

# **Mandatory Electronic Public Procurement in Hungary**

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## **Mandatory Electronic Public Procurement in Hungary**

**Abstract:** Since 15 April 2018, mandatory electronic public procurement has put the daily functioning of the Hungarian public procurement market onto a new footing. For the time being, legislation regulates the issue at the level of a government decree. Making the use of the Electronic Public Procurement System mandatory requires a cultural change, it transforms the attitudes of the stakeholders in public procurement and the nature of their activities.

This study presents the legal framework and the lessons which could be drawn after the first quarter in operation.

**Keywords:** public procurement, electronic procurement, European Single Procurement Document

## **Kötelező elektronikus közbeszerzés Magyarországon**

**Abstract:** A kötelező elektronikus közbeszerzés 2018. április 15-e óta új alapokra helyezte a magyar közbeszerzési piac mindennapjait. A jogszabályi háttér egyenlőre a kormányrendeleti szinten szabályozza a kérdést. Az Elektronikus Közbeszerzési Rendszer használatának kötelezővé tétele kulturális váltást tesz szükségessé, megváltoztatja a közbeszerzési érintettek hozzáállását, tevékenységének jellegét. Tanulmányunk azokat a jogszabályi kereteket és tapasztalatokat mutatja be, amelyet az első negyedév tapasztalatai alapján lehetőség van leszűrni.

**Kulcsszavak:** közbeszerzés, elektronikus beszerzés, Egységes Európai Közbeszerzési Dokumentum

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## 1. Introduction

In Hungary, electronic public procurement is regulated by Government Decree 257/2007. (X. 4.) on the rules of procedural acts that may be exercised electronically in public procurement procedures and the use of electronic auction as amended, Government Decree 424/2017. (XII. 19.) on the electronic public procurement system and the Decree by the Minister in charge of the Prime Minister's Office 40/2017. (XII. 27.) MvM on the rules related to the maintenance and operation of the electronic public procurement system. In addition to the fundamentals of interpretation already known from the directives and legal regulations, this study focuses first and foremost on the novelties which override the provisions of the law at the level of government decrees. At the same time, it employs a new approach which economic operators should get to know and become used to in the course of their work.

Accordingly, the study does not go into the details of the electronic solution for centralised public procurement, which in addition to EPP, will continue to have a role in framework agreement procedures in the future, neither does it present the details of the Dynamic Procurement System which is not much in use as yet, although it has been in existence for a long time, nor electronic auctions. Characteristically, It focuses on the content, which assists contracting authorities as well as bidders in transitioning to electronic public procurement.

## 2. European regulations

Under the European public procurement directives<sup>1</sup> public procurement was electronised with a view to improving efficiency and enhancing transparency. Full electronic communication means that communication must be conducted electronically in all phases of the procedure, including in general the transfer of applications to participate and the submission of bids (electronic submission) in particular. At the same time, preparing for the procedure, concluding the contracts, verifying performance and invoicing do not belong here according to the directives. Yet, the goal is to have IT support for the entire procurement process. Mandatory use is restricted also from other aspects, because its use cannot be extended to obligating bidders

- to process their bids electronically, and
- the process may not include required electronic evaluation or automatic processing, and channelling the internal communication of the contracting authority to electronic means.

Compared to previous rules, the directives practically repeat the already implemented, well-established rules of electronic auctions<sup>2</sup>. A novelty is the definition of the electronic catalogue formulated as follows in the preamble to the so-called classical directive:

“(68) Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment. An example could be tenders presented in the form of a spreadsheet. Contracting authorities should be able to require electronic catalogues in all available procedures where the

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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 (classical directive)

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

DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts

2

DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors

use of electronic means of communication is required. Electronic catalogues help to increase competition and streamline public purchasing, particularly in terms of savings in time and money.”

The above definition focuses primarily on bidding, while the electronic catalogue in fact means a genuine improvement in efficiency in the course of applying framework agreement procedures and dynamic procurement systems.

Similarly, the European Single Procurement Document appears as a novelty, which is a template to be used in the course of bidding. Together with the development of the E-Certis service, the purpose of its introduction was to unify bidding in the European Union, to promote the development of trans-border economic relations also in public procurement, and further reduce administration in the course of applying for participation and bidding. Its regulation – as shown below – determined the framework within which the Document was created together with the online service assisting with its completion, which helps bidders and contracting authorities in public procurement procedures throughout the European Union.

“The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.”

