

Guideline of the Public Procurement Authority

on the certificates, statements, records and data to be submitted in contract award procedures by the economic operators established in Hungary, in relation to grounds for exclusion

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The Public Procurement Authority issues the following Guideline, on the basis of the empowerment of Article 172(2)(k) of the **Act CVIII of 2011 on Public Procurement** (hereinafter referred to as the 'PPA'), and Article 13(1) of the **Government Decree 310/2011 (23 December)** (hereinafter referred to as the 'Gov. Decree') *on the way of certification of suitability and verification of the non-existence of grounds for exclusion as well as the definition of public procurement technical specifications in contract award procedures*, concerning the certificates, statements, records and data referred to in Articles 2 and 3 of the Gov. Decree.

Chapter IX of the PPA lays down requirements for tenderers and candidates. Some of these requirements concern the legal status of economic operators (grounds for exclusion), and others concern the criteria for technical and professional ability or the criteria concerning the economic and financial standing (suitability).

Articles 56 and 57 of the PPA set out the rules pertaining to grounds for exclusion. The grounds for exclusion determine the circumstances under which the tenderer, the candidate, the subcontractor or the entity contributing to the certification of suitability shall be excluded from the procedure.

I. The major changes made to the former regulation

The Act CXXIX of 2003 on Public Procurement (hereinafter referred to as the 'former PPA') laid down both the grounds for exclusion, and the major rules concerning the ways of verification thereof. According to the current system, the grounds for exclusion are specified by the PPA, while the detailed rules for the ways of verification are laid down in the Gov. Decree. The system of the grounds for exclusion stipulated by the former PPA was simplified by the current PPA. The grounds for exclusion enumerated in Article 60 of the former PPA are set forth in Article 56 of the current PPA – with the amendments detailed hereinafter –, and the optional grounds for exclusion enumerated by Article 61 of the former PPA are set out by Article 57 of the PPA. The evaluation of the two mandatory grounds for exclusion referred to in Article 62 of the former PPA was separated, i.e. the ground for exclusion concerning the provision of false data [Article 62(1)(b) of the former PPA] is considered a mandatory ground for exclusion by the current regulation [Article 56(1)(j) of the PPA], while the professional/ethical misconduct [Article 62(1)(a) of the former PPA] has become an optional

ground for exclusion [Article 57(1)(f) of the PPA], and the ethical misconduct shall only be taken into consideration if it was established in a procedure for breach of the code of ethics conducted by the competent trade organisation.

The mandatory ground for exclusion concerning certain criminal acts has been completed by three new elements (misappropriation, defalcation, budget fraud) [Article 60(1)(h) of the former PPA; Article 56(1)(h) of the PPA]. The existence of the ground for exclusion in force concerning the violation of the payment discipline towards subcontractors may be confirmed, if the economic operator has failed to meet, towards his subcontractor, more than 10% of his payment obligation established by an administrative ruling or a court decision, within the time limit set by the same ruling or decision. Moreover, the relevant period of two years shall be calculated from the date of verification of the non-existence of the ground for exclusion, instead of the date of the announcement of results [Article 60(1)(i) of the former PPA; Article 56(1)(i) and Article 57(3) of the PPA]. The current PPA also introduces a new ground for exclusion, namely, the offshore companies aiming at tax avoidance – in case of which the owner of the company may not be clearly identified and illegal tax avoidance may be established - may not participate in contract award procedures as tenderer, candidate, subcontractor or organization providing capacity [Article 56(1)(k) of the PPA].

In order to alleviate administrative burdens, the current regulation does not allow the contracting authorities of municipalities to prescribe the optional ground for exclusion concerning tax dues registered by the tax authority of the municipality in question [Article 61(2) of the former PPA].

In relation to tenderers/candidates established in Hungary, in the majority of cases, no certificate issued by the competent authority shall be attached for the verification of the grounds for exclusion, provided the economic operator is included in the database of taxpayers not having public debts.

The non-existence of grounds for exclusion, which had to be certified by the tenderer/candidate with the submission of an extract from trade register according to the former provisions, shall be verified, according to the current rules, by the contracting authority on the basis of data included in the company register, which may be requested free of charge, electronically from the Company Information and Electronic Company Registration Service. Certain data made available on the website www.e-cegjegyzek.hu are disclosed as such data included in the company register at the time of the inquiry (for instance, if the company is undergoing liquidation proceedings or is being wound up), while other data included in the company register are updated at the beginning of each week.

The number of requirements of certification related to subcontractors is reduced. For the purposes of the verification of non-existence of the grounds for exclusion, both in the case of organizations providing capacity and in the case of subcontractors (even if they are intended to be employed for more than ten per cent of the value of the public procurement contract), the tenderers (candidates) shall only make a statement on their intention not to employ any subcontractor or any organization providing capacity being subject to the grounds for exclusion, and there is no obligation to submit specific certificates therefor [Article 58(3) of the PPA].

II. General provisions

As referred to in the provisions of the PPA pertaining to notices launching the contract award procedure, *the notice shall contain the grounds for exclusion and the required means of verification* [Article 38(3)(k) of the PPA].

In the notice launching the procedure, the contracting authority shall refer to the mandatory [Article 56(1)(2) of the PPA] *grounds for exclusion* [Article 56(6) of the PPA].

In contract award procedures conducted according to Part Two of the PPA (provisions related to public procurements *reaching EU thresholds*), in case a change registration procedure is underway, *the contracting authority shall be obliged to stipulate in the notice launching the procedure that the request for change registration submitted to the registry court as well as the certificate of receipt thereof sent by the registry court be attached to the tender or request to participate* (Article 7 of the Gov. Decree).

In the course of contract award procedures *only those economic operators may submit a tender* which meet the suitability criteria established by the contracting authority and *are not subject to any ground for exclusion* [Article 56 and 57] [Article 55(1)].

