



GLG

Global Legal Group

The International Comparative Legal Guide to: Public Procurement 2012

A practical cross-border insight into
public procurement

Published by Global Legal Group,
with contributions from:

Advokatfirmaet Thommessen AS
Advokaturbüro Dr. iur. P. Galli
Alerion
Anderson Mori & Tomotsune
Arzinger
Ashurst LLP
Boga & Associates
CMS Rui Pena & Arnaut
Fried Frank Harris Shriver & Jacobson LLP
Garayar Asociados Abogados, S.L.
Georgiev, Todorov & Co.
GÖRG Partnerschaft von Rechtsanwälten
Grasty Quintana Majlis & Cía.
Heenan Blaikie LLP
J. Sagar Associates
Legance Studio Legale Associato
M. & M. Bomchil
Mamo TCV Advocates
Mannheimer Swartling Advokatbyrå AB
Matheson Ormsby Prentice
Pachiu & Associates
Schoenherr
Stibbe
Tark Grunte Sutkiene
Tassos Papadopoulos & Associates LLC
TozziniFreire Advogados
Wigley & Company

GLG

Global Legal Group

Contributing Editors

Julian Ellison and Philip Vernon, Ashurst LLP

Account Managers

Dror Levy, Maria Lopez, Florjan Osmani, Oliver Smith, Rory Smith, Toni Wyatt

Sub Editors

Suzie Kidd
Jodie Mablin

Senior Editor

Penny Smale

Managing Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

istockphoto

Printed by

Ashford Colour Press Ltd
December 2011

Copyright © 2011
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-908070-15-9

ISSN 1757-2789

Strategic Partners:



General Chapter:

1	EU Public Procurement Rules – Julian Ellison & Laure Baudrihayé, Ashurst LLP	1
---	---	---

Country Question and Answer Chapters:

2	Albania	Boga & Associates: Sabina Lalaj & Besa Velaj (Tauzi)	9
3	Argentina	M. & M. Bomchil: María Inés Corrá	16
4	Austria	Schoenherr: Christian Schmelz & Philipp J. Marboe	22
5	Belgium	Stibbe: David D’Hooghe & Leopold Schellekens	29
6	Brazil	TozziniFreire Advogados: Claudia Elena Bonelli & Célia Maria Nicolau Rodrigues	35
7	Bulgaria	Georgiev, Todorov & Co.: Alexander Pachamanov	42
8	Canada	Heenan Blaikie LLP: Paul M. Lalonde	49
9	Chile	Grasty Quintana Majlis & Cía.: José Francisco Sánchez & José Manuel Cruz	55
10	Cyprus	Tassos Papadopoulos & Associates LLC: Alexia Kountouri	63
11	England & Wales	Ashurst LLP: Julian Ellison & Laure Baudrihayé	69
12	Estonia	Tark Grunte Sutkiene: Elmer Muna & Erki Kergandberg	78
13	France	Alerion: Gérald Lagier & Julien Criard	84
14	Germany	GÖRG Partnerschaft von Rechtsanwälten: Dr. Lutz Horn	91
15	Greece	Ashurst LLP: Efthymios Bourtzalas	98
16	Hungary	Schoenherr Hetényi Law Firm: Dávid Adamov & János Juhász	105
17	India	J. Sagar Associates: Amit Kapur & Vishnu Sudarsan	112
18	Ireland	Matheson Ormsby Prentice: Helen Kelly & Bonnie Costelloe	122
19	Italy	Legance Studio Legale Associato: Filippo Pacciani & Ada Esposito	130
20	Japan	Anderson Mori & Tomotsune: Reiji Takahashi & Makoto Terazaki	138
21	Malta	Mamo TCV Advocates: Dr. Franco B. Vassallo & Dr. Joseph Camilleri	143
22	New Zealand	Wigley & Company: Michael Wigley	150
23	Norway	Advokatfirmaet Thommessen AS: Eivind J. Vesterkjær & Bjørn Alfred Immonen	155
24	Portugal	CMS Rui Pena & Arnaut: Gonçalo Guerra Tavares & Duarte Lebre de Freitas	161
25	Romania	Pachiu & Associates: Laurentiu Pachiu & Marius Nita	167
26	Spain	Garayar Asociados Abogados, S.L.: Gervasio Martínez-Villaseñor Fernández & Mario Sáez Bascuñana	176
27	Sweden	Mannheimer Swartling Advokatbyrå AB: Johan Carle & Niklas Sjöblom	184
28	Switzerland	Advokaturbüro Dr. iur. P. Galli: Peter Galli & Elisabeth Lang	189
29	Ukraine	Arzinger: Sergiy Shklyar	195
30	USA	Fried, Frank, Harris, Shriver & Jacobson LLP: James J. McCullough & Michael J. Anstett	201