As described above, electronic public procurement – in addition to channelling the general forms of communication to an electronic path – carries additional opportunities by including catalogues in the regulation, creating the European Single Public Procurement Document and promoting the Dynamic Procurement System, which can only be administered electronically. The directives were implemented in Hungary in 2015; this area of the law has developed a great deal, while the bases for mandatory electronic public procurement were created. This study now turns to the legal regulations related to the subject matter.

### 3. Hungarian regulations

In addition to Act CXLI of 2015 on Public Procurement (hereinafter: Public Procurement Act), two new implementing regulations entered into force on 1 January 2018 to determine electronic public procurement in Hungary: Government Decree 424/2017. (XII. 19.) on the detailed rules of electronic public procurement (hereinafter: EKR Decree), and

- Decree by the Minister in charge of the Prime Minister's Office 40/2017. (XII. 27.) MvM on the rules related the maintenance and operation of the electronic public procurement system (hereinafter: MvM Decree).

Government Decree 257/2007. (X. 4.) on the rules of the procedural acts that may be exercised electronically in public procurement procedures and the application of electronic auctions (hereinafter: old electronic decree) is still in force, but it will no longer govern in the future because the two of its chapters still in force cannot be applied by contracting authorities; it only governs the electronic submission of requests and announcements aimed at publishing public procurement and participation contests during the transitory period when the use of the Electronic Public Procurement System (hereinafter: EPS) is not mandatory. This study is about the rules of mandatory electronic public procurement based on the EKR Decree.

In fact, the procedural rules of the old electronic decree govern only the public procurement procedures launched prior to 1 January 2018; apart from posting announcements, these rules are no longer relevant. Thus, this study will present and analyse the new rules of the EKR Decree and the MvM Decree, but it will not discuss electronic auctions in detail as they have been around for some time, and there is experience in applying those rules.

Below, the rules of the EKR Decree will be analysed primarily, which govern the administration of the procedures from 2 January 2018 and will be expressly mandatory from 15 April 2018. This is substantiated by Article 40 of Act CXLI of 2015 on Public Procurement (hereinafter: Public Procurement Act), which entered into force on 15 April 2018, rendering the use of the Electronic Public Procurement System mandatory for public procurement procedures and concession awards reaching the national value limit and subject to the Public Procurement Act as follows:

“Article 40 (1) The public procurement procedure and the concession award procedure shall be administered using the single, electronic public procurement system operated by the Prime Minister’s Office.

(2) Separate legal regulations provide for the establishment, operation and conditions of making use of the electronic public procurement application referred to in paragraph (1).”The EKR Decree was enacted pursuant to the authorisation granted according to Article 198 (1) 3) and 8) of the authorising provisions of the Public Procurement Act; this decree may deviate from the Public Procurement Act in terms of its content, because under point 8 “The Government is authorised to regulate by decree the detailed rules of procedural acts that may be exercised electronically, the electronic auction, the electronic catalogue and the electronic procurement which may differ from the rules of this act to the extent made necessary by the electronic route and the exemptions from the mandatory use of electronic means of communications”.

That is to say, the rules of the implementing decrees may deviate from the rules of the Public Procurement Act, of which there will be several examples subsequently.

The most important additional legal regulations are the following:

- Government Decree 168/2004 (V. 25.) on the centralised public procurement system and the responsibilities and powers of the central procurement organisation
- Act CCXXII of 2015 on the General Rules for Electronic Administration and Trust Services (Eüsztv.)
- eIDAS regulation: Regulation 910/2014/EU of the European Parliament and of the Council of 23 July 2014 on repealing Directive 1999/93/EC

In relation to centralised public procurement, this study does not discuss the system deviating from EPS in detail; this is applied in addition to the mandatory electronic public procurement in the second half of the framework agreement procedures and hopefully in the future in the dynamic procurement system.

The so-called eIDAS regulation defines the electronic signature; apart from a few exceptions, the legislator is expected to repeal most of this and its use will not be rendered necessary in public procurement procedures, which is in line with European trends. Owing to its declining

importance and the primary use of the EPS system, the electronic signature will not be presented in detail.

Of the above rules, the most important novelties will be analysed with the primary focus on acts at the procedural level; this analysis will merely highlight the most important changes in the area of electronic auctions in view of its well-known regulatory environment.

### 3.1 The Act on Public Procurement

Articles 31 (5) and 32 (3) of the Public Procurement Act rendered electronic communication mandatory between the central procurement organisations and the economic operators as of 01.02.2017.

The obligation concerning the electronic publication of announcements is set forth in Article 37 (6); the announcements are published by the Public Procurement Authority in the Public Procurement Journal and on TED. The rule concerning publication was subsequently supplemented at the level of a government decree.

