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Developments in Public Procurement in Hungary – Opportunities and Challenges

SUMMARY: The article provides a brief overview of the status of public procurements, made relevant by the 20th anniversary of the introduction of the public procurement system in Hungary and the entry into force of the new Act on Public Procurement on 1 November 2015. It is intended to present the backbone of public procurement statistics released in the past 20 years to give an insight into the most important trends in Hungarian public procurements. Another goal of the study is to outline the structure of public procurement regulations and the relevant institutional system and to point out the most prominent novelties of the new Public Procurement Act. Statistics and trends are examined with the assistance of charts and tables. The novelties of the Public Procurement Act are presented by analysing the text of the legislation and by providing a summary of the relevant rules, and the institutional system is described by using a similar method. Readers gain an insight into the situation of public procurements through an analysis that is not only easy to utilise but that can also serve as a point of reference on the subject of the Public Procurement Act and the relevant institutional system.

KEYWORDS: public procurement statistics, Public Procurement Directive, new Public Procurement Act, public procurement institutional system

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Last year marked the 20th anniversary of the Hungarian public procurement law, enabling us to analyse the past and make plans for the future by drawing on two decades of experience in modern public procurements.

Looking back at the beginnings, the foundations of market economy were put in place by the change in the political and economic regime, which also called for the regulation of the purchases of public institutions. Indeed, the market of public procurements had to be made suitable for the selection of contractual partners based on the principles of transparency, equal opportunities and free competi-

tion. As modern public procurement was introduced in Hungary in 1995, establishing the legal institution of public procurement required the performance of new tasks, such as the execution and the establishment of the technical conditions of public procurement procedures, setting up advocacy organisations for the stakeholders of the procedures, or ensuring the resolution of disputes arising in relation to public procurements.

With Hungary's accession to the European Union, the legal framework of public procurements was fully transposed into national legislation and the Hungarian markets opened up for EU competition. The significance of public procurement legislation is aptly dem-

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onstrated by its dynamic development: over the past twenty years, the need arose for the formulation of two new families of directives, while parallel to these processes, as a new milestone in public procurement legislation, the fourth Hungarian public procurement code – Act CXLIII of 2015 on Public Procurement (hereinafter: PPA) – has been recently adopted, effective from 1 November 2015.

Since the entry into force of the first public procurement act on 1 November 1995, the volume of Hungarian public procurement procedures has been on the rise, which justifies the need for regulation and for the operation of an organisation capable of renewal. Accordingly, in discussing the development of Hungarian public procurements, developments concerning the institutional system of public procurements should not be overlooked either. The legal status of the Public Procurement Authority (and that of its legal predecessor, the Public Procurement Council) has not changed since the adoption of the first public procurement act: it discharges its duties subordinated solely to the National Assembly. The main objective of the Public Procurement Authority (hereinafter: Authority) is to assist public procurement participants in the adequate application of the law. The guidelines, information documents and specific positions issued by the Authority, as well as its training courses and accumulated administrative database are all designed to ensure the efficient performance of this task.

STATISTICS AND TRENDS IN HUNGARIAN PUBLIC PROCUREMENT

The viability and significance of the Hungarian public procurement market can be measured reliably based on our statistics; in line with the provisions of Article 187(2) b), the Authority keeps a registry of public

procurements. Thanks to the Authority's statistics, developments in Hungarian public procurements in the past 20 years are easy to overview and up-to-date data are constantly available for identifying and analysing the latest trends in Hungary's public procurement procedures.¹ The figures below present the most important public procurement statistics for the period between 1996 and 2015 before turning to the analysis of public procurement statistics for 2015.²

Examining the number and value of public procurement procedures in the period of 1996–2015, we find that the number of procedures peaked in 2014, while in terms of value, 2013 is considered to be a 'record breaking year'.³ (See Figure 1).

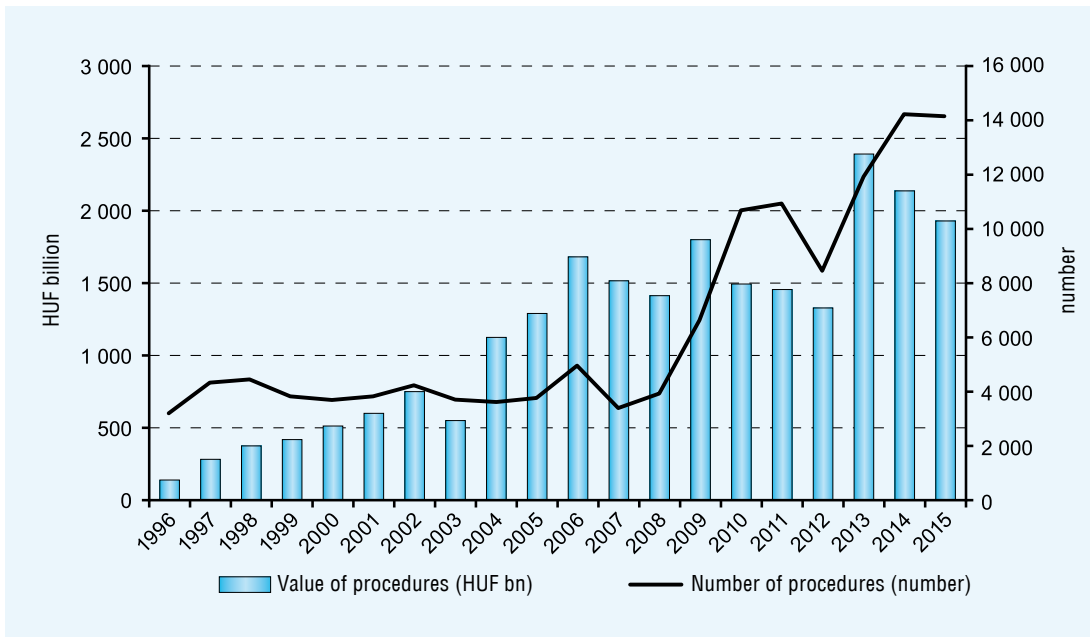
Breaking down public procurements by subject matter reveals that, with respect to subject matters, the annual values of public procurements recorded for each year in the period of 1996–2015 were proportionally similar. (See Figure 2)

Figures 3 and 4 illustrate the value of public procurement procedures by specific contracting authority types between 1996 and 2015, clearly demonstrating the significant role of local governments in public procurement procedures. It should be noted that most organisations (almost 40 per cent of all) included in the contracting authority registry maintained by the Authority registered as a regional/local contracting authority.