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Hungary



Dávid Adamov



János Juhász

Schoenherr Hetényi Law Firm

1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Effective as of 1 January 2012, the brand new Act No. 108 of 2011 on public procurement (PPA) shall be applicable for public procurements in Hungary. Until 31 December 2011, the current Act No. 129 of 2003 on public procurements will remain in effect. Pursuant to the official interpretation to the new Act, the adoption of the new regulation became necessary due to the complex and non-transparent nature of the former PPA.

Both the award of public contracts in general – in terms of Directive 2004/18/EC – and the award of utilities contracts – in terms of Directive 2004/17/EC – are covered by the PPA. However, the new PPA is more like a framework type of legislation, i.e. several detailed rules are anticipated to be laid down in government decrees at later stages.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The PPA is supplemented by several governmental and ministerial decrees such as, for example, the Government Decree 168/2004 (V.25.) on the System of Centralised Procurement, Government Decree 34/2004 (III. 12.) on Detailed Rules of Forwarding and Publication of Requests for Procurement and Design Tenders.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The Hungarian statutory law reflects the current EU procurement law. Furthermore, due to the fact that Hungary is a Member of the European Community, it has to comply with the obligations arising from the international agreements of the EC, including the GPA.

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The main principles are “equal treatment”; “best value for money”; “transparency of spending” and “clarity of the relevant competition”. These principles serve as the main basis for the interpretation of the law.

Beyond these purposes, the PPA aims to improve the chances of small and medium enterprises (SMEs) to successfully participate in the public procurement procedures and to decrease the go-round debts.

1.5 Are there special rules in relation to defence procurement or any other area?

The PPA is not applicable:

- to procurements affecting state or service secrets, or which are related to national security or defence concerns and requiring special security measures, provided that the competent committee of the Parliament has decided not to apply the PPA; and
- to the purchase of goods and services expressly for military and law enforcement purposes in the field of national defence (Article 346 of the Treaty on the European Union).

The above procurements are subject to special rules, e.g. the Government Decree 228/2004 (VIII.30.) on Special Provisions of the Procurement of Goods Regarding National Defence.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

Section 6 of the PPA lists all entities which qualify as contracting authorities: the PPA applies to State and public entities in general. Public entities are, under Hungarian law, the executive bodies of the State (e.g. ministries, central purchasing bodies, central budgetary entities and public money funds), bodies governed by public law (e.g. National Bank, Hungarian Television), any form of local and self-governments (e.g. municipalities, bodies of national minorities) and public foundations.

In addition to the aforementioned, in special cases, the PPA also applies to business entities. (See question 2.2.)

2.2 Which private entities are covered by the law (as purchasers)?

The PPA also applies to legal entities with a dominant influence of a public body, according to question 2.1, and established (i) by law for a certain purpose (e.g. a non-profit limited liability company), (ii) to serve non-industrial or commercial public interest, or (iii) to fulfil the main duties of an aforementioned private or public entity.

Furthermore, the PPA also applies to legal entities whose construction works, purchases or ordering of services are mostly and directly financed by a public entity. The PPA also applies if such activities are sponsored by or co-financed by the EU.

