KÖZBESZERZÉSI HATÓSÁG

GUIDELINE OF THE COUNCIL OPERATING WITHIN THE FRAMEWORK OF THE PUBLIC PROCUREMENT AUTHORITY

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Guidline of the Council operating within the framework of the Public Procurement Authority on certain questions related to the modification and performance of contracts in accordance with the PPA

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I. Introduction

The guideline summarizes the information related to the modification and performance of the contract in accordance with the relevant rules of the PPA. Pursuant to Article 197 (1) of the PPA that entered into force on 24 December 2015 the provisions of the PPA on contract modifications [Article 141 of the PPA], and the rules governing the change in the person of the winning tenderer [Article 139 of the PPA] shall also be applied to the possibility of modifying contracts concluded as a result of procurement or public procurement procedures without conducting a new public procurement procedure. As a general rule, the other legislation amending the PPA, [especially Act CXL of 2016 on the amendment of Act CXLIII of 2015 on public procurement and of certain related laws (hereinafter: Mod. Act No. 1), Act CLXXXVI of 2017 on the amendment of laws related to the reduction of administrative bureaucracy and the simplification of certain official procedures (hereinafter: Mod. Act No. 2), and Act LXXXIII of 2018 on the amendment of Act CXLIII of 2015 on public procurement (hereinafter: Mod. Act No. 3), Act CXX of 2019 Act (hereinafter Mod. Act No. 4) and Act CXXVIII of 2020 (hereinafter: Mod. Act No. 5.) unless the transitional provision related to the given amendment provides otherwise, applies only to public procurement procedures started after their entry into force. Article 197 (22) of the PPA introduced by Mod. Act No. 5. orders Article 138 (3) to be applied to contracts concluded on the basis of public procurement procedures started before the entry into force of this provision, with respect to subcontractors that have not yet been notified in the case of concluded contracts. It is not necessary to modify the draft contract included in the public procurement documents or the concluded contract, the contract can be concluded with the content of Article 138 (3) - in the appropriate case, in contrast to Article 131 (1), or in the case of already concluded contracts, the winning tenderer can declare not only in the contract that it will not use a subcontractor subject to exclusion.

II. Modification of the contract

Freedom of contract is a basic principle of civil law; according to this, the free will of the parties prevails in determining the content of the contract and concluding the contract. Freedom of contract is a basic principle that applies even during the existence of the contractual relationship, so in civil law relationships it also governs when amending the contract. Accordingly, Section 6:191. (1) of Act V of 2013 on the Civil Code (hereinafter: Civil Code) states that the parties may, by mutual agreement, modify the content of the contract or change the legal title of their commitment. At

the same time, the freedom of contract prevails under many restrictions in modern economic conditions.

With regard to the fact that pursuant to Article 2 (8) of the PPA provisions of the Civil Code shall be applied for public procurement contracts as well, with the deviations stipulated by the PPA, the unanimous will and mutual agreement of the parties is also necessary to modify the public procurement contract - unilateral modification of the contract is also only possible in the cases provided for in the Civil Code. Modifications to the contract may only take place during the term of the contract (e.g. in the case of a fixed-term contract before the end of the fixed contractual period), i.e. in the event that circumstances arise during the performance of the contract that require modification of the contract. A terminated or voided contract cannot be modified afterwards[1]. In this context, the case where the winning tenderer does not meet the stipulated deadline for the performance of the contract should be highlighted. In the latter case, the contract is not terminated or loses its effect, but the legal consequences of the delay are set in (e.g. the contracting authority can enforce a penalty for delay), which does not preclude the modification of the contract.

At the same time, the Public Procurement Authority draws attention to the fact that it leads to a breach of basic principle if, in certain cases, the contracting authority as a contracting party fails to enforce claims resulting from a breach of contract [PPA Article 142 (2)], and that the modification of the contract results in the nullity of the contract based on Article 142 (3) of the PPA, if it is aimed at exempting the winning tenderer from the breach of contract (or falling into breach of contract) and its legal consequences - not including the exercise of the right of termination or rescission, or which is aimed at taking over the additional work costs charged to the winning bidder or unreasonably other risks borne by the winning bidder based on the contract by the contracting authority.
Basically, the regulation approaches the modification of the contract from the point of view of the cases in which it is possible to speak of a new procurement, the implementation of which requires a public procurement procedure.

Article 141 of the PPA defines several legal grounds for the legality of modifying the contract, the existence of one of which establishes the possibility of modifying the contract without conducting a new public procurement procedure. The PPA does not set up a hierarchy between the legal grounds, so the contracting authority can examine them in any order. It may happen that more than one legal bases are fulfilled, in which case the contracting authority can freely decide which legal basis to refer to in connection with the modification of the contract. The existence of a legal basis defined in the PPA is a question of fact that does not depend on whether the contracting authority determines it correctly. In any case of contract modification, the contract modification cannot be considered illegal. If any or even several cases apply

[1] See Decision No. D.146/2010. of the Public Procurement Arbitration Board and judgement No. Kf.27.716/2010/6. of the Metropolitan Regional Court

to the given case, the contracting authority can modify the contract.[2] If one of the legal grounds for amending the contract is violated, but conditions according to other legal grounds exist, then the amendment of the contract is legal.[3]

The legal grounds for modifying the contract can be classified into three large groups:
• so-called "de minimis" rule (essentially requires the examination of changes in value)
• the existence of specific circumstances (the emphasis is on examining the circumstances defined in the given legal basis)
• non-substantial modification [practically, contract modification rules of Act CVIII of 2011 on public procurement (hereinafter referred to as the old PPA) are taken over with a small difference].

The contract modification rules of the PPA can provide a wider solution in the event of a new customer request, or in terms of ensuring procurement requests for a transitional period. In all cases, the contracting authority is obliged to consider and act carefully when examining whether there is a new procurement request or the need to conduct a new public procurement procedure.

