

電子公文

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主旨：有關囑洽查美國對外國廠商參與美政府採購市場之相關規定作法事，復如說明，請查照。

說明：

- 一、依據 貴辦公室本(98)年5月15日經談室字第09804981020號函辦理。
- 二、本案經委請華府Miller & Chevalier法律事務所蒐研相關意見，重點如下：
 - (一)外商來台參與服務採購標案是否應依我公司法規定取得認許：
 - 1、美國對外國公司在美境內營業是否須向政府機關辦理分公司登記或取得認許(certification of recognition)並無訂定聯邦立法規範，係由美國各州或地方自行訂定不同之管理規範。
 - 2、美國若干州訂有與我公司法第371條第2項類似之地方法令，其中多數法令依不同業別要求外國公司須取得營業所在地之地方主管機關(municipal authority)核發營業執照(license)，而非由該州或聯邦機關核發，惟外國公司申請前述營業執照時，須事先提出已向該州主管機關辦理公司登記、取得該州及聯邦之繳稅帳戶號碼，以及已向該州主管機關辦理公司商業名稱註冊等資料。



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3、美國法令並不要求外國公司在美境內營業須辦理分公司登記，係由各州依其法令要求外國公司辦理不同程度之營業及法人地位呈現，例如馬里蘭州要求外國公司可辦理登記為分公司、有限合夥關係、子公司或合資事業。惟外國公司在特定州營業一般皆被要求針對受僱於該外國公司在當地從事服務之個人或法人機構等「當地代理人」(resident agents)進行認證。

(二)外國公司是否應於投標前或履約前完成相關認許程序：

1、美「聯邦採購法」(FAR)並未規定外國服務業者應於參與投標前或履約前向各州或地方主管機關辦理登記，僅規定各採購機關應要求標案承包商於履約前須取得必要之公司登記、營業執照及相關許可，並要求工程、拆除、修繕及運輸設備等特定業別之承包商，應依聯邦、州及履約所在地法令取得必要之營業執照及許可，另建築工程承包商亦須確保該標案係由合法建築師及工程師所設計及認可。

2、由於FAR並無明確規範，除非各採購機關對其標案訂有較嚴格規定，外國公司在取得各州及履約所在地主管機關所核發之相關許可前，一般皆允許參與投標及與採購機關簽署合約，惟承包商在履約前仍須依合約履行地之法令取得該地方主管機關之營業許可。

(三)外商來台參與財物採購標案是否無需要求事先取得認許：

1、FAR並未規定外國財物供應商應於參與投標前或履約前向各州或地方主管機關辦理登記及取得營業執照，惟得標廠商於履約供貨前須先確保符合聯邦、州及地方之相關法令。另針對固定價格合約(fixed-price contract)，FAR則要求承包商之履約供貨行為須符合聯邦、各州、地方及行政命令等相關規定。

2、外國公司倘係運送貨品輸美以履行採購供應合約，一般皆無需向州級或地方主管機關辦理登記，惟針對特殊貨品之進口及特殊原產地規定則將依個案適用不同程度之規定。

(四)外國公司是否須先取得認許方能進行投標登錄作業：



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圖章

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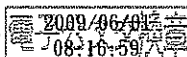
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- 1、外國公司依FAR等規定申請取得「北大西洋公約組織商業暨政府機構代碼」(NCAGE)及向美中央承包商系統(CCR)登錄以進行投標作業前，並無需向聯邦、州或地方主管機關取得任何形式之許可。
- 2、在各州規定方面，外國公司一般須依該州規定向類似CCR之各州資料庫進行登錄，並提供公司相關資訊。另部分州並要求外國公司參與投標前須先取得該州主管機關之營業許可，並設立繳稅帳戶。

三、檢送M&C法律事務所蒐研之相關意見如附件，請併參。

正本：經濟部經貿談判代表辦公室

副本：行政院公共工程委員會、經濟部國際貿易局



駐美國代表處經濟組

MEMORANDUM

TO: Francis W. Hou, Senior Officer, Economic Division, TECRO

FROM: Jay Eizenstat
Jon Huenemann
Nathan Lankford

DATE: May 26, 2009

RE: U.S. Regulations Applicable to Foreign Companies Bidding on Government Contracts

I. **INTRODUCTION**

TECRO asked if the United States has any laws that are analogous to Taiwan's Company Act Article 371.2. In particular, TECRO asked whether foreign companies bidding on Federal contracts must register with any government authority prior to submitting such bids or entering into contracts with the government.