In conformity with the former regulation, the PPA contains a full enumeration of the *grounds for exclusion* (both the mandatory and the optional ones), and the *contracting authorities may not extend that list*. Contrary to the former regulation, the PPA does not contain the list of documents, certificates to be submitted by tenderers (candidates) for the purposes of the verification of the non-existence of the grounds for exclusion. The Government, on the basis of the empowerment of Article 182(1) points 1 and 2 of the PPA, shall regulate in a decree which are the means of certification and the documents to be submitted for the certification of suitability and the verification of the non-existence of the grounds for exclusion that the contracting authority may prescribe or shall accept.

The *grounds for exclusion* are set forth by *Articles 56 and 57 of the PPA* and the *ways of verification of the non-existence of the grounds for exclusion are laid down by Articles 2-12 of the Gov. Decree*.

III. Mandatory grounds for exclusion

Article 56(1)(2) sets forth the grounds for exclusion which are mandatory in contract award procedures conducted according to the rules pertaining to EU procedures, i.e. in the case of verification of the existence of any of those grounds for exclusion, the contracting authority shall exclude the tenderer, the candidate, the subcontractor or the organization providing capacity from the procedure.

**1. Grounds for exclusion concerning all the entities participating on behalf of the tenderer
(the tenderer, the subcontractor, the entity contributing to the certification of suitability)**

Ground for exclusion	Way of verification and related information
The following economic operators are excluded from participating in the procedure as a tenderer, a candidate or a subcontractor, and may not contribute to the certification of suitability either	
(a) who are being wound up or who were subject to the publication of a decree in bankruptcy or the liquidation proceedings launched against whom were legally imposed, or against whom a similar process is in progress pursuant to their personal right, or who are in any analogous situation under their personal right;	<i>verification:</i> shall be verified by the contracting authority on the basis of data included in the company register, which may be requested free of charge, electronically from the Company Information and Electronic Company Registration Service ¹ (hereinafter referred to as: 'Company Information Service') [Article 2 of the Gov. Decree]
(b) who have suspended business activities or whose business activities have been suspended;	<i>verification:</i> shall be verified by the contracting authority on the basis of data included in the company register, which may be requested free of charge, electronically from the Company Information Service; if the economic operator is not a company according to <i>the Act V of 2006 on Public Company Information, Company Registration and Windingup Proceedings</i> , or apart from the registry court, other authorities may also suspend business activities of the entity in question, a statement attested by a notary public or an economic or professional chamber shall be accepted; [Article 2(a) of the Gov. Decree].
(c) who have been convicted of an offence concerning their business activities or professional conduct by a final judgment, until the time-limit for the detriments regarding criminal records lapses; or whose activity was restricted by a final judgment, under Article 5(2)(b) or (g) of Act CIV of 2001 on Measures Applicable to Legal Entities in Criminal Law, during the period of prohibition; or whose activities have been restricted for a similar reason and in a similar manner by another court in a judgement which has obtained the force of res judicata;	<i>verification:</i> certificate of no criminal record submitted by a private individual, in case of companies the non-existence of the ground for exclusion shall be verified by the contracting authority on the basis of data included in the company register, which may be requested free of charge, electronically from the Company Information Service; if the economic operator not being a private individual is not a company, a statement attested by a notary public or an economic or professional chamber shall be accepted; [Article 2(b) of the Gov. Decree]
(e) who have not fulfilled their tax, customs duty or social security contribution payment obligations for over a year, in accordance with the legal provisions of the country in which they are established or with those of the country of the seat of the contracting authority, unless they were granted a permission for deferred payment of the debt;	With regard to economic operators with a seat in Hungary the tax payment liability referred to in paragraph 1(e) shall mean the tax payment liability indicated in the records of the national tax authority and the national customs authority [Article 56(3) of the PPA]. The set period of time shall be calculated in each case from the date of verification of the non-existence of the ground for exclusion. In the procedures consisting of more than one stage, such verification shall be made by the contracting authority between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer as well [Article 57(3) of the PPA]. <i>verification:</i> shall be verified by the contracting authority on the basis of the database of taxpayers not having public debts ² pursuant to <i>the Act XCII of 2003 on the Rules of Taxation</i> (hereinafter referred to as: 'Art') or, in case the economic operator is not included in such database, the certificate of the competent tax and customs authority or the joint tax certificate specified in the Art shall be accepted [Article 2(d) of the Gov. Decree]. In the case of procedures consisting of more than one stage, Article 9 of the Gov. Decree – presented in detail in part VIII of this Guideline -

¹ www.ceggyezek.hu.