Moreover, the PPA applies in compliance with the Directive to private entities and their subsidiaries which are active in the utility sector (e.g. post, water supply utilities).

2.3 Which types of contracts are covered?

The PPA uses the general term of public contract. A public contract is a contract which a purchaser concludes with one of the following subject matters (which also has a value over the applicable threshold):

- purchase of goods (public supply in terms of Directive 2004/18/EC);
- construction works (public works);
- construction concessions (public work concessions);
- purchase of services (public services); and
- service concessions (public service concessions).

2.4 Are there financial thresholds for determining individual contract coverage?

There are two applicable threshold values in Hungary: the national threshold value; and the EC threshold value. Below the national threshold value, the PPA does not apply. In case the national threshold is exceeded, there are different regimes applicable depending on whether the amount of the EC threshold is exceeded or not.

The estimated value can be determined as the highest amount of consideration (inclusive options) generally requested or offered for the subject matter of the given contract. This value is calculated without tax. There are special calculation rules for the estimated value for specific contracts (e.g. for leasing with unlimited duration at 48 times of the monthly rent). In compliance with the Directives, there are different thresholds for the public sector and the utility sector. The national threshold values for 2011 are as follows [see Endnote 1]:

Public sector:

- public supply: HUF 8,000,000;
- public works: HUF 15,000,000;
- public work concessions: HUF 100,000,000;
- public services: HUF 8,000,000; and
- public service concession: HUF 25,000,000.

Utility sector:

- public supply: HUF 50,000,000;
- public works: HUF 100,000,000; and
- public services: HUF 50,000,000.

2.5 Are there aggregation and/or anti-avoidance rules?

In accordance with the Directives, there are particular rules concerning aggregations. When calculating the estimated value, the value of all procurements concerned must be calculated in the aggregate if: (i) these procurements are procured within the same fiscal year; and (ii) the procurement items and purposes are the same or their utilisation directly connected to each other.

There is a prohibition to dismember the procurement or abuse the calculation of the estimated value, when applying the specific aggregation rules set out in the PPA.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

The PPA distinguishes between public work and service concessions, which are types of public contracts by which the consideration consists of either the right of the use of the construction, respectively the right to exploit the service for a specific duration or these rights combined with payment. Certain service concessions – e.g. gambling operations, transport of products through pipelines, construction of national public roads or mining – also fall within the scope of the Act XVI of 1991 on Concessions (Concession Act). In case of public work and service concessions, both the PPA and the Concession Act are applicable.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The PPA distinguishes between procedures with one phase, two phases (consisting of both a participation or qualification phase and a bidding phase), and a three-phase procedure, the competitive dialogue (which contains a qualification phase, a dialog phase and a bidding phase). Under the PPA, purchasers are free to award public contracts either by applying the ‘open’ procedure (a one-phase procedure starting with the contract notice and followed by the offers), or the so-called ‘invitation’ procedure – the restricted procedure in terms of the Directive 2004/18/EC – by which only participants qualified (short-listed) in the participation phase may submit an offer.

The purchaser may use a negotiation procedure (with or without publication of the contract notice) only if (i) an open or restricted procedure or a competitive dialogue has failed, and (ii) in exceptional cases for public works and supply or service contracts (e.g. when the nature of the public works or supply does not permit prior overall pricing or in case of research and development contracts). Pursuant to the new PPA, if the estimated purchase price of goods and services does not reach HUF 25 million, or the estimated value of the construction project does not exceed HUF 150 million, the purchaser may not need to announce an invitation for tender but may instead ask at least three possible SME bidders to make an offer.

The purchaser may use the competitive dialogue only if he is not able to specify (i) the technical specifications, or (ii) the type of contract or the legal and/or financial make-up of the contract during a usual public procurement.

Beside these procedures, the purchaser may use the framework agreement and the dynamic purchasing system.

The purchaser may conclude a framework agreement with the participant as a consequence of the above-referred procedures.

