

## **Government Decree 306/2011 (23 December) on the detailed rules pertaining to public works contracts<sup>1</sup>**

The Government, on the basis of the empowerment of Article 182(1) point 10 of the Act CVIII of 2011 on Public Procurement and, with respect to Annex 1 and 2, on the basis of the empowerment of Article 62(1)(o) of the Act LXXVIII of 1997 on the Formation and Protection of the Built Environment, acting within its sphere of authority according to Article 15(3) of the Fundamental Law of Hungary, lays down the following:

### ***1. Scope of the Decree***

#### **Article 1**

1. This Decree shall apply for public procurement contracts pursuant to the Act CVIII of 2011 on Public Procurement (hereinafter referred to as: the 'PPA') whose subject-matter is public works according to Article 7(3) of the PPA or public works concession according to Article 7(5) of the PPA.
2. For the purposes of this Decree, wherever reference is made to public works such reference shall also include public works concessions.

### ***2. Estimated value of public works contracts***

#### **Article 2**

1. For the purposes of establishing the estimated value of public works contracts, in case of building activities subject to permit or declaration, the governing budget shall be drafted on the basis of the building permit plan – prepared in line with the contents of the building permit – or the final construction plan or the consolidated building permit plan and final construction plan together, shall contain all the necessary work-items related to the public works contract and shall be drawn up not more than twelve months prior to the starting date of the public procurement. As regards Article 5(1)(a)-(e), for the purposes of establishing the estimated value of public works contracts, the cost estimate containing all the necessary work-items related to the public works contract and drawn up not more than twelve months prior to the starting date of the public procurement shall govern.
2. For the purposes of Article 18(2) of the PPA, the public works contract broken into several execution phases in the building permit shall be considered the same public works contract (the buildings, parts of buildings constructed in each execution stage, shall be considered altogether).

### ***3. Contents of the documentation***

#### **Article 3**

1. In public works contracts, the contents of the documentation pursuant to Article 122(2) Chapter VIII of the PPA, in case of competitive dialogue the contents of the descriptive document, shall be in line with this Decree.

#### **Article 4**

1. The documentation of public works contracts subject to permit or declaration pursuant to the building regulations, and aiming at the execution of a building or of a work related to one of the activities specified in Annex 1 of the PPA, shall include the building engineering plans as defined in Gov. Decree 191/2009 (15 September) on Construction Industry (hereinafter referred to as: the 'CI') and being in compliance with the provisions set out in this Decree and the Annexes hereof.
2. Where the public works aiming at execution is not subject to any permit or declaration according to the building regulations, the documentation shall have the contents specified in Annex 1, in case of public works

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<sup>1</sup> In a single composition with Gov. Decree 134/2012 (VI. 28.) on the amendment of certain Gov. Decrees related to the amendment of the building competence on historic monuments, with Gov. Decree 109/2013 (9 April) on the measures promoting the hindrance of debts related to construction and building and with Gov. Decree 238/2013 (30 June) amending certain decrees concerning public procurement.

concerning historic monuments, Annex 1 and Annex 2, provided the requirements set in these Annexes are relevant to the public works in question.

## Article 5

1. Where the public works contract is aimed at execution together with planning of a building or works, or is aimed at the execution together with the planning of a work related to one of the activities specified in Annex 1 of the PPA, the documentation shall be prepared by the contracting authority with the contents specified in Annex 1. In case of public works aiming at execution and planning, the documentation shall be prepared on the basis of a legally binding building permit or construction permit and the documentation forming part thereof, except

- (a) where the building activity is not subject to an official building permit,
- (b) in case of contract award procedures using support from European Union Cohesion Funds, aiming at the execution of a specific type of building according to the Act on the Formation and Protection of the Built Environment (hereinafter referred to as: the 'FPBE'),
- (c) in case of contract award procedures for the implementation of water projects,
- (d) in case of contract award procedures for the realization of buildings needed for the performance of activities pursuant to Article 3(k)-(q) of the Act on Waste Management,
- (e) in case of public works contracts subject to the Act on the Acceleration and Simplification of the Implementation of Investments of Distinguished Importance in Terms of National Economy.
- (f) in case of additional works specified in Article 94(3)(a) of the PPA (if a documentation is prepared by the contracting authority)<sup>2</sup>**

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3. The documentation may be the building engineering plans as defined in the CI – complying with the provisions set out in this Decree – in case of public works contracts for execution and planning, and in such a case the task to be made by the winning tenderer consists of the performance of certain additional planning tasks.

