Public Procurement World - Hungary

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# 1. The Laws

## a. What is the applicable legislation?

As of November 1, 2015, Act CXLIII of 2015 on Public Procurement ("PPA") is the key piece of legislation governing public procurements in Hungary. As a general rule, the provisions of the Act are applicable to public procurements, contracts concluded on the basis of procurement procedures, design contests and review procedures requested, initiated or launched ex officio in relation thereto and preliminary dispute settlements.

Intended to transpose the most important rules of all three relevant EU Directives, the consolidated PPA is completed by the detailed rules of the implementing regulations (government decrees).

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Under EU law, Member States were required to transpose the provisions of the new directives into their national legislation by the transposition deadlines specified in the directives. The PPA is in line with the EC Directives.

At the time of its EU-accession, Hungary also joined the WTO Government Procurement Agreement ("GPA").

## c. What are the basic underlying principles of the legal framework?

transparency of public spending

open control of the appropriation of public funds efficiently, f

fair competition in the course of public purchases

equal treatment

acting in good faith and fairness, without any abuse of rights.

Having regard to public spending contracting authorities shall proceed bearing in mind the principle of efficient and prudent management.

In addition to the above, to combat corruption, the Public Procurement Authority (Authority) published a Code of Ethics (<http://www.kozbeszerzes.hu/data/filer_public/92/e2/92e2b491-c0a1-4654-be10-4ad65d2fbf36/kozbeszerzesi_etikai_kodex_2016.pdf>). The Code of Ethics complements the legal framework and both contracting entities and tenderers are encouraged to voluntarily abide by them. The Authority maintains a public register of those entites, who have accepted the Code of Ethics.

The principles governing the Code of Ethics are the following:

Legality:

Lawful use of rights

Fairness

Equity

Transparency:

Responsibility

Efficiency

anti-discrimination:

integrity

## d. Is aerospace and defense procurement treated differently from other types of procurement?

Yes, procurements in the field of defence and security are treated separately and thus, are not governed by the PPA; instead the following separate laws are applicable:

***Act XXX of 2016*** on procurement for defense and security purposes is the key legal instrument governing defense procurement related procedures ("Defense Procurement Act"," **DPA**") The DPA transposes into law Directive 2009/81 / EC of the European Parliament and of the Council of 13 July 2009 from 'classical' public procurement and covers defense procurement, security procurements, and services. The common features of defense supplies are that they are specifically designed for military purposes, given that EU case law is consistent in ensuring that goods, services and works that are capable of performing more than one function are to be procured in line with the directive if they are expressly designed for military purposes in their original or converted form.

The DPA only provides for the framework of the scope of the goods, services and works, and a detailed list of the Common Military List of the European Union is issued at government level. The concept of *security procurements* is introduced by the DPA referring to purchases not qualified as defense procurement, but which concern or affect Hungary's internal and external security and involve or generate classified data.

For the full transposition of the contracting authority concept of the Defense Directive, the law does not list specific bodies as its subject, but rather defines the scope of contracting entities by type of body, and, in the case of security procurements, public service providers as contracting entities.

Unlike the previous regulation, the Act regulates separate national and separate EU procedures. In the case of defense procurement, the law does not set a national threshold, while the law on security procurement applies only if Government decree 492/2015. (XII. 30.) - on the conditions and the procedure regarding the initiation of the exemption by the National Assembly in connection with the classified procurements, furthermore the requirements to be imposed by the contracting authority during the realisation of such procurements heir estimated value reaches or exceeds the amount corresponding to the respective national public procurement threshold. For both defense and security procurements, the EU value limit for defense and security procurements as well as less stringent rules related to the national procedural rules for procurements of estimated value or above, can not be applied.

**Government decree 225/2016. (VII. 29.)** - on the conditions and the procedure concerning the initiation of the exemption by the National Assembly in connection with the basic security interest related procurements, furthermore the requirements to be imposed by the contracting authority during the realisation of such procurements

**Government decree 492/2015. (XII. 30.)** - on the conditions and the procedure regarding the initiation of the exemption by the National Assembly in connection with the classified procurements.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

The following **classic public agencies** are covered:

ministries (all ministries and also the Office of the PM "Miniszterelnökség");

central purchasing bodies delegated by the Government (currently one entity: Public Procurement Directorate (Közbeszerzési és Ellátási Főigazgatóság, KEF);

the State and all budgetary authorities (National Media Authority, Competition Authority, Procurement Authority), public foundations, municipal governments, local and nation-wide nationality self-governments, associations of municipal governments and nation-wide nationality self-governments, regional development associations of local authorities, territorial development councils;

## b. Which private entities are covered by the laws?

Private entities may fall under the public procurement if (i) they qualify as public interest entities (ii) they are controlled / financed by public agencies; or (iii) their procurement is subsidized by a public agency or the State.

