

Legal



BUILDING STRONG®

Program Authority

- The Europe District Israel Program is executed under the Arms Export Control Act and Foreign Military Sales program
- Funding is Foreign Military Financing (FMF) which carries some restrictions on contractor participation, content and other matters.
- Defense Security Assistance Management Manual (DSAMM) applies



U.S Laws Apply

- Contracts funded by FMF are executed and administered under U.S. procurement laws and regulations
 - ▶ Federal Acquisition Regulations (FAR)
 - ▶ Defense Federal Acquisition Regulation Supplement (DFARS)
 - ▶ US case law



U.S. Laws Apply

- Jurisdiction to decide protests rests with Agency (Corps of Engineers), General Accountability Office (GAO) or Court of Federal Claims (COFC).
- From least formal (Agency) to most formal (COFC)
- Choice of forum for protest is up to bidder
- Rules for pursuing protests at each of these forums are available online



U.S. Laws Apply

- Disputes are resolved in accordance with the Disputes provision of the contract.
- Final Decision of the Contracting Officer
- Appeal of contracting Officer's decision to the Armed Services Board of Contract Appeals or to the Court of Federal Claims – contractors choice



FMF Rules Apply – U.S. Prime Contractor

- Prime contractor must be a U.S. firm or a joint venture of two or more U.S. firms
- Non U.S. firms may be subcontractors but cannot be prime contractors nor members of a joint venture prime contractor
- A joint venture of a U.S. firm and a non U.S. firm will not be considered for award
- Language in a proposal that states or implies that a non-U.S. firm is serving in a role as a prime or as a joint venture member with a prime will cause a proposal to not be considered



US Prime Contractor

- The prime contractor must be a legitimate US construction contractor registered in and regularly doing business in the US.
- The US prime CANNOT simply serve as a shell to pass a contract through to a foreign firm
- If the US firm is found to be simply passing the contract through to a foreign firm, this will constitute fraud against the US government



US Prime Contractor

- Penalties for fraudulently representing oneself as a US prime contractor include nullification of the contract, civil and criminal penalties.



Subcontractors

- A U.S. prime contractor CANNOT ‘appoint’ or ‘designate’ a subcontractor to act as it’s ‘agent’ or on it’s behalf for execution of the contract.
- The government deals with the prime contractor only.
- The prime contractor is responsible for execution of the contract and cannot shift that responsibility to a subcontractor.



Joint Ventures

- If submitting a proposal as a joint venture (JV), the experience and past performance of each JV partner will be considered
- The proposal of a JV must include a signed copy of a legally binding JV agreement signed by an authorized official of each of the firms making up the JV.



Joint Ventures

- The JV agreement submitted with the proposal must be the complete agreement – no unsubmitted annexes or sub agreements
- Any other JV or consortium agreement is null and void with respect to the contract
- The JV agreement must be in English



Joint Ventures

- The JV agreement must include a detailed statement outlining the responsibilities, authorities and roles of each JV member
- The JV agreement must specify that JV members are jointly and severally liable for any and all obligations under the contract
- The bid and performance guaranties must cover the JV, not just one member of the JV



FMF Rules Apply – U.S. Content

- FMF rules require that 51% of non-exempt content must be U.S.
- Exempted items include bulk materials, other items that cannot as a practical matter be procured outside the host nation
- Items exempted by the FAR and DFARS from Buy America considerations
- A list of typical exempted items is included in our solicitations.



