

eSelection id 83895
North Macedonia: Project Preparation and Tender of a New Natural Gas Distribution System - Legal Advisor

EBRD's Response to Requests for Clarifications

Q1. Considering the complexity of the task and the needed time for preparation of the Technical Proposal, as well as the situation with the Covid-19 pandemics particularly in N. Macedonia, can the Bank consider 2-3 week extension of the deadline for submission of the proposals?

A1. The deadline of the submission of proposals has been extended to 7th August 2020.

Q2. The notice contains the following explanation “*Consultants should note that one person could have more than one role (e.g., the Team Leader could also be a specialist) and one role could be filled by more than one person.*” In this regard, would it be possible for the Local Transaction Lawyer(s) to participate in more than one proposal (i.e. local law firm to team up with more than one International Transaction Lawyers/International law firms)? If yes, are there any conditions (i.e. would be necessary that the local law firm is formally nominated as a subcontractor of the International Transaction Lawyers/International; or the local law firm can participate in multiple proposals as a member of a consortia)? In case of required subcontracting, would the references and CVs of the nominated Local Transaction Lawyer(s) be considered/evaluated in same manner as in case of consortia?

A2. The Consultant (including the individual members of any JVCA) shall submit only one Response, either in its own name or as part of a JVCA in another Response. If a Consultant, including any JVCA member, submits or participates in more than one Response, all such Responses shall be disqualified and rejected. A Sub-consultant is not considered to be participating in a Response. CVs included in any proposal will be evaluated against the criteria outlined in the procurement notice.

Q3. As an alternative to the above, would it be possible for the same local law firm to nominate two or more different lawyers/teams for the position of the Local Transaction Lawyer(s) in more than one proposal? Same question related to the evaluation of the references/CVs.

A3. As above. A sub-contractor/sub-consultant is not considered as participating in a Response and therefore may participate in more than one response.

Q4. The following task within the 3.2.1 Legal Due-Diligence, including Legal and Regulatory Framework for Gas Distribution and its tariff mechanism is not clear enough.

“Review at a high level the land ownership status in the Project area with reference to EBRD’s requirements on land acquisition (PR 5 of the ESP, 2019) and the roles and responsibilities for land acquisition or access (for construction and operational phases of the Project) between the Government and the Private Partner. This information should be included in the Resettlement Framework required in Section 5.2.8;”

A4. This is a typo. The last sentence should refer to section 3.2.8, not 5.2.8. For more information on PR5, please look into EBRD Environmental and Social Policy.

The Legal Consultant is expected to review the land ownership status and advised who/what institution is best placed to undertake land expropriation.

Q5. Please confirm that is not expected from the legal consultant to obtain all property lists, which for sure are more than several thousands, in order to identify the land status (agriculture or construction land) and ownership (state or private) of each parcel?

A5. Land status and ownership can be easily identified via cadastre platform. The Legal Consultant is responsible only for high level review, i.e. property lists are not required for pipeline alignment but this certainly includes thorough assessment of land plots where pressure station are to be located.

Q6. The table within Section 4. Deliverables and Milestones provides the estimated timeline. The last column (Timeline) uses the abbreviations T + and P +. Could you specify what these letters stand for?

A6. 'T' is the Consultant mobilisation date and 'P' is a date when MoE approves deliverables from the Phase 1 of the assignment.

Q7. Among the Qualifications and Professional Experience required for the Local Transaction Lawyer(s) are the following:

- *"Track record experience working in capital project in North Macedonia"*
- *"Experience in infrastructure in North Macedonia is a must."*

Is advising and assisting the North Macedonia Government and / or MoE in conducting tenders for large energy investments qualifies as capital project? Would providing legal advice to the company that constructed natural gas transmission network and to the company constructing wind farm, both in North Macedonia, satisfy the requirement "experience in infrastructure in North Macedonia"?

A7. Yes, it does, for both questions.