TECRO also asked whether foreign companies bidding on Federal contracts must register with any government authority prior to registering with the Central Contractor Registration database ("CCR") and the North Atlantic Treaty Organization Commercial and Governmental Entity Code database ("NCAGE").

Finally, TECRO asked whether state governments had any similar requirements for bidders.

Because the activities of foreign companies operating in the United States are subject to a wide variety of complex state and local regulations, which differ significantly by locality, this memorandum offers several illustrative examples of such local regulations, and discusses the applicable Federal regulations in more detail.

Our responses to TECRO's questions are sent forth below.

II. **RESPONSES TO TECRO'S QUESTIONS**

- A. According to Article 371.2 of Taiwan's Company Act, a foreign company may not transact business within the territory of the Republic of China without obtaining a certificate of recognition from the government of the Republic of China and completing the procedure for branch office registration. Taipei therefore intends to require that foreign service-providers bidding on our government procurement tendering for services must obtain a certificate of recognition before registrations and operations as those services will be

rendered in the territory of Taiwan. Is there any regulation in the U.S. similar to Article 371.2 of our Company Act?

No Federal law requires foreign companies operating in the United States to register a branch office with any government authority or obtain a certificate of recognition. Rather, the ability of foreign companies to do business in the United States is primarily governed by state and local law, which vary significantly among localities.¹ The closest corollary to Taiwan's Company Act Article 371.2 are various state and local laws that require foreign companies to register before initiating operations.

Similar to Taiwan's Company Act provisions, companies doing business in the United States must typically register with state government authorities and obtain a business license from local authorities. While the specific registration requirements for foreign companies seeking to operate in the United States depend on the locality in which the company plans to do business and the type of operations contemplated, a sample of state and local regulations suggests certain common requirements. Specifically, in order to transact business in a particular locality, a company must obtain a license from the applicable municipal authority.

For example, a company seeking to open a retail store in the City of Santa Monica, California, must first obtain the appropriate license from that city, rather than California state authorities or any Federal agency.² However, to obtain a local business license, a company typically must show that it has (1) registered the company with state authorities, (2) established tax accounts with state and Federal tax authorities (*e.g.*, obtaining taxpayer identification numbers), and (3) register the company's trade name with state authorities.³ Thus, to obtain a license to do business in a particular locality in the United States, a company must submit various types of information (and modest administrative fees) to municipal, state, and Federal entities, and must obtain Federal and state tax identification number.

Unlike Taiwan's Company Act provisions, however, U.S. regulations do not require foreign companies operating in the United States to establish a branch office. Rather, state registration requirements allow foreign companies to have various levels of operational and legal presence in the United States. For example, in Maryland, foreign corporations may

¹ See U.S. DEP'T OF STATE, ASSISTING FOREIGN COMPANIES, *available at* <http://www.state.gov/e/eeb/cba/179.htm>.

² See CITY OF SANTA MONICA, INFORMATION GUIDE FOR ESTABLISHING A BUSINESS IN THE CITY OF SANTA MONICA (2008), *available at* <http://www01.smgov.net/finance/licenses/>.

³ See MONTGOMERY COUNTY JUDICIAL CTR., ROCKVILLE, MD, LICENSE DEP'T, BEFORE APPLYING FOR A BUSINESS LICENSE, *available at* http://www.montgomerycountymd.gov/MC/JUDICIAL/circuit/services/crtclerk/license/Business_License.html. See also U.S. INTERNAL REVENUE SERV., DO YOU NEED AN EIN?, *available at* <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html> (indicating that all companies that employ personnel must obtain a Federal Employer Identification Number ("EIN") from the U.S. Internal Revenue Service).

carry out their operations through a branch office, limited partnerships, subsidiary corporations, or joint ventures.⁴

However, companies doing business in a particular state are generally required to certify the name and address of a person or entity that is authorized to receive service of process on the company's behalf.⁵ Such persons or entities are commonly known as "resident agents," hired by foreign companies to accept service of process.