² www.nav.gov.hu

	<p>shall also be applied.</p> <p>The certificate of the authorities recording public debts set out in Article 56 (1) e. of the PPA shall state whether or not the economic operator has any public debt recorded by the authority at the time of drawing up of the certificate, and in case it has, when was the payment obligation of the economic operator due, whether it was granted a permission for deferred payment of the public debt and shall also state the term of the extension for payment [Article 11(1) of the Gov. Decree].</p> <p>The official certificate specified in paragraph 1 – provided such certificate otherwise proves that the economic operator has no public debts which were due more than a year before - shall be accepted by the contracting authority even if issued for other purposes and not to be used in a contract award procedure, or it was issued for the purposes of any other contract award procedure or other procedure of the contracting authority or an entity other than the contracting authority, or the issuing authority established less than one year of validity for the certificate and it has already expired [Article 11(2) of the Gov. Decree].</p> <p>In case an act of legislation sets forth new rates and taxes subject to Article 56(1)(e) of the PPA, the certificate thereof shall only be attached in procedures where the time limit for submission of tenders or the time limit for participation shall expire more than one year after the date of entering into force of the provision on the relevant public debts [Article 11(3) of the Gov. Decree].</p>
<p>(f) who supplied false data in an earlier contract award procedure (concluded within the previous three years) and was therefore excluded from the procedure, or the supply of false data was ascertained by a final judgment, until the time-limit set with the force of res iudicata.</p>	<p>The set period of time shall be calculated in each case from the date of verification of the non-existence of the ground for exclusion. In the procedures consisting of more than one stage, such verification shall be made by the contracting authority between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer as well [Article 57(3) of the PPA].</p> <p>In the case of procedures consisting of more than one stage, Article 9 of the Gov. Decree – presented in detail in part VIII of this Guideline - shall also be applied.</p> <p><i>verification:</i> the statement of the tenderer or candidate attested by a notary public or an economic, professional chamber shall be accepted [Article 2(e) of the Gov. Decree; Article 58(5) of the PPA].</p>
<p>(g) who have been found to have failed to meet the criteria for sound employment relationships pursuant to Article 50(1)(a) of Act CXCV of 2011, i.e.</p>	<p>If the economic operator fulfilled its obligation ordered in a final administrative ruling or a final court judgement on the prescribed time limit or term day, it shall be without prejudice to the application of paragraph 1(g) [Article 56(5) of the PPA].</p> <p>The set period of time shall be calculated in each case from the date of verification of the non-existence of the ground for exclusion. In the procedures consisting of more than one stage, such verification shall be made by the contracting authority between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer as well [Article 57(3) of the PPA].</p>
<p>(ga) who have violated the law by failing to fulfil the obligation of declaration of establishment of labour relationship, and this fact has been established in an administrative judgement or – in case of a review thereof – a court judgement, which has become enforceable no more than two years before, and who have been ordered to pay a labour fine or a fine for default according to the Act on the Order of Taxation, or</p> <p>(gb) who, in case of employment of foreigners subject to an employment permit in Hungary have violated the law by failing to fulfil the obligation of the employer to apply for the employment permit, and this fact has been established in an administrative judgement or – in case of a review thereof – a court judgement, which has become enforceable no more than two years before, and has been ordered to pay into the central budget or to pay a fine for the protection of public order according to the Act on the Admission and Right of Residence of Third-Country Nationals;</p>	<p><i>verification:</i></p> <p>the non-existence of the grounds for exclusion pursuant to point (ga) shall be verified by the contracting authority on the basis of data publicized from the register kept by the Labour Inspectorate pursuant to Article 8/c of the Act LXXV of 1996 on Labour Inspection and the register kept by the tax authority pursuant to Article 55(6) of the Art.^{3,45}</p> <p>the non-existence of the grounds for exclusion pursuant to point (gb) of the PPA shall be verified by the contracting authority on the basis of data publicized from the register kept by the Labour Inspectorate according to Article 8/c of the Act LXXV of 1996 on Labour Inspection and on the basis of data publicized on the homepage of the Office of Immigration and Nationality; [Article 2(f) of the Gov. Decree]⁶</p> <p>The Office of Immigration and Nationality shall publish on its homepage information on economic operators, which are concerned on the basis of Article 56(1)(gb) and have been ordered by the Office to pay a fine for</p>

³ <http://nyilvantartas.ommf.gov.hu/>.

⁴ www.mbfh.hu (in the cases under the Act XLVIII of 1993 on Mining

⁵ www.apeh.hu/benemjelentett.

⁶ www.bmbah.hu.

	<p>offence against law and order under the Act on the Admission and Right of Residence of Third-country Nationals, without breaching personal data, for a period of two years after the decision shall become legally binding. If the Office of Immigration and Nationality be informed that an action has been filed for the judicial review of its decision, it shall publish data concerning the ground for exclusion in light of the final enforceable judgement of the court, indicating the date on which the judgement dismissing the action or reversing the decision became legally binding. If the related data have already been published – at the time of being informed of the suit -, it shall arrange the deletion of the data disclosed on the homepage [Article 11(4) of the Gov. Decree].</p>
<p>(h) who, pursuant to the Criminal Code, have committed a crime of participation in a criminal organization– including committing a crime within a criminal organization – of bribery, bribery in international relations, misappropriation, negligence, budgetary fraud, infringement of the financial interests of the European Communities, as well as money laundering, or who have committed a similar crime pursuant to their personal right, provided the act of committing the crime has been established in a final court decision, until exonerated from the detrimental consequences of having a criminal record;</p>	<p>As regards criminal acts similar to those referred to in paragraph 1 (h), i.e. participation in a criminal organisation, bribery, bribery in international relations, infringement of financial interests of the European Communities and money laundering in the case of tenderers established in other Member State of the European Union, participation in a criminal organization, as defined in Article 2 (1) of Council Joint Action 98/733/JHA, corruption, as defined in Article 3 of the Council Act of 26 May 1997, and Article 3 (1) of Council Joint Action 98/742/JHA, respectively, fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities, money laundering, as defined in Article 1 of Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering shall be effective, respectively [Article 56(4) of the PPA].</p> <p>shall only be verified by economic operators being natural persons [Article 2(g) of the Gov. Decree]⁷</p> <p><i>verification:</i> certificate of no criminal record [Article 2(g) of the Gov. Decree]</p>
<p>(i) who, in relation to a contract concluded as a result of an earlier contract award procedure after 15 September 2010, failed to meet, towards their subcontractor, more than 10% of their payment obligation (originating from a final or partial invoice), established by an enforceable administrative or court judgement which has been pronounced within the last two years, within the time limit set in such judgement, although the party entering into the contract as contracting authority paid them in due time.</p>	<p>The set period of time shall be calculated in each case from the date of verification of the non-existence of the ground for exclusion. In the procedures consisting of more than one stage, such verification shall be made by the contracting authority between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer as well [Article 57(3) of the PPA].</p> <p>In the case of procedures consisting of more than one stage, Article 9 of the Gov. Decree – presented in detail in part VIII of this Guideline - shall also be applied.</p> <p><i>verification:</i> the statement of the tenderer or candidate attested by a notary public or an economic, professional chamber shall be accepted [Article 2(e) of the Gov. Decree; Article 58(5) of the PPA]</p>
<p>(j) in the course of the fulfilment of the obligation concerning data provision stipulated in the given procedure, it provides false data or makes false statement which may prejudice the fairness of competition;</p>	<p>The contracting authority shall inform the Public Procurement Authority of the exclusion specified in paragraph 1(j) and of the date of the exclusion, indicating the name and address (seat, residence) of the involved tenderer, candidate, subcontractor, organisation participating in the certification of suitability, as well as the subject-matter and the reference number of the procedure and the date of the exclusion [Article 56(7) of the PPA].⁸</p> <p><i>verification:</i> there is no need to submit any certificate or statement, the ground for exclusion is verified by the contracting authority in the course of the procedure [Article 2(h) of the Gov. Decree]</p>

