

A Guide to contracting with Iraqi government, construction & supply contracts

Mohammed Norri - Partner, Head of Office - Baghdad - Corporate / Mergers and Acquisitions / Commercial

m.norri@tamimi.com - Baghdad

September 2013

In particular this article will attempt to address the following issues.

- What expenses/guarantees are required to submit an offer?
- What legal presence is required to sign contracts, for foreign entities?
- What penalties can be imposed by the government with regard to public contracting?
- How to handle disputes arising before or during contract formation, esp related to public bidding and offer acceptance?
- What are the available Mechanisms for dispute resolution after contract formation? Mediation, Arbitration, litigation?
- In what language(s) are contracts written? which one prevails in case of difference in interpretation?
- What's the definition of "special circumstances" or force majeure effecting timely performance. Can security problems in Iraq excuse non performance?

First we need an overview of the contracting process. This article concerns official contracts governed by the Public Government Contracts law No 1 for the year 2008 and followup regulations for implementing government contracts. Please note that exceptions can be made where there is a need for confidentiality or speed, or for other reasons such as a market monopoly by one supplier. It should be noted as well that contracts totaling 50 000, 000 IQD (fifty million Iraqi Dinars) and less are also exempt from most of the said procedures. The latter is handled by an acquisition committee.

For construction and supply contracts the first step is to buy a tender. This is a requirement to enter public bidding and submit offers, this payment can not be refunded. Potential Contractors/Suppliers then submit technical and commercial offers, along with any other documents which may be required for the specific contract. At this stage a guarantee of 1% of the total contract price is required. This is to ensure the seriousness of an offer. This guarantee has to be issued from a CBI – Central Bank of Iraq – certified bank and is refundable. When opening a Letter of Credit the buyer (Public Entity) refunds the fees if it's opened inside Iraq.

If an offer is accepted the government entity will enter negotiations with the offeree to sign a contract. Contracts specify the need for a performance bond of 5% of the total contract price. This is a guarantee for good faith performance and is refunded by the bank after successful contract completion. Requires inspection reports for supply contracts and other similar documents for construction contracts.

There are no restrictions on foreign entities wishing to do business in Iraq so generally speaking foreign contractors and suppliers do not have to be registered with the ministry of planning. However to sign contracts a foreign entity needs to either open a branch in Iraq or incorporate an Iraqi company, it can own 100% of its stock in. A representative office does not suffice and needs to be converted to a branch.

In case of refusal to sign a contract within 15 days after a valid offer has been accepted the penalty is to liquidate the 1% preliminary guarantee. Other legal measures may be taken in case of other damages. In case of delayed or non performance the Iraqi contracting entity can suggest inserting the defaulting Contractor/Supplier in the ministry of planning black list. Being blacklisted deprives a party from any future business with the government for a minimum of two years. This does not effect litigation or any other legal actions taken.

Disputes arising before or during contract formation, complaints about offer acceptance, conditions effecting fair competition and other public bidding procedure issues are handled by an administrative court at the ministry of planning, complaints have to be submitted within 7 days of contract formation. The ministry of planning central contracting department oversees this process by following up on the courts decisions with contracting departments in relevant public ministries.

Article 11 of the regulation for implementing government contracts No 1 for the year 2008 allows for and encourages Mediation and arbitration, including International arbitration when dealing with a foreign entity. Article 9 states that (a) Contracts shall be written in Arabic, Kurdish and English whenever possible and (b) The tender document shall determine the prevailing version in case of difference in interpretation. This is relatively new in Iraq

When it comes to defining “special circumstances” or force majeure, Iraqi law requires that the impediment causing non performance be unforeseeable to the non performing party. Since 2003 Iraqi courts have ruled that security problems are not considered unforeseeable and that parties assume this risk when contracting. Therefore, it can not excuse non performance.