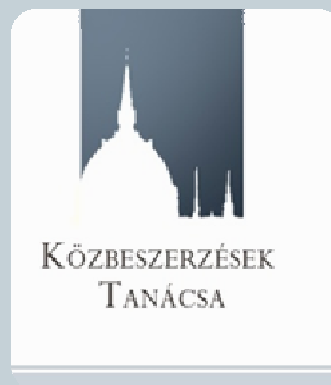


The new Public Procurement Act
National procedures, public procurement contracts



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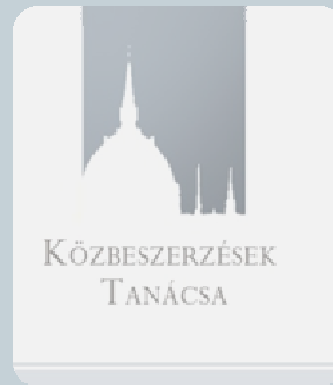


The new Public Procurement Act - National procedures

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The new PPA Part three - National procedures

- Based on EU procedures
- Based on own procedures



The new Public Procurement Act - National procedures

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National procedures - common rules

- Public procurements reaching national thresholds and not reaching EU thresholds
- Service concessions
- Exception to aggregation [18(3)]
- Services specified in Annex 4 [19(2)]
- New exceptions:
 - prevention of disasters
 - goods made, services provided and works executed in the framework of obligatory employment of prisoners

The new Public Procurement Act - National procedures

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1. Based on EU procedures

- *Grounds for exclusion* - the contracting authority may, but is not obliged to provide for
mandatory grounds for exclusion: - illegal tax avoidance, unclear structure of ownership [56(1)(k), (2)]
- *Documentation* - mandatory only in case of public works
- *Time limit for submission of tenders* - min. 20 days
- *Additional information* - within reasonable time
- *Amendment of invitation/documentation* - only to dispatch, information, no further procedural act may be carried out before its publication

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- *Negotiated procedure with the publication of a contract notice and competitive dialogue - in any case*
- *Negotiated procedures without prior publication of a contract notice*
 - supply/services up to HUF 25 million, public works up to HUF 150 million (SME shall be invited, notification of the Public Procurement Arbitration Board is omissible, not less than 3 tenderers)
 - exceptionally favourable procurements (publicised, open for any entity, the opportunity is persists only for a short period of time, significantly lower amount of consideration)
 - foreign representations (not less than 3 tenderers)
- *Reservation - turnover below HUF 100 million in case of public supply/services, below HUF 1 billion in case of public works*

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2. Based on own procedures

- *Only in case of public supply and public services*
- Invitation - publication of a notice is mandatory in all cases [30(1)(c)]
- *mandatory publication of the rules formulated individually, in the invitation*
- Rules formulated individually - compliance with the basic principles [2] !
- *Mandatory publication of the information necessary for appropriate submission of tenders (e.g.: subject-matter, quantity of the procurement, contract terms, award criteria and method, time limit for submission of tenders, entering into contact, etc.)*

The new Public Procurement Act - National procedures

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- *Grounds for exclusion* - the contracting authority may, but is not obliged to provide for
mandatory grounds for exclusion: - illegal tax avoidance, unclear proprietary structure [56(1)(k), (2)] (*offshore* companies)
- *Suitability* - contracting authority has the right to provide for further conditions/method of certification in addition to those set out in the legislation - proportionality [55(3)]
- *Technical specifications* - may not entail discrimination
- Notification of the participants of the *information/decisions* affecting the results (explanation!)
- *Results* - written summary, explanation, notification
- Right for *remedy*

The new Public Procurement Act - Public procurement contracts

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The new PPA - Part four - Public procurement contracts

- The conclusion of the contract
- The contents of the contract
- The validity of the contract
- The performance of the contract
- The amendment of the contract



The new Public Procurement Act - Public procurement contracts

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1. The conclusion of the contract

- On the basis of a successful procedure, with the winning entity, in writing
- With the tenderer ranked second only if he was designated in the summary
- In the case of subdivision of the contract into lots, by each lot
- Draft-contract, contents of the tender, final terms announced in the procedure, the content elements of the tender which are subject to evaluation
- Successful tenderer / tenderer ranked second - validity period of the tender is extended by 30 days - obligation to conclude the contract within this time limit
- Standstill period: 10 days