It should be noted that any actual deviation from the original contractual conditions - which includes technical documents and specifications - by mutual agreement of the tenderer and the contracting authority, regardless of whether the parties have included it in writing, is considered an amendment to the contract. In the civil law sense, the creation of obligations and their modification requires agreement between the parties on the basic terms of the obligation, and this is achieved if the parties actually agree to change the technical content in any way. In this case, at the same time, the parties also amend the contract, regardless of whether the formal requirements have been maintained.[4]

II.1. Legal basis „De minimis"

Based on Article 141 (2) of the PPA without examining the conditions laid down in paragraph 4 or 6, the contract may be modified without the conduct of a new procurement procedure, if the increase in the counter value occurring as a result of the modification or, where several successive modifications are made the net cumulative value of the successive modifications, does not reach any of the following values:
a) EU threshold, in the case of an initial contract reaching EU threshold;
b) 10% of the initial contract value in the case of public service, public supply and works concession or service concession and 15% of the initial contract value in the case of public works;

[2] See Decisions No. D.283/30/2017. and D.427/15/2018. of the Public Procurement Arbitration Board
[3] See Decision No. D.283/30/2017. of the Public Procurement Arbitration Board.
[4] See Decision No. D.24/22/2017. of the Public Procurement Arbitration Board.

moreover, the modification does not alter the overall nature of the contract and it is in line with the nature of the initial contract.

According to Article 141 (3) of the PPA the above rules can be applied to contract modifications which lead to a change in the contract value; in the case of modifications affecting more than one elements of the contractual relationship, to the elements of the modification which are related to the change in the value. Article 141 (2) of the PPA shall not be applied to contract modifications if the contracting authority launched the public procurement procedure preceeding the conclusion of the contract based on rules, which would not have been lawfully applicable, should the contracting authority have determined the estimated value of the procedure by considering the value following the modification of the contract.

The above-referenced second sentence of Article 141 (3) was incorporated by Mod. Act No. 1. on January 1, 2017. The application of this is presented in the following example:
If the contracting authority conducted a public procurement procedure for public works pursuant to Article 115 of the PPA effective from January 1, 2017, the value of which was HUF 290 million, and then the amount of compensation included in the contract would be increased by HUF 20 million pursuant to Article 141 (2) b), this would comply with Article 141 (2) b), since the increase in compensation does not reach 15% of the value of the original contract, however, according to the second sentence of Article 141 (3) of the PPA effective from January 1, 2017 Article 141 (2) cannot be applied, since as a result of the increased compensation - if the contracting authority had originally used the modified contract value as a basis - the original procedural rules (procedure starting without a notice according to Article 115 of the PPA) could not have been applied.

The contract can therefore be modified to the extent specified in Article 141 (2) without examining other circumstances, provided that the modification does not change the general nature of the contract and matches the nature of the original contract. In case of several modifications, their total value must be compared to the above values.

In the case of a procurement with a value reaching the EU threshold, the above condition is double, while in the case of a procurement with a value reaching the national threshold but not reaching the EU threshold, only Article 141 (2) b) of the PPA is relevant [the value of the modification cannot reach the amount specified in Article 141 (2) a) of the PPA if the modification is in accordance with Article 141 (2) b)].

The modification complies with Article 141 (2) b) of the PPA even if, as a result of the amendment, the value of the compensation does not increase, but decreases.

Article 141 (3) of the PPA allows that, in the case of modification of several elements of the contract, the provisions of Article 141 (2) are applied to those elements as well. which are directly related to the change in value (for example, quantity). This provision also regulates contract modifications due to changes in technical content (if the price necessarily changes as a result). The Public Procurement Authority draws attention to the fact that, solely or primarily for the purpose of extending the duration of the contract, the provision in question of the PPA is not applicable.

In Article 141 (2) [and also in points b) and c) of paragraph (4)] of the PPA, the value of the original contract must be determined on the basis of the indexed contract fee, if the contract contains a provision for the indexation of a fee element payable to the contracting entity as the winning bidder in accordance with point a) of paragraph (4). In the case of public works and service concession, if the contract does not contain an indexation provision, when applying paragraph (2) and points b) and c) of paragraph (4), the value based on indexation can be calculated by taking into account the annual average of the inflation value published by the Central Statistical Office [Article 141 (5) of the PPA]. Regarding the rules of Article 141 (5) of the PPA on contractual value to be taken into account during contract modifications, Mod. Act No. 5 clarifies in such a way of February 1, 2021 that, in the case of the indexed value, instead of compensation, it now refers to a contractual fee. This is particularly relevant in the case of framework agreements and framework contracts, since in such cases the indexed amount will no longer refer only to the part affected by the drawdown obligation, but to the entire value of the framework agreement, if this can be interpreted in the case of the given framework agreement. There is no change in the case of amendments to contracts concluded on the basis of framework agreements, i.e. in such cases the indexed value of each contract must still be taken into account.

In the case of a framework agreement, it is also possible to increase the framework amount on a de minimis legal basis according to the rules in Article 141 (2) of the PPA. In addition, the parties also have the opportunity to increase the consideration of their individual contracts concluded on the basis of the framework agreement based on 141 (2) of the PPA, at the same time, in all cases, they must pay attention to the fact that in connection with the change in the consideration of the individual contract, according to Article 141 (2) the benchmark is the original value of the individual contract, not the framework amount of the framework agreement. In the event that the parties wish to change the consideration of the individual contracts in excess of the framework amount, in addition to the modification of the consideration of the individual contract(s), the framework amount must also be modified, of course taking into account that the modification of the framework amount must also comply with Article 141 (2) of the PPA.

In the case of an EU threshold according to Article 141 (2) a) of the PPA, the parties are entitled to take into account the EU threshold applicable at the time of modifying the contract. The value according to the second sentence of Article 141 (3) - as it

applies to the originally conducted public procurement procedure - must comply with the threshold applicable when the public procurement was initiated.