The dynamic purchasing system means a definite term electronic system which operates the most frequent procurements. In this e-system, all participants who met the application criteria may apply.

The free choice among the different types of procedures is restricted as the PPA set forth the conditions of each type. However, in certain cases the PPA allows the free choice (e.g. in case of SME bidders under certain thresholds).

3.2 What are the minimum timescales?

Open procedure:

For receipt of tenders: 45 days starting on the day of the publication

of the call for tender (29 days in limited cases – if the announcement has already been published before the call for tender and 22 days in urgent cases).

For evaluating/awarding the tenders (validity periods of the tenders): 30 days in general and 60 days in case of public works, starting on the day of closing the tender. Upon request, the validity periods are subject to a maximum 60-day extension.

Restricted procedure:

For receipt of tenders: 40 days starting on the day of publication of the call for tender (26 days in limited cases – where the announcement has already been published before the call for tender; and in urgent cases 21 days).

For evaluating/awarding the tenders (validity periods of the tenders): 30 days in general and 60 days in case of public works, starting on the day of closing the tender. Upon request, the validity periods are subject to a maximum 60-day extension.

Negotiation procedure:

For evaluating/awarding the tenders: 30 days validity periods, starting on the day of closing the negotiations (60 days in case of public works).

Competitive dialogue:

For receipt of tenders: 30 days, starting on the day of publication of the call for tender (60 days in case of public works). The purchaser has 5 additional days to invite participants for the competitive dialogue.

For evaluating/awarding the tenders (validity periods of the tenders): 30 days, starting on the day of closing the tender (60 days in case of public works).

3.3 What are the rules on excluding/short-listing tenderers?

With regard to the exclusion grounds, the PPA follows Directive 2004/18/EC and lists the same exclusion grounds. The PPA distinguishes between exclusion grounds that apply automatically and exclusion grounds that can be applied by the purchasers. Mandatory exclusion grounds are, for example, the fact that the participant: (i) is under liquidation, a court decision ordering bankruptcy proceedings against him has been published or liquidation proceedings have been validly ordered against him; (ii) in a former public procurement procedure has not performed his payment obligation in an amount exceeding 10% of the total payables towards his subcontractors in relation with contracts concluded after 15 September 2010, or his delay of payment exceeds 15 days; (iii) has been convicted for any offence concerning his professional conduct; (iv) defaulted in payment of social security contributions or taxes; or (v) had been excluded from a former public procurement procedure due to submitting false information, etc.

Exclusion grounds that may be applied are, for example, the fact that the participant breached his obligation under a public contract or does not have in his state of incorporation the licences or chamber-membership necessary to perform a given service. Furthermore, there are some grounds which on occurrence during a public procurement procedure must lead to the exclusion of the tenderer, such as submitting false information, as a result of which his offer could have been avoidable to be declared invalid or the consideration of his offer could have been more favourable.

Short-listing can be applied either in a restricted procedure or in a negotiation procedure. In a restricted procedure, the purchaser may prescribe in the contract notice the number of the participants – at least five, if possible – who will be invited to submit an offer. In a

negotiation procedure, the purchaser is allowed to go on into the next negotiating round with the tenderers submitting the best bids by the time (at least three tenderers), provided this was prescribed in the invitation to offer.

3.4 What are the rules on evaluation of tenders?

The purchaser may evaluate the tender based on the concept of “lowest price” or “the most advantageous offer on the whole”. If the purchaser chooses the most advantageous offer, it must determine the objective methods of evaluation such as: sub-factors of the tender; measures of such factors; minimum and maximum scores (can be given for the exact factor); and methods of calculating and evaluating such factors. The PPA contains some examples for such factors. These can be: quantitative or qualitative measures; functionality; sustainability; and technical value.

3.5 What are the rules on awarding the contract?

The decision on awarding the contract must be taken within 30 days (and in case of public works, within 60 days) from the date of closing the application phase. After the expiry of 30/60 days, the validity of the tenders expires and the tenderers are not bound to their bids anymore. Even though the purchaser may request for the extension of the validity period, the participants are not obliged to extend the validity of their offers.

