

# Client alert

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## Amendment to the Public Procurement Act

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As of 1 April, 2011, several important changes to the Slovak public procurement regime will take effect

This Alert highlights the main changes introduced by the latest Amendment<sup>1</sup> to the Slovak Public Procurement Act<sup>2</sup> (PPA). While introducing greater transparency and public scrutiny to public tenders, the Amendment is likely to result in some uncertainty and risks for contracting authorities and their counterparties.

### 1. MORE ENTITIES FALL UNDER THE DEFINITION OF CONTRACTING AUTHORITY

The Amendment **extends the scope** of public procurement rules to persons hitherto not covered.

The Amendment affects situations where a **contracting authority** (in Slovak: *verejný obstarávateľ*) **provides money to an entity** that is itself not a contracting authority or a contracting entity (in Slovak: *obstarávateľ*). If such third-party entity (**Quasi-contracting entity**) then uses any part of such money **to procure a further contract**, even if the public funds represent only a small proportion of the contract price, the Quasi-contracting entity will have to apply public procurement rules. However, only the public funds will be considered the **expected value of the contract** for the purposes of public procurement, not the overall value of the contract. This will especially affect entities that are the recipients of public funds under investment-aid, guarantee or tax incentive schemes.

The **definition of contracting authority** has also been modified. It now includes each legal entity in which a contracting authority exercises **direct or indirect<sup>3</sup> control**. Secondly, a **legal entity established for the specific purpose of providing services in the general economic interest**, which are not commercial or industrial also falls under the definition of a contracting authority if another contracting authority appoints or elects more than one half of the members of its supervisory body. This category includes, among others, the Social Insurance Company, the National Property Fund and the Slovak Land Fund. Nevertheless, these entities were subject to the public procurement rules also prior to the Amendment, therefore it remains to be seen how many entities will be practically affected by this change of the definition of a contracting authority.

### 2. ELIMINATION OF SPECIAL TREATMENT FOR NON-PRIORITY SERVICES

Before the Amendment, contracts for **non-priority services** (listed in Annex 3 to the PPA, such as hotel and restaurant services, transportation, legal, training and healthcare services) of **below-limit** value were awarded using the procedures for **below-threshold** contracts. The publication of the results of public procurement in these cases was also optional. Following the Amendment such publication will be **mandatory** and the procurement method will correspond to the value of the contract, just like in the case of other services.

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<sup>1</sup> The amendment was published as Act No. 58/2011 Coll.

<sup>2</sup> Act No. 25/2006 Coll.

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<sup>3</sup> formerly only direct control was deemed relevant

### 3. LOWER THRESHOLDS MEAN STRICTER PROCUREMENT REGIME

For the purposes of the PPA, contracts are assigned into various categories according to their value. The categories determine the methods of public procurement to be used. The Amendment lowers the values in each category, resulting in **stricter procurement methods** having to be used by the contracting entities. Whereas contracts for services worth less than EUR 30,000 did not previously have to be procured pursuant to the PPA at all, now every contract worth at least EUR 10,000 falls under the PPA rules.

The new thresholds are as follows:

Type of contract	Old threshold (EUR)	New threshold (EUR)
Below-limit contract for goods or services ( <i>podlimitná zákazka</i> ),	60,000	40,000
Below-threshold contract for goods or services ( <i>podprahová zákazka</i> ),	30,000	10,000
Below-threshold contract for construction works	120,000	20,000
Below-limit contract for construction works	360,000	200,000

### 4. GREATER TRANSPARENCY

Contracting authorities will have to **notify** the Office for Public Procurement (the **Office**) of their entry into a contract within seven business days of its publication pursuant to the mandatory publication rules provided for in separate legislation<sup>4</sup>. If a certain contract, concession agreement, framework agreement or an amendment to a contract is not subject to the mandatory publication rules, the contracting authority is obliged to **send the Office a copy of the actual contract** (or other document in question) within seven business days of its execution. The sending of the documents to the Office is followed by the obligation of the Office to keep records of such documents and to **publish** them. On the other hand, the contract would remain valid even if this obligation is not met – unless the Office or a prosecutor files a petition to the court to declare such

contract invalid due to a breach of public procurement rules (see article 9 of this alert below).

The publication duties do not relate just to the concluded contract, which is essentially the final step in the public procurement procedure. Each contracting authority and contracting entity is now obliged to also send to the Office **for publication a whole range of pre-contractual documents** obtained in various stages of the public procurement procedure, including:

- A copy of the minutes containing the evaluation of how candidates complied with the pre-qualification conditions (in Slovak: *podmienky účasti vo verejnom obstarávaní*)
- Copies of tenders of all tenderers that were delivered within the submission deadline;
- A copy of the minutes from the opening of the tenders.