4. The contracting authority shall assure in the terms of the contract concluded with the designer that the winning tenderer be entitled to rework, redesign the project plans – placed at his disposal by the contracting authority – as required by the planning task to be made by him, without any obligation to pay a fee.

5. As regards Article 24(3) of the PPA, in the contract award procedures for execution, or execution together with planning or, following an (outline) building permit plan, the preparation of further plans for the same building, the participation of the designer which has prepared the plan forming the basis of the documentation – specified in Article 49 of the PPA – of such contract award procedure, does not result in a distortion of competition and does not qualify as a conflict of interests, provided such designer does not participate in any other manner in the preparation of the contract award procedure.

## Article 6

1. Where the use of the competitive dialogue is justified by the fact that the contracting authority would not be able to define the public procurement technical specifications concerning the subject-matter of the public procurement or would not be able to define it in the detail needed for using open or negotiated procedure, the descriptive document shall be drawn up according to the requirements set in Annex 1.

2. For the purposes of framework agreements, the unpriced budget included in the documentation of the procedure for the conclusion of the framework agreement shall only enumerate each item constituting the subject-matter of the framework agreement and to be priced at standard prices, without giving any further detail, if no further information is available in the first phase of the procedure.

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<sup>2</sup> This point entered into force on 1 July 2013.

<sup>3</sup> This paragraph was repealed on 1 July 2013.

#### **4. Reserve fund**

##### **Article 7**

1. Where the contracting authority intends to provide for a reserve fund pursuant to Article 125(9) of the PPA in the contract, the rules pertaining to the use of the reserve fund shall be set out in detail in the contract or contract terms forming part of the documentation in advance and the value of such fund shall be indicated therein.
2. Such reserve fund may only be employed for the purposes of the consideration of work necessary for the execution of public works, the proper and safe use.
- 3. For the purposes of paragraph 2, under the PPA, the use of a reserve fund does not necessitate any amendment to the contract or the conduct of a contract award procedure, however, the possible cases and financial criteria of the use of the reserve fund shall be clearly set out in the contract, in a way that ensures the opportunity for all tenderers to learn of it in advance.<sup>4</sup>**
4. The reserve fund shall be taken into consideration by the contracting authority when calculating the estimated value of the public procurement.

#### **5. Registration by a chamber**

##### **Article 8**

1. In procedures pursuant to Part Two of the PPA, in case of economic operators performing execution activities, the contracting authority shall be bound to stipulate in the notice launching the procedure, on the basis of Article 57(1)(d) of the PPA, the requirement of being registered in the list of entities performing execution activities specified in the FPBE 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).
2. In case of any doubt, the contracting authority may request the supply of missing information pursuant to Article 67 of the PPA from the tenderer or candidate and in the course of the supply of missing information the tenderer or candidate shall indicate which economic operator designated in the tender or request to participate does not perform such implementation activities or which economic operator do perform implementation activities requiring registration on the list of entities performing implementation activities according to the CI.

##### **5/A. Examination of the minimum hourly charge-out rate applied in the tender**

##### **Article 8/A<sup>5</sup>**

- 1. A tender shall be deemed to be abnormally low where the minimum hourly charge-out rate applied by the tenderer is lower than the minimum hourly charge-out rate set out in the Decree of the Minister responsible for the building matters pursuant to the recommendation of the Committee for the Building Sector Dialogue.**
- 2. The contracting authority, while requesting for explanation pursuant to Article 69 (1) of the PPA, shall request information regarding the amount of the minimum hourly charge-out rate applied by the tenderer. It shall request information how (what amount and method) certain expenses - included in the minimum hourly charge-out rate related to construction and building as defined in CI - has been taken into consideration while calculating the minimum hourly charge-out rate. The contracting authority, while examining if the explanation submitted by the tenderer is reconcilable with economic rationality, he shall take into consideration the amount of the minimum hourly charge-out rate set out in the Decree of the Minister responsible for the building matters. In case the minimum hourly charge-out rate applied by the tenderer is lower than the aforementioned, the contracting authority shall give special attention to the examination of the circumstance set out in Article 69 (6) of PPA.**

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<sup>4</sup> This amendment entered into force on 1 July 2013.

