



# PUBLIC PROCUREMENT REMEDIES IN HUNGARY

Dr. Zoltán Kövesdi  
Chairman  
Public Procurement Arbitration Board

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KÖZBESZERZÉSI  
HATÓSÁG

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# I. Relevant EU rules

EC Treaty

Directives:

89/665/EEC public sector

92/13/EEC utilities sector



**2007/66/EEC**

deadline for transposition 20 December 2009 (effective in Hungary  
from 1 January 2010)

ECJ case law

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# I.1. Main requirements of EC directives

- Rapid and effective remedies
- Effective interim measures
- Reparation of infringements
- Institutional requirements: independent review bodies/ judicial review at the last instance
- Relevant case law: C-81/98 (Alcatel), C-212/02 Commission v. Austria C- 26/03 (Stadt Halle)



# I.2. Relevant domestic measures

- **Act CXXIX/2003.**

Came into force: 1 May 2004 (on the date of the EU access)  
(until 31 December 2011)

- **Act CVIII/2011.**

Came into force: 1 January 2012

- executive regulations of the Government and Ministries
- „soft law” (recommendations, guidelines of PP Authority)

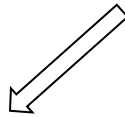


# II. Institutional frameworks of remedies

## Dual system

1. specialised independent- „quasi judicial”- review body: **Public Procurement Arbitration Board**

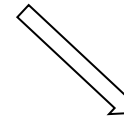
## 2. Civil Courts



rule on appeals against the decisions of PPAB



render the contract ineffective in given case



decide over damages



# III. Arbitration Board (PPAB)

- Operating alongside PP Council in the framework of PP Authority (functionally independent, but financially the same budgetary organization)
- Leaders: chairperson and deputy chairperson appointed by PP Council for 5 years term, with opportunity for re-election
- Members: public procurement commissioners: civil servants appointed by the PP Council, the number of the commissioners are also determined by PP Council



# III.1. Arbitration Board/ Legal status of the PP Commissioners

Minimum criteria: higher education degree, 3 years working experience, for lawyers: bar exam.

Profession: lawyers, other professionals with experience typically relating to the subject matters of PP cases. (architects, engineers, IT experts, economists, etc.)

Strict conflict of interest rules:

- Only scientific, teaching, artistic or other legally protected intellectual activity
- No membership with financial obligation in a business company
- No political membership
- No financial interest above a certain threshold in a business company





## III.2. Arbitration Board/ scope of action

- Jurisdiction: whole territory of the Hungarian state
  
- Main competence:
  - any infringement of the legislative provisions applicable to public procurement and qualified public procurement procedures, procurements in the field of defence and design contest under and above EU thresholds, incl. both public bodies and utilities sectors
  - Limited power regarding contracts concluded on the basis of contract award procedure: only amendment or performance violating PP Act. or related Gov. Decree



# III.3. Arbitration Board/ working orders

- Acts in proceeding panels consisting of 3 commissioners
- Two qualified lawyers and one expert having a degree closely related to the subject matter of the case, leader is always a qualified lawyer
- Panels selected on case-by case basis by the Chairperson of the PPAB
- independence in proceedings as well as in decisions is provided by PP Act



# III.4. Arbitration Board/working orders

- Time limits of proceedings
    - 15 days if no hearing is held
    - 30 days if hearing is held
    - Both deadline can be extended for 10 days if justified
    - 60 days if the subject of the case is the unlawful amendment or performance of a contract, maximum 30 days prolonge if justified.
  
  - Hearing: inquisitorial style, not limited to the parties arguments
  
  - Deliberation/decision of the case: voting on majority, each commissioner is required to sign the decision, no provision for dissenting or minority opinions
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# IV.1. Remedy proceedings/ preliminary dispute settlement

Direct complaints to the Contracting Authority (*preliminary dispute settlement*)

- „quasi” first stage of the remedial system: not part of the independent review system in the sense of EC directives, a possibility of reaching an agreement before engaging into legal dispute.

Eligibility:

- (1) tenderer/candidate against any decision or procedural act of the contracting authority
- (2) any interested economic operator/ the chamber/ the interest representation body against the contract notice/the invitation to tender or participate and the documentation



# IV.1. Remedy proceedings/ preliminary dispute settlement

- Time limits:
  - {1} 3 working days as off having knowledge of the illegal event
  - {2} not later than 10 days before the expiry of the time limit to submit tenders or to participate via fax or electronic means
  
- Answer of the Contracting authority:  
3 working days/ or launch an examination (require missing information or document, explanation) in this case 7 working days for answer
  
- Effects
  - Automatic suspension to the conclusion of the contract until 10 days period of time as off the date of delivery of the answer
  - Contracting Authority might modify it's final decision once
  - review process can be launched regardless of the outcome of the direct complaint process.



