AL Zubnair(AZB)-Situation Report dtd 11/9/03 from GT-Trade & Industry CPA (South) (b)(6) (without enclosures) to (b)(6) (b)(6)  
9/12L- SO1 OPS SUP
  - Background:
    - Jun 03 there were discussions between 40 FD Regt RA (b)(6) and Maj from US Army, the IPA and Maersk to get port of AZB running with investment from Maersk
    - Was known under former regime IPA received illegal income from smuggling from Udfay. "To 'placate' IPA it was suggested that a lump sum... would be paid to IPA by Maersk. However, at some point after this the director of the IPA...known as RAFSAT... said that there were other 'interested parties' who would like some 'bakeesh' in the form of a two week holiday to Danemark. At this

point Maersk almost withdrew from discussions"

- The "CO of the 40 Fd Regt RA encouraged Maersk to continue discussions, and the company offered visits to Maersk in Dubai and Oman. A contract was drawn up... shown to CPA (South); to whom is unclear, but it was apparently endorsed and in July 03 the contract was signed by the 2 Majors on behalf of 7 Armd Bde (with Brig Bradshaw's approval) and Maersk. However, it should be noted that the contract ... is between Maersk and the IPA."
  - IPA later complained about the contract to CPA-Baghdad who, it is believed, thought the contract to be illegal
  - Since Jul 03 Maersk provided infrastructure support to AZB, refurbished certain areas of facility, and provided perimeter security. They invested \$500K and \$1M worth of equipment.
  - Nov. 8 03 Maj JN HAZOU received copy of IPA Invitation to Tender requesting local and international companies to submit quotes for the investment in Iraqi ports including AZB. Result, Maersk threatening to withdraw all facilities and infrastructure at AZB.
  - Why CPA-Baghdad considered the contract illegal unclear. (b)(6) the CPA Baghdad Senior Maritime Advisor to Minisrty of Transport probably holds answer.
- Key Issues:
- (b)(6) (CPA-SouthContracts) confirmed CPA had not signed any contract with Maersk. "The previous CPA-South COS, (b)(6) is a director of Maersk, and was fully aware of the risks of becoming too involved. However, at the time he was the only Subject Matter Expert available and he did participate in discussions at a professional level at some stage. It is possible that he reviewed the contract, although this is only speculation.
- The Way Forward:

*There are press reports that Maersk did this w/out authority to force payment*



- (b)(6) concurs with conclusion (b)(6) (b)(6) and (b)(6) should broker revised contract with Maersk. States it "is inevitable an element will have to include an IPA "bakeesk" package. Maersk are not adverse to this, but they would want the CPA to endorse this in order to give it some legitimate status."
- Believes there will be meeting Nov. 14, 03 between Comd 20 Armd Bde and (b)(6) the regional director of Maersk.
- 13 Nov 03 HQ 20<sup>th</sup> Armoured Brigade Operation Telic 3  
Unclassified Commercial in Nature Minutes of Meeting -  
Maersk Iraq/20 Armd Bde
  - Among Maersk action Points
    - Jun Met Brig. Bradshaw (CPA involved).
    - Concurrently CPA met IPA and discussed contract issues raised by IPA.
    - 26 Jul Coalition/IPA give Maersk go ahead and contract signed.
    - Managing Director (MD) of Maersk gave presentation saying \$600K had been invested already, with a further \$1.4k allocated.
    - MD explained CPA had tasked IPA Director to negotiate contract. "However, in the month leading up to the 26 Jul the IPA continually changed and rechanged the contract.
    - MD gave assurance Maersk had no wish to profit from war and IPA would receive 60% of the profit made.
  - Comd Armd Bde- Action Points stated
    - intention was to keep Maersk "in the game" explaining if they were to leave it would have a major impact on Coalition's aim of revitalizing economy.
    - "He said that CPA Baghdad must understand that if Maersk were to withdraw it would have a huge detrimental effect.

- Vital all pull together to tie-up loose ends of the existing contract
  - Requested GT- Trade & Industry coordinate task with meeting between CPA Baghdad Sr. Maritime Adviser to the Ministry of Transport- the Governate Coordinator, and the CPA Sr. Contracts Negotiator.
  - Stated MD, Maersk Iraq, must be kept in picture at all times.
  - Emphasized Maersk would be supported by 20 ARmd Bde
  - CPA(S) GC must be briefed to that effect
- E-mail from (b)(6) dtd 17 Nov 03 subj: Maersk Report
- States understanding from (b)(6) is that CA South had chopped supposedly by (b)(6). However, he denied it when asked.
  - Appears shipping firm and IPA have not come into agreement.
  - What are alternatives?
  - Can we execute a contract if someone has funding.
  - Believes Maersk has grounds for a claim.
  - Informed there is a contract by MoHC that is to take place at Khor Al-AZubayr that is being denied access by Maersk
- Summary of conversation I had with (b)(6) on 12/17/03
- Prior to coming to IRAQ and working for CPA South he understood (b)(6) worked for Maersk.
  - (b)(6) did not talk to (b)(6) but LTC (b)(6) stated that he (b)(6) was uncomfortable with signing the agreement as a British Officer but he was directed to by a phone call from CPA South. (b)(6) said he asked if the call was from (b)(6) and LTC nodded his head affirmatively.



Mr. (b)(6) speculated that LTC (b)(6) may still have been uncomfortable with signing and that is why two majors signed.

- (b)(6) informed me that the agreement to operate the other Iraq port was competitively made months before the agreement with Maersk and that agreement was only for one year and the only compensation the other port operator received was a few hundred thousand dollars as compared with the unlimited fees Maersk receives.

VR

(b)(6)