If, in the context of a contract modification, there is a pending and new procurement request, the contracting authority must take into account the ratio of their total value as the basis of the percentage comparison. All this means that in this case the sum of the value of the modification must be taken into account when examining the percentage rate in Article 141 (2) of the PPA, with regard to that it is not possible to significantly modify the technical content or change the general nature of the contract in this way.

When applying the legal basis of de minimis, the contracting authority must act with particular care if, in addition to the compensation, other elements of the contract also change (in appropriate cases, the legal basis of de minimis cannot be applied in a way that conflicts with Article 2 (3) of the PPA, if it constitutes an abuse of rights).

If the contracting parties successively modify the consideration of the contract several times by reducing it once and increasing it another time, when examining the existence of a 10% or 15% limit according to Article 141 (2) b) of the PPA, the compensation included in the original contract must always be taken as a basis.

In the case of ordering additional work, it should be noted that, according to practice, it can also be treated as a so-called de minimis contract amendment according to Article 141 (2) of the PPA[5].

If a modification - not related to the consideration of the contract - would be considered essential in itself [see the rules in Article 141 (6) of the PPA], the application of the de minimis rules according to Article 141 (2) of the PPA in relation to the content element other than the consideration may be regarded as problematic even if the conditions according to Article 141 (2) a) b) exist. In the case of changes to content elements related to the consideration of the contract, it is always a requirement that their changes must be related to the consideration and proportional to the amount of the change in the consideration.

According to Article 141 (2) of the PPA an additional condition is that the modification cannot change the general nature of the contract and must match the nature of the original contract. Regarding the general nature of the contract, Recital 109 of Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC (hereinafter: Directive) provides guidance. According to this, the general nature of the contract is changed if the works, supplies or services to be implemented or procured are replaced by something

[5] See Decision No. D.283/30/2017. of the Public Procurement Arbitration Board.

different, or by fundamentally changing the type pf procurement, since in such a situation, a hypothetical influence on the outcome may be assumed.[6]

If, with reference to price increases, the winning tenderer indicates a request for a contract modification according to Article 141 (2) of the PPA that was foreseeable within the scope of responsible tendering, the Council operating within the framework of the Public Procurement Authority draws attention to the fact that contracting authority is required to take into account other rules relevant to contract amendments before its decision on the application of Article 141 (2). In accordance with the responsible management of public funds, it must act in such a way that it cannot unreasonably exempt the winning tenderer from the risks it is burdened with, with particular regard to Article 142 (3) of the PPA (see point II.6).

II.2. Existence of certain circumstances

Article 141 (4) of the PPA states that in addition to the situations provided for in paragraph 2, without examining the conditions laid down in paragraph 6, the contract may be modified or may be subject to a change without the conduct of a new procurement procedure in any of the following situations:
a) where the contract clearly stipulates the precise conditions and content of the subsequent changes of the determined substantial elements of the contract (including the right of option) and those conditions and contents are known in advance by all tenderers. However, such contract terms may not stipulate any modification which would alter the overall nature of the contract;
b) for additional works, services or supplies by the original contracting party that have become necessary and that were not included in the initial procurement where a change of the contracting party:
(ba) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
(bb) would cause significant inconvenience or substantial duplication of costs for the contracting authority. However, any increase in price or, where several successive modifications are made the net cumulative value of the successive modifications, shall not exceed 50 % of the value of the initial contract.
c) where all of the following conditions are fulfilled:
(ca) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
(cb) the modification does not alter the overall nature of the contract;
(cc) any increase in price is not higher than 50 % of the value of the original contract.
Where several successive modifications are made and those modifications occurred due to several circumstances specified in point (ca) and not interrelated, that limitation shall apply to the net value of each modification. Such consecutive modifications shall not be aimed at circumventing this provision.

[6] See Decision No. D.283/30/2017. of the Public Procurement Arbitration Board.

As indicated above, Mod Act No. 5. as of February 1, 2021, clarifies the rules in Article 141 (5), according to which the values of the original contract in points b) and c) of paragraph (4) must be established based on the indexed contract fee, if the contract is awarded to the winner in accordance with point a) of paragraph (4) contains a provision for the indexation of a fee element to be paid to the winning tenderer as a contracting party. In the case of construction and service concessions, if the contract does not contain an indexation provision, the value based on indexation can be calculated by taking into account the annual average of the inflation value published by the Central Statistical Office [Article 141 (5) of the PPA].

II.2.1. Legal basis in Article 141 (4) a) of the PPA

In the case mentioned in Article 141 (4) a) the content of the contract can be changed in several ways: the contract is not modified, because when the predicted circumstances occur, the contract automatically changes - also in a predetermined manner - or it takes place in accordance with the legal declaration of the parties or one of the parties - in a manner and content precisely determined in advance, e.g. according to the conditions contained in the option clause - to amend the contract. It may be appropriate, for example, to include the price change that occurs at the beginning of the budget year, the rate of which is the current inflation index published by the competent ministry for the budget planning for the given year in the planning circular of the previous year. In this case, therefore, the contracting authority is counting on a predictable, highly probable circumstance, and by concluding the contract, the conditions that change over time also become part of the contract, without the need to modify the contract. We emphasize that the conditions of the change must be clearly defined - preferably in the form of a formula, together with an explanation of the factors included in the formula - in the public procurement documents (e.g. when and in what way inflation changes the price; in what period the EUR/HUF exchange rate change occurs tracking and to what extent it changes the price; market changes of individual raw material prices – such as copper, iron, aluminum, etc. – in what period and to what extent changes the price).

The regulations regarding pre-fixed contract modification mechanisms according to Article 141 (4) a) must be interpreted strictly, in line with the basic principles of public procurement. Accordingly, conditions that are not clearly defined in a way that is not known to all tenderers in advance are not included in this scope (see, for example, what is written in point II.4 regarding the duration of the contract). If the modification of the contract, such as the price increase methodology, is known to all tenderers (for example, from the draft contract provided as part of the public procurement documents), it clearly states when the parties will apply it, the stipulation used by the parties complies with Article 141 (4) a). The contract must contain all the conditions of the modification in advance, so in the event of an extension of the deadline, in which case and by how much the deadline for the performance of the

contract can be extended, its temporal scope, the generally defined conditions are not sufficient.