The Public Procurement Act stipulates the electronic publication of the documentation free of charge in Article 39.

The most important fundamental rule, which follows Article 40 that prescribes mandatory electronic public procurement as of 15 April 2018, is set forth in Article 41 enabling the use of the electronic route as far as written communication is concerned. The legislator identifies the forms of maintaining contract, of which market agents may only use the electronic route as a matter of principle in the course of their public procurement, apart from a few exceptions.

“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.”

Article 46 (1) requires documentation by electronic means in the case of administration by electronic means.

In several cases the Public Procurement Act speaks about sending, accessing and making available by electronic means (Articles 56 (6), 57 (2), 79 (2), 79 (4) and 80 (3)), which means publication through the Electronic Public Procurement System to be presented later.

The so-called e-Certis system supports uniform bidding; this contains free electronic databases and other forms of verification operating in any Member State of the European Union listed as a database suitable for verification in the e-Certis system by the given Member State in a structured manner. (Article 69 (11)) Accessing the databases is not always possible; if, however, there is a database in a Member State suitable for verifying reasons for exclusion and meeting suitability criteria, Member States must present it in e-Certis. In Hungary, the registers run by authorities and the registers described in separate legal regulation can be regarded as suitable substitutes for the submission of verifications. The Public Procurement Authority takes care of publishing the list of these Hungarian registers in the e-Certis system.

Chapter XVI discusses the framework agreement procedure under the specific methods of procurement, in the second half of which contracting authorities characteristically administered the largest number of electronic auctions. The first series of procedural acts that can only be administered electronically can be managed in the Dynamic Procurement System, which in practice means the creation and operation of a pre-qualification system in a fully electronic environment. Accordingly, Articles 106 and 107 of the Public Procurement Act refer back to the rules of two-phase procedure when discussing procedural rules.

As DPS is not a mandatory part of EPS to be presented later, the legal regulations are relevant according to which all the necessary information related to the dynamic purchasing system, its mode of operation, the electronic means employed and the technical rules and the specification of connecting to it in DPS should be provided..

Article 109 concerning electronic catalogues enables the contracting authority to require the submission of bids in the form of electronic catalogues or the attachment of an electronic catalogue to the bid in the announcement launching the procedure. If so, the contracting authority must indicate all the necessary information related to the format of the electronic catalogue, the electronic means used and the technical rules and the specification of the connection in the public procurement documents. Electronic catalogues may be used both in a Dynamic Procurement System and in the second half of the framework agreement procedures. Article 109 (5)-(6) allow for a kind of streamlining, on the basis of which the reopening of competition may take place even on the basis of continuously updated catalogues, which may be concomitant with reducing administration as in this form the updating of the catalogue qualifies as submitting a new bid.

This may take place in two ways, either by submitting a new catalogue or through collecting data from a catalogue already submitted, depending on the requirements of the contracting authority. In other words, the bid comes into being either through the active collaboration of the contracting authority based on data collected from the catalogue following prior notification (Article 109 (8)), or a new catalogue is submitted. The latter option presupposes more intensive activity on the part of the bidders. The data collected by the contracting authority and the information found are not sufficient in themselves; the active confirmation of the bidder is needed to make it clear whether the bidder is able to deliver the product found in the catalogue. This is implemented in the Dynamic Procurement System so that those applying for participation submit their catalogues in DPS because in this case there was no bidding prior to the bidding phase, in contrast to the framework agreement procedure in the second half of which valid bids are available. So, the mode of application is almost identical, but the objects of procurement may change in the case of DPS, i.e. the system allows for the replacement of products and putting up newly developed, new products instead of the products to be taken out of the system. Unfortunately, it is not possible to enter into negotiations, which definitely limits its use. In the case of a framework agreement procedure, if the framework agreement includes several objects of procurement, bids must be submitted for every object within a lot. This is typical for central procurement organisations because it would require substantially more administration to launch framework agreements for many thousands of lots; it is simpler to group objects of procurement into lots. This, however, disallows product replacements because the products offered in the first phase of the framework agreement procedure must be supplied on an ongoing basis provided that the contracting authority so requires. The use of DPS is more flexible from several points of view, even if the application of the catalogue is for similar purposes in a framework agreement procedure.

Under the national regime, there is a rule (Article 113) according to which economic operators may apply even in an e-mail based on the summary information. It is not possible to make a direct indication in this way in the Mandatory Electronic Public Procurement System, only within EPS, and because of this, this exceptional possibility – which does not qualify as being in writing according to Article 41 of the Public Procurement Act – will gradually be discontinued in practice as the obligation to conduct electronic public procurement procedures affects the national regime, similarly to the EU regime.