Based on the data of notices published by the contracting authorities, in 2015 contracting authorities conducted 14,127 successful public procurement procedures, down only 0.5 per cent compared to the corresponding data of 2014. In terms of value, however, the decline is more significant: at HUF 1,931.6 billion, total public procurement value dropped by 9.6 per cent compared to the total value of HUF 2,135.9 billion recorded in the previous year.⁴

Figure 1

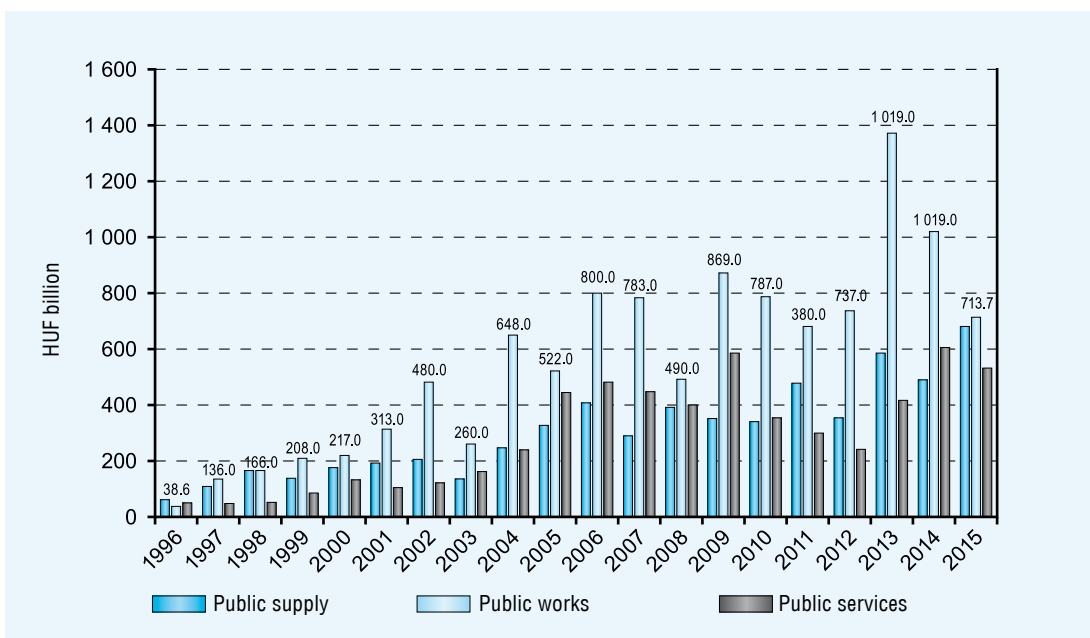
TRENDS IN THE VALUE AND THE NUMBER OF PROCEDURES INCLUDED IN STATISTICAL RECORDS (HUF BN, NUMBER)



Source: Department for Notice Management and Statistics, Public Procurement Authority

Figure 2

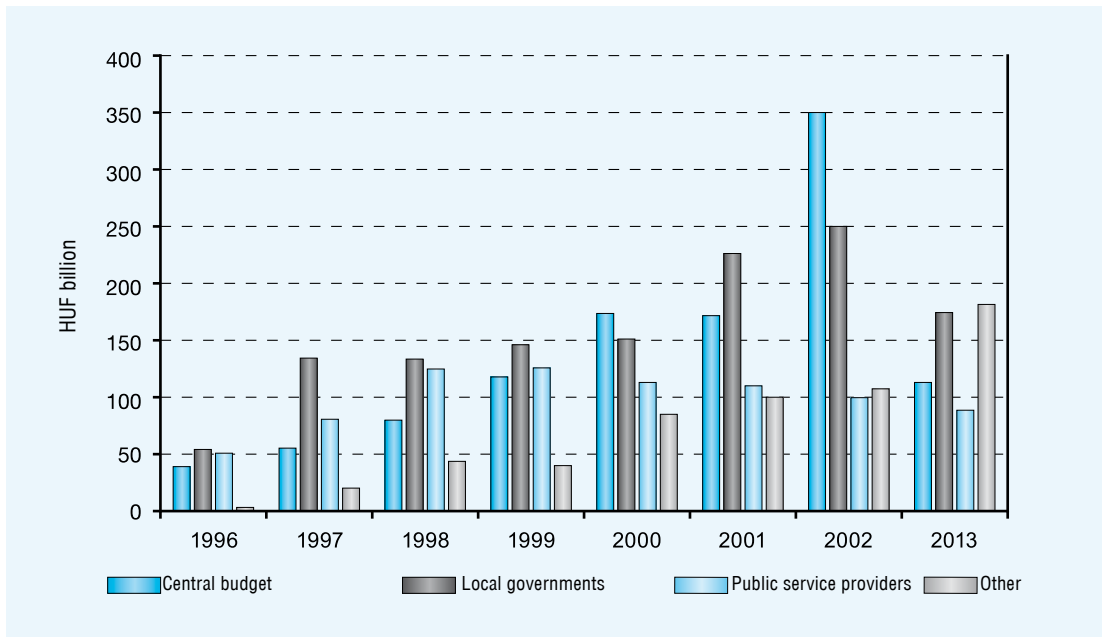
TRENDS IN THE VALUE OF MAIN SUBJECT MATTERS IN THE PERIOD OF 1996–2015 (HUF BN)