FMMF Rules Apply – U.S. Content

- The U.S. has determined by virtue of international agreements and treaties that items from ‘Qualifying’ or ‘Designated’ countries are exempt from Buy America considerations
- Countries are listed in the FAR and DFARS
- Most European countries are on one or both lists



FMF rules – U.S. content

- 51%
- Subtract the value of bulk materials and other items exempted from Buy America considerations by the FAR and DFARS
- Subtract the value of items from ‘qualifying’ or ‘designated’ countries
- 51 percent of remainder must be U.S. content



FMF Rules – Israeli Content

- Notwithstanding Israel's status as a qualifying country, DSCA 'Color of Money' policy does not allow Israeli content other than exempted items.
- An item does not become Israeli content simply because it is purchased in Israel. If the item originates elsewhere such as the U.S. or qualifying country, it is the point of origination that governs
- For example a generator manufactured in the U.S. but purchased from an Israeli agent is not Israeli content



FMF Rules Israel Content

- It is NOT true that an item manufactured or assembled in Israel becomes not Israeli content if 50% of the value of the item is in foreign materials- THIS IS A MYTH.
- The Contracting Officer (not ACO or COR) may sometimes as a specifically approved exception allow an item or materials to be assembled off site if it is something that could have been assembled on site as a construction activity.



FMF Rules – Israel Content

- Any items or materials other than bulk materials or items listed in the contract as exempt, must be specifically approved in advance by the Contracting Officer (not ACO or COR).
- We will not pay for any non exempt Israel content that is not approved by the Contracting Officer



Committed Subcontractors

- In the evaluation process, prime contractors can receive credit for the experience, past performance, and capabilities of a subcontractor provided the proposal includes a letter of commitment signed by both the prime and subcontractor
- A letter of commitment is not a contract but it represents a commitment by the firms to work together if a contract is awarded
- A sample letter of commitment is included in solicitations and the format should be followed.



Committed Subcontractors

- If a proposal is evaluated considering the qualifications of a committed subcontractor, no substitution can be made for that subcontractor with approval of the contracting officer
- Approval of substitutes will only be given if the contracting officer determines in their sole discretion that the substitution is in the best interests of the government



Related Entities

- If you wish to receive credit for the experience, past performance or management capabilities of a related company or entity you must either include that company or entity as part of a joint venture or as a committed subcontractor
- This is true even for a parent or subsidiary firm – if they are a separate legal entity they must be brought into the proposal as a JV partner or subcontractor



Related Entities (2)

- For name changes or newly formed companies within a larger corporate entity, submit a question laying out the corporate structure and ask for guidance.
- Incorporating a parent or other related firm as a committed subcontractor can allow you to use some of their experience or past performance but will not cover you for responsibility determinations which will be based on the attributes of the offering firm



Related Entities (3)

- A letter of commitment for a related firm will not satisfy the requirement to have executed two construction projects as a prime in the US
- To satisfy that requirement a new entity might consider a joint venture agreement with the related firm that has executed the required two projects



MOD

- Representatives of the Ministry of Defense and the services will participate as advisors on technical evaluation boards
- MOD advisors will have access to contractor proposals



Performance Guaranties

- Solicitations will typically specify standard bid and performance and payment bonds.
- Bonds must follow the standard rules and format for U.S. government contracts
- By exception and for smaller contracts only, the solicitation may allow Bank Letters of Guaranty (BLGs) as an alternative to bonds.
- This is at the discretion of the government.



BLGs

- A BLG is essentially an irrevocable letter of credit from a financial institution
- The BLG must follow the format specified in the solicitation
- The government must be able to draw upon the BLG at its discretion by simple letter without any need to furnish proof of non performance.



Air & Ocean Transportation

- See Clause 252.247-7023 Transportation of Supplies by Sea
- Para (b)(1): “The contractor shall use U.S. flag vessels when transporting any supplies by sea under this contract.”
- Supplies includes construction materials and end items.



Compliance with Local Labor Laws

- The US government is very concerned that laborers on our projects receive working conditions and wages in accordance with Israeli laws and regulations
- There are some very important provisions in the contract that relate to labor:
- The clause entitled 'Compliance With Local Labor Laws', tells you that you must comply with all host nation labor laws and regulations including laws and regulations relating to hours of work, compensation
- Please be aware that this applies to subcontractors as well as the prime contractor – the prime contractor is responsible for ensuring that all workers on the project are properly paid, regardless of whether the workers are employed directly by the prime contractor, principal subcontractor or subcontractors at any tier. We will hold the prime responsible.



