

## **Guideline of the Public Procurement Authority concerning the application of the rules for calculating together the estimated value of public procurements under the new PPA**

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Considering that the rules set out in **the Act CVIII of 2011** on Public Procurement (hereinafter referred to as the 'new PPA') for calculating together the estimated value of public procurements differ from those specified in **the Act CXXIX of 2003** on Public Procurement (hereinafter referred to as the 'former PPA'), the Public Procurement Authority issues the following Guideline on the basis of the empowerment of Article 172(2)(k) of the new PPA, with a view to enhance the application of rules.

### **I. The value of public procurements**

Pursuant to Article 5 of the new PPA, contract award procedures shall be conducted by entities defined as contracting authorities with the aim of concluding contracts for pecuniary interest in order to realize purchases of specified subject and value (public procurement).

Accordingly, the Act prescribes the obligatory conduct of a contract award procedure in the following conditions:

- any entity qualified as contracting authority,
- intends to conclude a contract for pecuniary interest,
- for the realization of any purchase whose
- subject-matter and
- *value are under the scope* of the new PPA.

These conditions are cumulative, i.e. they only constitute an obligation of conducting a contract award procedure if they appear together.

For the purposes of examining the rule for calculating together the estimated value of public procurements, the initial step shall be to examine the way of establishing the value of the public procurement, as one of the conditions underlying the application of the new PPA. The relevant rules are laid down in Articles 11-18 of the new PPA and these provisions – which together constitute an integrated system – provide for the principles and rules to be considered in the course of calculating the value of the

subject-matter of the public procurement, prior to the commencement of the public procurement. Accordingly, these principles and rules allow to decide whether or not the envisaged contracting is subject to the new PPA. The starting point is constituted by Article 11 of the new PPA, further detailed rules concerning each subject-matter of public procurements are set out in Articles 12-16, and finally Article 18 lays down the prohibition to split up any procurement, as well as the rule for calculating together the estimated value of public procurements.

## **II. The concept of the estimated value**

Pursuant to the first sentence of Article 11(1) of the new PPA, the value of a public procurement shall be the highest, full consideration requested or offered in general for its subject-matter at the time of the beginning of the contract award procedure, which is to be calculated net of VAT and taking account of the provisions of Articles 12 to 18 (hereinafter referred to as the 'estimated value').

According to Article 4 point 14 of the new PPA, *the public procurement shall be deemed to commence* on the date of dispatch of the contract notice launching the contract award procedure, on the date of dispatch of the direct invitation to participate [Article 38(1)] or, in the case of a negotiated procedure without prior publication of a contract notice, on the date at which the invitation to tender – in the case of application of Article 99(2) the invitation to negotiation – is sent, or in the absence of such documents, on the date of the starting of the negotiation.

Article 11(3) of the new PPA stipulates in a broad sense that it shall be prohibited to select the method for establishing the estimated value with the intention of avoiding the application of this Act.

It can be concluded from the above that *the estimated value shall be the highest consideration for the subject-matter of the public procurement, according to the contracting authority's market survey and market information*. For the purposes of establishing this amount, the contracting authority shall take into account the full consideration requested for the subject-matter of the public procurement, i.e. it shall contain all costs, fees, purchase price to be paid by the contracting authority for the subject-matter of the public procurement. According to the new PPA, only the amount of the value added tax (VAT) shall not be taken into account in the course of establishing the estimated value<sup>1</sup>. Furthermore, the full consideration shall also include the value of the optional part in the case of an invitation to tender containing an optional part, as well as the fees and payments (commission) payable by contracting authorities to the candidates or the tenderers, if contracting authorities shall be fulfilling such payments [see last sentence of Article 11(1), Article 11(2) of the new PPA].

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<sup>1</sup> Of course, as regards VAT, the tax rates specified in the legislation being in force at the time of the commencement of the public procurement shall govern.