Q8. We understand that local transaction lawyer(s) might be a team of two or more lawyers, in which case each lawyer member of the team doesn't have to individually satisfy all the requirements for Qualifications and Professional Experience, but as a group. Is this applicable for International Transaction lawyer - to propose more than one international lawyer that would jointly meet the criteria?

A8. Yes.

Q9. Group of Consultants first deliverables may have an impact (require changes) on the ongoing first phase (submission of Expression of Interest, EoI) of the procurement process conducted by MoE. Is the deadline for submission of expression of interest (10 August 2020) planned to be prolonged so that the Group of Consultants can provide possible changes to the already published documents (contract notice and first phase tender documentation)?

A9. This would depend on timings and the changes required.

Q10. Among the requirements stipulated in Section 5.1 International Transaction Lawyer with experience in gas distribution is the following one:

- *At least 1 successful gas distribution PPP transaction advising the public sector that has reached financial close preferably in the last 5 years,..*

We would like to point your attention that it is very uncommon, especially in the last 5 years, natural gas distribution network to be developed through establishing PPP, therefore it is almost impossible for any lawyer to meet this criterion. Could you reconsider this requirement and making it bit broader so that the experience could encompass any investment / development of energy facility based on PPP model?

A10. This requirement is amended as follows: At least 1 gas distribution project including PPP, Concessions, Privatization with private financing and working for the public sector.

Q11. Regarding to the required reference of the consultant' profile: *“The Consultant will be a firm or a consortium of firms with legal expertise. Previous experience in providing advisory services to governments on gas network PPP projects that reached financial close in established markets is required. Proposals unable to demonstrate such experience will be viewed as inadequate”*, we would like to point out that such reference is either very rare or probably impossible to possess.

A11. Yes, we are aware that we are looking for unique and rare expertise.

Q12. We would kindly propose the term “gas network PPP projects”, to be changed in “energy or infrastructure PPP projects”, considering that almost all distribution gas networks all over the European countries are developed base on awarded concession by the state/municipality authorities. We appreciate if you consider our proposed suggestion and this item of the tender announcement will be changed.

A12. This requirement is amended as follows: At least 1 gas distribution project including PPP, Concessions, Privatization with private financing and working for the public sector.

Q13. The Instructions refer to the Law on Public Procurement ”Official Gazette of the Republic of Macedonia No. 27/2015 - consolidate text and amendments of the Law No. 78/15, 192/15 and 27/16). We note that the new Law on Public Procurement is in force since 1 July 2019, and assume we should conform our response to the 2019 law.

A13. Yes, there was a new Law on Public procurement approved
<http://www.bjn.gov.mk/category/zakon-za-avni-nabavki/>.

Q14. We also note that the Energy Law of 2018 was amended in 2019 (Official Gazette of the Republic of North Macedonia no. 153/19 and 261/19) and assume our response should conform to these amendments.

A14. Yes, there were amendments, please conform.

Q15. Our understanding is that legal work on the social consultation is limited to a review that the reporting of the Risk Matrix and PPP structure are factually correct? Should any actor establish legal standing to intervene through the consultation process (for example, a challenge under the ESIA), then we assume that the EBRD will determine how this affects the project until the government can address this issue. Is that correct?

A15. Yes, correct.

Q16. Our understanding is that the work on the regulatory framework is to provide an overview of the economic underpinnings of it and, to the extent only that this is provided in the concession agreement, the legal regulatory overview. We assume that all other aspects of legal regulation are dealt with by the government. Is that correct?

A16. Yes, correct.

Q17. In regards to ToR, paragraph 3.2.6 and 3.2.7, is it correct that legal review of these elements is limited to ensuring that they are factually correct?

A17. Yes, the purpose of the review is to ensure factual correctness. In case issues are spotted, the Legal Consultant is expected to instruct the Lead Consultant on how to amend the deliverables.

Q18. We assume that the Lead Consultant will be tasked with preparation of the principal tender documents and their parameters and that the role of the legal consultant, other than for contracts that it is drafting, will be to ensure conformity with local laws and international best practices?