Article 108 of the Public Procurement Act contains the basic rules for applying electronic auctions, which have been about for quite some time; this positions the auction to the phase of

evaluation. The legal regulation is multifarious from the viewpoint that within the framework specified in Article 108, a special procedure is dedicated under the national regime when the contracting authority implements the bidding process in the course of its purchases only and exclusively by conducting an electronic auction. In this case, which is termed electronic bidding under Article 116, the auction is not conducted as part of the evaluation. The difference is that in the course of bidding, bidders make even their first bid in the course of the auction and other procedural acts, such as making the statement concerning reasons for exclusion, take place later following the auction. Under the national regime, electronic bidding implemented with very simple administration is technically an auction, whose winner must make the necessary statements following the closing of the auction.

The Public Procurement Act regulates the rules of communication to be applied in the legal remedy procedure. The requirements are characterised by a kind of duality because as from 1 January 2018 public procurement legal remedy procedures can be launched through the so-called company gateway in Hungary. Articles 149 (3) and 152 (4) also mention submission by way of an e-mail under Article 151 (2) d); however, if the application and its mandatory annexes were not submitted electronically as set forth in the Act on Electronic Administration, the Public Procurement Arbitration Board issues a call to make up for deficiencies. If maintaining contact electronically as set forth in the Act on Electronic Administration is not possible with the contracting authority, Article 154 (1) resolves the problem by enabling the Arbitration Board to send the notification on launching the procedure to the contracting authority by e-mail or telefax. Pursuant to Article 154 (1a), the Arbitration Board also sends the documents to the stakeholders electronically.

Making the documents of the procedure available was simplified to the extent that under Article 154 (2), the Public Procurement Arbitration Board calls upon the contracting authority involved in the public procurement procedure to send all the documents available in relation to the public procurement or procurement and in the case of data available in the system according to Article 40 (1) to make the data accessible. If the application is submitted by the contracting authority, it needs to send or make accessible the available documents together with the application. This means that if the data are available in the Electronic Public Procurement System, there is no need to send them as the contracting authority meets the requirements by making the data accessible to the Public Procurement Arbitration Board. In the event of an eventual additional legal remedy, the Public Procurement Arbitration Board may forward the documents to the court in the form of an electronic copy obtained from the system.

The fact that under Article 187 the operation of the public database of legal remedy decisions is part of the responsibilities of the Public Procurement Authority where the decisions of the Arbitration Board and of the courts are accessible electronically in full free of charge with the possibility of searching by keywords, is of significance from the viewpoint of the electronisation of public procurement. The Public Procurement Authority is also responsible for operating the Public Procurement Database, which is the central register of the public procurement procedures beside the Electronic Public Procurement System.

### **3.2 Implementing regulations**

The scope of the EKR Decree extends to public procurement procedures (including the national rules of the national regime), concession award procedures and participation contest procedures.

The main rule is that communication between the contracting authority and the economic operators takes place in EPS, which electronic public procurement system is an IT system supporting the central public procurement register operated by the Prime Minister's Office and the electronic administration of public procurement procedures.

As from 15 April 2018, public procurement procedures may only be conducted electronically in Hungary, unless an exemption is granted by legal regulation. Its use is not mandatory in the case of

- statements generated in the course of the preparation of the procedure,
- the conclusion of the contract,
- preliminary dispute resolution procedure initiated after the conclusion of the contract, applications to review documents and the related communications.

The legal regulation provides for additional exemptions, for instance, in the case of some negotiated procedures without announcement and with respect to the second half of innovation partnerships.

Electronic public procurement is mandatory, but not necessarily in EPS, in the case of participation contest procedures, the second half of the framework agreement procedure for direct orders, the bidding phase of the dynamic purchasing system and if electronic catalogues

are used. Similarly, the use of EPS is not mandatory in the case of the procedural acts of central procurement organisations under the cases described above, and when conducting the second half of the framework agreement procedure.

Even if electronic public procurement is not mandatory, the contracting authority is still obliged to publish the entire documentation of the procedure, the information on the results and other data required by Article 8 of the EKR Decree.

The decree allows for the use of IT systems other than EPS, the conditions of which are set forth in Article 2 (8) of the EKR Decree. If other IT systems are used, the possibility is given for other deviations, such as specifying the time and date of bid submission and bid opening to take place at the same time. This has a significance, because it follows from the features of EPS that there must be two hours between these two points in time, but if a system other than EPS is used, the submission and the opening of the bids may be at the same point in time.