## IV.2. Remedy proceedings/PPAB

- Initiation of proceedings: upon claim or ex officio
- „Locus standi” (eligibility) has to be justified

Upon claim:

- direct interest relating to the given case
- right or legitimate interest has been prejudiced or jeopardized

Ex officio: entities authorized in PP Act.

E.g.: President of the PP Council, State Audit Office, Entity responsible for granting support, Hungarian Competition Authority, etc.



# IV.3. Time limits for launching remedy proceedings

## I. claims

- 15 days from learning of the infringement, 10 days in cases of unlawful decisions closing the contract award procedure
- no claim admissible after 90 days following the occurrence of the infringement
- illegal direct award of the contract: 1 year following the conclusion of the contract/beginning of performance if interested party has learnt later thereof than the time limit above
- applications against the contract notice, invitation to tender: 5 days before the expiry date of submitting tenders

## II. ex officio

- Subjective deadline: 30 days, objective deadline: 1 year, in case of illegal direct award: 3 years



# IV.4. Main compulsory elements and enclosures of the claim

- Justification of „locus standi” (eligibility of the applicant)
- the date of the infringement (and learning thereof)
- the infringed legal provisions
- motion for decision
- motion for interim measures
- Data of the interested parties if it is possible
- The resolution of the preliminary dispute settlement if it has taken place
- Enclosures:
  - Document containing the standpoint of the contracting authority taken in the preliminary dispute settlement in a given case
  - Certificate from the bank of claimant or other relevant document justifying the transfer or payment of the administration fee.
- Ex officio: the same except for administrative fee and direct complaint documents





# IV.5. The costs of the proceedings (administrative service fee)

- Amount depends on the procedural regime and the value of public procurement and the content of the application (the number of the elements of the plea)
- Equal or above EU thresholds: 1% of the value of the tender/1% of the value of the lot concerned, max. 25 000 000 HUF~100 000 EUR = up to 3 elements of the plea
- Below EU thresholds: 1% of the value of the tender/1% of the value of the lot concerned, min. 200 000 HUF ~800 EUR max. 6 000 000 HUF~24 000 EUR = up to 3 elements of the plea
- Plea containing
  - 4-6 elements: 125% of the amount calculated above
  - 7-10 elements: 150%
  - 11-15 elements: 175%
  - 16 elements or more: 200%



## IV.6. Initiation of the proceedings

- 1 working day as off complete application (containing all data and documents obligatory) submitted
- In case of incomplete application: PPAB calls for supplying missing documents
- Failing to supply missing documents or administrative fee (8 calendar days) PPAB dismisses the claim with a decree without launching the proceedings (no substantial examination).



# IV.7. Procedural decisions of the Arbitration Board (decrees)

- Lack of jurisdiction
- Lack of competence
- The application was late
- Lack of „locus standi” (eligibility) of the applicant
- Applicant failed to submit complete application/lack of administrative service fee
- Withdrawal of application
- Withdrawal of call for tender by Contracting Authority



## IV.8. Legal effects of launching a review proceeding

- Automatic suspensive effect regarding the conclusion of the contract until the conclusive decision of the Arbitration Board
- Suspension is not automatic in relation to other actions and decisions of PP process itself (e.g. in pre -qualification stage). The contracting authority may suspend the ongoing contract award procedure



# IV.9. Interim measures

- Form: decree
  - In case of probability of infringement and risk of infringement:
    - Suspension of the contract award procedure, consequence: extension of the already running time limits.
    - Call upon the contracting authority to invite the applicant seeking a remedy to take part in PP procedure.
  - Special interim measure due to the automatic suspensive effect of initiating a remedy procedure:  
Allow the conclusion of the contract if a properly substantiated „overriding” reason exists.
  - Overriding reasons:
    - reasons of highly important general public interest
    - No economic interest directly linked to the contract
  - Contracting Authority has to prove the existence of such reasons
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# IV.10. Scope of investigation by the PPAB I.