Source: Department for Notice Management and Statistics, Public Procurement Authority

Figure 3

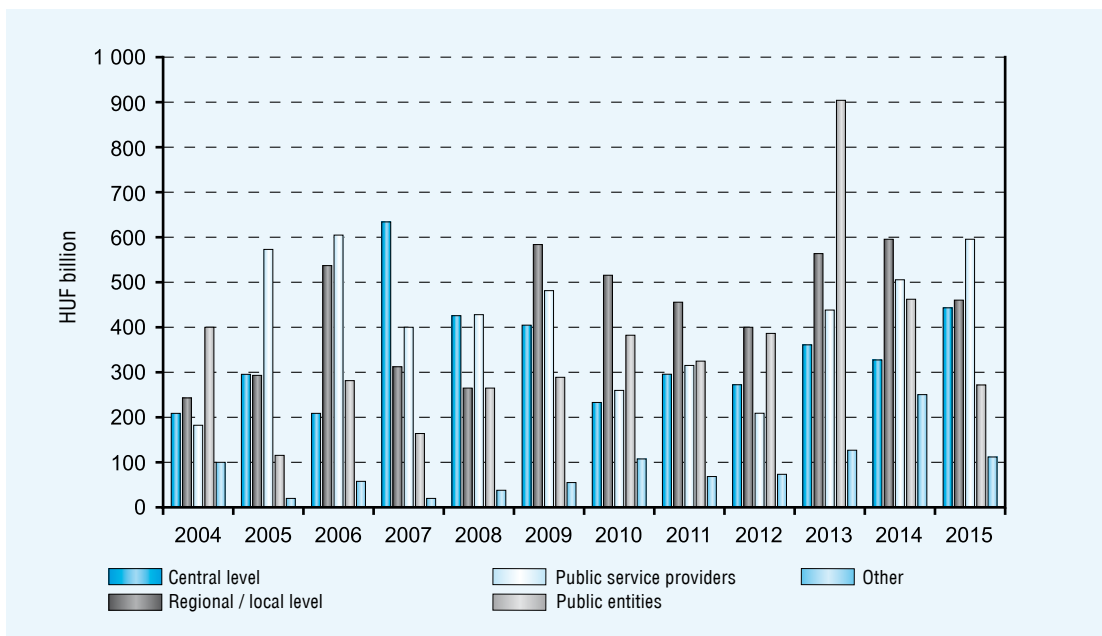
TRENDS IN THE VALUE OF PROCEDURES IN MAIN CONTRACTING AUTHORITY GROUPS, 1996–2003 (HUF BN)



Source: Department for Notice Management and Statistics, Public Procurement Authority

Figure 4

TRENDS IN THE VALUE OF PROCEDURES IN MAIN CONTRACTING AUTHORITY GROUPS, 2004–2015 (HUF BN)



Source: Department for Notice Management and Statistics, Public Procurement Authority

A comparison of the years of 2014 and 2015 reveals that the share of procedures co-financed by the European Union decreased both in terms of the number and the value of the procedures. The petering out of the tenders awarded under the 2007–2013 EU programming period may obviously have contributed to the contraction in procedures implemented, in part, from EU funds. Supplementary data indicate that contracting authorities allocated the lion's share (51.7 per cent) of the value of

procedures co-financed by the EU to the implementation of public works. (See Table 1).

As in previous years, in 2015 regional/local level contracting authorities conducted the highest number of procedures (41.8 per cent); with respect to value, however, they were surpassed by public service providers, with a share of 30.8 per cent. Micro, small and medium-size enterprises were awarded 83.6 per cent of the procedures, which roughly corresponds to the percentage share recorded in the previous

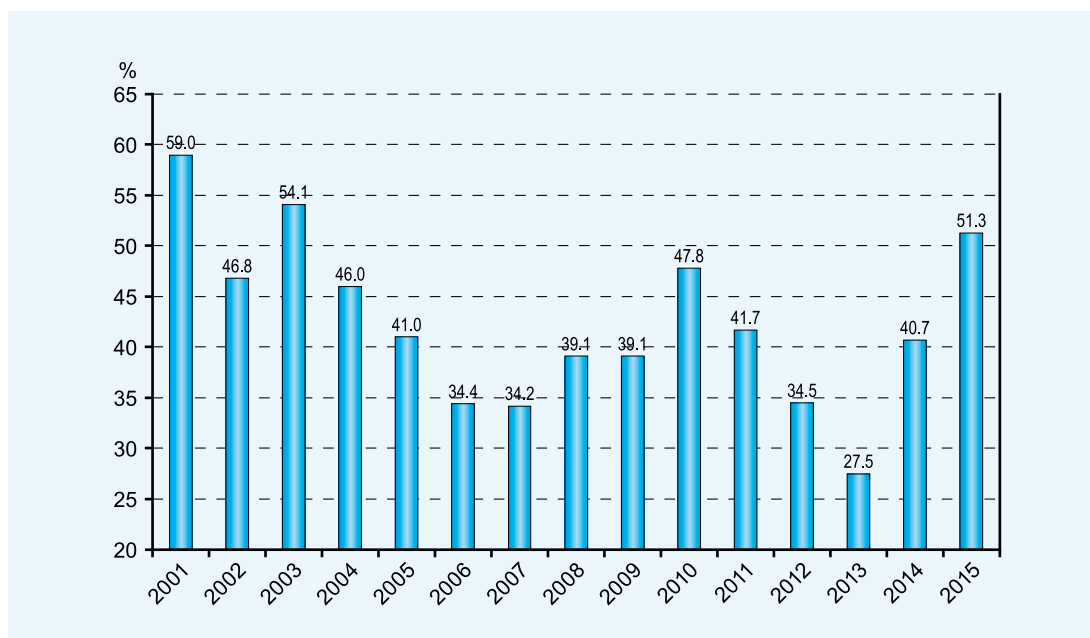
Table 1

EU CO-FINANCING (2014–2015)

Procedures	2014		2015		Change (2015/2014)	
	number	value (HUF billion)	number	value (HUF billion)	number of procedures %	value %
Co-financed by the EU	7,121	1,050.8	6,482	735.6	91.0	70.0
Total	14,197	2,135.9	14,127	1,931.6	99.5	90.4

Figure 5

SHARE OF PUBLIC PROCUREMENT PROCEDURES AWARDED TO SMES IN TOTAL VALUE



Source: Department for Notice Management and Statistics, Public Procurement Authority

year (84.0 per cent). In terms of value, however, the performance of SMEs improved considerably: their share in the total value of the procedures grew to 51.3 per cent from 40.7 per cent recorded in 2014.