In the case of the contract modification according to Article 141 (4) a) of the PPA, the contracting authority does not have to publish a notice based on Article 141 (7). At the same time, according to Article 43 (1) c), the data relating to the performance of the contract must be provided in accordance with the modified data.

II.2.1.1. Indexation

Pursuant to Article 141 (4) a) of the PPA a contract concluded as a result of a public procurement procedure can be modified - automatically - without conducting a new public procurement procedure, if the contract clearly sets out the exact conditions and content of the subsequent changes to specific content elements of the contract in a way that all tenderers know in advance. Changes in prices can be incorporated into contracts by fixing the indexation and defining the relevant rules and methods in advance, making it possible for subsequent price increases to be automatically followed by the contract prices, and the contract does not have to be modified several times. This may be especially necessary in the case of longer-term or price-sensitive contracts.

The Council operating within the framework of the Public Procurement Authority, draws attention to the fact that if according to Article 141 (4) a) of the PPA, the contract is automatically modified according to the pre-fixed conditions, even then it is recommended to document each modification in detail, including the derivation of the rate of price increase as stipulated in the contract and the recording of the new indexed prices.

1. Indexation based on price indices

On the website of the KSH and the European Statistical Office (EUROSTAT), the price indices for various areas (consumer prices, foreign trade prices, agricultural prices, industrial prices, construction prices, investment prices, service prices) are available with both annual and interannual data.[7]

The price indexation data available on the website of the KSH are objective data accessible to everyone, which are suitable for forming the basis of the automatic contract modification according to Article 141 (4) a) of the PPA. The contracting authority must define the conditions of indexing in detail in the contract, and it is also recommended to refer to the fact of such indexing in the contract notice starting the procedure.

[7] https://www.ksh.hu/stadat?lang=hu&theme=ara; https://ec.europa.eu/eurostat

For this, the contracting authority needs to record the following in the contract:

a) which KSH or EUROSTAT price index (exactly which KSH table, which data) forms the basis of the indexation (e.g. the aggregate value of the consumer price index of KSH table No. 1.2.1.2 or KSH table No. 1.1.1.5 on consumer price indices based on the classification of individual consumption according to its purpose [COICOP], also defining the relevant subgroup within it [e.g. workplace and student catering according to line 11.1.2], or the construction industry producer price index according to KSH table No. 1.1.1.30). In this regard, it is worth keeping in mind that, for example, the consumer price index indicates the price change of products and services purchased by the population for their own use, so it is typically not advisable to use it in public procurement procedures, rather the use of the industrial price index, construction industry price index, and service price index is recommended.

b) it will be possible to change the amount corresponding to the given index (100%) or only up to a certain percentage (e.g. up to 90% of the KSH consumer price index), as it was recorded in the contract;

c) it can also be stipulated in the contract that the possibility of indexing is opened only in the case of a price change exceeding a certain amount, to this extent the risk of the winning tenderer is the price change. Above this price change rate, it is possible for the parties to share the risk among themselves. The extent of the price change that exceeds the range of normal business risk must be determined by the contracting authority with the help of a specialist with expertise in the subject of the procurement, depending on the subject of the procurement, considering all the circumstances of the given case.

d) how often the indexing takes place (annually, quarterly, monthly, etc.), specifying exactly which month and until which day the examined period lasts, and from which day the value increased by indexing can be applied;

e) is the indexation automatic or is it subject to the notification or acceptance of one of the parties (e.g. by the specified deadline, the winning tenderer must indicate its request for indexing by referring to the data published by the KSH, however, if the winning tenderer does not indicate this request by the above deadline, then the prices will remain unchanged until the next indexation period);

f) if the prices are indexed, this is documented in writing between the parties by recording the indexed prices;

g) the legal basis for indexing is Article 141 (4) a) of the PPA.

2. <u>Indexing based on other values determined by the contracting authority</u>

If the contracting authority does not want to index its contract based on KSH price indices, but wants to tie the subsequent price changes for instance to the world market price of energy carriers, or to the exchange rate of the euro and dollar, then it is necessary to record the range of data that can be taken into account, its availability and the indexing method. In addition to what is stated in points b)-g) of point 1, in this case, the following must be indicated in the contract in particular:

a) the range of data on which the indexing is based (products, exchange rates, in-kind, etc.), their exact availability, and, if possible, websites that provide public access accepted according to official or other professional standards (e.g. MNB daily exchange rate[8], electricity stock exchange price [e.g. annual string product price][9], the stock market price of natural gas[10] or the exchange rate of TTF Dutch gas[11], the average price of Brent crude oil per barrel[12], monthly producer price indices according to KSH industrial producer prices in sectoral order (TEÁOR'08), etc.);

b) the contracting authority's obligation to record the stock market or other data in what form and with what frequency in order to determine the rate of price change for a given accounting period that can be established later, and to return the data to the winning tenderer for verification;

c) the determination of the extent to which the price of each energy carrier, raw material, and foreign currency is reflected in the price of the given products, along the predetermined percentage rates for each product affected by indexation (e.g. 5% of the hourly price of the cleaning service is the quotation price of individual stock exchange products in the price of electricity, 15% of the price of the transport service is the fuel cost, etc.);

d) the description of the exact method or the formula of indexing.

1. Example of a formula or method that can be used during indexing (with hypothetical figures)

At the outset, the Council operating within the framework of the Public Procurement Authority draws attention to the fact that the example is informative, and the contracting authority is advised to use it adapting it to the given situation, in the light

[8] https://www.mnb.hu/arfolyamok
[9] https://hudex.hu/hu/piaci-adatok/villamos-energia/napi-adatok
[10] https://hudex.hu/hu/piaci-adatok/foldgaz/napi-adatok
[11] https://www.theice.com/marketdata/reports/159;
https://tradingeconomics.com/commodity/eu-natural-gas
[12] https://markets.businessinsider.com/commodities/oil-price

of the unique circumstances of the procurement, if necessary, changing it to the given situation.