⁷ if, in accordance with Article 5(2)(b) or (g) of the Act CIV of 2001 on measures applicable to legal entities under criminal law, the court has limited in a final decision the activities of the legal entity for having committed the enumerated crimes, the existence of the ground for exclusion pursuant to Article 56(1)(c) of the PPA may be established in relation to this legal entity

⁸ The Public Procurement Authority continues to make available the list drawn up by it on its homepage (www.kozbeszerzes.hu)

<p>(k) in the case of whom any of the following circumstances occur:</p> <p>(ka) which have their fiscal domicile in a country outside the EU, the EEA or the OECD, or in a country having signed an agreement with Hungary on avoiding double taxation, or</p> <p>(kb) whose profit deriving from the public procurement contract would be subject to more favourable conditions of taxation in the country where they have their fiscal domicile (considering the final income tax to be paid after the reception of tax refunds) than the terms of taxation which would apply to its domestic profit deriving from the given country⁹. The latter criterion shall not be met by the economic operator if he will perform the public procurement contract through his branch office registered in Hungary and the profit earned on the basis of the contract would qualify as a profit attributable to that branch office,</p> <p>(kc) companies listed in a non-official stock exchange, whose proprietor pursuant to Article 3(r) of the Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing may not be identified [Article 56(1) of the PPA].</p>	<p><i>verification:</i></p> <p>with respect to points (ka) and (kb), the contracting authority shall verify on the basis of data included in the company register – which may be requested free of charge, electronically from the Company Information Service – whether or not the economic operator in question is actually registered in Hungary;</p> <p>with respect to Article 56(1)(kc) of the PPA, the statement of the tenderer or candidate specifying whether it is a company not listed in an official stock exchange or a company listed in an official stock exchange; in case the tenderer or candidate is not listed in an official stock exchange, a statement indicating the name and permanent residence of all the actual proprietors – as defined in Article 3(r) of the Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing (hereinafter referred to as the 'Act on Money Laundering') – shall be submitted;</p> <p>in case there is no actual proprietor as defined in Article 3(r) of the Act on Money Laundering, the statement of the tenderer or candidate thereon shall be submitted; [Article 2(i) of the Gov. Decree]</p> <p>As regards point (kc), the contracting authority has no further obligation of verification – any request made towards the authorities, other associations – as regards the ground for exclusion verified by such statement and not unless he is aware of a proof beyond a reasonable doubt shall he establish the fact of false statement.[Article 8(2) of the Gov. Decree]</p> <p>As regards point (kc), by 'official stock exchange' shall be meant the official stock exchange as defined in Article 5(1) point 114 of the Act CXX of 2001 on the Capital Market [Article 8(3) of the PPA]</p>
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2. Grounds for exclusion concerning solely the tenderer or the candidate

Grounds for exclusion	Way of verification and related information
An economic operator	
<p>in which a legal person or a business organisation without legal personality subject to the conditions set out in paragraph 1(k) owns directly or indirectly a share exceeding 25% or has the right to vote, may not be tenderer or candidate in the procedure. If the business organisation having a share exceeding 25 % or having the right to vote (in the given economic operator) is subject to partnership taxation, the condition set out in paragraph 1(ka) shall be applied – with the necessary changes where applicable – to the proprietor companies of the given partnership [Article 56(2)].</p>	<p><i>verification:</i> the statement of the tenderer or candidate on the existence or non-existence of a legal person or a business organization without legal personality owning directly or indirectly a share exceeding 25 % in it or having the right to vote; in case of existence of such entity, the tenderer or candidate shall indicate it in a statement and shall make a statement on the non-existence of the grounds for exclusion specified in Article 56(2) of the PPA, with respect to such entity [Article 2(j) of the Gov. Decree]</p> <p>For the purposes of Article 56(2) of the PPA by 'indirect shares' and 'indirect right to vote' shall be meant that the tenderer or candidate owns its share and exercises its right to vote through the ownership of the share, the right to vote of another economic operator (intermediate economic operator) having a share and a right to vote in the tenderer or the candidate. For the purpose of establishing the proportion of the indirect share and indirect right to vote, the right to vote or the share of the entity having an indirect share, right to vote in the intermediate economic operator shall be multiplied by the right to vote or the share – only by the one representing a larger proportion – of the intermediate economic operator in the tenderer or candidate. Where the right to vote or share in the intermediate economic operator exceeds 50 %,</p>

⁹ For the purposes of establishing the existence of the ground for exclusion pursuant to Article 56(1)(kb) of the PPA, it is indispensable to have knowledge of the fiscal law of the economic operator's country of fiscal domicile, considering the fact that the legal conditions of the country of fiscal domicile shall be examined in itself, and the conditions of taxation thereof shall not be defined in relation to the fiscal law in force in Hungary. The economic operator in question is subject to the ground for exclusion, if the profit deriving from a foreign country – in this case from Hungary - would be subject to more favourable conditions of taxation than the profit deriving from the country of his fiscal domicile, according to the law of the country of his fiscal domicile.

