

Department of Contracts
Notre Dame Ravelin
FLORIANA

To Permanent Secretaries
Directors General
Directors
Heads of Public Sector Organisations

10 January 2023

KEY EXPERTS: QUALIFICATIONS AND EXPERIENCE

A Key Expert may be defined as an individual possessing or displaying knowledge or skill in a particular subject derived from training and / or experience; through one's qualifications and / or experience, the Key Expert shall be deemed as having specialist expertise in the relevant field.

A 'Qualification' shall be understood as an official record attesting an individual's academic and accredited¹ educational background. On the other hand, 'Experience' relates to direct participation and involvement in the specific field.

Key Experts in Public Procurement and Concession Contracts

In line with Regulation 239(2)(b)² of the Public Procurement Regulations S.L. 601.03 and Regulation 170(2)(b) of the Utilities Procurement Regulations S.L. 601.05³, the most economically advantageous tender shall be identified based on the Price or Cost and may include the Best Price-Quality Ratio (BPQR), which shall consist of various criteria, including qualitative, environmental and / or social aspects. Such criteria may comprise, '*organisation, qualification and*

¹ An accreditation certifies that an educational programme has met certain formal official requirements. Article 2 of Chapter 607 (Further and Higher Education Act) defines accreditation as 'the formal approval by the competent authority established under this Act or any regulations made thereunder, that the operation of a further or higher education provider, or that an educational programme pegged against levels within the Malta Qualifications Framework, meets quality standards'. In addition, programme accreditation is defined as 'the formal approval of the Authority in accordance with this Act, of the status, legitimacy and appropriateness of a programme', wherein the latter term is then defined as 'any course of study accredited by the Authority which serves to obtain an award or a qualification classified within the Malta Qualifications Framework or to a foreign recognized and comparable qualifications framework'.

² Regulations 79 and 70 of S.L. 601.09 (Concession Contracts Regulations) relate to the Award Criteria and to the Technical and Functional Requirements respectively. Regulations 47 and 23 of S.L. 601.12 (Procurement of Property Regulations) relate to the Award Criteria and Technical Specifications respectively.

³ S.L. 601.05 - Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations.

experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract’.

Further to the above, within a Public Procurement / Concession Contract procedure, the necessity of a minimum number of assigned Key Experts is critical to the objectives and performance of certain contracts. Accordingly, in addition to specifying the Key Experts’ roles, duties and responsibilities, Contracting Authorities / Entities shall establish their Minimum Qualifications and / or Experience (if applicable as per policy)⁴ as well as other relevant conditions.

Key Experts are bound to commit themselves to be available and provide the required tasks during the Implementation Stage of the relevant Procurement / Concession Contract. Nonetheless, to allow mobility of Key Experts, it is not mandatory that Key Experts are directly tied to the Economic Operator. Therefore, in a Procurement / Concession Call, the Key Experts shall not necessarily be part of the managerial structure of the Economic Operator. Accordingly, Economic Operators are at liberty to outsource Key Experts, thus, exploiting their specific expertise in relation to the subject-matter of the Procurement / Concession Call.

In the eventuality that a Key Expert is employed with the Public Administration, one is bound to declare the absence of any Conflict of Interest⁵ as defined in the Public Administration Act, Chapter 595 of the Laws of Malta (First Schedule: Code of Ethics for Public Employees and Board Members – Article 5) as well as attain any necessary approvals and permission to engage in business outside one’s official duties.

Contracts Circular N° 11/2014 (dated 24 June 2014) titled ‘Qualifications of Key Personnel in Selection Criteria’ is being repealed and superseded by this Circular.

⁴ The ‘Experience’ requirement for Key Experts is only permissible for Procurement/Concession Calls having an Estimated Procurement Value equal to or exceeding €500,000 excluding VAT.

⁵ The Code of Ethics emphasises the importance of Integrity and Impartiality. In fact, it bounds Public Officers to ensure that ‘no conflict, real or apparent, arises between their official duties and any other occupations, activities or interests (financial or otherwise) that they or their close relations may have. Such a conflict arises if a public employee or board member’s ability to faithfully discharge their duties is, or can reasonably be, called into question on account of such other occupations, activities or interests, including instances where the public employee or board member is placed in a position to be biased or is seen as potentially being biased.’ The Public Administration Act may be downloaded from <https://legislation.mt/eli/cap/595/eng/pdf>.