The example is about the indexation of the real estate management service fee. The contractual operating fee is HUF 1,500/m2. At the time of signing the contract, the price of electricity is HUF 21/kWh, and the price of gas is HUF 6,300/MWh. In the real estate management service fee, electricity is 26%, while gas is 18%. The examined period is between January 1, 2021 and December 31, 2021, during which the average price of electricity was HUF 38/kWh and the average price of gas was HUF 8,500/MWh. The parties intend to index the operating fee fixed in the contract in proportion to the average increase in electricity and gas from January 1, 2022, but they also pay attention to the share of the given energy carrier in the operating fee.

V0 = the base price of the energy carrier, raw material, exchange rate, etc. that is the basis of the given indexation, which, in the case of the first indexation, is the value fixed in advance by the contracting authority in the contract (in the example, the price of electricity is HUF 21/kWh)

V1 = the average during the examined period of the energy carrier, raw material, exchange rate, etc. that serves as the basis for the given indexation. (in the example, HUF 38/kWh average price of electricity)

v = the change in the unit price of the energy carrier, raw material, exchange rate, etc. that is the basis of the indexation during the examined period. (in the example, the rate of increase in the price of electricity written in decimal form: 0.8095)

$v = (V_1/ V_0)-1$

eg. v = (38/21)-1=0,8095 (which corresponds to 80.95% in percentage form)

G0 = the base price of energy carrier, raw material, exchange rate, etc. that serves as the basis for the given indexation, which in the case of the first indexation is the value fixed in advance by the contracting authority in the contract (in the example, the price of natural gas is HUF 6,300/MWh)

G1 = the average during the examined period of the energy carrier, raw material, exchange rate, etc. that serves as the basis for the given indexation. (in the example HUF 8,500/MWh average price of natural gas)

g = the change in its unit price of the energy carrier, raw material, exchange rate, etc. on which the indexation is based (in the example, the rate of increase in the price of natural gas written in decimal form: 0.3492)

$g = (G_1/ G_0)-1$

eg. g = (8500/6300)-1=0,3492 (which corresponds to 34.92% in percentage form)

β = indicates to what extent the given energy carrier, raw material, exchange rate, etc appears in the price of the contracted product that (in the example, the cost of electricity in the price of a property management service: 0.26, which corresponds to 26% in percentage form))

γ = indicates to what extent the given energy carrier, raw material, exchange rate, etc. appears in the price of the contracted product (in the example, the cost of natural gas in the price of a property management service: 0.18, which corresponds to 18% in percentage form)

a = in what proportion does the price change of all energy carriers, raw materials, exchange rates, etc. that form the basis of the given indexation. appear in the price of the contracted product as a whole (in the example, the combined increase in the price of electricity and natural gas)

$a = (\beta \times v)+(\gamma \times g)$

eg. $a = (0{,}26 \times 0{,}8095)+(0{,}18 \times 0{,}3492)$

$a = 0{,}2733$ (which corresponds to 27.33% in percentage form)

A_0= the initial value of the real estate management service fee (in the example HUF 1,500/m2)

A_1= the revised, indexed property management fee (HUF/m2)

$A_1 = A_0 \times (1+a)$

$A_1 = 1500 \times (1+0{,}2733) = 1909{,}95$ Ft/m², i.e. rounded to whole forints 1910,- Ft/m²

	Price fixed in the contract (V_0, G_0)	Average price in the examined period (V_1, G_1)	Price change in the examined period (v, g)	Ratio of examined energy carriers in the management service fee in the examined period (β, γ)	Price change ration of examined energy carriers in the management service fee (a)
Electricity	21	38	0,8095	0,26	0,2105
Gas	63	85	0,3492	0,18	0,0628
The rate of increase in the management service fee during indexation					**0,2733**

So, if in the example the real estate management service fee was HUF 1,500/m2 when the contract was concluded, then it is increased by the increase in the price of electricity and gas during the examined period by 27.33%, so the new indexed operating cost will be HUF 1,910 /m2.

It may happen that further indexation will be necessary during the term of the contract, in which case the previously indexed value will be the starting point, so the

proportion of the energy carriers in the operating service fee will also change, accordingly, during further indexations, β and γ values must also be recalculated based on the data of the period on which further indexation is based.

$\beta_1 = ((A_0 \times \beta) \times (1+v))/A_1$
$\beta_1 = ((1500 \times 0{,}26) \times (1+0{,}8095))/1910 = 0{,}369$
In the initial period, the cost of electricity was 26% of HUF 1,500/m2, which is HUF 390/m2; which increased by 80.95% to HUF 705.705/m2, which is 36.95% of HUF 1910/m2.

$\gamma_1 = ((A_0 \times \gamma) \times (1+g))/A_1$
$\gamma_1 = ((1500 \times 0{,}18) \times (1+0{,}3492))/1910 = 0{,}1907$

In the initial period, the gas cost was 18% of HUF 1,500/m2, which is HUF 270/m2; which increased by 34.92% to HUF 364,284/m2, which is 19.07% of HUF 1,910/m2.