The Office must publish such documents "without delay" following their receipt.

Related to the publication duties is the protection of **business secrecy and confidential information**. Under the Amendment, contracting authorities are obliged to maintain confidentiality of information marked by candidates as "business secret" or "confidential". Nevertheless, this obligation does not apply if it would prevent the contracting authority from publishing information concerning: (i) the outcome of the public procurement, (ii) the identity of members of the tender evaluation commission; and (iii) the opening of tenders and the obligations under the mandatory publication of contracts.

### 5. IMPROVED ACCESSIBILITY TO DATA

Another novelty introduced by the Amendment, which comes into force as of **1 September 2011**, is the obligation of the Office to **publish** the Journal of Public Procurement in the form of **structured data** that enables further **automated processing**. While the Amendment itself does not further explain the practical impact of this change, based on publicly available information this should create, for example, the possibility to search aggregated data concerning the outcome of public procurement contests nationwide and the ability to compare the prices at which a certain commodity was offered.

<sup>4</sup> on which see another recent A&O alert

## 6. PREVENTING "TAILORED" CALLS FOR TENDERS

As of 1 April 2011 the contracting authorities and contracting entities will be obliged to **justify the adequacy of each condition for participation** and the necessity for its **inclusion** in the conditions for participation. Such justification must be contained in the announcement of public procurement.

If the documents submitted in the pre-qualification stage do not enable the contracting authority to assess their validity or the satisfaction of entry conditions by a candidate, it is obliged to send a written **request for explanation** to the candidate in question. This should help to prevent candidates being excluded from tenders on the basis of mere technicalities that can be easily remedied.

## 7. LOW-PRICED BIDS HARDER TO DISQUALIFY

If the contracting authority wishes to disqualify a tender due to an abnormally low price, it must request the tenderer to provide an explanation within a certain time period (at least five days) and (if it is not satisfied with the explanation) invite the tenderer to a **personal consultation**. Only if the tenderer fails to provide such explanation or if such explanation does not meet the statutory requirements, may such tenderer be disqualified.

## 8. MANDATORY USE OF ELECTRONIC AUCTION FOR SOME CONTRACTS

The use of electronic auctions will become mandatory in all open procedures<sup>5</sup>, restricted procedures<sup>6</sup> and negotiated procedures with publication<sup>7</sup> that concern contracts for the **delivery of goods**. The mandatory use of electronic auction also extends to contracts for the delivery of **services or construction works**, if the technical requirements concerning such services or works can be exactly stipulated.

## 9. STRONGER ENFORCEMENT OF PUBLIC PROCUREMENT RULES

Following the Amendment, the Office and public prosecutors (*prokurátori*) will have a new and important power: if a contracting authority enters into a contract in breach of the public procurement rules, the validity of such contract can be challenged within one year from its execution by either the Office or a public prosecutor. It remains to be seen, especially in big value tenders, how winning tenderers and their lenders will deal with this increased risk of invalidity.

## 10. OTHER CHANGES

The competitiveness in **restricted procedures** has been increased by raising the minimum number of candidates whom the contracting authority must invite to submit tenders **from five to ten candidates** (unless the total number of candidates is lower than ten).

The Amendment introduces a new, relatively low deposit of EUR 600 for tenderers appealing the disqualification of their bid due to an abnormally low price in the **appeal proceedings before the Office**.

### Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

**Martin Magál**  
Tel +421 2 5920 2412

**Hugh Owen**  
Tel +421 2 5920 2414

**Renátus Kollár**  
Tel +421 2 5920 2423

<sup>5</sup> The open procedure is the most competitive procedure in public procurement, in which all candidates that qualify are invited to submit tenders (in Slovak: *verejná súťaž*).

<sup>6</sup> The restricted procedure is similar to an open tender, however the contracting authority may restrict the number of candidates whom it will invite to submit tenders (in Slovak: *užšia súťaž*).

<sup>7</sup> The negotiated procedure with publication is announced for an unlimited number of candidates, however the contracting authority may restrict the number of candidates whom it will invite to submit tenders and then negotiate with the selected candidates about the conditions of the tender (in Slovak: *rokovacie konanie so zverejnením*).

Allen & Overy Bratislava, s.r.o.

Eurovea Central 1, Pribinova 4, 811 09 Bratislava, Slovak Republic | Tel +421 2 5920 2400 | Fax +421 2 5920 2424 | [www.allenoverly.com](http://www.allenoverly.com)

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