*Public interest entities*

**"Public interest entities" are generally - but not exclusively - established as private companies** (generally as companies limited by shared). In general, these companies are exclusively state-owned, but meeting three conjunctive requirements will result in their qualification as "public interest entities": (i) their purpose of public interest; (ii) legal capacity and (iii) directly or indirectly controlled or financed by the above-mentioned entities. Examples include such large companies as MÁV Zrt (Hungarian Railways), BKV Zrt (Budapest Metropolitan Area Transport), Magyar Közút Zrt (Hungarian Public Roads), ÁKK Zrt. (Government Debt Management).

*Controlled entities*

Those legal persons may be subject to public procurement rules over which a contracting authority is deemed to exercise decisive control as follows:

a control similar to that which it exercises over its own departments, where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, provided there is no direct private capital participation in that controlled legal person and more than 80 per cent of its net annual income stems from contracts concluded or to be concluded with the controlling contracting authority or with a legal person controlled in the same way by the contracting authority; or

jointly with other contracting authorities a control similar to that which it exercises over its own departments, where the contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person, provided there is no direct private capital participation in that controlled legal person and more than 80 per cent of its net annual income stems from the contracts concluded or to be concluded with the controlling contracting authority (contracting authorities) or with a legal person controlled in the same way by the contracting authority.

Examples include: Szerencsejáték Zrt. (Hungarian Gambling Zrt.); Egészségügyi Szoltáltató Zrt. (Health Care Provider Zrt.); Honvédelmi Minisztérium Elektronikai, Logisztikai és Vagyonkezelő Zrt.

**The PPA defines the classic public agencies; public interest entities and the controlled entities as "contracting authorities", which is the central notion of the PPA. The Public Procurement Authority maintains an up-to-date database of the registered contracting authorities, which is publicly available at** [**http://www.kozbeszerzes.hu/adatbazis/keres/ajanlatkerok/**](http://www.kozbeszerzes.hu/adatbazis/keres/ajanlatkerok/)

*Subsidized companies*

A body or person whose procurement is financed, for the most part, directly by one or more of the contracting authorities where the estimated value is equal to or greater than the EU procurement threshold, or subsidized directly by one or more of the same public agencies / controlled entities. by more than 75 %t and the estimated value of which is below the EU threshold, but equal to or greater than the national procurement threshold:

where those contracts involve civil engineering activities,

where those contracts involve building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes, or

where those contracts involve services which are connected to the above two works.

In addition to the above, if a project is funded by non-repayable grants, the body or person, whose procurement is intended for the supply of goods or services, or for works is subsidized directly by one or more of the contracting authorities by up to at least HUF 40 millions, with the following exception

by investment aid awarded by the individual decision of the Government (EKD subsidy)

by aid granted on a case-by-case basis for the creation of new jobs;

by training, and aid for the setting up and development of workshops;

by aid for research and development and innovation;

by aid granted to business entities for the purpose of re-industrialization; or

by any aid from Union or national resources requested before 1 November 2015.

**Addition to a. and b.**

Note that additional rules are in place to transpose the provisions of the Utilities Directive. Government decree 307/2015. (X. 27.) regulates specific public procurement rules for public service contracts. In line with the Utilities Directive, these are (i) public agencies or (ii) entities controlled by public agencies which provide fixed networks intended to provide a service to the public

in connection with the production, transport or distribution of **drinking water, or the supply of drinking water to such networks**;

in connection with the production, transport or distribution of gas or heat, or electricity, or the supply of **gas or heat, or electricity to such networks**;

activities relating to the provision or operation of networks providing a service to the public in the field of transport by **railway, automated systems, tramway, trolley bus, bus or cable**;

the exploitation of a geographical area for the purpose of the provision of **airport, maritime or inland port or other terminal facilities** to carriers by air, sea or inland waterway and to carriers of passengers, extracting **oil or gas**, or exploring for, or extracting, coal or other solid fuels;

**postal services**.

Examples include: Magyar Posta Zrt (Hungarian Post); HungaroControl Zrt., Fővárosi Vízművek Zrt, (Budapest Metropolitan Water) Magyar Gáztranzit Zrt; MAVIR Zrt. (Hungarian Transmission Operator)

Note that companies, who provide services based on an exclusive or special right may also qualify as public service provider. Notable example is Budapest Airport Zrt.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

In certain cases, co-operation between public bodies may be exempted from the public procurement regime.

Conditions of exemption are assessed vis-à-vis each contract to be concluded. **Exemption applies to contracts concluded by a contracting authority with one or more other contracting authorities, for cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common, where the implementation of that cooperation is governed solely by considerations relating to the public interest, and the annual net turnover of the participating contracting authorities does not exceed 20 % from the activities concerned by the cooperation performed on the open market**.