In relation to this issue, the Public Procurement Authority considers it important to underline that neither the notion of funding nor the notion of the tenderer's consideration may be deemed equivalent to the estimated value. The *estimated value* shall be taken into account when determining the material scope and selecting the proper type of procedure. Considering that the estimated value is an amount forecasted in the course of the preparation of the contract award procedure, for the date of the commencement of the contract award procedure, it shall be deemed a fictitious amount. In contrast, the *funding* shall be quantifiable on the basis of a disposable amount of money or the identification of the resources<sup>2</sup>. Furthermore, it is important to realise that the funding is a real amount the contracting authority intends to pay or can pay for the performance of the contract. However, a distinction shall be made between the amount of the funding and the full amount of money being at the contracting authority's disposal. In other words, the notion of the funding includes solely the amount that the contracting authority intends to or can use for the performance of the contract concluded as a result of the contract award procedure. The *consideration* is the amount of money included in the public procurement contract, while the funding is the resource thereof.

As referred to above, Articles 12-17 of the new PPA lay down the provisions pertaining to the special rules for establishing and calculating the estimated value, with the aim of completing the preceding provisions. The existence of these provisions is justified by special situations, such as contracts to be concluded for several years, or regular contracts, or contracts which are intended to be renewed periodically, as well as the specific nature of design contests and framework agreements, which require the drafting of further detailed rules. In this respect, the Public Procurement Authority only highlights the following.

Where the new PPA stipulates that, in the case of regular contracts or of contracts which are to be renewed periodically, the estimated value of the supply or service contract shall be the actual value of the contract or contracts having the same or similar subject-matters, concluded within the preceding calendar year [Article 13(1)(a) of the PPA], it only allows the contracting authority to establish the estimated value of the new contract award procedure on the basis of the consideration specified in the contract previously concluded by it, whether or not as a result of a contract award procedure. (Of course, adjusted according to the anticipated changes in quantity and value.) The other possible way of establishing the estimated value of procurements of a regular nature is to establish the estimated value on the basis of an estimation instead of the previous actual value: taking into account the estimated consideration following the first delivery, during the 12 months following the initial contract or during the term of the contract(s), if it exceeds 12 months. Thus, this provision *is not drafted as a rule for calculating*

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<sup>2</sup> See the decision n° D.155/12/2007 of the Public Procurement Arbitration Board

*together the estimated value of the public procurement, nevertheless, in the case of regular contracts or of contracts which are to be renewed periodically, the estimated value shall be established either on the basis of the value of the contracts concluded within the preceding calendar year (adjusted according to the anticipated changes), or the value of the contracts during the following 12 months.*

Finally, it is important to stress that *it is incumbent on the contracting authority to establish the estimated value, consequently, he shall also be able to prove, in the contract award procedure or in a possible review procedure, that the estimated value established by him is in conformity with the provisions set out in the PPA.*

### **III. The conditions for calculating together the estimated value of public procurements**

Before presenting in detail the rules for calculating together the estimated value of public procurements, it is necessary to stress that it is essential to establish the estimated value of procurements in order to be able to decide whether there is an obligation to conduct a contract award procedure. For it is possible that a contracting authority's procurement pursuant to the new PPA does not qualify a public procurement in itself, but qualifies as such only if the rules for calculating together the estimated value of public procurements are applied. On the other hand, the rules for calculating together the estimated value of public procurements shall be taken into account when determining the procedural rules applicable to the given contract award procedure.

First of all, the new PPA declares in a general way, referring to all contract award procedures, that it shall be prohibited to split up any procurement with the intention of avoiding the application of this Act or of Part Two of this Act [Article 18(1) of the new PPA]. Thus, in accordance with the relevant Directives of the European Union<sup>3</sup>, the Act prohibits to split up any (public) procurement with the intention of avoiding the provisions set out in the new PPA concerning competitive tendering.