A18. The Lead Consultant is expected to be responsible for financial and technical parameters of the tender documentation. The Legal Consultant is expected to be responsible for Legal parameters and drafting the documents in line with local laws. This is very much a group exercise with high level of cooperation.

Q19. In regards to ToR, paragraph 3.3 please clarify the reference here to regulatory framework, is this any different to what is referred to in paragraph 3.2.5 (overall model and key features) as far as the legal consultant is concerned?

A19. Paragraph 3.2.5 (Phase 1) refers to regulatory framework that is to govern the existing and new networks. Paragraph 3.3 (Phase 2) refers to regulatory framework for the tender phase of the PPP.

Q20. In regards to ToR, paragraph 3, as an isolated and emerging market with limited international interconnections (principally through the Interconnector Greece-North Macedonia), is it expected that the structure for the distribution model will require state subsidy for a transitional period or does the Ministry of Economy model envisage an entirely ratepayer-based model from the inception?

A20. Incentives are considered, as per section 3.10.3 of the updated feasibility study.

Q21. In regards to ToR, paragraph 3.3, please confirm whether/which of the legal documents to be drafted will be prepared based on North Macedonia's model documents (if any). Please confirm the intended governing law of the legal documents.

A21. All documents should be prepared in line with the laws of North Macedonia.

Q22. In paragraph 3.4 of the ToR, we note that the term Financial Close is used here whereas Final Close is used in paragraph 4 (item 16). We assume the Final Close of the project documents is not dependent upon any further advice or negotiation of direct agreements or other requirements of project lenders from the government. Is that correct?

A22. This is a typo. Item 16 in paragraph 4 should say: "Support until Financial Close and fulfilment of Conditions Precedent".

Q23. What is the timeline for the delivery of the PPP structure - is this also 5 months?

A23. Yes, 5 months.

Q24. We understand that unless otherwise agreed, all reports/deliverables are to be submitted to EBRD and MoE in both, English and Macedonian. Please clarify whether such reports/deliverables should be produced in English and then translated into Macedonian only for key project deliverable dates. In addition, please clarify whether for the purposes of translation of such documents an outsource translation agency could be engaged and if these costs are separately priced as disbursements outside the project cost?

A24. The working language of the assignment is English and all deliverables are to be produced in English. Final version of a document (i.e. ready for submission/approvals) shall be translated to Macedonian, for all deliverables. Translation costs shall be included within the financial proposal. It is up to the Consultant how translation is managed, externally or with the firm, to ensure the high quality of deliverables.

Q25. We understand that "P" is a longstop date of 6 months against which a further procurement timeline of 12 months is assessed and that the longstop date for

Final Close means a maximum duration of 24 months? Will there be additional budget available should an extra 12 months be required to achieve Final Close (i.e. out to 36 months)?

A25. 'T' is Consultant mobilization date and 'P' is a date when MoE approves deliverables from the Phase 1 of the assignment.

Q26. In the second paragraph of page 12 it is stated "At the beginning of the services, the MoE and EBRD will provide the Group with all the available information related to the Project. Information and documents will be provided in Macedonian and English, and, as required, the Group will be expected to provide unofficial translations in some instances to EBRD." Please clarify whether for the purposes of translation of such documents if different for the production of bilingual documents in support of key project milestones and if this would be priced as a separate disbursement? We assume that all documents during negotiations will not have to be produced bilingually for each draft? If we are providing the principal advice in English, will we ever have to provide such translation for the EBRD?

A26. No, translation described in page 12 is included in the cost estimate for the assignment.

Again, all deliverables will need to be produced in English and version ready for submission/approvals will be translated to Macedonian.

During Negotiations (3.4), amendments to Concession Agreement and other Project Agreements, will need to be done to both versions, English and Macedonian. Language (English or Macedonian) of the working documents (notes, tracking sheets, request letters etc.) during Negotiation will depend and will be agreed with the winning bidder and the Government.

Q27. For deliverables involving the Legal Consultant and the Lead and/or E&S Consultant (deliverables 1, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16), please confirm whether the Legal Consultant will receive instructions from the EBRD in accordance with paragraph 6 as appears to be the general position?