Key Experts: Technical Offer

Contracting Authorities / Entities, as part of the Procurement Document drafting, specify the *Technical Offer* requirements that an Economic Operator⁶'s proposal shall address and outline to fulfill the objectives of the Contract.

In the eventuality that part of the Technical Offer necessitates the engaging of a Key Expert (or a team of Key Experts), the requirements shall be directly related and proportionate to the subject-matter of the procurement as well as objectively verifiable and non-discriminatory. The Key Experts' requirements, in line with any other Technical Specifications, shall not have the effect of creating unjustified obstacles or distorting and artificially narrowing competition. To this end, Contracting Authorities / Entities shall specify the Minimum Qualifications and / or Experience (as applicable) for each Procurement / Concession Call.

Contracting Authorities / Entities are reminded that the Key Experts are the only element in a Technical Offer that fall under Note 2 and which may be rectified⁷. Hence, the Key Experts and / or the relative documentation may be changed when such information is incorrect and/or incomplete and / or missing. In such circumstances, if the Key Expert shall be rectified, the new proposed Key Expert shall possess the equivalent qualifications and experience (as applicable) as per the Procurement / Concession Call requirements.

Key Expert: Qualifications

The Key Experts' Educational and Professional 'Qualifications' shall be kept to the barest minimum possible within any of the three (3) types of procurement, namely Works, Supplies and Services⁸. Accordingly, this implies that the requirements should not be too stringent or confer a restricted freedom of choice on the Contracting Authority / Entity. To the contrary, Qualifications shall ensure the possibility of fair, genuine, and effective competition, without the intention of unduly favouring or disadvantaging certain Economic Operators and / or Key Experts.

⁶ A Key Expert, as and were applicable, depending on the nature of the Contract, may be the Economic Operator in its capacity as a Sole Trader.

⁷ Rectification Requests in relation to Key Experts are permissible for any Award Mechanism utilised, namely Price, Cost or the Best Price Quality Ration (BPQR).

⁸ Concessions may only be a works or services concession. Procurement of property relates to acquiring immovable property.

This implies that, if a (i) Warrant, or a (ii) License or an (iii) Authorisation to practice the relevant profession or trade satisfy the Key Experts' requirement, no further qualifications shall be requested. Thus, unless mandatory by Law, requiring that Key Experts are also enrolled in a relevant Professional / Trade Register and / or possess additional Certifications shall be deemed as unnecessary.

On the other hand, in other circumstances wherein the Minimum Qualification of Key Experts shall relate to an Academic/Educational Qualification such requirement shall not exceed an EQF/MQF⁹ Level 6 Bachelor's Degree, thus, encouraging a level playing field. Once again, the principle of proportionality should prevail.

To this end, prior to imposing 'Qualification'¹⁰ requirements, in liaison with the competent authorities¹¹, Contracting Authorities / Entities are encouraged to conduct proper research in relation to the Key Experts' Minimum Qualifications vis-à-vis the duties and tasks of the Contract.

The 'Qualification' requirement for Key Experts shall be kept to the barest minimum possible. It shall not exceed an EQF / MQF Level 6 (or equivalent) Bachelor's Degree.

Furthermore, Contracting Authorities / Entities are reminded that they shall not disqualify a Procurement / Concession Call submission on the grounds that the Key Experts' Qualifications do not comply with the qualifications required.

⁹ A Qualifications Framework is an instrument for the development and classification of qualifications according to a set of criteria using level descriptors applicable to specified levels of learning outcomes. In Malta, this is known as the Malta Qualifications Framework (MQF). On the other hand, the European Qualifications Framework (EQF) is a learning outcomes-based framework for all types of qualifications that serves as a translation tool between different national qualifications frameworks; it provides a comprehensive map of all types and levels of qualifications in Europe.