Contracting authorities shall calculate together the value of such public procurement contracts whose subject-matters are *similar supplies* or *similar services* and in the case of which the need for public procurement has occurred at the same time, and also the value of such public works contracts whose subject-matter is *the same work* [Article 18(2) of the new PPA]. Where the contracting authority ensures the possibility of dividing the contract into lots in the course of one contract award procedure, the value of all lots shall be calculated together for the establishment of the estimated value of the public procurement contract [Article 18.(5)].

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<sup>3</sup> 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.

The new PPA specifies that the rules for calculating together the estimated value of public procurements shall be applied separately in the case of certain contracting authorities, when it stipulates that in the case of public procurement contracts for the purchases of foreign representations, paragraph 2 shall be applied separately for each foreign representation and in the case of contract award procedures conducted for the purchases of parliamentary panels, paragraph 2 shall be applied separately for each parliamentary panel. Moreover, paragraph 2 shall be applied separately for the purchases to be realized from the allocation granted to the bodies specified in Article 8(1)(a)-(c) and Article 10(1) of Act CLXIII of 2011 on the Prosecution Service (hereinafter referred to as “APS”) [Article 18(6) of the new PPA]. Summing up, the rule stipulated by the new PPA for calculating together the estimated value of public procurements shall be examined and applied separately

- for each foreign representation,
- for each parliamentary panel, as well as
- for the purchases to be realized from the allocation granted to the following bodies:
  - the Office of the Prosecutor General,
  - the appellate chief prosecution services,
  - the chief prosecution services, and
  - the National Institute of Criminology.

Accordingly, the rule stipulated by Article 18(2) of the new PPA for calculating together the estimated value of public procurements shall only be examined separately in the case of the abovementioned prosecution services, which enumeration do not include the district prosecution services.

In particular, it shall be underlined that the application of the new rules for calculating together the estimated value of public procurements also *requires* law enforcers to *change their attitude*, considering the fundamental changes made to the old rules. The provision in question is now stipulated in a more general way, thus presuming that law enforcers have a conscious and responsible attitude, and also that those concerned always act in conformity with the basic principles of public procurements, instead of considering only one budgetary year as it was fixed under the old rules.

Contrary to the former regulation, the new PPA differentiates between the aspects to be considered in the case of public supplies and services, and those to be considered in the case of public works. In other words, the rules for calculating together the estimated value of public procurements establishing the estimated value of public supplies and services differ from those establishing the estimated value of public works, as laid down by the Act. But it remained unchanged that the obligation of calculating together the estimated value shall only be applied in the case of similar subject-matters, i.e. public supply shall only be calculated together with public supply, public service with public service, and public works with public works.

Since the entering into force of the new PPA, several questions were addressed to the Public Procurement Authority concerning the issue relating to the rule for calculating together the value to be applied in the case of joint tenders [Article 21(3) of the new PPA]. In this respect, the Public Procurement Authority holds the view that, for the purpose of calculating together the value, in all cases, each tenderer participating in a joint tender shall only take into account the estimated value of the procurement needs occurring within his own sphere of interest.

### III.1. The criteria for calculating together the value in the case of public supplies and public services

Under the new PPA, contracting authorities shall calculate together the value of such public procurement contracts

- whose subject-matters are *similar* supplies or similar services and
- in the case of which *the need for public procurement has occurred at the same time*.

It is apparent that *the criteria for calculating together the value in the case of public supplies and public services are cumulative*, i.e. they only constitute an obligation to add, calculate together the value of certain public procurements in the course of establishing the estimated value, if they appear together.