- Basically the case shall be brought by the applicant, the PPAB is bound in its proceedings by the content of the application.
- However, proceeding may be extended ex officio to those infringements that distort competition or prejudice the public nature of the competition, the equal opportunities of tenderers or substantially influence the decision of the contracting authority.
- Chairperson of the PPAB decides upon the extension of the proceeding on the basis of notification
- Withdrawal of an application: the PPAB shall continue the proceeding if there is indicative evidence that a serious infringement has taken place.



# IV.11. Hearing during the proceeding

- All substantial statements, comments of the parties and any other interested entities shall be made before the hearing.
- After the hearing, any further comments or statements can only be taken into consideration if it has been made upon request of the PPAB.



# IV.12. Access to documents during the proceeding

- Applicant
- Opposing party
- Members of the Public Procurement Authority are entitled to make copies or notes of all documents of the case
- However, on request prohibition or restriction can be imposed in order to protect of confidential business information or qualified data.
- PPAB may require the relevant party to prepare a version of the document which will not include any confidential business information.
- Access to the documents shall be subject to the permission of the PPAB, taking into consideration the provisions above.





# IV.13. Substantial decisions of the PPAB

- Dismisses unfounded application or states lack of infringement
- Establishes infringement
- Establishes infringement and imposes civil fines
- Establishes infringement and prohibit the economic operator from taking part in PP procedures for a definite period of time (minimum 0,5 year, maximum 3 years).
- Grounds for exclusion:
  - providing false data or making misrepresentation
  - relapse in violation of procurement rules (at least twice within 2 years)



## IV.14. Substantial decisions of the PPAB/ sanctions in case of infringements

- Set aside unlawful decision of the contracting authority (contract award decision and other decisions)
- Declare an injunctive order upon which the PP procedure can be continued or call upon person in breach of PP rules to act in conformity,
- Prohibit an economic operator from taking part in PP procedures
- Impose fines



# IV.15. Imposition of fine

- Compulsory fines/reasons defined in PP Act:
  - infringement of mandatory standstill period and provision for automatic suspension,
  - illegal direct award,
  - unlawful negotiated procedure without publication of contract notice
  
- Other:
  - grounds: subject to deliberation of PPAB, circumstances are to be taken into account defined in PP Act.

Amount:

- (1) in cases of obligatory fines: maximum 15% of the estimated value/contract value/or the estimated value of the lot concerned
- (2) other cases: maximum 10% of the estimated value/estimated value of the lot concerned



## IV.16. Measures contracting authority can take after the resolution of PPAB

- In case of setting aside the contract award decision, contracting authority shall bring a new award decision within 30 days from the receipt of the resolution
- If infringement has been established (without the annulment of the final decision) both the contracting authority and tenderers can rescind the contract in 30 days



# IV.17. Review of resolutions of the Arbitration Board

- Claims against decisions (decrees) rendered in the course of the proceedings or before the launch of the proceedings (time limit: 8 days from the communication of the decision) judicial decree, no further appeal.
- Claims against substantial decisions of PPAB (time limit: 15 days from the delivery of the decision) appeal system of 3 instances.
- 1<sup>st</sup> Administrative and labour courts
- 2<sup>nd</sup> Appeal against the judgement: tribunals

Procedural rules applied: Civil Proceedings Code



# IV.18. Remedies available against the decision of PPAB

The Court may

- Alter the decision of PPAB including the sum of the fine and apply the same legal sanctions set out in PP Act.
- Annul the decision of PPAB and order new procedure to be conducted. (only if an infringement of the substantial rules on legal remedy proceedings having an effect on the substance of the case)
- Procedural rules applied: Civil Proceedings Code



# IV.19. Special legal procedures related to public procurement

- Single legal procedure for the review of the decision of PPAB and for rendering the contract concluded to be void.
  - Shall be initiated against PPAB and the contracting parties
  - Grounds of application of ineffectiveness
    - unlawful direct award of the contract
    - Unlawful application of negotiated procedure without prior publication of a notice
    - breach of standstill period or automatic suspension as a result of which the claimant was deprived of the opportunity to resort to remedy and at the same time other breach of procurement rules which effected the chances of the claimant obtaining the contract.
  - Voidness (ex tunc), partial voidness of the contract (alternative sanctions apply, compulsory fine: 15% of the value of the contract.)
  - When PPAB finds that circumstances of voidness occurs, brings an action for annulling the contract
  - Time limit: 30 days from from the date of bringing the decision
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Thank you for your attention!

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