A27. Yes, we confirm.

Q28. We note that a study tour is required of the Lead Consultant. Will International or Local Counsel be expected to be in attendance or to provide training at any point of the mission? Do legal consultants have to present our reports in person or otherwise have a meeting with the stakeholders in that regard?

A28. The Legal Consultant is not expected to attend the study tour or provide any training. The Legal Consultant is expected to attend estimated roughly 20 meetings in Skopje over the course of the Assignment. In practice, this will however depend on COVID travel restrictions.

Q29. We note an estimated 20 meetings in Skopje - please confirm that these will be priced separately. Do we need to price any aspect of this in our proposal?

A29. All travel expenses should be included with the financial proposal.

Q30. In respect of Section "Consultant Profile", you mention that previous experience in providing advisory services to governments on gas network PPP projects that reached financial close is required. Can this requirement include also concessions contracts or other forms of design, build, finance and operate projects?

A30. This requirement is amended as follows: At least 1 gas distribution project including PPP, Concessions, Privatization with private financing and working for the public sector.

Q31. Can the requirements for the Key Expert 1 be met by a team of several experts or it should be only one legal expert/one CV which meets all requirements?

A31. Yes, more than one person can be proposed to fill in the role of a Key Expert. Please nominate one of them as leader.

Q32. One of the criteria for the Key Expert 1 is “at least 1 successful gas distribution PPP transaction advising the public sector that has reached financial close”.

- a. Does the requirement refer only to gas distribution projects or would gas transmission projects qualify as well?
- b. Would ongoing assistance provided to the government or to a government owned company after the financial closing of a gas pipeline concession project and in relation to matters which are incident during the operation by the private operator qualify as relevant experience?
- c. If the answer to question 2 above is positive (i.e. several lawyers can meet together the requirements for the Key Expert 1), can this requirement be met by two lawyers (for example, one with experience in advising the public sector on a successfully closed PPP project and another one with experience in advising the public sector, sponsors or lenders in relation to gas pipeline concessions or PPP projects)?

A32. a) Yes, a gas transmission project would also qualify.

b) We are looking specifically for advisors with expertise on project preparation and tender, but experience gained on providing advisory services during operation phase obviously valuable. It will be scored accordingly.

c) Yes, more than one CV can be proposed to fill in the role of a Key Expert. Please nominate one of them as leader.

Q33. In the project notice, the estimated timing of the Assignment is 24-36 months. However, according to the calendar in the terms of reference, the project preparation phase (inception, legal due diligence, risk matrix, term sheet, ESA, etc) is estimated at 6 months, the tender process up to awarding of the PPP contract is 12 months and another 6 months are allocated from awarding of contract up to financial closing. Given also that the Feasibility Study for the Project is already updated and that the expression of interest phase of the tender has already started, 6 months for project preparation phase before the tender should be a reasonable timing. Therefore, would a timing assumption of 24 months in total be acceptable in the proposal? Or, if the duration of the Assignment will be maximum 36 months, would an assumption that only 24 months out of the 36 months would involve constant input from the legal team be acceptable, while the work would be suspended for the rest of the 12 months?

A33. 24-36 months is an estimated timeframe that we are able to provide at this point. Please outline in your proposal a timeline that you feel in your professional expertise is most appropriate. In our experience, most PPP assignments tend to experience delays due to prolonged approvals, low capacity on public sector side, elections, unforeseen circumstances and other force majeure.

Q34. The Terms of Reference mentions an approximate number of 20 meetings during the Assignment. Is the International Key Expert expected to attend all these meetings in person or can it assume a lower number of meetings in person on the assumption that the rest of the meetings can be attended by the Local Expert only? In the context of Covid 19 pandemic, would an assumption that several of these meetings be replaced by videocalls be acceptable in the proposal?

A34. The International Key Expert is expected to attend all key meetings (kick-off, presentations of deliverables, negotiations etc.) in person. It is estimated at around 20 meetings during 24-36 months. Some of these meeting may be replaced by a video conference if COVID travel restrictions are still in place.