For the purposes of examining if '*similarity*' exists or not, law enforcers shall decide in which aspects their subject-matters – i.e. their public supplies or public services – are similar to each other. According to the Public Procurement Authority, the similarity, as a concept, may be examined in respect of the purpose of the subject-matters, i.e. it shall be examined *whether or not they are aimed at the same purpose*, and the existence of similarity may be assumed in relation to two or more subject-matters, provided that their procurement serves the same purpose. In this respect, it shall be underlined that identical subject-matters result in the existence of '*similarity*', in all cases. For instance, procurement of printed stationery, such as notepaper, envelopes, notebooks, printing paper, ... etc. may be considered as identical subject-matters of public procurement, therefore in these cases the first condition for calculating together the value, i.e. the criterion of similarity, may be established. The same situation occurs in case of public services, for instance, in relation to the preparation of the planning application documents concerning different real properties. Of course, it does not mean that the value of planning services of clearly different nature should be calculated together. It is more difficult to find the answer, if this question arises in the case of subject-matters which are not identical considering their nature, but appear to be similar from a certain point of view, such as their characteristic, purpose, function. Referring the abovementioned examples, both the procurement of printed stationery and the procurement of planning services (which may also include the preparation of outline planning application and/or execution documentation) constitute broader categories, but it is clear that similarity may be shown within each of the two notions (e.g. between writing instruments and paper, or

between the different types of documentation, such as planning application and execution documentation). It shall be noted that the analysis of the CPV codes may provide further help to decide on that issue<sup>4</sup>.

According to the Public Procurement Authority, the following phrase: *'the need for public procurement has occurred at the same time'*, shall be interpreted as follows: the contracting authority shall calculate together the value of all the similar public supplies and similar public services, in case of which – at the time of the planning of his public procurement contracts aiming at the public supply, public service concerned (in particular at the time of the planning of the budget, or the drawing up of the business plan, or the assessment of the procurements to be realized within one project) – *he is aware of the fact that a need for public procurement occurs to him, notably, the public procurements which he may take into account besides the given procedure and those he would be able to realize at the same time.*

In other words, in order to be able to decide whether or not there is an obligation of calculating together the value, it shall be examined whether the public procurements in question could be realized by the contracting authority in the same procedure, due to the fact that he needs all the similar supplies or services, and also he has the necessary resources to realize the procurements. Of course, it does not necessarily mean that those procurements shall be realized by the contracting authority in the same procedure, it only means that the value of those procurements shall be calculated together, and therefore, their aggregated value shall be taken into account when deciding between the procedural system of the EU and that of Hungary (for the purposes of the given public procurement). It shall be underlined in this respect that, according to the Public Procurement Authority, in the case of public procurements to be realised using support, the duly signed support contract is sufficient to fit the requirement of having the necessary resources. It shall also be noted that the ability to realize a procurement at the same time shall be examined in all cases on the basis of objective reasons, thus it may depend on the availability of the resources, or on the fact that certain public supplies occur in the sequential stages of a research process, being based on one another.

However, according to the Public Procurement Authority, in this respect, the contracting authority shall consider – inter alia – the prior information notice as defined in Article 32 of the new PPA, and in particular the public procurement plan as defined in Article 33 of the same, therefore on the basis of the latter it can easily be seen whether the contracting authority plans similar procurements for which his procurement need occur at the same time.

The special importance of planning of public procurements is also due to the fact that under Article 33(1) and (3) of the new PPA, contracting authorities defined in Article 6(1)(a)-(d), with the exception of contracting authorities acting under Chapter XIV and

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<sup>4</sup> Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV)

entities authorised to invite tenders in the course of centralised public procurements, shall draw up, at the beginning of the budgetary year, by 31 March at the latest, an annual overall public procurement plan, which shall outline all public procurements envisaged for given year. Consequently, the existence of the obligation of calculating together the estimated value shall be assumed in the case of *similar supplies and similar services specified in the public procurement plan*. Contracting authorities may only carry out procedures for the award of contracts not included in the procurement plan or for the award of contracts that have been modified as compared to what the plan contains, if a need for public procurement or other changes have occurred for reasons unforeseeable by them.

Accordingly, it shall be stated that a new procedure, not enumerated among the contract award procedures planned for the given year, may only be conducted lawfully by the contracting authority, if the need for public procurement have occurred for changes caused by reasons unforeseeable by him. In such cases, as appropriate it may not be assumed that the need for public procurement occurred at the same time.