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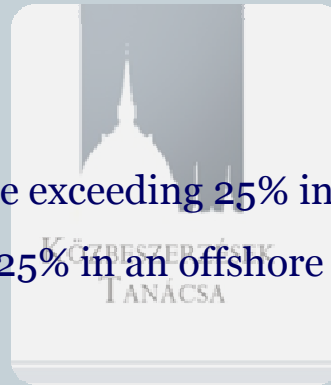
- Review procedure - the contract may not be concluded before the decision of the Arbitration Board is made - in the event that, during that time, the validity period of the tender expires, only if the tenderer maintains it
- Contract may be concluded before the end of the standstill period, if:
 - only one tender was submitted in an open procedure;
 - only one tender was submitted in a procedure consisting of more than one stage, and there was no invalid request to participate, or there was such a request to participate but the deadline for the initiation of a review procedure has expired, or the Arbitration Board considered the decision as lawful;
 - a negotiated procedure without prior publication of a contract notice used on the ground of extreme urgency;
 - the second part of a framework agreement procedure (except where it is conducted through a reopening of competition)
- To be relieved

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2. The contents of the contract

- laying down specific terms - in particular social, environmental, quality assurance conditions
- Successful tenderer:
 - may not pay/charge costs which were incurred by a company established with the aim of committing illegal tax avoidance;
 - reveals its structure of ownership;
- Mandatory termination:
 - an offshore company acquires a share exceeding 25% in the tenderer;
 - tenderer acquires a share exceeding 25% in an offshore company ;



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- successful tenderer has its fiscal domicile in a foreign country - an authorization stating that data may be acquired from the competent tax authority of the successful tenderer's fiscal domicile
- Duration of the contract - if possible, not for an indefinite period of time or for a disproportionately long period of time
- Reserve fund - not more than 5% of the amount of the consideration
- Guarantees - no significant change in the rules

it shall be indicated in the invitation - tenderer is bound to undertake to make it available

claims related to non-performance - not more than 5% of the amount of the consideration

claims related to guarantee and warranty - not more than 5% of the amount of the consideration

date of availability - commencement of liability

date of availability - payment, bank guarantee, insurance bond

new: in case of claims for guarantee and warranty withholding is possible (it shall be less than 50% of the guarantee!)

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3. Invalidity of the contract

- The contract is invalid, if:

 - it was concluded with an unlawful bypass of the contract award procedure;

 - the criteria for the application of negotiated procedure without prior publication of a notice were not fulfilled;

 - the infringement of the rules regarding the standstill period and as a result they deprived the tenderer of applying for a review procedure before concluding the contract, and it influenced the prospects of the tenderer to win the contract award procedure.

- Exceptions to invalidity:

 - dispatch of a notice concerning *ex ante* transparency

 - a public interest of high priority

- Partial invalidity:

 - exclusion/limitation of legal consequences in case of breach of contract by the contracting authority concerning the interest for late payment, at the expense of the entitled party



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4. The performance of the contract

- Successful tenderer (joint tenderers)
- Project company (jointly liable with the successful tenderer)
- Entities participating in the performance:
 - subcontractors indicated in the tender may participate;
 - subcontractor, expert, which contributed to the certification of suitability, is obliged to participate;
 - subcontractor not indicated in the tender - announcement, statement concerning the non-existence of grounds for exclusion;
 - replacement of subcontractor, expert contributing to the certification of suitability - for unforeseeable circumstance/faulty performance, approval of the contracting authority
- Legal succession - legal successor of the subcontractor is tenderer/non-natural person (in case of restructuring, closing down with a legal successor)

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- Acknowledgement of performance - within 15 days from performance/reported to be finished
- Public works contracts - Delivery procedure not more than 25 days
- Payment of consideration: not later than within 30 days from the receipt of the invoice (in case of deferred payment not more than 60 days)
- Advance:
public service contract above EU threshold and public works, period of two months;
5% of the amount of the consideration, but not more than HUF 10 million (they may agree on a more important amount);
- Direct payment to the subcontractor - in case of public works, subcontractors eligible to at least HUF 500 thousand (detailed rules in a separate Gov. Decr.)
- Article 36/ A

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5. The amendment of the contract

- The parties may not amend the elements of the contract determined on the basis of the invitation, the tender documentation and the contents of the tender, if

(a) the terms affected by the amendment had allowed the participation of others as well in addition to the original tenderers (candidates) or the success of another tender instead of the successful tender - shall not be verified if the amendment was made necessary by an unforeseeable reason jeopardizing a substantial legitimate interest of one of the parties (notification of the tenderers!)

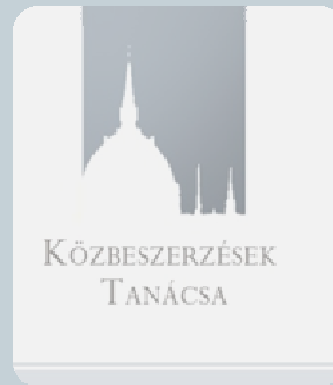
the amendment shifts the economic balance of the contract in favour of the successful tenderer (a raise exceeding 5% of the amount of the countervalue!)

the amendment extends the subject-matter of the contract over a new element

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**THANK YOU FOR
YOUR ATTENTION!**



16 November 2011