Furthermore, the following co-operations may also be exempted:

contracts concluded by a contracting authority with a controlled legal person provided there is no direct private capital participation in that controlled legal person and more than 80 per cent of its net annual income is from the performance of the contracts concluded or to be concluded with the controlling contracting authority or with a legal person controlled in the same way by the contracting authority;

contracts concluded by a contracting authority rwith a controlled legal person provided there is no direct private capital participation in that controlled legal person and more than 80 per cent of its net annual income is from the performance of the contracts concluded or to be concluded with the controlling contracting authority (contracting authorities) or with a legal person controlled in the same way by the contracting authority;

to procurements of works, supplies and/or services through a central purchasing body by way of public procurement procedures by bodies on whose behalf the central purchasing body has awarded the relevant public contracts, including ancillary purchasing services provided by the central purchasing bodies.

## d. Which types of contracts are covered?

The PPA covers the contracts the subject of which is: (i) the purchase of goods; (ii) purchase of services; (iii) construction projects; (iv) construction concessions; and (v) service concessions; provided that the goods or services are provided for consideration, the value of which reaches the respective minimum amounts defined by the PPA.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Generally speaking, substantial amendments to existing contracts require new procedures. Failure to conduct a new procedure results in the invalidity of the contract.

A modification of a contract is considered to be substantial, where (i) the terms affected by the amendment would have allowed the participation of other tenderers or the success of another tender instead of the successful tender, if those terms had been indicated in the procurement procedure preceding the conclusion of contract, (ii) where the amendment shifts the economic balance of the contract in favor of the successful tenderer; or (iii) where the amendment extends the subject-matter of the contract over a new, significant element compared to the tenderer's obligations imposed by the original contract.

**New procedure for the amendment may be avoided, if:**

the amendment is considered **unsubstantial**.

***de minimis changes*: the increase in the counter-value** occurring as a result of the modification or, where several successive modifications are made the net cumulative value of the successive modifications, **reaches neither the EU threshold nor 10% of the initial contract value** in the case of public service, public supply and works concession or service concession and 15% of the initial contract value in the case of public works; moreover, (as of 1 January 2017.)

**specific set of circumstances**: the contract clearly stipulates the precise conditions and content of the subsequent changes of the determined substantial elements of the contract (including the right of option) and those conditions and contents are known in advance by all tenderers and for additional works, services or supplies by the original contracting party that have become necessary and that were not included in the initial procurement where a change of the contracting party cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and would cause significant inconvenience or substantial duplication of costs for the contracting authority. However, any increase in price or, where several successive modifications are made the net cumulative value of the successive modifications, cannot exceed 50 % of the value of the initial contract.

## f. What is the applicable regime for framework agreements?

Framework agreements are permissible, but the term of a framework agreement may not exceed four years, except in duly substantiated cases, taking into consideration the subject-matter of the framework agreement. In this respect, it shall be considered whether the specific features related to the given framework agreement require the setting of a longer fixed term, and whether it results in a disproportionate restriction of competition.

Framework agreements with multiple suppliers are admissible and single orders under multiple supplier framework agreements may be realised (1) through a direct purchasing order placed by the contracting authority with the tenderer(s) selected pursuant to the objective criteria established in the framework agreement or (2) through reopening the tender. Direct purchasing orders are permissible if the framework agreement specifies the objective criteria based on which the contract for the execution of the given public procurement will be concluded and sets out all terms of the contract(s), unless the notice launching the relevant procurement procedure prescribes reopening the tender.

Similarly, if the framework agreement was concluded with one tenderer, including those cases in which the procedure had been aimed at the conclusion of a framework agreement with several tenderers, but finally it was concluded with the sole valid tenderer, the implementation of the given public procurement may take place by way of a direct purchasing order on the condition that the framework agreement sets out all terms of the contract aimed at the implementation of the public procurement based on it, and that the notice launching the relevant procurement procedure does not prescribe otherwise. If direct purchasing orders cannot be used, then the written consultation procedure is employed, in the course of which the tenderer shall submit a tender which is similar to or more favourable than the terms of the framework agreement. In such cases, the framework agreement needs to specify which terms may be subject to written consultation.

## g. What is the applicable regime for public-private partnerships (PPPs)?

There is no official definition of PPP in Hungarian law, no clear distinctions can be made when categorising a project as a PPP project. Hungary does not have a separate PPP law establishing the framework for PPP projects.

Please also note that PPP model is currently not a model favoured or used for new projects in Hungary. In the mid-2000s the Build-Operate and the Build-Operate-Transfer models were the most frequently used models. When the financial crisis hit Hungary, the government announced a moratorium on PPP projects and initiated a review of the existing PPP contracts.

## h. How are concessions dealt with?

For the award of the concession contracts, a dedicated chapter of the PPA applies. Thus, concessions form a special part of the procurement regime.