Figure 5 clearly demonstrates that compared to recent years, the percentage share achieved by SMEs was outstanding last year.

As in the previous year, in 2015 the most frequently used procedure type exceeding the EU threshold comprised open procedures (64.1 per cent), which also represented the largest share in total value (52.5 per cent). As regards the rules on public procurement procedures at the national level, the procedure type defined in Article 122/A of the PPA dominated the procedures both in terms of number (62.7 per cent) and value (38.1 per cent).

In 2015, 951 review procedures were opened by the Public Procurement Arbitration Board (hereinafter: Arbitration Board), which indicates a modest, 3.5 per cent decline compared to the review procedures initiated in 2014. Compared to 385 applicants in 2014, in 2015, 396 applicants submitted an application for review to the Arbitration Board. As in previous years, only a negligible number of contracting authorities initiated review procedures against their own public procurement procedures in 2015. The majority of procedures commenced at request are initiated by candidates or by contracting authorities. In the vast majority of the cases, applicants debate the lawfulness of contracting authorities' decisions concluding the procurement procedure.

DEVELOPMENTS IN PUBLIC PROCUREMENT REGULATIONS

New public procurement principles

The new directives on public procurement adopted by the European Parliament and by

the Council entered into force on 18 April 2014. The new directives cover a far broader spectrum of local government procurements than previous regulations. In addition to Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, Directive 2014/23/EU on the award of concession contracts was also adopted and issued. This Directive regulates the award processes of concession contracts based on the example of public procurements by defining rules similar to those applicable to public procurements.

Under EU law, Member States are required to transpose the provisions of the new directives into their national legislation by the transposition deadlines specified in the directives, as a general rule, by no later than 18 April 2016. The parts pertaining to electronic public procurement procedures are to be transposed by 18 April 2017 in the case of central purchasing bodies and by 18 October 2018 for all other contracting authorities. The transposition of the new public procurement directives is to be performed in two steps. In consideration of the longer time requirement of the establishment of an electronic public procurement system provided by the state and for the preparation of economic agents, the law ensures that a sufficiently longer period is available for the entry into force of the provisions applicable to electronic communication in public procurement procedures and the rules of the directives. With respect to the detailed rules of electronic communication and to the issues related to the operation of the electronic public procurement system, implementing regulations have been developed.

A central objective of the new directives was to simplify the rules pertaining to the execution of public procurement procedures,

thereby improving the flexibility and efficiency of public procurement procedures. Another priority objective of the crafting of the directives was to alleviate administrative burdens. As a main instrument applied to that end was the introduction of the application of the European Single Procurement Document. The acceleration of public procurement procedures, SMEs' easier access to the procedures, as well as the consideration of environmental and social aspects and the introduction of provisions supporting innovation also contribute to this goal and at the same time, may serve as independent objectives. These objectives are described in detail through the presentation of the Hungarian regulation.

Hungarian regulation

The transposition of the directives mentioned above into national legislation implied an extremely difficult task: although the new directive package contains only minor clarifications in respect of various issues, the introduction of certain, heretofore unknown instruments – such as the possibility of self-cleaning originating in German law - posed an enormous challenge for Hungarian legislators.

In line with the directives, the Prime Minister's Office in charge of the legislation has developed the new Public Procurement Act, adopted by the National Assembly on 22 September 2015. The new legislation, Act CXLIII of 2015 on Public Procurement entered into force – save for a few exceptions related to electronic procedures – on 1 November 2015.

As a general rule, the provisions of the Act are applicable – upon its entry into force – 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.

The structure of the regulation remained essentially the same. Intended to transpose the most important rules of all three directives, the consolidated PPA is completed by the detailed rules of the implementing regulations.

Main changes in the light of the new PPA

In line with EU objectives, in formulating the new rules the Hungarian legislator considered the following key aspects: guaranteeing transparency, achieving the best procurement results for contracting authorities, simplifying and accelerating procedures, alleviating administrative burdens and increasing the role of SMEs.

Novelties improving transparency

■ *Greater responsibility for performance, inspection of the modification and performance of contracts*

In accordance with the new directives, the new regulation clarifies the cases where contract modification is acceptable from a public procurement perspective; in other words, where the magnitude of the change does not necessitate the reopening of the competition. The new regulation expands the range of the Authority's responsibilities: under the new Act, the Authority is vested with official control powers and with the right to bring action for the protection of public interest in the case of infringements regarding the responsible management of public funds, resulting in null and void contractual amendments.

■ *Increased enforcement of the principle of transparency in public procurement rules defined at the national level*

The law facilitates open competition to a greater extent in the awarding of low-value contracts that nevertheless represent a formidable part of Hungarian public procurement expenditures. In the case of lower value contracts, the

legislator strived to promote competition and the economy of contractual terms even in the past by inviting at least three tenderers, while ensuring that the administrative burden of the procedures is not disproportionately high relative to contract value. Along the same lines, the law alters the rules applicable in national legislation in such a way that it increases the opportunities of SMEs' – the sector with a vested interest in winning the contracts concerned – to join the competition, thereby also serving the purposes of a more efficient use of public funds. The new rules reduce the value limit under which contracting authorities may open public procurement procedures only by issuing a direct invitation to participate to specific economic agents; at the same time, however, the prior disclosure obligation linked to contracts above this reduced threshold is simplified.

