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CHANGES IN HUNGARIAN PUBLIC PROCUREMENT LAW

In this article, we provide a brief overview of some of the changes in the rules governing Hungarian public procurement procedures, changes which entered into force on 1 July 2013 and which are of a larger practical relevance.

The Act no CXVI of 2013 on the amendment of the Act no CVIII of 2011 on Public Procurement Proceedings brought about some important changes effective as from 1 July 2013. Below, we will briefly discuss two of these changes.

(i) Naming of new business association in the public procurement

Under the rules effective prior to 1 July 2013, if a participant/bidder received a letter of request from the entity calling for a bid, in which letter of request the participant/bidder was called upon to make a supplementary submission and to file the missing documents and information, the participant/bidder was not allowed to name a new business association in the public procurement procedure within the framework of the supplementary filing. Failing to comply with this rule resulted in the submitted application/bid being rendered invalid. In other words, if a bidder named a few sub-contractors in its original bid and then it subsequently turned out that the bidder would not be able to use the services of a given sub-contractor out of those which were named in the original bid, the bidder could not name a new sub-contractor (i.e. a sub-contractor other than those named in the original bid) within the framework of the supplementary filing. In practice, this resulted in a situation where a company - otherwise capable of performing the work as required by the entity calling for bids - and which had a real chance to win the tender, was ultimately unable to make a proper submission.

As opposed to the above, pursuant to the new rules effective from 1 July 2013, the aforementioned prohibition no longer exists, i.e. participants/bidders may name a new business association in the documentation filed additionally as a supplementary filing and doing so does not result in the bid becoming invalid. In practice, this will most likely result in more valid bids being submitted to the entities calling for bids, which is also in the best interest of the Hungarian budget and serves the basic principle of the efficient use of public funds.

(ii) Treatment of business secrets

During public procurement procedures, participants/bidders were in the habit of declaring that – except for the information sheet containing their basic data – their entire submission

qualified as a business secret and that, as such, they expected the entity calling for bids to treat the entire submission as a business secret which was not open for review for other participants/bidders. In practice, this oftentimes made it impossible for the other participants/bidders to seek remedy (since they could not even review the submission of their competitors and, therefore, could not tell if the submission made was in compliance with the applicable laws and tender requirements).

Even though, in our view, the practice described above was definitely not in line with the provisions of the Public Procurement Act and of the Civil Code governing business secrets, unfortunately the entities calling for bids and even the Public Procurement Board (which is the authority in charge of making administrative decisions based on requests for remedy filed with it) accepted and agreed to this practice and did not challenge it in any way.

The law-maker recognized the above discrepancy concerning business secrets and adopted a change in the provisions of the Public Procurement Act. Under the new rules, also with regard to the definition of business secrets under the Civil Code, only that information, the publication of which would cause a considerable harm to the participant's/bidder's business, may qualify as business secrets. Taking the new rule into account, it is expected that the entities calling for bids and the Public Procurement Board will no longer follow their previous practice and that, as a consequence, participants/bidders will be able to review the bids of their competitors to the extent that they do not qualify as a business secret. As a result, participants/bidders will hopefully be put in a position to seek remedy if, based on the findings of their review of a bid, they detect a violation of the public procurement rules and/or the tender requirements.

It is worth noting that even though the new rules discussed above entered into force on 1 July 2013, they apply only to public procurement procedures commenced on or after 1 July 2013. In other words, if a public procurement procedure started prior to 1 July 2013 and is still ongoing, the old rules are applicable to such a procedure.

This summary is a publication of Szecskay Attorneys at Law intended for guidance purposes only. It should not be regarded as legal advice or a legal opinion. Should you have any legal questions on a specific matter or require more information, please contact our colleague on the contact details below:

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