It follows from the above that the concept of concession is very similar to the concept of a public contract. However, two additional elements are to observed: (i) operational risk and (ii) concession privilege. The PPA defines both the operational risk and who can be considered a concessionaire. Such conjunctive conditions are fully met is the operational risks are assigned to the concessionaire, otherwise there is no concession. It is considered that the concessionaire is liable for operational risk if it is uncertain whether the investments and costs incurred in the creation and operation of the works or services subject to the concession are recoverable.

Furthermore, construction or service concession may be awarded exclusively for a fixed period of time.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

In order to avoid anti-competitive conduct, the PPA provides that in the same public procurement procedure (i) a bidder must not submit a bid together with another bidder, (ii) a bidder should not be the subcontractor of another bidder, and (iii) a bidder should certify the eligibility of another bidder.

Section 11 of the Hungarian Competition Act prohibits agreements restricting economic competition. This provision implicitly covers the prohibition of bid rigging. Bid rigging in public procurement is the only antitrust violation that is punished by criminal law in Hungary: it is punishable by imprisonment of up to five years. Participation in bid rigging may also lead to exclusion from future public procurements. Some of the highest fines in the HCA's history were imposed on cartels targeting public procurement. In 2010, a fine of HUF 7.2 billion (approximately €23.2 million) was imposed on a railway construction cartel and in 2009, cartelists in the motorway construction industry were fined almost HUF 3 billion (approximately €9.4 million).

If the contracting authority notices the obvious violation of Section 11 of the Hungarian Competition Act or Article 101 of Treaty on the Functioning of the European Union, or assumes such violation with good cause, it must notify the Hungarian Competition Authority.

The Hungarian Criminal Code defines a crime regarding agreements in restraint of competition in public procurement and concession procedures, as follows:

"*Any* *person who enters into an agreement aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices (charges) or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade is guilty of felony punishable by imprisonment for up to five years.*

*Any person who partakes in the decision-making process of an association of companies, a public body, a society or similar organization, and adopting any decision that has the capacity for restraining competition aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract shall also be punishable as set forth in Subsection.*

*The punishment shall be imprisonment for a misdemeanor for up to two years, if the act specified in the above subsections if the value of the public contract involved is below substantial value.*

*The perpetrator of a criminal act defined in the above subsections shall be exonerated from punishment if he confesses the act to the authorities first hand and reveals the circumstances of the criminal act. Authorities shall also mean the bodies supervising competition and financial operations and the body which reviews procedures in connection with public procurement contracts*".

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Pursuant to the PPA, the following types of procedures may be followed.

open procedure: Contracting authorities may, at their discretion, be able to apply at any time in both EU and national procedures. The open procedure of a contracting authority may be applied at any time in both EU and national procedures. The open procedure is a one-stage procedure, where no negotiations take place.

restricted procedure: Contracting authorities may, at their discretion, be able to apply at any time in both EU and national procedures. The restricted procedure is a two-stage procedure consisting of a participation and a tender phase. This means that any interested economic operator may apply to participate in the participation phase of the call for proposals. In the participation stage only a participation application can be submitted. The second bidding stage is the submission of bids. The contracting authority is obliged to call upon candidates who are qualified after the submission of applications. The contracting authority invites all qualified candidates to take part in bidding, unless it has determined a framework number.

innovation partnership pursuant to the EU rules as summarized on the Innovation Public Procurement Platform.

negotiated procedure: the negotiated procedure may only be applied when the conditions set out in the PPA are met. The negotiated procedure is a two-stage public procurement procedure whose first stage of participation is the decision of the contracting authority to decide on the eligibility of the candidate to perform the contract. At the participation stage, the candidate can not bid. At the second bidding stage of the procedure, the contracting authority negotiates the terms and conditions of the contract with candidates qualified and invited to tender.

competitive dialogue: Competition dialogue can be applied in the same cases as in which cases a negotiated procedure can be conducted. Thus, authorities may freely decide whether to pursue a negotiated procedure or a competitive dialogue. All interested operators are eligible to submit applications for participation in a competitive dialogue. The contracting authorities will continue to consult the candidates and discuss their solution proposals.. The purpose of the consultation is to specify the subject-matter of the procurement, which will enable the selected candidate to submit a bid later.

negotiated procedure without publication of a notice: One-stage procedure with no participation qualification. At the initiation of the procedure, negotiations and negotiations will be held after the bidders have been invited to tender. Due to the restrictive and restrictive features of negotiated procedures without notice, they are only permitted under strict conditions, subject to stringent rules. The contracting authorities are obliged to inform the Public Procurement Authority of the initiation of a negotiated procedure without notice, explaining the facts underlying the legal basis. If, during the audit, the Authority finds that the legal basis is not in place, the Public Procurement Authority's Chair shall initiate an appeal procedure before the Public Procurement Arbitration Committee, upon receipt of a deficiency.