Novelties for achieving better procurement results

■ *A thorough preparation of procedures*

The law places greater emphasis on demanding thorough preparations for public procurement procedures and stipulates more detailed requirements for the definition of the estimated value. Regarding technical preparations for 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 is also required to provide for the control of plans and design architect's and design engineer's site supervision. Moreover, it should be stressed that even in public procurement procedures comprising multiple phases, the contracting authority is required to make available the public procurement documentation – including technical specifications – upon opening the procedure.

■ *Primacy of quality-based selection in the assessment*

Through the new directives, the legislation is intended to facilitate contracting authorities' transition to the primacy of quality-based selection in public procurement procedures. The winning bid can be selected on the sole basis of the lowest price only exceptionally, if qualitative requirements cannot be considered whatsoever given the nature of the procurement; moreover, the regulation precludes the application of the lowest price for the award criteria in the case of design, engineering and architectural services or public works. In addition, under the authorisation of the PPA, a separate act of legislation (or, in the 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.

Simplification, alleviation of administrative burdens

■ *Principle of self-declaration during the verification of the non-existence of the grounds for exclusion and the certification of suitability*

In keeping with the new directives, the Act renders public procurement procedures more flexible in several regards. Pursuant to the PPA, in lieu of certifications issued by authorities or third parties, upon submitting their applications (requests to participate), economic operators may submit a European Single Procurement Document comprising the economic operator's self-declaration as preliminary evidence to verify the non-existence of the grounds for exclusion and suitability. As a general rule, only the future winner is required to submit certifications.

■ *New rules pertaining to the provisions related to suitability criteria*

In accordance with the rules of the directives, legislation even at the level of the European Union allows contracting authorities to choose, in exceptional and justified cases, not

to prescribe any suitability criteria related to the technical and professional ability of tenderers.

■ *Simplification of the evaluation process*

The new rules of open procedures ease the evaluation process for contracting authorities by allowing them to change the order of the assessment and the evaluation process: if the contracting authority so indicated in the notice launching the procedure, it is entitled to choose not to evaluate the validity of the tenders in cases where, based on the evaluation criteria, the given tender cannot be either the most favourable or the second most favourable tender. Moreover, in open procedures the contracting authority may stipulate in the notice launching the procedure that only the evaluation of abnormally low price or cost will be carried out following the assessment of tenders, and it may choose to limit the evaluation to the first and second most favourable tenders.

■ *Simplifications of rules at the national level*

The PPA introduces further simplifications in the rules not covered by the directives – i.e. those defined at the national level – while also striving to ensure, in line with the above, improved transparency. Such simplifications include the provision that, in the case of low-value procedures launched by the direct invitation of three tenderers, the separate assessment of suitability would not be mandatory. This is because the contracting authority invited minimum three enterprises that were considered suitable in any event to submit a tender. At the same time, the prior publication obligation of the contract notice is being simplified in the case of public supplies and public services below the EU thresholds and in the case of public works below HUF 500 million.

Accordingly, in line with the rules defined at the national level, public procurement pro-

cedures, as a general rule, are not launched with the publication of a notice: instead, the contracting authority sends a summary information document concerning the procedure to the Public Procurement Authority at least five business days before the starting date of the procedure but within a maximum of twelve month, to be published on the Authority's website. Under the PPA, the minimum content requirement of the summary information is secured by guaranteed rules. The national procedure starts by sending off the notice launching the procedure based on the summary information document. In accordance with the new provisions, the contracting authority is required to send the notice launching the procedure to all economic operators who expressed their interest in the procedure by the deadline, and to any number of economic operators chosen by the contracting authority (preferably SMEs) with the proviso that at least three economic operators are to be invited.

The PPA revises the regulations pertaining to the procedures that may be launched by sending off three invitations to participate. Essentially, this particular procedure type will be permitted up to a lower value limit than the existing threshold; i.e. when the estimated value of public supplies or public services is below HUF eighteen million, or when the estimated value of public works is below HUF one hundred million. As another novelty, the contracting authority is required to send the invitation to tender to at least four economic operators who, in its opinion, are able to comply with the suitability criteria. The procedure can be conducted both as a negotiated procedure or as an open procedure; the provision on the minimum time limit for the submission of tenders shall not apply in either case. The contracting authority is not required to set suitability criteria, and the standstill period, as well as the time available for seeking

judicial remedy in relation to the decision closing the procedure is reduced to 5 days.

■ *Introduction of electronic public procurement*

Pursuant to the directives, the parts pertaining to electronic public procurement procedures are to be transposed by 18 April 2017 in the case of central purchasing bodies and the parts pertaining to electronic public procurement procedures are to be transposed into national legislation by 18 October 2018 for all other contracting authorities. That notwithstanding, the Hungarian legislator decided on an earlier transposition of the provisions even in this group of contracting authorities; accordingly, the introduction of the electronic public procurement system – which includes a fully electronised preparation, tendering and control process (notice, tender, evaluation, contract) – will be concluded by February 2017 (for central purchasing bodies the deadline is 1 November 2016).

Increased role of SMEs

■ *Simplification of procedures and alleviation of administrative burdens*

The simplification of procedures, the alleviation of administrative burdens – in particular, the application of the self-declaration principle in procedures – and the electronisation of the processes all contribute to facilitating the participation of small and medium-sized companies which, in view of the complexity of the procedures, had not appeared in the public procurement market in the past. Simplifications proposed with respect to low-value, national procedures and the new system of national rules also support the successful participation of the SME sector.