<sup>5</sup> This paragraph entered into force on 1 July 2013.

## **6. *Liability Insurance***

### **Article 9**

In case of public works, the party entering into the contract as tenderer shall purchase liability insurance not later than by the date of conclusion of the contract, or shall extend his existing liability insurance to the extent and value prescribed by the contracting authority in the notice launching the procedure or in the documentation.

## **7. *Rules pertaining to subcontractors***

### **Article 10**

(1) In the course of the performance of the contract, the party entering into the contract as contracting authority or the person (organization) acting on behalf of it shall verify on the basis of data included in the construction log that the subcontractor participating in the performance complies with the provisions set out in Article 128(2)-(3) of the PPA.

(2) <sup>6</sup> The entity whose previous performances were used by the tenderer (the candidate) for the certification of suitability pursuant to Article 55(6)(b) of the PPA, shall assume suretyship according to the provision set out in Article 274(1) of the Act IV of 1959 on the Civil Code (hereinafter referred to as the "Civil Code") for the indemnification of the contracting authority in the case of non-performance or deficient performance to the extent of the part of the contract in relation to which such organisation certified the suitability of the tenderer (candidate) through the presentation of its previous performances. The contracting authority shall indicate in the notice launching the procedure whether the reference certifies suitability for the whole performance of the contract or for which expressly specified part thereof.<sup>7</sup>

### **Article 11**

In the contract concluded with the subcontractor, the guarantee stipulated by the party entering into the contract as tenderer for his claims related to non-performance or defective performance by the subcontractor may not exceed ten-per cent (10–10 %) of the consideration – as specified in the contract – before the Value Added Tax (hereinafter referred to as: 'VAT') is added.

## **8. *Payment of the consideration in case of public works contracts***

### **Article 12**

1. Upon request of the tenderer, the advance pursuant to Article 131(1) of the PPA shall be paid by the party entering into the contract as contracting authority – or in case of projects using support, in the course of payment to contractors, the entity obliged to pay – not later than fifteen days after the handover of the construction site, except for the case specified in paragraph 2.

2. Where the contracting authority provides for the payment in advance of an amount larger than the amount specified in Article 131(1) of the PPA, the payment of the advance may be made in several instalments and only the first instalment shall be paid not later than 15 (fifteen) days after the handover of the construction site.

3. The amount of the advance as defined in paragraph 1 shall be calculated on the basis of the value of the full net consideration specified in the contract. The amount of the mandatory advance shall not be affected by any amendment to the contract.

### **Article 13**

1. In case of contracts setting a time limit for performance exceeding six months and at the same time setting a net consideration exceeding fifty million forints (HUF 50,000,000), the contracting authority shall provide for partial invoicing broken into periods suitable for the characteristics of the public works in question or into execution phases.

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<sup>6</sup> This amendment entered into force on 1 July 2013.

<sup>7</sup> This paragraph entered into force on 1 July 2013.

2. For the purposes of paragraph 1, in case of public works contracts below one thousand million forints (HUF 1,000,000,000) net of VAT, the contracting authority shall provide for the submission of not less than 4 (four) partial invoices (including the final invoice).
3. For the purposes of paragraph 1, in case of public works contracts exceeding one thousand million forints (HUF 1,000,000,000) net of VAT, the contracting authority shall provide for the submission of not less than 6 (six) partial invoices (including the final invoice).
4. The contracting authority shall in all cases provide for the issuing of the first partial invoice not later than the delivery of an actual performance of 25 % of the contract value net of VAT.
5. The total value of the advance and the payments made on the basis of partial invoices may not be less than 70 % of the contract value net of VAT.
6. The amount of the advance shall be established in line with the performance actually delivered under the contract, as approved by the contracting authority in a certificate of performance, noting that the value of the net consideration specified in the partial invoice may not exceed the realized value of the contract.