## b. What status do electronic means/procedures have?

As the relevant EU Directives allowed two years for member-states to put in place a functioning electronic procedure for procurements, use of which should be compulsory for parties involved in procurement falling within the scope of the PPA. Hungary undertook to fully implement such an electronic system before that deadline expires in October 2018. Government sources say implementation may be expected before the end of 2017.

## c. Where are contract notices, i.e. calls for bid, published?

Calls for tender are published in the Public Procurement Bulletin by the Public Procurement Authority and searchable in the Public Procurement Database kept by the authority as well. Both sources are public and access is secured through the website of the Public Procurement Authority ([see here](http://www.kozbeszerzes.hu/english/) – note that certain parts of the website are only available in Hungarian).

## c. Can certain prospective bidders be excluded from the competition?

Certain prospective bidders may be excluded from the competition on the basis of the excluding causes listed in the PPA. For example, a company should be excluded from a public procurement procedure if, among others, it is under voluntary or involuntary winding-up or bankruptcy, has overdue taxes, its activities have been suspended, or has provided false data which jeopardizes competition.

The contracting authority may exclude the companies for which no national treatment should be granted. National treatment should be granted for bidders seated in the European Union and for community goods. National treatment to non-Community tenderers and non-Community goods should be granted in compliance with the international commitments of the Republic of Hungary and the European Communities in the field of public procurements.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Pursuant to the PPA, the eligibility criteria defined by the contracting authority may relate to:

economic and financial standing;

technical and professional ability;

where deemed necessary to perform the contract, being enrolled in one of the professional or trade registers kept in the State of establishment, or having to possess a particular authorization or to be members of a particular organization or association in the State of establishment.

Contracting authorities may decide not to impose the criteria relating to technical and professional ability only in exceptional and duly justified cases, indicated in the procurement documents, and only if such criteria is considered unnecessary - relying on the particular characteristics of the procurement - for the purposes of verifying contractual performance.

Eligibility criteria must relate exclusively to the subject-matter of the contract having regard to equal treatment and non-discrimination of economic operators and to fairness of competition, and contracting authorities may prescribe them - taking into consideration the estimated contract value - solely to the extent that is in fact necessary for the fulfillment of the contract.

Recently the concept of minimum requirement in terms of references was introduced. It means that where the contracting authority requires proof of earlier supplies of goods and/or services, or public works worth up 75 % of the given procurement or up to 75 % in terms of quantity, where supplies of goods and/or services, or public works are considered equivalent to the procurement in question for technical considerations.

The prescribed eligibility criteria may be satisfied by groupings of tenderers or groupings of candidate tenderers collectively. As regards the requirements which can only apply to economic operators individually, it shall suffice if only one of them meets such requirements.

Tenderers and candidate tenderers may also satisfy the prescribed eligibility criteria relying on the capacities of other bodies (or persons), irrespective of the legal nature of the link between them.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Contracting authorities may issue prequalification notices which are generally used by public service providers in restricted or negotiated public procurement procedures or in the cases of competitive dialogue or innovation partnerships.

The PPA itself does not regulate prequalification in detail, however Government Decree 307/2015. (X.27.) on special public procurement regulations of public service providers, however, elaborates the procedure related to prequalification procedures.

Prequalification criteria established by contracting authorities have to be made public, and any economic operators are entitled to request being entered onto the list of prequalified participants provided that it duly submits the data, facts, certification, declarations or statements and other documents prescribed by the documents pertaining to the public procurement procedure in question. The request is reviewed solely on the basis of the set prequalification criteria. Incomplete requests may be corrected and the results of the evaluation of complete requests are to be communicated to economic operators within 15 days along with the reasoning given for refusal to enter the economic operator onto the list or prequalified participants in such is in order. Economic operators entered onto the list are under an obligation to report any change in the data or conditions related to prequalification criteria, but the contracting authority may decide to initiate proceedings aimed at the removal of economic operators whose eligibility is reasonably questionable.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Unofficial blacklist are maintained by the Public Procurement Authority in relation to (i) provision of false information and (ii) companies that were disqualified from public procurement procedures. Both available at <http://www.kozbeszerzes.hu/adatbazisok/> Furthermore, the tax authority also maintains a "blacklist" of those, who have tax debt. This is available at <https://www.nav.gov.hu/nav/adatbazisok/adoslista>

The PPA introduced self-cleaning to the Hungarian public procurement regime. As a result of 'self-cleaning' procedures introduced by the PPA, companies that are excluded from public-procurement procedures may now be able to participate in tenders. But to participate, they must initiate 'self-cleaning' procedures and demonstrate their reliability.

According to the PPA, a company undertaking self-cleaning must or must have:

pay/paid compensation to any aggrieved party for damages caused by criminal offense, misconduct, or infringement;

fully cooperate(d) with all competent authorities to clarify the facts and circumstances of the misconduct;

adopt(ed) specific technical, organizational, and personnel measures to prevent future misconduct and criminal activity.