■ *Restrictions related to the suitability criteria*

With respect to suitability criteria, pursuant to the PPA, for the purposes of reference works, the specification confined to the criteria actually necessary for the performance

of the contract means that the contracting authority may require certification of former public supply/works/services up to 75 % of the value of the given public contract. As regards the revenues required from tenderers, the contracting authority is entitled to establish the minimum suitability requirement in such a way as not to be disproportionate to the estimated value to enable an economic operator to be considered as suitable, if, in the business year or years examined by the contracting authority, its total revenues reached the full value of the given public contract.

Of course, the new PPA includes numerous innovative provisions in addition to those listed above, as well as clarifications deemed necessary based on the previous application of the law; this article, however, is limited to the presentation of the most significant novelties.

THE INSTITUTIONAL SYSTEM OF PUBLIC PROCUREMENTS

We celebrated the 20th anniversary of the establishment of the Hungarian institutional system of public procurement in November 2015, commemorating the entry into force of the first modern public procurement act on 1 November 1995.

Prime Minister's Office and other public bodies

Being responsible for the professional preparations required for the formulation of public procurement legislation, the Prime Minister's Office plays an essential role in designing public procurement policy. In addition, the Prime Minister's Office governs and controls the public procurements and contracts of budgetary institutions subject to the governance and supervision of the

government – including their units –, as well as those of public foundations and business associations majority-owned by the state. It also carries out the duties involved in the legal control of procurement procedures implemented from EU funds. Moreover, the Prime Minister’s Office is responsible for supervising activities related to the centralised public procurement procedures of the Directorate-General for Public Procurement and Supply (KEF). It is also important to briefly mention the role of special centralised procurement organisations such as the National Healthcare Service Centre and the National Office of Communications. Mention should be made of the Directorate General for Audit of European Funds, which has been operating independently within the chapter of the Ministry for National Economy since its foundation on 1 July 2010. Its purpose is to facilitate the efficiency and regularity of the utilisation of EU grants and to protect Hungary’s financial interests.

The Public Procurement Authority

The Public Procurement Council – the legal predecessor of the Public Procurement Authority – was set up twenty years ago to promote, in addition to fulfilling administrative tasks and standardising the relevant rules, the adoption of adequate public procurement practices in Hungary. As a result of legislative changes, both the name and some of the tasks of the Public Procurement Council have changed – as of 1 January 2012, it is referred to as Public Procurement Authority –, but its fundamental mission remained the same: it is responsible for effectively contributing to framing the public procurement policy, for forming and spreading the lawful public procurement behaviour, thus enhancing the transparency of spending of public funds,

while taking into account the public interest and the interest of contracting authorities and tenderers. As an independent organisation, the Public Procurement Authority operates subordinated to the Parliament only. While it is a budgetary institution, its budget appropriations are planned under a specific budget title of the central budget, and any regroupings against this appropriation during the year shall be subject to approval by the Parliament. The Authority is classified as an autonomous state administration organ.

Although the PPA preserved the organisational structure of the Authority, it transformed the tasks of the Council and of the Authority in line with actual operation. The Council continues to be responsible for the representation of three main spheres of interest: the persons acting as contracting authority or tenderer and such fundamental interests to be protected by law as certain legal policy objectives or the protection of the environment. The new regulation increased the number of Council members to nineteen.

The Public Procurement Arbitration Board

The organisational frameworks guaranteeing the exercise of the right to legal remedy were essentially put in place in 1995 upon the adoption of the first public procurement act, and apart from a number of minor or major modifications, they have not been changed significantly since then.

The Arbitration Board operates beside the Council within the framework of the Authority. Its purpose is to arrange remedy proceedings related to any infringements or disputes related to public procurement or design contest procedures. The Arbitration Board is composed of public procurement commissioners in a number determined by the Council and employed

as civil servants and a Chairperson. They are appointed and recalled by the Council.

The directives adopted by the European Parliament and by the Council constitute the basis of the legal remedy activity of the Arbitration Board. European Union law is also applicable to legal remedy related to public procurements, as ensuring competition in public procurements across the European Union demands that transparency and non-discrimination are guaranteed in the entire territory of the Union. To ensure efficient implementation, Member States are required to provide adequate instruments for legal remedy to tenderers in the event of infringements of EU law during public procurement procedures: indeed, the absence of adequate remedy may deter companies from submitting applications in other Member States, which would jeopardise the single European public procurement market. EU directives on public procurement remedies are coordinative in nature; they merely lay down the fundamental principles of legal remedy related to public procurements, while Member States are expected to develop their own detailed rules. The Arbitration Board has jurisdiction over the entire territory of Hungary.

NEW TASKS OF THE PUBLIC PROCUREMENT AUTHORITY

Similar to previous legislation, the PPA essentially preserved the tasks and the organisational structure of the Authority, and it stipulates that the Council will only be responsible for the basic personnel issues of the organisation and for the issue of guidelines in the future; operative work will be performed by the Authority.

Some of the tasks to be performed by the Authority are identical with those within its competence since its foundation (or that of

the Public Procurement Council), such as the publication of the Public Procurement Bulletin, public notices in relation to procurement procedures, publication of the decisions of the Arbitration Board, maintenance and publication of specific lists and registers, provision of opinion on pieces of legislation. On the other hand, the new regulations assigned numerous new tasks to the competence of the organisation and previous tasks have been changed in some regard. These changes are presented below.

The official list of approved tenderers⁵

Most of the rules regarding the maintenance of the list of approved tenderers remained the same; however, in the relevant implementing regulation the legislator eliminated the obligation to pay administrative service fee both for registrations and for renewals. As another novelty, economic and professional chambers are also entitled to create a list of approved tenderers.

Accredited public procurement consultants⁶

The regulation on accredited public procurement consultants entered into force on 2 November 2015, eliminating the legal status of official public procurement consultant.