The EKR Decree specifies other exemptions when electronic communication is not mandatory; for instance, if electronic bidding would require specific equipment or file formats, which are not readily available, or which are not supported by applications widely available. These cases include:

- if pursuant to the information published by the operator of EPS on its website, EPS is unable to ensure either in part or in full a procedure corresponding to the Public Procurement Act and its implementing regulations over the long term, or if a negotiated procedure without an announcement according to Article 98 (2) e) could not be implemented within the timeframe required by an emergency situation because of a breakdown in the operation of EPS lasting several days.

The contracting authority must justify the use of communication other than electronic forms – which is permitted only in the case of documents and the part of the bid in relation to which reasons for exclusions obtain in the summary. The position of the legislature is therefore rather stringent insofar it allows exemption from electronic public procurement, moreover pursuant to Article 3 of the EKR Decree, the contracting authority may not permit the non-electronic submission of the fiche, the public disclosure of other data or the subsequent uploading of the documentation for certain reasons.

In view of the fact that the use of the electronic signature is not mandatory, EPS must guarantee that communication and the forwarding, replacement and storage of information take place in such a way as to guarantee the unaltered forwarding of data, the inalterability of documents, their undeniability and maintaining the confidentiality of bids and applications for participation. It must also be guaranteed that the data forwarded electronically upon bid submission cannot be accessed prior to the expiry of the due date, and that the exact time and date of the submission of bids can be determined. Another important condition is that only authorised persons have access to any data needed for evaluation by identifying their authorization, only authorized persons be able to establish the time and date of opening the data received, they should remain accessible to authorized persons only and that access authorization to the forwarded data be given by authorised persons only after the point in time prescribed. It is also necessary that these can subsequently be verified.

In the course of its operation, EPS must guarantee equal opportunity for the economic operators, it must cooperate with widely used IT applications and it may not restrict the participation of economic operators in the public procurement procedure. The use of EPS may require the availability of IT and electronic communication generally used by economic operators allowing deviation from this in exceptional cases only. In order to be able to open the documents submitted by economic operators, the contracting authority specifies the characteristics of electronic documents to be submitted as annexes in EPS, in particular the file format of the public procurement documents.

The EKR Decree regulates the process and conditions of registration in detail. In addition to the provisions of Article 6, it stipulates that the contracting authority must specify the persons taking action on its behalf and authorised to register in EPS, as well as the order of exercising authority concerning the EPS application on its behalf.

As a main rule, from now on transparency is guaranteed via EPS. Contracts and the data related to performance need to be published both in EPS and in the electronic contract database of the Public Procurement Authority, i.e. for the time being the two systems operate in parallel. In addition, contracting authorities are required to publish their public procurement plans, preliminary dispute resolution, summaries, etc. in EPS. Article 7 (5) of the EKR Decree specifies the minimum content of the public procurement plan. Under Article 8 of the EKR Decree, contracting authorities also have other obligations to capture data for other procedure specific statistical purposes, such as the fact and the results of legal remedy procedures.

Documenting procedures in EPS includes the safeguarding of the data, and procedural acts conducted in the system have to be logged and archived. Article 9 does not use this term, but it refers to ensuring the possibility of interpreting the data subsequently.

It is an important rule reducing administration that the Public Procurement Authority, the Hungarian Competition Authority and the agency authorised to control a given procedure by legal regulation, as well as the Public Procurement Arbitration Board and a court taking action may view the documents of the public procurement procedure in EPS in the event of an application for legal remedy or an ex officio initiative. Article 154 of the Public Procurement Act also contains provisions concerning this. The contracting authority has to ensure electronic access to the documents for the agency authorised to do so, i.e. the contracting authority has to actively permit access to the data for the agencies or authorities concerned. Short of accessibility, the contracting authority must forward the data and the documents. In order to render all information accessible in EPS, the contracting authority has to upload the documents generated in the course of establishing the estimated value while preparing the procedure, the documents generated while evaluating and assessing the applications to participate and the bids or their simple electronic copies to EPS (particularly protocols of the evaluating committees, the evaluation sheets and other documents of evaluation) as part of the documentation of the given procedure to enable access by persons authorised to exercise control and to ensure the electronic safekeeping of the documents of the procedure in EPS. This does not mean that these documents would be accessible, for instance, to bidders, but it does mean that in the case of an audit, the agencies and authorities concerned can access them. This is also advantageous because in this way the documents of any given procedure are more easily accessible to the staff of the contracting authority itself.