With only a few exceptions, if a company falls under exclusion it may initiate self-cleaning procedures with Public Procurement Authority, which may declare it reliable, and allow it to participate in the tender process.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Yes. Persons or organizations involved by the contracting authority in the pursuing of any activity relating to the procurement procedure or to the preparatory work thereof may not participate in the procedure as a tenderer, candidate, subcontractor or an organization participating in the certification of suitability due to conflict of interest.

Furthermore, any organization, if its executive officer or a member of its supervisory board, or its owner or a relative living in the same household as the persons before mentioned is involved by the contracting authority in the pursuing of any activity relating to the procedure or to the preparatory work thereof is excluded for the same reason from participating where their involvement in the procedure may have the effect of distorting competition.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Two or more bidders may submit joint bids, with certain restrictions.

Tenderers or candidates may meet eligibility criteria by relying on the capacity of any other entity or person, regardless of the legal nature of their relation. The contract to be performed by the party entering into the contract as the successful tenderer or joint tenderers on the basis of the procurement procedure or by the business organisation in which the winning tenderer (tenderers) or the contracting authority together with the winning tenderer (tenderers) have an exclusive share (project-company).

The right of the tenderer to involve subcontractors cannot be limited, except where the contracting authority announced such a requirement (applicable only in the case of construction projects).

In the same public procurement procedure: (i) a bidder must not submit a bid together with another bidder; (ii) a bidder should not be the subcontractor of another bidder; and (iii) a bidder must certify the eligibility of another bidder.

## g. Can members of a bidder consortium be changed during a procurement procedure?

The party or parties entering into the contract as the winning tenderer may only be replaced (1) on the basis of a contractual provision that complies with the provisions of the PPA on permissible contractual amendments, (2) the succession is ensured by a project-company or a legal person which provides financing for the performance on the basis of a contractual provision aimed at guaranteeing performance, or (3) where the succession of the contracting party is a result of transformation, merger or division or any other way of termination of the legal person or it is due to partial succession in the course of which the entire branch of business responsible for the given activity passes to the successor or the contract is transferred in the course of insolvency proceedings against the original contracting party, provided in all of these cases, that the successor entering into the contract is not subject to exclusion and meets suitability criteria and that the succession is not aimed at circumventing the provisions of the PPA

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Yes. In the same public procurement procedure: (i) a bidder must not submit a bid together with another bidder; (ii) a bidder should not be the subcontractor of another bidder; and (iii) a bidder must certify the eligibility of another bidder.

# 5. Specifications

## a. Are there any rules on the specifications?

As a general rule, specifications must be described in a manner such that it fulfills the use for which it is intended by the contracting authority.

It may refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not ultimately effect the characteristics of such works, supplies or services, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

Technical specifications must allow equal access of economic operators and must not create unduly burdensome requirement to the opening up of public procurement to competition.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

The PPA does not allow for such changes.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

Specific provisions to this end are scarce in the PPA.

In the tender or the request to participate in multi-stage procedures, the tenderer or candidate tenderer shall - in addition to the submission of other documents as prescribed - specify whether he is recognized as a micro, small or medium-sized enterprise according to the Act on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises.

Part Three of the PPA, on procurements below EU thresholds, mentions that in the course of the selection of economic operators, the principle of equal treatment shall be complied with and, if possible, in particular the participation of micro, small or medium-sized enterprises is to be enhanced.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

The contracting authority is obliged to select the most economically advantageous tender, such that the criterion of either the lowest price, the lowest cost, or the best price-value criterion may be applied.

The contracting authority is obliged to apply the lowest cost or the best value-for-money evaluation criteria.

## b. Are there any limitations regarding the offered bid price?

The contracting entity may only choose the lowest criterion for the lowest price if the contractor's requirements are met by a product or service that meets a specified quality and technical requirement and the selection of the most economically advantageous tender is not further qualitative characteristics but only the lowest price evaluation.

The contracting entity may not apply the lowest price criterion as the sole criterion for design, engineering and architectural services and for works. In the case of a the award of a grant, the terms and conditions of the grant may lay down detailed rules concerning the applicable valuation system and methodology for each procurement object.

Abnormally low prices and other unreasonable commitments are strictly assessed and result in the exclusion of the respective bid.

The procedure applied if the price appears to be abnormally low is the following: the contracting authority requests the basic data determining the contents of the relevant tender elements and an explanation. If the acceptability of the explanation is put in doubt, the contracting authority may request supplementary explanation, notifying at the same time all the other tenderers, with the aim of assessing whether the explanation is acceptable. It is incumbent upon the tenderer to make all facts, data, calculation concerning the well-founded nature of the consideration available to make it possible for it to decide whether the consideration is well-founded. The tender shall be declared invalid, if the information supplied does not confirm that the contract may be executed at the given price.