The relevant decree contains 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, rules on the conditions of registration, the maintenance of the list of accredited public procurement consultants and the level of the administrative service fee payable for the registration, as well as rules on the liability insurance specified as a criterion for pursuing the activity. Request forms for registration as an

accredited public procurement consultant are to be submitted to the Prime Minister's Office. If all required documents had been submitted and upon verification of their adequacy, the Prime Minister's Office forwards the preliminary request for registration to the Authority, and the Authority registers the applicant as accredited public procurement consultant under the title of preliminary registration.

Control of contracts by the Public Procurement Authority⁷

In accordance with the directives, compared to previous public procurement acts, the new Public Procurement Act places far greater emphasis on the performance of contracts concluded on the basis of contract award procedures, the control of contractual performance and on the prevention of illegal contract modifications that would exempt enterprises from the legal consequences of a breach of contract or delayed performance thereof, and thus, those that would be detrimental to contracting authorities or, in a broader sense, to the state or local governments. The legislation assigned this control activity to the responsibilities and competence of the Authority. In the case of contracts concluded on the basis of contract award procedures, this control activity restricts the possibility of the automatic acceptance and approval of insufficient contractual performance and of illegal contract modifications detrimental to contracting authorities.

The Authority's control activity, as an administrative control procedure, is governed by the provisions of Government Decree No. 308/2015 (X. 22.) on the Public Procurement Authority's control of the performance and modification of contracts concluded on the basis of contract award procedures and of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services. The

Authority is required to draw up an annual inspection plan and as a general rule, it performs its control activity based on the inspection plan. The Authority performs the inspection primarily by checking the documents generated during the contract award procedure and the performance of the contract, but it may also perform on-the-spot checks as required. During the inspection it may not request the certification of any facts or data that can be retrieved from the Public Procurement Database or accessed in the electronic administrative registry. The Authority concludes the control procedure by drawing up minutes. The minutes also include the findings of the control procedure and recommendations on further measures to be taken by the Authority. As a result of the inspection, the Authority may turn to the Arbitration Board or to court and, if the inspection revealed violations requiring the action of another organ or authority, it will contact the authority with the relevant competence and jurisdiction.

The internal market information system – IMI⁸

Several internal market regulations stipulate that the competent authorities of the European Economic Area should provide assistance to partner institutions in other countries through the disclosure of information.⁹ IMI is an electronic instrument designed to facilitate the daily exchange of information between competent authorities.

The European Commission developed the system in close cooperation with the Member States. Based on the new public procurement directives,¹⁰ in April 2015 the IMI pilot project was launched in public procurement procedures as well, in the context of which contracting authorities may use the IMI system to contact the certifying authorities of

the relevant Member State regarding tenderers established in other EU Member States in order to request information about whether, based on the documents submitted by the given economic operator, it is subject to the grounds for exclusion or it complies with the prescribed suitability criteria. Participants of the exchange of information, therefore, are the contracting authority (contracting entity) and the authorities competent in certifying the tenderer's compliance with the requirements prescribed by the suitability criteria or with the requirements for contractual performance.

The Authority published a form on its website, and by completing the form, contracting authorities may request the Authority to contact the competent foreign authority. This solution benefits contracting authorities by relieving them from the burden of identifying the competent foreign authority. In order to ensure the adequate suitability of the system, Government Decree No. 321/2015 (X. 30.) Korm. on the method of certification of suitability and verification of the non-existence of the grounds for exclusion as well as the definition of public procurement technical specifications in public procurement procedures stipulates the rules pertaining to the role of the Authority and provides references to legislation regulating the use of the IMI system in more detail.

The e-Certis system

e-Certis is an information system that helps identify the different certificates and attestations frequently requested in procurement procedures across Member States. The Commission places great emphasis on the enhancement of the e-Certis system. The system helps enterprises determine which documents and certificates are required in the Member State where they wish to participate in public procurement procedures as tenderers. On the other hand,

it provides support to contracting authorities to verify the adequacy of the documents and certificates submitted by tenderers.

The system provides useful assistance in several regards. On the one hand, it is helpful for those who submit their bids for the first time and are not familiar with the requirements of public procurement procedures (even if they are established in the same country as the contracting authority), as it contains all documents – along with a detailed description of their contents – that tenderers are generally required to submit. On the other hand, it will have key significance in cross-border public procurements. By using the system, documents received from foreign countries will be easier to understand and, in the course of cross-border procurements, compliance of the submitted document with the requirements prescribed in a foreign country can also be verified.

Thanks to its standardised and consistent structure, it supports the in-depth analysis of various document types.¹¹

It should be remembered that e-Certis is a comparative tool, and as such, it is not a legal advisory service. It does not guarantee that the document resulting from the query will be accepted as valid by the contracting authority concerned. The system is merely an information tool that helps identify and recognise the certificates most frequently required in the course of public procurement procedures in different Member States. Member States are required to update their documents in the e-Certis system on a regular basis, which is one of the key tasks of the Hungarian Authority.

Self-cleaning

The concept of self-cleaning appears as a new element in the PPA; incorporated into the public procurement directive based on the German and Austrian models, the regulation also needed to

be included in the new Hungarian regulations on public procurement. In essence, an economic operator subject to one or more grounds for exclusion may take measures to prevent or reduce the risk of the recurrence of the activity constituting its ground for exclusion.

Pursuant to the PPA, competences regarding self-cleaning are vested with the **PUBLIC PROCUREMENT AUTHORITY**; therefore, despite the option provided by the directive, the decision of accepting the reliability of the economic operator does not fall within the competence of the contracting authority. The Authority (or in the event that a judicial review has been initiated, the court) is entitled to decide whether the measures taken by the economic operators concerned comply with the conditions stipulated by the PPA and are sufficient to demonstrate the reliability of the economic operator. Importantly, the economic operator can ascertain, even prior to participating in the procedure, that its bid cannot be invalidated due to the existence of grounds for exclusion (even though the ground for exclusion still exists, despite its continuing existence the economic operator has certified its suitability and its bid cannot be invalidated due to the existence of grounds for exclusion).