	<p>it shall be considered as a full share, right [Article 8(1) of the Gov. Decree].</p> <p>Where the statement is submitted, the contracting authority has no further obligation of verification – any request made towards the authorities, other associations – as regards the ground for exclusion verified by such statement and not unless he is aware of a proof beyond a reasonable doubt shall he establish the fact of false statement [Article 8(2) of the Gov. Decree].</p>
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IV. Optional grounds for exclusion

Article 57(1) sets forth the grounds for exclusion from which the contracting authority may select one or more to prescribe in the contract award procedure. According to the decision made by the contracting authority, these grounds for exclusion may be prescribed not only in relation to the tenderer/the candidate, but also in relation to the subcontractor and the entity contributing to the certification of suitability.

Grounds for exclusion	Way of verification and related information
<p>The contracting authority may stipulate in the notice launching the procedure that the following economic operators are excluded from participating in the procedure as a tenderer, a candidate, a subcontractor, and may not contribute to the certification of suitability:</p>	
<p>(a) who have violated the law concerning their business activities or professional conduct and this fact has been stipulated in a final judgment delivered within the previous five years;</p>	<p><i>verification:</i> the statement of the tenderer or candidate attested by a notary public or an economic, professional chamber shall be accepted [Article 3(a) of the Gov. Decree; Article 58(5) of the PPA]</p>
<p>(b) who have violated the law under Article 11 of Tptv., or according to Article 101 of the Treaty on the Functioning of the European Union, and this fact has been stipulated in the final and enforceable decision of the Hungarian Competition Authority – delivered within the previous five years —, or in the event of the court review of the decision of the Hungarian Competition Authority, by a final judgment of the court, and have been issued a pecuniary penalty; or if the establishment of such violation of the law by the tenderer has been ascertained by a final decision and a pecuniary penalty of another competition office or court within the previous five years;</p>	<p><i>verification:</i> the statement of the tenderer or candidate attested by a notary public or an economic, professional chamber shall be accepted [Article 3(a) of the Gov. Decree; Article 58(5) of the PPA]</p>
<p>(c) who have violated their contractual obligations undertaken in a previous contract award procedure as ascertained under a final administrative or final court judgement, which was pronounced within the last two years;</p>	<p>The set period of time shall be calculated in each case from the date of verification of the non-existence of the ground for exclusion. In the procedures consisting of more than one stage, such verification shall be made by the contracting authority between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer as well [Article 57(3) of the PPA].</p> <p>In the case of procedures consisting of more than one stage, Article 9 of the Gov. Decree – presented in detail in part VIII of this Guideline - shall also be applied.</p> <p><i>verification:</i> the statement of the tenderer or candidate attested by a notary public or an economic, professional chamber shall be accepted [Article 3(a) of the Gov. Decree; Article 58(5) of the PPA]</p>

(d) who are not registered in their country of establishment;	<p><i>verification:</i> the fact that the tenderer or candidate is included in the company register, shall be verified by the contracting authority on the basis of data included in the company register, which may be requested free of charge, electronically from the Company Information Service;</p> <p>in case of other registers the contracting authority shall verify the registers accessible pursuant to the provisions set out in Article 36(5) of the PPA,¹⁰¹¹</p> <p>in all other cases it shall accept an extract from the register, a certificate issued by the entity keeping the register or any other document certifying the fact of being included in the register;[Article 3(b) of the Gov. Decree]</p>
(e) who do not hold the permit or licence or are not members in a professional organisation or chamber prescribed in their country of establishment for the provision of the service.	<p><i>verification:</i> the contracting authority shall verify the register accessible pursuant to the provisions set out in Article 36(5);</p> <p>in all other cases it shall be obliged to accept the copy of the licence or permit or a certificate attesting the membership in an association or chamber; [Article 3(c) of the Gov. Decree]</p>
(f) committed, as defined by legislation, a serious breach of professional duty or an act violating professional ethics established in a procedure for breach of the code of ethics conducted by a professional organisation specified in a separate act of legislation, within the last three years;	<p>The set period of time shall be calculated in each case from the date of verification of the non-existence of the ground for exclusion. In the procedures consisting of more than one stage, such verification shall be made by the contracting authority between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer as well [Article 57(3) of the PPA].</p> <p>In the case of procedures consisting of more than one stage, Article 9 of the Gov. Decree – presented in detail in part VIII of this Guideline - shall also be applied.</p> <p><i>verification:</i> the statement of the tenderer or candidate attested by a notary public or an economic, professional chamber shall be accepted [Article 3(a) of the Gov. Decree; Article 58(5) of the PPA]</p>

Economic operators authorised to provide the relevant service in the country of their establishment shall not be excluded from the procedure on the grounds that they do not fulfil the legal and organisational criteria (e.g. being a legal entity) stipulated by Hungarian legislation for the provision of the relevant service, or that according to Hungarian legislation only natural persons are entitled to provide the relevant service [Article 57(2) of the PPA].

According to Article 8(1) of the Government Decree 306/2011 (23 December) *on the detailed rules pertaining to public works contracts*, in procedures pursuant to Part Two of the PPA, in case of economic operators performing implementation activities, the contracting authority shall, on the basis of Article 57(1)(d) of the PPA, be bound to stipulate in the notice launching the procedure the requirement of being registered in the list of entities performing implementation activities specified in the Act on the Formation and Protection of the Built Environment or, in case of an economic operator which is not established in Hungary, the requirement of being registered in the list of his country of establishment (provided the law of the country in which he is established prescribes such registration).

¹⁰ www.nyilvantarto.hu.

¹¹ www.mkik.hu.

V. Documents to be submitted by candidates and tenderers

The contracting authority may require economic operators to submit the certificates which are necessary for the conduct of the contract award procedure, for the evaluation of tenders or requests to participate. Those certificates shall help to verify – *inter alia* – the non-existence of the grounds for exclusion [Article 58(1)(a) of the PPA]. According to the explanation of the PPA, a paper is considered a certificate, if a circumstance is certified by a person/organization which is independent of the tenderer.