¹⁰ In Malta, Qualifications required are defined with reference to the Malta Further & Higher Education Authority (MFHEA) - <https://mfhea.mt/>. The Malta Qualifications Recognition Information Centre (MQRIC) is the competent body within MFHEA that provides recognition and comparability of both academic and vocational qualifications, using both the MQF and the EQF frameworks - <https://mfhea.mt/academic-qualifications/>.

¹¹ A competent authority shall be understood as the authority, body or person that has the necessary competence and knowledge to decide and/or perform relevant tasks and functions.

In line with the principle of Mutual Recognition in relation to Technical Specifications, Regulations 53(7)(b) and 53(9) of S.L. 601.03¹² as well as 76(7)(b) and 76(9) of S.L. 601.05 state:

‘Without prejudice to mandatory technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways: (b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when any of those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’.

‘Where a contracting authority [or contracting entity] uses the option of referring to the technical specifications referred to in sub-regulation 7(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 232 [of S.L. 601.03 and regulation 78 of S.L. 601.05], that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications’.

Accordingly, when a Qualification (such as EQF/MQF) is specified, such reference shall mandatorily be accompanied by the words ‘or equivalent’. To this end, it is to be understood that equivalent Key Experts’ Qualifications shall be accepted. However, such documentation shall be accompanied by the necessary proof attesting that the proposed Key Experts’ Qualifications satisfy in an equivalent manner the Qualifications required by the Contracting Authorities / Entities.

¹² Regulation 70 (Technical and functional requirements) of S.L. 601.09 and Regulation 23 (Technical Specifications) of S.L. 601.12 also refer.

Key Expert: Experience

Contracting Authorities / Entities may also impose the ‘Experience’ requirement on Key Experts, wherein a Minimum Level of Experience must be met. The Experience requirement shall afford equal access to Key Experts in the relevant field. In fact, it is important that no obstacles to competition are created.

Key Experts’ experience may be evaluated in terms of Performance and Functional requirements appropriate to the subject-matter and scope of the Contract. To this end, the experience requirement should focus on previous ‘similar’ Service / Supplies / Works undertaken wherein Contracting Authorities / Entities are bound to provide a Technical Definition of the constituents of ‘similar’, bearing in mind the principles of Equality, Non-Discrimination and Proportionality.

Contracting Authorities / Entities are reminded that as already established through Contracts Circular N° 11/2014, to continuously push forward Government’s drive to increase opportunities in Public Procurement as well as to allow greater access to new and emerging Economic Operators especially SMEs¹³, ‘Experience’ held by Key Experts shall be limited to high value procurement.

In line with Contracts Circular 08/2022, the ‘Experience’ requirement for Key Experts is only permissible for Procurement / Concession Calls having an Estimated Procurement Value equal to or exceeding €500,000 excluding VAT.

Accordingly, Key Experts’ requirements for Procurement / Concession Calls having an Estimated Procurement Value below €500,000 excluding VAT shall be limited only to the Educational and Professional qualifications without requesting experience.

Further to the above, to ascertain an adequate level of competition, Key Experts’ Minimum Level of Experience shall not exceed three (3) years. Once again, the principle of proportionality should prevail.

¹³ SME - Small and Medium Sized Enterprises.

Additional Information

To assist and guide Contracting Authorities / Entities in the applicability of 'Qualifications' and 'Experience' requirements to be possessed by Key Experts, it is recommended that one reviews Guidance Note #14 titled 'Key Experts'.

All Contracting Authorities / Entities are reminded that active ePPS account holders (when logged in) may access Guidance Notes, grouped in a zipped folder, through the 'Resources' section of Government's e-Procurement platform (Electronic Public Procurement System – ePPS).

In addition, the applicable eProcurement Templates provide guidance in relation to the necessary documentation (such as, but not limited to, Key Experts Form, Statement of Availability Form, Professionals Declaration Form, Public Employees Declaration Form and Curriculum Vitae).

Contact

Contracting Authorities may submit any queries to the Department of Contracts' Customer Care service on info.contracts@gov.mt or by calling on +356 21220212.

Anthony Cachia
Director General (Contracts)