## c. Are there any rules on alternative bids?

The contracting authority should indicate in the document initiating the public procurement procedure whether alternative bids are accepted or prescribed. The contracting authority is entitled to allow the possibility of alternative bids only if the award criterion is that the contract is awarded to the bidder which submits a bid that contains the most advantageous offer. If the contracting authority allowed alternative bids, it should specify in the documents initiating the public procurement procedure what minimum requirements and technical specifications the alternative bids must comply with. In such cases, the award criteria shall be set in such a way as to make it possible for the contracting authority to apply them to the variants and to the tenders which are not regarded as variants.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

In certain very strict conditions, the contracting authority may be entitled to call only one bidder for participating in a tender. This is the case, for example, when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be performed only by a particular organization or person.

Further, public contracts may be reserved for "sheltered employers". Pursuant to the PPA, the contracting entity may, and in certain cases must, reserve the right of participating in public procurement for bodies qualified as sheltered employers, bodies committed to a sheltered employment program, and for bodies authorized to operate social employment programs, if more than 30% of their workforce is comprised of people with some degree of incapacity, or for bodies providing employment under a social employment program for workers cared for in social institutions, if more than 30% of their workforce is comprised of people with disabilities. The contracting entity should clearly indicate this disposition in the tender notice.

In connection with the public contracts reserved according to the above subsection, the contracting entity should ensure equal opportunity to tenderers established in the European Union, if more than 30% of their workforce is comprised of workers with some degree of incapacity.

## b. What are the consequences for violation of the competitive bidding requirement?

The contract is null and void, if it was concluded unlawfully without the conduct of a procurement procedure or if it was concluded as a result of a negotiated procedure without prior publication of a notice and the criteria for the application of this type of procedure were not fulfilled or if it was concluded in breach of the rules regarding the standstill period and so deprived the tenderer of the opportunity to resort to a remedy preceding the conclusion of the contract, and at the same time they violated the rules applicable to public procurements in such a way that it influenced the prospects of the tenderer to win the procurement procedure.

Violations of the competitive bidding requirement fall into the scope of authority of the Public Procurement Arbitration Board. The sanctions that the Board may impose are elaborated below under 8.h

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

The PPA contains detailed rules on available remedies. In Hungary, the Public Procurement Arbitration Board is responsible for reviewing infringements of PPA provisions. Decisions of the Board may be challenged before the public administration courts.

A remedy procedure before the Board may be initiated either *ex officio* or upon the request of a contracting authority, a bidder or any other interested party, and upon payment of a procedural fee. The Board may decide to hold a public trial. The Board may take interim measures if it is likely that the PPA is violated or there is a jeopardy thereof.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Any claim in civil law based on an infringement of legislation applicable to public procurement or to the procurement procedure shall be admissible on condition that the infringement had been established in a final and binding decision by the Public Procurement Arbitration Board, or in the review of the decision of the Public Procurement Arbitration Board, by the court.

## c. Is there a specific forum before which procurement disputes are heard?

The Public Procurement Arbitration Board is responsible for reviewing infringements of the Act, it is entitled to conduct investigations and make administrative decisions on legal disputes falling within its competence.

The Board's jurisdiction extends over the entire territory of Hungary.

The Committee, acting in panels of three, decides on disputes arising in connection with the following alleged infringements of the Act:

the violation of public procurement rules;

the illegal amendment or performance of contracts awarded in a public procurement procedure; and

the violation of the procedural rules which were set out by the contracting authority independently in the case where the contracting authority chose to establish its own procedural rules.

## d. Are there any timing requirements for the review?

Yes, remedy proceedings may usually be requested or initiated within 15 days from the date on which the violation of the PPA came to the attention of the complainant if the complainant became aware of the violation only after it was committed.

If the request for remedy challenges the contracting authority's final decision establishing the results of the tender, remedy may be requested or initiated within 10 days from the date on which the violation of the PPA came to the attention of the complainant. If the request for remedy is challenging the call for tender or call for participation or the tender documentation, as a general rule, a remedy may be requested not less than 5 days before the expiration of the deadline for the submission of the bids.

The PPA contains certain presumptions concerning the date which is to be considered as the date of the violation and that of it coming to the attention of the complainant. No remedy proceedings may be requested more than 90 days after the date on which the violation of the PPA was committed.

## e. What are the main preconditions for review?

There are no specific admissibility requirements, but the review procedure may be initiated for the review of certain specified decisions and documents (final decision, call for tender, tender documentation).

Furthermore, only the contracting authority, the tenderer, any tenderer of a grouping, the candidate tenderer, any candidate tenderer of a grouping, or any other interested party, whose right or lawful interest is violated or jeopardized by any unlawful conduct or infringement of the PPA may file for review. (Certain chambers and associations may also be entitled to file review.)

