

# **Act CXLI of 2015 on Public Procurement<sup>1</sup>**

For the sake of the transparency and public control of the effective use of public funds, in order to establish conditions of fair competition in public procurement, furthermore, to enhance access of local small and medium-sized enterprises to procurement procedures, to promote environmental protection and social considerations of the State - in accordance with the international agreements concluded by Hungary in the field of public procurement and the directives of the European Union - the National Assembly of Hungary has adopted the following Act:

## ***PART ONE***

### ***GENERAL PART***

#### **CHAPTER I**

#### **PRINCIPLES AND SCOPE OF THE ACT**

##### **Article 1**

1. This Act regulates procurement procedures and concession award procedures, furthermore, rules concerning the legal remedies related thereto.
2. For the purposes of Part One as well as Part Five – Part Eight of this Act, procurement procedure shall also mean concession award procedure, unless otherwise provided herein.

##### **Article 2**

1. In procurement procedures, contracting authorities shall ensure and economic operators shall respect the fairness, transparency and public nature of competition.
2. Contracting authorities shall ensure equal opportunities and equal treatment for economic operators.
3. In the course of procurement procedures, contracting authorities and economic operators shall act in compliance with the principle of good faith and fair dealing. The abuse of rights is prohibited.
4. The respect of the principle of effective and responsible management shall be a primary consideration for contracting authorities when using public funds.
5. In the course of procurement procedures, national treatment shall be given to economic operators established in the European Union as well as to goods of Community origin. As regards economic operators established outside the European Union and goods originating outside the Community, national treatment is to be given in accordance with the international obligations assumed by Hungary and the European Union in the field of public procurement.

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<sup>1</sup> This Act was adopted by the Parliament at its meeting of 22 September 2015.

6. Procurement procedures shall be conducted in Hungarian language, however, the contracting authority may allow – but may not require – the use of another language besides the Hungarian.
7. Any derogation from the provisions of this Act is authorised only to the extent that such derogation is expressly allowed by this Act. As regards the application of the provisions of this Act as well as the issues which are not covered by an act of legislation, the objectives of the rules concerning public procurements and the basic principles of public procurement shall be observed in the course of the preparation and the conduct of procurement procedures, the conclusion and the performance of contracts as well as the review procedures related to procurement procedures.
8. The provisions of the Act V of 2013 on the Civil Code (hereinafter referred to as ‘the Civil Code’) shall be applied to contracts concluded on the basis of a procurement procedure, with the differences set out in this Act.

## CHAPTER II

### DEFINITIONS

#### Article 3

For the purposes of this Act the following definitions apply:

1. ‘*tenderer*’: an economic operator who (which) submits a tender in a procurement procedure;
2. ‘*subcontractor*’: an economic operator who (which) participates directly in the performance of the contract concluded in a procurement procedure involved by the tenderer, except for
  - (a) economic operators who (which) pursue their activity on the basis of an exclusive right,
  - (b) manufacturers, distributors and sellers of parts and basic materials intended to be employed for the performance of the contract,
  - (c) sellers of building material, in case of public works;
3. ‘*label*’: any document, certificate or attestation confirming that the given works, products, services, processes or procedures in question meet certain requirements;
4. ‘*label requirement(s)*’: the requirements to be met by the works, products, services, processes or procedures in question in order to obtain the label concerned;
5. ‘*European Single Procurement Document (ESPD)*’: for the purposes of Part Two of this Act, the document which serves as preliminary evidence for the non-existence of any ground for exclusion, the ability to meet the suitability criteria and the fulfilment of the objective criteria pursuant to Article 82(5); the ESPD shall consist of a self- declaration made by the relevant economic operator on the basis of a standard form established by the European Commission;

6. *'electronic communications network'* and *'electronic communications service'*: the term defined by the Act on Electronic Communications.
7. *'life cycle'*: all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the use of the product, provision of the service or existence of the works, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;
8. *'a work'*: the term defined by the Act on the Formation and Protection of the Built Environment;
9. the terms *'European Union and Member States of the European Union'* also refer to the European Economic Area and the states that are signatories to the Agreement on the European Economic Area, except in the case of Article 9 (1) (c);
10. *'economic operator'*: any natural or legal person, individual firm, any entity which has legal capacity under its personal right or any group of such persons or entities, which offers on the market, respectively, the execution of works, products or services;
11. *'disadvantaged workers'*: the term defined by the Act on Job Assistance and Unemployment Benefits;
12. *'innovation'*: the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, in particular with the purpose of improving the efficiency of a given activity and having a favourable impact on the society and environment;
13. *'written'* or *'in writing'*: for the purposes of declarations made and procedural acts carried out in the course of the procurement procedure, any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means;
14. *'ancillary purchasing services'*: activities consisting in the provision of support to the conduct of procurement procedures, in particular
  - (a) provision of the technical infrastructure which enables contracting authorities to conduct procurement procedures or to conclude framework agreements;
  - (b) advice on the conduct or design of procurement procedures;
  - (c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned;
15. *'Affiliated company'*: a company which shall prepare consolidated annual accounts together with the contracting entity pursuant to the Act on Accounting or any company
  - (a) over which the contracting entity can exert a dominant influence, whether directly or indirectly, or
  - (b) any company which can exert a dominant influence on the contracting entity or
  - (c) which, together with the contracting entity, is subject to the dominant influence of another company;
16. *'elements of the claim'*: a distinguishable part of the claim submitted to the Public Procurement Arbitration Board, which contains the procedural step, conduct, decision or omission considered unlawful, including the indication of the legal provision(s) infringed, furthermore, the motion for the decision of the Public Procurement Arbitration Board and the reasons for the motion, with the proviso that the challenging of the contracting authority's decision on the invalidity of the applicant's tender or the request to participate constitutes one single element of the claim, except where another legal consequence is linked to any of the grounds for invalidity;

17. *'the risk related to demand'*: the risk related to the current demand for the works or service which constitute the subject-matter of the contract;
18. *'framework agreement'*: an agreement between one or more contracting authority (authorities) and one or more tenderer(s), the purpose of which is to establish the substantial terms governing public contracts to be signed between the parties in a specific manner during a given period, in particular with regard to the consideration and, if possible, the quantity envisaged;
19. *'the risk related to supply'*: the risk related to the execution of the works or service which constitute the subject-matter of the contract;
20. *'concessionaire'*: an economic operator with which the contracting authority has concluded a contract related to works or service concession;
21. *'procurement document'*: any document produced or referred to by the contracting authority to describe or determine the subject-matter of the procurement or the concession, the procurement procedure or the concession award procedure, in particular the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, additional information, proposed conditions of contract, models for the presentation of documents by economic operators, detailed price table or the unpriced budget;
22. *'preparation of the procurement'*: completion of the activities required for launching the relevant procurement procedure or concession award procedure, including in particular the assessment of the situation and market survey, prior market consultation relevant to the public procurement in question, the assessment of the estimated value of the public procurement and preparation of procurement documents;
23. *'commencement of the public procurement'*: the date of dispatch of the contract notice or the concession notice or, in the case of a procedure without prior publication the date when the call for competition or the invitation to negotiation is sent or, in the absence of such documents, the date of the starting of the negotiation;
24. *'public contracts'* contracts for pecuniary interest concluded in writing by contracting authorities under this Act and having as their object the execution of works, the supply of products or the provision of services;
25. *'central purchasing body'* the entity which is entitled to launch a call for tenders in centralised purchasing procedures;
26. *'centralised public procurement'* activities conducted on a permanent basis by a central purchasing body, with the aim of
  - (a) acquiring supplies or services for resale to contracting authorities under this Act and
  - (b) awarding public contracts or concluding framework agreements for works, supplies or services intended for contracting authorities under this Act;
27. *'contracts of contracting entities'*: a public contracts which are intended to ensure the preparation, the starting or the pursuing of the contracting entities' public service activity under this Act;
28. *'dominant influence'*: it can be exercised by an entity which satisfies at least one of the following conditions regarding another entity:
  - (a) its contribution to the assets or, in the case of public limited-liability companies, the nominal value of the shares it holds exceeds half of the subscribed capital,

- (b) it alone controls the majority of the members' votes or, on the basis of an agreement concluded with the entity having such influence, other members vote with the same content as the latter, or other members exercise their right to vote through the entity having such influence, provided they hold together more than half of the votes,
  - (c) it is entitled to elect (appoint) or recall more than half of the entity's chief officers (decision-makers, managers) or members of the entity's supervisory board (supervisory, controlling authority, body);
29. *'media service provider'*: any natural or legal person who or which has an editorial responsibility for the choice of the media service's contents, and determines the provision of the media service's contents;
30. *'technical equivalence'*: a decisive technical parameter of a facility, product or service, which can be measured and the prescribed index number may be met by more than one facility, product or service;
31. *'sub-central contracting authority'*: contracting authorities under Article 5(1)(c)-(e) and paragraphs (2)-(3);
32. *financial institution*: the term defined by the Act on Credit Institutions and Financial Enterprises;
33. *'postal consignments'*: an item addressed in its final, deliverable form, irrespective of its weight; besides letters, in particular books, catalogues, newspapers, magazines and postal packages containing merchandise with or without commercial value;
34. *'postal services'*: services which consist of the clearance, sorting, transport and delivery of postal consignments, including in particular universal postal service, postal services that substitute universal postal service and the ones that do not substitute universal postal service under the Act on Postal Services;
35. *'services differing from postal services'* are services provided in the following areas:
- (a) mail-service management services (services both preceding and subsequent to dispatch, in particular mail management services);
  - (b) services concerning postal consignments not included in point (a), in particular direct mail bearing no address;
36. *'candidate'*: any economic operator who (which) submits a request to participate in the first stage, that of participation, of a procurement procedure consisting of more than one stage or in a concession award procedure;
37. *'professional tender'*: the offer made on the subject-matter of the procurement and the prescriptions established by the contracting authority in the technical specifications and the contract terms;
38. *'organization possessing social employment permit'*: an organization possessing social employment permit under Government Decree containing the rules on the granting of permission for and the exercising of supervision over social employment, and applying for social employment support and supervising the use of such support, which is based on the empowerment of the Act on Social Governance and Social Benefits;

39. '*subsidies*': the granting of funds or other pecuniary benefits to the contracting authority for the performance of the public contract, excluding tax incentives and guarantees;
40. '*design contest*': a procedure which is regulated in detail in an act of legislation and enables the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.
41. '*sheltered place of employment*': employment by an accredited employer on condition that the employer ensures a transit or permanent employment and as a minimum 30% of its employees are deemed to be persons with reduced ability to work pursuant to Article 22 of Act CXCI of 2011 on the benefits of persons with reduced ability to work and on the amendment of certain acts and, in addition, employers which were established with the aim of employing disadvantaged workers.

### **CHAPTER III**

#### **SCOPE OF THE ACT**

##### **Article 4**

1. For the purposes of awarding public contracts, works or service concessions with a value equal to or greater than the thresholds set, the procurement procedure or the concession award procedure under this Act shall be conducted by entities defined as contracting authorities in Articles 5-7.
2. For the purposes of public contracts a procurement procedure, and for the purposes of works or services concessions a concession award procedure shall be conducted.

##### *Contracting authorities*

##### **Article 5**

1. For the purposes of this Act, the following entities are subject to the obligation to conduct procurement procedures:
  - (a) ministries,
  - (b) the central purchasing body designated by the Government,
  - (c) the State, all the budgetary authorities, public foundations, local governments, local and national self-governments of nationalities, associations of local governments and self-governments of nationalities, associations of local governments for the purpose of regional development, development councils of sub-regions;

- (d) legal persons specified in Article 9(1)(h)-(i);
- (e) entities having legal capacity, which are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character or which pursue any of such activities, provided that one or more entities specified in points (a)-(e), the Parliament or the Government can exercise, either separately or together, a dominant influence over it or its operation is financed for the most part by one or more of those entities (bodies);
2. In relation to public procurements to be realised using subsidies, entities not covered by paragraph 1 whose procurement is subsidised directly by one or more entities subject to paragraph 1 to an extent exceeding 50% in case of procurements equalling or exceeding EU threshold, and to an extent exceeding 75% in case of procurements equalling or exceeding national threshold but not reaching EU threshold, shall be bound to conduct procurement procedures, provided that the subject-matter of the procurement is
- a) works which comprise civil engineering activities as listed in Annex I,
  - b) works which comprise building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes or
  - c) a service linked to works under points (a) or (b).
3. In addition to the provisions set out in paragraph 2, in relation to public procurements to be realised using non-repayable subsidies, not including combined financial instruments, entities not covered by paragraph 1 whose public works, public supply or public services contract is subsidised directly by one or more entities subject to paragraph 1 by at least HUF 25 million, shall be bound to conduct procurement procedures, except if the public procurement is realised<sup>2</sup>
- a) using an investment subsidy set out in a single government decision,
  - b) using single job creation subsidy,
  - c) using education, furthermore vocational training centre establishment and development subsidy,
  - d) using research-development and innovation aimed subsidy,
  - e) using the subsidy of large undertakings' investment aimed at reindustrialisation or
  - f) using any subsidy applied for prior to 1 November 2015, which is funded by the European Union or from national resources.<sup>3</sup>
4. If an entity not covered by paragraph 1 and 2 conducts a procurement procedure under this Act on the basis of an obligation assumed by it voluntarily or in a contract, or on the basis of an obligation set out by a separate act of legislation, the entity in question shall be subject to the provisions set out herein.

## Article 6

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<sup>2</sup> This amendment entered into force on 15 June 2016.

<sup>3</sup> This amendment entered into force on 24 December 2015.

1. For the purposes of this Act, in the course of procurements conducted by public service providers with the aim of performing their public service activity, contracting entities are entities referred to in Article 5(1) which pursue one of the following activities or were established for the purpose of pursuing such activity
  - a) in connection with the production, transport or distribution of drinking water, the provision or operation of fixed networks intended to provide a service to the public or the supply of drinking water to such networks;
  - b) in connection with the production, transport or distribution of gas or heat, the provision or operation of fixed networks intended to provide a service to the public or the supply of gas or heat to such networks;
  - c) the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable;
  - d) the exploitation of a geographical area
    - da) for the purpose of the provision of airports and maritime or inland ports or other port facilities to carriers by air, sea or inland waterway or passenger carriers,
    - db) for the purpose of extracting oil or gas or
    - dc) for the purpose of exploring for, or extracting coal or other solid fuels;
  - e) postal services or other services than postal services provided by postal service providers.
2. The procurement procedure of a public service provider whose activity is related to drinking water under Article 1(a) qualifies as a public service activity, if it is connected with
  - a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or
  - (b) the disposal or treatment of sewage.
3. As regards transport services under Article 1(c), a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

## **Article 7**

1. For the purposes of this Act, in the course of procurements conducted by public service providers with the aim of performing their public service activity, economic operators which are not subject to Article 5(1) and which pursue one of the public service activities under Article 6(1)-(2) or were established for the purpose of pursuing such activity qualify as contracting entities, provided that one or more entity (entities) referred to in Article 5(1) can exercise, either separately or together, a dominant influence over them.



2. For the purposes of this Act, in the course of procurements conducted by public service providers with the aim of performing their public service activity, economic operators which are not subject to Article 5(1) or paragraph 1 and which pursue one or more of the public service activities under Article 6(1)-(2) on the basis of special or exclusive rights, qualify as contracting entities.
3. For the purposes of paragraph 1 and 2, an activity shall not be considered to be a public service activity, if
- a) the production of gas or heat by the contracting entity concerned is the unavoidable consequence of carrying out an activity other than its public service activity and, furthermore, the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the contracting entity's turnover on the basis of the average for the preceding three years, including the current year;
  - b) the production of electricity or drinking water by the contracting entity concerned takes place because the consumption of electricity or drinking water is necessary for carrying out an activity other than its public service activity and, furthermore, supply to the public network depends only on that contracting entity's own consumption and has not exceeded 30 % of that contracting entity's total production of energy or drinking water, on the basis of the average for the preceding three years, including the current year.
4. For the purposes of paragraph 2, 'special or exclusive rights' means rights based on a legislative or administrative provision (administrative authorisation) the effect of which is to limit the conduct of public service activities defined in Article 6(1)-(2) to one entity or a limited number of entities, and which substantially affects the ability of other entities to carry out such activity.
5. Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute special or exclusive rights within the meaning of paragraph 2. Such procedures include:
- a) authorisation procedure concerning activities in the natural gas industry under the Act on Natural Gas Supply;
  - b) authorisation or tendering procedure concerning the establishment of new power generation capacities (power plants) under the Act on Electricity;
  - c) authorisation of the provision of a postal service subject to authorisation under the Act on Postal Services
  - d) the authorisation of prospecting, exploration and extraction of hydrocarbons under the Mining Act;
  - e) procurement procedures for public passenger transport services by bus, tram, railway or metro under Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, provided that the procurement procedures in question comply with Article 4(3)-(4) and Article 5(3) of the abovementioned Regulation.

### **Subject-matters of public procurements**

#### **Article 8**

1. Public procurement is the conclusion of public contracts as well as works or service concessions under this Act. Subject-matters of public contracts shall be the following: public supply, public works or public services.
2. Public supply means the acquisition by a contracting authority, with or without option to buy, of rights of ownership or right of use, of exploitation of negotiable movable property which can be taken into possession. Public supply shall in addition include installation and putting into operation.
3. Public works means one of the following types of work to be ordered (and taken over) 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 realisation, by whatever means or in whatever manner, of a work corresponding to the requirements specified by the contracting authority concerned.
4. Public service contracts are procurements which are not covered by the definition of public supply nor that of public works having as their object in particular an activity ordered by a contracting authority.
5. Works concession is a contract for pecuniary interest concluded in writing by a contracting authority under this Act, whereby the contracting authority purchases the public works referred to in paragraph 3 and the consideration by the contracting authority for the works to be carried out consists either of the right to exploit the work for a specified period of time or of this right together with monetary consideration; the operational risk related to the exploitation shall be borne by the concessionaire.
6. Service concession is a contract for pecuniary interest concluded in writing by a contracting authority under this Act, whereby the contracting authority purchases the services referred to in paragraph 4 and the consideration by the contracting authority consists either of the right to exploit the service for a specified period of time or of this right together with monetary consideration; the operational risk related to the exploitation shall be borne by the concessionaire.
7. For the purposes of paragraph 5 and 6, the concessionaire is deemed to assume operating risk, where it is not guaranteed that the concessionaire can recoup the investments made or the costs incurred in establishing and operating the works or the services which are the subject-matter of the concession. The operating risk shall encompass demand or supply risk or both and its existence may only be established on the basis of risks stemming from factors which are outside the control of the concessionaire.
8. The subject-matter of the public procurement shall be specified by reference to the Common Procurement Vocabulary (hereinafter referred to as 'the CPV') as well.

## **Exceptions**

### **Article 9**

- (1) This Act shall not apply to

- a) **procurements in the fields of defence and security specified in a separate act of legislation, with the proviso that such procurements shall be subject to the rules set out in a separate act of legislation; furthermore if the procurement is also exempt from the rules set out in the separate act of legislation and in case of procurements subject to the exception specified in point (ba), the competent committee of the National Assembly has granted exemption from the rules set out in the separate act of legislation in its preliminary decision based on an initiative satisfying the conditions laid down in the separate act of legislation;**<sup>4</sup>
- b) procurements which are not subject to point (a),
  - (ba) if the application of the rules on public procurements would oblige Hungary to supply information the disclosure of which would be contrary to the essential interests of the country's security,
  - (bb) where the protection of the essential security interests, national security interests of Hungary, the protection of classified information or the special security measures needed cannot be guaranteed by the security measures that may be required in procurement procedures,and purchase of which is subject to an exemption from the application of this Act granted by the competent committee of the National Assembly in its preliminary decision based on an initiative satisfying the conditions laid down in a separate act of legislation;
- c) procurements realised pursuant to a separate procedure laid down in an international agreement or arrangement, if the international agreement or arrangement concluded in conformity with the TFEU with one or more third countries is intended for a purchase related to the joint implementation or exploitation of a project, with the proviso that the Commission shall be notified of the conclusion of the international agreement or arrangement;
- d) procurements realised pursuant to a separate procedure laid down in an international agreement or arrangement, where the international agreement or arrangement relates to the stationing, passing through, deployment of troops (military forces), including in the case of units deployed (transferred), replaced to the operational area the purchases related to such deployment (transfer), replacement
- e) in cases where international law obligations require that the contracting authority realise the procurement according to a separate procedure prescribed by an international organization;
- f) procurements realised in accordance with rules specified by an international organisation or international financing institution, if the procurements concerned are fully financed by such organisation or institution or if the public contracts are co-financed for the most part by an international organisation or international financing institution and the parties agree on the application of procurement procedures other than those set out herein;
- g) procurements which are exclusively aimed at allowing the contracting authority to make available or use a public electronic communication network or the provision of one or more electronic communications services for the public;
- h) the contract concluded by a contracting authority under Article 5(1) with a legal person over which the contracting authority exercises a control similar to that exercised over its own organisational units, the contracting authorities jointly have decisive influence on setting the legal person's strategic goals and on making key decisions relating to its operation; furthermore, the legal person in question is not exposed to any direct private capital participation and more than 80 % of its annual net turnover derives from the performance of contracts concluded or to be concluded with the controlling contracting authority or with any other legal person over which the contracting authority exercises control under this point;

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<sup>4</sup> This amendment entered into force on 1 August 2016.

- i) the contract concluded by a contracting authority under Article 5(1) with a legal person over which the contracting authority exercises joint control with other contracting authorities and the control in question corresponds to the one exercised over its own organizational units, the contracting authorities jointly have decisive influence on setting the legal person's strategic goals and on making key decisions relating to its operation; furthermore, the legal person in question is not exposed to any direct private capital participation and more than 80 % of its annual net turnover derives from the performance of contracts concluded or to be concluded with the controlling contracting authority (contracting authorities) or with any other legal person over which the contracting authority exercises control under this point;
- j) the contract concluded by a contracting authority under Article 5(1) with another contracting authority or contracting authorities aimed at establishing cooperation between the contracting authorities concerned to carry out public service missions, provide public services or realize common objectives of general interest, with the proviso that not more than 20 % of the contracting authorities' annual net turnover related to their cooperation activity derives from the open market;
- k) the supply, services or works purchased by the central purchasing body in a procurement procedure, on behalf of the entities for the benefit of which the public contract has been concluded by the central purchasing body, as well as the purchase of ancillary services provided by the central purchasing bodies.

(2) The provisions set out in paragraph 1(h) shall be applicable if the legal person controlled concludes the public contract acting as a contracting authority with the contracting authority which exercises control over it or with any other legal person controlled by that contracting authority under paragraph 1(h).

(3) The provisions set out in paragraph 1(h) shall be applicable, if the State is a member of the legal person controlled. In such cases, the conditions according to paragraph 1(h) shall be applicable to the legal entity exercising ownership rights (the body directed by the minister or, if applicable, by another person directing a central administrative body) as a contracting authority.

(4) As regards paragraph 1(i), all the contracting authorities concerned shall be represented in the decision-making bodies of the legal person controlled. Each representing person may represent one controlling authority, more than one or all the controlling contracting authorities. The interests of the legal person controlled may not be conflicting with the interests of the controlling authorities.

(5) The conditions set out in paragraph 1(h)-(i) shall be fulfilled throughout the full term of the contract. If the abovementioned conditions are no longer fulfilled, the contracting authority may and shall terminate the contract.

(6) For the purposes of paragraph 1(h)-(i), the counter value of public services provided to a third party on the basis of the contracts shall be regarded as deriving from the performance of those contracts regardless whether this counter value is paid by the contracting authority or by the person using the public service.

(7) For the purposes of paragraph 1 (h)-(j), where the annual net turnover is not applicable in the case of the given contracting authority, the share of the activities done for the contracting authority or any other legal person controlled by the contracting authority shall be established on the basis of the costs incurred in relation to the abovementioned activities in a period of three years prior to the conclusion of the contract. If data concerning a period of three years preceding the conclusion of the contract is not available, the contracting authority shall only show that the abovementioned data are credible, particularly by means of business projections.

(8) This Act shall not apply to services in the following cases:

- a) contracts for the acquisition of existing buildings or other immovable property or for the acquisition of other rights on immovable property;

- b) any public contract awarded by an audiovisual or radio media service provider for the acquisition, development, production or joint production by audiovisual or radio media service providers of any programme intended for providing audiovisual or radio media services; furthermore, contracts for programme provision or broadcasting time that are awarded by any contracting authority to an audiovisual or radio media service provider;
- c) contracts for arbitration, mediation and conciliation services;
- d) legal services having any of the following subject-matters:
  - (da) legal representation of a client by a lawyer in judicial proceedings before the courts, an arbitration, administrative procedure, conciliation or mediation, as well as legal advice given in relation to any of the proceedings referred to above,
  - (db) document certification services provided by notaries,
  - (dc) legal services provided by trustees or appointed guardians designated by law or designated by a court, as well as other legal services which are carried out under the supervision of the designating court,
  - (dd) legal services which consist of the exercise of official authority in the Member State concerned;
- e) financial services specified by the Act on Investment Firms and Commodity Dealers, and on the Regulations Governing their Activities in connection with the issue, sale, purchase or transfer of securities or other financial instruments, central bank services and operations conducted within the framework of the European Financial Stability Facility and the European Stability Mechanism;
- f) credit contracts and loan contracts under the Act on Credit Institutions and Financial Enterprises;
- g) employment contracts, employment relationship of public officials, governmental officials, state officials or public servants, fellowship employment under the Act on Public Officials, employment relationship of public prosecutors, judges, law officers and the professional staff of law enforcement bodies, as well as the professional, contractual and voluntary reserve staff of the Hungarian Defence Forces<sup>5</sup>;
- h) civil defence and danger prevention for the protection of citizens, provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8; 98113100-9 and 85143000-3, except patient transport ambulance services;
- i) public passenger transport services by rail or metro;
- j) political campaign services covered by CPV codes 79341400-0, a 92111230-3 and 92111240-6, purchased by a political party in the context of an election campaign;
- k) where the service is provided by a contracting authority under Article 5(1) or by an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law or administrative decision, which is compatible with the TFEU;
- l) service contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5, except where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs and the service provided is wholly remunerated by the contracting authority.

(9) This Act shall not apply to public contracts of a contracting entity providing services stipulated in Article 6(1)(e), if the public contracts are awarded for the following activities of the contracting entity:

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<sup>5</sup> This amendment entered into force on 1 July 2016.

- a) added-value services linked to electronic postal services and provided entirely by electronic means (including the secure transmission of encrypted documents by electronic means, address management services, and transmission of registered electronic mail),
- b) financial services which are covered by CPV codes 66100000-1 to 66720000-3 and financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, and operations conducted with the European Financial Stability Facility and the European Stability Mechanism, including in particular postal money orders and postal giro transfers,
- c) philatelic services, or
- d) logistics services (services combining physical delivery or warehousing with other non-postal functions).

(10) In procurements under paragraph 1(b), the contracting authority is entitled to manage personal data concerning clean criminal record.

**(11) Due to national security interest, the contracting authority under Article 5 (1) (a)-(c) may restrict the retrieval of the data of public interest or the data disclosed due to public interest, which is processed in relation to procurements specified in paragraph (1) (b) herein, by considering the significance of the public interest in accessing the data and in restricting the access, maximum until the expiry of ten years as of the production of the data<sup>6</sup>.**

**(12) Access to the following shall not be restricted:**

- a) the decision of the body proceeding within its sphere of duties and competence in relation to the procurement,
- b) the identity of the successful tenderer of the procurement procedure, furthermore,
- c) the title, subject, value, duration, the name of the parties of the contract related to the procurement

**specified in paragraph (1) (b) herein in compliance with paragraph (11) herein<sup>7</sup>.**

### **Further exceptions applicable to contracting entities**

#### **Article 10**

1. In addition to the cases referred to in Article 9, this Act shall not apply to contracting entities in the cases referred to in Article 10-13.

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<sup>6</sup> This amendment entered into force on 1 August 2016.

<sup>7</sup> This amendment entered into force on 1 August 2016.

2. This Act shall not apply to contracts of contracting entities concluded for purposes of resale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject-matter of such contracts and other undertakings may obtain such rights subject to the same terms and conditions as the contracting entity.

3. This Act shall not be applied by contracting entities under Article 7 to contracts which are intended for purposes other than the pursuit of a public service activity under this Act or are related to a public service activity pursued by the contracting entity in a non-EU member country, under conditions not involving the physical use of a network or geographical area within the European Union.

4. The contracting entity shall provide information to the European Commission, at its request, through the Public Procurement Authority, on the activities, as well as group of goods or activities which are specified in paragraph 2 and 3 as exceptions.

#### **Article 11**

This Act shall not apply to

- a) the water supply awarded by a contracting entity conducting a public service activity under Article 6(1)(a) related to drinking water;
- b) the supply of energy or fuels for the production of energy awarded by a contracting entity conducting a public service activity under Article 6(1)(b) related to gas or heat, as well as electricity;
- c) the supply of energy or fuels for the production of energy awarded by a contracting entity conducting a public service activity under Article 6(1)(db) related to the extraction of crude oil or natural gas;
- d) the supply of energy or fuels for the production of energy awarded by a contracting entity conducting a public service activity under Article 6(1)(dc) related to the exploration and exploitation of coal or other solid fuels.

#### **Article 12**

1. This Act shall not apply to

- a) contracts of contracting entities concluded with an affiliated company,
- b) where a joint venture which was established for the pursuing of a public service activity under this Act and whose participants are exclusively contracting entities concludes a public services contract with a company affiliated to one of the contracting entities participating in the joint venture in question, provided that at least 80% of the average turnover of the company defined in points (a) and (b), recorded in connection with public supply or services or public works within the European Union, for the preceding three years, derives from economic activities conducted with any other entity with which it has a relationship defined in point (a) above or with the contracting entity in question.

2. Where the turnover of the company under paragraph 1, which concludes the contract with the contracting entity, is not available for the preceding three years, due to the date of its establishment or that of the commencement of its activities, it will be sufficient for that company to show that the turnover referred to in paragraph 1 is credible, particularly by means of credible business plans.

3. Where several companies, which are affiliated to the contracting entity as specified in paragraph 1 (a), provide the contracting entity with the same or similar services, supplies or works, the total turnover deriving from the provision of services, supplies or works by these companies shall be taken into account.

4. Where the entity having a relationship specified in paragraph 1 with the contracting entity, is not a contracting authority under this Act, and the given entity intends to employ a third entity – not covered by the scope of subjects to this paragraph – to an extent exceeding 25% for the performance of the contract concluded with the contracting entity, the exception pursuant to paragraph 1 may only be applied, if the entity having a relationship specified in paragraph 1 with the contracting entity conducts a procurement procedure based on Article 5(4) for the selection of that third entity. The application of exception pursuant to paragraph 1 shall only be subject to the abovementioned condition if the procurement of the contracting entity would otherwise require the conduct of a procurement procedure.

5. Furthermore, this Act shall not apply

- a) where a joint venture which was established for the pursuing of a public service activity under this Act and whose participants are exclusively contracting entities concludes a public services contract with any of the contracting entities participating in the joint venture in question,
- b) where the contracting entity concludes a contract of contracting entities with a joint venture of which it forms part, provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least for the same period.

6. Regarding the application of paragraphs (1)-(5), the contracting entity shall communicate – through the Public Procurement Authority – to the European Commission, at its request, the names of the companies concerned, the nature and value of the contracts involved, and any conditions or proof which may be deemed necessary by the European Commission to establish, if the relationship between the contracting parties complies with the requirements of this Article.

### **Article 13**

1. This Act shall not apply to contracts of contracting entities, if, pursuant to the procedure set out in Articles 34 and 35 of Directive 2014/25/EU, the European Commission has established that the public service activity concerned is directly exposed to competition on a market to which access is not restricted or the Commission has not issued any decision thereon within the time limit for decision-making.

2. The procedure of the European Commission shall be governed by Article 35, Annex IV of Directive 2014/25/EU as well as Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. The ways of initiation of the procedure of the European Commission and the sending of the request shall be stipulated by a separate act of legislation. The Hungarian Competition Authority performs the duties specified in a separate act of legislation, concerning the provision of information on all essential facts related to the performance of a given activity under competitive conditions.

### **Further exceptions applicable to concessions**

### **Article 14**

1. In addition to the cases referred to in Article 9, this Act shall not apply to the award of works or service concessions in the cases referred to in this Article. As regards the purchase of works or service concession by a contracting entity, the exceptions set out in Article 10-13 shall also apply.

2. In case of works or services concessions, this Act shall not apply to



- a) contracts which are related to an activity pursued by the contracting entity in a non-EU member country, under conditions not involving the physical use of a network or geographical area within the European Union;
- b) the conclusion of contracts which are related to an activity specified in Article 6(1)(a) and Article 6(2).

3. In case of services concessions, this Act shall not apply

- a) where a service under Article 6(1)(b)-(e) is provided by an economic operator on the basis of an exclusive right pursuant to a law or an authority's decision which is compatible with the TFEU, with the proviso that the notice specified in a separate act of legislation shall be published concerning the conclusion of the contract, unless the relevant sectoral legislation provides otherwise;
- b) to the conclusion of contracts on public passenger transport services by road and by rail under the Act on Passenger Transport Services;
- c) to the conclusion of contracts on air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008;
- d) to contracts for the organization of lottery services (lottery), which are covered by CPV code 92351100-7, concluded on the basis of an exclusive right pursuant to a law or an authority's decision which is compatible with the TFEU.

4. The contracting authority shall notify the European Commission within thirty days, through the Public Procurement Authority, of the establishment of the special or exclusive right under Article 3(a).

5. The establishment of the special or exclusive right under Article 3(d) shall be published in the Official Journal of the European Union.

## **Public procurement thresholds**

### **Article 15**

1. Thresholds for procurement procedures and concession award procedures:

- a) thresholds specified by European Union acts (hereinafter referred to as 'EU thresholds');
- b) thresholds specified by the Act on the Central Budget (hereinafter referred to as 'national thresholds').

2. Thresholds shall be periodically established and published in the Official Journal of the European Union by the European Commission.

3. National thresholds concerning each subject-matter of public procurement shall be determined annually by the Act on the Central Budget. The EU thresholds, specified by the European Union acts according to paragraph 2, concerning each subject-matter of public procurement shall be included in the respective Act on the Central Budget.

4. As regards social and other specific services defined in Annex 3, no national threshold for service concessions shall be established and the contracting authority shall only apply this Act in case of service concessions the value of which is equal to or greater than the EU threshold.

5. The EU thresholds, as well as the national thresholds concerning each subject-matter of public procurement shall be published by the Public Procurement Authority on its homepage at the beginning of each year. For this purpose, the amount of the EU thresholds expressed in HUF shall be set in compliance with the

Communication on the amount of the EU thresholds expressed in national currencies, published by the European Commission in the Official Journal of the European Union.

### **The estimated value of public procurements**

#### **Article 16**

1. The estimated value of a public procurement shall be the full consideration requested or offered in general for its subject-matter on the relevant market, at the time of the beginning of the procurement procedure and it is to be calculated net of VAT and taking account of the provisions of Articles 17 to 20. The full consideration shall include the value of the optional part, in the case of an invitation to tender containing an optional part.

2. The estimated value of the public procurement shall include the fees and other payments (commission) payable by contracting authorities to candidates or tenderers, where contracting authorities shall make such payments to candidates or tenderers.

3. Where the contracting authority ensures the possibility of dividing the contract into lots, the value of all lots shall be included in the estimated value of the public contract.

4. If the contracting authority is comprised of separate operational or institutional units (hereinafter referred to as 'operational unit'), the purchasing need of all the operational units shall be taken into account when establishing the estimated value of the public procurement, which is calculated in the light of the provision set out in Article 19(3), except where a separate operational unit is organised as an independent economic entity and it has the right to determine its own operational budget. In the latter case, the estimated value of the public procurement may be calculated at the level of the operational unit in question.

5. The Public Procurement Authority shall publish Guidelines concerning the methods for calculating the estimated value and the criteria to be taken into account when selecting the method to be applied.

#### **Article 17**

1. In the case of supply contracts for the acquisition of the right to use or exploit products, the estimated contract value shall be:

- a) in the case of fixed-term contracts, where the term of the contract is 12 months or less, the consideration for its duration or, where the term of the fixed-term contract exceeds 12 months, the consideration for its duration including the estimated residual value;
- b) in the case of contracts for an indefinite period or where the date of the termination of the contract cannot be indicated precisely at the time of the starting of the procedure, the monthly value multiplied by 48.

2. 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:

- a) either the actual consideration of the contract or contracts having the same subject-matters and concluded within the preceding calendar year, adjusted according to the anticipated changes in quantity and value in the following calendar year or
- b) the estimated consideration following the first delivery, over the next 12 months or during the term of the contract(s), if it exceeds 12 months.

3. In the case of service contracts, where the total price is not stated, the estimated contract value shall be:

- a) in the case of fixed-term contracts with a term of 4 years or less, the contract value for its duration;
- b) in the case of contracts of indefinite duration or with a term of more than 4 years, the monthly consideration multiplied by 48.

4. For the purposes of calculating the estimated value of services the following elements shall be taken into account in the case of the following services:

- a) in the case of insurance services: the premium payable and other considerations;
- b) in the case of banking and other financial services: fees, commissions, interest, and other considerations;
- c) in the case of services including design: the fee payable, or the commission and other considerations.

5. When calculating the estimated value of public works contracts, the total counter value of the works, which form a single functional unit as regards the technical and economic aspects, shall be taken into account. The estimated value of the supplies and services needed for the carrying out of the works and provided by the contracting authority shall also be taken into account for the purpose of calculating the estimated contract value of the works.

#### **Article 18**

1. The estimated value of the framework agreement shall be the estimated highest aggregated value of the contracts to be concluded on the basis of the framework agreement, throughout its duration.

2. Where the dynamic purchasing system is applied, the estimated value of the public procurement shall be the estimated highest aggregated value of the contracts to be concluded on the basis of the dynamic purchasing system, throughout its duration.

3. The estimated value of innovation partnerships shall be the highest estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as the highest estimated value of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

4. For the purpose of calculating the estimated contract value of the design contests the following elements shall be taken into account:

- a) the fees or other payments (commission) and any other consideration payable to candidates, as well as
- b) the estimated value of the services for which a contract shall be concluded with the winner or, based on a recommendation from the jury, with one of the winners (prize winners), within the framework of a negotiated procedure without prior publication under Article 98(5) conducted following the design contest, except where the contracting authority (the sponsor) excluded the conclusion of any such contract in the notice launching the procedure.

#### **Article 19**

1. The choice of the method used to calculate the estimated value shall not be made with the intention of avoiding the application of this Act.

2. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Act or the provisions on public contracts the value of which is equal to or greater than the EU threshold.

3. Where a public works contract or a public service contract, which is aimed at the same direct purpose, as well as the procurement of supplies, the intended use of which is the same or similar, is divided into lots and realised through more than one contract, the value of all lots shall be taken into account for the establishment of the estimated value of the public procurement. When determining the existence of the same direct purpose in case of public service contracts the technical and economic-functional integrity of each service shall be taken into consideration.

4. If the estimated value of the public procurement, which is calculated according to paragraph 3, is equal to or greater than the EU thresholds according to this Act, contrary to the provision set out in paragraph 3, the procedure laid down in Part Three of this Act shall apply to contracts

- a) having an estimated value taken alone less than HUF 23 455 200 in case of services and supplies and less than HUF 293 190 000 in case of public works contracts,
- b) in which the total value of the lots does not exceed 20% of the total estimated value of the public procurement calculated according to paragraph 3.

5. For the purposes of paragraph 4, the exceptions allowed under Article 111 shall not apply.

6. Paragraph 2 shall be applied separately to each foreign representation in the case of public contracts for the purchases of foreign representations, separately to each member institution in the case of training centres maintained by the minister responsible for vocational training and adult education, separately to each parliamentary panel and allocation in the case of procurement procedures to be financed from the operational and supply allocation of the parliamentary panels stipulated by law, and separately to 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.

### **The estimated value of concessions**

#### **Article 20**

1. The estimated value of works or service concessions shall be the total turnover, net of VAT, which is expected by the concessionaire during the contract period, at the time of the starting of the public procurement, and which derives from the works or services and related supplies for which the concession is intended.

2. In addition to the provisions set out in paragraph 1, consideration must be given to the following factors in particular in the establishment of the estimated value of works or service concessions:

- a) the value of the optional part in the case of an invitation to tender containing an optional part;
- b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority;
- c) payments or any financial advantage in any form whatsoever made by the contracting authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- d) grants or any other financial advantage, in any form, from third parties for the performance of the concession;
- e) revenue from sales of any assets which are part of the concession;
- f) the value of all the supplies and services that are made available by the contracting authorities, provided that they are necessary for executing the concessions;
- g) any prizes or other payments to candidates or tenderers.

2. When establishing the estimated value of works or service concessions, Article 19(1)-(3) shall be applied accordingly.
3. The objective method for establishing the estimated value of works or service concessions shall be specified in the procurement documents.

### **Applicable procedures**

#### **Article 21**

1. For the purposes of procurement procedures the value of which is equal to or greater than the EU thresholds, Part Two shall apply, and as regards procurement procedures the value of which is below the EU thresholds but at the same time their value reaches national thresholds, Part Three shall apply, unless otherwise provided by this Act.
2. For the purposes of procurement procedures concerning social and other services specified in Annex 3, excluding concession award procedures, Part Three shall be applied.
3. For the purposes of concession award procedures, Part Four shall be applied.
4. Specific rules, other than those set out in this Act, pertaining to procurement procedures concerning contracts of contracting entities, are set out in a separate act of legislation. This Act shall apply to procurement procedures concerning contracts of contracting entities, save as otherwise provided for in the separate act of legislation. In a procurement procedure which is conducted by a contracting entity under Article 6 for a purpose other than that of performing its public service activity, the general rules set out in this Act shall apply.
5. The detailed rules pertaining to design contests, which are applicable in particular in the field of town and country planning, architecture and construction or data processing, are laid down in a separate act of legislation.
6. Contracting authorities under Article 5(3) are subject to Part Three, except where their capacity as contracting authorities may also be established on the basis of Article 5(2). In the latter case, the applicable procedure shall be determined on the basis of paragraph 1.

### **Mixed procurement**

#### **Article 22**

1. Contracts which have as their subject-matter two or more types of procurement subject to Article 8(2)-(4), shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject-matter of the contract in question.
2. For the purposes of paragraph 1, if a public contract consists partly of social and other specific services within the meaning of Annex 3 and partly of other services or a public contract consists partly of services and partly of supplies, the main subject shall be determined on the basis of the value of those respective services or supplies which represent the highest value.

3. Concessions which have as their subject-matter both works and services or several types of services shall be awarded in accordance with the provisions applicable to the type of concession that characterises the main subject-matter of the contract in question.

4. For the purposes of paragraph 3, if a service concession consists partly of social and other specific services listed in Annex 3 and partly of other services, the main subject-matter shall be determined on the basis of the value of those respective services which represent the highest value.

5. In the case of contracts consisting partly of a public service activity pursued by the contracting entity and partly of an activity other than the entity's public service activity, the contracting entity may choose to

- a) award separate contracts for separate elements of the procurement; in this case, the rules applicable to the separate element in question shall be applied respectively to each separate contract, or
- b) to award a single contract; in this case, the rules applicable to the activity which constitutes the primary objective of the contract shall be applied.

The choice under this paragraph shall not be made with the intention of circumventing the provisions of this Act.

6. If, in the case provided for in paragraph 5(b), the activity constituting the primary objective of the public contract may not be identified

- a) where one of the elements of the public contract is covered by Part Two or Part Three, while another element of the public contract would be covered by the separate act of legislation according to Article 21(4), the general rules of procedure specified in this Act shall be applied (Part Two or Part Three);
- b) where one of the elements of the public contract is covered by the separate act of legislation according to Article 21(4), while another element of the contract, which is intended for purposes other than the pursuit of the contracting entity's public service activity, would be covered by Part Four, the contracting entity shall apply the provisions set out in the separate act of legislation according to Article 21(4);
- c) where one of the elements of the public contract is covered by the separate act of legislation according to Article 21(4), while another element of the contract, which is intended for purposes other than the pursuit of the contracting entity's public service activity, does not fall within the scope of this Act, the contracting entity shall apply the provisions set out in the separate act of legislation according to Article 21(4);
- d) in the case of works or service concessions, where one of the elements of the concession would be covered by the rules applicable to contracting entities, while another element of the concession would be covered by the rules applicable to contracting authorities specified in Article 5(1), i.e. not acting as contracting entities, Part Four shall be applied according to the rules pertaining to contracting authorities specified in Article 5(1), i.e. not acting as contracting entities;
- e) where one of the elements of the public contract, which is intended for the pursuit of the contracting entity's public service activity, would be covered by Part Four, while another element of the public contract, which is intended for purposes other than the pursuit of the contracting entity's public service activity, would be covered by Part Two or Part Three, the general rules of procedure specified in this Act shall be applied (Part Two or Part Three);
- f) where one of the elements of the public contract, which is intended for the pursuit of the contracting entity's public service activity, would be covered by Part Four, while another element of the public contract, which is intended for purposes other than the pursuit of the contracting entity's public service activity, does not fall within the scope of this Act, Part Four shall apply.

7. For the purposes of Articles 22-24, the term 'procurement procedure' shall not include concession award procedures.

## **Article 23**

1. This Article shall apply where, in addition to the cases referred to in Article 22, the different elements of a public contract are subject to different legislations, either because different provisions shall apply on the basis of this Act or because the public contract is partially not covered by this Act. In the case of contracting entities, the provisions set out in this Article shall apply, where all the elements of the public contracts, which are subject to different legislations, are intended for the pursuit of the contracting entity's public service activity.

2. Where the different elements of a given contract are objectively not separable and they are necessarily the subject-matter of a single contract, the rules applicable to the conclusion of the contract shall be determined according to the main subject-matter of the public contract.

3. For the purposes of paragraph 2, in the case of contracts including elements of service concession as well as public supply, the main subject-matter of the public contract shall be determined on the basis of the estimated value of those respective services or supplies which represent the highest value.

4. Where the different elements of a given public procurement are objectively separable and the contracting authority concludes separate contracts for each element of the public procurement, the conclusion of each contract is subject to the rules concerning the subject-matter of the given contract.

5. Where the different elements of a given public procurement are objectively separable and the contracting authority chooses to award a single contract, the rules to be applied shall be determined on the basis of paragraphs (6)-(8).

6. Where the contract contains elements of a public contract and that of a contract which constitutes an exception to the application of this Act, the conclusion of the contract shall be subject to the rules on procurement procedures, irrespective of the proportion that the value of the contract elements excluded from the scope of this Act represents in the total value of the whole contract.

7. Where the contract contains the elements of a public contract as well as that of a works or service concession, a procurement procedure shall be conducted for the conclusion of the contract, if the value of the element of the contract concerning the public procurement in itself reaches the relevant threshold.

8. Where the contract contains elements of a works or service concession and that of a contract which constitutes an exception to the application of this Act, the conclusion of the contract shall be subject to the rules on concession award procedures, irrespective of the proportion that the value of the contract elements excluded from the scope of this Act represents in the total value of the whole contract.

## **Article 24**

1. Notwithstanding the provisions set out in Article 22(5) and Article 23, this Act shall apply where the public contract consists of elements which are covered by this Act and elements which do not fall within the scope of this Act according to Article 9(1)(a) or (ba).

2. Where the different elements of a given public contract are objectively not separable and they are necessarily the subject-matter of a single contract,

- a) this Act shall not apply to the conclusion of the contract, if any element of the contract qualifies for the exemption laid down in Article 9(1)(ba) and the exemption specified in Article 9(1)(b) is available;
- b) if any element of the contract is subject to Article 9(1)(a) and the case specified in point (a) does not occur, the Act on Defence and Security related Procurements shall apply.

3. Where the different elements of a given public procurement are objectively separable and the contracting authority concludes separate contracts for each element of the public procurement, the conclusion of each contract is subject to the rules concerning the subject-matter of the given contract.

4. Where the different elements of a given public procurement are objectively separable and the contracting authority chooses to award a single contract

- a) this Act shall not apply, if any element of the contract qualifies for the exemption laid down in Article 9(1)(ba) and the exemption specified in Article 9(1)(b) is available, on condition that there is an objective reason for executing the public procurement by the conclusion of a single contract;
- b) if any element of the contract is subject to Article 9(1)(a) and the case specified in point (a) does not occur, the Act on Defence and Security related Procurements shall apply, on condition that there is an objective reason for executing the public procurement by the conclusion of a single contract.

5. The decision of the contracting authority on the conclusion of a single contract shall not be made with the intention of circumventing the provisions of this Act or the Act on Defence and Security related Procurements.

#### *CHAPTER IV*

#### *RULES PERTAINING TO THE PARTICIPANTS OF PROCUREMENT PROCEDURES*

#### **Conflicts of interest**

#### **Article 25**

1. Contracting authorities shall take all the necessary measures to prevent conflicts of interest and avoid any distortion of competition.

2. Persons or organizations not being able to perform their functions in an unbiased and objective manner for whatever reason, in particular due to economic or other interests or any other common interest with an economic operator participating in the procedure, may not participate in the preparation and the execution of the procedure on behalf of the contracting authority, for that is qualified a conflict of interest.

3. The following entities may not participate in the procedure as a tenderer, candidate, subcontractor or an organization participating in the certification of suitability, for that is qualified a conflict of interest:

- a) persons or organizations involved by the contracting authority in the pursuing of any activity relating to the procedure or to the preparatory work thereof,
- b) any organization, if
  - ba) its executive officer or a member of its supervisory board,
  - bb) its owner,
  - bc) a relative living in the same household as the person specified in point ba) and bb) is involved by the contracting authority in the pursuing of any activity relating to the procedure or to the preparatory work thereof<sup>8</sup>,where their involvement in the procedure may have the effect of distorting competition.