#### **Article 14**

1. **Contrary to the provision set out in Article 292/B(1) of the Civil Code<sup>8</sup>**, where the party entering into the contract as tenderer employs a subcontractor for the performance of the contract, the party entering into the contract as contracting authority, or in case of support from the European Union, in the course of payment to the contractors, the entity obliged to pay (for the purposes of this Article, hereinafter jointly referred to as: 'the party entering into the contract as contracting authority') shall pay the consideration according to the following rules:

- (a) the parties entering into the contract as tenderer shall make a declaration to the contracting authority not later than the issuing date of the acknowledgement of performance, stating who is entitled for which sum among them;
- (b) all the parties entering into the contract as tenderer shall make a declaration not later than the issuing date of the acknowledgement of performance, stating the subcontractors involved by them are entitled for which sum one by one, and at the same time shall invite them to issue these invoices;
- (c) all the parties entering into the contract as tenderer are entitled to issue their invoice after the acknowledgement of performance, specifying in the invoice the degree of performance actually delivered by the subcontractor and the degree of performance actually delivered by the tenderer;
- (d) the party entering into the contract as contracting authority shall transfer the consideration to be paid for the performance delivered by the subcontractor specified in the invoice as per point (c) to the tenderers within fifteen days;
- (e) the party entering into the contract as tenderer shall pay the invoices of the subcontractors without delay, or withhold it, or withhold a part of it, according to Article 36/A (3) of the Act XCII of 2003 on the Rules of Taxation (hereinafter referred to as: the 'Art'), or withhold part of the fee of the subcontractor according to the contract concluded with the subcontractor;
- (f) the parties entering into the contract as tenderer shall hand over the copies of certifications of the transfers as per point (e), or the copy of the joint tax certification showing public debt of the subcontractor to the party entering into the contract as contracting authority (the latter shall be handed over to allow the party entering into the contract as contracting authority to establish that the party entering into the contract as tenderer has acted legally by not having paid the whole sum to the subcontractor);
- (g) the consideration of the performance delivered by the principal to the contract, as specified in the invoice submitted by the parties entering into the contract as tenderer shall be transferred by the party entering into the contract as contracting authority within 15 (fifteen) days to the parties entering into the

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<sup>8</sup> This amendment entered into force on 1 July 2013.

contract as tenderers, if the latter have fulfilled their payment obligation regarding Article 36/A of the Art. as well;

(h) if any of the parties entering into the contract as tenderer does not fulfil its obligation stipulated in point (e) or (f), the contracting authority shall safekeep the remaining part of the consideration and this shall be due the tenderer if it certifies that it has fulfilled its obligation stipulated in point (e) or (f) or certifies with an authentic document that the subcontractor or expert is not entitled to the sum or part of the sum declared by the tenderer according to point (b);

(i) in case of contract award procedures carried out wholly or partially with the support of the European Union, the time limit stipulated in point (d) shall be thirty days.

2. The parties to the contract may only agree on deferred payment pursuant to **Article 292/B(2) of the Civil Code**<sup>9</sup> in case of the consideration specified in paragraph 1(g). Article 136/A(3) of the Art. may only be applied to the party entering into the contract as tenderer up to the amount specified in paragraph 1(g).

3. If the party entering into the contract as contracting authority pays the consideration in several parts, paragraphs 1-2 shall apply to all parts.

4. Where the winning tenderer (tenderers) set up a project-company in order to perform the public procurement contract, for the purposes of this Article, the party entering into the contract as winning tenderer shall mean the project-company.