The award must be announced (together with its proper reasoning) in a written form to all participants (applied or took part in the tender) within 3 working days of the date of passing the decision on awarding the contract.

The purchaser is allowed to conclude the contract with the best tenderer only after the expiration of the standstill period.

3.6 What are the rules on debriefing unsuccessful bidders?

Both successful and unsuccessful tenderers must be informed by written notice on the decision and a proper reasoning thereof within 3 working days, starting on the day of passing such decision.

3.7 What methods are available for joint procurements?

The PPA provides for so-called centralised public procurements: public organisations subordinated to the government may conduct their purchases via a central purchasing body (Central Service Directory of the Government – “központi beszerző szervezet”), which totals the requested purchases and conducts centralised public procurements. This procedure is subject to a special regulation of the Government Decree 168/2004 (V.25.) on the System of Centralised Procurement. The Central Service Directory generally applies the dynamic purchasing system in order to procure goods, services or works for the Ministries, public funds etc. and of any purchasers who join voluntarily this procurement regime as well. However, it is also possible that for certain purchases, contracting authorities conduct together joint procurement procedures.

3.8 What are the rules on alternative bids?

Alternative bids must be only allowed where (i) the award is made on the “most advantageous offer on the whole” basis, and where (ii) the consideration of alternative bids was indicated in the contract notice. In case alternative bids are allowed, the purchaser has to

provide details of the minimum requirements, technical specifications of the public procurement and any other conditions to be met by a variant.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The grounds for exclusion/exemption are in compliance with the Directives. Under the new regulation, offshore companies or companies in which a participation of an offshore entity exceeds 25 per cent cannot be bidders in public procurement procedures.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

In-house procurements (procurements between the state or local municipalities and their enterprises) have been simplified. There is no need to conduct public procurement procedures for contracts to be concluded between the State or local municipalities and their own enterprises/subsidiaries if at least 80 per cent of the revenue of such enterprises otherwise stems from the owner. However, such contracts may not be concluded for a period exceeding five years and must be reconsidered accordingly.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

The PPA sets out the specific provisions relating to remedies in compliance with the Directive 2007/66/EC. The review procedure may be commenced – either at request or *ex officio* – in all cases where it is suspected that the provisions of the PPA and other laws and regulations governing public procurement have been infringed. Moreover, the review procedure may be commenced in case of unlawful bypass of the public procurement procedure. A review procedure can be initiated by a participant of the public procurement procedure (e.g. contracting authority or tenderers), a third party (not participating in the procedure), whose right or lawful interest has been violated or risked by an unlawful conduct or infringement of the PPA or representative bodies and chambers, whose activity is connected to the procurement item. As a general rule, the disputes concerning the contracts awarded during a public procurement procedure fall under the competence of regular courts, while the Public Procurement Arbitration Committee (“Arbitration Committee”) decides on acts and/or negligence that infringe the relevant public procurement acts.

As mentioned above, review procedures can be initiated *ex officio*; the president of the Authority of Procurements, the State Audit Office of Hungary and the Hungarian Competition Authority, for example, are also entitled to challenge an infringement if they become aware of such, generally within 30 days from the award. Irrespective of whether the review procedure had been initiated *ex officio* or at request, the same terms apply to all review procedures. Once the request for review procedure has been admitted, the Arbitration Committee may – at its sole discretion – (i) order the suspension of the public procurement procedure, (ii) prohibit the conclusion of a contract not yet signed, or (iii) request the

contracting entity under review to allow the applicant to enter the procedure.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

The PPA provides for a so-called Prior Settlement Procedure. The participant can initiate the Prior Settlement Procedure within three working days after obtaining knowledge of the unlawful conduct, if he considers the written evaluation, any procedural action of the purchaser or any documents produced during the procedure partly or entirely unlawful. The participant or the representative bodies and chambers whose activity is connected to the procurement item can initiate the Prior Settlement Procedure until the tenth day prior to the expiration deadline for application or participation (in the case of simplified or accelerated procedure until the expiration deadlines), if they consider the invitation for tender, the invitation for participation, the documentation or the amendments thereof are partly or entirely unlawful. Besides this, there are no proceedings or applications outside the legislation.