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<sup>8</sup> This amendment entered into force on 12 December 2015.



4. In addition to the entities specified in paragraph 3, with the exception of public limited companies, an organization may not participate in the procedure as a tenderer, candidate, subcontractor or an organization participating in the certification of suitability, if it is owned by

- a) the President of the Republic,
- b) the Speaker of the National Assembly or the Deputy Speaker of the National Assembly<sup>9</sup>,
- c) the member of the Government<sup>10</sup>,
- d) the President of the Curia, the President of the National Judiciary Office,<sup>11</sup>
- e) the Prosecutor General<sup>12</sup>,
- f) the President of the Constitutional Court<sup>13</sup>,
- g) the President of the State Audit Office<sup>14</sup>,
- h) the President of the Public Procurement Authority, the Head of the Equal Treatment Authority, the President of the Hungarian Competition Authority, the President of the Hungarian National Authority for Data Protection and Freedom of Information, the President of the National Election Office, the President of the Hungarian Central Statistical Office, the Head of the Hungarian Atomic Energy Authority, the President of the Hungarian Intellectual Property Office, the President of the National Tax and Customs Administration of Hungary, the President of the National Research, Development and Innovation Office, the President of the National Media and Infocommunications Authority, the President of the Hungarian Energy and Public Utility Regulatory Authority, or<sup>15</sup>
- i) the President of the Hungarian Central Bank<sup>16</sup>,
- j) – m)<sup>17</sup>

or by an entity of the relative living in the same household as the persons specified in points a)-i)<sup>18</sup>, for that is qualified a conflict of interest.

5. Should the participation in the procurement procedure of a person or organization involved in the preparatory work of the procedure have the effect of creating a conflict of interest pursuant to paragraph 3 and 4, the contracting authority shall be obliged to notify such a person or organization thereof, considering in particular the extra information gathered by it.

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<sup>9</sup> This amendment entered into force on 12 December 2015.

<sup>10</sup> This amendment entered into force on 12 December 2015.

<sup>11</sup> This amendment entered into force on 12 December 2015.

<sup>12</sup> This amendment entered into force on 12 December 2015.

<sup>13</sup> This amendment entered into force on 12 December 2015.

<sup>14</sup> This amendment entered into force on 12 December 2015.

<sup>15</sup> This amendment entered into force on 12 December 2015.

<sup>16</sup> This amendment entered into force on 12 December 2015.

<sup>17</sup> These points were repealed on 12 December 2015.

<sup>18</sup> This amendment entered into force on 12 December 2015.

6. Persons or organisations acting on behalf of the contracting authority or involved by the contracting authority in the pursuing of any activity relating to the procedure or the preparatory work thereof shall declare in writing specifying whether they are subject to the conflicts of interest set out in this Article.

7. For the purposes of paragraph 3, the participation of any person (organisation) in the procedure

- a) from whom or which the contracting authority requested information for the assessment and market survey related to the given public contract or for the assessment of the estimated value of the public contract, without the indication of the starting date of the public procurement, and only advising them of the data necessary for the assessment,
- b) who or which participated in the preliminary market consultation [Article 28(4)] held by the contracting authority,
- c) from whom or which the contracting authority received a price offer necessary for the submission of the application (claim) for subsidies,

does not entail the distortion of competition and does not qualify a conflict of interest, on condition that, in relation to the application of point (a), (b) or (c), those persons (organizations) were not given any information beyond the scope of the data disclosed to all tenderers or candidates by the contracting authority in the course of the procurement procedure.

8. Tenderers or candidates may be excluded from the procedure on the basis of this Article only if equal opportunities may not be guaranteed in any other way for economic operators participating in the procurement procedure. Prior to the exclusion, the contracting authority shall, by a request for supply of missing information or provision of information, ensure that the economic operator concerned is given an opportunity to prove that its participation in the preparation of the procurement procedure does not violate the principles of equal opportunity and fair competition or to prevent the conflict of interest in any other way. The measures taken by the economic operator in order to prevent the conflict of interest shall be indicated by the contracting authority in the summary concerning the evaluation of tenders (requests to participate).

## **Common provisions pertaining to contracting authorities**

### **Article 26**

1. Contracting authorities, with the exception of those referred to in Article 5(2) and (3), shall notify the Public Procurement Authority of their falling under the scope of this Act and any changes in their data within thirty days following the date from which they come under the scope of this Act or from the date of those changes.

2. The Public Procurement Authority shall maintain an up-to-date register of contracting authorities, publish it on its website, and shall provide further information about the contracting authorities included in the register, as required by the European Commission. If the entity concerned fails to fulfil its obligations of notification as set out in paragraph 1 or, where there is a doubt whether the entity concerned is subject to this Act, the President of the Public Procurement Authority initiates the procedure of the Public Procurement Arbitration Board.

### **Article 27**

1. Contracting authorities shall be obliged to determine, in accordance with the relevant legislation, the distribution of responsibilities for the preparation, carrying out and internal control of their procurement procedures, as well as the responsibilities of persons and organisations acting on their behalf or involved by them in such procedures and the procedure of documentation applicable to their procurement procedures. In doing so, contracting authorities shall specify in particular the person, persons or bodies responsible for decisions made in the course of the procedure.

2. Where a contracting authority does not have any general rule on public procurement drawn up according to paragraph (1) or fulfils the criteria that allow derogation from such rules as laid down therein, it shall lay down the requirements set forth in paragraph (1) before the preparatory work for the given procurement procedure at the latest.

3. Persons and organisations acting in the name of a contracting authority or involved in a procurement procedure who or which take part in the preparatory work for the procurement procedure, the preparation of the invitation and the procurement documents, the assessment of tenders or in any other stage of the procedure, shall be required to jointly demonstrate adequate professional competence related to the subject-matter of the public procurement, as well as adequate competence in the field of public procurement, law and finance. The contracting authority shall involve an accountable, accredited public procurement consultant in procurement procedures which are partly or fully funded by the European Union or, in the case of public supplies and public services, which are above EU thresholds and, in the case of public works, the value of which exceeds HUF 500 million.

4. Contracting authorities shall set up an evaluation committee of at least three members, who jointly have the professional competence pursuant to paragraph 3, for the evaluation and assessment of the tenders according to this Act, taking place following the supply of missing information, the provision of requested information or the provision of explanation [Articles 71-72], where appropriate. The evaluation committee shall put forward in writing an expert's opinion and a proposal for the decision for the person or body making the decision closing the procurement procedure. The work of the evaluation committee shall be documented by drawing up minutes, which may contain the members' reasoned evaluation sheets, if applied by the contracting authority.

5. The person taking the decision closing the procurement procedure in the name of the contracting authority may not be a member of the evaluation committee. In the case of a collective decision-making process, persons delegated by the decision-making body in the evaluation committee shall be entitled to have right of consultation. In the case of collective decision-making process, a vote by call-over shall be applied.

## **Preparation of the procedure**

### **Article 28**

1. The contracting authority shall ensure thorough preparation of the procurement procedure, as regards the subject-matter and the estimated value of the public contract. The procurement documents made available by the contracting authority shall ensure that economic operators are given an opportunity in the procedure to make an offer which is technically suitable, physically executable and economically rational. Contracting authorities shall, even during the preparation of the procurement procedure, seek to ensure conditions necessary for high quality performance, protection of environment – in light of the subject-matter of the public contract - and consideration of sustainability concerns, as well as prevention of amendments to the subject-matter of the public contract. The contracting authority can also use the method of value assessment.

2. The contracting authority, under his responsibility specified in paragraph 1, shall conduct a separate examination aimed at the establishment of the estimated value and the results of the examination shall be documented. In the course of the examination, the contracting authority may use methods based on objectivity. Such methods are in particular

- a) inviting the indicative bids concerning the subject-matter of the public procurement,
- b) market research concerning the subject-matter of the public procurement, conducted by organizations specialized thereto,
- c) involving a forensic expert,
- d) tariffs proposed by professional chambers,

- e) detailed database of building projects, which is created and maintained by the relevant professional chambers and is based on execution value,
- f) price statistics issued by the Public Procurement Authority,
- g) analysis of the contracting authority's former contracts having a similar subject-matter.

3. In the case of public works, the procedure may only be launched, if the plans meeting the requirements set in a separate act of legislation are available. In the cases specified in a separate act of legislation, the contracting authority shall also provide for the control of plans and design architect's and design engineer's site supervision.

4. Before launching the procurement procedure, preliminary market consultations may be held by the contracting authority with independent experts, public authorities and market participants in order to prepare the procurement procedure and to provide economic operators with information on the public procurement planned and the requirements thereof. Contracting authorities shall take all necessary measures, in particular concerning the disclosure of all the relevant information in the procurement documents as well as the establishment of the suitable time limit for the submission of tenders, to ensure compliance with the principles of fair competition, equal opportunities and equal treatment of economic operators.

### **Joint procurement procedures**

#### **Article 29**

1. The contracting authority may authorise other contracting authorities to conduct a procurement procedure on its behalf. However, this authorisation may not result in the avoidance of the rules to be applied to the authorising contracting authority according to this Act.

2. A public contract may be realized jointly by several contracting authorities who may choose and authorise one of them to conduct the procurement procedure.

3. In the cases pursuant to paragraphs 1 and 2, the contract notice launching the procedure shall state that the contracting authority conducts the procedure (also) on behalf of other contracting authority (authorities).

#### **Article 30**

1. Contracting authorities may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system with contracting authorities from other Member States of the European Union.

2. Unless the conditions specified in this Article have been regulated by an international agreement, in the case referred to in paragraph 1, the contracting authority and the contracting authority coming from another Member State shall conclude an agreement that determines:

- a) the responsibilities of each contracting authority, and the law applicable to the public contract, as well as
- b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

3. The information specified in paragraph 2(a) shall be referred to in the procurement documents for jointly awarded public contracts.

4. Unless this Act or a separate act of legislation requires the use of a specific central purchasing body, the contracting authority may call upon a central purchasing body located in another Member State. The national provisions of the Member State where the central purchasing body is located shall apply to the award of contracts under a dynamic purchasing system or on the basis of a framework agreement.

5. A contracting authority may set up a joint entity with a contracting authority from another Member State of the European Union in order to award a public contract (public contracts). In this case, the participating contracting authorities shall, by a decision of the main competent body of the joint entity, agree on the applicable national procurement rules of one of the following Member States:

- a) the national provisions of the Member State where the joint entity has its registered office; or
- b) the national provisions of the Member State where the joint entity is carrying out its activity.

6. The joint entity referred to in paragraph 5 may either be established for an undetermined period, or may be limited to a certain period of time, to certain types of contracts or to one or more individual contract awards, on condition that this is provided for in the joint entity's instrument of constitution.

### **Centralised public procurement**

#### **Article 31**

1. The Government may order the budgetary authorities under its control or supervision, public foundations established by itself, and economic organisations under state ownership and over which it exercises direct or indirect dominant influence to execute any public procurement within the framework of a centralised procedure and may determine the personal and material scope thereof, the organisations entitled to invite tenders (central purchasing body) and the conditions for participation in such procedures.

2. A centralised procedure shall be used for health-care services of organisations financed by the Health Insurance Fund, in the cases specified by a separate act of legislation. The Government shall be entitled to specify the detailed rules for the procedure, including the personal and material scope thereof and the organisation entitled to invite such tenders (central purchasing body).

3. A centralised procedure shall be used for procurements related to government communication tasks, in the cases specified by a separate act of legislation. The Government is entitled to determine the detailed rules of the centralised procedure, including the personal and material scope thereof, and the organisation entitled to invite tenders (central purchasing body).

4. The detailed rules pertaining to centralised public procurement procedures pursuant to this paragraph, if different as required by such procedures from those set out in this Act, shall be determined in a separate act of legislation.

5. Centralised public procurement procedures shall be conducted electronically<sup>19</sup>

#### **Article 32**

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<sup>19</sup> This point is to enter into force on 1 November 2016.

1. Public procurements may be implemented in a combined, centralised manner by several contracting authorities, which have created a joint central purchasing body or have designated among themselves a central purchasing body, where Article 31 does not provide for the use of a central purchasing body. Rules pertaining to the cooperation of contracting authorities establishing a centralised procurement system shall be laid down in a cooperation agreement.

2. The central purchasing body shall have responsibility for the functioning of the centralised public procurement system. Contracting authorities using the system are responsible for implementing those elements of the public procurement which are conducted by them, in particular for ordering from the dynamic purchasing system operated by the central purchasing body or purchasing on the basis of a framework agreement concluded by the central purchasing body, by reopening or without reopening competition.

3. Centralised public procurement procedures shall be conducted electronically.<sup>20</sup>

### **Reserved Public Contracts**

#### **Article 33**

1. Contracting authorities may or, if the Government so provides, shall reserve the right to participate in a public procurement procedure for organizations that are designated as sheltered place of employment and for organizations possessing a social employment permit, provided more than 30 % of their employees are disadvantaged or disabled workers, furthermore, for organizations providing employment for inmates of social institutions in the framework of social employment, provided more than 30% of their employees are handicapped workers. Contracting authorities may or, if the Government so provides, shall require that the public contract be performed in the framework of a job creation programme, provided at least 30% of the people employed in the course of the performance of the contract are disadvantaged, disabled or handicapped workers (sheltered employment programmes). Contracting authorities shall refer to this fact in the contract noticelaunching the procedure.

2. In the case of contracts that are reserved according to paragraph 1, contracting authorities shall ensure equal rights, where more than 30% of the employees of an economic operator established within the European Union are disadvantaged, handicapped or disabled workers.

#### **Article 34**

1. Contracting authorities may reserve the right for economic operators to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Annex 3, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8, provided that the economic operators in question fulfil all of the following conditions:

- a) their objective is the pursuit of a public service mission linked to the delivery of those health, social and cultural services referred to in this paragraph;
- b) they are non-profit-making organizations, in which profits are reinvested with a view to enhance the performance of their public tasks or, where profits are distributed or redistributed, this should be based on participatory considerations;
- c) the structures of management or ownership of the organisation ensure the active participation of employees in the management or require the active participation of employees or stakeholders in the pursuit of the public task; and

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<sup>20</sup> This point is to enter into force on 1 November 2016.

- d) on the basis of this paragraph, they have not been awarded a contract, having a subject-matter subject to this paragraph, by the contracting authority concerned, within the past three years.
- 2. The contract specified in paragraph 1 shall be limited in time and its maximum duration shall not be longer than three years.
- 3. The call for competition shall make reference to the reservation of the right of participation in the procurement procedure under this Article.

### **Common rules pertaining to economic operators**

#### **Article 35**

- 1. Tenders or requests to participate may be submitted by several economic operators jointly.
- 2. In the case of application of paragraph 1, joint tenderers or candidates shall designate among themselves a representative entitled to act on behalf of the joint tenderers or candidates in the course of the procurement procedure.
- 3. All the statements made on behalf of the group of joint tenderers or candidates shall clearly include the designation of the joint tenderers or candidates.
- 4. Where this Act stipulates that contracting authorities shall send a notification to tenderers or candidates, furthermore, for the purposes of supply of additional information [Article 56], supply of missing information [Article 71], request of information [Article 71] and request of explanation [Article 72], the contracting authority shall dispatch the information, notification and request addressed to the joint tenderers or joint candidates to the representative defined in paragraph 2.
- 5. Where the contracting authority prescribes the provision of a tender guarantee [Article 54], the joint tenderers shall provide the guarantee only on one occasion. In the event of the infringement of the validity period of the tender by any joint tenderer [Article 54 (4)], the contracting authority is entitled to receive the tender guarantee.
- 6. Joint tenderers are jointly liable for the performance of the contract to the contracting authority.
- 7. After the expiry of the time limit for the submission of tenders or, in the case of a procedure consisting of more than one stage, the expiry of the time limit for participation, the economic operator(s) submitting a joint tender or request to participate may not be replaced.
- 8. The contracting authority may not require setting up an economic organisation as a condition for participating in the procurement procedure; however, it may be required from successful tenderer(s), if it is justified for the performance of the contract to be concluded pursuant to a procurement procedure. The notice starting the procurement procedure shall clearly set the requirement of the contracting authority for setting up an economic organisation.
- 9. If a contracting authority allows or requires the setting up of an economic organisation (project company) for the performance of the contract, the contracting authority shall specify the requirements concerning the business organisation to be set up in the procurement documents; the requirements may only be related to the legal form, the minimal amount of the subscribed capital, defined in proportion to the value of the contract, to the scope of the activity of the business organisation and the control of its activity.

## **Article 36**

1. In the course of the same procurement procedure or, in the case of a possibility of division of a contract into lots the contract concerning one lot, the tenderer or the candidate

- a) may not submit another tender or another request to participate jointly with another tenderer or candidate,
- b) may not participate as a subcontractor of another tenderer or candidate,
- c) may not certify the suitability of any other tenderer or candidate for the performance of the contract [Article 65(7)].

2. Where a contracting authority experiences an obvious breach of the provisions set out in Article 11 of the Hungarian Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices; hereinafter referred to as: the 'CA'), as well as the provisions set out in Article 101 of the TFEU or it has a sound reason to assume it in the course of its procedure, the contracting authority shall notify the Hungarian Competition Authority thereof in accordance with the provisions of the CA regarding notification or complaint.

3. Where the minister responsible for public procurements or the minister responsible for the use of EU funds experiences an obvious breach of the provisions set out in Article 11 of the CA or the provisions set out in Article 101 of the TFEU or it has a sound reason to assume it in the course of the legal control of procurement procedures, public contracts, works or service concessions or any amendment thereof, the minister notifies the Hungarian Competition Authority in compliance with the provisions of the CA concerning notification or complaint and, in doing so, he is entitled to transfer any data, which is made available in the course of the control of the procurement procedure, public contract, works or service concession concerned or any amendment thereof, with the exception of qualified data, to the Hungarian Competition Authority.

## *CHAPTER IV*

### *PUBLICATION, COMMUNICATION, THE PUBLIC NATURE OF PROCUREMENT PROCEDURES*

## **Publication**

## **Article 37**

1. The following documents shall be published by the contracting authority:

- a) the prior information notice;
- b) the contract notice launching the open procedure;
- c) the invitation to participate starting restricted procedures, negotiated procedures, competitive dialogues and innovation partnerships, except for the direct invitation to participate starting restricted and negotiated procedures launched by a prior information notice or a periodic indicative notice specified by a separate act of legislation, furthermore, the direct invitation to participate starting restricted procedures, negotiated procedures, competitive dialogues and innovation partnerships launched by a pre-qualification notice pursuant to a separate act of legislation;
- d) the invitation launching a procedure subject to independent procedural rules according to Article 117;
- e) the periodic indicative notice and pre-qualification notice specified in a separate act of legislation;
- f) the contest notice launching a design contest;



- g) the concession notice, except for the procedure specified in Article 128 and 129(2);
- h) the notice on the results of the procedure;
- i) the notice on the results of the design contest;
- j) the information notice concerning an amendment to the contract.

2. The notice on the results of the procedure pursuant to paragraph 1(h)-(i) shall be sent for publication by the contracting authority not later than ten business days after the conclusion of the contract or, failing this, the decision of the contracting authority declaring the procedure unsuccessful or refusing the conclusion of the contract [Article 131(9)]. The procurement procedure shall be concluded by the publication of that notice.

3. Where the notice launching the procedure was published in the form of a prior information notice and the contracting authority does not intend to conclude any further contract within the period specified in the prior information notice, this fact shall be indicated in the notice on the results of the procedure.

4. Contrary to the provision set out in paragraph 2, in the case of a framework agreement or a dynamic purchasing system, the contracting authority may publish a common notice on the results of the procedure concerning all the contracts concluded based on the framework agreement or in the dynamic purchasing system. In this case, the notice on the contracts awarded in the previous quarter of the year shall be sent for publication within ten business days after the last day of the calendar quarter.

5. The contracting authority shall send for publication the information notice defined in paragraph 1(j) concerning an amendment to the contract not later than fifteen business days after any amendment to the contract.

6. Contracting authorities shall send notices for publication to the Public Procurement Authority by electronic means as specified in a separate act of legislation. Contracting authorities shall publish notices defined in this Act according to a standard form specified in a separate act of legislation. Detailed rules pertaining to the applicable standard forms, the mandatory content elements thereof and the sending and examination of notices, the related fees and their payment and the way of publication of notices shall be laid down in a separate act of legislation. The fee related to the examination of notices is considered as administrative service fee. The Public Procurement Authority shall be obliged to use the fees to cover the costs of its own operation in the sphere of its basic activity.

### **Article 38**

1. After the budgetary year begins, contracting authorities may prepare a prior information notice and contracting entities may prepare a periodic indicative notice specified in a separate act of legislation, concerning the total number of public supply, public works or public service contracts planned by them for the relevant year, or for the subsequent 12 months at the most.

2. In the case of social and other specific services defined in Annex 3, the prior information notice shall include the designation of the services, which constitute the subject-matter of the contracts, the information that no further notice containing an invitation will be published in the procedure and an invitation addressed to economic operators to confirm in writing their intention to participate. In such cases the prior information notice may cover a period exceeding twelve month.

3. Contracting authorities shall publish prior information notices or periodic indicative notices, in a notice drawn up according to the standard form specified in a separate act of legislation.

4. Where the prior information notice or the periodic indicative notice is published on the homepage of the contracting authority, the contracting authority shall be obliged to send the notice called 'the notice on a buyer profile' to the Publications Office of the European Union, through the Public Procurement Authority. The prior information notice or the periodic indicative notice may be published on the homepage only after the dispatch of that notice to the Publications Office of the European Union by electronic means.

5. Publication of a prior information notice or a periodic indicative notice shall not entail any obligation to conduct a procedure for the award of a contract included therein.

### **Article 39**

1. The contracting authority shall offer economic operators unrestricted and full access free of charge by electronic means to the procurement documents, with the exception of the registration data.

2. Where unrestricted and full access free of charge by electronic means may not be provided in the case of certain procurement documents, for any of the following reasons:

- a) the specialised nature of the procurement would require the use of specific electronic means of communication which are not generally available to economic operators,
- b) the contents of the procurement documents may not be displayed using open source applications or applications which are generally available among economic operators or are under a proprietary licensing scheme and the necessary applications or licence cannot be made available by the contracting authority,
- c) the supply of the procurement documents would require specialised office equipment that is not generally available to contracting authorities or
- d) the procurement documents contain business secrets, classified information or any information classified for security or national security reasons, which require such a high level of protection that it cannot be properly ensured by using electronic means of communication that are generally available to economic operators,

the contracting authority shall indicate in the notice launching the procedure how access to the procurement documents will be given to economic operators, possibly by non-electronic means, or what measures will be prescribed in order to preserve the confidential nature of the procurement documents and in what ways can economic operators have access to the documents concerned.

### **Communication in procurement procedures**

### **Article 40<sup>21</sup>**

1. Procurement procedures and concession award procedures shall be conducted using the eProcurement Applications operated by the Public Procurement Authority.

2. The creation, operation and the conditions of use of the eProcurement Applications specified in paragraph 1 shall be subject to a separate act of legislation.

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<sup>21</sup> This Article is to enter into force on 1 February 2017.

## **Article 41**

1. All the statements related to the procurement procedure shall be made in writing between the contracting authority and the economic operators, unless otherwise required by this Act.

2. Where this Act does not expressly provide for a specific form of contact keeping, written statements may be made as follows:

- a) by postal delivery or through direct delivery, taking into account the provision set out in paragraph 5;
- b) by fax;
- c) by electronic means.

3. The contracting authority may prescribe the application of a specific form of contact keeping, but it may not prejudice the equal opportunities of economic operators. Tenderers may not be obliged to make their statements exclusively by electronic means, except in procedures conducted by a central purchasing body, as well as the use of dynamic purchasing system, online catalogue or electronic auction.

4. According to paragraph 2(c), statements may be submitted in an electronic document which is supplied with an advanced electronic signature, or which meets the requirements specified in a separate act of legislation based on the empowerment of the Act.

5. For the purposes of the provision or request of information stipulated by this Act, postal delivery may only be used exceptionally, and in justified cases.

6. In procurement procedures, procedural actions may also be carried out electronically. The method of carrying out of the public procurement procedural actions by electronic means is laid down in a separate Government Decree, the provisions of which may be different from the provisions set out in this Act, to the extent as required by the carrying out of procedural actions by electronic means.

## **Public nature of procurement procedures**

## **Article 42**

1. Contracting authorities defined in Article 5(1), with the exception of central purchasing bodies, shall draw up, at the beginning of the budgetary year, by 31 March at the latest, an annual overall public procurement plan (hereinafter referred to as 'public procurement plan'), which shall outline all public procurements envisaged for the given year. The public procurement plan shall be retained by the contracting authority for a period of at least five years. Public procurement plans shall be made publicly available.

2. Contracting authorities may launch procurement procedures prior to the completion of the public procurement plan; those procedures shall be subsequently included in the public procurement plan, as appropriate.

3. The public procurement plan shall not entail any obligation to carry out the procedures for the award of contracts included therein. Contracting authorities may 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. In such cases the public procurement plan shall be amended upon the occurrence of such a need or other changes, indicating the justification thereof.

4. Contracting authorities shall, upon request, forward their public procurement plans to the Public Procurement Authority or to the bodies empowered by an act of legislation to exercise control over the contracting authority.

### **Article 43**

1. The contracting authority shall publish the following data, information, documents in the Public Procurement Database maintained by the Public Procurement Authority or, if the publication in the Database is not possible, on its own homepage or on the homepage of the maintaining entity:

- a) the public procurement plan and amendment(s) thereto, without delay upon adoption of the plan or any amendment thereto;
- b) data specified in Article 80(2) concerning preliminary dispute settlement, without delay upon receipt of the request for the preliminary dispute settlement;
- c) the contracts concluded in accordance with Article 9(1)(h)-(i) as well as Article 112(1)-(5), without delay upon conclusion of the contract;
- d) the contracts concluded on the basis of the procurement procedure, without delay upon conclusion of the contract;
- e) the summary concerning the evaluation of requests to participate and the summary concerning the evaluation of tenders, at the same time as they are submitted to the candidates or the tenderers;
- f) the following data concerning the performance of the contract: reference to the notice launching the procurement procedure (in the case of procedures without prior publication of a contract notice, to the invitation), the name of the parties to the contract, the establishment whether the performance was in compliance with the contract, the date of the acknowledgement by the contracting authority of the performance of the contract, the date of the payment of the consideration and the value of the paid consideration, within thirty (30) days following the fulfilment of the contract by each party or, in the case of public procurements carried out using subsidies, in the context of the payment of suppliers, following the fulfilment by the entity which is obliged to make payment;
- g) the annual statistical summary defined in a separate act of legislation, by the time-limit laid down therein.

2. The data defined in paragraph 1 are qualified as data to be published in the public interest and their disclosure may not be prohibited by invoking business secrecy. However, where the tender is annexed to the contract by the parties, the public nature of the tender shall be subject to Article 44.

3. If the public procurement plan defined in paragraph 1(a) is published on the homepage, it shall be accessible until the publication of the public procurement plan regarding the following year on the homepage.

4. The data, information, documents specified in paragraph 1(b) and (f)-(g) shall be accessible on the homepage at least for the period specified in Article 46(2).

5. The contracts specified in paragraph 1(c) and (d) shall be accessible on the homepage for a period of at least five years continuously following the performance of the contract.

6. In the case of contracts concluded for a term over one year or for an indefinite period of time, the information specified in paragraph 1(f) shall be updated annually following the conclusion of the contract.

### **Article 44**

1. Economic operators may prohibit the release of documents containing business secrets (including know-how) [Article 2:47 of the Civil Code], which are included separately in their tender, request to participate, supply of missing information or explanation pursuant to Article 72 of this Act. The documents containing business secrets shall only contain pieces of information that, if made public, would be unreasonably detrimental to the business activities conducted by the economic operator.

A justification shall be annexed by the economic operator to the separate document containing business secrets for demonstrating in detail why and how the given pieces of information or data, if made public, would be unreasonably detrimental to the economic operator. The justification given by the economic operator is not satisfactory, if it only offers generalities.

2. For the purposes of paragraph 1, the following information may not be claimed to be a business secret:

- a) any information, data that can be accessed by everyone on an electronic, official or any other register,
- b) data public on grounds of public interest according to Article 27(3) of the Act CXII of 2011 on the Right of Informational Self-determination and on Freedom of Information,
- c) as regards the certification of suitability, any information and data presented by the tenderer or candidate
  - (ca) in relation to the conclusion, contents and execution of former public contracts as well as works or service concessions specified by this Act,
  - (cb) in relation to machines, equipment, installations, professionals, certificates, labels,
- d) description of the supplies, works, services specified in the tender, excluding that clearly identified element of the description which fulfils, as demonstrated by the justification given by the tenderer, the conditions set out in paragraph 1,
- e) where requested by the contracting authority, the professional tender of the tenderer, excluding a clearly identified element of the professional tender which fulfils, as demonstrated by the justification given by the tenderer, the conditions set out in paragraph 1 and in case of which there is no obstacle to being considered as business secret according to paragraph 3.

3. Economic operators may not prohibit the public release of their name, address (seat, residence) or any fact, information, solution or data (hereinafter jointly referred to as 'data') to be evaluated under the award criteria according to Article 76, but they have the right to prohibit the public release of basic data, partial information not covered by paragraph 2 (such as in particular the priced budget) which serve as the basis of the data mentioned above.

4. If, when declaring the specified information and data to be business secret, the economic operator has failed to comply with paragraph 1-3, the contracting authority shall, in the course of the request for missing information, invite the economic operator concerned to submit a document with the appropriate contents.

#### **Article 45**

1. After the dispatch of the summary concerning the evaluation of tenders or requests to participate, the tenderer or candidate participating in the given procedure may ask to have access to those parts of the tender or request to participate of another economic operator, including the supply of missing information, provision of requested information as well as provision of explanation, which do not contain business secrets. The economic operator shall indicate in the request for access to documents the alleged infringement in relation to which the access is requested and those parts of the tender or request to participate which he is asking to have access to. Access to documents shall be provided during office hours, within two days after reception of such request. The contracting authority shall offer access to documents to the extent necessary to ensure enforcement of the right related to the alleged infringement indicated by the economic operator. In the framework of the access to documents, there is no possibility to carry out full examination of the tender or request to participate of another economic operator.

2. On request by a tenderer submitting an admissible tender, after sending the results of the procedure, the contracting authority shall provide specific information regarding the features of the winning tender and its advantages over the tender submitted by him and in the case of negotiated procedures, competitive dialogues and innovation partnerships, regarding the negotiations and the dialogue conducted with the tenderers, within five business days from receiving the request, taking into consideration the winning tenderer's interests regarding business secrecy.

## **The documentation of procurement procedures and the calculation of time limits**

### **Article 46**

1. Contracting authorities shall arrange for the documentation of each of their procurement procedures, covering the procedures from the preparatory work up to the performance of the contract concluded on the basis of those procedures, in writing or, if the procurement procedure is carried out electronically, by electronic means according to a separate act of legislation based on the empowerment of this Act.

2. Contracting authorities shall retain all documents created in the course of the preparation and conduct of the procurement procedure for a period of at least five years following the closure of the procedure [Article 37(2)] and all documents created in relation to the performance of the contract for a period of at least five years following the performance of the contract. If a procedure has been launched to seek legal remedy in connection with the public procurement, the documents shall be kept until completion of that a procedure, or in the case of a judicial review, until completion of the review, but at least for five years.

3. Contracting authorities shall, upon request, forward the public procurement documents to the Public Procurement Authority or to other bodies empowered by an act of legislation or make the public procurement documents accessible to those bodies by electronic means.

### **Article 47**

1. Where this Act prescribes that minutes shall be drawn up in the course of the procurement procedure, this criterion may also be fulfilled by recording the actions in a public document provided that the actions take place in the presence of a notary public.

2. Where contracting authorities, on the basis of this Act or a separate act of legislation based on the empowerment of this Act, require the submission of a document in the course of the public procurement procedure, the document may be submitted in a simple copy form, unless provided otherwise by an act of legislation. The contracting authority may prescribe the submission of originals or - if it is allowed by the contracting authority - certified copies of such statements that serve directly as the basis of the enforcement of a claim (in particular declaration of guarantor or surety). Where the tender is not submitted electronically, the original copy of the tender submitted pursuant to Article 68(2) shall contain the original, duly signed copy of the statement pursuant to Article 66(2). In the case of documents not submitted in Hungarian, the liable translation produced by the tenderer shall also be accepted by the contracting authority.

3. If the certificate required by this Act is non-existent in the country outside the European Union where the tenderer is established, contracting authorities may accept a certificate or a document that is equal to that certificate.

### **Article 48**

1. For the purposes of the time limits stipulated by this Act, the time limits or periods (hereinafter jointly referred to as 'time limits') expressed in days, months or years shall be calculated in such a manner that they do not include the starting date. The starting date shall be the date of the event or other circumstances from which the time limit begins to run.

2. A time limit expressed in months or years shall expire on the day which corresponds to the date following that of the starting date; if the month of expiry does not contain such a date, expiry shall take place on the last day of the month.

3. Where the closing date of the time limit is not a business day, expiry shall take place only on the subsequent business day.
4. Time limits indicated in notices (invitations) shall begin to run on the day following the date of dispatch of the relevant notice (invitation) or on the date of the direct sending of the invitation.
5. Paragraphs 1 to 3 shall also apply to the calculation of the validity period and the period specified in Article 131(6).

## PART TWO

### PROVISIONS RELATED TO PUBLIC PROCUREMENTS REACHING EU THRESHOLDS

#### CHAPTER VI

##### STARTING OF PROCUREMENT PROCEDURES

##### **Types of procurement procedures**

##### **Article 49**

1. Procurement procedures may be
  - a) open procedures,
  - b) restricted procedures,
  - c) innovation partnerships,
  - d) negotiated procedures,
  - e) competitive dialogues,
  - f) negotiated procedures without prior publication of a contract notice.
2. Negotiated procedure, competitive dialogue and negotiated procedure without prior publication of a contract notice may only be conducted under the conditions laid down by this Act. Innovation partnership shall aim to serve the purpose specified by this Act.
3. In the course of a procurement procedure there shall be no changeover from one type of procedure to another.

The contracting authority can apply the specific procurement methods defined in Chapter XVI.

##### **The notice launching or announcing the procedure**

##### **Article 50**

1. According to the rules on each type of procurement procedure, notices launching the procurement procedure shall be the contract notice, the invitation to participate, the invitation to tender, or the direct invitation to participate.

2. The notice launching the procurement procedure shall contain in particular:

- a) name, address, telephone number and fax number, e-mail and, if any, website address of the contracting authority;
- b) type of the procurement procedure, in the case of negotiated and accelerated procedures, competitive dialogues and negotiated procedures without prior publication of a contract notice, the grounds for their use;
- c) contact points at which the procurement documents are available or will be available for unrestricted and full direct access, free of charge. Where, in case of certain procurement documents, direct electronic access is not available for the reasons set out in Article 39, an indication of how the procurement documents concerned can be accessed.
- d) subject-matter and quantity of the public procurement;
- e) description of the contract to be concluded as a result of the procurement procedure;
- f) indication of the conclusion of a framework agreement, the use of dynamic purchasing system, electronic auction, where appropriate;
- g) term of the contract or the time limit for performance/delivery;
- h) place of performance/delivery;
- i) conditions for settling the consideration or reference to the applicable legislation;
- j) possibility or ruling out of variant (alternative) offers;
- k) acceptance or prohibition of the division of the contract into lots. If the division of the contract into lots is accepted, an indication whether only one, several or all of the lots may be subject to tendering and whether the number of the lots which can be awarded to the same tenderer is limited. In the case of prohibition of the division of the contract into lots, the reasons therefor;
- l) award criteria of the tenders. Where the selection of the most economically advantageous tender is not exclusively based on price or is solely based on the costs determined according to Article 78, the weighting (exceptionally, order of importance) of the award criteria related to the most economically advantageous tender shall also be indicated;
- m) grounds for exclusion and the required methods of certification;
- n) suitability criteria, data needed for the assessment of suitability and the required method of certification;
- o) time limit for submission of tenders or in the case of an invitation to participate the time limit for the submission of requests to participate;
- p) address to which tenders or requests to participate shall be sent and the way of submission;
- q) language (languages) of the contract notice or the invitation to participate, an indication whether or not the tenders or the requests to participate may be submitted in another language in addition to Hungarian;
- r) time of opening tenders and, if it is not made electronically, its place, as well as the parties authorised to be present at the opening of the tenders; in the case of an invitation to participate the time of the opening of requests to participate and, if it is not made electronically, its place;
- s) minimum validity period of the tender, except for invitations to participate;
- t) in the case of an invitation to participate the planned date of sending the invitation to tender;
- u) information on the prescription of a tender guarantee, which shall also be indicated in the invitation to tender, concerning the subsequent stage of the procedure;
- v) where the performance of the contract is subject to special conditions, those conditions;
- w) in the case of public procurements receiving subsidies from the European Union, data concerning the relevant project (programme).



3. In addition to paragraph 2, the direct invitation to participate shall refer to the prior information notice and the date of its publication. The invitation to tender and the direct invitation to participate shall state the date of its dispatch to economic operators.

4. The notice launching the procedure as well as all the other procurement documents shall be drawn up in all cases in such a way as to grant equal opportunities to economic operators to submit an appropriate tender or request to participate.

#### **Article 51**

1. Where, in the case of sub-central contracting authorities, restricted procedures or negotiated procedures are launched by the use of a prior information notice pursuant to Article 82(3) or Article 86(2), the prior information notice shall be published with the contents specified in a separate act of legislation. The prior information notice launching the procedure shall refer specifically to the subject-matter of the contract, it shall indicate whether the contract will be awarded by restricted procedure launched by a direct invitation to participate or negotiated procedure, furthermore, it shall invite economic operators to express their interest by the time limit set in the prior information notice.

2. Data concerning the subject-matter of the public procurement shall be given in the prior information notice announcing the procedure in such a way as to make it possible for economic operators to assess whether they intend to participate in the procedure.

#### **The setting of the time limit for submission of tenders and the time limit for requests to participate**

#### **Article 52**

1. The time limit for submitting tenders and requests to participate shall be established by the contracting authority in such a way as to ensure enough time for drawing up tenders or requests to participate, taking into account the degree of complexity of the contract and the minimum time limits specified herein.

2. Where tenders can be made only after a visit to the site or after on-the-spot inspection of certain documents, the time limit for the submission of tenders shall be longer than the minimum time limit set out in this Act and shall allow all economic operators concerned to obtain all the information needed to produce tenders.

3. The time limit for receipt may only be made longer and it shall be made in line with the provisions on the amendment of the contract notice, the invitation to tender and the invitation to participate [Article 55].

4. Contracting authorities shall extend the time limit for the receipt of tenders or requests to participate in the following cases<sup>22</sup>:

- a) where any additional information, although requested by the economic operator in good time in accordance with Article 56, is not supplied within the time limit set [Article 56 (2)] or
- b) where changes are made to the procurement documents.

5. The length of the extension shall be proportionate to the importance of the additional information or change. Contrary to the provision set out in paragraph 4(b), contracting authorities shall not be required to extend the time limit, if the changes made to the procurement documents are not significant and the amendment is

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<sup>22</sup> This amendment entered into force on 24 December 2015.

sent not later than ten days before the expiry of the time limit for the submission of tenders or requests to participate or, if a notice shall be published concerning the amendment, such notice is published not later than eleven days before the expiry of the time limit for the submission of tenders or requests to participate. The changes made to the procurement documents shall not be considered significant, if they do not affect the timely, proper preparation of requests to participate or tenders.

## *CHAPTER VII*

### *THE BINDING NATURE OF THE PARTIES' DECLARATIONS IN PROCUREMENT PROCEDURES*

#### **Withdrawal from the public procurement**

##### **Article 53**

1. The contracting authority shall have the right to revoke the notice launching the procedure, until the expiry of the time limit for the submission of tenders in case of open procedures or the time limit for requests to participate in case of procedures consisting of more than one stage.

2. If the notice launching the procedure was published, a notice shall be published concerning the revocation before the expiry of the time limit set out in paragraph 1, and at the same time those economic operators who expressed their interest to the contracting authority shall be informed. In procedures without prior publication of a notice, economic operators invited to submit a tender or to participate shall be informed simultaneously and directly, before the expiry of the original time limit.

3. The publication of the prior information notice shall not constitute an obligation to conduct a procurement procedure, even if the notice was aimed at publishing the procurement procedure. In the latter case, the contracting authority shall publish a notice stating that the procedure will not be launched and shall notify economic operators who submitted their declaration of interest.

4. After the expiry of the period prescribed in paragraph 1, the contracting authority is not obliged to assess tenders or requests to participate, to conclude the negotiation or the competitive dialogue, in procedures consisting of more than one stage it has the right to withdraw the invitation to tender by the expiry of the time limit for submission of tenders, if it provides proof that he is incapable of performing the contract due to unforeseeable and unavoidable reasons, which occurred after the expiry of the period prescribed in paragraph 1, beyond its control or, due to such circumstances there exists the right to withdraw from or to terminate the contract. In such cases, the contracting authority shall declare the procedure unsuccessful.

5. Contrary to the provisions set out in paragraph 4, where the contracting authority informed economic operators in the notice launching the procedure that the procedure may be declared unsuccessful in case of the occurrence of a specific, unavoidable, uncertain future event after the expiry of the period prescribed in paragraph 1, it has the right to declare the procedure unsuccessful (conditional public procurement).

6. A conditional public procurement may also be launched in the event that the contracting authority has submitted, or will submit an application for funding (tender, project proposal, amendment of a funding agreement or notification of a change), irrespective of whether or not the call for proposal of funding has already been published, and the contracting authority considers that the rejection of the application or the award of a lower funding is capable of constituting a circumstance such as to justify declaring the procedure unsuccessful.

7. Article 75 shall apply where the procedure is declared unsuccessful on any other ground and Article 131(9) shall apply to the obligation to conclude the contract after sending the results of the procedure.

8. The candidate shall have the right to withdraw his request to participate until the expiry of the time limit for participation. The tenderer shall have the right to withdraw his tender until the beginning of the validity period.

9. As regards the validity period relevant to the tenderer, the rules set out for each type of procurement procedure shall govern respectively.

### **Tender guarantee**

#### **Article 54**

1. A contracting authority may make subject participation in the procedure to the condition of provision of a tender guarantee to be provided by tenderers by the beginning of the validity period, in the amount defined in the contract notice. Tenderers shall produce proof of having the tender guarantee provided to the contracting authority. The tender guarantee ensures the observance of the validity period of the tender and the contracting authority may not make subject the participation in the participation stage to the condition of provision of a guarantee.

2. The tender guarantee may be provided by having the prescribed sum deposited into the payment account of the contracting authority or by the provision of a guarantee or surety undertaken by a financial institution or an insurance company or by furnishing a promissory note issued pursuant to an insurance contract containing surety, at the choice of the tenderer. The place of payment and the payment account number of the contracting authority, together with the method of evidencing such payment shall be defined in the contract notice or in the invitation to tender.

3. The amount of the tender guarantee shall be established in a way that ensures equal opportunity to all tenderers and set so as to cover any potential cost to be incurred, as foreseeable, by the contracting authority in the event of infringement of the validity period of the tender as described in paragraph 4. Where the contracting authority allows the division of the public procurement into lots, the tender guarantee and the amount thereof shall be set separately for each lot.

4. If the tenderer withdraws its tender during the validity period or the contract is not concluded due to a reason arising within the tenderer's sphere of interest, the tender guarantee shall be forfeit and can be claimed by the contracting authority, except in the case set out in Article 131(9). Furthermore, the tender guarantee shall be forfeit and can be claimed by the contracting authority, where the tender is to be regarded as invalid on the ground that the tenderer, at the request of the contracting authority, does not submit or does not submit properly the documents supporting his self-declaration included in the European Single Procurement Document (ESPD), concerning his tender subjected to the validity period.

5. The tender guarantee shall be refunded

- a) to tenderers within ten days after the withdrawal of the contract notice or the invitation to tender, or after having their tender declared invalid or after the dispatch of the notice on the results of the procedure to the tenderers;
- b) to the successful tenderer or, where it is referred to in the summary, to the tenderer ranked second, within ten days after the conclusion of the contract, unless the contract notice stipulated the tender guarantee to be retained and transferred as additional security which confirms the ensuing contract.

6. If participation in the procedure was made subject to the condition of the provision of a tender guarantee, the contracting authority shall, within ten days, refund double the amount in case of a tender guarantee furnished in cash, or an amount equivalent to the tender guarantee in all other cases

- a) to tenderers in the event of failing to notify tenderers of the results of the procedure during the validity period as set in the invitation to tender or during the extended validity period;
- b) to the successful tenderer and, where it is referred to in the summary, to the tenderer ranked second, in the event of failing to conclude the contract, except in the case set out in Article 131(9).

7. Where, before the end of the validity period, the contracting authority requests tenderers to maintain their tender, in the cases set out in this Act, and any of the tenderers or all tenderers choose not to maintain the tender, the guarantee shall be refunded within ten days after the receipt of the tenderer's statement or the dispatch of the notice on the results of the procedure to the tenderers, without application of the provisions set out in paragraph 6. Tenderers who maintain their tender shall be requested by the contracting authority in the invitation to maintain the tender to offer the same guarantee as the one that was offered before, for the extended validity period of the tender.

### **Modification of the invitation and other procurement documents, furthermore, the tender and the request to participate**

#### **Article 55**

1. Where the contracting authority intends to modify the contents of an invitation (including the extension of the time limits) in relation to which a notice was published, it shall have the right to modify the terms specified in the invitation, by the publication of a notice, until the expiry of the time limit to submit tenders or, in the participation stage of a procedure consisting of more than one stage the time limit for participation. When publishing the notice, the contracting authority shall inform the economic operators who have expressed their interest in the procedure, in particular those who electronically accessed the procurement documents or asked for additional information. The notice shall contain a reference, where appropriate, to the fact that the other procurement documents were also modified.

2. Contrary to the provision set out in paragraph 1, in case of accelerated procedures, the notice concerning the amendment shall only be sent until the expiry of the time limit to submit tenders or, in the participation stage of an accelerated procedure consisting of more than one stage the time limit for participation and, at the same time, the contracting authority shall inform the economic operators who have expressed their interest in the procedure. In such cases, the time limit to submit tenders or the time limit for participation shall be extended accordingly.

3. Where the contracting authority intends to modify the contents of an invitation in relation to which no notice was published or the contents of any other procurement document which was not published, economic operators who were invited to submit a tender or, in case of a direct invitation to participate, those invited to participate, as well as those who have expressed their interest in the procedure shall be informed of the modification directly, at the same time, in the case of an invitation to tender and procurement documents related to the tendering stage until the expiry of the time limit to submit tenders, while in the case of an invitation to participate and procurement documents related exclusively to the participation stage until the expiry of the time limit for participation.

4. The contracting authority shall make the modifications of the procurement documents available directly, electronically, at the same place as the original documents.

5. In the participation stage of the restricted procedure, the elements of the invitation to tender or the procurement documents which have already been included in the invitation to participate may not be modified.

6. The modification of the invitation and the other procurement documents shall not have the effect of modifying the subject-matter or the terms of the contract to such an extent that the knowledge of the new conditions could have substantially influenced the decision of the economic operators concerned as to whether they

can submit a request to participate or a tender in the procurement procedure or, in light of the change, the suitability criteria should have been established by the contracting authority in such a way that more economic operators could have participated in the procedure.

7. The tenderer and the candidate shall have the right to modify its tender or request to participate by submitting a new tender or request to participate, until the expiry of the time limit to submit tenders or time limit for participation. In such cases, the tender or request to participate which was submitted first should be considered as withdrawn.

## *CHAPTER VIII*

### *ADDITIONAL INFORMATION AND ON-THE-SITE INSPECTION*

#### **Article 56**

1. In order to submit an appropriate tender or request to participate, any economic operator being a potential candidate or a potential tenderer in a given procurement procedure may ask in writing from the contracting authority or the authority designated by it additional information concerning the contents of the procurement documents.

2. The additional information shall be given within reasonable time after the reception of the request, but not later than six days, in the case of accelerated procedures not later than four days, in negotiated procedures without the publication of a contract notice not later than three days before the expiry of the time limit for submission of tenders, and in the participation stage of the procurement procedures not later than four days before the expiry of the time limit for submission of requests to participate.

3. If the request for additional information has been submitted later than the fourth day, in an accelerated procedure or a negotiated procedure without the publication of a contract notice the third day preceding the time limit for the sending of the answer set out in paragraph 2, the contracting authority is not obliged to provide additional information.

4. If the contracting authority cannot provide the additional information within the time limit set out in paragraph 2, or it modifies the procurement documents at the time of the provision of additional information, Article 52(4) shall apply.

5. The provision of additional information shall not prejudice the equal opportunities of economic operators. The full contents of the information shall be made available or sent to all the economic operators which expressed their interest in the procedure to the contracting authority, in the participation stage of procedures consisting of more than one stage and in negotiated procedures without the publication of a contract notice all the economic operators invited directly to submit a tender or request to participate. In the course of the provision of additional information the contracting authority does not disclose which of the economic operators asked for the information, and which of the economic operators received the answer in addition to the economic operator who asked for the information.

6. Additional information may also be provided in the form of consultation. In that case, the time and place of the consultation shall be indicated in the notice launching the procedure. Minutes shall be taken on the consultation to be forwarded or made available by electronic means within five days thereof to the economic operators defined in paragraph 5.