## f. What are admissible grounds for starting a review proceeding?

The Public Procurement Arbitration Board decides on disputes arising in connection with the following alleged infringements of the PPA:

the violation of public procurement rules;

the illegal amendment or performance of contracts awarded in a public procurement procedure; and

the violation of the procedural rules which were set out by the contracting authority independently in the case where the contracting authority chose to establish its own procedural rules.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

In an ongoing review procedure, until conclusion of the contract based on the procurement procedure involved in the review procedure, the Public Procurement Arbitration Board may order interim measures if there is a likelihood of an infringement of the provisions or principles of the PPA or if an infringement has been committed or there is a risk that an infringement will be committed.

As an interim measure, the Public Procurement Arbitration Board may suspend the procurement procedure or call upon the contracting authority involved in the procurement procedure to invite the applicant seeking a remedy to take part in the procurement procedure. Such suspension of the procurement procedure shall result in the extension of the ongoing periods of time prescribed in the invitation by the duration of the suspension period, however, to protect a pressing, particularly vital interest or public interest the Board may allow the conclusion of the contract on request of the contracting authority.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

If the Public Procurement Arbitration Board states in its decision that an infringement has occurred, it may

call upon the person who committed the infringement to act in conformity with the rules laid down in the PPA (before closure of proceedings) or order that the contracting authority take decisions subject to certain conditions;

declare the decision of the contracting authority void (during the procurement procedure or closing it), provided that no contract has been concluded yet based on the decision in question;

order the removal of the tenderer from the list of approved tenderers;

impose a fine on any organisation or person that has infringed the law or on any person or organisation that is liable for the infringement and has a legal relationship with the person or organisation liable for the infringement in question, the amount of which fine shall not exceed 10% of the estimated value of the procurement procedure or, in the case of the division of the contract into lots, the lot concerned by the remedy taking into account all the circumstances relevant in the matter(importance of the offence committed, subject-matter and value of the public procurement, effect of the offence on the closing decision, reoccurrence, cooperation in review proceedings, time elapsed and whether the offence was manifestly deliberate).

## i. How long does a judicial proceeding for review take?

Review proceedings before the Public Procuration Board may take up to 30 day. After the Board decides on the matter, judicial review may be requested not more than 15 days after the receipt of the decision. Generally such procedures take around 1-1.5 years.

## j. Must unsuccessful bidders be notified before the award? If so, when?

The Public Procurement Arbitration Board notifies all parties concerned in the public procurement action on the opening of the proceeding, and shall request such parties to present any comments they may have within five days.

## k. Are review proceedings common?

Yes, review proceedings are common.

## l. Are damage claims in relation with procurement procedures common?

No, damage claims are quite rare. Pursuant to the PPA, subject to certain limited exceptions, civil actions may be launched in connection with any infringement involving public procurements and contract award procedures only if the infringement is established by final ruling of the Public Procurement Arbitration Board, or by the court following the review of a decision of the Board.

However, if a tenderer's claim for damages is limited to recovering from the contracting authority his expenses incurred in connection with the preparation of his tender and with participation in the public procurement procedure, it shall suffice to provide proof to the extent:

that the contracting authority has breached any provision of the regulations on public procurements and contract award procedures;

that they were in real contention for the contract; and

that the infringement had a direct impact on his chances for winning the contract.

## m. What are the leading court decisions involving procurement disputes?

In Hungary, there have been many court decisions involving public procurement disputes, including those by the Supreme Court of Hungary. These court decisions cover various fields of public procurement, such as references (Supreme Court's decisions No. BH299.137), abnormally low price (Supreme Court's decision No. EBH2005.1351), and invalid bid and excluding causes (Supreme Court's decision No.BH2004.344).

A long awaited Curia decision recently clarified competence issues. Decision BDT 2017.3688 was recently published which sets forth that if an administrative dispute has not been initiated in connection with the judicial review of the substantive decision of the Public Procurement Arbitration Board, the invalidity of the contract due to unlawful omission of public procurement procedure and the civil action for the application of the legal consequences fall within the competence of the civil courts.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

The Public Procurement Authority issues guidelines and its president issues briefings which together constitute a set of soft law guidance which serves as an important source of information for both the contracting authorities and bidders.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

There are no specific laws.

## b. Are there any specific laws or practices that apply in the defense sector?

The Defense Procuration Act (***Act XXX of 2016*** on procurement for defense and security purposes) and related executive decrees govern the defense sector.

## c. Are there any specific laws or practices that apply in the health care sector?

Government Decree No. 16/2012. (II.16.) on the specific rules for the procurement of medicines and medical devices governs some major procurement in the health care sector.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

There are no specific laws.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The most recent amendment of the PPA became effective as of 1 January 2017. The Government has not submitted as of this date, any motion to amend the act, however, the PPA is a framework legislation by its nature, therefore, government and ministerial decrees may be adopted, especially with a view to the introduction of the compulsory electronic procedure rules put forth by the pertinent directive.

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