In line with the public procurement directive, the PPA specifies the types of measures that the affected person or organisation needs to fulfil in order to be exempted from the exclusion. Accordingly, it is required to pay or undertake to pay compensation for the damages incurred, to clarify the facts and circumstances in a comprehensive manner by actively collaborating with the competent authorities, and to take concrete technical, organisational and personnel measures that are appropriate to prevent the recurrence of the activities constituting the ground for exclusion. In consideration of the above, the PPA empowers the Authority to assess the suitability of the measures taken in the context of self-cleaning.

E-procurement

Electronic information and communication tools can considerably simplify the publication of contracts and improve the efficiency and transparency of public procurement processes. For that purpose, the public procurement directive prescribes the mandatory transmission of notices in electronic form, the electronic availability of the procurement documents and – after a transition period – full electronic communication. Full electronic communication means communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders (electronic submission). Under the directive, contracting authorities should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with the ICT products in general use and which do not restrict economic operators' access to the procurement procedure. The use of such means of communication should also take accessibility for persons with disabilities into due account.¹²

Pursuant to Article 187 of the PPA, the tasks of the Authority in that regard include the following:

- keeping a registry of public procurements;
- publishing the Public Procurement Bulletin;
- publishing and controlling notices;
- publishing summary information documents on its website;
- publishing the Public Procurement Database and public procurement documents on its homepage;
- maintaining and operating the electronic public procurement system.

The legislator assigned the development of the e-procurement system to the competence of the Prime Minister's Office, while its operation and maintenance will be the duty of the Authority.

CONCLUSION

From the effective date of the new regulation, the **PUBLIC PROCUREMENT AUTHORITY** has been ready to perform its new tasks, with special regard to educating stakeholders about the changes in public procurements and the newly evolving public procurement practice. In this context, it organises conferences and seminars, it takes responsibility for the professional content of the Authority's official

journal, the *Public Procurement Bulletin*, it participates actively in training courses – whether they require secondary or tertiary qualification – and cooperates with other training institutions.

In conclusion, it is important to stress that in organising its events, enhancing its portals and communicating with customers while performing its administrative duties, the Authority is mindful of the concept of a service provider authority.

NOTES

- ¹ Data sources for the statistical records include the information notices entitled 'Notice on the Results of the Procedure', completed and posted by the contracting authorities and published in the Public Procurement Bulletin.
- ² Statistical analyses are prepared by the Public Procurement Authority's Department for Notice Management and Statistics. The figures included in the article have been prepared for the anniversary publication of the Public Procurement Authority and for the 2015 statistical analysis of the Authority.
- ³ The highest total value of public procurements was recorded in 2013, amounting to HUF 2,394.3 billion.
- ⁴ Despite the decline, however, the total value recorded for 2015 is the third largest amount in the history of Hungarian public procurements.
- ⁵ Detailed rules: Articles 27–44 of Government Decree No. 321/2015 (X. 30.) Korm. on the method of certification of suitability and verification of the non-existence of the grounds for exclusion as well as the definition of public procurement technical specifications in public procurement procedures
- ⁶ Detailed rules: Decree No. 46/2015 (XI. 2.) MvM of the Minister of Prime Minister's Office on the preliminary registration of accredited public procurement consultants. The above-mentioned Decree will be replaced by Decree No. 14/2016 (V. 25.) MvM of the Minister of Prime Minister's Office on the activity of accredited public procurement consultants, which will enter into force on the thirty-first day following its promulgation (promulgated on: 25 May 2016).
- ⁷ Detailed rules: Government Decree No. 308/2015 (X. 27.) on the Public Procurement Authority's control of the performance and modification of contracts concluded on the basis of contract award procedures
- ⁸ Detailed rules: Article 45 of Government Decree No. 321/2015 (X. 30.) on the method of certification of suitability and verification of the non-existence of the grounds for exclusion as well as the definition of public procurement technical specifications in public procurement procedures
- ⁹ Hungarian legislative background: Act LXXVI of 2009 on the general rules on taking up and pursuit of service activities; Government Decree No. 354/2013 (X. 7.) on the operation of and

participation in the internal market information system.

and postal services sectors and repealing Directive 2004/17/EC (Article 102)

¹⁰ 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 (Article 86); Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport

¹¹ <http://ec.europa.eu/markt/ecertis/login.do?selectedLanguage=hu> (10/11/2015).

¹² Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC

LITERATURE

RIGÓ, Cs. B. (2015): Developments in public procurement in Hungary – Opportunities and challenges. Presentation at the Conference entitled ‘Good Practices – In focus: Public Procurement and the Utilisation of EU Funds’. 19 November 2015, Budapest

Act LXXXVI of 2009 on the general rules of taking up and pursuing service activities

Act CXLIII of 2015 on Public Procurement

Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC

Decree No. 46/2015 (XI. 2.) MvM of the Minister of Prime Minister’s Office on the preliminary registration of accredited public procurement consultants

Decree No. 14/2016 (V. 25.) MvM of the Minister of Prime Minister’s Office on the activity of accredited public procurement consultants

Government Decree No. 308/2015 (X. 27.) on the Public Procurement Authority’s control of the perfor-

mance and modification of contracts concluded on the basis of contract award procedures

Government Decree No. 321/2015 (X. 30.) Korm. on the method of certification of suitability and verification of the non-existence of the grounds for exclusion as well as the definition of public procurement technical specifications in public procurement procedures

Government Decree No. 354/2013 (X. 7.) on the operation of and participation in the internal market information system

<http://ec.europa.eu/markt/ecertis/login.do?selectedLanguage=hu> (10/11/2015)

Report to the National Assembly on the activity of the Public Procurement Authority in the period between 1 January and 31 December 2015 (2016)

The 20th anniversary of public procurement in Hungary – Contribution of the Public Procurement Authority (2016)

www.kozbeszerzes.hu