Compliance with Host Country Rules and Customs

- Another important provision, 'Compliance With Host Country Rules and Customs', tells you that the contractor is responsible for:
 - ▶ Manning the job
 - ▶ Obtaining any necessary visas, permits, clearances for workers.
 - ▶ The contractor assumes the risk and cost of obtaining the necessary labor to execute the project.
 - ▶ The US will not compensate you if labor turns out to be more expensive than you expected.
 - ▶ This is true even if the reason for the added expense is a change in Israeli laws and regulations that increases your labor cost.



Choice of Law (Overseas)

June 1997

This contract shall be construed and interpreted in accordance with the substantive laws of the United States of America. By the execution of this contract, the Contractor expressly agrees to waive any rights to invoke the jurisdiction of local national courts where this contract is performed and agrees to accept the exclusive jurisdiction of the United States Armed Services Board of Contract Appeals and the United States Court of Federal Claims for the hearing and determination of any and all disputes that may arise under the Disputes clause of this contract.

(End of clause)

This means that any disputes arising under this contract will be decided under US law in US courts or the Armed Services board of Contract Appeals. You are waiving your right to have disputes decided under Israeli law or in Israeli courts



52.000-4004 Immunity from Legal Process

(USEEUCOM CLAUSE JUL 1966-E)

The contractor agrees to indemnify and save harmless the United States Government against all claims and suits of whatsoever nature arising under or incidental to the performance of this contract by any subcontractor against the United States Government. The Contractor further agrees to waive his rights to bring suit or other legal action against the United States Government, except as provided in the Disputes clause of this contract and in the United States Federal Statutes.

This means that if a subcontractor attempts to bring a lawsuit against the US or to otherwise join the US in a lawsuit in Israeli court, the prime contractor must defend the suit and to indemnify and save harmless – legal terms meaning you will pay any judgment rendered in an Israeli court, not us. Any dispute under the contract can only be decided in US court or the US Armed Services Board.



Breach

United States law will apply to resolve any applicable claim of breach of this contract.



Government of Israel

The contractor waives any rights it may have to bring legal actions against the Government of Israel with respect to any matter arising out of or relating to, activities of the Government of Israel with respect to technical reports, designs, estimates, or similar documents prepared by the Government of Israel, its employees or contractors in connection with this contract, regardless of whether such legal actions are characterized as sounding in contract or tort. The contractor further agrees to indemnify and save harmless, the Government of Israel against all claims and suits of whatsoever nature arising out of or relating to activities of the Government of Israel with respect to technical reports, designs, estimates or similar documents prepared by the Government of Israel, its employees or contractors.

Once again, the sole remedies for resolution of disputes under this contract are the remedies provided under the Disputes provision of the contract and US law. You cannot bring an action against the Government of Israel for a dispute arising out of this contract regardless of whether the action is in contract or in tort.



War Risk

In the event of hostilities which cause damage to the site or to work performed under this contract, and to the extent not covered by insurance, costs for repairs of that damage will be borne by the Government. As used in this response, the term “hostilities” is limited to war, armed conflict, or insurrection. The term “hostilities” does not include strikes, demonstrations, work stoppages or civil unrest, that the Contracting Officer, in their sole discretion, considers reasonably foreseeable and not rising to the level of war, armed conflict or insurrection. If directed by the Government, the contractor will proceed to repair or replace work damaged by hostilities and an equitable adjustment for costs not covered by insurance will be made under the change provisions of this contract. Delays caused by hostilities or civil unrest not amounting to hostilities, will be treated as excusable delays and may be the basis for time extensions, without increase in price. Failure to agree to any adjustment contemplated under this clause shall be a dispute subject to the disputes provision of this contract.



Questions?