2. Example of a formula and method that can be used during the indexation of lump sum flat-rate contracts for construction and investment purposes (building materials, construction products)

At the outset, the Council operating within the framework of the Public Procurement Authority draws attention to the fact that the example is informative, and the contracting authority is advised to use it, adapting it to the given situation, if necessary, in the light of the unique circumstances of the procurement. The Council, operating within the framework of the Public Procurement Authority, also draws attention to the fact that - in addition to the fact that the contracting authority is recommended to record in advance the frequency of indexing justified by the subject of procurement in the public procurement documents - the indexing must take place at a time when the cost of indexing arises during an expectedly reasonably planned performance.[13]

$$I_n = a + b\frac{ÉA1_n}{ÉA1_{báz}} + c\frac{ÉA2_n}{ÉA2_{báz}} + d\frac{ÉA3_n}{ÉA3_{báz}} \quad \dots \quad + q\frac{HUF/deviza_n}{HUF/deviza_{báz}}$$

where

I_n = index value, correction multiplier, by which value the original consideration of the contract is multiplied index értéke,

„a" means the non-modifiable part of the contractual consideration in percentage terms, the definition of which is the task of the contracting authority during the preparation of the procedure, this may include non-price-sensitive products and

[13] For example, during the construction of a steel hall, the indexing of the steel building material should not take place during the mechanical work of the already built steel structure.

services, as well as products and services that are less relevant from the point of view of the given performance

„b" „c" „d"… – weighting coefficients, which represent the proportions of the relevant building materials and construction products in the contractual consideration. These must be established during the preparation of the procedure - where applicable, relying on the method used for the determination of the estimated value - by dividing the price elements that form part of the subsequent contractual consideration into percentages.

„q" - weighting coefficient, which represents the proportional parts of the relevant, imported building materials and construction products in the contractual consideration. During the preparation of the procedure, relying on the method used to determine the estimated value, where appropriate, this must be established by dividing the price elements that are part of the subsequent contractual consideration into percentages.

Determining the elements "a" "b" "c" "d"... "q" is the task of the contracting authority during the preparation of the procedure. The Council operating within the framework of the Public Procurement Authority draws attention to the fact that elements "b", "c", "d"... and "q" cannot overlap, so it is not possible to index the same part based on different types of weighting coefficients at the same time.

Check: a+b+c+d+…+q=100% (The non-modifiable part of the contractual consideration and its modifiable parts must equal to a total of 100% in all cases, so the total contractual consideration must be divided according to the above.)

"ÉA1n", "ÉA2n", "ÉA3n" means the producer price index of each relevant building material at the time of the indexation as a percentage compared to the beginning of the price review period, the calculation of which is the task of the contracting authority based on the information available on the KSH website, the so-called with chain indexing. Select in the Data, Publications menu item of the KSH website the Information database, under Economic statistics/Prices/Industrial producer prices "Monthly producer price indices by sector (TEÁOR'08)" from the interannual data.

Within this:

- select from the indicators in the "Column" the "Producer price index of domestic sales, previous month = 100.0 (percent)"
- in the "Row" the months for which we want to query data
- in the "Page" search for the 4-digit TEÁOR'08 branch (e.g. 2512 Manufacturing of metal building elements) (only one type of branch can be queried at a time)
- after selecting the branch, click on the "Display" button. The result of the query can be imported into an excel file.

In the excel table obtained as a result of the above query, in the column "Producer price indices of domestic sales (previous month = 100.0 percent)" the index number at the start date of the period to be indexed will be the base, 100%, hundredth part of the index number at the next date of the period to be indexed is multiplied by the value assigned to the previous (starting) date, and starting from this, we multiply by 1/100th part of the chain ratios until the corresponding period (see the example below, based on which the price index was changed to 106.7% from January 2019 to April 2019).

Eg.

	a	b	c
January 2019	101		100,0
February 2019	102,1	1,021=(a/100)	102,1=(bx100)
March 2019	102,6	1,026=(a/100)	104,8=(bx102,1)
April 2019	101,9	1,019=(a/100)	106,7=(bx104,8)

"ÉA1báz", "ÉA2báz", "ÉA3báz" mean the producer price indices of each relevant construction raw material at the beginning of the settlement (price review) period (value = 100% valid at the time of conclusion of the contract - or, as the case may be, based on the responsible decision of the contracting authority, at the time of the binding offer)

HUF/foreign currency means the MNB daily exchange rate valid for the indexation at the end of the settlement period

HUF/currency base means the MNB daily exchange rate valid at the beginning of the settlement period, at the time of the conclusion of the contract - or, as the case may be, based on the responsible decision of the contracting authority, at the time of the binding offer.

Derivation of a calculation example based on the formula above:

The calculation example was made on the basis of producer price indices for domestic sales of domestically produced industrial products and services (previous month = 100%) on the KSH website.

How did the price change compared to the price at the time of signing the contract on January 21, 2019, until March 25, 2022 (In=?)

- Non-modifiable part of the contract: a=70%

- Relevant building material industry product (TEÁOR'08)

  ÉA1: 2512 Production of metal building elements
  weighting coefficient: b=20%
  The producer price index of domestic sales at the time of the price review compared to the time of the conclusion of the contract $ÉA1_n$= 131,6%

The producer price index of domestic sales at the time of the conclusion of the contract $EA1_{báz}$=100.0%
ÉA2: 2361 Construction concrete product production
weighting coefficient: c=6%
The producer price index of domestic sales at the time of the price review compared to the time of the conclusion of the contract $ÉA2_n$= 136,7%
The producer price index of domestic sales at the time of the conclusion of the contract $ÉA2_{báz}$=100,0%

Euro import purchase:
ÉA3: 2320 Manufacture of refractory products
weighting coefficient: q=4%
EUR MNB exchange rate on January 21, 2019: $deviza_{báz}$=318,2
EUR MNB exchange rate on March 25, 2022: $deviza_n$=375,18

Calculation:

$$I_n = 70\% + 20\% * \frac{131,6}{100} + 6\% * \frac{136,7}{100} + 4\% * \frac{375,18}{318,2}$$

$$I_n = 70\% + 26,32\% + 8,20\% + 4,72\%$$
$$I_n = 109,24\%$$

The Council operating within the framework of the Public Procurement Authority draws attention to the fact that when applying the formula, Article 32 (4)-(6) of Gov. Decree 322/2015 on the detailed rules for the public procurement of public works and design and engineering services related to public works (hereinafter: Works Decree) must also be taken into account.

The calculation methods in the presented examples can also be used for the calculation of the change in the consideration due to the reasons mentioned above in the case of a modification according to Article 141 (2) and (4) c) of the PPA, in a way that the contracting authority takes into consideration that if the contract did not originally contain a clause on price indexation, the winning tenderer had to determine his bid price by calculating the foreseeable price change (e.g. the different situation can be taken into account when determining how much price change the calculated difference is compensated for).