The EPS prefers the use of forms, in the absence of forms the economic operator may submit the simple electronic copy of the hard copy document. There is an interesting sub-rule according to which the statement may be attached as a document with increased security signature in the absence of a foreign language form. The fiche may only be requested and submitted as a form. As a matter of principle, existing forms have to be completed even if a statement in another language is attached. In such a case, the attached statement qualifies as an attested translation, if the form is completed in Hungarian. If the Public Procurement Act or its implementing decree requires an attested statement, the attested document may be submitted in the form of an electronically signed version, or as a simple copy. In practice, this latter means annexing the scanned copy of the document.

In relation to statements, which directly serve as the basis of enforcing some kind of claim (in particular, statements undertaking guarantees or suretyship), the contracting authority may require bidders to annex an electronic document meeting the requirements of a private deed of full probative force. In this case, a simple copy is not permitted, the electronically signed document must bear the electronic signature of a public notary or the financial institution itself.

The decree clarifies that the obligations concerning “direct forwarding” referred to in legal regulations also mean “rendering electronically accessible” in EPS; this was already mentioned in relation to the Public Procurement Act.

With respect to the rules governing the resolution of discrepancies, there is a new rule according to which the contracting authority does not have to notify the bidder to resolve the discrepancies unless it is deemed necessary if the document annexed as part of a bid fails to meet the requirements concerning the IT characteristics of documents constituting part of a bid as set forth in the public procurement documents, provided that it can be opened and read by the contracting authority.. In such a case the bid shall be considered compliant with requirements. If the document attached as part of a bid fails to meet the IT requirements and it cannot be opened and read by the contracting authority, it shall not be regarded as a formal discrepancy, it shall be handled as if the bidder failed to submit the document concerned, and action has to be taken in view of the rules of the Public Procurement Act regarding discrepancies. This provision, however, does not override the stringent legal restrictions concerning the resolution of discrepancies in the technical bid for the contracting authority.

In the event that business secrets are specified, the document concerned can be placed in EPS separately, which the contracting authority is not going to show even in the case of the inspection of documents. Accordingly, a document containing business secrets is to be attached as a separate file.

The receipt of documents is automatically confirmed; this confirmation also verifies the time and date of uploading the document.

If an economic operator has already submitted documents electronically in EPS verifying its suitability or the non-existence of reasons of exclusion in an earlier public procurement procedure to the same contracting authority, such documents cannot be requested from the economic operator provided that the contracting authority is the same. In such cases, the

economic operator has to make a statement and accurately identify the document among the data of the earlier procedure concerned in order to use the same document again.

In the case of an economic operator submitting a bid or application to participate in the system, it is presumed in EPS that the person who has access and authorisation required for making statements in EPS in the name of the contracting authority or economic operator is to be regarded as its representative. Based on this presumption, the electronic form completed in EPS is to be regarded as the original statement of the contracting authority and the economic operator, respectively. Statements to be made by submitting an electronic form in EPS are made by the economic operator submitting the bid or application to participate representing joint bidders or applicants for participation and other organisations participating in verifying suitability. An economic operator authorised to make a statement on behalf of others is liable exclusively for the fact that the statement made by it electronically should comply with its authorisation and the statements and data made available to it, which rule does not affect the joint and universal liability of the bidders. The authorisation has to cover the fact that the economic operator authorised to represent the joint bidders or applicants for participation may take action representing the individual joint bidders or applicants for participation when making statements electronically in EPS with respect to the given procedure.

The terms used have also changed: availability of documents is to be understood as accessibility in EPS, and it has to be indicated in this way in the announcement. Similarly, a contracting authority has to give the EPS URL as the address for bid submission and opening.

The due dates for bid submission and the submission of applications for participation can be specified for the period between 8 a.m. and 4 p.m., but other procedural acts may be conducted at different times in the system. Another new rule is that bid opening takes place two hours after the due date. The two-hour interval means a period of waiting with respect to bids already received, i.e. bids and applications to participate must be uploaded by the original due date. An economic operator may reassure itself of this by checking whether a confirmation of uploading was received from EPS.

Automatic opening does not have to be supported by human resources; moreover, the values given for the evaluation criteria – practically the content of the fiche – are made accessible by the system to the other bidders and applicants, including the amount of the coverage if that was given by the contracting authority and bids have become binding.

Article 16 of the EKR Decree defines the concept of breakdown. Accordingly, an unplanned shutdown or unplanned situation restricting the functionality of EPS established by the EPS operator and documented as set forth in separate legal regulation qualifies as breakdown.