- B. Does the U.S. require the foreign service-provider bidding on government procurement for services to be rendered in the U.S. to obtain a certificate of recognition? Are the certificates required before the bidding or before the execution of the contract?

The Federal Acquisitions Regulations ("FAR") do not contain any general provision requiring foreign service-providers to register with state or local authorities before bidding on or entering into contracts with Federal agencies. Rather, as discussed in our memorandum dated April 15, 2009 regarding construction contractors, the FAR requires contractors to meet applicable registration, licensing, and permitting requirements before entering into certain types of service contracts with Federal agencies.⁶

As noted in our previous memorandum, the FAR establishes uniform policies and procedures for acquisition by all U.S. executive agencies.⁷ Thus, the FAR applies solely to Federal agencies, and has no direct application to contractors.

However, the FAR requires Federal agencies to include provisions concerning state and local registration, licenses, and permits (collectively "authorizations") in certain solicitations for bids ("solicitations") and contracts for certain types of services. Specifically:

- Construction, demolition, dismantling, and repair contractors are responsible for obtaining any necessary licenses and permits, and for complying with any Federal, state, and municipal laws, codes, and regulations applicable to the performance of the work.⁸
- Architectural or engineering contractors must ensure, when applicable, that a locally registered architect or engineer prepares or reviews and approves the

⁴ See OFFICE OF THE ATTORNEY GEN. & THE DEP'T OF BUS. & ECON. DEV., GUIDE TO LEGAL ASPECTS OF DOING BUSINESS IN MARYLAND 12-17, (2009).

⁵ See *id.* at 14. See also ECKERT SEAMANS, LEGAL GUIDE TO DOING BUSINESS IN PENNSYLVANIA 13, available at http://www.lexmundi.com/images/lexmundi/PDF/GuidesToDoingBusiness/Guide_Pennsylvania.pdf.

⁶ See Memorandum dated April 15, 2009 regarding construction contractors, at 2-3.

⁷ 48 C.F.R. § 1.101.

⁸ See 48 C.F.R. §§ 36.507, 52.236-7.

design of architectural, structural, mechanical, electrical, civil, or other engineering features of the work.⁹

- Transportation contractors must obtain and maintain, when applicable, any permits, franchises, licenses, and other authorities required by state, local, and Federal government agencies.¹⁰
- Contractors seeking contracts to relocate Federal offices must obtain and hold, when applicable, operating authority from relevant local authorities in the form of a certificate, permit, or equivalent license to operate.¹¹

The FAR is silent on whether contractors must obtain such state and local authorizations before submitting a bid or executing a contract. Thus, in the absence of contrary provisions in the particular solicitations (which, as discussed in our previous memorandum, may indeed contain more stringent requirements than those in the FAR), bidders are allowed to bid on or enter into Federal contracts before obtaining the necessary state and local authorizations.

However, foreign companies bidding on contracts for services to be performed in the United States must ensure that they have obtained all state and local authorizations before providing services under the contract. Most types of Federal contracts include a clause requiring the contractor to comply with all applicable Federal, state, and local laws, executive orders, rules, and regulations applicable to its performance under the relevant contract.¹² Furthermore, even when the solicitation and contract do not address state and local laws, the contractor may nevertheless be bound by such laws. Therefore, such companies must register with state authorities and obtain a business license from local authorities (as discussed above) before providing any services under the contract.

Finally, contractors must ensure that they are in compliance with the particular terms of each solicitation on which they bid. As discussed in our previous memorandum, Federal agencies may impose provisions regarding Federal, state and local authorizations that are more stringent than those of the FAR, and the type of work contemplated in certain contracts may require specialized Federal, state and local authorizations.¹³

⁹ See 48 C.F.R. §§ 2.101; 16.505(8)ii; 52.236-25.

¹⁰ See 48 C.F.R. 47.207-1; 52.247-2.

¹¹ See 48 C.F.R. § 52.247-3.

¹² See 48 C.F.R. § 52.212-4. See also § 52.301 (showing that the abovementioned clause is required in all types of Federal contracts except certain types of cost-reimbursement contracts, and time and material/labor hours contracts).