## ***9. Public works concerning historic monuments***

### **Article 15**

**1. Public works concerning historic monuments are public works classified as building activities being the subject of an official building permit executed on historic monuments defined in the Act on Protection of Cultural Heritage.**<sup>10</sup>

2. In the case of contract award procedures of public works concerning historic monuments, in compliance with the provisions set out in a separate act of legislation on the certification of suitability and the verification of the non-existence of the grounds for exclusion in contract award procedures, the contracting authority shall prescribe the following, as regards technical and professional ability:

(a) the description of major works carried out over the past five years, concerning a historic monument, being of the same size and nature as the work ordered for the historic monument constituting the subject-matter of the public procurement, and

(b) the contracting authority shall also prescribe that the tenderer or candidate indicate the name, qualifications, professional experience of the experts (bodies) and managers that he intends to involve in the performance of the contract – at least regarding the ones who will perform the next task –, and certify that the concerned persons (bodies) are entitled to perform the task:

(ba) responsible technical manager,

(bb) restorer, by professional branches, if the public procurement concerns restoration as well,

(bc) an expert of historic buildings, if the construction permit requires it.

3. Where the reference work described for the certification of suitability has not been performed in Hungary, historic monument shall mean listed as a historic monument or equivalent thereto under the law of the country in question.

4. The public works documentation of listed properties shall include, in addition to the documents specified in Annex 1, at least the documents specified in Annex 2, approved in the building permit.

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<sup>9</sup> This amendment entered into force on 1 July 2013.

<sup>10</sup> This amendment entered into force on 1 July 2012.

## **10. Public works concessions**

### **Article 16**

Considering the provisions set out in Article 7(5) of the PPA, the rules pertaining to the payment of the consideration shall not be applied in case of public works concessions.

## **11. Final provisions**

### **Article 17**

1. This Decree shall enter into force on 1 January 2012.

### **Article 18**

1. The provisions of this Decree shall be applied for public procurements started after its entering into force and for contracts concluded on the basis of contract award procedures launched after its entering into force. Article 5(4) shall not apply where the contract was concluded with the designer prior to the entering into force of this Decree.

2. For the purposes of public procurements started prior to 1 January 2012, the provisions set out in the Gov. Decree 215/2010 (9 July) on the contents of the documentation to be drawn up in contract award procedures in case of public works contracts shall apply.

**3. The rules of this Decree set out in Article 8/A pursuant to Gov. Decree 109/2013 (9 April) on the measures promoting the hindrance of debts related to construction and building shall be applied to public procurements which were started after 1 July 2013.<sup>11</sup>**

**3. The Articles of this Decree set out in Article 3 of Gov. Decree 238/2013 (30 June) amending certain decrees concerning public procurement (hereinafter referred to as AmendD) shall be applied to public procurements which were started after the entering into force of the AmendD.<sup>12</sup>**

### **Article 19**

The Gov. Decree 215/2010 (9 July) on the contents of the documentation to be drawn up in contract award procedures in case of public works contracts, shall be repealed.

### **Article 20**

This Decree, together with the PPA, shall serve the purpose of compliance with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as well as Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

### **Annex 1 to Gov. Decree 306/2011 (23 December)**

#### ***Contents of the documentation drawn up for public works contracts***

##### **1. General requirements**

1.1 The contents of the documentation shall include all the written documents and building plans made according to the stipulations set out in this Decree.

1.2 The documentation shall state – in the detail needed considering the specificities of the professional field related to the nature of the building, the requirements regarding the content elements:

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<sup>11</sup> This paragraph entered into force on 1 July 2013.

<sup>12</sup> This paragraph entered into force on 1 July 2013.

- 1.2.1 location, size, quantity of the parts of buildings, structural elements, built-in installations, etc.,
  - 1.2.2 quality related and technical requirements concerning ready state,
  - 1.2.3 circumstances, services affecting the construction of the building, the way of implementation,
  - 1.2.4 any work to be carried out together with the public works, affecting substantially the tendering process, although not being considered as public works.
- 1.3 The documentation shall include at least the content elements specified by this Decree, shall be in line with the detailed requirements for content elements concerning the specificities of the professional field related to the nature of the building, and shall enumerate each part of work broken down according to the field of work and in the detail needed.
- 1.4 The documentation shall include at least:
- 1.4.1 basic data, inspections and surveys, technical specifications and plans, technical expert reports (e.g. conclusions and requirements related to frames, health protection and safety, as regards usability of the existing structures), which affect the carrying out of the work and are based on the necessary explorations regarding the existing building or part of building concerned,
  - 1.4.2 reference to the acts of legislation which shall be complied with as a criterion of validity set by the contracting authority,
  - 1.4.3 special requirements and circumstances in relation to working conditions,
  - 1.4.4 circumstances which substantially affect the carrying out of the work, in particular restrictions of time and place and the weather conditions.