In *open procedures*, which are procedures consisting of one stage, the *documents* concerning the grounds for exclusion and the certification of suitability pursuant to the stipulations of the invitation and the documentation, as well as the provisions set out by this Act *shall be submitted by the tenderer together with his tender* [Article 83(3) of the PPA].

The provision of the former Act, requiring that not only tenderers submit the certificates concerning the non-existence of the grounds for exclusion but also subcontractors intended to be employed by the tenderer for more than 10% of the contract value, was repealed.

As regards *subcontractors* intended to be employed for the fulfilment of the contract and *the organization contributing to the certification of suitability*, the tenderer or candidate *shall only make a statement* in the tender or in the request to participate to the effect that those entities are not subject to the grounds for exclusion specified in Article 56, and no further certificate or statement shall be attached in the case of these entities in relation to the grounds for exclusion [Article 58(3) of the PPA; Article 10 of the Gov. Decree].

Where the contracting authority has also stipulated that *the grounds for exclusion specified in Article 57 of the PPA* be applied to the *subcontractor* and any other *entity contributing to the certification of suitability*, the tenderer or candidate, *according to its choice*, may

(a) *submit a statement made by itself*, to the effect that it shall not employ any subcontractor subject to the grounds for exclusion specified in Article 57 of the PPA and no other entity employed by him to contribute to the certification of its suitability is subject to the grounds for exclusion specified in Article 57 of the PPA, or

(b) submit the statement of the *subcontractor* designated in the procedure – in addition to the statement as defined in point (a) in case of subcontractors not designated in the procedure – as well as *the statement of any other entity employed to contribute to the certification of suitability*, to the effect that the subcontractor, entity concerned is not subject to the grounds for exclusion specified in Article 57 [Article 10 of the Gov. Decree].

Where, on the basis of the PPA, or a separate act of legislation based on the empowerment of the PPA, contracting authorities require the submission of a certificate in the course of the public procurement procedure, such a *certificate may be submitted in a simple copy form*, unless provided otherwise by an act of legislation. The contracting authority may prescribe the submission of originals or certified copies of such statements that serve directly as the basis of the enforcement of a claim (in particular bank guarantee or declaration of guarantee). In the case of documents not submitted in Hungarian, the liable translation produced by the tenderer shall also be accepted by the contracting authority [Article 36(3) of the PPA].

In case the certificate required by this Act is non-existent in the country outside the European Union where the tenderer is established, *contracting authorities may accept a certificate, and even a document that is equal to the certificate* [Article 36(4) of the PPA].

As regards certain grounds for exclusion, the tenderers/candidates shall not attach the relevant certificates, due to the fact that the provision set out in Article 36(5) of the PPA shall be applied also for the way of verification of the non-existence of the grounds for exclusion, and the abovementioned provision stipulates that *the certification of facts and data that may be verified free of charge by the contracting authority on an electronic, official or authentic register available in Hungarian*, including the registers specified by the Act on General Rules of Launching and Conducting a Service Providing Activity, *may not be requested by the contracting authority* in the course of the contract award procedure and shall not be presented by the tenderer or the entity contributing to the certification of the suitability thereof.

VI. Verification of the non-existence of the grounds for exclusion

In the course of evaluating the tenders [Article 63-66 of the PPA], the contracting authority shall examine whether or not the tenders are valid. In the course of this process, the contracting authority shall decide whether there are any tenderer (in procedures consisting of more than one stage, candidate) to be disqualified from the procedure and whether the tenders are otherwise in compliance with the conditions set in the contract notice (in the invitation to tender or - in the case of requirements already set in the invitation to participate – in the invitation to participate), in the documentation, and by law.

Considering the fact that there are several grounds for exclusion the non-existence of which may be verified by a statement, *if doubts arise over the reliability of the statement, the contracting authority shall have the right to request information from other public bodies or economic operators* for the verification of the contents of certificates, statements submitted in the tender or in the request to participate, and such information shall be provided by the addressed entity within three business days [Article 58(4) of the PPA].

In conformity with Article 36(5) of the PPA, Article 5 of the Gov. Decree also stipulates that for the purposes of Articles 2-4 of the Gov. Decree, the non-existence of the ground for exclusion shall be verified by the contracting authority also in cases which are not expressly stipulated in the Gov. Decree, provided the contracting authority may verify the facts, data related thereto free of charge, in an electronic, official or authentic register, which is available in Hungarian.

The contracting authority verifies the fact of the inclusion in the registers specified in Article 36(5) of the PPA on one occasion, during the period between the expiry of the time limit to submit tenders and the sending of the notice on the results of the procedure or, in a procedure consisting of two stages, between the expiration of the participation deadline and the sending to the candidate of the notice of results concerning the participation stage, and keeps a record of the act and the result of the verification among the documents concerning the procedure. [Article 36(7) of the PPA].

Pursuant to Article 6 of the Gov. Decree, *if the official list of approved tenderers proves that the economic operator is not subject to any of the grounds for exclusion*, the fact that the economic operator is included in the electronically available official list of approved tenderers, or the certificate submitted by an economic operator established in any other Member State of the European Union and issued by the authority responsible for keeping the list of recognized tenderers of the country where the economic operator is established, *shall be accepted by the contracting authority* in lieu of other ways of certification.

VII. Tenders or requests to participate subject to exclusion

Articles 74 and 75 of the PPA specify in which cases a tender or a request to participate shall be deemed invalid.

The contracting authority *shall exclude* from the procedure those tenderers, candidates, subcontractors, or entities contributing to the certification of suitability

- (a) who fall under the effect of grounds for exclusion (Articles 56–57);
- (b) on whose side grounds for exclusion (Articles 56–57) arose during the course of the procedure [Article 75(1) of the PPA].