II.2.2. Legal basis in Article 141 (4) b) of the PPA Kbt. 141. § (4) bekezdés b) pont szerinti jogalap

The conditions in Article 141 (4) b) of the PPA are to be interpreted strictly - narrowly.

Conjunctive conditions for the existence of this legal basis:

• the newly incurred works, services, supply should not be included in the original contract, but at the same time, this does not have to be unforeseeable, i.e. the foreseeability in the case of Article 141 (4) b) shall not be examined,
• only the original winning tenderer can fulfill the newly arising procurement need for economic or technical reasons (in particular due to interchangeability or cooperation with existing equipment, services or facilities procured under the original contract),
• entering into a contract with another economic operator would result in a significant disadvantage for the contracting authority (for example, a significant delay in terms of the delivery deadline) or a multiplication of costs and
• the increase in consideration (in the case of several modifications based on this legal basis, the combined net value of each modification) may not exceed 50% of the value of the original contract.

Preamble (108) of the Directive also mentions examples related to the above. Accordingly, contracting authorities may be faced with situations where additional works, supplies or services become necessary; in such cases a modification of the initial contract without a new procurement procedure may be justified, in particular where the additional deliveries are intended either as a partial replacements or as the extension of existing services, supplies or installations where a change of supplier would oblige the contracting authority to acquire material, works or services having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance.

The possibility of modifying the contract according to Article 141 (4) b) applies to those narrow cases, typically involving the use of a special technology, when, for economic or technical reasons, there is no alternative for the contracting authority other than the contract with the original contracting party. It can also be read from the wording of the Directive and the PPA that it is possible to apply this contract amendment legal basis in the case of public works, when concluding a contract with a person other than the original contracting party would lead to the fact that the construction work procured from a contracting party other than the original contracting party would be incompatible, e.g. during operation and maintenance a technical difficulty would occur.[14]

The ministerial justification of the PPA highlights Article 141 (4) c) as a possible way of ordering additional work by modifying the contract without conducting a new public procurement procedure. At the same time, to order additional work, a contract modification according to Article 141 (4) b) may also be suitable.

A Kbt. miniszteri indokolása a Kbt. 141. § (4) bekezdés c) pontját emeli ki, mint a pótmunka új közbeszerzési eljárás lefolytatása nélkül, szerződésmódosítás útján

[14] See Decision No. D.25/7/2017. of the Public Procurement Arbitration Board.

történő megrendelésének lehetséges módját. Ugyanakkor a pótmunka megrendelésére a Kbt. 141. § (4) bekezdés b) pontja szerinti szerződésmódosítás is alkalmas lehet.

Preamble (108) of the Directive is realized in Article 72 (1) b) of the Directive, which was transposed into Hungarian law by Article 141(4) b) of the PPA cited above.

According to our point of view, a situation may arise during the ordering of additional work that can also comply with Article 141 (4) b) of the PPA and thus the additional work can be ordered by modifying the contract, without conducting a new public procurement procedure. The condition in Section 6:244. (2) of the Civil Code, according to which the order for additional work must be subsequent and necessary, complies with Article 141 (4) b) of the PPA which states that additional construction works, services or goods must be procured from the original contracting party, which were not included in the original contract. However, it can also be seen that the modification according to Article 141 (4) b) of the PPA in addition to these conditions, also requires the existence of additional conditions, namely that a change in the identity of the contracting party
- not feasible for economic or technical reasons, in particular due to interchangeability or cooperation with existing equipment, services or facilities procured under the original contract; and
- would result in a significant disadvantage for the contracting authority or an increase in costs,
- the value of the additional work cannot exceed 50% of the value of the original contract.
The contracting parties must be able to prove their joint existence. No detailed guidelines can be given in this regard, the parties must decide on a case-by-case basis, with a responsible consideration of the circumstances, whether Article 141 (4) b) of the PPA is applicable.[15] It is also important to note that unpredictability, or unforeseeability with due care, is not a condition of the application of Section 6:244. (2) of the Civil Code, nor Article 141 (4) b) of the PPA.

II.2.3. Legal basis in Article 141 (4) c) of the PPA

Article 141 (4) c) of the PPA allows, among other things, according to the legislative justification, the ordering of additional work[16] without conducting a new public

[15] See Decision No. D.24/22/2017. of the Public Procurement Arbitration Board.

[16] A Polgári Törvénykönyvről szóló 2013. évi V. törvény 6:244. § [Többletmunka. Pótmunka]
(1) A vállalkozó köteles elvégezni a vállalkozási szerződés tartalmát képező, de a vállalkozói díj meghatározásánál figyelembe nem vett munkát és az olyan munkát is, amely nélkül a mű rendeltetésszerű használatra alkalmas megvalósítása nem történhet meg (többletmunka).
(2) A vállalkozó köteles elvégezni az utólag megrendelt, különösen tervmódosítás miatt szükségessé váló munkát is, ha annak elvégzése nem teszi feladatát aránytalanul terhesebbé (pótmunka).

procurement procedure, if the contracting authority could not have foreseen the need for additional work even with due diligence.

In this case, therefore, foreseeability must also be examined, in which respect the previous jurisprudence can be considered as a guideline. Accordingly, it can be said in general that the requirement of unforeseeability can basically be fulfilled if the contracting authority was not aware of the future occurrence of the circumstances justifying the modification of the contract, and the contracting authority could not have expected it, even with the utmost care, knowing the circumstances of the procurement. At the same time, based on a thorough examination and consideration of all the circumstances of the given case, it is only possible to decide whether unpredictability exists on a case-by-case basis. The PPA leaves this to the contracting parties (especially the contracting authority), given that knowledge of the circumstances of the procurement is basically expected from the contracting parties, and primarily from the contracting authority.