When EPS is not accessible:

a) for a total of at least one hundred and twenty minutes in the twenty-four-hour period preceding the bid or application submission date specified by the contracting authorities as a result of breakdown(s) persisting continuously for at least five minutes [Article 22 (2)], or

b) continuously for at least twenty-four hours during the bid or application submission date without having the due date extended because of a breakdown [Article 22 (2)], shall be understood as shutdown.

In the case of a breakdown verified by the EPS operator, the bid or application submission date, which may expire in the meantime, does not expire but is extended, of which the contracting authority has to publish an announcement (if the procedure was launched with an announcement). In the case of point a) sufficient time has to be provided, which is two days from sending the notification on the extension and in the case of amending the announcement four days have to be made available for submitting bids and applications for participation. This can be done also after the expiry of the due date, if the former due dates cannot be abided by because of the breakdown.

If a shutdown occurs during the period open for additional procedural acts, such as a resolution of discrepancies, providing information or price justification or initiating preliminary dispute resolution, or less than two hours remain until the deadline following the restoration of service, the contracting authority must accept procedural acts carried out within twelve hours following the restoration of service as performed within the deadline.

Moreover, the EKR Decree stipulates as a main rule that the contracting authority does not commit a violation of the law, if it fails to keep a deadline for any procedural act as specified in the Public Procurement Act or its implementing decrees if an EPS breakdown disallows the performance of the given act by the due date. In such a case the contracting authority must carry out the act it failed to make immediately following the restoration of EPS's operation.

Directly as a result of a breakdown, a new reason for lack of success is introduced, according to which the contracting authority may declare the procedure unsuccessful, if the breakdown of

EPS gives rise to a violation of the law, which cannot be remedied in a manner that would ensure the enforcement of the principles laid down in the Public Procurement Act.

Another new rule is that any bid or application to participate submitted earlier must be withdrawn prior to submitting a new bid or application to participate, i.e. the new bid cannot be uploaded if that would result in two bids of equal weight but of different content in the system at the same time.

In the future, announcements are to be posted so that the application and its annexes must be created in EPS and sent to the Public Procurement Authority via EPS. The same applies to the summary information as well.

The contracting authority provides for the inspection of documents by the representative of the economic operator in person, once the summary information is posted.

The rule was changed governing the correction of calculation errors in the course of evaluation: from now on, the bidder is to correct the error and this procedural act will no longer be within the sphere of responsibilities of the contracting authority.

The contracting authorities must pay a uniform system usage fee of HUF 40,000 for each public procurement procedure launched in EPS to the operator; this fee is payable by every contracting authority with a few exceptions. The EPS operator is entitled to limit the service that enables the launching of the procedure or the posting of the announcement until the system usage fee is paid.

Chapter II of the EKR Decree concerning the detailed rules of electronic auctions supplements the auction-related rules of the Public Procurement Act. These rules are highly detailed; in terms of providing information, the main rule is about equality of opportunity for economic operators and bidders. In addition, the EKR Decree addresses auctions conducted in EPS, it specifies the mandatory elements of content of the invitation to bid and of the public procurement documents, and the conduct and evaluation of the auction. Under Articles 26-32 of the EKR Decree, there was little change in the conduct of the individual procedural acts over the past decade as this is a mature procurement technique regulated by a directive since 2004. The new rule in the EKR Decree is set forth in Article 26 (1): there is an obligation according to which the contracting authority must reassure itself in the course of preparing for the procedure that EPS supports a method of evaluation chosen by it in the course of re-ranking during the auction

in order to allow for automatic evaluation during the auction. Article 26 (2) is not really new as it enables waiving the performance of the auction, if there is only one bidder in a procedure. If there were not at least two bids received by the bid submission date, and if the contracting authority indicated this possibility in the invitation to bid launching the procedure, it may decide not to have an electronic auction but to conclude the procedure with the assessment and evaluation of the submitted bid.

The rules of the auction can be applied as appropriate in the case of electronic bidding administered under the national regime as indicated above in relation to the Public Procurement Act with a few exceptions. Another new rule is set forth in Article 26 (4) whereby the contracting authority may conduct an electronic procedure separately at different points in time for the lots of the public procurement procedure – this provides an answer to genuine legal issues, which arose in the course of earlier legal remedy procedures.

The main rule enabling an auction of valid bids, which caused problems in domestic legal practice, has not changed. Therefore, problems will continue to exist in a situation when it is subsequently revealed that a participant in the auction was an invalid bidder, i.e. it placed bids in the auction not in compliance with the law.