Accordingly, the contracting authority shall only exclude the economic operator in respect of which the ground for exclusion has arisen. Consequently, the detrimental legal consequences – which may, in particular, arise in relation to the supply of false data - of the exclusion will only concern the given tenderer, candidate, subcontractor or entity contributing to the certification of sustainability. However, it shall be underlined that the exclusion of any economic operator indicated in the tender/the request to participate shall result in the invalidity of the tender/request to participate in the given contract award procedure [Article 74(1)(c) of the PPA].

The contracting authority may exclude from the procedure

- (a) those tenderers or candidates who are not eligible for national treatment (Article 2(5)); or
- (b) those tenderers who offer a product in the tender not eligible for national treatment due to its place of origin (Article 2(5)) [Article 75(2) of the PPA].

According to the explanation of the PPA given by the legislators, the ground for exclusion set forth in Article 75(2) of the PPA may be applied by the contracting authority without having indicated it in the contract notice. For the sake of the basic principles of the PPA, in particular the principle of equal opportunities, the Public Procurement Authority advises contracting authorities to indicate it in the contract notice, if they intend to apply Article 75(2) of the PPA.

The tender or the request to participate shall be deemed invalid if the tenderer, the candidate or its subcontractor or the entity contributing to the certification of sustainability have been excluded from the procedure [Article 74(1)(c) of the PPA].

According to Article 74(4) of the PPA, the contracting authority shall not assess invalid tenders based on the award criteria.

VIII. The different rules pertaining to the certain types of procedure

As regards the verification of the non-existence of the grounds for exclusion in the case of *restricted procedures* and *negotiated procedures with the publication of a contract notice*, the PPA stipulates that *the invitation to tender shall contain*, as required in the invitation to participate – and if necessary – *the definition of certificates, declarations and documents to be attached to the tender, which shall prove that neither the tenderer, its subcontractor nor the entity contributing to the certification of suitability is liable to the grounds for exclusion at the time of the tendering stage* [Article 87(1)(d) of the PPA; Article 91(1)(d) of the PPA]. However, those *certificates and declarations that had already been attached to the request to participate shall not be attached to the tender, except where the previously submitted certificate or declaration is not adequate anymore for the purposes of certifying as required* [Article 87(3) of the PPA; Article 91(3) of the PPA].

In *negotiated procedures with the publication of a contract notice*, pursuant to Article 93 of the

PPA, the evaluation of tenders is divided in two, in the tendering stage. *Any other missing data, information in relation to the certificates, declarations – outside the scope of the professional tender - included in the tender shall be supplied before the conclusion of the negotiations*, in compliance with the rules pertaining to the supply of missing information.

As regards *competitive dialogues*, the PPA stipulates that *the invitation to conduct a dialogue shall contain*, as required in the invitation to participate and if necessary, *the definition of certificates, declarations and documents to be attached to the proposal for solution, which shall prove that neither the tenderer, its subcontractor nor the entity contributing to the certification of suitability is liable to the grounds for exclusion at the time of the conduct of the dialogue* [Article 105(1)(m) of the PPA]. *The invitation to tender shall state*, in compliance with the stipulations of the invitation to participate, *if necessary, the certificates, declarations and documents to be attached to the tender, certifying that the tenderer and its subcontractor and the entity contributing to certification of suitability is not under the scope of grounds for exclusion in the tendering stage either* [Article 107(4)(e) of the PPA].

In *procedures consisting of more than one stage*, as regards the grounds for exclusion specified in Article 56(e)-(g) and (i) of the PPA, as well as Article 57(1)(c) and (f) of the PPA, *the verification shall also be made by the contracting authority* between the participation deadline and the dispatch of the information notice on the results of the procedure to the tenderer, i.e. *in the tendering stage (dialogue and tendering) of the procedure as well* [Article 57(3) of the PPA]. The verification is made on the basis of data included in the register pursuant to Article 36(5) of the PPA, and as regards further grounds for exclusion not verifiable in such a manner, a statement of the tenderer to the effect that the tenderer, its subcontractor and, if any, any other entity contributing to the certification of suitability is still not subject to the grounds for exclusion shall be sufficient on the basis of Article 87(1)(d), Article 91(1)(d), Article 105(1)(m) and Article 107(4)(e) of the PPA. In procedures according to Part Two of the PPA (public procurements reaching EU thresholds), the certificate or statement already submitted together with the request to participate shall only be submitted again in the tendering stage of the procedure, if the certificate or statement submitted before is not suitable anymore to prove compliance with the relevant provisions [Article 9 of the Gov. Decree].

In the course of *the negotiated procedure without prior publication of a contract notice*, the tenders are evaluated in two stages by the contracting authority, pursuant to Article 98 of the PPA. Before the commencement of the negotiations, the contracting authority shall verify whether the tenders are in compliance with the conditions set out in the invitation to tender and the documentation, whether the tenderer is suitable for the performance of the contract, and whether the tender is subject to any of the grounds for exclusion. *Prior to the starting of the negotiations, the tender shall be declared invalid if the tenderer does not fulfil the suitability criteria necessary for the performance of the contract, or if his suitability may not be established, or the tender is invalid due to the existence of a ground for exclusion, or if the tender is invalid due to a reason in relation to which the tender may not be made suitable in the course of the negotiations or the supply of missing information.* Accordingly, the negotiation may only be continued with the suitable tenderer, who is not subject to any ground for exclusion.

In negotiated procedures without prior publication of a contract notice within the meaning of Article 94(2)(d) of the PPA (to be conducted under extreme urgency), the tenderer shall only make a statement to the effect that he is not subject to the grounds for exclusion according to Article 56 and, where appropriate, to other grounds for exclusions stipulated by the contracting authority, furthermore, the successful tenderer shall attach the certificates necessary for the verification of the non-existence of the grounds for exclusion not later than fifteen days following the conclusion of the contract [Article 99(3)(b) and (c) of the PPA].

IX. Rules pertaining to national procedures pursuant to Part Three of the PPA

1./

As regards public procurements within the meaning of *Part Three of the PPA*, i.e. public procurements equaling or exceeding national thresholds, the PPA stipulates that, in the notice launching the procedure, *the contracting authority shall be entitled to prescribe the enforcement of one or more of the grounds for exclusion pursuant to Article 56-57 in the contract award procedure, and shall be bound to prescribe the enforcement of the grounds for exclusion pursuant to Article 56(1)(k) and (2) [Article 122(1) of the PPA].* Accordingly, the contracting authority is entitled, but not obliged to prescribe the enforcement of the ground or grounds for exclusion pursuant to Part Two of the PPA, in the notice launching the procedure; the only exception, which shall in all cases be prescribed by the contracting authority as a ground for exclusion, is illegal tax avoidance and the supporting of bribery and corruption by way of situations where the owner of the company may not be clearly identified.

As regards the non-existence of the grounds for exclusion, the tenderer, the candidate shall only make a statement and, regarding Article 56(1)(kc), shall submit a document according to the general rules [Article 122(1) of the PPA; Article 12 of the Gov. Decree]. As regards the subcontractor and, if any, other entities contributing to the certification of suitability, it shall also proceed pursuant to the general rules [Article 12 of the Gov. Decree].

2./

In the case of application of *independent procedural rules developed by a contracting authority* within the meaning of Part Three of the PPA, in the notice launching the procedure, *the contracting authority shall be entitled to prescribe to apply in the contract award procedure one or more grounds for exclusion set out in Articles 56-57, however, other grounds for exclusion than those set out by this Act may not be prescribed. The contracting authority shall be bound to prescribe the application of the ground for exclusion specified in Article 56(1)(k) and (2) [Article 123(4) of the PPA].*

Where, on the basis of Article 123 of the PPA, the contracting authority acts according to independent procedural rules developed by itself, it shall lay down the way of verification of the grounds for exclusion specified in the notice, pursuant to the provisions set out in the Gov. Decree [Article 12 of the Gov. Decree].

X. Specific rules pertaining to contracting entities in the utilities sector

According to Article 3(1) of the *Government Decree 289/2011 (22 December) on the specific rules pertaining to public procurements in the utilities sector* (hereinafter referred to as the 'Utilities Decree'), *the contracting entity may also exclude from the procedure tenderers submitting an offer for public supply where the proportion of the products originating from a country not eligible for national treatment exceeds fifty percent of the total value of the products constituting the tender.*

In restricted or negotiated procedures with the publication of a periodic indicative notice, the contracting authority shall indicate both in the periodic indicative notice and in the direct invitation to participate the grounds for exclusion and the required means of verification of the non-existence thereof [Annex IV of Commission Implementing Regulation (EU) No 842/2011; Article 6(1) of the Utilities Decree; Article 6(5) of the Utilities Decree].

Contrary to the provisions set out in Article 38(3)(k) and (l), *in restricted or negotiated procedures launched by a pre-qualification notice, the direct invitation to participate shall include, if needed, the list of certificates, statements and documents to be enclosed with the application, which certify that the pre-qualified candidate is not under the scope of the grounds for exclusion – pursuant to the pre-qualification criteria - in the participation phase [Article 7(7)(a) of the Utilities Decree].*

The contracting entity shall specify the pre-qualification criteria and the means of certification thereof, in compliance with Chapter IX of the PPA, according to the Gov. Decree, noting that *a simple statement may be accepted where the way of certification is the submission of a statement and in the case specified in Article 57(1)(e) of the PPA.* The contracting entity shall have the right to choose from the criteria and the ways of certification pursuant to Chapter IX of the PPA and the Gov. Decree [Article 9(1) of the Utilities Decree].

In the negotiated procedure without prior publication of a contract notice conducted on the basis of a framework agreement, the contracting entity shall not verify the non-existence of the grounds for exclusion [Article 17(2) of the Utilities Decree].

XI. Provisions pertaining to the contents and the performance of contracts

In relation to the grounds for exclusion concerning offshore companies, the PPA contains provisions which enforce the grounds for exclusion even in the course of the fulfilment of the contract.

The contracting authority shall be bound to set the following as *contract terms*:

(a) any cost arising in relation to a company not being in compliance with the stipulations set out in Article 56(1)(k) and which may be used for reduction of the successful tenderer's taxable income, may not be paid or charged by the successful tenderer in the context of the performance of the contract;

(b) the successful tenderer shall reveal its structure of ownership to the contracting authority during the full period of performance of the contract, and notify without delay the contracting authority of the transactions according to Article 125(5) of the PPA [Article 125(4) of the PPA].

The rule prescribing the mandatory termination of the contract:

The party entering into the contract as a contracting authority shall be entitled to and at the same time shall be bound to terminate the contract – where necessary, giving a period of notice which makes it possible for him to arrange for the carrying out of his duty according to the contract - if

(a) any legal person or any business organisation without legal personality not complying with the stipulations set out in Article 56(1)(k) acquires directly or indirectly a share exceeding 25% in the successful tenderer;

(b) the successful tenderer acquires directly or indirectly a share exceeding 25% in any legal person or any business organisation without legal personality not complying with the stipulations set out in Article 56(1)(k) [Article 125(5) of the PPA].

The process to be followed, if the tenderer (candidate) intends to use a new subcontractor, in the course of the performance of the contract:

Pursuant to the PPA, all the subcontractors intended to be employed by the tenderer for more than ten per cent of the value of the public procurement contract shall be indicated in the tender (in the request to participate) [Article 40(1)(b) of the PPA]. The *tenderer* shall be obliged to notify the contracting authority, in the course of the performance, of the participation of any subcontractor – even if it is the subcontractor intended to be employed in place of the one designated before – not designated by him in the tender. Together with the notification he *shall also make a statement* to the effect that *the subcontractor* intended to be employed by him *is not subject to the grounds for*

exclusion according to Article 56 and, if the contracting authority prescribed it in the preceding contract award procedure, neither the grounds for exclusion according to Article 57 [Article 128(2) of the PPA].