## 2. Requirements in detail

### 2.1 Basic data, documents:

2.1.1 Data which are characteristic for the building, building activity constituting the subject-matter of the public works:

2.1.1.1 precise designation – specified in the relevant regulations – of the building, building activity,

2.1.1.2 designation of the place of work of the building,

2.1.1.3 the determinant parameters of the building, building activity (efficiency, capacity, holding capacity, substantial size, etc.)

2.1.1.4 nature of the building activity (construction of a new building, reconstruction, extension, demolition, etc.)

2.1.1.5 the required starting date and completion date of the construction.

2.1.2 Preliminary documents(copies):

2.1.2.1 legally binding, enforceable and valid building permit (construction permit) in cases stipulated by an act of legislation,

2.1.2.2 exemptions and deviation permits.

2.1.3 Special requirements, circumstances, services defined by the contracting authority:

2.1.3.1 irregular circumstances, environmental factors which affect the building activity (keeping traffic uninterrupted, activity in progress of another contractor in the same area, requirements related to protection of environment, nature and national heritage, the limitation of working time, etc.),

2.1.3.2 services provided by the principal to the contract (availability of site building, electricity, building machine, implementation plan, etc.).

2.2 Public procurement technical specifications:

2.2.1 General description of the building, building activity:

2.2.1.1 deployment, environmental relations, intended purpose, function, technology, wheel-chair accessibility, operation, etc.),

2.2.1.2 enumeration of the parts of the building, functional units, premises, etc. – making reference to the building plans – and the detailed definition of the design, criteria, level of standards, equipment, etc. thereof.

2.2.2 Description of the intended technical solutions (parts of building, structures, installations, devices, wires, system elements, etc.) making reference to the building plans in a way that allows identification thereof:

2.2.2.1 by determining quality of materials, and other requirements, standards and technical criteria to be considered,

2.2.2.2 by presenting in detail suggested solutions which were developed in the technical documentation,

2.2.2.3 by determining possible scope of alternative, equivalent technical solutions.

2.2.3 Description of the requirements related to quality assurance, work safety and security

2.3 Technical plans:

2.3.1 site plan(s), which shall include the construction site, the existing, remaining and planned buildings and the buildings to be demolished, the vegetation, the determinant parameters of surface height as well as an outline of the connections between the buildings and the energy network, system of public utilities thereof,

2.3.2 general plans and floor plans, vertical and horizontal sections, longitudinal sections, cross sections, views, etc. on the basis of which the buildings and its parts, spatial location, parameters, structures, materials, installations, etc. may be determined, the quantitative statement may be checked and further detail drawings, technological plans, manufacturing plans and assembly plans as well as other technical plans needed for the implementation may be prepared,

2.3.3 detail drawings, the drawings of parts, structures of the building which may not be duly shown on the general plans as well as drawings of the assembly of such parts, structures.

2.4 The invitation for an unpriced budget according to Article 49(2).

**Annex 2 to Gov. Decree 306/2011 (23 December)**

***Requirements in relation to historic monuments***

1. In case of public works contracts concerning historic monuments, the technical documentation shall include, in addition to the documents specified in Annex 1, the following documents, approved in the building permit:

1.1 summary of building history,

1.2 copies of archive plans and photos,

1.3 research documentation (documentation concerning research of historic monuments, studies of building diagnostics).

2. If, according to the building permit, the public works concerning a historic monument also includes restoration activity, the public works documentation shall include the following documents, in addition to the documents specified in point 1:

- 2.1 inspection, description of state of the subject of the restoration, photo documentation with the visible signs of decay,
- 2.2 the documentation of restorations in the past, if any
- 2.3 descriptions of the prescribed interventions, processes, the materials to be used,
- 2.4 proposal for aesthetic restoration work,
- 2.5 the expected results and the risks of the treatments.