To conclude this point, it shall be underlined that it is incumbent upon the contracting authority – having knowledge of all the relevant circumstances of the case – to assess whether or not the conditions of calculating together the value exist, therefore the Public Procurement Authority deems it advisable for the contracting authority to ask for the justified opinion of a specialist of the subject-matter of the public procurement on that issue, which opinion may also be of great importance in an eventual, subsequent legal dispute.

Overall, it shall be stressed in relation to both conditions that, taking into consideration the general nature of their definitions given, the development of the relevant detailed rules shall mainly take place in practice.

### III.2. The criteria for calculating together the value in the case of public works

First of all, it shall be stated that – in conformity with the former regulation – the new PPA keeps the 'project-approach', and it lays down the following: when calculating the estimated value of public works contracts, the total counter value of the works shall be taken into account [Article 16(1) of the new PPA].

According to Article 2 of the Government Decree 306/2011 (23 December) on the detailed rules pertaining to public works contracts (hereinafter referred to as the 'Decree'), 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 planning application documents – prepared in line with the contents of the building permit – or the construction documentation or the consolidated planning application and construction documentation together, shall contain all the necessary work-items related to the public works contract and shall be drawn up not more than 12 (twelve) months prior to the starting date of the public procurement. As regards Article 5(1)(a)-(e) – i.e. where the public works contract is

aimed at the execution together with the planning of a building, or is aimed at the execution together with the planning of a work related to one of the professional activities specified in Annex 1 of the PPA, and licensed plans are not yet necessarily available – 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 12 (twelve) months prior to the starting date of the public procurement shall govern.

The Public Procurement Authority would like to underline that the fact that the abovementioned cost estimate shall be drawn up not more than 12 (twelve) months prior to the starting date of the public procurement does not mean that the estimated value can be established in respect of a date other than the starting date of the public procurement, in conformity with Article 11(1) of the new PPA, which specifies that the estimated value of a public procurement shall be the highest, full consideration requested or offered in general for its subject-matter at the time of the beginning of the contract award procedure, and is to be calculated net of VAT.

As referred to in the second part of Article 18(2), contracting authorities shall calculate together the value of such public works contracts *whose subject-matter is the same work*.

The notion of public works as a subject-matter of public procurements is defined by Article 7(3) of the new PPA. It specifies that *public works contracts* are contracts for pecuniary interest having as their object one of the following types of work to be ordered (and accepted) by a contracting authority:

- (a) the execution, or both the execution and design as defined in a separate act of legislation, of works related to one of the activities listed in Annex 1;
- (b) the execution, or both the execution and design as defined in the relevant legislation, of a work;
- (c) the execution, by whatever means or in whatever manner, of a work corresponding to the requirements specified by the contracting authority concerned.

In relation to this provision, the question as to how to define the notion of '*the same public works*' may arise, in particular, what kind of criteria shall be examined to be able to distinguish one public works – as defined by the new PPA - from another, in order to establish the estimated value.

According to Article 2(2) of the Decree, the public works contract broken into several execution phases in the building permit shall also be considered the same public works contract (the buildings, parts of buildings constructed in each execution stage, shall be considered altogether). It is important to realize that the public works contract broken into several execution phases in one building permit, as referred to in the abovementioned rule, is only one example for the definition of 'the same public works contract', and under no circumstances may it be construed the other way around as if one building permit would always represent one public works contract<sup>5</sup>.