7. Paragraph 6 shall be applicable also to additional information provided during on-the-site inspections and site visits.

*CHAPTER IX*  
*PROCUREMENT DOCUMENTS*

**Article 57**

1. The contracting authority shall make available procurement documents at the time of the publication or dispatch of the notice launching the procedure, except for the additional information provided in the course of the procedure and the specific cases provided for in relation to each type of procedures. In order to facilitate the preparation of suitable tenders and requests to participate, besides the documents specified in this Act, the contracting authority shall be bound to make available the following procurement documents supplementing the contract notice, except in the case of negotiated procedures without publication:

- a) the draft contract, except for the cases in which a negotiated procedure or a competitive dialogue is used, where the contracting authority is entitled to specify only the contract terms and conditions known by him, instead of a draft-contract (draft-contract and contract terms and conditions hereinafter referred to as: 'draft-contract').
- b) provision of information necessary for the tenderers and the candidates in relation to the preparation of the tender and the request to participate, the list of the certificates, declarations to be submitted as part of the tender and the request to participate, as well as the standard form of the ESPD. The documentation may also contain samples of certificates, declarations proposed for the tenderers.

2. At least one tenderer or candidate or subcontractor designated in the tender or the request to participate per each tender or request to participate shall have electronic access to the procurement documents, by the expiry of the time limit for the submission of tenders or in the case of a procedure consisting of more than one stage the time limit for participation.

*CHAPTER X*  
*REQUIREMENTS REGARDING THE SUBJECT-MATTER OF THE PUBLIC PROCUREMENT*

**Technical specifications**

**Article 58**

1. The contracting authority shall state the subject-matter and quantity of the public procurement, by indicating an optional part where appropriate, in the invitation launching the procedure and, in the case of procedures launched with a prior information notice, the prior information notice.

2. The contracting authority shall lay down the technical specifications concerning the subject-matter of the public procurement in the notice launching the procedure or in the other procurement documents. Technical specifications are the totality of the technical prescriptions defining the characteristics required by the subject-matter of a public contract, which permits the subject-matter of a public procurement to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives [Article 76(7)].

3. Technical specifications shall ensure equal access of all economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

4. Detailed rules for the determination and the contents of technical specifications are stipulated by a separate act of legislation.

### **Requirement of labels and certification**

#### **Article 59**

1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics or intend to take those characteristics into account in the evaluation, they may, in the technical specifications, the contract performance conditions or the award criteria, require a specific label, provided that all of the following conditions are fulfilled:

- a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the subject-matter of the contract;
- b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations may participate;
- d) the labels are accessible to all interested parties;
- e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

2. Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate those label requirements which shall be met or are taken into account in the evaluation.

3. Contracting authorities shall accept as proof of compliance all labels that confirm that the works, supplies or services meet equivalent label requirements. Where an economic operator demonstrates that he had no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the time limit for the submission of tenders, for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, in particular a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or, in the case set out in paragraph 2, the specific requirements indicated by the contracting authority.

4. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

#### **Article 60**

1. Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions. Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by contracting authorities.

2. For the purposes of paragraph 1, a conformity assessment body shall be a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.

3. Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer, where the economic operator concerned demonstrates that he had no possibility of obtaining the certificates or test reports drawn up by the body indicated by the contracting authority – or obtaining an equivalent certificate - within the relevant time limit for submission, provided that the lack of access is not attributable to the economic operator concerned. In such cases, the economic operator concerned shall prove that the works, supplies or services to be provided by it meet the requirements or criteria set out by the contracting authority.

### **Variant offers and division of the contract into lots**

#### **Article 61**

1. The contracting authority shall indicate in the notice launching the procedure whether or not the submission of variant offers is permitted or prescribed. When permitting or prescribing the submission of variant offers, the contracting authority shall indicate in the contract notice whether a variant offer may only be submitted in the case of a tender, which may not be regarded as a variant.

2. The contracting authority shall state in the procurement documents the minimum requirements to be observed by the variant offers and any specific requirements therefor. There shall be no requirement for the variant offers which is not linked to the subject-matter or the contract [Article 76(7)]. The award criteria shall be set in such a way as to make it possible for the contracting authority to apply them to the variants and also to the tenders which are not regarded as variants.

3. The fact that, in the case of the acceptance of a variant offer, the subject-matter of the public procurement would qualify as a public service contract instead of a public supply contract, or as a public supply contract instead of a public service contract, shall not affect the suitability of any variant offer.

4. The contracting authority shall verify whether the nature of the subject-matter of the procurement and the other circumstances linked to the contract allow division into lots. If the contracting authority does not allow the division of the contract into lots, it shall give the justification for doing so in the notice launching the procedure.

5. In the case of division into lots, the notice launching the procedure shall stipulate which elements of the subject-matter of the public procurement may be divided into lots for the purpose of submission of tenders or requests to participate.

6. Contracting authorities shall indicate in the notice launching the procedure, whether tenders (requests to participate) may be submitted for one, several or all of the lots. Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the notice launching the procedure. In this case contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number. Where a given lot shall not be awarded to a tenderer, the tenderer whose offer was ranked second shall be the winning tenderer.

### **CHAPTER XI**



## *REQUIREMENTS RELATED TO TENDERERS AND CANDIDATES*

### **Grounds for exclusion**

#### **Article 62**

1. The following economic operators are excluded from participating in the procedure as a tenderer, candidate, subcontractor or an organization participating in the certification of suitability:

- a) who or which committed any of the following crimes and this fact has been established by final court ruling over the last five years, as long as he is not relieved from the detrimental consequences attached to prior conviction:
  - (aa) participation in a criminal organisation, including crimes committed by participating in a criminal organisation, under the Act IV of 1978 on the Criminal Code (hereinafter referred to as the 'Act IV of 1978') and the Act C of 2012 on the Criminal Code (hereinafter referred to as the 'Criminal Code');
  - (ab) active corruption, abuse of a function, indirect bribery, bribery in international relations, indirect bribery in international relations, misappropriation, defalcation and the crimes of corruption specified in Chapter XXII of the Criminal Code, as well as the misappropriation and defalcation under the Criminal Code;
  - (ac) budget fraud under the Act IV of 1978, infringement of the financial interests of the European Communities, budget fraud under the Criminal Code;
  - (ad) terrorist offences under the Act IV of 1978 and the Criminal Code, and the incitement, aiding and abetting or attempt connected thereto;
  - (ae) money laundering under the Act IV of 1978 and the Criminal Code, as well as terrorist financing under the Criminal Code;
  - (af) trafficking in human beings under the Act IV of 1978 and the Criminal Code, as well as forced labour under the Criminal Code;
  - (ag) agreement in restraint of competition in public procurement and concession procedures under the Act IV of 1978 and the Criminal Code;
  - (ah) a crime which is similar to those listed in points (a)-(g), according to personal law of the economic operator;
- b) who or which is in breach of its obligations relating to the payment of their tax, customs duty or social security contribution for more than a year, unless they have paid the debt, including, where applicable, any interest accrued or fines by the time of the submission of the tender or the request to participate, or they were granted a permission for deferred payment of the debt;
- c) who or which is subject of winding-up proceedings, who were subject to the publication of a decree in bankruptcy, the liquidation proceedings launched against whom were legally imposed, or against whom a similar process is in progress according to personal law, or who are in any analogous situation according to personal law;
- d) who or which have suspended business activities or whose business activities have been suspended;
- e) who or which have been convicted by final court ruling of an offence related to their business activities or professional conduct, over the past three years;
- f) whose activity was restricted by final court ruling under Article 5(2)(b) - or (c) or (g) as appropriate in the given procurement procedure - of the Act CIV of 2001 on Measures Applicable to Legal Entities in Criminal Law, during the period of prohibition; or the tenderer's activities have been restricted by final court ruling for a similar reason and in a similar manner by another court;
- g) who or which have been prohibited from participating in procurement procedures by final decision based on Article 165(2)(f), until the end of the period established by the final decision of the Public Procurement Arbitration Board or, in case of review of the decision of the Public Procurement Arbitration Board, by final court ruling;
- h) who or which supplied false data or made false declarations in an earlier procurement procedure or concession award procedure and was therefore excluded from that procedure and no judicial remedy was provided for the prohibition, for a period of three years after completion of the procurement procedure in question;

- i) who or which, in the course of the fulfilment of the obligation concerning data provision stipulated in the given procedure, provides incorrect data (hereinafter referred to as 'false data') or makes a declaration which contains false data or is unable to supply the information required for the fulfilment of the selection criteria, the verification of the absence of the grounds for exclusion or the criteria specified in Article 82(5), despite the declaration he submitted as a preliminary certification in the procurement procedure, if
  - (ia) the false data or declaration substantially influences the decision taken by the contracting authority on the exclusion, the suitability, compliance of the tender with the technical specifications or the evaluation of tenders and
  - (ib) the economic operator has intentionally supplied false data, made false declaration or acting with due care could have clearly recognised that the data supplied by him are incorrect and the declaration made by him does not comply with the contents of the certifications;
- j) in his case, the contracting authority can prove that he has undertaken to unduly influence the decision making process of the contracting authority in the given procedure or attempted to obtain any confidential information that may confer upon it undue advantages in the procurement procedure or was excluded from an earlier procurement procedure or concession award procedure for the same reason and no judicial remedy was provided for the exclusion, for a period of three years after completion of the procurement procedure in question;
- k) who or which are subject to any of the following circumstances:
  - (ka) which have their fiscal domicile in a country outside the European Union, the European Economic Area or the Organisation for Economic Cooperation and Development or in a non WTO/GPA country or outside the overseas countries and territories specified in Article 198 of the TFEU or in a country which has not signed any agreement with Hungary on avoiding double taxation or which has not signed a bilateral agreement with the European Union concerning public procurement,
  - (kb) companies which are not listed on any official stock exchange, which cannot identify their actual owner pursuant to Article 3(ra)-(rb) or (rc)-(rd) of the Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing or
  - (kc) economic operators in which any legal person or any entity - having legal capacity according to personal law - who is subject to the conditions set out in point (kb) owns directly or indirectly a share exceeding 25% or has the right to vote;
- l) where a third-country national, whose employment is subject to an authorisation in Hungary, committed an infringement of the law established by the employment authority, on the basis of Article 7/A of the Act LXXV of 1996 on Labour Inspection, and was ordered to pay a given amount into the central budget or was ordered by the immigration authority to pay a fine for the protection of public policy pursuant to the Act on the Entry and Stay of Third-Country Nationals;
- m) in his case, the only way to remedy the distortion of competition arising from any conflict of interest under Article 25 or his prior involvement in the preparation of the procurement procedure is to exclude that economic operator from the given procedure;
- n) who or which have committed an infringement of law established in a final and enforceable decision of the Hungarian Competition Authority, delivered within the previous three years or, in the event of a review of the decision of the Hungarian Competition Authority, by final court ruling according to Article 11 of the CA or Article 101 of the TFEU, and was ordered to pay a fine; or if such infringement of law committed by the tenderer was established by another competition authority or court within the previous three years and at the same time the tenderer was ordered to pay a fine;
- o) in his case, the contracting authority can prove that the tenderer has committed an infringement of law under Article 11 of the CA or Article 101 of the TFEU in the given procurement procedure, except where the economic operator exposes the conduct which is liable to infringe Article 11 of the CA or Article 101 of the TFEU to the Hungarian Competition Authority before submitting the tender, in the case of a negotiated procedure or a competitive dialogue the final tender, and the Hungarian Competition Authority establishes in its decision under Article 78/C(2) of the CA that the conditions for non-imposition of the fine, specified in Article 78/A(2) of the CA, are satisfied.
- p) a final judicial decision, a final administrative decision (in the case of a review of the latter, a final judicial decision) delivered within the previous three years established that he had not used the advance specified in Article 135(7)-(9) in a manner consistent with the contract.

(2) Furthermore, the following economic operators are also excluded from participating in the procedure as a tenderer, candidate, subcontractor or an organization participating in the certification of suitability:

- a) its executive officer or a member of its supervisory board, its manager or, in the case of a business organization its sole member or a member, according to personal law, of its similar management or supervisory body or a person vested according to personal law with the same powers of decision as the ones mentioned above is a person who was convicted by a final court judgement of a crime specified in paragraph 1 (a) over the last five years, and he has not been relieved from the detrimental consequences attached to such prior conviction or
- b) a person who was convicted by a final court judgement of a crime specified in paragraph 1 (a) over the last five years - or, where such a period is shorter, within the period needed for the person convicted to be relieved from the detrimental consequences attached to the conviction for the given crime - was, in the economic operator concerned, the executive officer or a member of the supervisory board, the manager or, in the case of a business organization, the sole member or a member, according to personal law, of the similar management or supervisory body or a person vested according to personal law with the same powers of decision as the ones mentioned above, when committing the crime in question.

3. With regard to economic operators with a seat in Hungary the tax payment liability referred to in paragraph 1 (b) shall mean the tax payment liability indicated in the records of the national tax authority and the national customs authority.

4. Paragraph 1(c) shall not apply, where the contracting authority conducts a negotiated procedure without prior publication on the basis of Article 98(4)(d).

5. In the case of tenderers established in another Member State of the European Union and natural persons who are foreign nationals and are subject to the criminal jurisdiction of another country, criminal acts similar to those referred to in paragraph 1 (ah) shall mean

- a) participation in a criminal organisation shall mean the offences relating to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime,
- b) crimes of active corruption, passive corruption, active corruption of public officials, passive corruption of public officials, active corruption in court or regulatory proceedings, passive corruption in court or regulatory proceedings shall mean bribery and corruption as defined in Article 3 of the Convention established by the Council Act of 26 May 1997 drawing up, on the basis of Article K.3(2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union,
- c) crimes of budget fraud shall mean fraud as defined in Article 1 of the Convention on the protection of the European Communities' financial interests,
- d) terrorist offences shall mean terrorist offences or offences relating to a terrorist group as defined in Article 1 and 3 of Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), furthermore, inciting, aiding or abetting, and attempting an offence as defined in Article 4 of that Framework Decision,
- e) crimes of money laundering or terrorist financing shall mean money laundering and terrorist financing as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,
- f) trafficking in human beings or forced labour shall mean child labour and any other form of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

5a. Paragraph 1 (n) shall not be applied in procurement procedures, if for the opening up to competition the Government has granted exemption from its application upon the initiative of the contracting authority in the single government decision issued based on the proposal of the minister responsible for public procurement. The

contracting authority shall apply for such exemption exclusively prior to launching the procurement procedure, if significant part of the economic operators of the market affected by the procurement procedure are subject to the ground for exclusion under paragraph 1 (n) herein, not including the economic operators, which under self-cleaning pursuant to Article 64 shall not be excluded from the procurement procedure. The contracting authority shall specify in the notice launching the procedure that considering the decision of the Government the ground for exclusion pursuant to paragraph 1 (n) is not applied in the procurement procedure<sup>23</sup>.

6. In the notice launching the procedure, the contracting authority shall refer to the grounds for exclusion set out in paragraph 1 and 2.

7. The contracting authority shall inform the Public Procurement Authority of the exclusion specified in paragraph 1(i) and (j) and of the date of the exclusion, indicating the name and address (seat, residence) of the involved tenderer, candidate, subcontractor, organisation participating in the certification of suitability, as well as the subject-matter and the reference number of the procedure, the date of the exclusion and the day on which the excluded economic operator became aware of his exclusion.

### **Article 63**

1. The contracting authority may stipulate in the notice launching the procedure that the following economic operators are excluded from participating in the procedure as a tenderer, candidate, subcontractor, and may not contribute to the certification of suitability:

- a) a final judicial decision, a final administrative decision or, in the case of a review of the latter, a final judicial decision delivered within the previous three years established that he had failed to comply with the obligations in the fields of environmental, social and labour law specified in Article 73(4);
- b) a final judicial decision, a final administrative decision or, in the case of a review of the latter, a final judicial decision delivered within the previous three years established that he had committed, as defined by legislation, a serious breach of professional duty, except for the case specified in point (c), or an act seriously violating professional ethics established in a procedure for breach of the code of ethics conducted by a professional organisation specified in a separate act of legislation;
- c) who have been, over the past three years, in serious breach of their contractual obligations undertaken in a previous procurement procedure or concession award procedure and the breach of contract resulted in the termination or rescission of the aforementioned previous contract, a compensation claim or any other penalty applicable on the basis of the contract, furthermore, where the subsequent impossibility was partly or fully attributable to the wrongful conduct of the party entering into the contract as the successful tenderer;
- d) who, in relation to a contract concluded as a result of an earlier procurement procedure or concession award procedure, failed to meet, towards their subcontractor, more than 10% of their payment obligation originating from a final or partial invoice and the breach of contract their payment obligation originating from a final or partial invoice and the breach of contract was established by final court ruling pronounced within the previous three years, although the party entering into the contract as contracting authority paid them in due time.

2. The contracting authority shall be bound to identify in the notice launching the procedure the grounds for exclusion applied according to paragraph 1.

3. The period of time specified in paragraph 1, as well as Article 62(a), (b), (e), (h), (j), (l), (n) and (p), shall always be calculated from the date of verifying the non-existence of the ground for exclusion. The contracting authority shall exclude an economic operator where it turns out that the economic operator is subject to any of

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<sup>23</sup> This amendment entered into force on 15 June 2016.

the grounds for exclusion to be applied in the procedure. The non-existence of the grounds for exclusion shall be verified by the contracting authority pursuant to the provisions set out in this Act and in a separate act of legislation.

### **Self-cleaning**

#### **Article 64**

1. Despite the existence of any ground for exclusion other than those referred to in Article 62(1)(b) and (f), a tenderer, candidate, subcontractor, or an organization contributing to the certification of suitability shall not be excluded from the procurement procedure, if the final decision specified in Article 188(4) of the Public Procurement Authority or, in the case of a review thereof, a final judicial decision specified in Article 188(5) established that measures taken, prior to the submission of the tender or the request to participate, by the economic operator concerned are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

2. If the final decision specified in Article 188(4) of the Public Procurement Authority or, in the case of a review thereof, a final judicial decision specified in Article 188(5) established that the economic operator subject to the given ground for exclusion is reliable, the contracting authority shall accept it without any discretion. The final decision shall be submitted by the economic operator at the same time as the European Single Procurement Document.

### **Suitability criteria**

#### **Article 65**

1. The contracting authority may make submission of a tender subject to fulfilment of the suitability criteria established by it, in relation to

- a) economic and financial standing;
- b) technical and professional ability;
- c) the enrollment in the register of the country in which the economic operator is established or the permit, licence or membership in a professional organisation or chamber prescribed in his country of establishment, where this is necessary for the performance of the contract.

2. In exceptional cases, which shall be duly justified in the notice launching the procedure, the contracting authority may choose not to prescribe any suitability criteria related to technical and professional ability, but only if specific features of the public procurement do not require the prescription of such suitability criteria for the purposes of proper performance. If, on the legal basis of negotiated procedures without prior publication, only a specific economic operator may be invited to submit a tender, it is not necessary to give a specific justification thereof. The suitability criteria and the documents to be submitted for the verification of compliance therewith shall be accurately indicated in the notice launching the procedure. In doing so, the contracting authority shall specify those situations which rule out suitability of the tenderer or the candidate for the performance of the contract in case of their presence or absence or the level of their insufficiency which rule out such suitability.

3. Without prejudice to the principles of equal opportunity, equal treatment and fair competition, the contracting authority shall confine the establishment of suitability criteria to the subject-matter of the contract and he may prescribe such criteria only to the extent actually necessary for the performance of the contract, also taking into consideration the estimated contract value.

4. The detailed rules pertaining to the ways of certification of suitability and the establishment of suitability criteria shall be set out in a separate act of legislation.

5. For the purposes of reference works, the specification confined to the criteria actually necessary according to paragraph 3 shall mean that the contracting authority may require certification of former supply, works or services up to 75 % of the value, calculated without applying Article 19(3), of the given public contract or, in the case of quantification, up to 75 % of the quantity or scope of the given public contract and the subject-matter of those supplies, works or services is technically equivalent to the given public contract. As regards turnover required from tenderers, net of VAT, contracting authorities shall establish the minimum suitability requirement in such a way as not to be disproportionate to the estimated value, calculated without applying Article 19(3), of the public contract. The contracting authority shall provide for a minimum requirement for turnover data to enable an economic operator to be considered as suitable, if, in the business year or years examined by the contracting authority, he had a total turnover that reached the value, calculated without applying Article 19(3), of the given public contract.

6. The specified suitability criteria may also be met jointly by joint tenderers or joint candidates. For the purposes of the possibility of joint compliance, criteria which apparently concern each economic operator individually, shall only be met by one of them.

7. Tenderers or candidates may also meet suitability criteria by relying on the capacity of any other entity or person, regardless of the legal nature of their relation. In such cases, the tender or, in a procedure consisting of more than one stage the request to participate shall identify that entity and, indicating the related point of the notice launching the procedure, the suitability criterion or criteria for the certification of which the tenderer or candidate relies or relies also on the resources of that entity. Except in the case provided for in paragraph 8, the document containing the commitment which is undertaken in a contract or preliminary contract by the entity providing resources and proves that the resources needed for the performance of the contract will be available during the period of implementation of the contract, shall be annexed to the tender or the request to participate.

8. Under the provisions set out in Article 6:419 of the Civil Code, the entity whose data are used by the tenderer or the candidate for the certification of economic and financial standing shall be liable in the same way as a guarantor for compensating the damage suffered by the contracting authority as a result of nonperformance or non-conformity by the tenderer.

9. In order to certify the fulfilment of criteria related to the availability of skilled people, their educational and professional qualifications, as well as the reference works which prove the relevant professional experience as set out in a separate act of legislation, economic operators may only rely on the capacities of other entities where the latter will perform the works, services or supplies for which these capacities are required. The economic operator may only rely on the capacities of another entity in order to certify the fulfilment of the criteria laid down in paragraph 1(c), where the given entity will perform the task in relation to which it is required to be included in a relevant register, to hold membership in a professional organisation or a permit. The commitment to be annexed according to paragraph 7 shall provide proof thereof.

10. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, in the case of joint tenders, by one of the joint tenderers. In such cases, in relation to those tasks, for the purposes of certification of suitability according to paragraph 9 tenderers or candidates may not rely on the capacity of another entity and, contrary to the provision set out in paragraph 7, those tasks may not be delegated to a subcontractor in the course of the execution of the contract.

11. In order to certify his suitability, the economic operator may not rely on data which could be used by him on the basis of succession, without involving the predecessor according to paragraph 7, where the predecessor economic operator is subject to a ground for exclusion applicable in the procedure or, in case of termination of the predecessor, the latter would have been subject to it in the absence of its termination. In such cases, the economic operator may avail himself of the provision set out in Article 64 and shall have the right to rely on data of the predecessor for the certification of suitability, if he demonstrates his reliability in relation to the ground for exclusion that has previously occurred.

## *CHAPTER XII*

### *TENDERS AND REQUESTS TO PARTICIPATE*

#### **The drawing up of tenders and requests to participate**

##### **Article 66**

1. The tender and the request to participate shall be drawn up and submitted by the economic operator in compliance with the requirements for the contents and form set out in the procurement documents.
2. The tender shall contain in particular the explicit statement of the tenderer concerning the conditions set out in the contract notice or invitation to tender, the conclusion and performance of the contract and the requested consideration.
3. No offer may be made in the request to participate.
4. In the tender or, in the case of a procedure consisting of more than one stage in the request to participate, in addition to the submission of other required documents, the tenderer or the candidate shall make a statement whether it qualifies as a micro, small or medium-sized enterprise according to the Act on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises.
5. The tender and the request to participate shall contain a reading sheet which indicates the information specified in Article 68(4) in the case of tenders or the information defined in Article 68(5) in the case of requests to participate.
6. The contracting authority may prescribe in the notice launching the procurement procedure that the following information shall be indicated in the tender or, in the case of a procedure consisting of more than one stage in the request to participate:
  - a) those part (parts) of the public procurement for the performance of which the tenderer (candidate) intends to employ a subcontractor,
  - b) the subcontractors intended to be employed in those parts, if they are already known at the time of the submission of the tender or the request to participate.

##### **Article 67**

1. In the tender or, in the case of a procedure consisting of more than one stage, in the request to participate, the economic operator shall submit his self-declaration included in the European Single Procurement Document (ESPD), concerning the non-existence of the grounds for exclusion, compliance with suitability criteria and, where appropriate, with the objective criteria specified in Article 82(5).
2. The document specified in paragraph 1 shall consist of a formal statement made by the economic operator that he is not subject to the grounds for exclusion and fulfils the relevant suitability criteria, furthermore, he shall provide the information required in the procedure, including data concerning the fulfilment of the suitability criteria. The contracting authority shall indicate in the procurement documents the level of details of information expected in the statement made in the ESPD by the economic operator concerning the fulfilment of the suitability criteria. The statement shall identify the authority empowered to issue the certificate to be

submitted according to Article 69(4), it shall include the information necessary for accessing the database pursuant to Article 69(11) and, where appropriate, a declaration of consent.

3. Where the tenderer or the candidate fulfils the suitability criteria by relying on the capacities of another entity, the statement specified in paragraph 1 shall be submitted in the tender or, in a procedure consisting of more than one stage, the request to participate on behalf of the entity providing resources and the entity in question shall certify by the same means as the ones prescribed for the tenderer or the candidate that it is able to fulfil the suitability criteria set, but only as regards the suitability criteria.

4. Tenderers or candidates shall make a statement in their tender or, in the case of a procedure consisting of more than one stage, request to participate that they do not employ for the performance of the contract any subcontractor subject to the grounds for exclusion specified in Article 62 and, if it was prescribed in the given procurement procedure, the grounds for exclusion specified in Article 63. Even in the event that the contracting authority hasn't prescribed the designation of the subcontractors already known to tenderers, the statement shall be submitted.

### **Submission and opening of tenders and requests to participate**

#### **Article 68**

1. The documents containing the tenders or requests to participate shall be opened at the time of the expiry of the time-limit for the submission of tenders or the time limit to participate.

2. In the case of submission of tenders and requests to participate by non-electronic means, tenders and requests to participate shall be submitted in one original copy, in writing, in a sealed envelope, by hand delivery or mail, to the address indicated in the contract notice, in the invitation to tender or in the invitation to participate, by the expiry of the time limit to submit tenders or the time limit to participate. The contracting authority may prescribe the submission of electronic copies.

3. In the case of submission of tenders and requests to participate by non-electronic means, the opening procedure may be attended only by the contracting authority, the tenderers (candidates), and persons invited by them and – in case of contracting authorities receiving subsidy for the public procurement – the representatives of the organisations and persons specified in a separate act of legislation. Those persons shall have access to the reading sheet at the opening procedure.

4. Upon opening the tenders, the names and addresses (seat, residence) of the tenderers, as well as the main quantifiable particulars to be assessed according to the award criteria, shall be announced. Before the opening procedure of the tenders is started, the amount of the funds available for the performance of the contract may be disclosed.

5. Upon opening the requests to participate, the names and addresses (seat, residence) of the candidates shall be announced.

6. The contracting authority shall draw up minutes of the opening of the tenders and requests to participate as well as of the provision of the data specified in paragraph 4-5 and shall send those minutes to all tenderers and candidates within five days from the day of opening. The submission of tenders or requests to participate received after the expiry of the deadline shall also be recorded by drawing up minutes and those minutes shall be sent to all tenderers and candidates, including the belated ones.



## *CHAPTER XIII*

### *THE EVALUATION OF TENDERS AND REQUESTS TO PARTICIPATE*

#### **The evaluation process**

##### **Article 69**

1. In the course of the evaluation of tenders and requests to participate, the contracting authority shall examine whether the tenders and requests to participate are in compliance with the conditions set in the procurement documents and by law.

2. The contracting authority shall determine which tenders or requests to participate are invalid and whether there are any economic operators to be disqualified from the procedure. In the course of the award process, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of a self-declaration, for the purpose of the preliminary verification of the suitability criteria, the non-existence of the grounds for exclusion and the fulfilment of the criteria laid down in Article 82(5), furthermore, assess conformity of the request to participate and tender in all other aspects, perform the acts of evaluation according to Articles 71-72, as necessary. Together with the self-declaration included in the ESPD, the contracting authority shall verify - in case of procedures consisting of more than one stage in the participation stage - data in the databases which are referred to in the self-declaration and are accessible according to paragraph 11.

3. Tenders which are considered appropriate according to paragraph 2, shall be assessed on the basis of the award criteria.

4. Before taking the decision on the result of the procedure, the contracting authority shall invite the tenderer submitting the most favourable tender on the basis of the award criteria, by setting a time limit of five days, to submit the certificates specified in the notice launching the procedure concerning the non-existence of the grounds for exclusion, the suitability criteria and, where appropriate, the objective criteria according to Article 82(5). The organization on whose capacities the tenderer relies shall only submit the relevant certificates in relation to the suitability criteria.

5. Where the tenderer specified in Article 4 fails to submit or fails to submit properly, even after the supply of missing information or the provision of information, the relevant certificates (including those cases in which the certificate does not confirm the contents of the self-declaration included in the ESPD or is inconsistent therewith), the contracting authority, without taking account of that tenderer's tender, invites the tenderer submitting the most favourable tender on the basis of the award criteria to submit the certificates according to paragraph 4. The winning tenderer indicated in the decision closing the procedure shall be a tenderer who has fulfilled its obligation of certification prescribed according to this Act and the provisions set out in a separate act of legislation in relation to the suitability criteria, the non-existence of the grounds for exclusion and the criteria specified in Article 82(5).

6. Before taking the decision closing the procedure, the contracting authority may decide that not only the most favourable tenderer but also a predefined number of tenderers ranked behind the most favourable tenderer will be invited to submit the relevant certificates pursuant to paragraph 4. The second most favourable tenderer may only be designated in the summary, if he was also invited to submit the relevant certificates before the decision closing the procedure was taken by the contracting authority. The contracting authority may only make use of the option provided for in this paragraph, where, taking the evaluation method into consideration, a tender may be disregarded without affecting the ranking of the other tenderers.

7. Where, in the course of the evaluation of requests to participate or tenders, the contracting authority has reasonable doubts about the truthfulness of the self-declaration of any economic operator, it can request at any time that the tenderer or candidate concerned submit the certificates specified in paragraph 4 within five business days.

8. Where the contracting authority makes use of the possibility of setting the range of economic operators to be invited to submit a tender in the participation stage of a procedure consisting of more than one stage, and the number of the requests to participate submitted in the given procedure exceeds the range, the contracting authority shall require the submission of the certificates specified in paragraph 4 in the course of the evaluation of the requests to participate and the results of the participation stage shall be established in the light of those certificates.

9. The obligation of ex-post certification of tenderers or candidates is aimed at providing evidence of compliance with the values taken into account by the contracting authority on the basis of the ESPD in relation to the suitability criteria, the non-existence of the grounds for exclusion and the criteria specified in Article 82(5). Where the values taken into account for the purposes of the suitability criteria, the non-existence of the grounds for exclusion and the criteria specified in Article 82(5) are confirmed, the tender or request to participate shall be deemed valid, even if the submitted certificates deviate from the data indicated in the self-declaration made at an earlier stage. However, the data confirmed by the subsequent submission of certificates cannot change the ranking of candidates to be invited to tender, even if those data exceed the values indicated in the previous self-declaration.

10. The Government determines in a decree the ways of certification that the contracting authority shall accept and the documents that the contracting authority may require for the assessment of the suitability and the verification of the non-existence of the grounds for exclusion.

11. Economic operators shall not be required to submit certificates where and in so far as the contracting authority has the possibility of obtaining the certificates or other relevant information directly by accessing an electronic database in any Member State, which is available free of charge and is indicated by the given Member State in e-Certis as a database suitable for certification. If a register is in a language other than Hungarian the contracting authority may request that the Hungarian translation of the relevant certificate or information be submitted. In Hungary, the official registers and the registers referred to expressly in a separate legislation shall be considered to be suitable for replacing the submission of certificates. The Public Procurement Authority shall make available in e-Certis a complete list of Hungarian databases.

12. As regards the suitability criteria, the economic and professional chamber, in the scope of the activity of its members, may create the list of approved tenderers, regulated in detail by a separate act of legislation. The list of approved tenderers shall be registered with the Public Procurement Authority; the Public Procurement Authority shall verify that the conditions for being included in the list meet the requirements set out in this Act and in a separate act of legislation.

13. The contracting authority shall have the right to request information from other public or local bodies, public authorities or economic operators for the verification of the contents of certificates, statements submitted in the tender or in the request to participate. The entity addressed shall be obliged to provide the contracting authority with the information within three business days.

14. For the purposes of the verification of non-existence of the grounds for exclusion and the assessment of suitability, the contracting authority shall have the right to manage data concerning identity, as well as skills, qualifications, professional experience, current membership in an organisation or public body and a business organisation of the persons designated in the tender or the request to participate. For the purposes of the verification of non-existence of the grounds for exclusion, a certificate attesting clean criminal record may also be requested pursuant to the rules for certification set out in a separate act of legislation. The declaration, specified in a separate act of legislation, to be submitted for the purposes of the verification of non-existence of the grounds for exclusion may also be a declaration made for an economic or professional chamber by its member.

## **Article 70**

1. The contracting authority shall evaluate tenders as quickly as possible. Notwithstanding Article 69, the contracting authority can decide to declare the procedure unsuccessful without evaluating and awarding the tenders, if all final price tenders exceed the amount of the financial cover, to be certified according to paragraph 75(4), available to the contracting authority in the given procedure. If the contracting authority does not evaluate tenders, it cannot exercise the option to launch a negotiated procedure without prior publication of a contract notice under Article 98(2)(a), taking into account the unsuccessful procedure.

2. If the contracting authority cannot complete the evaluation in good time to allow him to notify tenderers of the decision closing the procedure during the validity period of tenders, the contracting authority may request tenderers to maintain their tenders until a date set, but the extension of the validity period of tenders may not exceed sixty days from the original date of expiry of the validity period. If the tenderer does not make any statement within the time limit set by the contracting authority, it shall be considered that the tenderer will maintain its tender until the date set by the contracting authority. If any of the tenderers refuses to maintain his tender, after the expiry of the original validity period of tenders his tender may not be taken into consideration in the course of the procedure, for the purposes of the evaluation.

3. The contracting authority shall be obliged to evaluate the requests to participate as quickly as possible. If the contracting authority cannot complete the evaluation by the date of sending of the invitation to tender, indicated in the request to participate, all candidates shall be notified at the same time of the new date of sending the invitation to tender, which may not be later than sixty days from the original date thereof, and the candidates shall be notified of the results of the participation stage at an earlier date.

## **Request for the supply of missing information, for the provision of information and correction of calculation errors**

## **Article 71**

1. The contracting authority shall ensure the possibility of supplying missing information under the same conditions for all tenderers and candidates and it shall request information from the tenderer or candidate for the purpose of clarifying the content of any ambiguous statement, declaration, certificate included in the tender or request to participate.

2. The request for supply of missing information or provision of information shall be sent by the contracting authority directly to the tenderer or candidate, informing about this fact at the same time all the other tenderers or candidates and setting the time limit and, in the case of request for the supply of missing information, specifying the information to be supplied.

3. The supply of missing information shall be restricted to align the tender or the request to participate with the requirements set out in the procurement documents or the relevant legislation. In the course of the supply of missing information the documents, including the documents to be submitted according to Article 69(4)-(5), included in the tender or the request to participate may also be modified or complemented.

4. Where the contracting authority finds that, for the purposes of the certification of suitability, the tenderer or the candidate relies on the capacities of an economic operator or nominated a subcontractor which is subject to a ground for exclusion according to Article 62(1)(a)-(h), (k)-(n), (p) and, on the basis of his conduct in a previous procedure, (j) or, if required by the contracting authority, Article 63, in addition to the exclusion of the economic operator concerned, the contracting authority shall request, in the framework of supply of missing information, that the tenderer or candidate nominate, if necessary, another economic operator to replace the excluded one.

5. Throughout the whole time available – specified in the request or notification according to paragraph 2 – for any tenderer or candidate in order to supply missing information, the tenderer or candidate has the right to supply any missing information in relation to which he has not been requested by the contracting authority to supply missing information.

6. If the contracting authority perceives any missing information not mentioned in the previous request(s) for missing information, it shall be obliged to request for another supply of missing information. Where, in the course of the supply of missing information, the tenderer or candidate involves in the procedure an economic operator which was originally not included in the tender or request to participate and this involvement would require another supply of missing information, the contracting authority shall not request that other supply of missing information, on condition that it specified in the notice launching the procedure that, in such cases, it would not prescribe another supply of missing information or would only prescribe another supply of missing information with the restrictions set by itself. The missing information indicated earlier may not be supplied in the course of a subsequent supply of missing information.

7. The request for the provision of information shall be in compliance with the provisions set out in paragraph 1 and 2, furthermore, the scope of the information requested shall be restricted to the information necessary for the evaluation of tenders or requests to participate.

8. The supply of missing information or the provision of information:

- a) may not prejudice the principles set out in Article 2(1)-(3) and (5), furthermore,
- b) in the tender, as regards any document concerning the characteristics of the subject-matter of the procurement, the way of fulfilling the contractual obligations by the tenderer or any other contractual term, only those errors may be corrected, those pieces of missing information may be supplemented, furthermore, in the case of flat rate agreements, only those items and unit prices of the priced budget (detailed bid) may be supplemented, modified, complemented or deleted, which are not significant and concern specific details and whose modification does not affect the total price or a partial amount thereof to be evaluated and the ranking of tenderers to be formed during the evaluation.

9. For the purposes of the evaluation under 76(3)(b), in the framework of the supply of missing information, the professionals to be presented at the request of the contracting authority may only be replaced in a way that allows the presentation of a professional who is at least equivalent to the previous one as regards all the relevant circumstances to be taken into account in the course of the evaluation. Even if the person presented in the framework of the supply of missing information is more experienced and more highly qualified than the previous one, the contracting authority may only take account of the information related to the previous professional, the supply of missing information is limited to the establishment of validity and does not result in any change in the factors to be taken into account in the course of the evaluation.

10. The contracting authority shall be obliged to ascertain that the supply of missing information or the request for the provision of information complies with the provisions set out in this paragraph. In the case of non-observance of the provisions of paragraph 3, 8 or 9 or, if the supply of missing information, provision of information was not fulfilled or was fulfilled beyond the time limit set, only the original copy (copies) of the tender or request to participate may be taken into consideration in the course of the evaluation.

11. If the contracting authority perceives in the tender a calculation error affecting the result of the evaluation, this error shall be corrected by the contracting authority by calculating the aggregate price based on the itemised value (core data) of the elements of the subject-matter of the contract, or by calculating another data based on a calculation included in the tender. All tenderers shall be advised forthwith in writing of the correction of the calculation error simultaneously, directly and without delay.

## **Abnormally low price and other disproportionate commitments**

### **Article 72**

1. If as regards the price or cost which was taken into consideration as an award criterion or any element thereof to be evaluated individually a tender contains an amount appearing to be abnormally low in light of the subject-matter of the contract to be concluded, the contracting authority shall request in writing the basic data determining the contents of the tender elements that are relevant for the assessment as well as an explanation, and shall notify the other tenderers of such request at the same time in writing.

The contracting authority may take into consideration objective explanations relating in particular to

- a) the cost-efficiency of the manufacturing process, the public works or the provision of services,
- b) the technical solutions chosen,
- c) the exceptionally favourable conditions of performance for the tenderer,
- d) the originality of the goods, works, or services offered by the tenderer,
- e) compliance with the environmental, social and labour requirements specified in Article 73(4) or
- f) the possibilities that the tenderer possesses for obtaining state aid.

3. If there is doubt as to acceptability of the explanation, the contracting authority shall have the right to request supplementary explanation from the tenderer, notifying at the same time all the other tenderers, with the aim of assessing whether or not the explanation is acceptable. It is incumbent upon the tenderer to make all facts, data, calculation concerning the well-founded nature of the consideration available to the contracting authority so as to make it possible for the contracting authority to decide, after due deliberation, whether the consideration is well-founded. The contracting authority shall declare the tender invalid, if the information supplied do not properly confirm that the contract may be executed at the given price or cost.

4. In particular, the explanation may not be considered as proper, if it is established that the tender contains an abnormally low price or cost due to the fact that it does not comply with the environmental, social and labour requirements specified in Article 73(4). For the purposes of the consideration of the well-founded nature of the tender, the contracting authority may request information from the tenderer about the standard wages applicable in the given sector.

5. With the aim of comparing offers, the contracting authority may request data founding specific tender elements from the other tenderers as well, where it is necessary for the decision-making on the well-founded nature of the tender price.

6. The contracting authority may only declare a tender invalid for being abnormally low owing to state aid, only if they had previously requested information in this respect from the tenderer in writing, and the tenderer was unable to prove that it obtained the relevant state aid legally. The contracting authority shall inform the European Commission, through the Public Procurement Authority, about the tenders deemed invalid for that reason.

7. The procedural rules set out in paragraphs 1-6 shall apply accordingly where any other element of the tender contains an undertaking which is not feasible. In such cases, the contracting authority shall declare the tender invalid, if the information supplied do not confirm properly that the given undertaking is feasible.

### **Invalidity of the tender and the request to participate**

## Article 73

1. The tender or the request to participate shall be deemed invalid, if

- a) it is submitted after the expiry of the time-limit to submit tenders or to submit requests to participate;
- b) the tenderer, candidate has been excluded from the procedure;
- c) a subcontractor of the tenderer or candidate or an organization participating in the certification of suitability is excluded from participating in the procedure due to a ground for exclusion specified in Article 62(1)(i) or, as a result of its conduct in the given procedure, point (j).
- d) the tenderer or candidate does not comply with the suitability criteria required for the performance of the contract or has not properly certified compliance with those conditions;
- e) it does not comply in any other way with the conditions stipulated in the contract notice, the invitation to tender or the invitation to participate and the procurement documents and by law, with the exception of formal requirements for tenders and requests to participate set out by the contracting authority;
- f) furthermore,
  - (fa) an information is classified as a business secret by the tenderer or the candidate in contravention of Article 44(2)-(3) and this situation is not remedied, even after the contracting authority's request for supply of missing information; or
  - (fb) the justification pursuant to Article 44(1) is not sufficient, even after the supply of missing information.

2. In addition to the cases set out in paragraph 1, the tender shall be deemed invalid, if the consideration offered is abnormally low or it contains any other unfeasible undertaking [Article 72].

3. In addition to the cases set out in paragraph 1, the request to participate shall be deemed invalid, if the candidate submits a tender.

4. According to paragraph 1(e), the tender shall be deemed invalid, in particular, if it does not comply with the environmental, social and labour requirements laid down by legislation or mandatory collective agreement or the provisions on environmental, social and labour requirements listed in Annex 4. On the basis of the data made available each year by the minister responsible for employment policy, the Public Procurement Authority shall publish on its website information relating to the lowest wages applicable in each sector in Hungary.

5. In the procurement documents, the contracting authority indicates, for information purposes, the name of the organisations from which the tenderer can obtain information on the requirements specified in paragraph 4, which shall be met in the course of the performance. The contracting authority is not obliged to stipulate that special information shall be included in the tender as regards the provision set out in paragraph 4, it shall only verify that the information included in the tender do not run counter to the requirements laid down in paragraph 4.

6. In particular, the tender shall be deemed invalid according to paragraph 1(e), if

- a) it was withdrawn by the tenderer, although the validity period has not yet expired;
- b) the tenderer failed to provide the tender guarantee within the time-limit set by the contracting authority or provided the tender guarantee in a smaller amount than it was prescribed;
- c) in the notice launching the procedure, the contracting authority determined in advance an amount, above which all tenders would be declared invalid in the course of the evaluation, and the price or cost included in the given tender exceeds that amount.

#### **Article 74**

1. The contracting authority must exclude from the procedure the tenderers, candidates, subcontractors, or entities contributing to the certification of suitability
  - a) who are subject to the grounds for exclusion (Articles 62 and, where the contracting authority provided for it, Article 63);
  - b) on whose side any ground for exclusion arose in the course of the procedure.
2. The contracting authority may exclude from the procedure
  - a) the tenderers or candidates who are not eligible for national treatment [Article 2(5)],
  - b) the tenderers who offer a product not eligible for national treatment due to its place of origin [Article 2(5)].
3. The place of origin of products shall be established on the basis of the rules stipulated in a separate act of legislation or in Regulation (EU) No 952/2013 of the European Parliament and the Council of 9 October 2013 laying down the Union Customs Code<sup>24</sup>.

#### *CHAPTER XIV*

#### *THE RESULTS OF THE PROCUREMENT PROCEDURE*

#### **Declaring the procurement procedure unsuccessful**

#### **Article 75**

1. The procedure shall be deemed unsuccessful, if
  - a) no tenders or, in the case of a procedure consisting of more than one stage, no requests to participate have been submitted;
  - b) only invalid tenders or requests to participate have been submitted;
  - c) the validity period has expired for all submitted tenders and neither of the tenderers maintain their tender;
2. The contracting authority shall have the right to declare the procedure unsuccessful
  - a) due to its becoming incapable to conclude the contract or deliver thereunder or the contract should be rescinded or terminated [Article 53(4)-(6)];
  - b) where the financial cover available to the contracting authority, to be certified according to paragraph 4, is not sufficient to conclude the contract with the tenderer who submitted the most favourable tender on the basis of the award process;
  - c) due to an act committed by a tenderer or candidate which is severely damaging to the fairness of the procedure or the interests of the other tenderers or candidates;

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<sup>24</sup> This amendment entered into force on 1 May 2016.

- d) where the Public Procurement Arbitration Board annuls a decision made by the contracting authority, and the contracting authority decides to conduct a new procurement procedure or to relinquish its intention to conduct such procedure, but the procedure may not be declared invalid by the contracting authority, if the lawfulness of the procedure may be restored by making a lawful decision after having the decision closing the unlawful procedure annulled.

3. Where, in the case set out in paragraph 2(a), the procedure shall be declared unsuccessful because the financial cover, which had originally been available, was fully or partly withdrawn, the contracting authority shall provide information on the amount of the financial cover that had originally been available and shall inform those concerned which organisation, when and why took the decision on the withdrawal or redistribution of that amount.

4. In the case set out in paragraph 2(b), the contracting authority can confirm the amount of the available financial cover with the data recorded in the electronic notice management system (request) at the time of the dispatch of the notice launching the procedure or with the data documented in the procurement procedure and provided to tenderers or candidates prior to the opening of final tenders at the latest, in the case of electronic auctions with the data recorded in the electronic system prior to the commencement of the auction.

5. Where the contracting authority has allowed the subdivision of the contract into lots, only the lot concerned by the reason for invalidity may be declared unsuccessful. If the contracting authority has indicated in the notice launching the procedure that the invalidity of any lot makes him lose interest in the conclusion of the contracts, and also has given an explanation for it therein, he may declare the procedure unsuccessful as regards all lots.

### **Selection of the winning tenderer**

#### **Article 76**

1. In the notice launching the procedure, the contracting authority shall specify the criterion or criteria on the basis of which he shall select the tender that he considers to be the most economically advantageous tender, also as regards social, societal and environmental issues, where appropriate (hereinafter referred to as 'award criteria').

2. Award criteria may be

- a) the lowest price,
- b) the lowest cost to be calculated using the cost-efficiency method determined by the contracting authority or
- c) criteria representing the best price-quality ratio, in particular qualitative, environmental, social criteria, which include price or cost.

3. Criteria representing the best price-quality ratio, in particular, relate to

- a) quality, technical merit, aesthetic and functional characteristics, accessibility for all users, employment of disabled workers and other social, environmental and innovative characteristics, distribution arrangements, after-sale service and technical assistance, supply of spare parts, securing stocks, delivery date or period;
- b) the organisation, qualification and experience of the staff participating in the performance of the contract, where the quality of the staff may significantly affect the quality of the performance of the contract.



4. The criteria representing the best price-quality ratio may also be applied by indicating the element of price or cost at a fixed value and the tenderers compete with each other on the other award criteria.

5. Contracting authorities shall be bound to apply the award criteria for the lowest cost or the best price-quality ratio. Where the contracting authority's needs can only be met by a particular supply or service which is able to satisfy specifically identified qualitative and technical requirements and, in the particular case, the most economically advantageous tender may be selected on the basis of the award criteria for the lowest price, while further quality characteristics would not help select such tender, the contract may be awarded on the sole basis of the award criteria for the lowest price. The contract may not be awarded on the sole basis of the award criteria for the lowest price in case of design, engineering and architectural services or public works. A separate act of legislation based on the empowerment of this Act or, in case of public contracts carried out using subsidies, the conditions for the subsidies may lay down detailed rules on the award criteria and method to be applied as regards certain subject-matters of public contracts.

6. The award criteria shall meet the following requirements:

- a) they shall be related to the subject-matter of the contract;
- b) the award criteria shall not allow arbitrary decision-making by the contracting authority and shall be based on quantifiable elements or elements that may be evaluated based on professional requirements;
- c) they shall ensure that the principles stipulated in Article 2(1)-(5) are embraced;
- d) within the scope of the award criteria the suitability of the tenderer for the performance of the contract may not be subject to evaluation. When assessing the circumstances specified in paragraph 3(b), where those situations are accompanied by suitability criteria as well, a clear distinction shall be made between the minimum criteria necessary for performance (suitability criteria) and the criteria to be taken into account in the course of the evaluation;
- e) the award criteria shall never allow the same substantial element in a tender being taken into consideration more than once.

