

Infrastructure Projects in Saudi Arabia: Getting qualified

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Infrastructure Boom

With the Kingdom of Saudi Arabia (KSA) rolling out a succession of major public infrastructure projects in recent years, KSA's foreign investment policy makers have made it clear that they are keen to see more foreign participation in those projects. As the economic powerhouse of the GCC with a strong pipeline of work in the years ahead, KSA is on the radar for foreign contractors looking to expand in the Middle East. Often, to be eligible to bid for these larger projects, a contractor must be pre-qualified.

Pre-qualification for government contracts in Saudi Arabia

Pre-qualification is used to identify contractors who have the necessary experience, know-how and resources to successfully carry out a particular scope of work or project.

In KSA the pre-qualification process, where utilised, is itself a competitive tender process and is governed by the Government Tender and Procurement Law ("**GTPL**") and its implementing regulations ("**GTPR**").

The specific requirements for pre-qualification for government tenders vary between different government agencies and also from project to project. Generally for government projects the GTPR mandates that contractors must:

- Have a Commercial Registration in KSA. For foreign contractors this first requires a licence from the Saudi Arabian General Investment Authority ("**SAGIA**").
- Be registered with the General Organisation for Social Insurance.
- Have a tax or zakat certificate.
- Have a Saudization certificate.
- Have a certificate of membership of the Chamber of Commerce.
- Be registered with the Ministry of Labour.
- Have a requisite Contractor Classification issued by the Ministry of Municipal and Rural Affairs ("**MOMRA**") to carry out the work required. This will depend on the type of work specified and the value of the contract.

Generally, though it may vary between various government entities, other pre-qualification requirements may require the contractor to:

- Have no conflict of interest (including for any proposed subcontractors).
- Have no recent instances of contractual non-performance (which could be within say the past five years).
- Meet required financial levels, provide audited financial statements, and be solvent with no recent history of liquidation, bankruptcy or defaults (say within the past five years).
- Have certain annual turnovers (depending on the project requirements).
- Meet specific experience requirements depending on the precise nature of the project.
- Declare any fees, gratuities, payments or inducements paid to any party in respect of pre-

qualification or the bidding or tender process.

Streamlined processes for foreign contractors

A foreign contractor that does not have a commercial presence / registration in KSA may still qualify to bid for a government contract.

The recent Council of Ministers Resolution No. 405, released in August 2014, applies to contractors in the areas of: construction; roads; water and sewage works; implementation of works for water conveyance; desalination plants and electric power; electrical, mechanical, electronic, industrial and marine works; and communications technology.

This resolution allows contractors that are licensed as first class in their home country, or certain 'well known' contractors, to obtain a temporary certificate from SAGIA allowing the contractor to bid on government projects (but only one at a time). The contractor may then fulfil the other requirements (set out above) after it is awarded a government contract.

If successful in being awarded a government contract, the foreign contractor must establish an entity in KSA and obtain a temporary commercial registration. A temporary commercial registration licence must be applied for within 30 days of the date the contract is awarded and a copy of the award letter or the project execution contract signed by the government authority must be submitted to SAGIA.

A temporary commercial registration licence from SAGIA:

- Will be limited to the activities necessary to carry out the project awarded by the KSA government authority.
- Will be limited to a time period linked to the expected duration of the project awarded by the KSA government authority.
- Will be linked to the KSA government authority that awarded the project.
- Must be renewed every 12 months and the consent of the KSA government authority that awarded the project is required.

As a further refinement, a foreign contractor classified in the first class in its country, or which has implemented a project with a value of not less than SAR500 million, has not less than 2,000 employees and total assets of not less than SAR50 million, can apply for a SAGIA licence using the recently introduced Fast Track process. SAGIA states that the Fast Track system allows a licence to be issued in as few as five days from acknowledgement of a completed application.

Joining a consortium to bid for contracts in KSA

A consortium is essentially an agreement between a number of parties to undertake a joint venture. If a foreign entity is a joint venture partner it must hold a SAGIA foreign investment licence and a Commercial Registration issued by the Ministry of Commerce and Industry. Usually (but not always) the consortium will establish a KSA limited liability company to execute the contract. A consortium intending to bid for a government contract will be required to submit a copy of the consortium agreement.

For a foreign contractor bidding for KSA government contracts as part of a consortium, there may be a need for the foreign contractor to have a KSA SAGIA licence, depending on the terms of the Request for Proposal or Tender. Some may require KSA registration first, others may not. The SAGIA licence will need to be obtained by the new JV company (if there is one) otherwise it must be obtained by the foreign company setting up an entity in KSA as part of an unincorporated consortium.

Pre-qualifying for private sector contracts

Tender and pre-qualification processes for private sector contracts in KSA are not governed by specific laws.

Requirements for pre-qualification issued by private companies in KSA (other than government procurement) vary depending on the level of sophistication of the company, whether the company has experience in carrying out similar past projects, and the value and complexity of the work. However, most of the information required for government pre-qualification is generally also requested in private sector tenders.

Other pre-qualification requirements may include:

- Past occupational health and safety record.
- Any ISO or similar compliance.
- References from past employers, head-contractors or sub-contractors.
- A requirement to provide a financial guarantee / bond.

It may be a pre-qualification requirement that all bidders already have a KSA established entity.

Inducement of government officials

KSA has laws that keep the tender process transparent, fair and free from impropriety.

The Anti-Bribery Law 1992 makes it clear that the receipt of any benefit or advantage (financial or non-financial) concerning any government official would be considered a bribe and includes a promise, gift, bounty, favour or recommendation.

Prohibited circumstances include not only when officials demand a bribe for themselves or another person for performing their normal duties (or abstaining from performing such duties) but also receiving what is deemed to be a bribe without demand by the official concerned.

There are severe penalties for bribery, which vary according to the severity of the circumstances. The most severe penalties are 10 years imprisonment and/or a SAR1 million fine. The lesser crimes still carry imprisonment penalties of up to 3 years and/or a fine of up to SAR100,000.

Bribes or inducements in the private sector are illegal under Shari'ah principles.

Conclusion

Qualifying as an approved bidder is the first part of the tender process and contractors now have a more streamlined way to qualify as a bidder in KSA.

The willingness of the government to bring in more streamlined processes for contractors entering KSA is a reflection of the significant amount of work being carried out and the need for experienced foreign contractors to bring their know-how and resources to implement projects in the Kingdom of Saudi Arabia.

With the continued rollout of world class infrastructure projects across the Kingdom, the demand for foreign contractors and suppliers will remain strong in the years ahead. Knowing how to pre-qualify to tender on those projects is an essential first step for any contractor looking to win tenders in KSA.