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<sup>5</sup> cf. Article 27(2) of Gov. Decree 193/2009 on the official procedures for building authority permit and the inspection by the building control authority

According to the Public Procurement Authority, it is advisable to also examine the definitions referred to in **the Act LXXVIII of 1997** on the Formation and Protection of the Built Environment (hereinafter referred to as AFPBE), which go beyond the everyday usage of the term 'same'. The *public works contract*, as defined in Article 2 point 30 of the AFPBE, shall mean all the economic and building related activities conducted in relation to the performance of the building activity, which definition is not the same as the one referred to in Article 7(3) of the new PPA applicable in the course of establishing the estimated value and of calculating together the value. Article 2 point 36 of the AFPBE specifies the definition of *building activity*, as follows: it shall mean any building and building installation work, as well demolition work done for the construction, reconstruction, extension, renovation, restoration, modernization, maintenance, repair, demolition, displacement of a building, parts of a building, a building complex. Under Article 34(1) of the AFPBE the conduct of *abuilding authority procedure* shall be required in order to conduct a building work in the cases defined by law. The building activities are divided into the following three categories by Annex 1 of **the Decree 37/2007 of the Ministry of Local Government and Regional Development** on the official procedures for building authority permit and the contents of the building site documentation and technical-construction documentation: building activities subject to building permit, building activities subject to registration, and building activities which are neither subject to building permit nor to registration

Having regard to the provisions of the three abovementioned legislations, if certain building activities are subject to *the same permit or registration*, such activities constitute 'the same public works', and in such cases the fulfilment of the criteria referred to in Article 18(2) in question of the new PPA may be assumed. Furthermore, it shall be stated that the obligation for calculating together the value may be established in the case of public works subject to registration, and of public works neither subject to permit nor to registration, where the *building activities are functionally connected to each other* (for instance the renovation work to be done on the same building).

On the other hand, the Public Procurement Authority also refers to the fact that Article 2(2) of the Decree provides only one example for determining the scope of 'the same public works' in the case of building activities subject to building permit. It is also possible that the builder requires several different permits for the elements of the same public works, and in such cases the prohibition to split up any public procurement contract and the obligation of calculating together the value shall be examined.

For the purposes of interpreting 'the same public works', the law enforcers of the Member States shall construe the PPA in conformity with the text and the purposes of the directives upon which the PPA is based, according to the guiding principle applicable in all cases when interpreting the PPA. As provided for in Article 9(3) of Directive 2004/18/EC, no 'works project' may be subdivided to prevent its coming within the scope of this Directive.

It shall be underlined that the mere fact that certain public works contracts are realized

within the same support contract (a project in terms of the support policy), does not justify the application of the rule for calculating together the value.

However, it shall be stressed that the definite answers to the questions arising in relation to the interpretation of this provision shall be substantially and beyond doubt provided by the law enforcement in practice.

#### *IV. Exemption from the obligation of calculating together the value*

According to **Article 18(3)-(4) of the new PPA**, contrary to the provision set out in paragraph 2, the procedure laid down in Part Three of this Act shall apply, in all cases, to contracts having an estimated value less than HUF 21 824 000 in case of services and supplies and less than HUF 272 800 000 in case of works contracts, on condition that the estimated value of such a part not calculated together does not exceed 20 % of the value that would have been established by the contracting authority in case of application of paragraph 2 as the total estimated value of the public procurement contract. Where the estimated value of the public procurement would reach the EU threshold pursuant to paragraph 2, the provisions set out by Part Three of this Act as an exception to this Act [Article 120] may not be applied on the basis of paragraph 3.

In conformity with the provisions set out by the EU directives on public procurement, the new PPA allows exemption from the obligation of calculating together the value of contracts which would be otherwise subject to same obligation according to the rule prohibiting the splitting up of contracts, provided the value of such contracts does not reach the amount specified by an act of legislation (in compliance with the provisions set out by the Directives and the Communication from the Commission on the corresponding values of the thresholds of Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council). Such low value public procurements shall be realized by the contracting authority in all cases in accordance with the rules on national procedures, i.e. this provision may not be used by the contracting authority to be exempted from the obligation to conduct a contract award procedure, by splitting up one public procurement into several contracts. However, it shall be underlined that, in the case of application of Article 3, where the estimated value calculated together reaches the current community thresholds, the contracting authority may not take into account the exemptions specified in the provisions concerning the national procedures, so he may not circumvent the legislative provisions regarding his procurement.