To rectify the error in the former regulation, Article 29 (2) stipulates that the bidder may submit its bid in the course of an electronic auction only by using the data transmission service accessible exclusively to the bidder for submitting bids. Until the opposite is proven, the submission of the first bid gives rise to the presumption that there is no change in the legal status of the bidder in the period between the submission of its former valid bid and the commencement of the electronic auction, which could result in the exclusion of the bidder from the public procurement procedure under the Public Procurement Act. In other words this means that the bidder does not upload the first bid separately in the auction because it had already submitted a bid in the bidding phase, which it may present in the auction provided that the bidder participates in it. If the bidder does not submit a bid in the course of the electronic auction, its bid submitted prior to the electronic auction will be binding according to Article 31 (1), i.e. not participating in the auction does not automatically result in the invalidity of the bid.

According to Article 33, the contracting authority is to declare the electronic auction unsuccessful in the case of a breakdown or shutdown and it should make out a protocol on this. The contracting authority may also declare the auction unsuccessful, if at least half of the bidders cannot access EPS in the course of the electronic auction because of a breakdown in

the electronic communications network provided that the bidders concerned indicated this fact to the EPS customer service during the period of the electronic auction; however, the contracting authority shall pass a decision on this at its own discretion. If, however, the contracting authority, the service provider or any bidder participating in the electronic auction notes a violation of the confidentiality of the auction under article 33 (3), the contracting authority must declare the auction unsuccessful and then repeat it.

Decree 40/2017. (XII. 27.) MvM on the rules related to the maintenance and operation of the electronic public procurement system sets forth the most important rules related to the operation of EPS.

The Prime Minister's Office performs the tasks of operating the electronic public procurement system through an organisation designated by legal regulation, called the NEKSZT Kft. (hereinafter: operator). The EPS operator publishes all the necessary information related to the use of EPS, the electronic means used, as well as the technical rules and the specification of connection and all the information concerning the conditions of the electronic submission of bids and applications to participate in the EPS website ([www.ekr.gov.hu](http://www.ekr.gov.hu)).

The EPS operator ensures the availability of the data in the system as well as their archiving.

The technical issues related to the handling of a breakdown and shutdown referred to in the EKR Decree are regulated in this decree. The MvM Decree regulates the planned form of the shutdown, notification thereof as well as its form and content in detail.

In order to exclude the possibility of disputing procedural acts and deadline modifications linked to a breakdown, the operator of EPS must make a register of shutdowns and breakdowns accessible in the EPS platform as well as its own website.

It is an important point that under the regulation those participating in the operation of EPS bear no liability for damages vis-à-vis its users incurred through any damage from the operation, breakdowns or errors arising in the course of the operation of EPS. In view of the fact that all this is regulated in the MvM Decree, the full exclusion of liability on the part of the operator can be disputed for the time being.

#### 4, Experiences of the first quarter

Based on the experiences of market agents, the use of EPS is not smooth yet. The primary reason for this is the underdeveloped nature of domestic electronic communications in public procurement. In principle, it would have been possible to make use of the electronic route earlier, the parties characteristically contacted one another in simple e-mails, which did not ensure the transfer of documents in writing in the procedure. The established practice simplified data flows, but it rendered certain procedural acts less secure and first and foremost illegal. Typically, relevant issues included asking for and giving supplementary information, calls for resolving discrepancies, calls for justification and answering such calls.

The requirement of the mandatory use of the electronic public procurement system put an end to this erroneous practice which, however, does not automatically enable economic operators to use the system.

Over the first quarter, registration and the distribution of authorisations gave rise to the largest number of problems and uncertainties in the procedures.

It is a general problem that the transitory rules do not provide an opportunity for conducting the procedure on paper in the case of procedures launched earlier with the so-called summary information. Consequently, several procedures will have to be declared unsuccessful subsequently or channelled to the electronic pathway retroactively. This has given rise to legal uncertainties. Setting up the customer service and organising training courses assists in informing economic operators. Being without experience, contracting authorities and bidders are averse to the use of the system and they have adopted a 'wait and see' attitude for the time being and they are monitoring the legal disputes, which will help them to launch their own procedures as contracting authorities and to submit binding bids as bidders with less risk.

Contracting authorities are expected to launch the currently postponed procedures at the end of the year, thus experiences with legal remedy procedures concerning value can presumably be summarised with experiences of a year, while currently the stakeholders are practising forms of communication related to lower value procedures.

It must be accepted that a full cultural change cannot be accomplished over a few months, but the experiences of the first quarter reveal that economic operators are beginning to get used to

the everyday use of the system, the monitoring of updates and changes while the system is continuously developing.

## 5. Literature

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