5.3 Before which body or bodies can remedies/enforcement be sought?

Proceedings initiated in connection with infringements of the procedures and amendment or fulfilment of public contracts affected by the violation of the PPA fall within the scope of the Arbitration Committee, a specific administrative tribunal. Primarily it is exclusively at the Arbitration Committee’s discretion to decide whether an action or misconduct qualifies as an infringement of the PPA or not. Therefore, a claim based on an infringement of the PPA (e.g. for damages or to declare the contract ineffective) can only be filed before court after the Arbitration Committee decided that the challenged action constitutes an infringement. The judicial review of the Arbitration Committee’s decision falls within the competence of the Municipality Court of Budapest and it may be submitted within 15 days from the delivery of the decision.

5.4 What are the limitation periods for applying for remedies/enforcement?

The general deadline for application is 15 days, calculated from the day when the infringement happened and 10 days calculated from the day when the unlawful decision was delivered. The PPA sets out presumptions regarding the dates of obtaining knowledge. No application can be submitted after 90 days from the infringement/violation of the law. In case the petitioner only becomes aware of the fact that a public contract had been concluded without a public procurement procedure after the aforementioned deadline, the public contract can be challenged within one year before court. The right to initiate a review procedure ceases to exist after these deadlines. A claim for judicial review against the Arbitration Committee’s decision must be submitted within 15 days of the delivery.

5.5 What remedies are available after contract signature?

A public contract may not be concluded during the standstill period – or as mentioned above – in case a review procedure is initiated. However, it may happen that a contract has been concluded during the standstill period or even without a public procurement procedure (direct award). For such cases the PPA – in compliance

with the Directive 2007/66/EC – entitles certain persons (see question 5.1 above) to challenge such public contracts, and enables the court under certain conditions to set aside the signed contract, by rendering it ineffective. However, prior to the remedy procedure before the court about ineffectiveness, a prior decision of the Arbitration Committee – declaring the infringement of the PPA – is necessary.

The claimant may request the court review in case of public contracts concluded, based on a decision which has been passed by breaching the rules of public procurement. In such cases, both the revision of the underlying decision and the invalidity of the contract have to be requested by the court at the same time (practically in the same statement of claim).

5.6 What is the likely timescale if an application for remedies/enforcement is made?

The Arbitration Committee must decide within 15 days (in case no hearing is held) or 30 days (if a hearing is held). These deadlines can be extended by 10 days.

The Arbitration Committee must decide within 60 days if the subject matter of the arbitration is the unlawful modification or fulfilment of an existing public contract. This deadline can be extended by 30 days.

Due to these short deadlines, the Arbitration Committee holds a hearing in most of the cases.

5.7 Is there a culture of enforcement either by public or private bodies?

As mentioned above, some public bodies have the right to initiate proceedings. In numerous cases, the President of the Authority of Procurements initiates review procedures *ex officio*.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

The Arbitration Committee has been applying the previous PPA in a very strict manner and this approach often resulted in decisions, which made public purchases more difficult rather than easier. On the other hand, it seems that some developments have been initiated by the courts through their interpretation of the law in practice, just as it happened for example before the Municipality Court of Budapest: the court ruled that although the PPA stipulates that in a negotiated procedure at least three tenderers have to be invited to submit an offer, it is not against the law to proceed with the procedure and award the contract even in case the number of the invited tenderers does not reach the above number. This interpretation of the Municipality Court of Budapest has been confirmed by the ECJ (C-138/08).