7. In line with Article 6(a), the award criteria may be considered to be related to the subject-matter of the contract, if they are related, in any way and at any stage of their life cycles, to the works, supplies or services to be realized on the basis of the given contract, including the factors which

- a) are related to the specific process of production, provision or trading and its conditions of those works, supplies or services; or
- b) are related to a specific process during a later stage of the life cycle of those works, supplies or services;

even where such factors do not form part of the material substance of those works, supplies or services.

8. The offered degree of employment of unemployed or long-term unemployed people as well as the implementation of measures which are aimed at the training of unemployed people within the framework of the given contract may be evaluated, in particular, in relation to the specific process of production or provision of the requested works, supplies or services.

9. Where the award criteria for the lowest price or, as determined by the method specified in Article 78, the lowest cost is not the sole award criteria applied by the contracting authority, it shall determine

- a) the award criteria for the lowest costs or the best price-quality ratio as well as the rated multipliers which determine their weight, commensurate with the actual significance of the given award criteria (hereinafter referred to as 'weight'),

- b) if, within the scope of the award criteria, sub-factors have been specified, the relevant weight of the latter shall be specified commensurate with their actual significance,
- c) the lowest and highest scores - to be the same for all award criteria - for the content elements of tenders when evaluating according to the award criteria,
- d) the method (methods) that shall provide the scores in the range between the limits of the scores [point (c)].

10. The information specified in paragraph 9 shall be indicated in the notice launching the procedure, however, the detailed description of the method (methods) specified in paragraph 9(d) may also be included in other procurement documents. In exceptional cases, where the weighting specified in paragraph 9(a) or (b) is not possible for objective reasons, and this fact is clearly confirmed by the contracting authority in the notice launching the procedure, the contracting authority shall indicate the criteria in decreasing order of importance. In this case Article 77(2) shall not apply, the method used for the award of the contract shall be defined by the contracting authority in the procurement documents.

11. Where the contracting authority applies the lowest cost as sole award criterion and, in this context, he assesses the costs of the supply, service or works using a life-cycle costing approach, paragraphs (9)-(10) notwithstanding, only the specifications set out in Article 78 shall be indicated in the procurement documents.

12. The Public Procurement Authority shall prepare guidelines regarding the methods referred to in paragraph 9(d) and the evaluation of the tenders.

13. The requirements specified by the contracting authority in the procurement documents shall allow the contracting authority to verify the information submitted by the tenderers in order to determine whether and to what extent the tender meets the award criteria. In case of doubt, the contracting authority shall ascertain the relevance of the information submitted by the tenderer.

## **Article 77**

1. In relation to the tender elements concerning award criteria (sub-criteria) other than the award criterion or sub-criterion related to price or cost, the contracting authority may specify in the notice launching the procedure the most favourable level of the tender element in question, and he may stipulate that he will give the same score as the highest score to this most favourable level, as well as to the offers going beyond this level. The contracting authority may specify, as regards any of the criteria, a minimum level of requirement which shall be met, compared to which the given tender element cannot be less favourable.

2. Where the award criterion related to the lowest price is not the sole criterion applied by the contracting authority, the contracting authority shall evaluate, using the method determined by it, the tender elements according to the award criteria between the minimum and maximum points specified in the notice launching the procedure, then weigh the scores given to each tender element and aggregate the products of multiplication for each tender. The most favourable tender will have the highest aggregate score. Where the contract is awarded on the sole basis of the award criteria for the lowest cost, and the costs related to the public supply, public service or public works are assessed by using a life-cycle costing approach, the most favourable tender shall be selected on the basis of the method specified in Article 78.

3. After the evaluation of tenders, the contracting authority may launch an electronic auction, if it was indicated previously in the notice launching the procedure.

4. The winning tenderer shall be the one who submitted the most favourable tender according to the award criteria and whose tender shall be deemed valid.

5. The contracting authority shall have the right to establish, in the notice launching the procedure, the objective method or the additional criterion according to Article 76(6)(a)-(d), on the basis of which he selects the most favourable tender, if the total score of several tenders calculated according to paragraph 1 is identical,

or the amount of the lowest price or cost, applied as the sole award criterion, is the same in several tenders. Where no such method or criterion had been specified by the contracting authority, the tender which received higher score for the award criterion (having been given a different score) with the largest weight shall be deemed the most advantageous one, while in the case of the award criterion related to the lowest price, the contracting authority shall choose from the lowest tenders on the basis of a drawing held in the presence of a notary public. Moreover, the contracting authority shall have the right to hold a drawing in the presence of a notary public, if the most advantageous tender may not be identified on the basis of the method specified in this paragraph.

## **Article 78**

1. Where contracting authorities assess the costs - taken into account in the course of the evaluation - of the supply, service or works using a life-cycle costing approach, they shall refer to it in the notice launching the procedure and shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.

2. Life-cycle costing shall, to the extent relevant, cover parts or all of the following costs over the life cycle of a product, service or works:

- a) costs, borne by the contracting authority or other users, such as:
  - (aa) costs relating to acquisition,
  - (ab) costs of use, such as consumption of energy and other resources,
  - (ac) maintenance costs,
  - (ad) end of life costs (in particular collection and recycling costs),
- b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

3. The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:

- a) it is based on objectively verifiable criteria which ensure compliance with the principles set out in Article 2(1)-(3) and (5), furthermore, which shall not unduly favour or disadvantage certain economic operators;
- b) the method is predetermined, is accessible to all interested parties and is not tailored to one specific procedure, can be used in other procedures as well;
- c) the data required can be provided with reasonable effort by normally diligent economic operators.

4. The Public Procurement Authority shall publish guidelines on the methods for the calculation of life-cycle costs and, where appropriate, it shall indicate that a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the European Union. In the case of certain subject-matters of procurement, mandatory methods for the calculation of life-cycle costs may be prescribed by a legislative act drawn up on the basis of the empowerment of this Act.

## **Communication of the contracting authority's decisions**

## **Article 79**

1. The contracting authority shall inform the tenderer or the candidate in writing of the results of the procedure or the participation stage, the lack of success of the procedure, the classification of their tender or request to participate as invalid, the exclusion of an economic operator as well as of the relevant reasons thereof in detail, as soon as possible after the decision to this effect, but within three business days at the latest.

2. Upon completing the evaluation of the tenders and requests to participate, the contracting authority shall prepare a written summary of the tenders and requests to participate according to the standard forms specified in a separate act of legislation. Upon completing the evaluation of the tenders and requests to participate, the contracting authority shall provide the information pursuant to paragraph 1 by sending the written summary by fax or electronic means to all tenderers, in the case of the end of the participation stage to all candidates, at the same time.

3. The summary shall be sent, upon request, to the European Commission, the Public Procurement Authority, any other organization authorized to control the procurement procedure or the Hungarian Competition Authority. The summary shall be sent to the European Commission via the Minister responsible for public procurements.

4. If the contracting authority observes after the sending of the results that the result (or lack of success) was unlawful and the modification provides legal remedy thereto, the contracting authority may modify on one occasion the written summary, where necessary, retract the communication on invalidity, furthermore, rescind the contract already concluded within twenty days from the dispatch of the written summary to the tenderers, in the case of a written summary concerning the participation stage until the expiry of the time limit to submit tenders or, where the initial situation may not be restored anymore, terminate the contract immediately. If the communication on the invalidity of a request to participate is retracted by the contracting authority in the context of the modification, he can send an invitation to tender to the candidate concerned by setting a new time limit for the submission of tenders. The contracting authority shall dispatch the modified written summary by fax or electronic means to all tenderers at the same time, without delay.

5. Any clerical error (change of names, misspelled names, numeric errors, miscount or any other similar error) detected in the written summary concerning the tenders or the requests to participate may be corrected by the contracting authority at or without request. The contracting authority shall send the corrected written summary to all tenderers or candidates at the same time, not later than ten days after sending the results of the procedure or the participation stage.

### **Preliminary dispute settlement**

#### **Article 80**

1. The following entities may initiate the preliminary dispute settlement:

- a) the tenderer or the candidate, within 3 business days after having knowledge of the unlawful event, if it considers that the written summary or any procedural act of the contracting authority or any other document made during the procurement procedure, except for those listed in point (b), is partly or completely unlawful;
- b) any interested economic operator or the chamber or the organization for the representation of interests having an activity related to the subject-matter of procurement (for the purposes of this Article, hereinafter jointly referred to as 'applicant')
  - (ba) not later than ten days before the expiry of the time limit to submit tenders or to participate, in accelerated procedures or negotiated procedures without prior publication of a contract notice until the expiry of these time limits,
  - (bb) in the prior information notice announcing a restricted procedure or negotiated procedure by the time limit for the indication of interest,

if he considers that the notice launching or announcing the procedure, the procurement documents accessible together with the notice or the modification thereof is partly or completely unlawful.

2. The applicant shall state in his application to the contracting authority (hereinafter referred to as 'preliminary dispute settlement application') the points of the written summary or other document, or procedural action deemed unlawful, furthermore, his recommendations, remarks, and the data and facts supporting his opinion and he shall also refer to the documents, if any, supporting such data and facts.

3. The preliminary dispute settlement application shall be dispatched to the contracting authority by fax or electronic means, and the contracting authority shall inform the applicant for settlement about its standpoint regarding the application not later than three days after reception of the application by the same means as that of the submission, furthermore, the contracting authority shall inform all tenderers or candidates, known to it, participating in the procedure about the submission of the preliminary dispute settlement application and his answer thereto.

4. Where the infringement committed in the procedure is remediable through those procedural acts, the contracting authority may require – on not more than one occasion, not later than three business days after the reception of the preliminary dispute settlement application – the tenderers or candidates to supply missing information (Article 71), to provide information (Article 71) or an explanation (Article 72), setting a time limit of three business days, even if the procedural rules would not allow to do so. In this case the contracting authority shall inform the applicant for settlement and the tenderers or candidates about the submission of the application for preliminary dispute settlement on the date of dispatch of the request for the supply of missing information or the provision of information or explanation, and he shall inform these entities, by fax or electronic means, about his answer to the application not later than seven business days after reception of the application.

5. If a tenderer has submitted a preliminary dispute settlement application in connection with a procedural act done, document made following the opening of tenders within the time limit pursuant to paragraph 1 and in compliance with paragraph 2, the contracting authority may not conclude the contract, if division into lots was possible, he shall not conclude the contract on the lot concerned, before the end of a period of ten days from the date of submission of the application, following the date of dispatch of its reply, even if the standstill period would otherwise expire until that date.

#### *CHAPTER XIV*

#### *SPECIFIC RULES PERTAINING TO CERTAIN TYPES OF PROCEDURE*

#### **Open procedures**

#### **Article 81**

1. The open procedure is a procurement procedure consisting of one stage whereby all interested economic operators may submit a tender.
2. The open procedure shall be launched by a contract notice.
3. For the purposes of the verification of the non-existence of the grounds for exclusion and the certification of suitability, the ESPD shall be submitted by the tenderer together with his tender.

4. In open procedures, the contracting authority may stipulate in the notice launching the procedure that the evaluation of abnormally low price or cost will be carried out following the assessment of tenders. In this case, the contracting authority assesses whether the price or cost is abnormally low and applies, where appropriate, the procedure referred to in Article 72, only as regards the tenderer who submitted the most favourable tender and, if it intends to designate the second most favourable tenderer in the summary, as regards that tenderer as well. If the tender of a tenderer is considered to be invalid due to abnormally low price or cost, he will be replaced by the second most favourable tenderer and the necessary acts of evaluation shall be carried out in accordance with this situation.

5. In open procedures, the contracting authority may stipulate in the notice launching the procedure that the evaluation of tenders will be carried out, on the basis of the self-declaration included in the European Single Procurement Document, following the assessment of tenders. In this case the evaluation will be carried out only as regards the most favourable tenderer or the most favourable tenderer and the following most favourable tenderer or tenderers. The provisions set out in Article 69 shall apply accordingly, with the proviso that it shall be ensured in this case too that, before the decision closing the procedure is taken, the validity of the tender submitted by the winning tenderer designated in the summary, and if the contracting authority intends to designate the second most favourable tenderer in the summary, the validity of his tender as well is fully evaluated by the contracting authority, also as regards the examination of certificates supporting the self-declaration of the tenderer.

6. The contracting authority may only make use of the option provided for in paragraph 4-5, where, taking into consideration the criteria and the method applied for the assessment, a tender may be declared invalid without affecting the ranking of the other tenders.

7. The time limit for submission of tenders shall be set by the contracting authority in the contract notice at not less than thirty-five days from the date of dispatch of the contract notice. Where the tenders may also be submitted electronically, the time limit for submission of tenders shall be set at not less than thirty days from the date of dispatch of the contract notice.

8. If the contracting authority has dispatched a prior information notice at least thirty-five days, but not earlier than twelve months, before the dispatch of the contract notice, and the prior information notice contained the data to be specified in the information notice according to a separate act of legislation, the time limit for submission of tenders may be shorter than the time limit laid down in paragraph 7, however, it may not be shorter than fifteen days from the date of dispatch of the contract notice.

9. Where, in compliance with Article 39(2), the contracting authority does not offer full direct access by electronic means in the case of certain procurement documents, the time limit for the submission of tenders specified in paragraphs 7 and 8 shall be extended by at least five days.

10. Exceptionally, in duly justified and urgent cases, where the time limits specified in paragraph 7 could not be met, the contracting authority shall have the right to set a shorter time limit to submit tenders than the time limit according to paragraph 7, but it may not be less than fifteen days from the date of dispatch of the contract notice (accelerated procedure). The reason for the use of the accelerated procedure shall be stated in the notice launching the procedure.

11. No negotiation may take place in open procedures. In open procedures, the contracting authority shall be bound by the stipulations of the invitation and the procurement documents, while the tenderer shall be bound by his tender from the date of expiry of the time limit for submission of tenders. In the contract notice, the contracting authority may not set a validity period exceeding thirty, in case of public works, or where the procurement procedure is conducted under a control integrated in a process stipulated by a separate act of legislation, sixty days from its commencement.

### **Restricted procedures**

## **Article 82**

1. The restricted procedure is a procurement procedure consisting of two stages in the first stage of which, that of participation, the contracting authority decides, in line with the provisions set out in Article 69, whether or not the candidates are suitable for the performance of the contract. No offer may be made by the candidate in the participation stage. In the second stage, that of tendering, only those candidates qualified suitable and invited to tender by the contracting authority may submit a tender.

2. The restricted procedure shall start with an invitation to participate and, in the course of the participation stage of the procedure, any interested economic operator shall have the right to submit a request to participate, except in the case provided for in paragraph 3.

3. Sub-central contracting authorities may use a prior information notice as a call for competition in a restricted procedure. In this case the contracting authority shall not publish the invitation to participate, it sends the invitation to participate directly, at the same time to the economic operators who submitted their declaration of interest within the time limit set in the prior information notice and invites them to confirm their interest by submitting their request to participate (hereinafter referred to as 'direct invitation to participate'). The direct invitation to participate shall be sent within twelve months from the date of publication of the prior information notice.

4. In the invitation to participate or, in the case set out in paragraph 3 in the prior information notice or in the direct invitation to participate, the contracting authority may set the range of the number of tenderers, and state that, in the second stage of the procedure, it will send an invitation to tender only to a number of candidates, selected from the candidates which are suitable and also submitted a valid request to participate falling within the upper limit of that range. The range must include at least five tenderers and shall provide for genuine competition.

5. If the contracting authority sets a range, it shall also define in the invitation to participate or, in the case set out in paragraph 3 in the prior information notice or in the direct invitation to participate, a ranking method in case the number of suitable candidates exceeds the upper limit of the range. The contracting authority shall provide the objective criteria, which are in line with the basic principles laid down in this Act, on the basis of which the tenders are ranked. The contracting authority may indicate which certificates shall be submitted by the economic operators, according to Article 69, regarding compliance with those objective criteria, in order to support the self-declaration included in the ESPD.

## **Article 83**

1. In the restricted procedure, the time limit for participation may not be shorter than a period of thirty days from the day of dispatch of the invitation to participate or the day of sending of the direct invitation to participate.

2. Exceptionally, in duly justified and urgent cases, if the times limits specified in paragraph 1 could not be met, the contracting authority shall have the right to set a shorter time limit for participation than the time limit according to paragraph 1, but it may not be less than fifteen days from the date of dispatch of the invitation to participate or the day of sending of the direct invitation to participate (accelerated procedure). The reason for the use of the accelerated procedure shall be stated in the notice launching the procedure.

3. If the participation stage is successful, the contracting authority shall send not later than five business days after notifying the candidates of the results the invitation to tender, at the same time, to all suitable candidates or, in the case of setting of a range to selected candidates.

4. If the number of the candidates qualified as suitable is lower than the lowest number in the range, the contracting authority shall continue the procedure by inviting to tender the candidates that qualify as suitable. Candidates invited to tender may not submit joint tenders.

#### **Article 84**

1. As a minimum, the invitation to tender shall contain the following information:

- a) name and address, telephone and fax number as well as e-mail address of the contracting authority;
- b) reference to the invitation to participate or prior information notice published and the date of publication, the date of sending of the direct invitation to participate;
- c) electronic location where the procurement documents can be accessed; in the case set out in Article 39(2), if those documents were not yet made available otherwise, they shall be annexed to the invitation;
- d) in the tendering stage, in line with the invitation to participate or the direct invitation to participate, reference to the certificates to be submitted according to Article 69 to support the self-declaration included in the ESPD and, if necessary, reference to the declarations and documents to be attached to the tender, which shall prove that neither the tenderer, its subcontractor nor the entity contributing to the certification of suitability is liable to the grounds for exclusion at the time of the tendering stage;
- e) time limit for submission of tenders;
- f) address used for the submission of tenders and the way of submission;
- g) indication whether or not the tender may also be submitted in a language other than the Hungarian;
- h) time and, if it is not made electronically, the place of the opening of tenders as well as the parties authorised to be present at the opening of the tenders;
- i) validity period of the tender;
- j) date of sending the invitation to tender.

2. No negotiation may take place in the restricted procedure. In the restricted procedure, the contracting authority shall be bound by the stipulations of the invitation to participate from the expiry of the time limit to participate and he shall also be bound by the stipulations of the invitation to tender and the procurement documents, while the tenderer shall be bound by his tender from the date of expiry of the time limit for submission of tenders. In the invitation to tender, the contracting authority may not set a validity period exceeding thirty, in case of public works, or where the procurement procedure is conducted under a control integrated in a process stipulated by a separate act of legislation, sixty days from its commencement.

3. Certificates and declarations that had already been attached to the request to participate shall not be attached to the tender, except where the previously submitted certificate or declaration is not adequate anymore for the purposes of certifying as required.

4. In the tendering stage of the restricted procedure, the time limit for submission of tenders shall be determined by the contracting authority as a period not shorter than thirty days from sending the invitation to tender. The time limit for submission of tenders may be determined as a period not shorter than twenty-five days from sending the invitation to tender provided that the tenders may also be submitted by electronic means.

5. In the case of procedures launched by a request to participate, if the contracting authority has dispatched a prior information notice at least thirty-five days, but not earlier than twelve months before the dispatch of the invitation to participate, and the prior information notice contained the data to be specified in the information notice according to a separate act of legislation, the time limit may be shorter than the time limit laid down in paragraph 4. In such cases the time limit for submission of tenders may not be shorter than ten days from the date of dispatch of the invitation to tender.



6. In procedures launched by sub-central contracting authorities the contracting authority and the candidates to be invited to submit tenders may agree on the time limit for the submission of tenders, provided that each candidate is allowed the same period to draw up and submit his tender. If the contracting authority and the candidates, which are considered suitable, are unable to agree on the time limit for the submission of tenders, the time limit shall be determined by the contracting authority, with the proviso that the time limit may not be shorter than ten days from the date of sending of the invitation to tender.

7. Where, in compliance with Article 39(2), the contracting authority does not offer full direct access by electronic means in the case of certain procurement documents, the time limit for the submission of tenders specified in paragraphs 4-6 shall be extended by at least five days.

8. In accelerated procedures, where the time limits specified in paragraph 7 could not be met, the contracting authority may not set a time limit for submission of tenders which is shorter than ten days from the day the invitation to tender is sent.

### **Negotiated procedures**

#### **Article 85**

1. The negotiated procedure is a procurement procedure consisting of two stages in the first stage of which, that of participation, the contracting authority shall decide, in line with the provision set out in Article 69, whether or not the candidate is suitable for the performance of the contract. No offer may be made by the candidate in the participation stage. In the second stage, that of tendering, the contracting authority conducts negotiations on the terms of the contract with the suitable candidates invited to submit a tender.

2. Contracting authorities may conduct a negotiated procedure in the following cases:

- a) the needs of the contracting authority may only be satisfied by adjusting, tailoring ready-made solutions which are immediately available on the market;
- b) the subject-matter of the public contract includes design or innovative solutions;
- c) the most favourable tender cannot be selected without prior negotiations because of specific circumstances related to the nature, complexity of the contract, its legal and financial terms;
- d) the technical specifications cannot be established by the contracting authority with sufficient precision in accordance with one of the following references: standards, European Technical Assessment, common technical specifications or technical references; or
- e) the previously conducted open or restricted procedure failed because all the tenders submitted were invalid or the procedure failed on the basis of Article 75(2)(b) because all the tenders submitted exceeded the amount of the financial cover available to the contracting authority.

#### **Article 86**

1. The negotiated procedure shall be launched by an invitation to participate, which shall state the grounds for the use of the negotiated procedure. In the participation stage of the procedure, any interested economic operator shall have the right to submit a request to participate, except in the case provided for in paragraph 2.

2. Sub-central contracting authorities may also use a prior information notice as a call for competition in accordance with the rules laid down in Article 82(3).

3. The contracting authority may set the range of the number of tenderers in negotiated procedures as well in accordance with the rules laid down in Article 82(4)-(5), save that the upper limit of that range shall include at least three tenderers.

4. In negotiated procedures Article 83 shall also apply.

#### **Article 87**

1. The contracting authority may specify in the procurement documents the elements of the technical specifications and the contract terms which constitute the minimum requirements and may not be subject to negotiation. The description of the subject-matter of public procurement and the contract terms shall be established by the contracting authority with sufficient precision to allow economic operators to identify the subject-matter and the nature of the public procurement, to decide whether or not they intend to submit a request to participate and to have equal opportunities to submit a suitable first tender in the tendering stage.

2. The contents of the invitation to tender shall be subject to Article 84(1), noting that the time limit for submission of tenders shall mean the time limit for submission of the first tender. Furthermore, the invitation to tender shall contain the process of negotiations and the related fundamental rules prescribed by the contracting authority and the date of the first negotiation.

3. The time limit for the submission of the first tender shall be set in accordance with Article 84(4)-(8).

4. In the negotiated procedure, the contracting authority shall be bound by the stipulations of the procurement documents, while the tenderer shall be bound by his tender from the date of conclusion of the negotiations. In the invitation to tender, the contracting authority may not set a validity period exceeding thirty - in case of public works, or where the procurement procedure is conducted under a control integrated in a process stipulated by a separate act of legislation, sixty - days from its commencement (the conclusion of negotiations).

Article 55(6) shall also be applied to tenders.

6. The contracting authority may decide, following the receipt of the first tenders, not to conduct negotiations and to complete the procedure by evaluating and assessing the tenders, if he indicated in the notice launching or announcing the procedure that he reserves the right to do so. In this case the contracting authority shall notify the tenderers of that decision without delay, by fax or by electronic means and the tenderers shall be bound by the validity period from the date of sending of that notification for the duration determined by the contracting authority, in accordance with the maximum durations foreseen in paragraph 4.

#### **Article 88**

1. In negotiated procedures, the negotiations between the contracting authority and one or more tenderers aim to award the contract with the most advantageous terms.

2. In the course of the negotiations, the contracting authority shall ensure equal treatment of the tenderers, thus in particular, all information provided by the contracting authority shall be communicated to all tenderers.

3. If the contracting authority negotiates with the tenderers one by one, no information provided by the tenderer about his tender during the negotiation may be communicated to the other tenderers without his permission.

4. The contracting authority shall draw up minutes of each negotiation, the minutes shall be signed by all tenderers that participated in the stage in question not later than by the commencement of the subsequent stage of the negotiation or, in the case of a single stage or the last stage not later than two days after the negotiations ended, and a copy of such minutes shall be handed over or dispatched to them within two business days.

5. The contracting authority shall have the right to stipulate that the negotiations in the tendering stage of the procedure will be conducted by him in several stages and that it will continue the negotiation in the subsequent stage only with those tenderers which submitted the most favourable tender according to the award criteria. In such cases the contracting authority shall already state in the notice launching the procedure that he intends to reduce the number of the tenderers in the course of the negotiation. For the purposes of the submission of final tenders, genuine competition shall be ensured in those cases as well, the number of tenderers to be invited to submit their final tender may not be reduced to one tenderer in the course of the rounds of the negotiation.

6. In the course of the negotiation, the subject-matter and the terms of the public procurement may not be modified in such a way as to

- a) modify the terms set out in the notice announcing or launching the procedure, the invitation to tender and the procurement documents or complement those terms to such an extent that would distort competition or prejudice equal opportunities of economic operators, in particular, where the decision of the interested economic operators concerning their ability to participate in the procurement procedure could have been substantially influenced by their awareness of the new terms or the modifications would make any tenderer incapable to submit a final tender at the end of the negotiations.
- b) change the award criteria or method.
- c) change the minimum requirements established by the contracting authority in accordance with Article 87(1).

7. In the case pursuant to paragraph 5, the contracting authority shall stipulate in advance in the invitation to tender the process of such a multi-round negotiation and the upper limit of the number of tenderers to be selected for the negotiation following the first or the given round. In the course of further negotiations conducted with the tenderers selected in the above manner the tenderers may only submit tenders which are more advantageous to the contracting authority compared to the tenders submitted in earlier rounds.

8. The contracting authority shall notify all tenderers participating at the negotiations of any amendment to the technical specifications or other procurement documents in good time to allow them to modify their tender, prior to the submission of the final tenders or the modified tenders requested from tenderers in the course of the negotiations.

9. The contracting authority shall clearly notify in advance the tenderers of the date of conclusion of the negotiations, if the invitation to tender does not contain any precise information in this respect. As a conclusion of the negotiations, the contracting authority shall invite tenderers to submit a final tender in writing. The contracting authority shall also specify the time limit for submission of final tenders.

## **Article 89**

1. With the exception of the case provided for in Article 87(6), in the course of the negotiated procedure, the tenders are evaluated in several stages by the contracting authority:

- a) As regards the first tender, not entailing a validity period and submitted within the time limit for submission of tenders set in the invitation to tender, the contracting authority shall verify that the first tender is in compliance with the terms set out in the procurement documents. If the tender is invalid due to a reason in relation to which the tender may not be made suitable in the course of the negotiations or the supply of missing information, the tender shall be

declared invalid prior to the starting of the negotiations. Before starting the negotiations, the tender may only be declared invalid due to unsuitability of the professional tender, if the professional tender does not comply with the minimum requirements laid down by the contracting authority. Any other missing data, information in relation to the declarations, documents included in the tender shall be supplied until the conclusion of the negotiations.

- b) After the conclusion of the negotiations, the contracting authority shall verify that the final tenders are in compliance with the contents of the procurement documents at the time of the conclusion of the negotiations and with the requirements set out in the relevant legislation, and, where appropriate, he applies Article 72. Any missing data, information in relation to the declarations, documents which should have been supplied until the conclusion of the negotiations on the first tender, may not be supplied subsequently.
- c) The final tenders, which are considered suitable according to point (b) shall be evaluated by the contracting authority on the basis of the award criterion set in the notice launching the procedure and, if the certificates have not been requested in an earlier stage of the procedure, the contracting authority shall proceed pursuant to Article 69(4)-(6).

## **Competitive dialogue**

### **Article 90**

1. The competitive dialogue is a procurement procedure, whereby the contracting authority shall conduct a dialogue with the candidates selected by him in line with the provisions set out in Article 69, with the aim of identifying with precision the subject-matter of the public procurement, the type of and the terms for the relevant contract, and after the dialogue the contracting authority invites the candidates to submit a tender.

2. The competitive dialogue consists of three stages:

- a) participation stage,
- b) dialogue,
- c) tendering stage.

3. The contracting authority may use the competitive dialogue in the cases set out in Article 85(2).

4. The competitive dialogue shall start with an invitation to participate. The invitation to participate shall state the grounds for the use of competitive dialogue. In the participation stage of the procedure, any interested economic operator shall have the right to submit a request to participate. Article 86(3) shall also be applied to competitive dialogues.

5. In the competitive dialogue, the time limit for participation may not be shorter than thirty days from the date of dispatch of the invitation to participate.

6. In the competitive dialogue, the contract shall be awarded on the sole basis of the award criteria for the best price-quality ratio.

7. For the purposes of the subject-matter of the public procurement, the needs and requirements of the contracting authority shall be set out in the invitation to participate and shall be given in detail in the descriptive document. The descriptive document shall contain, in particular, the definition of the subject-matter of the public procurement, the related technical specifications, furthermore, the contract terms, to the extent the contracting authority is capable of doing so, as well as guidelines about the circumstances concerning which the contracting authority requests proposals from tenderers and about the scope or requirements imposed by

the contracting authority as regards those circumstances. An indicative time limit for the conclusion and performance of the contract shall also be indicated in the procurement documents.

#### **Article 91**

1. If the participation stage is successful, the contracting authority shall, not later than five business days after notifying the candidates of the results, send an invitation to tender at the same time to all candidates qualified as suitable or, in the case of setting of a range, to the selected candidates.

2. Where the number of candidates qualified as suitable is lower than the lowest number in the range, the contracting authority may continue the procedure by inviting the candidates qualified as suitable to conduct a dialogue. The tenderers invited to participate individually in the dialogue may not submit a joint proposal for solution or joint tender.

3. In the dialogue stage of the procedure, the tenderers shall submit proposals for solution, and then, based on those proposals for solution, the contracting authority shall conduct a dialogue with them.

#### **Article 92**

1. As a minimum, the invitation to tender shall contain the following elements:

- a) name and address, telephone and fax number as well as e-mail address of the contracting authority;
- b) reference to the invitation to participate published and the date of its publication;
- c) electronic location where the procurement documents can be accessed; in the case set out in Article 39(2), if those documents were not yet made available otherwise, they shall be annexed to the invitation;
- d) deadline for submitting the proposal for solution;
- e) address and way of submitting the proposal for solution;
- f) indication whether or not the proposal for solution may be submitted or the dialogue may be conducted in another language in addition to Hungarian;
- g) place and, if it is not made electronically, time of opening the proposals for solution;
- h) parties authorised to be present at the opening of the proposals for solution, where it is not made electronically;
- i) date of sending the invitation to conduct a dialogue;
- j) procedure of the conduct of the dialogue and the fundamental rules, the date of commencement thereof set by the contracting authority;
- k) where the contracting authority intends to reduce the number of the tenderers in the course of the dialogue, the conduct of the stages of the dialogue and the upper limit of the number of participants to be selected for the dialogue following the given stage;
- l) if the contracting authority intends to give a prize to one or more tenderer(s), the stipulations thereon set out by him;
- m) in line with the invitation to participate, if necessary, reference to the certificates, declarations and documents to be attached to the proposal for solution, which shall prove that neither the tenderer, its subcontractor nor the entity contributing to the certification of suitability is liable to the grounds for exclusion at the time of the conduct of the dialogue.

2. Article 88(5) shall also be applied to competitive dialogues, noting that negotiation shall be read as dialogue and the contracting authority reduces the number of proposals for solution to be discussed.

3. The proposed solution shall contain

- a) the proposal of the tenderer for a single or a multi-variant solution regarding the conditions according to Article 90(7),
- b) the preliminary offer of the tenderer, in the event that the contract is performed according to the technical, legal, or financial criteria proposed by that tenderer, as well as
- c) the indication of the element of the proposed solution which qualifies as a business secret.

4. The rules pertaining to the opening of tenders shall be applied to the submission and opening of proposals for solution and the provisions set out in Article 73(1)(a) and Article 75(1)(a) shall apply correspondingly to the proposals for solution submitted by tenderers as well.

### **Article 93**

1. The dialogue between the contracting authority and one or more tenderer in the competitive dialogue aims at finding the solutions best adapted to satisfy the procurement needs of the contracting authority.

2. During the dialogue the contracting authority shall ensure equal treatment to all tenderers and, in particular, all information provided by the contracting authority shall be communicated to all tenderers.

3. During the dialogue, tenderers shall not be bound by their proposal for solution and the contracting authority shall not be bound by the conditions set by him either, however, in the procedure, neither the subject-matter of the public procurement, nor the conditions set by the procurement documents may be changed to such an extent that it would distort competition or prejudice equal opportunities of economic operators. Neither the award criteria nor the method may be modified in the course of the procedure.

4. In the case set out in Article 92(2), in the course of further dialogue conducted with the participants still being in competition, the tenderers may only propose more favourable solutions for the contracting authority than those proposed in the previous stage. Where a tenderer submits a multi-variant proposal for solution, those shall be considered as independent proposals, and the contracting authority is not bound to invite to a successive stage or stages of the dialogue any specific solution proposed by a tenderer.

5. The contracting authority shall conduct the dialogue with the tenderers one by one, and no information provided by the tenderer may be communicated to the other tenderers without his consent. The tenderer's consent shall be requested for the intended communication of specific information.

6. Where oral negotiations take place or also take place in the course of the dialogue, the contracting authority shall draw up minutes for each negotiation, which shall be signed by all tenderers who participated in the negotiation in question not later than by the commencement of the subsequent stage of the dialogue, in the case of a single stage or the last stage not later than two days after the dialogue ended, and a copy of such minutes shall be handed over or sent to them within two business days.

### **Article 94**

1. After the conclusion of the dialogues the contracting authority shall invite in writing, at the same time all tenderers who participated in the dialogue, or where appropriate, in the last stage of the dialogue to submit their tender.

2. Where all participants concerned have provided their consent for using their proposal for solution, wholly or partly, during the definition of the requirements for the subject-matter of the procurement and the contracting authority considers it necessary, the contracting authority may use wholly or partly one or more proposals for solution in defining the public procurement technical specifications and the contract terms, for the drawing up of the final tender. In this case new procurement documents shall be made available for the submission of the final tender.

3. Where the conditions according to paragraph 2 do not exist, tenderers shall submit their tenders by finalizing the previous proposal for solution.

4. The invitation to tender shall state the following information:

- a) deadline and the place for submission of tenders,
- b) place and time of opening the tenders,
- c) in the case specified in paragraph 2, the information concerning the accessibility of procurement documents,
- d) validity period of the tender,
- e) in the tendering stage, in compliance with the stipulations of the invitation to participate, reference to the certificates to be submitted according to Article 69 to support the declaration included in the ESPD and, if necessary, reference to the declarations and documents to be attached to the tender, which shall prove that neither the tenderer, its subcontractor nor the entity contributing to the certification of suitability is liable to the grounds for exclusion at the time of the tendering stage.

5. The tenderer shall be bound by the validity period of the tender from the date of expiry of the time limit for submission of tenders. In the invitation to tender, the contracting authority may not set a validity period exceeding thirty - in case of public works, or where the procurement procedure is conducted under a control integrated in a process stipulated by a separate act of legislation, sixty - days from its commencement.

6. In competitive dialogues, the validity period shall be applied to the tenderer, with the proviso that the contracting authority may further clarify, where appropriate, certain non-essential contract terms with the tenderer to be indicated as the winning tenderer. These clarifications shall not distort competition or violate the principle of equal opportunities of economic operators.

## **Innovation partnership**

### **Article 95**

1. The innovation partnership is a special type of procurement procedure which aims at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works.

2. The innovation partnership consists of two stages:

- a) the conclusion of the innovation partnership agreement or agreements is subject to the procedural rules laid down by this Act (procedural stage) and
- b) the development process and the purchase is subject to the terms and conditions specified in the innovation partnership agreement (contractual stage).

### **Article 96**

1. The innovation partnership agreement or, where the contracting authority intends to establish the partnership with several tenderers, agreements shall be subject to the rules on negotiated procedures, with the differences stipulated in this Article.

2. In the procurement documents, in compliance with Article 95(1), the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. The procedure may not be launched in a prior information notice and the choice of this type of procedure shall be justified by the contracting authority on the grounds of the novelty (innovative nature) of the subject-matter of the procurement. The contract terms included in the procurement documents shall define in detail the arrangements applicable to intellectual property rights. In the case of public works, it is not necessary to provide economic operators with an unpriced budget or to submit a priced budget in the tender.

3. The time limit for participation may not be shorter than thirty days from the date of dispatch of the invitation to participate and the possibilities for the reduction of time limits in negotiated procedures are unavailable.

4. The contract shall be awarded on the sole basis of the award criteria for the best price-quality ratio.

5. In the tendering stage of the procedure, Article 75(1) shall not apply. The contracting authority may not exercise the option under Article 87(6).

6. In case of a limitation of the number of candidates to be invited to tender, the contracting authority in the selection of candidates shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

7. The tenders shall include a description of research and development projects aimed at satisfying the needs which may not be met using the existing solutions defined by the contracting authority. The contracting authority shall determine the remuneration components to be paid to tenderers to which the price shall be given and he shall determine how the price shall be broken down in the tender, furthermore, the contracting authority shall include in the award criteria the predetermined maximum price of the supplies, services or works to be produced as a result of the development.

8. At the end of the procedural stage, the contracting authority shall have the right to conclude partnership agreements with several tenderers. The notice specified in Article 37(1)(h) shall be published concerning the conclusion of the partnership agreement.

## **Article 97**

1. The partnership agreement shall provide for the organisation of the research and innovation process which shall be structured in successive phases and which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partner and provide for payment of the remuneration related thereto.

2. The contracting authority may decide after each phase to terminate the innovation partnership or to reduce the number of partners by terminating individual contracts, provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use. The objective criteria to be applied in reducing the number of partners, the number of economic operators from which the contracting authority intends to purchase the supplies, services or works at the end of the process and, where the number of partners was not reduced accordingly in the development process, the objective criteria to be applied by the contracting authority in order to decide from which partner he intends to purchase the supplies, services or works shall be clearly stated in the partnership agreement.



3. In the case of innovation partnerships established with several partners, contracting authorities shall not reveal to the other partners any information communicated by a partner without his consent. Such consent shall be given with reference to the intended communication of specific information.

4. The contracting authority shall ensure that the structure of the partnership, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of the solution. The value of supplies, services or works created in the development process shall not be disproportionate in relation to the investment required for their development.

### **Negotiated procedures without prior publication of a contract notice**

#### **Article 98**

1. The negotiated procedure without prior publication of a contract notice is a procurement procedure consisting of one stage, in which the contracting authority negotiates the terms of the contract with the tenderers invited to submit a tender.

2. Contracting authorities may conduct a negotiated procedure without prior publication of a contract notice in exceptional cases, where:

- a) the preconditions set out in Article 85(2)(e) are met and the original terms of the public contract have not been altered substantially, furthermore, all tenderers of the open or restrictive procedure whose tender was considered invalid are invited by the contracting authority to the negotiation, on condition that the invalidity is not based on Article 73(1)(b) or (d), and their tender have fulfilled the formal requirements set, where appropriate, after a supply of missing information;
- b) the open, restrictive procedure was unsuccessful because no tender or request to participate was submitted in the procedure or the tenders or requests to participate submitted were substantially unsuitable, provided that the original terms of the public contract have not been altered substantially; the contracting authority shall, upon request, inform the European Commission via the Minister responsible for public procurements. The tender shall be considered substantially unsuitable, if it is invalid on the ground that the professional tender is clearly unable to meet the needs and requirements defined by the contracting authority, unless substantial changes are made to it; the request to participate shall be considered substantially unsuitable, if it is invalid on the basis of Article 73(1)(b) or (d).
- c) for technical reasons or for reasons connected with the protection of exclusive rights, the contract may only be concluded with a particular economic operator, provided that no reasonable alternative or substitute exists to satisfy the purchasing need of the contracting authority and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
- d) the contract may only be concluded with a particular economic operator because it is aimed at the creation or acquisition of a unique work of art or artistic performance;
- e) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authority, the time limit laid down for the open or restricted procedures cannot be kept; however, the circumstances invoked to justify extreme urgency must not in any event be attributable to the negligence of the contracting authority or be caused by the contracting authority.

3. Furthermore, contracting authorities may award public works or public service contracts by negotiated procedure without prior publication of a contract notice in case of new public works or services consisting in the same or similar works or services entrusted to the former winning tenderer to which the same contracting authority awarded an earlier contract. This is subject to the proviso that such new works or services conform to a basic project for which a first contract was awarded in an open or restricted procedure, and the contracting authority indicated in the notice launching or announcing the original procedure that the negotiated procedure might be adopted and also indicated the subject-matter of the further possible works or services and the conditions for their procurement, furthermore, it took into

consideration the total estimated value of subsequent works or services (to determine whether it reaches the EU threshold) when determining the estimated value of the works or services in the former procedure. Such negotiated procedure may only be applied during the three years following the conclusion of the original contract.

4. In addition, contracting authorities may award public supply contracts by negotiated procedure without prior publication of a contract notice in the following cases:

- a) where the products involved are manufactured purely for the purpose of research, experiment, study or development; however, this provision does not cover quantity production to establish commercial viability or to recover research and development costs;
- b) where, in the course of a partial replacement or the extension of existing supplies, a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; however, the total length of such contract(s) concluded with the former winning tenderer may not exceed three years;
- c) where the product is listed on and procured from a commodity exchange;
- d) where the supplies are procured with exceptionally favourable terms in the course of a sale in a liquidation procedure, in a closing sale or in the execution of a court warrant or in any similar procedure related to the personal rights of the entity concerned.

5. In addition, contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice, where a previous design contest was conducted and the contract must be awarded to the successful candidate or, according to the recommendation of the evaluation committee, to one of the successful or prize winning candidates; in the latter case, all candidates or tenderers recommended by the evaluation committee shall be invited to participate in the negotiations.

#### **Article 99**

1. Negotiated procedures without prior publication of a contract notice shall start by sending an invitation to tender, with the exception of the case specified in Article 98(4)(c)-(d), and in the case pursuant to Article 102(2) it shall start by sending an invitation to negotiate. If several tenderers may submit a tender, the invitation to tender or the invitation to negotiate shall be sent to all tenderers at the same time.

2. In the negotiated procedures without prior publication of a contract notice, only those economic operators may submit a tender which were invited to tender. The economic operators invited to tender may not submit a joint tender, however, nothing prevents any economic operator invited to tender from submitting a joint tender with any other economic operator not invited to tender by the contracting authority.

3. Where Article 98(2)(b) and (4)(a) applies to the negotiated procedure and, if it is reasonably possible in a situation resulting in extreme urgency, in the case of application of Article 98(2)(e), the contracting authority shall, as far as possible, send an invitation to tender to at least three tenderers.

#### **Article 100**

1. In addition to the contents provided for in Article 50, the invitation to tender shall contain the following elements:

- a) the ground for adopting the negotiated procedure;
- b) the process of negotiations and the related fundamental rules prescribed by the contracting authority;
- c) the date of the first negotiation.

2. Where the contracting authority does not make available separate procurement documents in addition to the invitation, the contracting authority shall include the contract terms, the technical specifications, the unpriced budget in the case of public works, and, where appropriate, the requirements for the business organisation to be set up by the successful tenderers in the invitation for the submission of tenders.

3. In the negotiated procedure without prior publication of a contract notice according to Article 98(5), the contract shall be awarded on the sole basis of the award criteria for the best price-quality ratio.

4. The tenderer shall be bound by his tender from the date of conclusion of the negotiations. In the invitation for the submission of tenders, the contracting authority may not set a validity period exceeding thirty, in case of public works, or where the procurement procedure is conducted under a control integrated in a process stipulated by a separate act of legislation, sixty days from its commencement (the conclusion of negotiations).

#### **Article 101**

1. Article 88(2)-(4) shall also apply accordingly to negotiations. Article 88(9) shall apply subject to the condition that the final tender shall only be submitted in writing, if more than one tenderer participates in the procedure.

2. In the course of the negotiation, the subject-matter and the terms of the public procurement may not be modified in such a way as to

- a) result in a divergence in the properties or conditions of the subject-matter or the terms of the contract awarded in the procedure from the original subject-matter intended to be purchased or from the terms of the contract laid down at the time of sending of the invitation to tender to such an extent that would have not allowed the application of a negotiated procedure without prior publication of a contract notice,
- b) modify the terms set out in the invitation to tender and the procurement documents or complement those terms to such an extent that makes any tenderer incapable to submit a final tender at the end of the negotiations, or
- c) change the award criteria or method.

#### **Article 102**

1. In negotiated procedures without prior publication of a contract notice under Article 98(2)(e), negotiations shall be conducted and a written contract concluded when the negotiations have been completed with the tenderer or the tenderers able to perform the contract within the period of time required by the extraordinary circumstances or, if more economic operators received a call for competition or an invitation, with the tenderer who submitted the most favourable tender.

2. In that case the contracting authority shall send an invitation to tender or, where such an invitation to tender may not be drawn up due to an extreme urgency brought about by the circumstances, an invitation to negotiation to the suitable economic operators. The invitation to negotiation shall state the name and seat of the tenderer, the place and time of the negotiation and at least the subject-matter and the quantity of the public procurement.

3. In a procedure to be conducted on imperative grounds of urgency

- a) contracting authorities need not state the reasons for not prescribing any suitability criteria, if that is the case.
- b) in addition to the verification of the available electronic records, contracting authorities can accept the ESPD, consisting of a self-declaration, for the purposes of the final verification of the non-existence of the grounds for exclusion.

### **Article 103**

1. On the starting date of a negotiated procedure without prior publication of a contract notice, the contracting authority shall submit to the Public Procurement Authority the invitation to tender, as well as an information note on the name and address (seat, residence) of the economic operators to be invited to tender, the estimated value of the public procurement and the circumstances which justify the use of the negotiated procedure.

2. For the purposes of Article 98(2)(e), when the contracting authority sends the invitation to tender or, where appropriate, the invitation to negotiation to the economic operators, he shall be bound to inform at the same time, without delay the Public Procurement Authority according to the provisions set out in paragraph (1). Instead of the invitation to tender, the invitation to negotiate shall be sent, where appropriate.

3. On the starting date of the negotiated procedure specified in Article 98(4)(c) and (d), an information note stating the circumstances which justify the use of the negotiated procedure and, in cases according to point (d), the name and address of the organisation concerned shall be submitted by the contracting authority to the Public Procurement Authority.

4. In the case of the negotiated procedure specified in Article 98(2)(e), the Public Procurement Authority shall take a substantiated decision stating the detailed reasons, on the basis of which it can be clearly established whether or not the legal basis for using a negotiated procedure is well-founded. The Public Procurement Authority publishes its decision on its homepage as well.

## *CHAPTER XVI*

### *SPECIFIC PROCUREMENT METHODS*

#### **Framework agreement**

### **Article 104**

1. The contracting authority may carry out its public procurement through a framework agreement as well.

2. For this purpose, he shall conclude a framework agreement by conducting a procurement procedure in line with the provisions set out in this Act and subsequently, on the basis of the framework agreement, shall carry out the public procurement according to the provisions set out in this subchapter.

3. The contracting authority shall indicate in the notice launching the procedure whether the procedure is aimed at the conclusion of the framework agreement with one or more tenderer(s), furthermore, how the procurement can be carried out on the basis of the framework agreement, in accordance with Article 105. The tenderers participating in the framework agreement are bound by the obligation to submit a tender and to conclude the relevant contract. Regardless of whether the division of the contract into lots is accepted, the contracting authority may also provide that each contract concerning the different parts of the framework agreement shall be concluded in the different ways specified by Article 105(1) or, where more than one tenderer participate in the contract, Article 105(2).

4. On the basis of the framework agreement, in the cases set out in Articles 29-30 and 31-32, only the contracting authorities nominated in the notice launching or announcing the procedure shall have the right to conclude contracts with the tenderers participating in the framework agreement.

5. In the case of framework agreements to be concluded with several tenderers, the contracting authority shall state in the notice launching the procedure the range of the tenderers that have submitted the most favourable tender according to the award criteria and he shall conclude the framework agreement with a number of tenderers not exceeding that highest limit number. The range shall be adjusted to the subject-matter of the public procurement and to the specific characteristics of the procedure, and under all circumstances shall ensure genuine competition. The range shall include at least three tenderers, but the obligation to conclude the framework agreement with at least three tenderers shall only be met, if there are at least three tenderers who submitted a valid tender. Where several tenders are identical at the limit of the highest number of tenderers that have submitted the most favourable tenders, the contracting authority can, instead of applying Article 77(5), conclude a framework agreement with all such tenderers that have submitted identical tenders. Where the contracting authority indicated in the notice launching the procedure that the procedure is aimed at the conclusion of the framework agreement according to Article 105(2), the procedure may also be declared invalid, if only one suitable tender has been submitted. In the case of framework agreements to be concluded with several tenderers, the second sentence of Article 69(5) shall apply to all tenderers participating in the framework agreement.

6. The term of a framework agreement may not exceed four years, except in duly substantiated exceptional cases, taking into consideration, in particular, the subject-matter of the framework agreement. In this respect it shall be considered whether the specific features related to the given framework agreement require the setting of a longer fixed term, and whether or not it results in a disproportionate restriction of competition. The notice starting a procurement procedure to be conducted for the conclusion of a framework agreement exceeding four years shall specify the justification of the setting of a longer term.

7. The contracting authority is not obliged to implement its public procurement according to the framework agreement, particularly when the framework agreement has been concluded for a term of several years or when the number of tenderers that concluded the framework agreement does not allow genuine competition. In this case the contracting authority, in the notice launching the new procedure, shall refer to this circumstance and, if the procedure is launched with a notice, shall inform without any delay the tenderers that concluded the framework agreement about the publication of this new notice.