¹³ Memorandum dated April 15, 2009 regarding construction contractors, at 3.

- C. For government procurement tendering to supply goods, does the U.S. require foreign bidders to get such certificates when the goods are not produced in the U.S.?

The FAR does not contain any general provision requiring foreign suppliers of goods to obtain state or local authorizations before bidding on or entering into contracts with Federal agencies. Indeed, none of the FAR's provisions that specifically address registration, licenses, and permits (listed above) apply to contracts to provide goods (*i.e.* not services).¹⁴

However, foreign companies bidding on contracts to provide goods in the United States must ensure that they are in compliance with all applicable Federal, state and local regulations before providing goods under the contract. The FAR requires any contractor engaged in a fixed-price contract to provide goods to comply with all applicable Federal, state, and local laws, executive orders, rules, and regulations applicable to its performance under the relevant contract.¹⁵

Unlike foreign service-providers, foreign companies that merely ship goods into a particular U.S. locality in fulfillment of a procurement to provide goods, are generally not required to register their company with any state or local government entities. For example, the registration and licensing requirements of the City of Newport, Oregon specifically exclude from their coverage companies that merely deliver goods produced outside of the city, and those that merely send goods into the city.¹⁶ While state and local registration and licensing requirements generally do not apply to companies that merely ship goods into a locality, a complex set of Federal, state, and local regulations apply to the importation of goods, depending on the specific nature of the goods (*e.g.*, agricultural, hazardous), their country of origin (*e.g.*, from a country subject to sanctions or other import restrictions), among numerous other factors. However, because of the FAR's silence on this issue, it is not necessary for a foreign company to address the regulatory issues surrounding the importation of goods prior to bidding on or executing a Federal contract for the supply of goods. Rather, the foreign company must ensure compliance with such regulations at the time the contract is performed.

Finally, as with service contracts, contractors that are providing goods must ensure that their operations and products are in compliance with the particular terms of each solicitation on which they bid. Specifically, Federal agencies may impose requirements that are more stringent than the FAR in their solicitations, and certain types of goods may require specialized Federal, state, and local authorizations.¹⁷

¹⁴ See 48 C.F.R. § 52.301 (indicating that §§ 52.236-7, 52.236-25, 52.247-2, and 52.247-3 do not apply to supply contracts).

¹⁵ See 48 C.F.R. § 52.212-4. See also § 52.301 (showing that the abovementioned clause is required in all fixed price supply contracts).

¹⁶ See Newport Regulations, Ch. 4.05 § 060, available at <http://www.thecityofnewport.net/dept/pln/documents/Ch4-05-BusinessLicenses.pdf>.

¹⁷ Memorandum dated April 15, 2009 regarding construction contractors, at 3.

- D. It is required in the U.S. that companies bidding on government procurement tendering need to first register with the CCR and NCAGE. Are such requirements based on any related U.S. law or regulation, except required by the FAR? Are foreign companies required to get certificates of recognition before the above registrations?

As discussed in our April 15, 2009 memorandum, both domestic and foreign companies bidding on government tenders must register with the Central Contractor Registration database ("CCR"). While FAR § 4.11 is the primary statutory source of this requirement, the Federal Acquisition Circular ("FAC") 2001-16, and the Defense Federal Acquisition Regulations Supplement ("DFARS") § 204.7302, also require all companies bidding on government tenders to register with the CCR, subject to certain limited exceptions.¹⁸ Specifically, the government contracting officer ("contracting officer") must verify that prospective contractors are registered in the CCR before awarding a contract or an agreement, except in certain limited circumstances.¹⁹ The FAR encourages contracting officers to check the CCR early in the acquisition process, after the competitive bidders have been identified, and to communicate to any unregistered bidders that they must register.²⁰ Thus, while bidders do not have to be registered in the CCR at the time of bidding, they must be registered before they can be awarded a government contract.

However, to register with the CCR, foreign companies must first obtain a North Atlantic Treaty Organization ("NATO") Commercial and Governmental Entity Code ("NCAGE Code"). A foreign company in certain countries may obtain an NCAGE Code from the national certification bureau of the country in which the company is located.²¹ If the foreign company is located in a country that does not have a national certification bureau that is authorized to issue NCAGE Codes, the company may obtain one from the online non-NATO NCAGE tool hosted by NATO's Maintenance and Supply Agency in Luxemburg.²² U.S. companies, on the other hand, are not required to obtain an NCAGE Code prior to registering with the CCR.