5.9 What mitigation measures, if any, are available to contracting authorities?

The mandatory provisions of the PPA to be closely followed by the contracting authorities do not contain any explicit provisions regarding mitigation of liability under certain circumstances. However, in the so-called “national procedure” (which applies in case the volume of the public procurement is below the EU value thresholds), the contracting authorities are allowed to create and apply their own public procurement rules, which may differ from the general mandatory rules (e.g. in respect of the provisions on the

reasons resulting in invalidity of the applications or procurement tenders etc.).

Further, in case of SME bidders the PPA also allows certain different procedure rules to apply: if the estimated purchase price of goods and services does not reach HUF 25 million, or the estimated value of the construction project does not exceed HUF 150 million, the purchaser does not need to announce an invitation for tender but may instead ask at least three possible SME bidders to make an offer and select the winner from among them in the course of a negotiation procedure type of procurement.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) pre-contract signature? If not, what are the underlying principles governing these issues?

As to changes during a procedure, it has to be outlined that the purchaser may amend or change the conditions of the tender or withdraw the contract notice until the deadline for the submission of the offers. The tenderers may also change or withdraw their offer within this period. Generally, the public contract must be concluded according to (i) the conditions published at the outset of the tender (the contract notice and documentation also contain a draft of the public contract), and (ii) the conditions set out in the offer; in case of a negotiated procedure when the conditions of the contract are – up to a certain level – negotiable.

6.2 To what extent are changes permitted post-contract signature?

The post-signature changes are permitted only if these changes are not significantly modifying the original call for tender; the documentation or the content of the tender in a way that: (i) it could result that more participants could apply for the tender or could result in the change of the winner; (ii) it changes the balance of the contract in favour of the winner; or (iii) inserts a new obligation for the purchaser. A 5 per cent increase of the original consideration must be considered as a significant change in the balance of the given contract.

The PPA imposes strict reporting obligations on the purchasers. Amendments/changes to a public contract, as well as the performance, must be reported to the Authority of Procurements. In case of contracts with a term over one year or an unlimited term, the performance must be reported yearly. In the event the amendment/change to the contract most likely does not comply with the PPA, an *ex officio* review procedure is risked. Therefore, purchasers are cautious with this issue. However, since the obligation to justify an amendment/change to a public contract lies in the common interest of both the purchaser and the former tenderer, in most cases amendments/changes will be justified.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The PPA makes no reference to privatisations, which are governed

by separate legislation: the Act CVI of 2007 on State Property. Public procurement procedures regarding public works or public services, in which the (partial) consideration is the transfer of a state-owned real estate where the transferred real estate itself is not subject to the procurement, shall qualify as public privatisation tender. Such procedures may only commence after the Hungarian National Asset Management Zrt (the manager of state-owned assets) approved the transfer of the property and commissioned the purchaser to conduct the transfer.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

PPPs are disputed in Hungary and there is no separate PPP legislation in force. The question of whether purchases within the framework of a PPP fall under the PPA and/or the Concession Act has to be examined in each case, and depends on the subject matter, the value of the purchase and the nature of the public partner.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Act No. CVIII of 2011 on public procurements (as the new PPA) was promulgated on 20 July 2011 to replace the former public procurement act that had been in effect since 2003. The PPA shall enter into force on 1 January 2012. Pursuant to the official interpretation to the new PPA, the adoption of the new regulation became necessary with regard to the undue complexity and non-transparent nature of the former public procurement act.

The new PPA also aims to improve the chances of small and medium enterprises (SMEs) to successfully participate in the public procurement procedures and to decrease the go-round debts.

In order to achieve the goal of SMEs obtaining more assignments from public procurements, purchasers may choose to give the right of participation in the procurement procedure to enterprises whose annual net revenue does not exceed HUF 100 million in the case of a purchase of goods and services, or HUF 1 billion in the case of construction works. This rule may only be applied for construction works and concessions if the purchase does not exceed HUF 500 million (this threshold may be extended pursuant to recent initiatives, which are not yet decided).