8. On the basis of the framework agreement, contracts may only be concluded during the period of the framework agreement and the quantity purchased on the basis of the framework agreement may not exceed the total quantity envisaged in the framework agreement.

9. Where a written consultation or the reopening of competition takes place on the basis of the framework agreement, the terms laid down in the framework agreement may not be substantially modified in the course of the written consultation or the reopening of competition.

## **Article 105**

1. On the basis of a framework agreement concluded with one tenderer, including those cases in which the procedure was aimed at the conclusion of a framework agreement with several tenderers, but finally it was concluded with the sole valid tenderer, the realisation of the given public procurement may take place as follows:

- a) if the framework agreement sets out all terms of the contract(s) aimed at the realisation of the public procurement based on it, according to the terms set in the framework agreement, through a direct purchasing order placed by the contracting authority;
- b) if the framework agreement sets out all terms of the contract(s) aimed at the realisation of the public procurement based on it, according to point (a) through a direct purchasing order or according to point (c) through the conclusion of the contract following a written consultation, provided that the latter was prescribed by the contracting authority in the framework agreement as well as previously in the relevant procurement procedure, in the notice launching the procedure. The choice of whether specific public contracts shall be executed following the written consultation or directly according to the terms set out in the framework agreement shall be made pursuant to the objective criteria set out in the framework agreement. The framework agreement shall also specify which terms may be subject to written consultation. In the course of the written consultation, the tenderer shall submit a tender which is similar to or more favourable than the terms of the framework agreement.

- c) if the framework agreement does not set out all terms of the contract(s) aimed at the realisation of the public procurement based on it, through the conclusion of the contract following a written consultation. In the invitation for consultation, the tenderer shall be invited by the contracting authority to complement his tender submitted in the procedure aimed at the conclusion of the framework agreement; the supplements to be taken into consideration by the tenderer when drawing up his tender shall be laid down by the contracting authority in the invitation for consultation. The invitation for consultation shall specify the data related to the subject-matter and the contract terms of the given public procurement. In the course of the written consultation, the tenderer shall submit a tender similar to or more favourable than the terms of the framework agreement, the tenderer shall be bound by his tender submitted in the course of the consultation until the deadline set in the invitation for consultation. The contracting authority shall notify the tenderer of the acceptance or the rejection of his tender submitted in the course of the consultation.

2. On the basis of a framework agreement concluded with several tenderers the realisation of the given public procurement may take place as follows:

- a) if the framework agreement sets out all terms of the contract(s) aimed at the realisation of the public procurement based on it, according to the terms set in the framework agreement, through a direct purchasing order, placed by the contracting authority with the tenderer(s) selected pursuant to the objective criteria established in the framework agreement. The framework agreement shall specify the objective criteria (in particular the ranking established on the basis of the award criterion applied in the first part or any other objective criteria related to the subject-matter of the public procurement to be executed on the basis of the framework agreement) on the basis of which the contract for the execution of the given public procurement will be concluded by the contracting authority with a tenderer participating in the framework agreement.
- b) if the framework agreement sets out all terms of the contract(s) aimed at the realisation of the public procurement based on it, according to point (a) through a direct purchasing order or according to point (c) through the reopening of the competition, provided that the latter was prescribed by the contracting authority in the framework agreement as well as previously in the relevant procurement procedure, in the notice launching the procedure. The choice of whether specific public contracts shall be executed following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the framework agreement. In the framework agreement, it shall also be specified which terms may be subject to reopening of competition.
- c) if the framework agreement does not set out all terms of the contract(s) aimed at the realisation of the public procurement based on it, through the reopening of the competition pursuant to paragraph (3)-(5).

3. In application of paragraph 2(b) or (c), the contracting authority shall send an invitation to tender in writing, at the same time to all tenderers that concluded the framework agreement. No other tenderer may be involved in the procedure. The invitation to tender shall include the following elements:

- a) name and address, telephone and fax number as well as e-mail address of the contracting authority;
- b) reference to the notice announcing or launching the procedure to be conducted for the conclusion of the framework agreement and the date of its publication;
- c) reference to the concluded framework agreement;
- d) subject-matter and quantity of the specific public procurement;
- e) determination of the contract;
- f) term of the contract or time limit for performance of the contract;
- g) place of performance/delivery;
- h) conditions for settling the consideration or reference to the applicable law;
- i) time limit for submission of the tender, the address used for the submission of tenders and an indication whether the tender may also be submitted in a language other than the Hungarian;
- j) place and, if it is not made electronically, time of opening the tenders and the parties authorised to be present;
- k) an invitation addressed to the tenderers according to which they shall make a declaration concerning the non-existence of the grounds for exclusion;
- l) any other information necessary for the submission of the tender, as regards, where appropriate, the accessibility of further procurement documents;

- m) validity period of the tender;
- n) award criteria and method according to Article 76.

4. The contracting authority may apply award criteria other than those applied in the procedure conducted for the conclusion of the framework agreement, provided that he specified those criteria in the procurement documents in the course of the procedure conducted for the conclusion of the framework agreement and those criteria are included in the framework agreement as well. The award criteria and method shall be specified according to Article 76. The tenderer may only submit tenders which are similar to the contents of the framework agreement or which are more advantageous for the contracting authority compared to the contents of the framework agreement.

5. Article 68(4) shall apply to the opening of tenders, Article 69(1) and Articles 73-75 shall apply to the evaluation of tenders, Article 79 shall apply to the communication of the decisions of the contracting authority, furthermore, Article 131 shall apply to the conclusion of the contract. The amount specified in Article 73(6)(c) may also be indicated in the invitation to consultation or invitation to tender sent to the tenderers participating in the framework agreement.

### **Dynamic purchasing system**

#### **Article 106**

1. The contracting authority may create a dynamic purchasing system for the implementation of its commonly used public procurements.
2. The dynamic purchasing system shall be operated as a completely electronic process, in which all communications between the contracting authority and the tenderers shall be made electronically.
3. Any economic operator shall have the right to join the dynamic purchasing system throughout its entire duration, provided that he satisfies the selection criteria laid down by the contracting authority.
4. The dynamic purchasing system may be divided by the contracting authority into several phases on the basis of the objective characteristics of procurements to be realised in the given phase (in particular on the basis of the highest value or the place of performance/delivery of contracts to be concluded in the given phase). In this case each part and the characteristics thereof shall be included in the notice launching or, in the case of procedures advertised in a prior information notice, advertising the procedure. The suitability criteria shall be established by the contracting authority separately for each phase. Article 61(4)-(6) shall not apply.

#### **Article 107**

1. Admittance to the dynamic purchasing system is subject to the rules on the participation stage of the restricted procedure, while the implementation of the procurement in the dynamic purchasing system is subject to the rules on the tendering stage of the restricted procedure, with the differences stipulated in this subchapter. Article 83(3) shall not apply.
2. The notice launching or, in the case of procedures announced in a prior information notice, announcing the procedure shall include that a dynamic purchasing system is involved. When the procedure is started, the subject-matter of the public procurement must be specified in the procurement documents in such a way as to allow clear determination of the nature of the purchases envisaged, furthermore, the procurement documents shall include the estimated quantity of the purchases envisaged and the most important contract terms on the basis of which the economic operators are able to decide whether or not they intend to participate in the

dynamic purchasing system. The procurement documents shall also specify all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications. The exact technical specifications and contract terms concerning the specific public procurement to be implemented in the system shall be made available at the time of the sending of the invitation to tender.

3. Contracting authorities shall by electronic means offer direct access free of charge to the procurement documents, as long as the system is valid.
4. All the candidates who meet the suitability criteria shall be admitted to the dynamic purchasing system, the number of candidates to be invited to tender may not be limited.
5. When implementing the dynamic purchasing system, the time limit for participation may not be shorter than a period of thirty days from the day of dispatch of the invitation to participate or the day of sending of the direct invitation to participate, the rules on accelerated procedures shall not apply. This time limit for participation shall govern the implementation of the system and, within its framework, the sending of the invitation to tender related to the first public procurement. No further time limits for participation may be set in relation to subsequent public procurements to be carried out in the system, requests to participate may be submitted throughout the entire duration of the system.
6. The contracting authority shall be bound to evaluate the requests to participate within ten days from the date of receipt thereof and notify the candidates of their admittance to the dynamic purchasing system or of their rejection. In duly justified cases the time limit may be extended to fifteen business days, in particular in case of a request for supply of missing information or provision of information. When implementing the dynamic purchasing system, the evaluation period may be extended; in such cases the invitation to tender related to the first public procurement may not be sent until the evaluation of the requests to participate is completed. The summary of the evaluation of requests to participate shall only be prepared at the time of the implementation of the dynamic purchasing system. All candidates shall be notified of the extended period of the evaluation.
7. Contracting authorities shall invite all admitted economic operators to submit a tender for each specific procurement under the dynamic purchasing system. Where the dynamic purchasing system has been divided into different categories, contracting authorities shall invite all economic operators having been admitted to the category corresponding to the specific procurement concerned to submit a tender. The contracting authority may not set a time limit for submission of tenders which is shorter than ten days from the day the invitation to tender is sent. Sub-central contracting authorities may apply Article 84(6) when setting the time limit for submission of tenders.
8. As regards the given public procurement, the winning tenderer shall be the tenderer which has submitted the most favourable tender according to the evaluation criteria published in the notice launching or, in the case of procedures announced in a prior information notice, advertising the procedure in relation to the dynamic purchasing system. For the purposes of the evaluation of requests to participate and tenders Article 69 shall apply, save that the contracting authority may request at any time during the whole period of the system that the admitted economic operators submit the ESPD, consisting of an updated self-declaration, within five business days.
9. The notice launching or, in the case of procedures announced in a prior information notice, advertising the procedure shall indicate the duration of the dynamic purchasing system. Any change to the duration shall be published in the notice specified in a separate act of legislation.
10. No charges may be billed to economic operators in relation to their participation in the dynamic purchasing system.



## **Electronic auctions**

### **Article 108**

1. In electronic auctions, new prices, revised downwards, and/or new values concerning certain quantifiable elements of tenders are presented by tenderers. For this purpose, contracting authorities shall structure the electronic auction as a repetitive electronic process, which occurs after the evaluation of the tenders according to Article 76, enabling them to be ranked using automatic evaluation methods.

2. If it was indicated in advance in the notice launching the procedure, contracting authorities may initiate an electronic auction with the aim of selecting the winning tenderer, in the following cases:

- a) in open, restricted or negotiated procedures, where the content of the procurement documents, in particular the technical specifications, can be established with precision,
- b) on the reopening of competition among the parties to a framework agreement as provided for in Article 105(2)(b) or (c),
- c) the award of contracts under the dynamic purchasing system referred to in Article 106.

3. Certain public service contracts and certain public works contracts having as their subject-matter intellectual performances, such as the design of works, shall not be the object of electronic auctions.

4. The electronic auction may take place in a number of successive phases.

5. The electronic auction shall be based on one of the following elements of the tenders:

- a) solely on prices where the contract is awarded on the basis of price only;
- b) on prices and/or on other award criteria applied in the procedure where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost.

6. In the case set out in Article 5(b), an electronic auction may only be initiated in relation to criteria which can be established with sufficient precision. It is considered that the award criteria can be established with sufficient precision, if they are quantifiable and can be expressed in figures or percentages in such a way as to enable the tenders to be ranked automatically according to a predetermined formula.

7. Before proceeding with an electronic auction, contracting authorities shall evaluate tenders pursuant to Article 76, in accordance with the award criterion or criteria and with the weighting fixed for them.

8. Following the evaluation of tenders according to paragraph 7, all tenderers shall be notified by electronic means and invited simultaneously to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation.

9. The electronic auction may not be used by the contracting authority contrary to its purpose, in particular for preventing, restricting or distorting competition, furthermore, following the conduct of the electronic auction the subject-matter of the contract concluded on the basis of the procedure may not differ from the subject-matter defined in the notice launching the procedure and the procurement documents.

10. After closing the electronic auction, the winning tenderer shall be selected on the basis of the results of the electronic auction, according to Article 76 and, where the certificates were not submitted at an earlier stage, according to Article 69(4)-(6).

11. Detailed rules pertaining to the conduct of electronic auctions are laid down in a separate act of legislation.

## **Electronic catalogues**

### **Article 109**

1. Where the use of electronic means of communication is required by the contracting authority in accordance with Article 41(3), it may stipulate in the notice launching the procedure that tenders must be presented in the format of an electronic catalogue or tenders must be accompanied by an electronic catalogue.

2. Tenderers shall be allowed to attach other documents, completing the tender, to tenders presented in the form of an electronic catalogue.

3. Where the presentation of tenders in the form of electronic catalogues is required, contracting authorities shall:

- a) state so in the notice launching the procedure or, where a prior information notice is used as a means of calling for competition, in the direct invitation to participate;
- b) indicate in the procurement documents all the necessary information, pursuant to a separate act of legislation, concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the electronic catalogue.

4. The electronic catalogue shall be produced by the tenderer for participation in a specific procurement procedure, in accordance with the format and technical specifications established by the contracting authority on the basis of paragraph 3(b) as well as the requirements for the electronic means of communication defined on the basis of a separate government decree.

5. Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts shall take place on the basis of the updated catalogues.

6. In the case set out in paragraph 5, contracting authorities shall use one of the following methods:

- a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- b) notify tenderers that they intend to collect the information needed to constitute tenders adapted to the requirements of the contract in question, from the electronic catalogues which have already been submitted.

7. The contracting authority shall indicate in the procurement documents for the framework agreement that he will apply the method specified in Article 6(b).

8. Where contracting authorities reopen competition for specific contracts in accordance with paragraph 6(b), they shall notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question, at least five business days before the collection of information starts. The contracting authority shall give tenderers the possibility to refuse such collection of information.

9. Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

10. Contracting authorities may also require that offers be presented in the format of an electronic catalogue, when using a dynamic purchasing system.

11. Contracting authorities may also apply the method specified in paragraph 6(b) and paragraph 8 in the framework of a dynamic purchasing system, provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority. That catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph 6(b).

### PART THREE

#### PROCEDURES BELOW EU THRESHOLDS

##### *CHAPTER XVII*

##### *RULES PERTAINING TO THE PROCEDURES BELOW EU THRESHOLDS*

#### **Article 110**

This Chapter shall apply to public contracts, not including works and service concessions, the value of which is below EU thresholds and at the same time is equal to or greater than national thresholds. Furthermore, the procedure pursuant to this Chapter may be applied in cases where Chapter III of this Act permits or requires it [Article 19(4); Article 21(2)].

#### **Exceptions**

#### **Article 111**

This Act shall not apply to the following procurements the value of which is below EU thresholds:

- a) to the procurement of textbooks, if it is carried out in accordance with the Act on the Rules for the Textbook Market of the National Public Education, in the framework of the supply of textbooks to schools and where the textbook is registered in the textbook register.
- b) to the procurement of supplies and services for the full boarding of children situated in children's homes and apartment homes on the basis of the Act on the Protection of Children and on Guardianship Administration, for the full boarding of those who receive after-care and of persons receiving social services under Articles 59-85/A of Act III of 1993 on Social Administration and Social Benefits;
- c) to hotel and catering services under Annex 3, library management services which are covered by CPV codes 79995000-5 to 79995200-7, recreational, cultural and sporting services which are covered by CPV codes 92000000-1 to 92700000-8, as well as legal services;
- d) to any kind of service under Annex 3, provided that its estimated value is below HUF 18 million;
- e) to the procurement within the framework of international development cooperation and international humanitarian aid activity<sup>25</sup>;
- f) to the procurement of cold foodstuffs and cooking raw materials, fresh and processed vegetables and fruits, milk and dairy products, cereals, bread products, honey, eggs, horticultural plants;

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<sup>25</sup> This amendment entered into force on 1 January 2016.

- g) in case of public services aimed at the creation of a literary (technical, scientific) work, or involving consulting or personal interpreting activity necessary for the performance of the contracting authority's core activity;
- h) to the procurement of services of an accredited public procurement consultant;
- i) to Article 3(5)(7)(9) of the Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts, as well as, in case of an emergency or urgent situation, to public procurements carried out with the aim of preventing epidemic diseases in animals, directly preventing or avoiding damage caused by serious industrial or traffic accidents or by water, preventing adverse impacts on water quality, as well as for the purposes of protective preparedness or the subsequent reconstruction;
- j) to the procurement of goods made, services provided and works executed in the framework of obligatory employment of prisoners;
- k) to the procurement of goods made, services provided and works executed by a public employer in the framework of public employment;
- l) to the use of services related to cash management pursuant to the Act on Credit Institutions and Financial Enterprises;
- m) to the procurements of an organization providing postal services or other services than postal services provided by a postal service provider;
- n) to the purchasing of items within the domain of cultural goods and other rights related thereto;
- o) to the procurements financed from the allocation stipulated by Article 113 and 114(3) of the Act XXXVI of 2012 on the National Assembly;
- p) to public services which are awarded for carrying out, or directly facilitating, the scientific, awareness-raising, research or educational activities specified in the statutes of the foundation established on the basis of Article 1 of the Act XLVII of 2003 on the foundations carrying out scientific, awareness-raising, research, educational activities which assist the functioning of political parties;
- q) to the procurement carried out for a foreign representation;
- r) to architectural services which are covered by CPV codes 71221000-3, 71222000-0, 71223000-7, 71243000-3, 71245000-7, 71410000-5, 71420000-8, 79932000-6;
- s) to services covered by CPV codes 71241000-9, 71242000-6, 71244000-0, 71246000-4, 71247000-1, provided that such service is purchased together with an architectural service specified in point (r), for the same public works;
- t) to the procurement of goods made or services provided by disadvantaged workers, in a sheltered place of employment.

### **Procedural rules to be applied**

#### **Article 112**

1. For the purposes of carrying out a public procurement covered by this Part, the contracting authority, according to its choice
  - a) shall conduct a procedure developed independently in a way pursuant to Article 117, or
  - b) shall proceed according to the rules set out in Part Two of this Act, with the differences stipulated in Articles 113-116.
2. For the purposes of paragraph 1(b), Part Two of the Act shall apply in compliance with the separate act of legislation specified in Article 21(4), subject to the criteria set out in Articles 22-24.

#### **Article 113**

1. The open, restricted and negotiated procedure shall not be launched with the publication of a notice. The contracting authority shall send a summary information concerning the procedure to be initiated to the Public Procurement Authority, at least five business days before the starting date of the procedure but within a maximum of twelve month, at the electronic location and in the manner foreseen by the Public Procurement Authority and that summary information shall be published by the Public Procurement Authority on its homepage, within one business day following the sending thereof. The summary information shall specifically contain the

name and address of the contracting authority, the contact point where interest in the procedure may be expressed, the subject-matter of the contract, the duration of the contract or the deadline of performance/delivery, place of performance/delivery, the reservation under Article 114(11) as well as the invitation addressed to the economic operators to express their interest in the procedure to the contracting authority by the time limit set in the summary information, noting that the time limit may not be shorter than five business days following the sending of that summary information. Data concerning the subject-matter of the public procurement shall be given in the summary information in such a way as to make it possible for economic operators to assess whether they intend to express their interest to the contracting authority. The expression of interest is subject to Article 41. The contents of the summary may not be modified following its publication. If the contracting authority does not intend to launch the procedure or to launch the procedure according to the data included in the summary information, it shall notify the Public Procurement Authority of the withdrawal of the summary information within twelve month following the sending of that information, at the electronic location and in the manner foreseen by the Public Procurement Authority, furthermore, it shall notify thereof in writing the economic operators who have already expressed their interest in the procedure. The Public Procurement Authority shall publish the information on such withdrawal on its homepage within one business day following the notification.

2. The contracting authority shall send the notice launching the procedure to at least three economic operators and to all those economic operators who expressed their interest in the procedure to the contracting authority. The call for competition shall be sent to at least three economic operators, even if less than three economic operators expressed their interest or no economic operator expressed its interest in the procedure. The notice launching the procedure shall be directly sent to economic operators at the same time, in writing, not later than twelve months after sending the summary information. The procurement documents shall be made available by the contracting authority on the date of sending of the call for competition at the latest, in accordance with Article 57. Only those economic operators have the right to submit a tender or a request to participate in the procedure to which the contracting authority has sent the notice launching the procedure. Economic operators, who received the notice launching the procedure, even if they did not express their interest to the contracting authority, may not submit joint tenders or joint requests to participate. Any economic operator who received the notice launching the procedure shall have the right to submit a joint tender or a joint request to participate with another economic operator who did not receive the notice launching the procedure.

3. For the purposes of application of paragraph 2, in the course of the selection of economic operators, the principle of equal treatment shall be complied with and, if possible, in particular the participation of micro, small or medium-sized enterprises shall be enhanced. For the purposes of the consideration thereof, the restrictive provision laid down in Article 3(4) of the Act XXXIV of 2004 on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises shall not apply.

4. In case of application of paragraphs 1-2, instead of publishing a notice on the modification of the time limit for submission of tenders or requests to participate, on the amendment of the notice launching the procedure, the procurement documents or the revocation of the notice launching the procedure, the economic operators who received the notice launching the procedure shall be informed thereof at the same time, directly, in writing by the contracting authority, prior to the expiry of the original time limit. The contracting authority shall make the modifications of the procurement documents available directly, electronically, at the same place as the original documents. Those elements of the notice launching the procedure or the procurement documents which have already been included in the summary information specified in paragraph 1 may not be amended.

5. Paragraphs 1-4 shall not apply where

- a) the estimated value of the public works is equal to or greater than HUF 500 million;
- b) the estimated value of the service under Annex 3 is equal to or greater than EU threshold;
- c) the contracting authority uses a prior information notice, a periodic indicative notice or a pre-qualification notice as notice launching the procedure.

6. Where paragraph 1-2 shall not be applied, the notice amending the time limit for submission of tenders or the time limit to participate, the notice launching the procedure or the procurement documents shall only be dispatched, but not published until the expiry of the original time limit for submission of tenders or time limit

to participate, however, the economic operators who have expressed their interest in the procedure, in particular those who had access by electronic means to the procurement documents or asked for additional information shall be notified at the same time, directly, in writing of the contracting authority's intention of amendment and of the dispatch of the amending notice, prior to the expiry of the original time limit for submission of tenders or time limit to participate. No measures or decisions may be taken and no documents may be submitted in the procurement procedure before the publication of the amending notice.

#### **Article 114**

1. In the notice launching the procedure, the contracting authority shall be entitled to provide for the application of one or more of the grounds for exclusion pursuant to Articles 62-63 in the procurement procedure, and shall be bound to provide for the enforcement of the grounds for exclusion pursuant to Article 62(1)(g)-(k) and (m).

2. For the purposes of the self-declaration pursuant to Article 67(1), the standard form established by the European Commission shall not be used; where Part Two of this Act refers to the "European Single Procurement Document" (the "ESPD") it shall mean the self-declaration pursuant to Article 67(1). Detailed information concerning Article 62(1)(kb) shall be given by the tenderer and the candidate in the self-declaration pursuant to Article 67(1) according to the rules set out in a separate act of legislation. Furthermore, the contracting authority shall verify the non-existence of the ground for exclusion in the available electronic registers in accordance with the relevant Gov. Decree. The self-declaration pursuant to Article 67(1) is limited to a statement made by the economic operator that the suitability criteria he intends to certify are fulfilled and no detailed information shall be given concerning the fulfilment of the suitability criteria. Upon request from the contracting authority, according to Article 69, the economic operator shall submit his self-declarations specified in the notice launching the procedure and containing detailed information concerning the fulfilment of the suitability criteria, according to the rules on the submission of the certificates specified in the notice launching the procedure concerning the suitability criteria and, where appropriate, the objective criteria according to Article 82(5).

3. In the case of public works, the contracting authority shall make available the procurement documents in line with Article 57(1), except in the case of negotiated procedures without publication initiated on the grounds set out in Article 98(2)-(3); in other cases it is entitled to do so, with the proviso that in the case of public supplies and public services, in addition to the requirements listed in Article 57(1)(a)-(b), it is entitled to communicate the essential contract terms instead of providing a draft contract (hereinafter jointly referred to as the 'draft contract').

4. In open and restricted procedures, the time limit for submission of tenders may not be shorter than the following time limits counted from the date of sending of the notice launching the procedure or the date of dispatch of the notice launching the procedure or the date of dispatch of the invitation to tender:

- a) ten days in the case of public supplies and public services,
- b) fifteen days in the case of public works.

In the participation stage of the procedures consisting of more than one stage, the time limit to participate shall be set in such a way as to allow appropriate submission of requests to participate.

5. The negotiated procedure and the competition dialogue may be applied in all cases. Where the prior information notice related to the services listed in Annex 3 covers a period of more than twelve months, the direct invitation to participate may be sent more than twelve months after the date of publication of the prior information notice, but it shall be sent within the period covered by the prior information notice.

6. The supplementary information shall be provided by the contracting authority within a reasonable time before the expiry of the time limit for submission of tenders or the time limit to participate. Where the contracting authority considers it necessary to answer the question for the sake of proper submission of tenders or

requests to participate but there is not enough time to provide the relevant answer in reasonable time and to take account of the answer, it may extend the time limit for submission of tenders and the time limit for submission of requests to participate in accordance with the methodology established in Article 52(3).

7. In the case of application of the framework agreement, the reopening of the competition may be realized in an electronic auction instead of application of Article 105(2), provided that it was prescribed by the contracting authority in the framework agreement as well as previously in the relevant procurement procedure, in the notice launching the procedure.

8. If the conclusion of the contract with the tenderer submitting the most advantageous tender on the basis of the assessment resulted in a higher contract value than the estimated value and thus the rules according to which the procedure was launched by the contracting authority would not have been applicable, had the contracting authority determined that value as the estimated value of the procedure, the contracting authority shall declare the procedure unsuccessful.

9. The contracting authority may launch a negotiated procedure without prior publication of a contract notice, if the publicised terms of the purchase, which are exceptionally favourable and open to all, persist only for a limited period of time and the amount of the consideration is substantially lower than the market prices, furthermore, the application of a procedure according to this Part would not allow the contracting authority to take advantage of those favourable terms.

10. Competition shall be ensured by the contracting authority also in the case specified in Article 9 and at least three economic operators - which, in the opinion of the contracting authority, are able to comply with the suitability criteria for the performance of the contract - shall be invited to tender.

11. The contracting authority may reserve the right to participate in a public procurement procedure for tenderers whose turnover, net of value added tax, did not reach in the previous year HUF 100 million in the case of public supply and public services or HUF 1 billion in the case of public works and who use subcontractors also complying with the condition set in this paragraph for the performance of the contract and who fulfil the defined suitability criteria with the support of the capacity of another entity also complying with the conditions set by this paragraph.

12. In the case of public works, paragraph 1 may only be applied if the value of the public procurement does not exceed HUF 500 million.

13. In the cases specified in Article 80(1)(b), preliminary dispute settlement may be initiated until the expiry of the time limit for submission of tenders or the time limit to participate, while in relation to the summary information specified in Article 113(1), until the expiry of the time limit set for the expression of interest.

## **Article 115**

1. If the estimated value of public supplies or public services does not reach HUF 18 million or the estimated value of public works does not reach HUF 100 million the contracting authority, according to his choice, may conduct the procurement procedure in accordance with the rules on open procedures or negotiated procedures without prior publication at national level, with the differences laid down in this Article, except where the public contract is financed by European Union funds and is related to a cross-border project. The contracting authority is not obliged to establish suitability criteria in the procedure. In case of application of the rules on open procedures, paragraphs 2-4 shall apply, while in case of application of the rules on negotiated procedures without prior publication of a contract notice paragraph (5) shall apply.

2. The contracting authority shall ensure genuine competition and, instead of publishing a notice launching the procedure, it shall directly send the invitation to tender at the same time, in writing to at least four economic operators who, in the opinion of the contracting authority, are able to comply with the suitability criteria for the performance of the contract. Article 113 shall not apply. When selecting the economic operators to be invited to submit a tender, the principle of equal treatment

shall be complied with and, if possible, in particular the participation of micro, small or medium-sized enterprises shall be enhanced. For the purposes of the consideration thereof, the restrictive provision laid down in Article 3(4) of the Act XXXIV of 2004 on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises shall not apply. A period of five days shall be applied instead of the period of ten days set out in Article 80(5).

3. The provision on the minimum time limit for submission of tenders in open procedures, shall not apply. No notice shall be published on the modification of the time limit for submission of tenders, the amendment of the invitation to tender or the procurement documents or the revocation of the invitation to tender; prior to the expiry of the original deadline, the economic operators invited to tender shall be informed thereof at the same time, directly, in writing by the contracting authority.

4. Only the economic operators invited to tender may submit their tender in the procedure. Economic operators invited to tender may not submit joint tenders. Any economic operator invited to tender may submit a joint tender with any other economic operator not invited to tender by the contracting authority.

5. In the case of application of the rules on negotiated procedures without prior publication of a contract notice, paragraph 2 shall apply accordingly. Article 103(1)-(2) shall not apply.

## **Electronic bidding**

### **Article 116**

1. Public supplies may also be awarded in an electronic bidding process, at the option of the contracting authority, in accordance with the rules on open procedures at national level, with the differences laid down in this Article and in accordance with the detailed rules, which are different from those stipulated in this Act, on electronic biddings set out in a government decree. Electronic bidding means a procurement procedure in which the contracting authority conducts an electronic auction in accordance with the detailed rules laid down in Article 108 and in the relevant government decree, without requiring the submission of tenders before the auction.

2. The notice launching the procedure is not subject to Article 50(2)(n)-(p) and (r), no suitability criteria may be set by the contracting authority in the procedure and the contracting authority shall rule out the possibility of submitting variant (alternative) offers. The notice launching the procedure shall include the time limit for submission of the application for registration in the procedure. When applying accordingly the rules on open procedures, time limit for participation shall mean the time limit for submission of the application for registration in the procedure.

3. Application for registration in the procedure may be submitted, within the time limit set therefor, by economic operators who could submit a tender in an open procedure. The application for registration shall include the name, address (seat, residence) of the economic operator. The contracting authority shall send the confirmation of the acceptance or the rejection of the application for registration and the reasons therefor, not later than two business days after the submission of the application for registration, to the address given by the economic operator. It is neither possible to supply missing information nor to request the provision of information in relation to the application for registration; if an application for registration is rejected by the contracting authority, the economic operator concerned may submit a new application for registration. The rejection of the application for registration shall always be based upon objective grounds, in accordance with the principles of non-discrimination and equal opportunities, the application may be rejected in particular where the application for registration was submitted after the expiry of the time limit set therefor. Registration shall not be subject to the provision of a tender guarantee.

4. The tenderer shall have the right to modify or withdraw his tender until the closing date of the electronic bidding. The contracting authority shall be bound by the stipulations of the notice launching the procedure and the procurement documents from the date of expiry of the time limit for submission of the application for



registration, while the tenderer shall be bound by his offer made in the electronic bidding from the closing date of the electronic bidding. Where the contracting authority indicated in the notice launching the procedure that tenderers would be invited to submit a professional tender following the closing date of the electronic bidding, the tenderer shall be bound by the contents of his professional tender from the time limit for the submission thereof, however, when setting the validity period, the starting date of such period shall always be based on the closing date of the electronic bidding.

5. The contracting authority, in accordance with Article 69, shall invite the tenderer or tenderers to submit the declarations specified in Article 66(4) and (6) as well as Article 67(1) and other documents, in particular the professional tender, required by an act of legislation or the notice launching the procedure, where appropriate. No reading sheet shall be submitted by the tenderers.

6. Article 68 and Article 73(1)(a) and (d) shall not apply in the procedure. The contracting authority shall declare the procedure unsuccessful, if no application for registration has been submitted.

### **The application of independent procurement rules**

#### **Article 117**

1. The contracting authority may develop independent procedural rules not subjected to the provisions set out by Part Two of this Act.
2. The type of procedure chosen by the contracting authority may not be changed by him in the course of the procurement procedure. If the contracting authority develops independently the rules concerning the procedure to be conducted in the course of the procurement procedure, those rules shall be included in the notice launching the procedure. The notice launching the procedure shall ensure in all cases that, on the basis of it, the economic operators are able to submit appropriate tenders or requests to participate with equal opportunities.
3. The notice launching the procedure shall state all the information necessary for appropriate tendering (request to participate) by the economic operators, in particular the most important elements of the contract to be awarded (the subject-matter of the procurement, the quantity, the contract terms) and a short description of the way of awarding (award criteria and method), the time limit for submission of tenders (time limit to participate) and the information concerning the way of contacting the contracting authority. The contracting authority shall be bound to arrange for the opening of the tenders at the time and place indicated in the notice launching the procedure. The invitation shall be published by the contracting authority in a notice drawn up pursuant to the standard form specified in a separate act of legislation.
4. In the notice launching the procedure the contracting authority shall be entitled to prescribe the application of one or more ground for exclusion set out in Articles 62-63, however, grounds for exclusion other than those set out by this Act may not be prescribed. The contracting authority shall be bound to provide for the application of the grounds for exclusion specified in Article 62(1)(g)-(k) and (m). As regards suitability, the contracting authority may provide for other objective suitability criteria and way of certification than the certification of suitability criteria set out in the separate act of legislation, but the provisions set out in Article 65(3) shall be applied in such cases as well.
5. For the purposes of establishing the procedural rules according to paragraph 1, the contracting authority shall be bound to ensure the public nature of procedures to the appropriate degree, in compliance with this Act.

6. The contracting authority shall ensure the right to participate for all the economic operators established in the European Union, mutual recognition of diplomas, certificates and other evidence of formal qualifications, as well as provision of information on the time limits suitable for the submission of tenders (requests to participate), development of the regulations providing preliminary information on the applicable procedural rules and respect of the principle of non-discrimination and equal treatment when the decision closing the procedure is taken.

7. The subject-matter of the contract shall be described by the contracting authority in a non-discriminatory way. The technical specifications may not be set by the contracting authority in such a way as to exclude certain economic operators or goods from the procedure or to result in their inappropriate, discriminatory or preferential treatment. If the precise and intelligible description of the subject-matter of the public procurement justifies reference to a specific make or source, or type, or a particular process, activity, person, patent or trade mark, the specification shall state that this was justified only by the need to specify the subject-matter precisely, and such a reference shall be accompanied by the word “or equivalent”.

8. The contracting authority shall inform in writing tenderers, candidates and - before the opening of tenders - the economic operators who have expressed their interest in the procedure about all the decisions and information affecting the results of the procedure and the detailed justification thereof as soon as possible but not later than three business days after the decision. After completion of the evaluation of tenders, the contracting authority shall be bound to draw up a written summary which provides information on the evaluation of tenders and the reasons for the selection of the winning tender and to send that written summary to all tenderers at the same time, by fax or by electronic means.

9. For the purposes of establishing the individual procedural rules pursuant to paragraph 2, the contracting authority shall be bound to provide for the grounds for exclusion specified in Article 73(1) and shall be entitled to provide for the grounds for exclusion specified in Article 72(2) and (3), with the proviso that the ground for exclusion specified in Article 73(1)(c) shall only apply in case of the prescription of the ground for exclusion specified therein and Article 73(1)(d) shall only apply in case of the prescription of suitability criteria. Article 73(4) and (6) shall apply accordingly.

10. In the course of the procedure the provisions set out in Articles 44 and 45 shall be applied accordingly.

## PART FOUR

### CONCESSION AWARD PROCEDURES

#### *CHAPTER XVIII*

#### *THE RULES PERTAINING TO CONCESSION AWARD PROCEDURES*

#### **The commencement of the procedure**

#### **Article 118**

1. The contracting authority shall proceed as indicated in this Part of the Act in the case of works or service concessions the value of which is equal to or greater than the national threshold or, in the case of social and other services specified in Annex 3, the value of which is equal or greater than the EU threshold.

2. The publication of notices is subject to different obligations, set out in a separate act of legislation, in the case of concessions below and above EU thresholds.

3. The contracting authority shall have the freedom to organise the concession award procedure, subject to compliance with the basic principles and basic procedural rules laid down in Part One as well as in this Part of the Act.

4. The concession award procedure may consist of one or more stage(s), the contracting authority shall communicate, in the notice launching the procedure, the description of the organisation of the procedure, in the case of procedures consisting of more than one stage the objective of each stage, as well as an indicative completion deadline. Detailed information on the organisation of the procedure may also be indicated in other procurement documents and, in that context, clear information shall be provided on the point of the procedure from which tenderers are bound by the validity period. Where, in the course of the procedure, the contracting authority or contracting entity provides more precise information on the organisation of the procedure it shall notify thereof all economic operators participating in the procedure; in the event of any change in the essential information given in the notice launching the procedure or any information communicated in the procurement documents, it shall proceed according to Article 119(3).

#### **Article 119**

1. The notice launching the procedure shall be published in compliance with the separate act of legislation, except in the cases specified in Articles 128 and 129.

2. The notice launching the procedure shall contain in particular:

- a) name, address, telephone number and fax number, e-mail and (if any) website address of the contracting authority or contracting entity;
- b) contact points at which unrestricted and full direct access, free of charge is ensured or will be ensured to the procurement documents. Where, in case of certain procurement documents, direct electronic access is not available for the reasons set out in Article 39, an indication of how the procurement documents concerned can be accessed;
- c) in compliance with Article 102(1), the subject-matter and quantity of the works or service concession, by indicating an optional part, where appropriate;
- d) term of the contract or the envisaged maximum duration;
- e) place of performance/delivery;
- f) acceptance or prohibition of the division of the concession into lots; if the division of the concession into lots is accepted, an indication whether only one, several or all of the lots may be subject to tendering and whether the number of the lots which can be awarded to the same tenderer is limited;
- g) award criteria specified in Article 125(2);
- h) grounds for exclusion to be applied in the given procedure and the required methods of certification;
- i) suitability criteria, the data needed for the assessment of suitability and the required method of certification;
- j) time limit for submission of tenders or requests to participate;
- k) address to which tenders or requests to participate shall be sent and the way of submission;
- l) language (languages) of tenders or requests to participate, an indication whether or not the tenders or the requests to participate may be submitted in another language in addition to Hungarian;
- m) date of opening the tenders and, if it is not made electronically, its place, as well as the parties authorised to be present at the opening of the tenders; in the case of an invitation to participate the date of the opening of requests to participate and, if it is not made electronically, its place;
- n) where the performance of the contract is subject to special conditions, those conditions;
- o) in the case of public procurements receiving support from the European Union, data concerning the relevant project, programme.

3. The notice launching the procedure may be modified by the contracting authority until the date on which any economic operator may be involved in the procedure. By that date a notice shall be published concerning the modification of the notice launching the procedure and, at the same time, all economic operators who expressed their interest in the procedure to the contracting authority or contracting entity shall be notified thereof. All the economic operators participating in the

procedure shall be notified at the same time of any modification of other procurement documents. In the case of modification of the notice launching the procedure and any other procurement document, sufficient time shall be ensured to allow economic operators to prepare therefor, the time limit for submission of tenders or requests to participate shall be extended, except in the case of minor modifications. Article 55(6) shall also be applied to modifications.

## **Procurement documents**

### **Article 120**

1. Where the economic operators shall submit a tender in response to the notice launching the procedure, the contracting authority or contracting entity shall make available the procurement documents at the time of the publication or dispatch of the notice launching the procedure, except for the additional clarifications provided, the answers given to the questions from the economic operators in the course of the procedure. Where the notice launching the procedure does not include an invitation to tender, the procurement documents shall be made available at the time of the invitation to tender. The procurement documents specifically prepared for the submission of the request to participate shall be made available at the time of the publication or dispatch of the notice launching the procedure.

2. The contracting authority shall make available procurement documents which specify, in addition to the requirements set out in this Act, the following information:

- a) the contract terms known to him;
- b) the technical specifications concerning the subject-matter of the concession;
- c) information necessary for economic operators to prepare the tender and the request to participate as well as the list of the certificates, declarations to be submitted as part of the tender and the request to participate. The contracting authority or contracting entity shall have the right to provide for the use of the standard form of the ESPD also in concession award procedures. The use of further model forms of certificates and declarations, if any, made available by the contracting authority, may be recommended.

3. At least one tenderer, candidate or subcontractor designated in the tender or the request to participate per each tender or request to participate shall have electronic access to the procurement documents.

## **The requirements concerning the subject-matter of the concession**

### **Article 121**

1. Description of the works or service concession, by indicating its nature and scope, scale or indicative value, shall be given in the notice launching the procedure in such a way as to make it possible for economic operators to assess whether they intend to participate in the procedure.

2. The contracting authority shall provide economic operators with technical specifications in the procurement documents. Technical specifications are subject to Article 58(2)-(3) and the provisions set out in the separate act of legislation on the definition and contents of public procurement technical specifications, unless the relevant legislation provides otherwise.

3. Where the contracting authority conducts negotiations on the technical specifications or the contract terms or the contracting authority or contracting entity requests that economic operators submit variant offers or propose solutions for certain specific characteristics, conditions, objectives, it shall specify the minimum requirements, in particular technical, functional, legal conditions, which shall be met by all tenders.

4. Where labels or certification are required, the provisions set out in Articles 59-60 shall apply.

### **The negotiation**

#### **Article 122**

1. Where the contracting authority conducts negotiations with the economic operators participating in the procedure, Article 88(1)-(4) and (8) shall apply accordingly, with the proviso that the minimum requirements shall mean the conditions set out in Article 121(3).

2. Article 88(6), taking into account Article 125(4), shall apply accordingly during the entire procedure until the contracting authority is not bound by the conditions set by him.

3. The contracting authority can start negotiations with the economic operators or reopen competition, if, following the evaluation of tenders, it realizes that that, considering the conditions of the most advantageous tender, the conditions set out in Article 8(7) or the condition set out in Article 133(2) would not be met.

### **Submission of tenders and requests to participate**

#### **Article 123**

1. As required by the organisation of the procedure, tenders or requests to participate - the latter may not include a tender and shall have the contents determined by the contracting authority - shall be submitted, according to the requirements set by the contracting authority or contracting entity, in response to the notice launching the procedure.

2. Economic operators shall be allowed a sufficient period of time to submit their request to participate and tender, in all cases. The time limit for the submission of tenders or requests to participate to be submitted in response to the notice launching the procedure may not be shorter than thirty days following the dispatch of the notice launching the procedure. Where the procedure consists of several stages and requests to participate had to be submitted in response to the notice launching the procedure, the time limit for the submission of the first tenders at a later stage of the procedure may not be shorter than twenty-two days following the sending of the invitation to tender.

3. As regards requests to participate, the first offer requested from tenderers and the final tender - which is evaluated before the decision closing the procedure is taken - submitted in concession award procedures, the provisions set out in Article 68 shall apply, the contracting authority shall provide for the reading sheet, having the contents as required therein, to be annexed to the request to participate or the tender.

4. The contracting authority may prescribe in the procurement documents that the following information shall be indicated in the tender or in the request to participate:

- a) those part (parts) of the concession for the performance of which the tenderer (candidate) intends to employ a subcontractor,
- b) the subcontractors intended to be employed in those parts, if they are already known at the time of the submission of the tender or the request to participate.

5. The contracting authority shall indicate in the invitation to tender or participate what is covered by the possibility of the supply of missing information.

## **Suitability criteria and grounds for exclusion**

### **Article 124**

1. In the notice launching the procedure, the contracting authority shall establish suitability criteria concerning the technical-professional ability as well as the economic-financial standing of candidates or tenderers. The suitability criteria and the documents to be submitted for the verification of compliance therewith shall be accurately indicated in the notice launching the procedure. In doing so, the contracting authority shall specify those situations which rule out suitability of the tenderer or the candidate for the performance of the contract in case of their presence or absence or the level of their insufficiency which rules out such suitability.
2. As regards suitability criteria, Article 65(3), (6)-(8) and (11) as well as (9) shall apply in concession award procedures, taking also into account that the contracting authority may prescribe suitability criteria other than those applicable in case of public procurements according to a separate act of legislation, on condition that such criteria are based on objective requirements.
3. Where the tenderer or the candidate fulfils the suitability criteria by relying on the capacities of another entity, the entity in question shall certify by the same means as the ones prescribed for the tenderer or the candidate that it is able to fulfil the suitability criteria set. In concession award procedures, there shall be no requirement for the implementation of a specific part of the contract by the tenderer in person.
4. Articles 62-64 shall also apply in concession award procedures. The ground for exclusion, specified in Article 62(1)(i), concerning the failure to submit the certificates supporting the declaration included in the ESPD shall apply, if the contracting authority prescribes the use of the ESPD for the preliminary certification of the non-existence of the grounds for exclusion in the concession award procedure.
5. Where the subcontractor or the organization involved in the certification of suitability is subject to any ground for exclusion, Article 71(4) shall apply.

## **Award criteria**

### **Article 125**

1. For the purposes of selecting the winning tenderer objective award criteria shall be applied. For the purposes of establishing the award criteria, Article 76(1)-(8) and (11) as well as (13) shall apply, save that the subcriteria to be evaluated in the framework of the award criteria shall only be indicated in decreasing order of importance, instead of their weighting.
2. In the notice launching the procedure, the award criteria shall only be indicated in decreasing order of importance; their weighting and the other information specified in Article 76(9) as well as the description of the method used for the evaluation shall be included in the procurement documents.
3. Where a life-cycle costing approach is used, Article 78 shall also apply.
4. If a tender submitted in the procedure offers an innovative solution which is able to deliver an outstanding functional performance and such solution could not have been foreseen by a contracting authority acting with due care, the contracting authority may exceptionally modify the weighting of the award criteria, without prejudice to the order of importance indicated in the notice launching the procedure, or the order of importance of the subcriteria given in the framework of the award criteria. In such cases the contracting authority or contracting entity shall notify all tenderers of the modification and send a new invitation to tender, taking into account

the minimum time limit of twenty-two days for the submission of tenders set out in Article 123(2). The contracting authority may only make use of the option provided for in this paragraph, if the procedure consists of several stages, no tender had to be submitted in response to the notice launching the procedure and the invitation to tender was only sent at a later stage of the procedure to the candidates who had been qualified as suitable, furthermore, at the time of the publication of the notice launching the procedure the economic operators could only be aware of the award criteria and the order of importance thereof.

### **The evaluation of tenders and requests to participate**

#### **Article 126**

1. In the course of evaluating tenders and requests to participate, the contracting authority shall examine whether the tenders and requests to participate are in compliance with the conditions set in the procurement documents and by law.

2. The contracting authority or contracting entity shall determine which tenders or requests to participate are invalid and whether there are any economic operators to be disqualified from the procedure. If the contracting authority did not request the supply of missing information from the economic operator, the tender or request to participate concerned cannot be considered invalid for a reason that could have been remedied by a supply of missing information.

3. The winning tenderer shall be a tenderer who fulfils the following conditions:

- a) whose tender is in compliance with the conditions set in the procurement documents and by law,
- b) who meets the suitability criteria prescribed in the procedure and
- c) who is not subject to any ground for exclusion.

4. Article 73(1) and (4)-(6) as well as Article 74 shall apply to the invalidity of the requests to participate or tenders, furthermore, the grounds for invalidity set out in Article 73(2) and (3) may also be applied by the contracting authority or contracting entity.

5. The procedure shall be deemed to be invalid in the case pursuant to Article 75(1) as well as in the cases specified by the contracting authority or contracting entity in the notice launching the procedure. Where the contracting authority or contracting entity specifies situations in which the procedure may be declared invalid, it shall also lay down the objective criteria on the basis of which the decision on invalidity will be taken.

6. In addition to the provisions laid down in paragraph 5, the procedure shall be declared invalid, if, following the evaluation, it can be established that, on the basis of the tender considered to be the most favourable tender according to the award criteria, the value of the concession is higher than the estimated value and the publication at EU level specified in a separate act of legislation should have been made instead of the publication at national level, had the former value been considered to be the estimated value at the time of the starting of the procedure.

7. In addition to the provisions laid down in paragraph 5, the procedure shall be declared invalid, if it can be established that, considering the conditions of the most favourable tender according to the award criteria, the conditions set out in Article 8(7) or the condition set out in Article 133(2) would not be met.

#### **Article 127**

1. The contracting authority shall inform all tenderers or the candidates or, before the opening of tenders, the economic operators who expressed their interest in the procedure in writing (by fax or electronic means) of the results of the procedure, the lack of success of the procedure, the classification of a tender or request to

participate as invalid, the exclusion of an economic operator as well as of the relevant reasons thereof in detail, as soon as possible after the decision to this effect, but within three business days at the latest. After completion of the evaluation of tenders, the contracting authority or contracting entity shall be bound to draw up a written summary which provides information on the evaluation of tenders and the reasons for the selection of the winning tender, the possibility of judicial remedy and the duration of the standstill period and it shall send that written summary to all tenderers at the same time, by fax or by electronic means.

2. Where the decision of the contracting authority or contracting entity was unlawful and a modification provides legal remedy thereto, it shall notify, by fax or electronic means, without delay, tenderers or candidates of that modification - which may be made as a result of the notification sent by an economic operator - of its decision specified in paragraph 1. The contracting authority or contracting entity shall have the right to take the necessary measures to restore legality of the procedure, taking into account the basic principles laid down in Article 2(1)-(3). The contracting authority or contracting entity may, if necessary, rescind the contract which was already concluded or, where the initial situation cannot be restored because the performance/delivery has already been started, terminate the contract with immediate effect.

3. According to paragraph 2, the contracting authority or contracting entity shall inform tenderers or candidates, even if only a clerical error shall be corrected, which has no impact on the legality of the procedure.

4. Upon request by a tenderer submitting an admissible tender, after sending the results of the procedure, the contracting authority or contracting entity shall provide specific information regarding the features of the winning tender and its advantages over the tender submitted by that tenderer within five business days from receiving the request, taking into consideration the winning tenderer's interests regarding business secrecy.

### **Concession award procedures without prior publication of a notice**

#### **Article 128**

1. Contrary to the provision set out in paragraph 2, instead of being published, the notice launching the procedure shall be sent directly, at the same time to all the economic operators concerned, in the following cases:

- a) in the case specified in Article 98(2)(c) and (d),
- b) if the concession award procedure with the publication of a notice was unsuccessful because no tender or request to participate was submitted in the procedure or the tenders or requests to participate submitted were substantially unsuitable, provided that the original terms of the concession have not been altered substantially; the contracting authority or contracting entity shall, upon request, inform the European Commission through the Minister responsible for public procurements. The tender shall be considered substantially unsuitable, if it is invalid on the ground that the professional tender is clearly unable to meet the needs and requirements defined by the contracting authority or contracting entity, unless substantial changes are made to it; the request to participate shall be considered substantially unsuitable, if it is invalid on the basis of Article 73(1)(b) or (d).

2. In concession award procedures without prior publication of a notice, tenders or requests to participate may only be submitted by the economic operators invited to do so. The economic operators invited to tender or participate may not submit a joint tender or joint request to participate, however, nothing prevents any economic operator invited to tender or participate from submitting a joint tender or joint request to participate with any other economic operator not invited by the contracting authority or contracting entity.

3. In the case specified in Article 1(b), the notice launching the procedure shall be sent to at least three economic operators, which are able to comply with the suitability criteria for the performance of the contract, in the opinion of the contracting authority or contracting entity.



4. The economic operators participating in the procedure shall be directly notified of any changes made to the procurement documents. In the course of the procedure, the subject-matter or terms of the contract may not be modified to such an extent that would have not allowed the application of a concession award procedure without prior publication of a notice.

5. The minimum time limits specified in Article 123(2) shall not apply to the time limit for submission and the time limits shall be set in such a way as to allow economic operators a sufficient period of time to submit their request to participate or tender.

6. In the case set out in Article 1(a) the final offer may also be made orally at the negotiation and shall be duly documented by the contracting authority or contracting entity.

## *CHAPTER XIX*

### *SPECIAL RULES PERTAINING TO CONCESSIONS HAVING A PARTICULAR SUBJECT-MATTER*

#### **Rules pertaining to social and other services**

#### **Article 129**

1. In the case of social and other services specified in Annex 3, the provisions set out in this Part shall be applied subject to the derogations laid down in this Article.

2. The publication of concession award procedures may also be made in a prior information notice. The prior information notice published shall have the contents specified in a separate act of legislation. The prior information notice announcing the procedure shall invite economic operators to express their interest by the time limit set therein. The data concerning the subject-matter of the concession shall be given in the prior information notice announcing the procedure in such a way as to make it possible for economic operators to assess whether they intend to participate in the procedure. In this case, the notice launching the concession award procedure shall be sent directly to economic operators who have expressed their interest in the procedure. A notice shall be dispatched, allowing an appropriate period, concerning any changes made to the data included in the prior information notice, while economic operators shall be notified directly of any modification in the notice launching the procedure, which was sent directly.

3. The contracting authority or contracting entity shall have the right to choose more than one winner with whom the service concession contract or contracts will be concluded. The contracting authority or contracting entity may derogate from Article 125 as required by the specific features of the given service and the organisation thereof, but in any case it shall ensure that the evaluation is based on objective criteria known in advance to economic operators and the relative weight of each criterion is known in advance to economic operators.

4. The contracting authority or contracting entity may stipulate that the contract shall be performed in person by the tenderer and shall have the right to preclude involvement of other economic operators in the certification of suitability.

## **PART FIVE**

### **RULES PERTAINING TO CONTRACTS**

## *CHAPTER XX*

### *RULES PERTAINING TO CONTRACTS*

#### **Article 130**

1. The provisions set out in this Part shall be applied to public contracts, framework agreements as well as works and services concessions (hereinafter jointly referred to as the 'contract') subject to this Act.
2. In case of innovation partnerships only Article 131, Articles 136-137, Articles 139, 141 and 143 shall apply.

#### **Conclusion of the contract**

#### **Article 131**

1. On the basis of successful procurement procedures, contracts shall be concluded in writing, with the tenderer winning the procedure – in the case of joint submission of the tender, the tenderers winning the procedure - in accordance with the final terms communicated in the procurement procedure, the content of the draft contract and the tender.
2. The contract shall contain the assessed elements of the successful tender, in compliance with the award criteria applied in the procedure.
3. If the contracting authority allowed division into lots, each contract concerning each lot shall be concluded with the winners of the different lots.
4. The contracting authority may only conclude the contract with the successful tenderer, or upon the withdrawal of the successful tenderer, with the tenderer considered as offering the second most favourable tender in the course of assessing the tenders, if he was named in the written summary on the evaluation of tenders.
5. The validity period of the tender shall be extended by thirty days, in case of public works contracts by sixty days for the successful tenderer and in the case specified in paragraph 4 for the tenderer submitting the second most favourable tender from the date of sending of the written summary concerning the evaluation of tenders to the tenderers.
6. The contract shall be concluded by the contracting authority within the validity period pursuant to paragraph 5. Unless otherwise provided by this Act, the contract may not be concluded in any case before the end of a period of ten days or, in the case of the procedure laid down in Article 115 a period of five days, following the date of dispatch of the written summary or, where correction shall be made to the summary, and any data concerning the effectiveness of the procedure, the validity of the tender or the result of the assessment is modified, the modified summary.
7. Where an application for review procedure [Article 148(2)] is filed or a review procedure is initiated [Article 152], the contract, in the case stipulated in paragraph 3 the contract on the part of procurement affected by the review procedure, may be concluded only after the substantial decision or the decision closing the public procurement case has been taken, except in cases where the Public Procurement Arbitration Board allows the conclusion of the contract [Article 156(4)]. Where the

validity period of the tender of the successful tenderer has expired, the contract may only be concluded with the successful tenderer by the contracting authority, if he makes a statement that he maintains his tender.

8. Contrary to the provisions set out in paragraph 6, the contract may be concluded before the expiry of the period of ten days or five days referred to therein
- a) if only one tender was submitted in the course of an open procedure, a concession award procedure launched by a notice and consisting of one stage or in a procedure conducted according to Article 117 and consisting of one stage;
  - b) where only one tender was submitted in the course of a restricted procedure, a negotiated procedure, a competitive dialogue, a procedure for an innovation partnership, for the conclusion of a contract on the basis of a dynamic purchasing system, in a concession award procedure launched by a notice and consisting of more than one stage or in a procedure conducted according to Article 117 and consisting of more than one stage and, furthermore, there was an invalid request to participate in the procedure or there was an exclusion and the time limit for initiating a review procedure by the concerned parties against the decision thereon expired or the given decision was considered as lawful by the Public Procurement Arbitration Board;
  - c) if the negotiated procedure without prior publication of a contract notice was launched on the basis of Article 98(2)(e);
  - d) in the case of public procurements carried out on the basis of a framework agreement, except for the cases where the public procurement is carried out through the reopening of competition and several tenders are submitted in the course of the reopening of competition;
  - e) if the negotiated procedure without prior publication of a contract notice was started on the basis of Article 98(2)(c)-(d), (3) or 4(b)-(d) and only one tenderer was invited pursuant to Article 98(5) or the concession award procedure without prior publication of a notice was started on the basis of Article 128(1)(a) and the President of the Public Procurement Authority did not launch the review procedure within the time limit set in Article 152(3);
  - f) if only one tender was submitted in a procedure under Article 115.

9. The contracting authority may only be relieved of its obligation to conclude the contract with the successful tenderer and the successful tenderer may only be relieved of its obligation to contract (become free from the validity period) within the period stipulated by paragraph (5), if, due to unforeseen circumstances beyond its control, which have arisen after the sending of the written summary on the evaluation of tenders, it was incapable, respectively, to conclude or perform the contract or the contract should be rescinded or terminated due to such circumstances.

### **Special conditions for the performance of the contract**

#### **Article 132**

1. The contracting authority may set special conditions for the performance of the contract, in particular, conditions related to social and environmental considerations as well as incentives for innovation. Reference to such contract terms shall be made in the notice launching the procedure and detailed conditions thereof may be included in the procurement documents.

2. Those special conditions shall be related to the subject-matter of the contract [Article 76(7)] and may not result in the violation of the principles laid down in Article 2(2)-(3) and (5).

3. For the purposes of the application of paragraph 1 a social criterion, in particular, shall be
- a) involvement in the fulfilment of the relevant contract of an organisation specified in Article 33 or, according to the legal provisions of another Member State of the European Union an organisation specified in Article 20 of Directive 2014/24/EU;
  - b) employment of job-seekers, disabled workers, unemployed people or prisoners;

- c) employment of persons, in part-time jobs, who are recipients of any child care benefit set out in the act on family benefits during the receipt of such payments or subsequent to the ending of such payments, and employment of persons who are recipients of maternity care benefit and child care fee after the end of such payment<sup>26</sup>;
- d) stipulation of measures for ensuring the implementation of the principle of equal treatment;
- e) in the framework of the performance of the given contract, provision of training in the skills needed for the performance for unemployed or young people participating in the performance.

### **The duration of the contract**

#### **Article 133**

1. In the notice launching the procedure, the period of the contract shall be set by the contracting authority in such a way that does not bind him for an indefinite or definite but disproportionate period of time, which would not be in compliance with the aim of maintaining competition and effective use of public funds, unless such a period of the contract is justified by the subject-matter, the chosen structuring of the contract, the terms of payment related thereto or the investment realized by the successful tenderer.

2. Works or service concessions may only be concluded for a limited period of time. If the duration of the works or service concessions exceed a period of five years, the contracting authority shall prove by calculation that the duration of the contract does not exceed the period in which the investments made by the concessionaire, over the duration of the contract, for the execution of the works or services or in relation to the performance of the contract may be, under reasonable assumptions, recouped and a reasonable return may be achieved on the capital invested.

### **Guarantees provided for in the contract**

#### **Article 134**

1. Where a guarantee is required by the contracting authority in the contract, the requirements for the guarantee shall be included in the procurement documents. For the purposes of the guarantees aimed at the confirmation of the contract stipulated by Chapter XXVI of Book Six of the Civil Code, the stipulations laid down in paragraphs 2-8 shall not apply.

2. The amount of the guarantee for non-performance of the contract may not exceed five per cent of the amount of the consideration provided for in the contract, exclusive of the reserve fund and net of value added tax.

3. The amount of the guarantee for lack of conformity may not exceed five per cent of the amount of the consideration provided for in the contract, exclusive of the reserve fund and net of value added tax.

4. The amount of the guarantee specified in paragraphs 2-3 shall be reduced in proportion to the satisfaction of the contracting authority's claim, no obligation may be imposed on the party entering into the contract as tenderer to maintain continuously a fixed level of guarantee. The guarantees shall be made available under the conditions laid down in the contract, however, it may not be stipulated that the guarantee for non-performance shall be made available prior to the date of the

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<sup>26</sup> This amendment entered into force on 1 January 2016.

entering into force of the contract or the guarantee for lack of conformity shall be made available prior to the date of performance of the contract. In the case of any other type of guarantee, the availability may only be required as from the date at which the event concerned by the guarantee may occur, and it may not be earlier than the date of the conclusion of the contract.

5. The tenderer shall only declare in the tender that the guarantee specified in paragraph 4 will be provided within the time limit set, no other certificate, declaration concerning the guarantees may be required in the procurement procedure.

6. Where a guarantee to be made available is stipulated, the contracting authority, in the procurement documents, shall

- a) specify that, subject to the choice of the party entering into the contract as tenderer, the guarantees may be provided as a collateral security, by having the prescribed sum deposited, transferred into the payment account of the party entering into the contract as contracting authority, by the provision of a guarantee or a surety undertaken by a financial institution or an insurance company or by furnishing a promissory note issued pursuant to an insurance contract and containing surety or,
- b) indicate one or more forms of guarantee or way of offering a guarantee not mentioned in point (a) and stipulate that the guarantee may be provided according to any of the forms or the ways indicated, by the contracting authority or specified in point (a), subject to the choice of the party entering into the contract as tenderer.

7. As regards the guarantee for lack of conformity, the contracting authority may allow in the contract to assure the guarantee or a set part thereof by withholding it from the amount of consideration due to the tenderer for the performance or partial performance; in such cases the rules pertaining to collateral security shall apply *mutatis mutandis*.

8. The party entering into the contract as the successful tenderer shall have the right to change one of the forms of guarantee defined in Article (6) and (7) into another form of guarantee defined therein, however, the guarantee shall be accessible continuously according to the amount and time limit set out in the contract.

### **Specific provisions pertaining to the performance of the contract**

#### **Article 135**

1. The party entering into the contract as contracting authority shall make a written declaration on the acknowledgement of the performance of the contract (receipt of performance) or the refusal of such acknowledgement within 15 days from the date of the performance by the party entering into the contract as tenderer or the receipt of the written notification thereof.

2. In case of construction contracts concluded for the carrying out of public works, if the delivery procedure is not started by the contracting authority upon the written notice (completion notice) of the party entering into the contract as tenderer within 15 days following the deadline defined in the contract as the deadline for starting the delivery procedure, or if it is started but, in light of Article 6:247 (2) of the Civil Code, not completed by the deadline defined in the contract, the party entering into the contract as contracting authority shall issue a receipt of performance upon the request of the party entering into the contract as tenderer.

3. Contrary to the provisions set out in Article 6:130 (1)-(2) of the Civil Code, in case of public works and public supplies, 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 shall pay the consideration according to the following provisions:

- a) the parties entering into the contract as tenderer shall declare, not later than the issuing date of the acknowledgement of performance, who is entitled to receive which sum from the consideration;
- b) all parties entering into the contract as tenderer shall declare, not later than the issuing date of the acknowledgement of performance, who receives, among the subcontractors involved by them according to Article 138, which amount from the consideration;
- c) the contracting authority invites tenderers and the subcontractors specified in point (b) to issue their invoice after the acknowledgement of performance and, if they are not included in the Public Debt-Free database of taxpayers according to Article 36/A of the Act XCII of 2003 on the Order of Taxation (hereinafter referred to as the 'AOT'), invites them, at the same time, to submit a joint tax certificate not older than thirty days from the date of actual payment;
- d) the consideration to be obtained by the tenderer or the subcontractor in return for the performance of the contract shall be transferred directly to each tenderer and subcontractor not later than thirty days or, in the case set out in Article 6:30(3) of the Civil Code, not later than sixty days after the receipt of the invoice.
- e) contrary to the case set out in point (d), if, on the basis of the joint tax certificate, any tenderer or subcontractor has public debts at the time of the payment, the contracting authority, according to Article 36/A of the AOT, withholds part of the consideration, up to the amount of the public debt.

4. In case of public contracts carried out using subsidies, for the payment of suppliers, the entity obliged to make payment shall do so according to the rules to which the party entering into the contract as the contracting authority is subject, i.e. according to the rules set out in Article 6:130 (1)-(3) of the Civil Code, paragraph 3 herein or the government decree drawn up on the basis of the empowerment of this Act, respectively.

5. The parties may also agree on payment in instalments, provided that the chosen type of contract actually justifies it. In such cases each instalment shall be subject to the provisions on payments set out by this Act or the relevant Gov. Decree.

6. Only the overdue claims of the same kind, acknowledged by the entitled party may be set off by the contracting authority against its debts arising from the consideration based on the contract.

7. Where the subject-matter of the public contract consists of public works and the time limit for the performance of the contract exceeds two months, the contracting authority shall make available an advance of 5% of the full amount of the consideration, exclusive of the reserve fund and net of value added tax, provided for in the contract, but not more than HUF 75 million. The contracting authority may not make the payment of that mandatory advance subject to the provision of a guarantee by the contracting party.

8. In the contract, the parties may provide for the payment of an advance the amount of which exceeds the obligatory amount set in paragraph 7, and may provide for the payment of an advance in any other case as well. Paragraph 7 does not limit the contracting authority's option not to request any guarantee or to request a guarantee in a lower amount than the amount specified in paragraph 7.

9. Contrary to paragraph 7, in case of public contracts carried out using subsidies, for the payment of suppliers, the contracting authority shall make available an advance of 30% of the eligible amount of the contract, exclusive of the reserve fund and net of value added tax. In this case the amount of the guarantee required by the contracting authority shall not exceed the level of the difference between 10% of the eligible amount of the contract, exclusive of the reserve fund and net of value added tax, and the advance requested by the supplier.

10. The stipulations set out in paragraphs 1-3 and 6-7 as well as 9 shall form part of the contract even if the parties did not agree on this matter or the parties have agreed otherwise, excluding in the latter case the provision set out in paragraph 8.

11. Any provision of a contract concluded pursuant to a procurement procedure shall be considered null and void should it exclude or restrict the application of legal consequences stipulated to a breach of contract perpetrated by the contracting authority except for the case set out in Article 6:155 (4) of the Civil Code concerning the interest on late payment.

12. In case of conditional public procurements, the condition to which the contracting authority subjected the effectiveness of the public procurement and which was indicated in the notice launching the procedure, may be stipulated by the contracting authority as a condition suspending the entering into force of the contract being concluded as a result of the procurement procedure.

### **Article 136**

1. The contracting authority shall be bound to set as contract terms that the successful tenderer

- a) may not pay or charge, in the context of the performance of the contract, any cost incurred in relation to a company not being in compliance with the stipulations set out in Article 62(1)(ka)-(kb) and which may be used for reduction of the successful tenderer's taxable income;
- b) shall reveal its structure of ownership to the contracting authority during the full period of performance of the contract, and notify without delay the contracting authority of the transactions according to Article 143(3).

2. The successful tenderer having his fiscal domicile in a foreign country shall be bound to attach to the contract an authorization stating that data concerning the successful tenderer may be acquired by the Hungarian National Tax and Customs Authority directly from the competent tax authority of the successful tenderer's fiscal domicile, without using cross border legal assistance.

### **Invalidity of the contract**

### **Article 137**

1. The contract is null and void, if

- a) it was concluded unlawfully without the conduct of a procurement procedure;
- b) it was concluded as a result of a negotiated procedure without prior publication of a notice and the criteria for the application of this type of procedure were not fulfilled;
- c) the parties concluded the contract in breach of the rules regarding the standstill period [Article 80(5), Article 115(2) and 131(6)-(8)] and, as a result, deprived the tenderer of the opportunity to resort to a remedy preceding the conclusion of the contract, and at the same time they violated the rules applicable to public procurements in such a way that it influenced the prospects of the tenderer to win the procurement procedure.

2. Contrary to paragraph (1) the contract is not void, if the contracting authority did not conduct a procurement procedure with the publication of a contract notice or it concluded an agreement outside a formal procurement procedure [Articles 9-14, Articles 111] because it presumed that this Act allowed him to apply a procurement procedure without prior publication of a notice or to conclude the contract outside a formal procurement procedure, furthermore, it published a notice in accordance with the standard form provided in a separate act of legislation about its intention to conclude a contract and it concluded the contract more than ten days following the publication of the notice.

3. In the case of contracts concluded under paragraph (1), in the course of enforcing the legal consequences of invalidity, the court may declare the contract valid with retroactive effect to the date of conclusion of the contract, if overriding reasons relating to a general interest require the performance of the contract. Economic

interests directly connected to the contract (in particular costs resulting from the obligations due to the delayed performance, the conduct of a new procurement procedure, the possible changes of the contracting partner or invalidity) may not be considered overriding reasons relating to a general interest, and any further economic interest connected to the validity of the contract may only be regarded so, if the invalidity of the contract would result in disproportionate consequences.

4. The provisions set out in this Act shall not exclude the application of Article 6:95 of the Civil Code in order to declare that the contract concluded by way of infringement of the regulations applicable to public procurements and procurement procedures is null and void. In addition to the cases stipulated in paragraph (1), the infringement of the rules (not including the provisions on the content elements of the contract) on procurement procedures shall result in the ineffectiveness of the contract, where the validity of the contract would be incompatible with the purpose and the principles of this Act, taking into account the importance and the nature of the given infringement of the rules.

### **The parties involved in the performance/delivery**

#### **Article 138**

1. The contract shall be performed by the party entering into the contract as the successful tenderer or joint tenderers on the basis of the procurement procedure or, if the contracting authority required or allowed setting up a business organisation [Article 35(8)-(9)], by the business organisation (hereinafter referred to as project-company) in which the winning tenderer (tenderers) or the contracting authority together with the winning tenderer (tenderers) have an exclusive share. In case of public works and public services the overall proportion of performance by subcontractors may not exceed the proportion of performance by the winning tenderer (tenderers).

2. The party entering into the contract as tenderer shall make use, for the performance of the contract, of the organisation contributing to the certification of suitability in the cases and in a way specified in Article 65(9), furthermore, he shall involve professionals presented for the certification of suitability in the performance of the contract. The tenderer may only choose not to involve those organisations or professionals in the performance or to replace them with another organisation or professional (including the cases of succession through transformation, division or merger), if the tenderer is able to meet - where, on the basis of the data presented for the given suitability criteria in the procurement procedure, the contracting authority reduced the number of economic operators participating in the procedure, the tenderer is able to meet in an equivalent manner - the same suitability criteria without that organisation or professional or with the new organisation or professional as those met by the party entering into the contract as tenderer together with the organisation or professional nominated in the procurement procedure.

3. The right of the tenderer to involve subcontractors may not be limited, except where the contracting authority made use of the possibility under Article 65(10). The winning tenderer shall be obliged to notify the contracting authority, not later than the date of the conclusion of the contract, of all subcontractors who will participate in the performance of the contract and, if the given subcontractor was not nominated by him in the procurement procedure, he shall also make a statement, at the time of the notification, that the subcontractor intended to be employed by him is not subject to any ground for exclusion. Throughout the period of the performance of the contract, the winning tenderer shall be obliged to notify in advance the contracting authority of all other subcontractors that he intends to involve in the performance of the contract and he shall also make a statement, at the time of the notification, that the subcontractor intended to be employed by him is not subject to any ground for exclusion.

4. Where, taking into account the specific characteristics of the given contract, the use of a given person (organisation) constituted a determinant factor in the evaluation of tenders, the tenderer may not take a decision not to involve in the performance that organisation or professional presented by him in the procedure. In such cases, the organisation involved may be replaced solely in cases of succession where the new organisation may be considered to be the successor of the organisation presented in the procedure as regards all the relevant circumstances taken into account in the evaluation, in the case referred to in Article 76(3)(b), as



regards the staff assessed. The professional considered to be decisive in the evaluation process may only be replaced with the agreement of the contracting authority and on condition that the professional presented is equivalent to the professional assessed as regards all the relevant circumstances taken into account in the evaluation.

5. In the case of public works and public services, the subcontractor participating in the performance of the contract may not employ further participants to an extent exceeding 50% compared to the performance delivered by him in person.

#### **Article 139**

1. The party or parties entering into the contract as the winning tenderer may only be replaced in the following cases:

- a) where, on the basis of a clear contractual provision that complies with Article 141(4)(a), the succession is ensured by a project-company or a legal person which provides financing for the performance on the basis of a contractual provision aimed at guaranteeing performance or a legal person designated by the above-mentioned legal person; or
- b) where the succession of the contracting party is a result of transformation, merger or division or any other way of termination of the legal person or it is due to partial succession in the course of which the entire branch of business, operating as a single economic unit, (together with the contracts, resources and the staff related to it), in the case of business organisations the entire organisational unit responsible for the given activity, passes to the successor or the contract is transferred in the course of insolvency proceedings against the original contracting party;

on condition that the successor entering into the contract is not subject to any ground for exclusion applicable in the procurement procedure - according to the rules pertaining to tenderers pursuant to Article 138(2)-(4) -, he meets the suitability criteria applied in the procurement procedure and the succession is not aimed at circumventing the application of this Act.

2. Apart from the cases referred to in paragraph 1, the party entering into the contract as tenderer may only be replaced as a result of a new procurement procedure. Any change concerning the other elements of the legal relationship shall be subject to Article 141.

3. The succession of the party entering into the contract as contracting authority may not be aimed at circumventing the application of this Act.

#### **Article 140**

1. If the winning tenderer or tenderers set up a project-company in order to perform the contract, it shall be stipulated in the contract that the project-company shall enjoy the rights and assume the obligations set out therein from the date of its establishment; the contracting parties shall make the necessary arrangements therefor. In this case, the subcontractors named in the tender shall conclude the contract, which is required for the performance of the contract, with the project-company.

2. Otherwise, the rules pertaining to public contracts shall be applied to the contract concluded between the party entering into the contract as contracting authority and the project-company, in particular the provisions set out by this Act or by other acts of legislation concerning the public nature of contracts, the mandatory contents and any amendment to contracts, as well as the control of performance of contracts.

3. The project-company and the winning tenderer or tenderers are jointly and severally liable for the performance of the contract.

4. The project-company shall perform activities and conclude contracts only in order to perform the contract, it may not acquire share in another economic organisation, nor may undergo a transformation, division or merger with another legal person.

5. Only the winning tenderer or tenderers may acquire a share in the project-company, except if the contracting authority indicates in the notice launching the procedure that the project-company shall be established by the winning tenderer or tenderers together with the contracting authority. The subscribed capital and the assets other than the subscribed capital, excluding the dividend, may not be deprived by the founders.

6. The winning tenderer or tenderers may terminate the project-company, if

- a) the project-company has performed the requirements set out in the contract, furthermore, the project-company and the contracting authority have performed their obligations regarding settling accounts with one another, or
- b) the winning tenderer or tenderers have completely taken over from the project-company the rights and obligations deriving from the contract and from the contract concluded to perform the contract.

7. The party having entered into the contract as contracting authority may terminate the contract, if it stipulated that the successful tenderer must set up a business organisation and the tenderer does not arrange for the registration of the conclusion of the articles of incorporation or the acceptance of the articles of association with the Court of Registry within twenty days following the conclusion of the contract.

8. Where the contract also falls within the scope of the Act on Concessions, the provisions set out in this Article shall apply subject to the derogations according to the provisions on concession contracts and concession companies laid down in the Act on Concessions.

9. All those members of the project-company who have actually taken part in the performance may present the performance of the project-company as reference for the certification of suitability or as revenue, according to the proportion of their participation in the performance, even if the project-company has since been dissolved.

## **Contract modification**

### **Article 141**

1. The provisions set out in this subchapter shall apply to modifications made by the contracting parties or any of the contracting parties entitled to do so and to any change in the legal relationship of the contracting parties in accordance with the stipulations of the contract (hereinafter jointly referred to as 'contract modification').

2. Without examining the conditions laid down in paragraph 4 or 6, the contract may be modified without the conduct of a new procurement procedure, if the increase in the counter value occurring as a result of the modification or, where several successive modifications are made the net cumulative value of the successive modifications, does not reach any of the following values:

- a) EU threshold, in the case of an initial contract reaching EU threshold;
- b) 10% of the initial contract value in the case of public service and public supply and 15% of the initial contract value in the case of public works, works or service concessions; moreover, the modification does not alter the overall nature of the contract and it is in line with the nature of the initial contract.

3. Paragraph 2 may be applied to contract modifications which lead to a change in the contract value, in the case of modifications affecting more than one elements of the contractual relationship, to the elements of the modification which are related to the change in the value.

4. In addition to the situations provided for in paragraph 2, without examining the conditions laid down in paragraph 6, the contract may be modified or may be subject to a change without the conduct of a new procurement procedure in any of the following situations:

- a) where the contract clearly stipulates the precise conditions and content of the subsequent changes of the determined substantial elements of the contract (including the right of option) and those conditions and contents are known in advance by all tenderers. However, such contract terms may not stipulate any modification which would alter the overall nature of the contract;
- b) for additional works, services or supplies by the original contracting party that have become necessary and that were not included in the initial procurement where a change of the contracting party:
  - (ba) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
  - (bb) would cause significant inconvenience or substantial duplication of costs for the contracting authority. However, any increase in price or, where several successive modifications are made the net cumulative value of the successive modifications, shall not exceed 50 % of the value of the initial contract.
- c) where all of the following conditions are fulfilled:
  - (ca) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
  - (cb) the modification does not alter the overall nature of the contract;
  - (cc) any increase in price is not higher than 50 % of the value of the original contract. Where several successive modifications are made and those modifications occurred due to several circumstances specified in point (ca) and not interrelated, that limitation shall apply to the net value of each modification. Such consecutive modifications shall not be aimed at circumventing this provision.

5. For the purpose of paragraphs 2 and 4(b) and (c), the updated contract value shall be the reference value for the calculation of the original contract value, when the contract includes an indexation clause in accordance with paragraph 4(a). In case of works and service concessions, when the contract does not include an indexation clause, the updated value shall be calculated on the basis of the annual average inflation rate published by the Hungarian Central Statistical Office.

6. In addition to the situations provided for in paragraph 2 and 4, the contract may be modified without the conduct of a new procurement procedure, if the modification is not substantial. A modification of a contract is substantial, if the essential conditions established by the modification are substantially different compared to those set out in the original contract. A modification of a contract shall always be considered to be substantial, where

- a) the terms affected by the amendment would have allowed the participation of other tenderers (candidates) as well in addition to the original tenderers (candidates) or the success of another tender instead of the successful tender, if those terms had been indicated in the procurement procedure preceding the conclusion of contract;
- b) the amendment shifts the economic balance of the contract in favour of the successful tenderer; or
- c) the amendment extends the subject-matter of the contract over a new, significant element compared to the tenderer's obligations imposed by the original contract.

7. With the exception of paragraph 4(a), the contracting authority shall publish a notice, in line with the contents of the standard form specified in a separate act of legislation, concerning the modification of the contract.

8. A new procurement procedure shall be required for those modifications of the provisions of a public contract which are not covered by this Article. Where the contract was modified with the unlawful bypass of the procurement procedure, the contract is void in accordance with Article 137(1)(a).

### **Compliance with the principle of responsible management of public finances in the course of the performance of contracts**

#### **Article 142**

1. The data concerning the performance of the contract shall be documented by the contracting authority and this includes the obligation to control and document the performance of contractual obligations which were taken into account in the course of the assessment process in the procurement procedure as well as all the performances which do not comply with the contract terms, the reasons therefor and, where appropriate, the enforcement of claims related to the breach of contract.

2. When failing to enforce claims arising from a breach of contract (not including the exercise of the right of rescission or termination), the party entering into the contract as contracting authority violates the principles laid down in Article 2(1)-(4), if

- a) the breach of contract is the result of non-compliance with an obligation which was taken into account by the contracting authority in the course of the assessment of tenders in the procurement procedure; or
- b) as a result of the breach of contract, the performance deviates from the contents of the contract to such an extent that it would constitute a substantial modification according to 141(6), had the parties modified their contract to that effect.

3. Any modification of the contract which is aimed at exempting the party entering into the contract as successful tenderer from a breach of contract (or attempted breach of contract) for which he is responsible (or he would be responsible) and the legal consequences thereof (not including the exercise of the right of rescission or termination) or which is aimed at transferring extra costs of work from the successful tenderer to the contracting authority or transferring without reason to the contracting authority other risks to be incurred by the successful tenderer according to the contract, shall be null and void.

4. The Public Procurement Authority shall be entitled to verify, according to Article 187(2)(j), compliance with the requirements set out in this Act concerning the modification and the performance of contracts and, in the event of violation of those requirements, initiate the proceeding of the Public Procurement Arbitration Board or the competent court [Article 153(1)(c), Article 175].

5. If the party entering into the contract as successful tenderer has been found in serious breach of his contractual obligations and the breach of contract resulted in the termination or rescission of the contract, a compensation claim or any other legal consequences applicable on the basis of the contract, furthermore, if the wrongful conduct of the party entering into the contract as successful tenderer resulted in, partly or fully, the impossibility of the contract, the contracting authority shall notify the Public Procurement Authority thereof. The notification shall include the description of the breach of contract, the legal consequence applied and whether or not the contracting party admitted breaching the contract, whether or not an action was filed in relation thereto.

6. Where the party entering into the contract as successful tenderer has been found in breach of his contractual obligations and this fact was established by final court ruling, the contracting authority shall notify the Public Procurement Authority of that breach of contract, its description, substantial characteristics, including, where appropriate, that the breach of contract resulted in the termination or rescission of the contract, a compensation claim or any other sanction applicable on the basis of the contract and that the wrongful conduct of the party entering into the contract as successful tenderer resulted in, partly or fully, the impossibility of the contract.

### **Specific provisions pertaining to the termination of the contract**

### **Article 143**

1. The contract may be terminated or rescinded according to the Civil Code by the contracting authority, if
  - a) it is absolutely necessary to carry out a substantial modification to the contract, which would require a new procurement procedure pursuant to Article 141;
  - b) the contracting authority fails to ensure compliance with Article 138 or the valid succession of the party entering into the contract as tenderer does not comply with Article 139; or
  - c) on the basis of Article 258 TFEU an infringement procedure was initiated for the violation of the rules on public procurement or the Court of Justice of the European Union declared in a procedure pursuant to Article 258 TFEU that an infringement of the obligations was committed under European Union law and the contract is not considered null and void on the basis of the infringement established by the Court.
2. The contracting authority shall terminate the contract or rescind the contract according to the Civil Code, if, after the conclusion of the contract, he learns that the contracting party has been subject to a ground for exclusion in the procurement procedure and should have been excluded from the procurement procedure.
3. The party entering into the contract as contracting authority shall be entitled to and at the same time shall be bound to terminate the contract – where necessary, giving a period of notice which allows the party concerned to arrange for the carrying out of his duty according to the contract -, if
  - a) any legal person or any entity having legal capacity under its personal right subject to the situations set out in Article 62(1)(kb) owns directly or indirectly a share exceeding 25% in the successful tenderer or has the right to vote;
  - b) the successful tenderer acquires directly or indirectly a share exceeding 25% in any legal person or any entity having legal capacity under its personal right, which is subject to the situations set out in Article 62(1)(kb).

## **PART SIX**

### **JUDICIAL REMEDIES AVAILABLE FOR PUBLIC PROCUREMENT**

#### **CHAPTER XXI**

#### **RULES PERTAINING TO REVIEW PROCEDURES**

### **Article 144**

1. Against acts or defaults in violation of the legislation applicable to public procurements, procurement procedures, works or service concessions, as well as concession award procedures, judicial remedy pursuant to the provisions of this Part shall be available.
2. Jurisdiction shall be reserved to the court in civil-law claims related to procurement procedures, concession award procedures, contracts concluded pursuant to procurement procedures, as well as works or service concessions and the amendment thereto or the performance thereof.
3. Wherever this Part refers to public procurement or procurement procedure, such reference shall also include concession award procedure and design contest.

### **General provisions pertaining to the proceedings of the Public Procurement Arbitration Board**

## **Article 145**

1. The provisions of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter referred to as 'AP') shall apply to the proceedings of the Public Procurement Arbitration Board, unless otherwise provided by this Act or the government decree based on the empowerment of this Act.

2. Proceedings initiated against any infringement of the legislative provisions applicable to public procurements, procurement procedures, works or service concessions and concession award procedures, including the proceeding initiated against the rejection of the request for prequalification and the deletion from the prequalification list specified in the separate act of legislation referred to in Article 21(4) (hereinafter referred to as 'review procedures initiated in prequalification cases'), shall fall within the competence of the Public Procurement Arbitration Board, with regard to procurement procedures or concessions award procedures.

3. With the exception of civil-law claims related to the amendment to or performance of contracts, the Public Procurement Arbitration Board shall have the competence to conduct proceedings initiated against an amendment to or the performance of contracts, which were concluded on the basis of a procurement procedure or concession award procedure, in a manner violating this Act or the Gov. Decree based on the empowerment of this Act, as well as proceedings initiated against any misconduct or failure violating the procedural rules laid down independently by the contracting authority in compliance with Article 117.

4. Jurisdiction shall also be reserved to the Public Procurement Arbitration Board in legal disputes related to infringements within the meaning of paragraph 1 and 2, committed by any organisation or natural person applying this Act on a voluntary basis.

5. The Public Procurement Arbitration Board shall have jurisdiction in the whole territory of Hungary.

6. In the course of review procedures related to non-application of this Act, the Public Procurement Arbitration Board may not review the decision taken by the competent Committee of the Parliament to grant an exemption from the application of this Act. The Public Procurement Arbitration Board may have jurisdiction over the infringements of rules on defence and security related procurements, furthermore, procurements, procurement procedures which concern qualified data and the fundamental security and national security interests of the country, or whose execution must be accompanied by special security measures, if so required by law.

7. Representation by an accredited public procurement consultant, a legal advisor or a lawyer is mandatory in review procedures before the Public Procurement Arbitration Board.

## **Public procurement commissioners**

## **Article 146**

1. In the cases determined in Article 145(2)–(4) (hereinafter referred to as 'public procurement cases'), with the exception described in paragraph 4, the Public Procurement Arbitration Board shall act in a panel consisting of three public procurement commissioners, passing its decision by a majority vote.

2. The members and the president of the acting panel shall be appointed by the Chairperson of the Public Procurement Arbitration Board. At least two of the appointed members of the panel handling the case shall have the bar examination, in the case of public procurement cases affected by European Union support at least one of the members shall have experience in public contracts carried out using subsidies and one of the members shall have a degree in higher education closely related to the subject-matter of the case. The president of the acting panel shall only be a public procurement commissioner who has obtained the Bar examination.

3. The president of the acting panel shall be responsible for preparing and presiding over the proceeding. Apart from the interim measures and decrees resulting in the closure of the public procurement case [Articles 151(5) and (6) and Articles 30 and 31(1) of the AP], the decision on the extension of the procedure [Article 158(1)] and the decision on the substance of the public procurement case (hereinafter referred to as 'substantial decision') [(Article 165], the president of the acting panel may take any measures and make any decisions which, under the provisions of this Act, fall within the competence of the Public Procurement Arbitration Board.

4. In matters specified in Article 153(1)(a)-(b) and (d), a single public procurement commissioner of the Public Procurement Arbitration Board shall proceed. Only public procurement commissioners having qualified for the Bar can be appointed as single acting commissioners by the Chairperson of the Public Procurement Arbitration Board. Any reference in this Act to the acting panel or president shall also include single acting commissioners.

#### **Article 147**

1. In addition to the cases specified in Article 42 (1) and (3) of the AP, the public procurement commissioner shall be prohibited from acting in the public procurement case, if

- a) he has ownership of or indirectly owns a share exceeding 50% in the contracting authority or in an entity which has unlawfully failed to adopt the procurement procedure in its procurement, or own a share in a tenderer or in any other interested entity having initiated the procedure (hereinafter jointly referred to as 'client organisation');
- b) he has ownership of or indirectly owns a share exceeding 50% in an entity which maintains regular business relations with the client organisation;
- c) he has been an employee of the client organisation, or has been in any other legal relationship for the purpose of employment therewith, or has held a membership therein, or has been an executive officer or a member of the supervisory board, or has had ownership thereof or indirectly owned a share exceeding 50% therein within the last two years preceding the commencement of the review procedure.

2. Public procurement commissioners shall be prohibited from acting in a public procurement case, if any of their relatives living in the same household<sup>27</sup>

- a) is employed by, or has any other legal relationship for the purpose of employment with the client entity or is a member thereof, or an executive officer or board member thereof;
- b) has ownership of or indirectly owns a share exceeding 50% in the client entity;
- c) is employed by, or has any other legal relationship for the purpose of employment with or is a member of, or an executive officer or board member of an entity which maintains regular business relations with the client entity, or has ownership thereof or indirectly own a share exceeding 50% therein;
- d) works as a civil servant, governmental official, state official for an entity which is either responsible for the supervision of the client entity or is subordinated to it, or has been granting the client entity any support or exclusive rights<sup>28</sup>.

3. The public procurement commissioner shall notify without delay and not later than within 3 (three) days the Chairperson of the Public Procurement Arbitration Board, if he is subject to any ground for exclusion pursuant to this Article or Article 42 (1) or (3) of the AP. The public procurement commissioner shall assume disciplinary and financial liability for any failure of or delay in filing such notification.

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<sup>27</sup> This amendment entered into force on 12 December 2015.

<sup>28</sup> This amendment entered into force on 1 July 2016.

4. The decision in exclusion cases shall be made by the Chairperson of the Public Procurement Arbitration Board. Where the Chairperson of the Public Procurement Arbitration Board participates in the proceeding as a member of the acting panel, the chairperson of the Public Procurement Authority shall decide on his exclusion.

5. For the purposes of this Act, indirect holding shall mean a share held through the share of another organisation having a share in the client organisation (hereinafter referred to as the 'intermediate organisation'). The proportion of the indirect holding is to be calculated by multiplying the share owned by the entity - which has that indirect holding - in the intermediate organisation by the share owned by the intermediate organisation in the client organisation. Where the share in the intermediate organisation exceeds 50%, it shall be considered full ownership.

## **Review procedures**

### **Article 148**

1. The Public Procurement Arbitration Board shall proceed upon application or ex officio.

2. An application may be submitted by the contracting authority, the tenderer, in the case of a joint tender any of the tenderers, the candidate, in the case of a joint request to participate any of the candidates, or any other interested party whose right or legitimate interest is being harmed or risks being harmed by an activity or default which is in conflict with this Act. Chambers or representative associations having an activity related to the subject-matter of procurement may submit an application regarding the illegal nature of the contract notice, the invitation for submission of tenders, the invitation to participate, the procurement documents or any amendment thereto or the illegal nature of the information specified in Article 113(1). (Those included in this paragraph are hereinafter jointly referred to as 'applicant'.)

3. The application may be submitted, subject to the derogation referred to in paragraphs 4-5, within fifteen days from the date when the applicant learned of the infringement and in cases of infringing decisions closing a procurement procedure within ten days from the date when the applicant learned of the infringement. No application may be submitted more than 90 days following the occurrence of the infringement.

4. Contrary to the provision set out in paragraph 3, in the case of a procedure under Article 115, the application may be submitted within fifteen days from the date when the applicant learned of the infringement and in cases of infringing decisions closing a procurement procedure within five days from the date when the applicant learned of the infringement. No application may be submitted more than 90 days following the occurrence of the infringement.

5. The application related to the contract notice, the invitation to tender or the invitation to participate, the procurement documents or their modification may be submitted not later than five days before the expiry of the, in case modified, time limit to submit tenders or time limit to participate, however if the time limit stipulated in paragraph 3 or 4 expires later, the applicant is entitled to submit its application till the date stipulated in paragraph 3 and 4, respectively. As regards the contract notice, the invitation to tender or the invitation to participate, the procurement documents or any amendment thereto the contracting authority may submit an application regarding an infringement committed by itself, by the date of sending of the written summary concerning the tenders.

6. No separate application for review may be submitted in respect of an infringing procedural act under Article 69(4)-(7), the application related to that infringement may be included in the application for review against the unlawful decision closing the procurement procedure. The application in respect of an infringing procedural act under Article 69(4)-(7) does not constitute an element of application other than the one related to the unlawful decision closing the procurement procedure and, when calculating the time limit specified in paragraphs 3-4, the date when the applicant learned of the infringement and the date when the infringement was committed shall be the date to be taken into account in the case of the application for review against the unlawful decision closing the procurement procedure.



7. When compliance with the time limit referred to in paragraphs 3-4 is examined, the infringement shall be deemed to have become known at:
- a) the date of the publication of the notice launching the procurement procedure and the information specified in Article 113(1) with unlawful contents or the receipt of the direct invitation with unlawful contents or, in the case of procurement documents with unlawful contents the accessibility thereof;
  - b) where a notice is dispatched after the expiry of the relevant time limit the fifteenth day after the publication of the notice, where a notice concerning the withdrawal of the information specified in Article 113(1) is sent to the Public Procurement Authority after the expiry of the relevant time limit the fifteenth day after the publication of the notice on the homepage of the Public Procurement Authority;
  - c) in relation to the infringement in the decision closing the procurement procedure in connection with the documents reviewed the date of closing the access to documents for review, if the applicant has had access to the tender(s) at the contracting authority or the Public Procurement Arbitration Board within ten days following the receipt of the written summary;
  - d) where preliminary dispute settlement has been requested in relation to the infringement referred to in the application and
    - (da) the contracting authority has sent its position on time but no further measure has been made, the date of sending the position of the contracting authority;
    - (db) the contracting authority failed to send its position within the relevant time limit, the date of expiry of the time limit for sending the position of the contracting authority;
  - e) in the case of an amendment to or performance of a contract, which was concluded on the basis of a procurement procedure, in violation of this Act, the thirtieth day after the publication of the notice concerning the amendment of the contract or after the publication of the data concerning performance [Article 43(1)(f)] in the database maintained by the Public Procurement Authority or, if the publication in the Public Procurement Database is not possible, on the contracting authority's homepage or on the homepage of its maintaining entity<sup>29</sup>.

8. When compliance with the time limit referred to in paragraphs 3-4 is examined, the infringement shall be deemed to have become known at:
- a) in the case of the notice launching the procurement procedure and the information specified in Article 113(1) with unlawful contents the date of publication of the notice or information, in case of a direct invitation the date when the invitation was sent;
  - b) where the notice is dispatched or the information specified in Article 113(1) is sent after the expiry of the relevant time limit the date of publication of the notice or information;
  - c) in case of a procurement without the conduct of a procurement procedure the date of the conclusion of the contract, or if this date cannot be established, the commencement of its performance by either party.

9. If the applicant learned that the procurement was conducted without the conduct of a procurement procedure after the expiry of the time limit set out in paragraphs 3-4, the application may be submitted within one year following the conclusion of the contract or, if it cannot be established, following the date when any of the parties began to perform the contract.

10. Failing to meet the time limits set out in paragraphs 3 and 9 shall result in the forfeiture of rights.

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<sup>29</sup> This amendment entered into force on 24 December 2015.

11. The Public Procurement Arbitration Board shall publish without delay the designation and subject-matter of the procedure concerned by the application, the indication of the names of the parties and the date of receipt of the application on the homepage of the Public Procurement Authority following the submission of the application.

12. Prior to the submission of the application, the applicant specified in paragraph 1 shall notify the contracting authority or the procurer of this fact – by designating the infringement assumed by him – in the same way as the application was submitted by him.

#### **Article 149**

1. The application shall state:

- a) the name and seat (residence) of the applicant and its representative, and the facts supporting the eligibility of the applicant;
- b) the name and seat of the contracting authority of the procurement procedure concerned in the application, the subject-matter of the procurement and, in the case of division of the contract into lots, the lot concerned by the remedy, or, in the case of a purchase carried out without the conduct of a procurement procedure the name, and seat of the purchaser and the subject-matter of the purchase;
- c) the date when the infringement occurred and the date when the applicant learnt thereof, in such a way that allows clear identification as regards each element of the application;
- d) the infringed provision of law in such a way that allows clear identification as regards each element of the application;
- e) the motion for the decision of the Public Procurement Arbitration Board and the reasons for such a decision in such a way that allows clear identification as regards each element of the application;
- f) the motion for ordering an interim measure (Article 156) and the reasons therefor;
- g) the name and seat (residence) known to the applicant of any entities possibly interested in the public procurement case;
- h) the conduct of the preliminary dispute settlement, if any, its results and the answer of the contracting authority, which shall be attached to the application.

2. The number of copies of the application which are to be lodged shall be the number of potential parties concerned in the proceedings as can be known to the applicant, plus one.

3. An electronic version of the submitted application, which was written using IT tools and may be edited, shall be made available to the Public Procurement Arbitration Board and, if it is submitted by email, the receipt thereof shall be confirmed by the Public Procurement Arbitration Board within one business day.

#### **Article 150**

1. The proceeding of the Public Procurement Arbitration Board initiated with an application shall be subject to the payment of an administrative service fee, the level of which shall be set, as a proportion of the estimated value of the public contract, in a Decree issued by the Minister competent in public procurements. The document showing that the fee has been paid shall be attached to the application.

2. Chambers having an activity related to the subject-matter of the procurement shall be exempted from the payment of the fee specified in paragraph 1 in the case of review procedures for the illegal nature of the contract notice, the invitation for submission of tenders, the invitation to participate, the procurement documents or any amendment thereto or the illegal nature of the information specified in Article 113(1). In review procedures, where the application is submitted by the contracting authority in respect of its own unlawful activity or omission, the contracting authority shall be exempted from the payment of the fee, specified in paragraph 1, in relation to the application submitted by the contracting authority.

3. If, in the course of the procedure, a new element is added by the applicant to the application for review, the administrative service fee shall be paid by the applicant, at the request of the Public Procurement Arbitration Board, in respect of the new element of application as well. If the applicant fails to adjust the amount of the administrative service fee, the Public Procurement Arbitration Board is not obliged to act in respect of the new element of application.

### **Article 151**

1. The review procedure shall be launched by the Public Procurement Arbitration Board, at the latest, on the business day following the day of receipt of the application pursuant to Articles 148(1)-(9), 149(1)-(2) and 150(1)-(2).

2. If the application fails to include the information as provided for in Article 149(1) or there is no supporting document to show that the fee provided for in Article 150(1) has been paid or no authorisation for the authorised representative has accompanied the application, the Public Procurement Arbitration Board shall call upon the applicant to supply the missing information or document(s) within five days and, at the same time, warns the applicant that, should he submit an incomplete application again, such application shall be dismissed by the Public Procurement Arbitration Board. No certification may be accepted in the case of the failure to meet the time limit to supply missing documents or information.

3. Where the estimated value of the public contract may not be known to the applicant on the basis of the documents of the procurement procedure concerned by the review procedure, the applicant shall refer to this circumstance in its application for review. In that case, the Public Procurement Arbitration Board, on the basis of the data available, informs the applicant, in a request for the submission of missing information, of the amount of the estimated value on which the administrative service fee is based.

4. When establishing the estimated value - in the case of the division of the contract into lots the value of the lot concerned by the remedy - the Public Procurement Arbitration Board may request that the contracting authority supply information and the contracting authority shall do so within two business day.

5. The Public Procurement Arbitration Board shall dismiss the application within five days without a substantial examination if - in addition to the cases set out in paragraph 30 of the AP - it concludes that

- a) the applicant failed to submit the requested missing information within the defined time limit or it has submitted an incomplete application again;
- b) the contracting authority has legally withdrawn its notice, invitation launching the procurement procedure or the information specified in Article 113(1).

6. The Public Procurement Arbitration Board shall dismiss the review proceeding, where the application should have been dismissed without substantial examination according to paragraph 5, but the ground for dismissing the application was learned by the Public Procurement Arbitration Board only after the proceeding had started.

7. The applicant may withdraw his application initiating the proceeding or certain elements thereof until a decision has been passed [Article 165] on the substance of the case.

8. If the Public Procurement Arbitration Board rejects the application for judicial remedy without a substantial examination or dismisses the review proceeding on the basis of a ground set out in paragraph 6, the administrative service fee shall be reimbursed to the applicant. If the application or certain elements thereof is/are withdrawn, the applicant may claim the reimbursement of the administrative service fee taking account of the elements maintained and in line with the stipulations set out in a separate act of legislation.

## Article 152

1. An ex officio proceeding of the Public Procurement Arbitration Board may be initiated by the following entities or persons on the grounds that they have, in the performance of their duties, learned of any behaviour or default in violation of this Act:

- a) the President of the Public Procurement Council;
- b) the State Audit Office;
- c) the government body responsible for control;
- d) the body responsible for the legal supervision of local governments;
- e) the Hungarian State Treasury;
- f) the Commissioner for Fundamental Rights;
- g) the entity granting support for the public procurement, or the entity co-operating pursuant to law in the use of the support;
- h) the central purchasing body appointed by the Government;
- i) the Hungarian Competition Authority;
- j) the body auditing European Union supports;
- k) the minister competent in the supervision of the national property;
- l) the public prosecutor;
- m) the minister competent in public procurements.

2. The ex officio proceeding of the Public Procurement Arbitration Board may be initiated by a person or entity specified in paragraph 1 within sixty days from learning of the infringement but

- a) not later than within three years after the occurrence of the infringement,
- b) in the case of procurements without the conduct of a procurement procedure, contrary to point (a), within five years from the conclusion of the contract or, if it cannot be established, from the start of performance by any of the parties or
- c) in the case of public procurements to be realised using support, contrary to points (a) and (b), within the period required to keeping documents as stipulated in the relevant separate act of legislation on granting and use of the given support, however, that period may not be shorter than five years after the occurrence of the infringement, in the case of procurements without the conduct of a procurement procedure, within five years from the conclusion of the contract or, if it cannot be established, from the start of performance by any of the parties.

3. Unless otherwise provided in paragraph 2, Article 148(8) shall apply accordingly in respect of the date of committing the infringement. Contrary to paragraph 2, in the case set out in Article 153(1)(d), the President of the Public Procurement Authority may initiate the ex officio proceeding of the Public Procurement Arbitration Board within the time limit set in Article 189(1).

4. The document initiating the ex officio proceeding of the Public Procurement Arbitration Board shall contain the data listed in Article 149(1)(a)–(d) and (g), and a proposal may be made concerning points (e) and (f). The initiating document shall be accompanied by copies of the documents available in relation to the purchase or public procurement involving an infringement. An electronic version of the submitted initiating document, which was written using IT tools and may be edited, shall be made available to the Public Procurement Arbitration Board and, if it is submitted by email, the receipt thereof shall be confirmed by the Public Procurement Arbitration Board within one business day.

5. The Public Procurement Arbitration Board shall launch the proceeding not later than on the first business day following the receipt of the initiation complying with paragraph 1.

6. If the initiation does not contain the data set out in paragraph 4, the Public Procurement Arbitration Board shall call upon the entity or person concerned to provide the missing information. Article 151(2) shall apply accordingly to the supply of missing information.

7. The Public Procurement Arbitration Board shall publish without delay the designation and subject-matter of the procedure concerned by the initiation, the indication of the names of the parties and the date of receipt of the initiation on the homepage of the Public Procurement Authority following the submission of the initiation.

8. Dismissal of the initiation without substantive examination and termination of the proceeding shall be governed by Article 151(5)-(8) as appropriate.

### **Article 153**

1. The President of the Public Procurement Authority shall launch the ex officio proceeding of the Public Procurement Arbitration Board
  - a) if the contracting authority fails to publish the annual statistical summary in the Public Procurement Database by the time limit set in a separate act of legislation, as from the date of the request of the President of the Authority,
  - b) if the given entity does not fulfil its obligations of registration and declaration on the list of contracting authorities covered by this Act, notwithstanding a request from the Public Procurement Authority,
  - c) if, on the basis of the outcome of the official control according to Article 187(2)(j) or without the carrying out of the official control, there is indicative evidence that an amendment to or the performance of the contract violated this Act, in particular where an infringement specified in Article 142(2) was committed or
  - d) if, upon the examination of the documents sent to the Public Procurement Authority in relation to the launching of a negotiated procedure without prior publication of a contract notice, there are reasonable grounds to consider that rules and principles pertaining to public procurement and procurement procedures have been violated.

2. In addition to paragraph 1, the President of the Public Procurement Authority may initiate the ex officio proceeding of the Public Procurement Arbitration Board, in particular, where the contracting authority fails to publish, within the time limit set, the data, information, documents specified in Article 43(1)(a)-(f) in the Public Procurement Database, in spite of a request by the Public Procurement Authority.

3. Article 152(2)-(8) shall apply to the initiation set out in paragraphs 1-2.

### **Article 154**

1. The Public Procurement Arbitration Board shall notify the parties and any parties interested in the public procurement case of the launch of the proceeding, and shall request them to submit their comments within five days. The Public Procurement Arbitration Board shall attach the application to the notice or, in cases of ex officio launched proceedings the document initiating this proceeding.

2. Furthermore, at the time of the notification, the Public Procurement Arbitration Board shall call upon the contracting authority of the relevant procurement procedure or the purchaser who carried out a purchase without the conduct of a procurement procedure to supply within five days all documents related to the public procurement or purchase in question or, where it is not necessary, the documents required by the Arbitration Board. When the application is submitted by the contracting authority, the available documents shall be supplied together with the application. At the same time as the documents, an electronic version of the documents, which was written using IT tools and may be edited, shall also be sent, if available in such format. The Public Procurement Arbitration Board shall confirm within one business day the receipt of the editable version of the documents, where those documents have been submitted by email.

3. Where a proceeding is launched by the Public Procurement Arbitration Board, the contracting authority may suspend the ongoing procurement procedure and it shall notify the Public Procurement Arbitration Board thereof. The suspension shall extend any time limits running by the duration of the suspension period.

#### **Article 155**

1. The Public Procurement Arbitration Board may order that certain cases being dealt with by it be consolidated if their subjects are interrelated or settling such cases collectively is justified by practical, economic or other procedural considerations.

2. The Public Procurement Arbitration Board may order that certain parts or elements of application of a given case being dealt with by it be separated if settling such cases separately is justified by practical, economic or other procedural considerations.

3. In case the applicant has more issues (elements) in the application concerning the same procurement procedure the Public Procurement Arbitration Board may make its decision at the same time. The Public Procurement Arbitration Board may make a single compound decision.

#### **Interim measures**

#### **Article 156**

1. In an ongoing review procedure, until conclusion of the contract based on the procurement procedure (or purchase) involved in the review procedure, the Public Procurement Arbitration Board may, on request or ex officio, order interim measures, having regard to all the circumstances of the case, if there is the likelihood of an infringement of the legal provisions or principles pertaining to the public procurement or the procurement procedure has been committed or there is a risk that an infringement will be committed.

2. As an interim measure, the Public Procurement Arbitration Board shall

- a) order the suspension of the procurement procedure;
- b) call upon the contracting authority involved in the procurement procedure to invite the applicant seeking a remedy to take part in the procurement procedure.

3. Suspension of the procurement procedure shall result in the extension of the ongoing periods of time prescribed in the invitation by the duration of the suspension period.

4. In order to protect a pressing, particularly vital interest or public interest (including an issue of national economy) the Public Procurement Arbitration Board may allow the conclusion of the contract in its decree, upon the request of the contracting authority, if the benefits exceed the drawbacks of the conclusion of the contract. The pressing, particularly vital interest or public interest (the issue of national economy) shall be stated in the application and the documents giving grounds for the application shall be submitted together with the application. For the purposes of this paragraph, public interest means in particular the maintenance of the uninterrupted security of conduct of the public utilities activity. The Arbitration Board makes a decision within five days following the receipt of the application, no review procedure shall lie from the decree.

5. The Public Procurement Arbitration Board shall ensure without delay the publication of its decree on the permission for the conclusion of the contract on the homepage of the Public Procurement Authority.

## **Initiating the preliminary ruling procedure of the Court of Justice of the European Union**

### **Article 157**

1. If the Public Procurement Arbitration Board initiates a preliminary decision-making procedure of the Court of Justice of the European Union in accordance with the rules laid down in the TFEU, such initiative shall be subject of an individual decree and, at the same time, the Public Procurement Arbitration Board shall suspend the proceeding in question. In its decree, the Public Procurement Arbitration Board shall identify the issue requiring a preliminary decision by the Court of Justice of the European Union and recite the facts and the relevant Hungarian legislation to the extent required for addressing the issue raised. At the same time when the decree is delivered to the Court of Justice of the European Union, the Public Procurement Arbitration Board shall also supply a copy thereof to the Minister competent in justice and the Minister competent in public procurements for their information.

## **Scope of investigation by the Public Procurement Arbitration Board**

### **Article 158**

1. If, during the proceeding and before a substantial decision [Article 165] is taken, the Public Procurement Arbitration Board learns of an infringement additional to those already being investigated pursuant to the application or initiation, it may proceed ex officio also in respect of such an infringement. The proceeding may only be extended where the disclosed infringement distorts competition or prejudices the public nature of the competition, the equal opportunities of tenderers or substantially influenced the decision of the contracting authority. Decision on the extension of the proceeding shall be taken by the proceeding panel.

2. In case an application is being withdrawn, the Public Procurement Arbitration Board shall continue the proceeding, if, on the basis of the available data, a serious infringement is likely to have taken place.

3. Should the Public Procurement Arbitration Board, in the course of the proceeding, detect any circumstances which might suggest non-compliance with another act of legislation, it shall report such violation to the competent authority, in particular to the one responsible for prosecution, the State Audit Office, an internal audit body designated by the government or the Hungarian Competition Authority.

### **Article 159**

1. Where the substantial decision on the public procurement case in respect of the infringement pursuant to Article 142(2) depends on a preliminary ruling on whether a breach of contract was committed, the Public Procurement Arbitration Board shall bring an action for the establishment of the breach of contract and, at the same time, shall suspend the procedure. The Public Procurement Arbitration Board is entitled to exemption from all court costs.

2. The Public Procurement Arbitration Board shall publish a notification about initiating the action set out in paragraph 1 on the homepage of the Public Procurement Authority. The notification shall contain the naming of the case in question (the indication of the related procurement procedure), the date of submission of the claim and the naming of the parties to the proceedings.

### **Article 160**

1. The Public Procurement Arbitration Board shall make arrangements to ensure that the applicant, the party initiating the procedure and the opposing party can reveal all new facts in the course of the proceeding, as well as all applications and statements filed, and enable both parties to put forward their points of view thereon.

2. The Public Procurement Arbitration Board shall send the comments of the parties and the entities interested in the public procurement case according to Article 154(1) to the adverse party and to any other interested entities, noting that they shall be bound to make their statements thereon not later than within three days. In addition, the Public Procurement Arbitration Board may call upon, at any time, the parties and any parties interested in the public procurement case to make a statement or give their comments, allowing an appropriate period. At the request of the Public Procurement Arbitration Board, an electronic version of the statements and comments as well as other documents, which were written using IT tools and may be edited, shall also be made available to the Public Procurement Arbitration Board, if available in such format. The Public Procurement Arbitration Board shall confirm within one business day the receipt of the editable version of the documents, if those documents are submitted by email.

3. If the Public Procurement Arbitration Board does not hold a hearing in the given case, it can give a date by which the parties and any other interested entities must make all substantial statements and comments, by notifying them. If the Public Procurement Arbitration Board holds a hearing in the given case, the parties and any other interested entities must make all substantial statements, comments before the hearing.

4. After the date specified in paragraph 3 or subsequent to the hearing, the parties and any other interested entities may only make further comments or statements, if a request is made by the Public Procurement Arbitration Board therefor. Any further comment or statement made after the date specified in paragraph 3 or subsequent to the hearing of the given case, without the request of the Public Procurement Arbitration Board, shall not be taken into consideration by the Public Procurement Arbitration Board for its decision.

#### **Article 161**

1. The Public Procurement Arbitration Board shall settle the public procurement case without a hearing, except where it is absolutely necessary to hold a hearing, in particular, for the sake of the parties' rights, the clarification of the facts, an informed decision-making in the course of which all the relevant circumstances are taken into account. No hearing may be held, if the review procedure is limited to the establishment whether the references presented by the economic operator in the procurement procedure are technically equivalent to the requirements specified in the notice launching the procedure.

2. The hearing shall be held by the Public Procurement Arbitration Board not later than fifteen days after the starting of the proceeding.

3. At the hearing held by the Public Procurement Arbitration Board, in addition to the parties to the proceedings, other interested persons may attend in person or through their representatives, and they may make comments, and bring forward their evidence until the hearing is closed.

4. The hearing shall be held in public. The Public Procurement Arbitration Board may, by its reasoned decree, exclude the public from the hearing or a part of thereof, if requested or ex officio, if this is necessitated in order to keep a qualified data, business secret or any other secrets defined as such in a separate act of legislation.

5. The Public Procurement Arbitration Board shall send the minutes of the hearing to the parties and any other interested entities within five days from the date of the hearing.

#### **Article 162**



1. The applicant or the initiating party of the public procurement case, the opposing party as well as their representatives shall have the right within ten days from the initiation of the proceeding to have access to and make copies or notes of all documents drawn up in the course of the procurement procedure or the review procedure, furthermore, any members of the Public Procurement Authority shall have the right at any time during the proceeding to do so.

2. The contracting authority, the tenderer and the candidate may request, referring to the protection of business secrets, that a prohibition or restriction be imposed on access to documents or data by any persons specified in paragraph 1 in the case of documents not considered having public interest or information made public out of public interest. 3. If certain specified documents are included by the tenderer or the candidate separately, as a business secret in the tender or in the request to participate, or, if the tenderer or the candidate requests to treat any other document submitted by him in the course of the procurement procedure as a business secret, it shall be regarded as a request for the prohibition imposed on access to these documents by any persons specified in paragraph 1.

4. The Public Procurement Arbitration Board shall examine if the circumstances justifying the prohibition or the restriction imposed on access to these documents exist and, when making a decision on an application to this effect, it may at the same time require the relevant party to prepare a version of the document in question which will not include any confidential business information.

5. Access to documents drawn up in the course of the procurement procedure or the review procedure, the making of copies and notes thereof by persons other than those referred to in paragraph 1 shall only be granted to a person who has legitimate interest in getting to know the documents and his access to documents does not violate any rule applicable to the protection of qualified data.

6. Documents containing qualified data shall not be accessed in the absence of the permission for use. Neither shall other documents containing other information protected by law be accessed where such access is prohibited by the legislation regulating the protection of the relevant information, or the entity specified in paragraph 1 and requesting access is not prevented from exercising its right for judicial remedy by not being familiar with the protected information.

7. Minutes taken of a hearing from which the public has been excluded in order to protect qualified data must not be copied or have notes made of. Even access to such documents – as specified in the Act of Protection of qualified data – is subject to the terms and conditions set by the Chairperson of the Arbitration Board.

8. Access to the documents shall be subject to the permission of the Public Procurement Arbitration Board, taking into consideration the provisions set out in paragraphs 1-7.

### **Article 163**

1. The Public Procurement Arbitration Board may impose a procedural fine from HUF 50.000 up to HUF 500.000 on the applicant or any other person taking part in the review procedure if such participant

- a) has supplied false data or has failed to disclose data relevant to the judgement of the case;
- b) has failed to supply the required information or has supplied it after the expiry of the time limit set therefor;
- c) has failed to submit a document or has submitted it after the expiry of the time limit set therefor or has submitted a document in a format other than an electronic form, which may be edited, in the cases provided for by this Act;
- d) has been hindering access to documents related to its business, professional or public procurement activities;
- e) has made a clearly unsubstantiated statement with respect to exclusion, or makes a repeated unsubstantiated statement against the same public procurement commissioner during the same procedure.

2. An individual remedy of the decree imposing a procedural fine may be sought under Article 169. Appeal for such an individual remedy shall have a suspensory effect on the execution of the decree.

#### **Article 164**

1. When no hearing is held in the case, the Public Procurement Arbitration Board shall be required to finish the case within fifteen days countered from the launch of the proceeding, save for the case specified in paragraph 2.

2. If the Public Procurement Arbitration Board has held a hearing in the case, it shall be required to finish the case within twenty-five days counted from the launch of the proceeding, save for the case specified in paragraph 3.

3. The Public Procurement Arbitration Board shall conclude the case concerning an amendment or performance violating this Act of the contract concluded on the basis of the procurement procedure within sixty days from the launching of the procedure.

4. In the case of the consolidation of cases according to Article 155(1) the time limit for arrangement shall be aligned to the latest review procedure.

5. The time limit referred to in paragraphs 1 and 3 may be extended with up to 10 days on one occasion, in justified cases.

The parties who were notified of the launching of the procedure shall be notified of that extension not later than the date of expiry of the initial time limit set in accordance with paragraphs 1 to 3.

6. The parties may not have the right to apply for suspension of the proceedings.

#### **Substantial decision of the Public Procurement Arbitration Board**

#### **Article 165**

1. The Public Procurement Arbitration Board shall make its decision in the name of the Public Procurement Authority.

2. In its decision the Public Procurement Arbitration Board

- a) shall dismiss any unfounded applications;
- b) in procedures launched or conducted ex officio shall state the lack of infringement;
- c) shall state that an infringement has occurred;
- d) shall state that an infringement has occurred and shall apply the legal consequences listed in paragraph 3;
- e) shall, besides stating that an infringement has occurred, impose a fine in cases set out in paragraph 6;
- f) shall state that an infringement has occurred and shall prohibit the tenderer, the subcontractor or any other entity or person who or which participated in the procurement procedure from participating in the procurement procedure.

3. If the Public Procurement Arbitration Board states in its decision that an infringement has occurred, it may

- a) before the closure of the procurement procedure, call upon the person who committed the infringement to act in conformity with the rules laid down in this Act, or shall order that the contracting authority may take its decisions only subject to certain conditions;
- b) declare void any decision made by the contracting authority either during the procurement procedure or as a decision closing that procedure, provided that no contract has been concluded yet on the basis of the decision in question;
- c) order the removal of the tenderer from the official list of approved tenderers;
- d) impose a fine on any organisation or person who or which has infringed the law or on any person or organisation that is liable for the infringement and has a legal relationship with the person or organisation liable for the infringement in question.

4. The amount of the fine specified in paragraph 3(d) shall be not more than 10% of the estimated value of the procurement procedure or, in the case of the division of the contract into lots, the lot concerned by the remedy, subject to the provisions set out in paragraph 11.

5. If a preliminary dispute settlement has been requested in relation to the infringement referred to in the application and the contracting authority has sent its position on the infringement but no further measure has been taken, the amount of the fine specified in paragraph 3(d) shall be not more than 15% of the estimated value of the procurement procedure or, in the case of the division of the contract into lots, the lot concerned by the remedy, subject to the provisions set out in paragraph 11.

6. The Public Procurement Arbitration Board, besides stating that an infringement has occurred, shall impose a fine, if
- a) the infringement has occurred with the unlawful bypass of the procurement procedure;
  - b) the parties have concluded the contract with the infringement of the rules regarding the standstill period;
  - c) the contract has been concluded as a result of a negotiated procedure without prior publication of a contract notice and the criteria for the application of this type of procedure were not fulfilled;
  - d) the contracting authority failed to send previous notice to the Public Procurement Authority, in the case of a negotiated procedure without prior publication of a contract notice;
  - e) the ex officio proceeding has been initiated by the Chairperson of the Public Procurement Authority [Article 153] and the Public Procurement Arbitration Board states that there was an infringement.

7. The amount of the fine specified in paragraph 6 shall be not more than 15% of the estimated value of the procurement procedure or, in the case of the division of the contract into lots, the lot concerned by the remedy or, in the case of the unlawful bypass of the procurement procedure, the value of the contract, subject to the provisions set out in paragraph 11.

8. According to paragraph 2(f), the Public Procurement Arbitration Board shall state that an infringement has occurred and shall prohibit the tenderer, the subcontractor or any other entity or person who or which participated in the procurement procedure from participating in the procurement procedure for a period between 6 months and 3 years, subject to the provisions set out in paragraph 11, if

- a) he has supplied false data, made false declaration in the course of the given procurement procedure or in relation thereto and is subject to the grounds for exclusion specified in Article 62(1)(i);
- b) he attempted to wrongly influence the decision making process of the contracting authority in the given procedure or attempted to obtain any confidential information which would give him an undue advantage in the procurement procedure.

9. According to paragraph 2(f), the Public Procurement Arbitration Board shall state that an infringement has occurred and, subject to the provisions set out in paragraph 11, shall prohibit the tenderer, the subcontractor or any other entity or person who or which participated in the procurement procedure from participating

in the procurement procedure if, in his case, the distortion of competition arising from any conflict of interest under Article 25 or his prior involvement in the preparation of the procurement procedure may not be effectively remedied by other measures, which are less coercive than the exclusion from the procedure.

10. For the purposes of paragraph 8, the Public Procurement Arbitration Board shall prohibit the tenderer, the subcontractor or any other entity or person who or which participated in the procurement procedure from participating in the procurement procedure or concluding the contract not only for the future but also in the procurement procedure examined and in any other procurement procedure in progress, if the results have not yet been sent in the procedures concerned. In the case provided for in paragraph 9, the Public Procurement Arbitration Board may prohibit the tenderer, the subcontractor or any other entity or person who or which participated in the procurement procedure from participating in the procurement procedure or concluding the contract only in the procurement procedure examined.

11. In determining whether a fine is to be imposed, in fixing the amount of the fine and setting the period of the exclusion, the Public Procurement Arbitration Board shall take into account all the circumstances relevant in the matter, in particular the importance of the offence committed, the subject-matter and value of the public procurement concerned, the effect of the offence on the decision closing the procurement procedure, the reoccurrence, if any, of the infringement of this Act, the liable person's readiness to cooperate in the proceedings, the length of time which elapsed between the committing of the offence and the launching of the review procedure, in the case of public procurements carried out using support the fact that, in the procedure of another authority, a sanction concerning the repayment of the support may be attached to the offence. When establishing the sum of the fine and setting the period of the exclusion, it shall also be taken into account whether the act of the offence has been manifestly deliberate.

12. If the Public Procurement Arbitration Board annuls the decision of the contracting authority having concluded the procedure, then the contracting authority shall make a new decision closing the procedure, within thirty days following the date when the decision becomes enforceable. If the procedure shall not presumably be unsuccessful, the contracting authority - before making its decision - shall obtain the statement of all tenderers having submitted valid tenders to the effect that they uphold their tenders, setting a time limit. In such cases where the tenderer has not made any statement, it shall be presumed that he does not maintain his tender. If the contracting authority made subject participation in the procedure to the condition of provision of a tender guarantee, tenderers who uphold their tenders shall certify that the tender guarantee is also upheld or is made available for the new term of the validity period set by the contracting authority.

13. If the Public Procurement Arbitration Board establishes in its decision pursuant this paragraph an infringement of the legislation applicable to public procurement or the procurement procedure, the contracting authority or the party entering into the contract as tenderer may, within thirty days from the service of the decision of the Public Procurement Arbitration Board, rescind the contract concluded pursuant to the relevant procurement procedure, provided that the infringement affected the decision concluding the procurement procedure.

### **Announcement and publication of the decision of the Public Procurement Arbitration Board**

#### **Article 166**

1. The decree on suspension of the procedure, the decree and the decision closing the public procurement case shall be delivered to the parties, as well as to other parties having an interest in the case. Where the decree on suspension of the procedure, the decree or the decision closing the public procurement case is related to a public procurement carried out using support, the decision shall also be delivered to the organisation providing that support for the public procurement.

2. The decree and the decision closing the public procurement case and the decree on the allowance of the conclusion of the contract [Article 156(4)] shall be published on the homepage of the Public Procurement Authority on the day of their drawing up. The substantial decision shall be published even if the Public Procurement Arbitration Board has excluded the public from the proceedings pursuant to Article 161(4).

3. The Public Procurement Arbitration Board shall publish the decision on the homepage, even if an application for a judicial review [Article 170] of the decision has been lodged, but it shall also include a reference to that fact.

4. In addition to the data specified in Article 148(11) and Article 156(5) of the application initiating the proceeding of the Public Procurement Arbitration Board and the substantial decision, the decree on the dismissal of the application without substantial examination, the decree on termination of the procedure, in the case of the judicial review of the substantial decision, the decision of the court shall be published on the homepage of the Public Procurement Authority on the day of their drawing up.

5. If the judicial review of the decision of the Public Procurement Arbitration Board is requested, the contracting authority may suspend the procedure or may postpone the conclusion of the contract until the court makes its final decision.

### **Review procedures for prequalification cases**

#### **Article 167**

1. The provisions pertaining to the procedure conducted by the Public Procurement Arbitration Board shall apply to review procedures for prequalification cases with the differences pursuant to paragraphs 2–4, as appropriate.

2. The applicant may lodge an appeal against the rejection of its prequalification application and its deletion from the pre-qualification list. Such appeal may be lodged within fifteen days of receiving written notification of the same by the contracting entity.

3. The appeal shall state:

- a) the name, seat (residence) of the applicant and its representative;
- b) the name and seat of the contracting entity operating the prequalification system covered by the appeal;
- c) the date of receiving the contracting entity's written notification;
- d) the legal provision violated;
- e) the motion relating to the decision of the Public Procurement Arbitration Board, and its reasons.

4. In its decision, the Public Procurement Arbitration Board shall, besides stating that an infringement has taken place, declare void or change the contracting entity's decision.

### **Ensuring the uniformity of the decisions taken by the Public Procurement Arbitration Board**

#### **Article 168**

1. For the sake of the uniformity of the remedies procedures, a general council including the public procurement commissioners shall operate within the framework of the Public Procurement Arbitration Board. The representatives of the organisational unit responsible for the area of public procurement in the ministry headed by the minister responsible for public procurements as well as the representatives of the body auditing EU supports may participate in a consultative capacity in the meetings of the general council.

2. The Public Procurement Arbitration Board shall operate a council for the cases and groups of cases set out in the organisational and operational regulations. The college shall examine the practice of the Public Procurement Arbitration Board, monitor developments in the court's case-law and express its opinion on the disputed legal issues in order to enhance a uniform practice of review.

3. If the proceeding panel of the Public Procurement Arbitration Board has made a decision on a matter of principle, it shall be bound to present its decision to the Chairperson of the Public Procurement Arbitration Board. The Chairperson of the Public Procurement Arbitration Board shall present the decision concerning the matter of principle to the general council.

4. The Chairperson of the Public Procurement Arbitration Board continuously monitors the decision-making process of the Public Procurement Arbitration Board. If the Chairperson has knowledge of decision-makings by the proceeding panels on the basis of conflicting grounds of principles, he shall inform the general council thereof. The general council shall express an opinion on the issue of law in question for the sake of the uniform decision-making. Before expressing its opinion, the general council gives the bodies referred to in paragraph 1 the opportunity to state their views on the given issue of law, within a reasonable time limit, those views are not binding on the general council. The opinion expressed by the general council may only be departed from according to the provisions set out in paragraph 5. In case of agreement within the general council the Public Procurement Arbitration Board shall publish information of the new opinion of the general council on the homepage of the Public Procurement Authority.

5. If the proceeding panel of the Public Procurement Arbitration Board intends to depart from the contents of the opinion in relation to an issue of law, it shall notify the Chairperson of the Public Procurement Arbitration Board thereof. The Chairperson of the Public Procurement Arbitration Board shall present the envisaged decision to the council competent to deal with the given group of matters or the general council and shall ask for the opinion of the council or the general council. For the purposes of the decision-making, the proceeding panel shall be bound to wait for the opinion of the college or the general college, however, it is not bound by that opinion and it shall have the right to make a decision departing from the opinion. In case of mutual agreement between the proceeding panel and the council or general council the Public Procurement Arbitration Board shall publish information of the new opinion of the general council or the modification of the opinion on the homepage of the Public Procurement Authority.

6. The public procurement commissioners shall pursue their enforcement activities in line with the opinions issued by the general council.

7. Rules pertaining to the operation of the councils and the general council are laid down by the organisational and operational regulations of the Public Procurement Arbitration Board.

### **Review of decisions taken by the Public Procurement Arbitration Board**

#### **Article 169**

1. Individual review of decrees of the Public Procurement Arbitration Board made in the course of the proceedings shall be available, if the law so provides. Review shall be available pursuant to this Article also against decrees suspending the proceedings, decrees dismissing the application without substantial examination, as well as decrees dismissing the review proceeding.

2. Applications for a review may be submitted or sent by registered post to the Public Procurement Arbitration Board within eight days from the communication of the decision. Upon receipt of the application, the Public Procurement Arbitration Board shall forward it, together with the documents of the case, to the court without delay.

3. Applications for an individual review of a decision of the Public Procurement Arbitration Board made in the course of the proceedings shall be decided by the administrative and labour court by way of a priority treatment within the framework of a non-litigious proceeding. The Court may alter the decree of the Public Procurement Arbitration Board. No appeal or judicial review shall lie from the Court's relevant decree. 4. Unless otherwise required by this Act or the nature of the non-litigious proceeding, Chapter XX of Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as 'CP') shall apply as appropriate to the proceedings of the court.

#### **Article 170**

1. No appeal or application for retrial shall be brought against the substantial decision of the Public Procurement Arbitration Board. Anyone whose right or legitimate interest is being harmed by the decision of the Public Procurement Arbitration Board on the substance of the case, or the person or organisation requesting the proceeding of the Public Procurement Arbitration Board pursuant to Article 152, shall be entitled to bring an action before the court for its judicial review. The reason for asking review shall not only be the infringement of the Public Procurement Arbitration Board, but that circumstance as well if according to the claimant the Public Procurement Arbitration has not evaluated, qualified accordingly the previous procedure, decision of the requested with regard to the provisions of this Act.

2. The claim may only be submitted or sent by registered post to the Public Procurement Arbitration Board within fifteen days from the receipt of the decision.

3. The Public Procurement Arbitration Board shall forward the application together with the documents of the case – and with its statement on the contents of the application – to the court within five days, and at the same time it shall inform the court about the parties participating in the procedure of the Public Procurement Arbitration Board and about the interested parties concerning whom the decision contains a provision.

4. Any person who is not to be granted to act as a public procurement commissioner on the grounds set out in Article 147 shall be excluded from trying the case and shall not participate in it as a judge.

#### **Article 171**

1. The court shall examine the application within eight days, and it shall send the application which is in accordance with the legislation together with the declaration of the Public Procurement Arbitration Board to the claimant.

2. If the application contains a request for the suspension of the execution of the decision, the court shall make a decision in this matter within five days following the receipt of the documents at the court and it shall send its decision to the parties without delay.

3. The court shall inform the opponent party and any parties interested in the public procurement case for whom the decision of the Public Procurement Arbitration Board contains an order, about the possibility to intervene within the time limit specified in paragraph (1), noting that the intervention shall be reported to the court within eight days following the receipt of the notification. Failing to meet this time limit no excuse shall be granted.

4. In the course of the legal proceeding a time limit of not more than eight days shall be given for the submission of the missing information of the applications. When justified, the time limit may be extended once with a period of eight days at most.

#### **Article 172**

1. The court shall make its decision on the substance of the case without holding a hearing; however, upon the request of the parties the court shall hold a hearing. Holding a hearing may be requested by the claimant in his application and by the defendant in his declaration related to the application. In default of this, no certification may be accepted. The intervening trial shall be requested in accordance with Article 338(3) of the CP. For the adjudication without holding a trial Article 338(5), (7) and (8) of the CP shall apply.

2. Article 332/B of the CP shall be applied with the derogation that the first trial shall be hold within thirty days following the receipt of the documents at the court and if there is no need to conduct a procedure of evidence, or in the case of a procedure without a hearing the decision shall be made within this time limit. When counting the time limits the time period for the submission of the missing information shall not be taken into account.

3. The court may change the decision of the Public Procurement Arbitration Board - including the sum of the fine – and it may apply the legal consequences set out in Article 165(3), (6), (8) and (9).

4. The decision of the Public Procurement Arbitration Board may not be annulled by the court unless an infringement of the substantial rules on legal remedy proceedings having an effect on the substance of the case occurred in the proceeding of the Public Procurement Arbitration Board.

5. No appeal shall lie from the court's ruling except where the decision of the Public Procurement Arbitration Board is reversed by the court.

6. The decision of the court shall be served to the parties within fifteen days following the date on which it was given. The court shall send its decision applying Article 165(8) and (9) to the Public Procurement Authority.

**Consolidated legal procedure for the review of the decision of the Public Procurement Arbitration Board and for the statement of the invalidity of contracts infringing regulations applicable to procurement procedures**

**Article 173**

1. The applicant shall request the review of the decision of the Public Procurement Arbitration Board and the statement of the invalidity of the contract on which the decision is based – due to the reasons specified in paragraph 137(1) – and the application of the legal consequences of the invalidity exclusively in one single legal procedure. The legal procedure shall be initiated against the Public Procurement Arbitration Board and the contracting parties. The application shall be submitted or sent by registered post to the Public Procurement Arbitration Board not later than fifteen days after receipt of the decision.

2. In the course of the legal procedure other civil right claims shall not be open for enforcement, the statement of the invalidity of the contract due to reasons other than those listed in paragraph 137(1) shall not be requested.

3. In the course of the legal procedure, Chapter XX of the CP shall apply with the derogations specified in this Act.

4. The Public Procurement Arbitration Board shall forward the application together with the documents of the case and the provision of information according to Article 170(3) as well as its statement on the contents of the application to the court within five days after receiving the application.

5. Any person who is not to be granted to act as a public procurement commissioner on the grounds set out in Article 147 shall be excluded from trying the case and shall not participate in it as a judge.



6. The application may be changed or extended only within the period open for the initiation of the legal proceeding. Article 335/A (2) of the CP shall apply in this case as well.

7. Where a hearing is held upon the request of any of the parties, any further comment or statement made after the hearing of the given case, without the request of the Public Procurement Arbitration Board shall not be taken into consideration by the Public Procurement Arbitration Board for its decision.

#### **Article 174**

1. The court may change the decision of the Public Procurement Arbitration Board – including the sum of the fine – and it may apply the legal consequences set out in Article 165(3), (6), (8) and (9). If the court annuls the decision of the Public Procurement Arbitration Board it shall close the legal procedure on the subject of the invalidity of the contract. The decision of the Public Procurement Arbitration Board may not be annulled by the court unless an infringement of the substantial rules on legal remedy proceedings having an effect on the substance of the case occurred in the proceeding of the Public Procurement Arbitration Board.

2. If the court declares the contract concluded pursuant to a procurement procedure to be valid under Article 137(3), it shall impose a fine, the sum of which shall be – taking into consideration all the circumstances relevant to the case – not more than fifteen percent of the value of the contract. If, in the course of enforcing the legal consequences of ineffectiveness, the court orders payment for monetary value of the services yet uncompensated, it shall impose a fine the sum of which shall equal – taking into consideration all the circumstances relevant to the case – not more than ten per cent of the contract value.

3. No appeal may lie from the court's decision, except for the decisions concerning the invalidity of the contract and for the cases where the decision of the Public Procurement Arbitration Board is reversed by the court.

#### **Civil action for stating the invalidity of a contract modification**

#### **Article 175**

1. If, on the basis of the outcome of the official control according to Article 187(2)(j), the Public Procurement Arbitration Board establishes that the contents of the contract are likely to violate Article 142(3), it shall bring an action with a view to declaring the modification of the contract invalid and applying the legal consequences of invalidity. The Public Procurement Authority is entitled to exemption from all court costs.

2. The Public Procurement Authority shall initiate the action set out in paragraph 1 within thirty days counted from the completion of the control. In the case of failing to meet the deadline, a certification may be presented in accordance with the provisions set out in the CP.

3. The Public Procurement Authority shall publish a notification about initiating the action set out in paragraph 1 on its homepage. The notification shall contain the naming of the case in question (if appropriate, the indication of the related procurement procedure), the date of submission of the claim and the naming of the parties to the proceedings.

4. If the court states the invalidity of the contract modification on the grounds specified in Article 142(3) in the legal action pursuant to paragraph (1), it shall enforce the legal consequences of ineffectiveness in compliance with the provisions laid down in the Civil Code, furthermore, it shall impose a fine the amount of which shall be – taking into consideration all the circumstances relevant to the case – not more than fifteen percent of the value of the contract.

## **Civil action for stating the invalidity of contracts infringing regulations applicable to procurement procedures**

### **Article 176**

1. If the Public Procurement Arbitration Board states in its substantial decision that an infringement set out in Article 137(1) has occurred, it shall bring an action with a view to annulling the contract and applying the legal consequences of invalidity. Simultaneously with the initiation of the legal proceeding, the Public Procurement Arbitration Board shall request the court – as an interim measure – to suspend the further execution of the contract. The Public Procurement Arbitration Board is entitled to exemption from all court costs.

2. The Public Procurement Arbitration Board shall initiate the action set out in paragraph 1 within thirty days counted from the date of making its substantial decision. In the case of failing to meet the deadline, a certification may be presented in accordance with the provisions set out in the CP.

3. The Public Procurement Arbitration Board shall publish a notification about initiating the action set out in paragraph 1 on the homepage of the Public Procurement Authority. The notification shall contain the naming of the case in question (the indication of the related procurement procedure), the indication of the decision on the substance of the case, the date of the submission of the claim and the naming of the parties to the proceedings.

4. If the court states the invalidity of the contract due to reasons specified in Article 137(1) in the legal action pursuant to paragraph (1), it shall enforce the legal consequences of ineffectiveness in compliance with the provisions laid down in the Civil Code and those laid down in this Act.

5. If the court declares the contract concluded pursuant to a procurement procedure to be valid under Article 137(3), it shall impose a fine, the sum of which shall be – taking into consideration all the circumstances relevant to the case – not more than fifteen percent of the value of the contract. If, in the course of enforcing the legal consequences of ineffectiveness, the court orders payment for monetary value of the services yet uncompensated, it shall impose a fine the sum of which shall equal – taking into consideration all the circumstances relevant to the case – not more than ten per cent of the contract value.

6. The legal action specified in paragraph 1 falls within the exclusive competence of the administrative and labour court trying the case in the administrative proceeding pursuant to Article 170 initiated in relation to the same infringement of the public procurement law. If a request for judicial review was lodged against the substantial decision of the Public Procurement Arbitration Board stating an infringement specified in Article 137(1) and the administrative proceeding was initiated later than the civil action, the case shall be referred to the court trying the case in the administrative proceeding pursuant to Article 170. The administrative proceeding and the civil action initiated by the Public Procurement Arbitration Board shall be consolidated. The Public Procurement Arbitration Board shall inform without delay the court trying the case in the civil action if an application for the judicial review of its substantial decision stating an infringement specified in Article 137(1) was submitted to it.

7. As regards the consolidated proceedings specified in paragraph 6, Chapter XX of the CP shall apply with the derogations defined in Articles 173(2), (5)-(7) and 174.

## **Other civil actions related to public procurements**

### **Article 177**

1. With the exception of cases covered by Article 173(1), Article 175(1) and 176(1) as well as paragraph 3 herein any claim in civil law grounded on an infringement of legislation applicable to public procurement or to the procurement procedure shall be admissible on condition that the infringement has been stated in a legally enforceable decision by the Public Procurement Arbitration Board, or in the course of the review of the decision of the Public Procurement Arbitration Board, by the court.

2. If tenderers only claim the reimbursement of their costs (damages) incurred in the preparation of a tender and in relation to their participation in a procurement procedure from the contracting authority, it is sufficient to prove for the enforcement of such a claim that

- a) the contracting entity has violated a legislative provision applicable to public procurement or the procurement procedure,
- b) they have had a real chance of winning the contract and
- c) the infringement has adversely affected their chance of winning the contract.

3. The provisions laid down in paragraph 1 shall not apply, if the enforcement of a claim in civil law – or a reference made to the invalidity of the contract - is grounded on the infringement of the provisions stipulated in Articles 133-135, 138-140 and Article 142(3) or other provisions set out in this Act or in the related decrees concerning the content elements of the contract.

## *CHAPTER XXII*

### PROCEDURE OF THE EUROPEAN COMMISSION

#### **Article 178**

1. Where the European Commission considers that a manifest infringement of European Union law in the field of public procurement has been committed during a procurement procedure falling within the scope of Part Two, it may initiate procedures pursuant to paragraph 2.

2. The European Commission shall notify the perceived infringement to the contracting entity also, calling upon it to remedy the infringement by the time of the conclusion of the contract.

3. The contracting entity shall be required to report on the notified infringement to the Public Procurement Authority in such a way as to allow the Public Procurement Authority to forward it to the European Commission within twenty-one days from the receipt of the request, or thirty days in the case of a procurement procedure related to a public utility contract.

4. The contracting entity shall give notification, in particular, whether

- a) the infringement has been remedied,
- b) the infringement has not been remedied, or
- c) it has suspended its procurement procedure in question, or the Public Procurement Arbitration Board has suspended the procurement procedure as an interim measure in the course of remedy proceedings.

5. The notice in accordance with paragraph 4(b) shall give reasons. Where the reason for failure to remedy the alleged infringement is that this infringement is already the subject of a remedy proceeding, the Public Procurement Authority shall, without delay, inform the European Commission of the decision delivered in the remedy proceeding.

6. In cases within the meaning of paragraph 4(c) the Public Procurement Authority shall also notify, without delay, the European Commission of the outcome of the procurement procedure and/or the remedy proceeding and the question of remedying the reported infringement.

## PART SEVEN

### THE PUBLIC PROCUREMENT AUTHORITY AND THE PUBLIC PROCUREMENT ARBITRATION BOARD

#### CHAPTER XXIII

#### THE PUBLIC PROCUREMENT AUTHORITY

##### Article 179

1. For purposes of enforcing the objectives set out in this Act, a Public Procurement Authority (hereinafter referred to as 'Authority') shall operate, as subordinated to Parliament only.

2. The Authority is a central budgetary organ operating as an autonomous state administration organ subordinated to Parliament, with general competence within its scope of responsibilities as laid down in this Act, it has jurisdiction over the entire territory of Hungary. Its seat shall be in Budapest.

3. The Authority's budget shall be planned as a specific budget title under budget heading 'National Assembly' of the Act on the central budget. Any regroupings against this appropriation for the Authority during the year shall be subject to approval by Parliament.

4. Within the framework of the Authority, a Council shall operate (hereinafter referred to as the 'Council') as well as the Public Procurement Arbitration Board (hereinafter referred to as the 'Arbitration Board').

#### The President of the Authority

##### Article 180

1. The president of the Authority shall
  - a) represent the Authority and the Council;
  - b) if invited, attend sessions of Parliament and of its committees, and present the Authority's annual report;
  - c) issue a president's briefing on practical information related to procurement procedures;
  - d) initiate a direct voting, in periods between council sessions, in accordance with the provisions of the organisational and operational regulations of the Authority, in order to make decisions on matters falling within the Authority's competence and allowing of no delay;
  - e) exercise employer's rights over the secretary-general of the Authority (hereinafter referred to as 'secretary-general'), the employees of the Secretariat of the Authority and the Chairperson, deputy Chairperson and public procurement commissioners of the Arbitration Board;
  - f) perform other responsibilities designated to it by law.
2. The Vice-President shall have full powers to substitute for the President of the Authority in the absence of the latter.

## **Article 181**

1. The Council shall decide on the appointment of the President of the Authority for five years with a two-thirds majority of members present. The appointment shall be renewable on one occasion.
2. The Act on Civil Servants (hereinafter referred to as 'ACS') shall be applicable to the President of the Authority with the derogations set out in this Act.
3. The President of the Authority shall be entitled to salary and other benefits as due to public administration state secretaries.
4. The Council shall exercise employer rights over the President of the Authority, and the President shall make the statement of his incompatibility to the Council.
5. The Council shall elect the Vice-President of the Authority for five years from among the members with a two-third majority of the members present.
6. The term of office of the President, Vice-President of the Authority and members of the Council shall end in the event of
  - a) the expiry of the term;
  - b) recalling;
  - c) resignation;
  - d) the occurrence of circumstances as set out in Article 182(8);
  - e) becoming undeserving or permanently unsuitable for the office;
  - f) death;
  - g) establishment of incompatibility.
7. In cases within the meaning of paragraph 6 (e) and (g) the Council shall state the termination of the term of office with the vote of two thirds of the members present and with attention to the opinion of the bodies or persons designating the person in question.
8. In case the Authority does not decide on the appointment of the new president of the Council until the expiry of the term of office of the president, the term of office of the president shall extend until the end of the calendar year.

## **The Council operating within the framework of the Authority**

## **Article 182**

1. The Council shall have nineteen members. Specific objectives in the public interest, contracting authorities and tenderers shall be each represented by the members of the Council.
2. The enforcement of the principles of this Act and specific objectives in the public interest, the interests of contracting authorities and of tenderers shall be the responsibility of the following persons in the Council:
  - a) the person designated by the Minister competent in public funds;
  - b) the person designated by the Minister competent in economic policy;

- c) the person designated jointly by the Minister competent in agricultural policy and the Hungarian Chamber of Agriculture, Food Economy and Rural Development;
- d) the person designated by the Minister competent in public procurements;
- e) the person designated by the Minister competent in the building matters;
- f) the President of the State Audit Office or the person designated by him;
- g) the President of the Hungarian Competition Authority or the person designated by him;
- h) the President of the Government Control Office or the person designated by him;
- i) the head of the Hungarian Authority for Consumer Protection or the person designated by him;
- j) the Governor of the Hungarian National Bank or the person designated by him;
- k) the person designated jointly by the national associations of local governments;
- l) the four persons designated by the national employers' interest representation bodies and the national economic chambers;
- m) the person designated jointly by the Hungarian Chamber of Engineers and the Chamber of Hungarian Architects;
- n) the two persons designated by the professional body of the accredited public procurement consultants.

3. The president of the Council is the president of the Authority. The vice-president of the Council is the vice-president of the Authority.

4. The president of the Council shall become a member of the Council even if he was not designated from among the members. Where the president of the Council was selected from among members of the Council, the president shall discontinue representing the general objectives or interests of the person designating him, and the person designating him shall be entitled to designate a new member to the Council. The designating person shall not exercise against the president of the Council their right as laid down in Article 181(6)(b) and (7).

5. The Council member shall report to the person designating him on his activities within the Council for the achievement of objectives he has to enforce, the general interests he represents, and also the objectives of this Act, as well as the enforcement of these in the field of public procurement.

6. The president, the vice-president and the members of the Council shall be obliged to make a declaration of property according to the rules regarding the members of Parliament, for the first time within thirty days from their designation. As regards the registration, control and filing of declarations of property the rules applicable to the registration, control and filing of declarations of property of members of Parliament shall be applied.

7. If the president, the vice-president or the member of the Council refuse their obligation to make a declaration of property, neglect to fulfil their obligation or declare false data, fact in their declaration of property, their term of office shall be terminated due to incompatibility.

8. The following persons shall not be eligible for membership in the Council:

- a) members of Parliament, spokespersons of nationalities;
- b) have previous convictions under criminal law.

9. The term of office of members shall be two years at least.

10. The rules, except as laid down in paragraphs 7-9, for designating and recalling members shall be set by the designating bodies in such a way as to guarantee the sustained operability of the Council.

Members shall be required to perform their designated tasks in person.

#### **Article 183**

The Council shall

- a) establish the headcount of the Public Procurement Arbitration Board;
- b) appoint or recall the Chairperson and deputy Chairperson of the Public Procurement Arbitration Board and the public procurement commissioners; judge cases of incompatibility related to public procurement commissioners;
- c) consulting with the minister competent in public procurements and, where appropriate, in collaboration with the national economic chambers and other trade organisations, prepare guidelines with the aim of facilitating the application of the regulations applicable to public procurements based on the experiences acquired from the decisions of review procedures and the control of public contracts in practice and concerning practical information on public procurement (in particular on the issues provided for in this Act);
- d) perform other responsibilities designated to it by law.

#### **Article 184**

1. The Council shall convene its sessions as required, but at least on six occasions every year.
2. The Council shall have a quorum if two thirds of its members are present.
3. The Council shall make decisions with a simple majority vote, with the exceptions within the meaning of this Act.
4. Members of the Council who are relatives living in the same household as the persons affected in the matter may not participate in the preparation and passing of the decision of the Council on the subject of Article 183(b)<sup>30</sup>.
5. Members of the Council shall be required to notify to the president if they are or have become subject to reasons for incompatibility within the meaning of paragraph 4 and shall be required to discontinue their participation in the ongoing procedure.

#### **The Secretariat of the Authority**

#### **Article 185**

1. The coordination of the activities of the Authority and the Council, the preparation and implementation of its decisions, and the data collection, recording and administration activities required for the same shall be the responsibility of the Authority's Secretariat. The Secretariat shall be headed by the secretary-general.
2. The secretary-general and employees of the Secretariat shall be in a civil servant relationship with the Authority, for which the ACS shall apply. The secretary-general shall be entitled to salary and other benefits as due to deputy state secretaries.

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<sup>30</sup> This amendment entered into force on 12 December 2015.

## **Article 186**

The president, vice-president of the Authority and members of the Council, the secretary-general, the employees of the Secretariat and the public procurement commissioners or persons having held such positions or conducted such activities, shall handle as confidential all qualified data and business secrets disclosed to them in the course of discharging their responsibilities.

## **Responsibilities and competence of the Authority**

## **Article 187**

1. The Authority shall be responsible for effectively contributing to framing the public procurement policy and for forming and spreading the lawful public procurement behaviour enhancing the public and transparent spending of public funds while taking into account the public interest and the interest of contracting authorities and tenderers.

2. The Authority shall

- a) manage, update and publish on its homepage
  - (aa) the list of the contracting authorities falling under the scope of the legislation,
  - (ab) the official list of approved tenderers, established by the Authority,
  - (ac) the list of accredited public procurement consultants,
  - (ad) the list of tenderers excluded from participation in procurement procedures, which list shall include the term of such exclusion as well,
  - (ae) where an economic operator has been found in breach of its contractual obligations assumed by it in the procurement procedure and this fact was established by final court ruling or admitted by the economic operator, reference to the breach of contract, its description, substantial characteristics, including, where appropriate, that the breach of contract resulted in the termination or rescission of the contract, a compensation claim or any other sanction applicable on the basis of the contract and that the wrongful conduct of the party entering into the contract as successful tenderer resulted in, partly or fully, the impossibility of the contract, noting that those data shall be made available on the homepage for a period of three years from the breach of contract,
  - (af) the final decisions establishing that the economic operator subject to a ground for exclusion is reliable [Article 188(4)],
  - (ag) the list of sheltered places of employment, including the products manufactured or distributed, services provided by those places of employment;
- b) keep a registry of public procurements;
- c) assess the adequacy of conditions for being included as approved tenderer in the list drawn up by the economic or professional chamber, as well as register the list;
- d) send the missing statistical data to the European Commission, at the request of the Commission, send the information specified by this Act to the European Commission;
- e) by 1 March 2017 for the first time and every three years thereafter, draw up a statistical report on public contracts below EU thresholds, in particular on the total, aggregate estimated value of such public contracts during the period concerned, and dispatch the report to the minister responsible for public procurements, within a reasonable period;
- f) make arrangements for editing the Public Procurement Bulletin, which is the Official Journal of the Public Procurement Authority (hereinafter referred to as 'Public Procurement Bulletin' and for publishing and examining notices related to the contract award and design contest procedures. ensure completeness



of data in the course of the control of notices and, in that context, may call upon the contracting authority to supply information. ensure publication of the information referred to in Article 113(1) on its homepage, furthermore, publication of other data and information stipulated by this Act on its homepage or in the Public Procurement Bulletin;

- g) publish on its homepage, at the time of their receipt, the data of the application initiating the procedure of the Arbitration Board and of the ex-officio initiation of the procedure, the substantial decision of the Arbitration Board and the decision closing the public procurement case, furthermore, in case of the judicial review of the decision, the decision of the court;
- h) set up and operate and publish on its homepage the public database of the decisions of review procedures, in which it ensures a free, full, electronic access for anybody to the decisions of the Arbitration Board and the court with the possibility of a keyword search;
- i) publish on its homepage the guideline or communication specified in paragraph 10, Article 183(c) and Article 194(3);
- j) monitor any amendment to the contracts concluded pursuant to procurement procedures and supervise their performance according to the AP in the framework of an official control according to the detailed rules set out in a separate act of legislation and, in particular, take the measures specified in Article 153(1)(c) and Article 175;
- k) maintain the Public Procurement Database, which is the central register of procurement procedures, promote public access to public procurement information, the spread of the use of electronic public procurement databases, furthermore the support of electronic administration and communication possibilities; and within the framework of the aforementioned it shall ensure the possibility of an electronic publication, where the contracting authority may make available the procurement documents in a centralized manner, without any charge, in full, directly by electronic means for the tenderers, and where the tenderers may have access to procurement documents without any charge;
- l) organize conferences in order to improve the knowledge of public procurement rules;
- m) express opinions on issues of interpretation in matters of principle in cooperation with the minister responsible for public procurements - if necessary - in order to help contracting authorities in the course of the preparation and conduct of procurement procedures;
- n) in the framework of relations with the public procurement organisations of other EU Member States, provide information - concerning in particular the certificates to be used in procurement procedures, the publicly available Hungarian databases, registers -, ensure publication of the list of relevant registers in e-Certis and, in particular, fulfils the obligations pursuant to Articles 44(3), 59(6), 60(5), 61(1), 62(3), 64(1) and (8) as well as Article 69(5) of Directive 2014/24/EU, furthermore, the obligations pursuant to Articles 62(3), 81(3) as well as 84(5) of Directive 2014/25/EU;
- o) monitor the enforcement of the rules stipulated in this Act, and initiate with competent persons the making or amendment to legislation related to public procurement;
- p) review draft legislation and legislation concepts related to public procurement and the operation of the Council;
- q) renew permanently, maintain and publish on its homepage the wages usual or determined in the different sectors and the related common charges, on the basis of the collected data made available each year by the Minister responsible for Employment Policy;
- r) determine the approval criteria and the methods of certification in relation to the official list of approved tenderers, established by the Authority;
- s) collect statistical data on procurement procedures, enabling it to prepare price statistics which shall be published on its homepage on a regular basis;
- t) prepare the organisational and operating regulations of the Authority and other internal regulations relating to the Authority's operations, furthermore, its draft budget and annual budget report and approve the organisational and operating regulations of the Public Procurement Arbitration Board;
- u) is responsible for the tasks related to the operation and maintenance of the e-procurement system;
- v) perform other responsibilities designated to it by law.

3. Upon invitation by the president of the Authority or a public procurement commissioner, all entities shall be required to give information on matters related to public procurement within ten days, including trade organisations and representative organisations.

4. Each year, the Authority shall prepare a report to the Parliament on its activity, on its experience on the fairness and transparency of public procurement processes, and on the experience of review procedures. The report shall make statements regarding the tendency of the number and value of procurement procedures, and the economic situation of national tenderers, including micro, small and medium size enterprises. For information, the Authority shall send the report to the State Audit Office as well.

5. For the purposes of the official list of the approved tenderers, the Authority, the economic and professional chamber are entitled to manage data concerning identity, as well as skills, qualifications and professional experience of the persons designated by the applicant.

6. For the purposes of the list of the accredited public procurement consultants, the Authority is entitled to keep record of data concerning identity, the contact address, qualifications, ability to act, clean criminal record of the accredited public procurement consultant, as well as data concerning the employer and the professional experience in public procurement of the accredited public procurement consultant, furthermore, to keep record of the eligibility of the accredited public procurement consultant to pursue an activity according to Article 5(1) and (2) of the Act XI of 1998 on Attorneys at Law.

7. The Authority shall be entitled to manage data pursuant to paragraph 6 for one year after the deletion of the accredited public procurement consultant from the list. The accredited public procurement consultant shall be deleted from the list if he does not fulfil requirements for registration laid down by a separate act of legislation; any of the grounds for exclusion pursuant to paragraph 8 occurs; a final judgement pronounced that the accredited public procurement consultant, in his capacity as an accredited public procurement consultant, committed wilfully an infringement of law; the effect of the registration has expired and no request for renewal was submitted; or such a request was submitted but rejected; the accredited public procurement consultant asks for it; in case of death of the person included in the list; or the dissolution of the accredited public procurement consultant organisation.

8. The following shall preclude eligibility for the post of accredited public procurement consultant

- a) incompetency or partially limited capacity;
- b) lack of exemption from the disadvantages attached to previous convictions under criminal law;
- c) post of public procurement commissioner;
- d) presidency or vice-presidency of Public Procurement Authority.

9. The documents or the certified copy thereof proving the non-existence of the grounds for exclusion pursuant to paragraph 8 shall be attached to the application for registration. For the registration, the renewal of the registration and the supplementation of the submitted data, an administrative service fee shall be paid, the level of which is set in a separate act of legislation.

10. Guidelines shall be issued by the Authority - in cooperation with the minister competent in foreign policy - concerning the international agreements related to public procurements, as well as concerning countries which have an agreement on avoidance of double taxation with Hungary.

11. A person whose personal or pecuniary interest is linked to any of the entities concerned by the procedure to be carried out by the Authority according to paragraph (2)(ab) and (ac) may not participate in the implementation or preparation thereof. The person concerned by that conflict of interest shall notify the President of the Authority without delay thereof and cease immediately to participate in the ongoing procedure or in the preparation of the procedure. No appeal shall lie from the decision and decree of the Authority delivered within its scope of duties, unless otherwise provided by this Act. The judicial review of the decision may be requested from the court by the applicant, i.e. the approved tenderer concerned in case of procedures pursuant to paragraph 2(ab), and by the applicant, i.e. the accredited public procurement consultant concerned in case of procedures pursuant to paragraph 2(ac), not later than fifteen days after receipt of the decision. The administrative and labour court shall take its decision in a non-litigious procedure, no later than sixty days after submission of the request, it may reverse the decision of the Public

Procurement Authority. No appeal and review shall lie from the court's decree. Chapter XX of the CP shall apply accordingly to the proceedings of the court, unless other provisions of this Act specify otherwise or the nature of the non-litigious procedure clearly indicates otherwise.

#### **Article 188**

1. Any economic operator who is subject to a ground for exclusion other than those referred to in Article 62(1)(b) and (f) may lodge an application with the Authority to establish that the measures taken by it are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. The evidence of the measures taken shall be submitted to the Public Procurement Authority, together with the relevant application.

2. In order to demonstrate its reliability, the economic operator subject to a ground for exclusion shall prove that

- a) it has paid or undertaken to pay compensation in an amount as agreed with the injured party, within a specified period, in respect of any damage caused by the criminal offence, misconduct or other infringement;
- b) it has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the competent authorities; and
- c) it has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences, misconduct or other infringement.

3. The measures referred to in paragraph 2 shall be evaluated by the Authority taking into account the gravity and particular circumstances of the criminal offence, misconduct or other infringement.

4. The Authority shall assess, in its decision to be taken within fifteen days following receipt of the application, whether the measures taken by the economic operator are appropriate. In duly justified cases the time limit may be extended on one occasion by not more than fifteen business days and the applicant economic operator shall be notified at the same time thereof. The Authority may call upon the applicant economic operator to make further statements, attach further evidence, documents, allowing an appropriate period. The Authority shall send in writing, without delay, a statement of the reasons for its decision to the economic operator. The decision establishing that the economic operator subject to a ground for exclusion is reliable may not include any condition or requirement of further measures to be taken by the economic operator. Where the application is rejected by the Authority - or, in the case of its judicial review, by the court -, the economic operator subject to the given ground for exclusion may submit another application, according to paragraph 1, in relation to the same ground for exclusion, only if it intends to demonstrate its reliability by reference to a measure taken subsequent to the rejection of its previous application.

5. The judicial review of the decision rejecting the application according to paragraph 4 may be requested by the applicant from the court, within fifteen days following receipt of the decision. The administrative and labour court shall take its decision in a non-litigious procedure, no later than sixty days after submission of the request, it may reverse the decision of the Public Procurement Authority. No appeal or judicial review shall lie from the Court's relevant decree. Chapter XX of the CP shall apply accordingly to the proceedings of the court, unless other provisions of this Act specify otherwise or the nature of the non-litigious procedure clearly indicates otherwise.

6. A person whose right or legitimate interest is directly affected by the case or who cannot be expected to assess the case objectively may not be involved in the examination of the application referred to in paragraph 1. When establishing whether a conflict of interest arises in the case of persons involved in the examination of the application according to paragraph 1, Article 147(1)-(2) shall apply accordingly, with the proviso that the client organisation referred to therein shall mean applicant, the public procurement case shall mean the examination of the application, the commencement of the review procedure shall mean the date of submission of the application. The person who is subject to the ground for conflict of interest referred to in this paragraph shall notify the President of the Authority without delay thereof and cease immediately to participate in the ongoing procedure or in the preparation of the procedure.

## **Article 189**

1. Where the President of the Authority finds upon the examination of the documents sent to the Authority in relation to the launch of a negotiated procedure without a notice that there is a well-founded supposition of a breach of the rules and fundamental principles set out for public procurement and for procurement procedures, he shall initiate the ex officio procedure of the Public Procurement Arbitration Board, not later than ten days counted from the receipt of such documents. When lodging the initiation, the President of the Authority shall notify the contracting authority thereof, by indicating the alleged infringement.

2. Where compliance with the requirements concerning the applicability of the negotiated procedure without prior publication of a contract notice or the lawfulness of the invitation to tender may not be clearly established on the basis of the documents supplied by the contracting authority, the President of the Authority shall call upon the contracting authority to supply the necessary information within three days by fax or by electronic means.

3. Should the contracting authority fail to produce the missing information, the President of the Authority shall decide about the initiation of the proceeding on the basis of the information already available.

## **Article 190**

For the purposes of publication of the decisions of the Arbitration Board and the decisions delivered in the judicial review of the procurement procedures, the provisions set out in Chapter XII of the Act CLXI of 2011 on the Organisation and Administration of the Courts (hereinafter referred to as 'OAC') shall be applied with the following differences:

- a) contrary to the provisions laid down by Article 163(1) of the OAC, it is incumbent on the Public Procurement Authority to publish the court rulings delivered in the procurement procedure and the Reports on the Decisions of the Public Procurement Arbitration Board,
- b) it is incumbent on the Public Procurement Arbitration Board to make anonymous digital copies according to Article 163(3) of the OAC in relation to the decisions of the Public Procurement Arbitration Board,
- c) the application specified in Article 166(4) may be presented to the President of the Public Procurement Authority,
- d) Article 163(2) and (5) may not be applied,
- e) Article 163(3) Article 164(1) of the OAC may be applied noting that the decision shall be sent to the President of the National Council of Justice of Hungary by the Chairperson of the court which delivered the decision for the purposes of its publication in the Reports and the President of the National Council of Justice of Hungary shall make the decision – as well as the related decisions specified in Article 163(3) of the OAC - available for the President of the Public Procurement Authority.

## **The operation of the Authority**

## **Article 191**

1. The Authority may not conduct any other business activities, accept pecuniary contributions from, or grant the same to any entities or persons.
2. The collected administrative service fee, shall constitute the Authority's own revenues. The revenue from the examination of the notices shall be used partly to ensure the IT support for the Authority to perform its duties pursuant to this Act.

3. The administrative service fees payable pursuant to paragraph 2 shall be used to cover the costs incurred by the Authority in the course of performing its duties.

4. The Authority shall keep separate records of the administrative service fee, procedural fine and fine payments received, for the purpose of monitoring compliance with the fee payment obligation. Taking into account Article 339 (1) and Article 339 (2) (q) of the CP and the related provisions of this Act, the Authority shall make settlements of its revenues, as of December 31, from fines in the current year as reduced with the amount of its repayment obligations incurred in the current year. The maintenance of records on fees, procedural fine and fine, their handling and reporting shall be governed by the legislation on the accounting of public finances.

5. To the administrative service fee referred to in paragraph 2 Act XCIII of 1990 on Duties (hereinafter: AD) shall apply as follows:

- a) its provisions set out in Article 3 (4) and Article 28 (2) and (3) shall apply to fee payment obligation;
- b) the first sentence of Article 31(1) and the provisions set out in Article 31(2) and (5) and shall apply to the establishment of entities subject to fee payment;
- c) its provisions set out in Article 86 shall apply to limitation as appropriate, with the derogation that the duty referred to in the AD shall be interpreted as fee.

## *CHAPTER XXIV*

### *THE PUBLIC PROCUREMENT ARBITRATION BOARD*

#### **Article 192**

1. The Public Procurement Arbitration Board shall be responsible for arranging remedy proceedings related to any infringements or disputes related to public procurement or design contest procedures.

2. The efficient operation of the Arbitration Board shall be ensured against the Authority's budget.

3. The Arbitration Board shall be constituted by public procurement commissioners in a number determined by the Council and employed as civil servants, and a Chairperson, who are appointed and recalled by the Authority.

4. The Chairperson and the deputy Chairperson of the Arbitration Board shall be appointed for five years by the Council with the vote of two thirds of the members present. The deputy Chairperson of the Arbitration Board shall be appointed by the Council from the public procurement commissioners and the person shall be recommended by the Chairperson of the Arbitration Board. The Chairperson and the deputy Chairperson of the Arbitration Board can be re-elected.

5. A person may qualify for the position of the Chairperson of the Arbitration Board, if this person

- a) holds a professional certificate in law and
  - has at least five years' experience in public procurement, or
  - has at least three years' experience in public leadership, or
- b) has at least three years' experience as a judge or prosecutor.

6. The ACS shall be applicable to the public service relationship of the Chairperson of the Arbitration Board with the differences pertaining to the public official legal status of the public procurement commissioners according to this Act.

7. The Chairperson of the Arbitration Board shall be entitled to salary and other benefits as due to deputy state secretaries. The deputy Chairperson shall be entitled to salary as due to heads of departments.

### **Article 193**

1. The Chairperson of the Arbitration Board shall
  - c) manage the work of the Arbitration Board;
  - d) represent the Arbitration Board;
  - e) prepare and submit for approval to the President of the Authority the organisational and operating regulations of the Arbitration Board;
  - f) verify that procedural time limits are observed;
  - g) ensure that the naming and the subject of the case related to the application, the names of the clients, the date of the receipt of the application, the substantial decision of the Arbitration Board closing the case and its decree allowing the conclusion of the contract, and in the case of a judicial review the decision of the court are published without delay following the submission of the application initiating the proceedings of the Arbitration Board;
  - h) ensure that public procurement commissioners are informed about the opinion of the college pursuant to Article 168(2).
2. The deputy Chairperson shall have full powers to substitute for the Chairperson of the Arbitration Board in the absence of the latter.
3. The legal status of public procurement commissioners as civil servants shall be governed by the ACS with the derogations provided for in this Act.
4. A person may qualify for the position of public procurement commissioner on condition that he has a higher education degree and at least three years of work experience, as well as a professional certificate in public administration and/or law, or has public administration studies postgraduate specialisation qualification or governmental studies postgraduate specialisation qualification<sup>31</sup>.
5. As regards the requirement for professional certificate provided for in paragraph 4, the time limits laid down in the ACS shall be applied as appropriate.
6. With the exception of scientific, teaching, artistic, publisher's reader's, editorial, legally protected intellectual activities and foster parental employment relationship, public procurement commissioners shall not accept other assignments, shall not have other gainful occupations, shall not be members under obligation to make personal contribution, chief officers or supervisory board members in business enterprises.
7. The following persons shall be precluded eligibility for the post of public procurement commissioner:
  - a) members of Parliament, members of local government, spokespersons of nationalities, mayors and chamber officers;
  - b) persons holding an interest beyond twenty-five percent, and/or HUF twenty-five million in a business enterprise.

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<sup>31</sup> This amendment entered into force on 1 July 2016.

8. Public procurement commissioners shall be classified in accordance with the promotion rules stipulated in the ACS with the derogation that they shall be entitled to salary due under the classification two levels higher than their own classification.

9. Public procurement commissioners classified as chief counsellor shall be entitled to head of department salary, and public procurement commissioners classified as senior chief counsellor shall be entitled to deputy assistant under-secretary salary.

10. The legal status of public procurement commissioners as civil servants may terminate with dismissal other than provided for in the ACS in the event that the Council reduces the headcount of the Public Procurement Arbitration Board.

11. In the event that the public procurement commissioner's mandate terminates, he shall be re-classified in accordance with the rules of the ACS.

12. Public procurement commissioners shall be independent in the decision-making process, their decisions shall be taken according to the relevant legislation and shall reflect their conviction, and they may not be influenced nor given instructions in making their decisions.

## PART EIGHT

### FINAL PROVISIONS

#### **Obligations stemming from European Union law**

##### **Article 194**

1. The minister responsible for public procurements shall ensure coordination of the monitoring of the application of public procurement rules. In order to do so, the minister responsible for public procurements, the Public Procurement Authority, the State Audit Office, the government body responsible for control, the Hungarian Competition Authority and the body auditing European Union supports shall cooperate with each other and, when identifying a specific infringement or a systemic problem - as a result of their own initiation or following receipt of relevant information -, they notify each other thereof, besides taking other measures in the given case (including the initiation of a review procedure, the initiation of the modification of the relevant legislation).

2. By 18 April 2017 for the first time and every three years thereafter, the minister responsible for public procurements shall forward to the Commission a monitoring report which shall cover, as appropriate, the most common reasons for misapplication of public procurement law or legal uncertainty - including the structural or systematic problems, if any, concerning the application of the rules -, the level of participation of micro, small and medium-sized enterprises in public procurement, furthermore, the prevention, investigation and proper reporting of crimes related to public procurements [in particular the crimes referred to in Article 62(1)(ab) and (ac)], serious irregularities related to conflicts of interest and other serious irregularities. Moreover, at the request of the Commission, the minister responsible for public procurements shall provide information on the practical implementation of national strategic policies on public procurement. Data which are necessary for the monitoring report and the abovementioned provision of information shall be made available in good time to the minister responsible for public procurements by the organisations referred to in paragraph 1 and, for this purpose, the latter may establish a committee with representatives from the organisations referred to in paragraph 1.

3. The minister responsible for public procurements shall ensure publication of the outcome of the monitoring process. The publication may be made on an ad hoc basis or by publishing the monitoring report specified in paragraph 2. Where the outcome of the monitoring is included in the Authority's report specified in Article

187(4), no further publication of the outcome of the monitoring is required. The minister responsible for public procurements may prepare guidelines or communications with the aim of facilitating the application of the regulations applicable to public procurements based on experiences acquired from the decisions of review procedures and the control of public contracts in practice and concerning practical information on public procurement.

4. The minister responsible for public procurements shall ensure the designation of a contact person responsible for cooperation with the Commission in the application of public procurement rules.

5. By 18 April 2017 for the first time and every three years thereafter, the minister responsible for public procurements shall forward to the Commission a statistical report - made available by the Public Procurement Authority - for procurements which are below the EU thresholds. The minister responsible for public procurements shall inform, as necessary, the Commission of the relevant features of the national institutional framework with respect to the implementation, monitoring of Directive 2014/24/EU of the European Parliament and of the Council and compliance therewith as well as the national initiatives for providing direction and assistance related to the implementation of the EU rules on public procurements or for responding to challenges of implementing those rules. The statistical report and provision of information referred to in this paragraph may be included in the monitoring report specified in paragraph 2.

6. In case of public supply contracts, public service contracts and service concessions the value of which equals or exceeds EU thresholds as well as public works contracts and works concessions the value of which equals or exceeds HUF 300 million, which are carried out using resources other than national resources, the minister responsible for public procurements is tasked with monitoring procurement procedures conducted as well as authorising to modify the contracts based on those procurement procedures. Detailed rules pertaining to the monitoring and authorisation referred to in this paragraph are laid down in a separate act of legislation.

### **Other tasks of the Minister competent in Public Procurements**

#### **Article 195**

1. The Minister competent in Public Procurement has the competence to authorize the launching and central monitoring of the conduct of procurement procedures of the budgetary organs controlled or supervised by the government, the institutions thereof, the public foundations of the government, and the economic organisations in which the state has a majority ownership and, on behalf of the state, the ownership (shareholder, membership) rights are exercised by a central budgetary organ or an institution thereof on the basis of a ministerial decree or an agency contract concluded with the Hungarian National Asset Management Inc.; furthermore, to authorize any amendment to the public contracts, works or service concessions of such organisations as well as to authorize conclusion of, and amendment to the contracts of such organisations and the foundations founded or managed by them, which concern a purchase but were not concluded through a procurement procedure;

2. The minister competent in public procurements approves the development of the framework for the training of the participants in procurement procedures, furthermore, manages, supervises and controls the public procurement education;

3. Detailed rules pertaining to the tasks referred to in paragraphs 1-2 are laid down in a separate act of legislation.



4. In relation to the central monitoring specified in (1) the minister responsible for public procurement may impose a procedural fine on the organ affected by the monitoring which fails to fulfil its obligations or which fails to meet the deadlines set out by the separate act of legislation.<sup>32</sup>

### **Entry into force**

#### **Article 196**

1. This Act shall enter into force on 1 November 2015, except for the provisions set out in paragraph 2 and 3.
2. Article 31(5) and Article 32(3) shall enter into force on 1 November 2016.
3. Article 40 shall enter into force on 1 February 2017.

### **Transitional provisions**

#### **Article 197**

1. The provisions set out in this Act shall be applied to public procurements, contracts concluded on the basis of procurement procedures, design contests and review procedures requested, initiated or launched ex officio in relation thereto and preliminary dispute settlements initiated after the entering into force of this Act. Articles 139, 141, 142, Article 153(1)(c) as well as Article 175 shall be applied to the possibility of amending, without the conduct of a new procurement procedure, public procurements or contracts, which were concluded on the basis of procurement procedures, started before the entry into force of this Act, as well as to the control of the amendment thereto and performance thereof, furthermore the provisions of Chapter XXI. for review procedures in relation thereof<sup>33</sup>.
2. The provisions laid down in the Act CVIII of 2011 on Public Procurement shall be applied to public procurements, contracts concluded on the basis of procurement procedures, design contests and review procedures requested, initiated or launched ex officio in relation thereto and preliminary dispute settlements started before 1 November 2015, save for the provisions referred to in the second sentence of paragraph 1.
3. Until the entering into force of the separate act of legislation under Article 9 (1)(a) conducting the review procedure in procurement procedures governed by Governmental Decrees in compliance with Article 198 (1) 20-21 shall fall within the competence of the Public Procurement Arbitration Board. Chapter VI. of the present Act shall be applied during the review procedure, with the proviso that the appeal and the decision shall not be published on the homepage of the Public Procurement Authority and the Public Procurement Arbitration Board shall hold only a closed meeting.<sup>34</sup>
4. The provisions of Article 5 (3), 62 (5a) of the present Act enacted by Act LXIII of 2016 on the Modification of Act CXLIII of 2015 on Public Procurement (hereinafter referred to as Modification Act) shall be applied in public procurements, public procurement procedures, contracts concluded pursuant to procurement procedure and for review procedures in relation thereto, which started after the entering into force of the Modification Act.<sup>35</sup>

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<sup>32</sup> This amendment entered into force on 24 December 2015.

<sup>33</sup> This amendment entered into force on 24 December 2015.

<sup>34</sup> This amendment entered into force on 24 December 2015.

<sup>35</sup> This amendment entered into force on 15 June 2016.

## **Article 197/A**

1. Act CXCI of 2015 on the Modification of Certain Acts of Legislation related to the Reorganisation of the National Tax and Customs Administration of Hungary together with Budget Planning and Management establishing
  - a) Article 25 (3) and (4), its provisions concerning the relatives living in the same household shall be applied in the procedure launched after 1 November 2015,
  - b) Article 25 (4) – with the exception set out in a) –, its provisions shall be applied in the procedure launched after the entering into force of Act CXCI of 2015 on the Modification of Certain Acts of Legislation related to the Reorganisation of the National Tax and Customs Administration of Hungary together with Budget Planning and Management<sup>36</sup>.

## **Empowerment**

### **Article 198**

1. The Government shall be empowered to regulate in a decree
  1. the detailed rules, in procurement procedures, pertaining to the way of certification of suitability and the non-existence of the grounds for exclusion, the documents which may be requested for that purpose, the determination of the contents of suitability criteria as well as the verification of the suitability and the non-existence of the grounds for exclusion by the contracting authority, the determination and the contents of the public procurement technical specifications;
  2. rules pertaining to approved tenderers, conditions for and way of certification of being included in the list of approved tenderers, rules of the keeping of the lists of approved tenderers, requirements for the non-existence of grounds for exclusions and suitability proved by the certificate based on the list, as well as the requirements proved by such a certificate issued by the organisation of another Member State of the European Union;
  3. the rules pertaining to design contests;
  4. specific public procurement rules pertaining to the procedures aimed at the conclusion of contracts of contracting entities, as well as rules pertaining to the procedure according to Article 13;
  5. detailed rules pertaining to the centralised public procurements in relation to budgetary authorities controlled or supervised by it, to public foundations founded by it and the business organisations owned by the state, the amount of the fee covering the costs that shall be incurred only in connection with the execution, to be paid to the entity authorised to publish tenders in the framework of centralised public procurement;
  6. in the case of organisations funded from the Health Insurance Fund, the detailed rules of centralised procedures related to health care services and the amount of fee payable to the organisation authorised to invite tenders in a centralised procedure whose sole purpose is to cover the expenses incurred in the course of the implementation;
  7. detailed rules pertaining to central procedures related to government communications tasks, the amount of fee payable to the organisation authorised to invite tenders in a centralised procedure whose sole purpose is to cover the expenses incurred in the course of the implementation, as well as the rules pertaining to public procurement of communications services and related supply contracts ensuring government communications tasks, different from those set out in this Act due to the very particular features of such procedures;

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<sup>36</sup> This amendment entered into force on 12 December 2015.

8. the detailed rules pertaining to procedural acts which may be conducted by electronic means, electronic auctions, electronic catalogue as well as electronic public procurements, different from those set out in this Act as required by the use of electronic means;
9. detailed rules, different from those set out in this Act as required by the particular features of public contracts having those subject-matters, for public works and the purchase of the related design and engineering services for the execution of public works contracts, as well as rules, which are different from those set out in this Act and in the Civil Code, pertaining to the payment of the consideration set out by the contract, in case of public works contracts;
10. detailed rules pertaining to the award criteria and method with respect to certain subject-matters of public procurement, the determination of cases where there is an obligation to integrate social, in particular employment-related and environmental, sustainability, energy efficiency considerations in the procurement procedures and the methods thereof, including the mandatory application of reserved public procurement;
11. the specific rules pertaining to public procurement of pharmaceutical products and medical technology equipment, different - as required - from those set out in this Act;
12. **the conditions and the procedure concerning the initiation of the exemption of procurements under Article 9 (1) (b) by the competent committee of the National Assembly, furthermore the requirements to be imposed by the contracting authority during the realisation of such procurements**<sup>37</sup>;
13. the specific public procurement rules for determining and taking into consideration of the energy and environmental impacts for the whole operational lifetime of the vehicle, entails with the operation of road vehicles, and the detailed rules for the related reporting obligation;
14. the specific rules for the authorization of the launching and central monitoring of the conducting of procurement procedures of the budgetary organs controlled or supervised by the government, the institutions thereof, the public foundations of the government, and the economic organisations in which the state has a majority ownership and, on behalf of the state, the ownership rights (shareholder's, membership rights) are exercised by a central budgetary organ or an institution thereof on the basis of a ministerial decree or an agency contract concluded with the Hungarian National Asset Management Inc.; as well as the specific rules for the authorization of any amendment to the public contracts, works or service concessions of such organisations; furthermore, the authorization of conclusion of and amendment to the contracts of such organisations and the foundations founded or managed by them that concern a purchase but were not concluded through a procurement procedure; and the extent of data to be sent in relation to the central monitoring and authorisation of public procurements. Within the framework of activities related to authorisation and monitoring, substantive requirements may also be specified in relation to the public procurement and the conditions thereof with the aim of enforcing the objectives of the government related to legal policy<sup>38</sup>;
15. For the purposes of public supply contracts, public service contracts and service concessions the value of which equals or exceeds EU thresholds as well as public works contracts and works concessions the value of which equals or exceeds HUF 300 million, which are carried out using resources other than national resources, the detailed rules pertaining to the monitoring of procurement procedures conducted as well as the authorisation of the modification of contracts based on those procurement procedures.
16. detailed rules pertaining to the official control to be conducted by the Public Procurement Authority for the control of performance and modification of contracts, its obligations related to the verification of contracting authorities and economic operators in the framework of which the Public Procurement Authority is entitled to be fully apprised of all the information related to the performance, modification of the procedure and the contract and may ask contracting authorities and economic operators to supply it with all relevant information;
17. cases where there is an obligation to reserve public contracts for sheltered places of employment and entities having a permission for social employment or employing disabled workers;
18. the detailed rules pertaining to procurement within the scope of the NATO Programme for Security, and other programmes commonly financed and supported by NATO;
19. rules pertaining to the development of the framework for the training of the participants in procurement procedures, furthermore, the management, supervision and control of public procurement education;

<sup>37</sup> This amendment entered into force on 1 August 2016.

<sup>38</sup> This amendment entered into force on 24 December 2015.

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21. the specific rules concerning the procurement related to the measures connected to the crisis due to mass migration;<sup>40</sup>

22. <sup>41</sup>

2. The Minister competent in public procurements shall be empowered to regulate in a decree

- a) the rules of sending, dispatching and publishing notices, and the public procurement plan, the examination of notices and, with the consent of the minister responsible for tax policy, the related fees and their payment, the rules pertaining to annual statistical summary of public procurement, furthermore the order of publication in the Public Procurement Bulletin or on the homepage of the Public Procurement Authority;
- b) the standard forms for notices, award summaries and annual statistical summaries, certain content elements of the notices;
- c) the rules pertaining to the activity of accredited public procurement consultants, the public procurement practice specified as a criterion for acting as an accredited public procurement consultant, the provision of proof of such practice, the preliminary registration prior to being included on the list of accredited public procurement consultants, the conditions and process of such preliminary registration, furthermore - with the consent of the minister responsible for tax policy - the fee of the preliminary registration and its collection, the list of accredited public procurement consultants, the keeping thereof, the conditions for being included on the list, the professional body of accredited public procurement consultants as well as, with the consent of the minister responsible for tax policy, the level of the administrative service fee payable for registration, renewal of registration and supplementation of the submitted data and the rules pertaining to the liability insurance specified as a criterion for acting as an accredited public procurement <sup>42</sup>;
- d) detailed rules pertaining to the maintenance and operation of the e-procurement system;
- e) the level and the way of payment of the administrative service fee, established with the consent of the minister responsible for tax policy, to be paid to the Public Procurement Arbitration Board and the rules pertaining to the payment and the way of incurring thereof;
- f) detailed rules pertaining to the preparation of price statistics to be issued by the Public Procurement Authority as well as the conditions and method of the statistical reporting for the Public Procurement Authority.

### **Amended provisions**

#### **Article 199<sup>43</sup>**

### **The repealed provisions**

#### **Article 200<sup>44</sup>**

### **Compliance with European Union law**

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<sup>39</sup> This point was repealed on 1 August 2016.

<sup>40</sup> This amendment entered into force on 24 December 2015.

<sup>41</sup> This point was repealed on 1 August 2016.

<sup>42</sup> This amendment entered into force on 24 December 2015.

<sup>43</sup> This article was repealed on 2 November 2015.

<sup>44</sup> This article was repealed on 2 November 2015.

## Article 201

This Act shall serve the purpose of compliance with

- a) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;
  - b) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;
  - c) Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV,
  - d) Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,
  - e) Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, together with the Gov. Decree based on the empowerment given by point 13 of Article 198(1) as well as the Act XXXIII of 2004 on passenger transport by bus,
  - f) Article 7(1)(b) of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals,
  - g) <sup>45</sup>
  - h) Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions,
  - i) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts,
  - j) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,
  - k) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors
- and repealing Directive 2004/17/EC.

### Annex 1 to Act CXLIII of 2015 on Public Procurement

#### List of works specified in Article 8(3)(a)

In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
45			Construction	This class includes: construction of new buildings and works,	45000000

<sup>45</sup> This point was repealed on 1 August 2016.

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				restoring and common repairs	
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>- demolition of buildings and other structures</li> <li>- clearing of building sites</li> <li>- earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc.</li> <li>- site preparation for mining: <ul style="list-style-type: none"> <li>- overburden removal and other development and preparation of mineral properties and sites</li> </ul> </li> </ul> <p>This subgroup also includes:</p> <ul style="list-style-type: none"> <li>- building site drainage</li> <li>- drainage of agricultural or forestry land</li> </ul>	45110000
		45.12.	Test drilling and boring	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>- test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes</li> </ul> <p>This subgroup excludes:</p> <ul style="list-style-type: none"> <li>- drilling of production oil or gas wells, see 11.20</li> <li>- water well drilling, see 45.25</li> <li>- shaft sinking, see 45.25</li> </ul>	45120000

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				- oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20	
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>-construction of all types of buildings</li> <li>- construction of civil engineering constructions:</li> <li>-bridges, including those for elevated highways, viaducts, tunnels and subways</li> <li>-long-distance pipelines, communication and power lines</li> <li>-urban pipelines, urban communication and power lines</li> <li>-ancillary urban works</li> <li>-assembly and erection of prefabricated constructions on the site</li> </ul> <p>This subgroup excludes:</p>	<p>45210000</p> <p>Except:</p> <p>45213316</p> <p>45220000</p> <p>45231000</p> <p>45232000</p>

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				-service activities incidental to oil and gas extraction, see 11.20  -erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28  -construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23  -building installation, see 45.3  -building completion, see 45.4  -architectural and engineering activities, see 74.20  -project management for construction, see 74.20	
		45.22	Erection of roof covering and frames	This subgroup includes:  -erection of roofs	45261000



NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				-roof covering  -waterproofing	
		45.23	Construction of motorways, roads, airfields and sport facilities	This subgroup includes:  -construction of highways, streets, roads, other vehicular and pedestrian ways  -construction of railways  -construction of airfield runways  -construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations  -painting of markings on road surfaces and car parks  This subgroup excludes:  -preliminary earth moving, see 45.11	45212212 and DA03  45230000 Except: - 45231000 - 45232000 - 45234115
		45.24	Construction of water projects	This subgroup includes the construction of:	45240000

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				<ul style="list-style-type: none"> <li>-waterways, harbour and river works, pleasure ports (marinas), locks, etc.</li> <li>-dams and dykes</li> <li>-dredging</li> <li>-subsurface work</li> </ul>	
		45.25	Other construction works involving special trades	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>-construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment:</li> <li>- construction of foundations, including pile driving</li> <li>-water well drilling and construction, shaft sinking</li> <li>-erection of non-self-manufactured steel elements</li> <li>-steel bending</li> <li>-bricklaying and stone setting</li> <li>-scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms</li> <li>-erection of chimneys and industrial ovens</li> </ul>	45250000

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				<p>This subgroup excludes:</p> <p>-renting of scaffolds without erection and dismantling, see 71.32</p>	
	45.3	.	Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This subgroup includes:</p> <p>-installation in buildings or other construction projects of:</p> <p>-electrical wiring and fittings</p> <p>-telecommunications systems</p> <p>-electrical heating systems</p> <p>-residential antennas and aerials</p> <p>-fire alarms</p> <p>-burglar alarm systems</p> <p>-lifts and escalators</p> <p>-lightning conductors, etc.</p>	<p>45313316</p> <p>45310000</p> <p>Except: -</p> <p>45316000</p>
		45.32	Insulation work activities	<p>This subgroup includes:</p> <p>-installation in buildings or other construction projects of thermal, sound or vibration insulation</p>	45320000

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				<p>This subgroup excludes:</p> <p>-waterproofing, see 45.22</p>	
		45.33	Plumbing	<p>This subgroup includes:</p> <p>-installation in buildings or other construction projects of:</p> <p>-plumbing and sanitary equipment, gas fittings</p> <p>-heating, ventilation, refrigeration or airconditioning</p> <p>-equipment and ducts</p> <p>-sprinkler systems</p> <p>This subgroup excludes:</p> <p>-installation of electrical heating systems, see 45.31</p>	45330000
		45.34	Other building installation	<p>This subgroup includes:</p> <p>-installation of illumination and signalling systems for roads, railways, airports and harbours</p>	<p>45234115</p> <p>45316000</p> <p>45340000</p>

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
				-installation in buildings or other construction projects of fittings and fixtures n.e.c.	
	45.4		Building completion		45400000
		45.41	Plastering	<p>This subgroup includes:</p> <p>-application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials</p>	45410000
		45.42	Joinery installation	<p>This subgroup includes:</p> <p>-installation of non self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials</p> <p>-interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</p> <p>This subgroup excludes:</p> <p>-laying of parquet and other wood floor coverings, see 45.43</p>	45420000

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
		45.43	Floor and wall covering	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>- laying, tiling, hanging or fitting in buildings or other construction projects of:</li> <li>-ceramic, concrete or cut stone wall or floor tiles</li> <li>-parquet and other wood floor coverings</li> <li>-carpets and linoleum floor coverings, including of rubber or plastic</li> <li>-terrazzo, marble, granite or slate floor or wall coverings</li> <li>-wallpaper</li> </ul>	45430000
		45.44	Painting and glazing	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>-interior and exterior painting of buildings</li> <li>-painting of civil engineering structures</li> <li>-installation of glass, mirrors, etc</li> </ul> <p>This subgroup excludes:</p> <ul style="list-style-type: none"> <li>-installation of windows, see 45.42</li> </ul>	45440000

NACE Rev. 1 <sup>1</sup>					
Section F			CONSTRUCTION		CPV CODE
Class	Group	Subgroup	Subject	Comments	
		45.45	Other building completion	<p>This subgroup includes:</p> <ul style="list-style-type: none"> <li>-installation of private swimming pools</li> <li>-steam cleaning, sand blasting and similar activities for building exteriors</li> <li>-other building completion and finishing work n.e.c.</li> </ul> <p>This subgroup excludes:</p> <ul style="list-style-type: none"> <li>-interior cleaning of buildings and other structures, see 74.70</li> </ul>	45212212 and DA04 45450000
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	<p>This subgroup excludes:</p> <ul style="list-style-type: none"> <li>-renting of construction or demolition machinery and equipment without operators, see 71.32</li> </ul>	45500000

<sup>(1)</sup> Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1).

Annex 2 to Act CXLIII of 2015 on Public Procurement

**List of supplies in the field of defence**

Chapter 25:	Salt, sulphur, earths and stone, plastering materials, lime and cement
Chapter 26:	Metallic ores, slag and ash
Chapter 27:	Mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes except: ex 27.10: special engine fuels
Chapter 28:	Inorganic chemicals, organic and inorganic compounds of precious metals, of rare-earth metals, of radioactive elements and of isotopes except: ex 28.09: explosives ex 28.13: explosives ex 28.14: tear gas ex 28.28: explosives ex 28.32: explosives ex 28.39: explosives ex 28.50: toxic products ex 28.51: toxic products ex 28.54: explosives
Chapter 29:	Organic chemicals except: ex 29.03: explosives ex 29.04: explosives ex 29.07: explosives ex 29.08: explosives ex 29.11: explosives ex 29.12: explosives ex 29.13: toxic products ex 29.14: toxic products ex 29.15: toxic products ex 29.21: toxic products ex 29.22: toxic products ex 29.23: toxic products ex 29.26: explosives ex 29.27: toxic products



	ex 29.29: explosives
Chapter 30:	Pharmaceutical products
Chapter 31:	Fertilisers
Chapter 32:	Tanning and dyeing extracts, tannings and their derivatives, dyes, colours, paints and varnishes, putty, fillers and stoppings, inks
Chapter 33:	Essential oils and resinoids, perfumery, cosmetic or toilet preparations
Chapter 34:	Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'
Chapter 35:	Albuminoidal substances, glues, enzymes
Chapter 37:	Photographic and cinematographic goods
Chapter 38:	Miscellaneous chemical products, except: ex 38.19: toxic products
Chapter 39:	Artificial resins and plastic materials, celluloses esters and ethers, articles thereof, except: ex 39.03: explosives
Chapter 40:	Rubber, synthetic rubber, factice, and articles thereof, except: ex 40.11: bullet-proof tyres
Chapter 41:	Raw hides and skins (other than fur skins) and leather
Chapter 42:	Articles of leather, saddlery and harness, travel goods, handbags and similar containers, articles of animal gut (other than silk-worm gut)
Chapter 43:	Fur skins and artificial fur, manufactures thereof
Chapter 44:	Wood and articles of wood, wood charcoal
Chapter 45:	Cork and articles of cork
Chapter 46:	Manufactures of straw of esparto and of other plaiting materials, basketware and wickerwork
Chapter 47:	Paper-making material
Chapter 48:	Paper and paperboard, articles of paper pulp, of paper or of paperboard
Chapter 49:	Printed books, newspapers, pictures and other products of the printing industry, manuscripts, typescripts and plans
Chapter 65:	Headgear and parts thereof
Chapter 66:	Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof
Chapter 67:	Prepared feathers and down and articles made of feathers or of down, artificial flowers, articles of human hair
Chapter 68:	Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials
Chapter 69:	Ceramic products
Chapter 70:	Glass and glassware
Chapter 71:	Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles thereof; imitation jewellery
Chapter 73:	Iron and steel and articles thereof
Chapter 74:	Copper and articles thereof

Chapter 75:	Nickel and articles thereof
Chapter 76:	Aluminium and articles thereof
Chapter 77:	Magnesium and beryllium and articles thereof
Chapter 78:	Lead and articles thereof
Chapter 79:	Zinc and articles thereof
Chapter 80:	Tin and articles thereof
Chapter 81:	Other base metals employed in metallurgy and articles thereof
Chapter 82:	Tools, implements, cutlery, spoons and forks, of base metal, parts thereof, except: ex 82.05: tools ex 82.07: tools, parts
Chapter 83:	Miscellaneous articles of base metal
Chapter 84:	Boilers, machinery and mechanical appliances, parts thereof, except: ex 84.06: engines ex 84.08: other engines ex 84.45: machinery ex 84.53: automatic data-processing machines ex 84.55: parts of machines under heading No 84.53 ex 84.59: nuclear reactors
Chapter 85:	Electrical machinery and equipment, parts thereof, except: ex 85.13: telecommunication equipment ex 85.15: transmission apparatus
Chapter 86:	Railway and tramway locomotives, rolling-stock and parts thereof, railway and tramway tracks fixtures and fittings, traffic signalling equipment of all kinds (not electrically powered), except: ex 86.02: armoured locomotives, electric ex 86.03: other armoured locomotives ex 86.05: armoured wagons ex 86.06: repair wagons ex 86.07: wagons
Chapter 87:	Vehicles, other than railway or tramway rolling-stock, and parts thereof, except: ex 87.08: tanks and other armoured vehicles ex 87.01: tractors ex 87.02: military vehicles ex 87.03: breakdown lorries ex 87.09: motorcycles ex 87.14: trailers

Chapter 89:	Ships, boats and floating structures, except: ex 89.01A: warships
Chapter 90:	Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus, parts thereof, except: ex 90.05: binoculars ex 90.13: miscellaneous instruments, lasers ex 90.14: telemeters ex 90.28: electrical and electronic measuring instruments ex 90.11: microscopes ex 90.17: medical instruments ex 90.18: mechano-therapy appliances ex 90.19: orthopaedic appliances ex 90.20: X-ray apparatus
Chapter 91:	Manufacture of watches and clocks
Chapter 92:	Musical instruments, sound recorders or reproducers, television image and sound recorders or reproducers, parts and accessories of such articles
Chapter 94:	Furniture and parts thereof, bedding, mattresses, mattress supports, cushions and similar stuffed furnishings, except: ex 94.01A: aircraft seats
Chapter 95:	Articles and manufactures of carving or moulding material
Chapter 96:	Brooms, brushes, powder-puffs and sieves
Chapter 98:	Miscellaneous manufactured articles

Annex 3 to Act CXLIII of 2015 on Public Procurement

**Social and other specific services**

CPV	Code Description
75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 [Supply services of domestic help personnel]; 79624000-4 [Supply services of nursing personnel] and 79625000-1 [Supply services of medical personnel] from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 [Private households with employed persons] and 98513000-2 to 98514000-9 [Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services]	Health, social and related services
85321000-5 and 85322000-2, 75000000-6 [Administration, defence and social security services], 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8 79950000-8 [Exhibition, fair and congress organisation services], 79951000-5 [Seminar organisation services], 79952000-2 [Event services], 79952100-3 [Cultural event organisation services], 79953000-9 [Festival organisation services], 79954000-6 [Party organisation services], 79955000-3 [Fashion shows organisation services], 79956000-0 [Fair and exhibition organisation services]	Administrative social, educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations,

	youth associations and other membership organisation services
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 [55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service] 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other enterprises or other institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted- clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	Hotel and restaurant services
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded pursuant to point (d) of Article 10
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services
75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	Prison related services, public security and rescue services to the extent not excluded pursuant to point (h) of Article 10
79700000-1 to 79721000-4 [Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services] 79722000-1[Graphology services], 79723000-8 [Waste analysis services]	Investigation and security services
98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]	International services
64000000-6 [Postal and telecommunications services], 64100000-7 [Post and courier services], 64110000-0 [Postal services], 64111000-7 [Postal services related to newspapers]	Postal services

and periodicals], 64112000-4 [Postal services related to letters], 64113000-1 [Postal services related to parcels], 64114000-8 [Post office counter services], 64115000-5 [Mailbox rental], 64116000-2 [Post-restante services], 64122000-7 [Internal office mail and messenger services]	
50116510-9 [Tyre-remoulding services], 71550000-8 [Blacksmith services]	Miscellaneous services

**List of international social, labour and environmental conventions referred to in article 73(4)**

- ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- ILO Convention 98 on the Right to Organise and Collective Bargaining;
- ILO Convention 29 on Forced Labour;
- ILO Convention 105 on the Abolition of Forced Labour;
- ILO Convention 138 on Minimum Age;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- ILO Convention 100 on Equal Remuneration;
- ILO Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.