Foreign companies do not need to obtain any type of Federal, state, or local authorization in order to receive an NCAGE Code and register with the CCR. To receive an NCAGE CODE, a foreign company need only submit various types of basic information about the company, such as the company's name, address, and contact information.²³ Indeed,

¹⁸ See generally, CENT. CONTRACTOR REGISTRATION, CENTRAL CONTRACTOR REGISTRATION USER'S GUIDE 1, (2009), available at <http://www.ccr.gov/doc/CCRUsersGuide.pdf>.

¹⁹ 48 C.F.R. 4.1103(a).

²⁰ See *id.*

²¹ See HOW TO OBTAIN A NATO CAGE CODE: THE REQUIRED FORM AND INSTRUCTIONS (2009), available at http://www.dlis.dla.mil/Forms/Form_AC135.asp.

²² See *id.* (providing a link to the non-NATO NCAGE tool: <https://nmcrplus.namsa.nato.int/>).

²³ See *id.*

applications for NCAGE CODEs do not require companies to submit information related to Federal, state, or local authorizations.²⁴ Similarly, registering with the CCR does not require companies to submit information related to Federal, state, or local authorizations.²⁵ However, companies are required to provide taxpayer identification numbers when applying to register with the CCR.²⁶ Thus, as with applying for local business licenses, companies must first establish appropriate tax accounts with the Federal tax authorities (the Internal Revenue Service).²⁷

- E. Do all states have such requirements for obtaining certificates or recognition, or only part of them requiring it?

To obtain state government contracts, companies must generally register in state databases that resemble the CCR. In Maryland, for instance, companies seeking to bid on state government contracts must register online with eMaryland Marketplace (“eMaryland”).²⁸ Similar to the CCR, to register with eMaryland, a company must provide various types of basic company information.²⁹ However, unlike the CCR, state databases may require foreign and domestic companies to first register their operations with state authorities and establish tax accounts with state tax authorities (discussed above). For example, registration in eMaryland requires foreign and domestic companies to provide a Business Entity Number, which can only be obtained after a company is registered in Maryland and has obtained a tax identification number from Maryland tax authorities.³⁰ Once a company is registered in a state database, the company may be able to receive notifications of tender requests. For example, eMaryland notifies registered vendors of all Maryland

²⁴ See *id.* (providing a form used to apply for a NCAGE number, which requires basic company information, and asks for various types of additional identification information that is optional).

²⁵ See CENTRAL CONTRACTOR REGISTRATION, CCR REGISTRATION QUICK START (providing a chart that outlines the various types of information required to register with the CCR), available at https://www.bpn.gov/ccr/Help/New/CCR_New_Registration_Help.htm. See also Memorandum dated April 15, 2009 regarding construction contractors, at 2-3 (discussing the various types of information required for CCR registration).

²⁶ See *id.*

²⁷ See INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, DO YOU NEED AN EIN? (2009), available at <http://www.irs.gov/businesses/small/article/0,,id=97872,00.html>.

²⁸ See EMARYLAND MARKETPLACE, VENDOR REGISTRATION, available at <https://ebidmarketplace.com/regmain.asp>. See also PA EMARKETPLACE, WELCOME TO THE PENNSYLVANIA SUPPLIER PORTAL! (Pennsylvania’s vendor registration website), available at <https://www.pasupplierportal.state.pa.us/irj/portal/anonymous>.

²⁹ See EMARYLAND MARKETPLACE, VENDOR REGISTRATION HELP, available at <https://ebidmarketplace.com/help/venreg.asp?hlp=reggeneral#reggeneral>.

³⁰ This information was obtained during in interview with the eMaryland Helpdesk by telephone on May 26, 2009.

government tender requests for contracts valued at over \$25,000 in the vendors' areas of specialization.³¹

³¹ This information was obtained during an interview with Walter Bayne, Senior Procurement Officer, Maryland Department of Motor Vehicles, by telephone on May 26, 2009.