SMEs are also favoured by another new rule. If the estimated purchase price of goods and services does not reach HUF 25

million, or the estimated value of the construction project does not exceed HUF 150 million, the purchaser may not need to announce an invitation for tender but may instead ask at least three possible SME bidders to make an offer. In such a case, the Public Procurement Arbitration Board, acting as a general supervisory body, need not even be notified.

The rules regarding in-house procurements (procurements between the state or local municipalities and their enterprises) have been simplified. There is no need to conduct public procurement procedures for contracts to be concluded between the State or local municipalities and their own enterprises if at least 80 per cent of the revenue of such enterprises otherwise stems from the owner. Such contracts may not be concluded for a period exceeding five years and must be reconsidered accordingly.

Under the new regulation, offshore companies or companies in which a participation of an offshore entity exceeds 25 per cent cannot be bidders in public procurement procedures.

Bidders with pending payment obligations to subcontractors related to former public procurement procedures are also disqualified and prohibited from participating. But this rule only applies to contracts concluded after 15 September 2010, in relation to former public procurement procedures. The fact that the debt has been due for more than 15 days must be verified by an enforceable administrative or court decision.

Procurements below an estimated value of HUF 21 million in the case of the purchase of goods and services, and HUF 263 million in the case of construction works, representing the EU thresholds, may be conducted according to the so-called national procedure rules. In the framework of the national procedure rules, the purchasers are entitled to create and apply their own procedural rules.

The New Act is considerably shorter than the former legislation. It is claimed that the new legislation is more transparent, simple and understandable. However, several material issues are not regulated in the New Act at all, meaning it is more a framework act than a comprehensive regulation of the public procurement procedure. Detailed rules are promised and anticipated to be laid down in government decrees at later stages.

Endnote

1. The new threshold values for 2012 will be set out in the annual Budget Act for 2012, which has not yet been adopted at the time of finalising this chapter.

**Dávid Adamov**

Schoenherr Hetényi Law Firm
Buday László utca 12.
1024 Budapest
Hungary

Tel: +36 1 345 8778
Fax: +36 1 345 8777
Email: d.adamov@schoenherr.eu
URL: www.schoenherr.eu

Dávid Adamov is an attorney at law with Schoenherr Hetényi Law Firm, who joined the firm in January 2010. Dávid specialises in intellectual property law, consumer protection law and public procurement law. Dávid is fluent in English and speaks German as well.

**János Juhász**

Schoenherr Hetényi Law Firm
Buday László utca 12.
1024 Budapest
Hungary

Tel: +36 1 345 8778
Fax: +36 1 345 8777
Email: j.juhasz@schoenherr.eu
URL: www.schoenherr.eu

János Juhász is an associate of Schoenherr Hetényi Law Firm and a member of the regulatory, as well as the banking & finance practice group of the Budapest office. János focuses mainly on energy, regulatory and banking and finance matters. He speaks German and English.

schönherr

Schoenherr is a leading full service law firm in Central Europe. About 300 professionals service national and international clients from our offices in Belgrade*, Bratislava, Brussels, Bucharest, Budapest, Kyiv, Ljubljana*, Prague, Sofia*, Vienna, Warsaw and Zagreb* (*cooperation office). Operating in a rapidly evolving environment, we are a dynamic and innovative firm with an effective blend of experienced lawyers and young talent. As one of the first international law firms to move into CEE/SEE, we have grown to be one of the largest firms in the region. With 12 offices and several country desks, our comprehensive coverage of the region means we can offer solutions that perfectly fit the given industry, jurisdiction and company.

The International Comparative Legal Guide to: Public Procurement 2012

Other titles in the ICLG series include:

- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Gas Regulation
- Insurance & Reinsurance
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Real Estate
- Securitisation
- Telecommunication Laws and Regulations
- Trade Marks

To order a copy of a publication, please contact:

Global Legal Group
59 Tanner Street
London SE1 3PL
United Kingdom
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk