

The amended briefing of the President of the Public Procurement Council

on the availability of the documentation free of charge and the ensuring of preliminary access to documentation¹

(Public Procurement Bulletin, n° 7/2011; 17 January 2011)

In order to promote wide-ranging competition in public procurements, to avoid the occurrence of unjustified costs for tenderers in relation to contract award procedures and to facilitate the participation of micro, small and medium-sized enterprises in contract award procedures, the President of the Public Procurement Council draws the contracting authorities' attention to the following, as regards the documentation concerning contract award procedures.

Article 54(1) of the **Act CXXIX of 2003 on Public Procurement** (hereinafter referred to as the 'PPA') prescribes as regards all the subject-matters of public procurements in EU procedures, Article 1(1) of the Gov. Decree 215/2010 (09. 07) on the contents of the documentation to be drawn up in procedures for the award of public works contracts prescribes as regards procedures for the award of public works contracts, and Article 249(5) of the PPA prescribes as regards national procedures that contracting authorities shall be bound to draw up a documentation with the aim of facilitating proper tendering. In all other cases, the contracting authority may consider at his own discretion whether or not he prepares a documentation concerning his contract award procedure.

According to Article 54(6) of the PPA, the contracting authority may stipulate in its contract notice that, to be able to submit a tender, at least one of the tenderers per each tender or a subcontractor intended to be employed for more than 10% of the contract value shall buy or receive the tender documentation or have online access to it.

Although the contracting authorities have the right to charge a fee for access to documentation according to Article 54(6) of the PPA, we recommend that **contracting authorities not make availability of documentation subject to any payment**, in order to achieve the objectives set out in the introduction of this briefing. We would like to underline that the PPA also 'encourages' that the documentation be made available free of charge, when it provides for the application of shorter time limits – contrary to the general rule –, in case the documentation is made available in full, free of charge, by way of electronic means [see for instance Article 74(4) of the PPA].

We would like to mention that in most countries it is not acceptable for contracting authorities to request money for the documentation, considering the fact although it seems to reduce its costs incurred in relation to the contract award procedure, those costs will then obviously be passed on by the tenderers to the contracting authority, as part of their consideration.

In our view, if the contracting authority may not dispense with the prescription of a fee for the documentation, the unjustified costs incurred by the tenderer may also be mitigated by **authorizing** the entities interested in the contract award procedure **to have access to documentation before its purchase**. Thus, tenderers may

¹ This president's briefing is the amended version of the briefing of the President of the Public Procurement Authority on the availability of the documentation free of charge and the ensuring of preliminary access to documents, published in the Public Procurement Bulletin, n° 43/2010 (16 April 2010). The new wording, added to the text of the former briefing, is underlined.

take an informed decision about whether or not to submit a tender to the given subject-matter. We would like to draw the contracting authorities' attention to the fact that **ensuring preliminary access to documentation does not mean that tenderers may submit a tender – after having access to the documentation – without purchasing the documentation**, because participation in the procedure may be made subject to the condition that the tenderers purchase the documentation, according to the relevant provisions of the PPA.