Typically, for example, a design error is not considered an unforeseen circumstance. Of course, if it is certified that the contracting authority acted with due diligence in the preparation of the appropriate plans, and then when he discovered the defects in the plans during the construction based on the plans, the unpredictability can be substantiated in this case as well.[17]

If the parties place the order for additional work by applying Article 141 (4) c) of the PPA, they must pay attention to the following: the conditions of the additional work, according to which the order of the additional work must be subsequent and necessary, are supplemented by the conditions according to which the additional work was incurred by the contracting authority with due care he could not foresee when acting, the additional work does not change the general nature of the contract, and the value of the additional work cannot exceed 50% of the value of the original contract. Among these, in particular, unpredictability with due diligence by the contracting authority, means an excess that is not a condition for additional work according to Section 6:244 (2) of the Civil Code, so the parties entering into the contract must take into account that they are concluding not just a civil law contract, but a contract that was preceded by a public procurement procedure. In other cases, also in this case, the parties must decide on a case-by-case basis, with a responsible consideration of the circumstances, whether Article 141 (4) c) of the PPA can be applied.

Based on Section 6:244 (1) of the Civil Code out of the two cases of additional work, technically necessary work that arises later can be included here.
The modification must be related to the original contract in such a way that the modification cannot change the general nature of the contract. An additional

[17] See Decision No. D.181/12/2014. of the Public Procurement Arbitration Board.

conjunctive condition - in addition to the above - is that the increase in the consideration cannot exceed 50% of the value of the original contract. If the contract is modified several times due to unrelated circumstances based on Article 141 (4) c), the net value of individual amendments may not exceed 50% of the value of the original contract.
Based on the above - contrary to the provisions of Article 132 of the Previous PPA - in the case of Article 141 (4) c), it is not necessary to examine whether the amendment is essential, but as a first step, unforeseeability must be examined.
The condition for establishing the legality of a contract modification is the necessity of the modification within the framework of the given contract.

Several legal bases of contract modifications specify as a mandatory condition that the modification of the contract cannot change the general nature of the contract. A change in the general nature of the contract may result from a change in the main subject of the contract, a change in the contractual structure (for example, the type of contract), or a change in the result to be created by the contract. However, in the given case, for example, the Arbitration Board established that the subsequent purchase of 7 m2 of paving stones compared to the originally planned procurement of 1,313 m2 of paving stones did not change the general nature of the contract.[18]

II.2.3.1. Application of legal basis in Article 141 (4) c) of the PPA in case of framework agreements and framework contracts

If the individual contract concluded on the basis of the framework agreement or framework contract is modified by the parties, then the consideration according to the relevant individual contract must be determined according to the 50% limit of Article 141 (4) c) cc) of the PPA.
In the case of an increase in the unit price affecting the entire framework agreement, the 50% limit of Article 141 (4) c) cc) of the PPA must be determined by comparing it with the total consideration (framework amount) of the framework agreement.
In case of modification of the contract according to Article 141 (4) c) of the PPA increase in the unit price of individual products may exceed 50% in the event that the original consideration (framework amount) of the framework agreement, or the consideration of the individual contract is not, or by a maximum of 50% is raised.
It is also possible for the parties to raise the unit price with effect for the entire framework agreement in such a way that - in the case of a framework amount - the framework amount remains unchanged.
Regarding the increase in the unit price, it may also be necessary to examine the change in the general nature of the contract. (E.g. an extreme price change significantly transforms the composition of the subject of the purchase, possibly the conditions related to its calling/ordering, etc.)

[18] See Decision No. D.32/6/2017. of the Public Procurement Arbitration Board.

II.2.3.2. Applicability of the legal basis in Article 141 (4) c) in connection with the increase in raw material prices and the price of energy carriers

The EU member states were also faced with the rise in the prices of raw materials and energy carriers and found various solutions in this regard (e.g. price review, indexation clause, quarterly adjustment of the prices of the framework agreement due to the increase in the price of energy carriers, etc.). [19] Having examined the solutions of the Member States, the Council operating within the framework of the Public Procurement Authority developed the following proposal in connection with the issue.[20]

The Council operating within the framework of the Public Procurement Authority first of all draws attention to the fact that, as in the case of all contract modifications, the agreement of the parties is also essential for the modification according to Article 141 (4) c) of the PPA, the contract can only be modified (apart from exceptional cases, such as the exercise of the unilateral right to modify the contract stipulated in the contract) by mutual agreement of the parties.

Based on practical experience, domestic contracting authorities often enter into contracts at a fixed price and, in connection with this, usually state in the public procurement documents that the tender price must include the entrepreneur's risk resulting from price changes during the performance period and the entrepreneur's profit, but this does not mean that the modification of the public procurement contract would be excluded due to the increase in the prices of raw materials or energy carriers.

Force majeure situations (e.g. war, epidemic situation, etc.) that cannot be foreseen at the time of the conclusion of the contract may affect the production and availability of certain raw materials required for contractual performance, thereby affecting not only the (investment) value of the projects, but also their time schedule. These circumstances may also justify the modification of the contract in relation to the performance deadline.

In itself, a force majeure situation (increase in the price of raw materials or energy carriers) is not a sufficient basis for modifying the contract, since in all cases the existence of unforeseen circumstances and their direct causal relationship with the subject of the specific contract and the modification request must be proven. Therefore, the parties must prove that the increase in the price of raw materials or

[19] https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-3290https://www.bautechnik.pro/Download/Preis/LF_Preisver%C3%A4nderungen_und_Liefereng p%C3%A4sse_2022_03.pdf; https://www.bmj.gv.at/themen/vergaberecht/dokumente-zum-vergaberecht/vergaberechtliche-rundschreiben.html

[20] The practical experiences of the following member states were examined: Austria, Portugal, Slovakia, Germany, Denmark, Finland

energy carriers has a direct influence on the performance of the given contract, and represents a direct obstacle to it in some respect.

The necessity of the amendment in the context of a given contract cannot be interpreted broadly, so if the price increase occurs in connection with an increase in the price of certain raw materials or energy carriers, then the increase in the consideration value is only considered necessary if it serves as a cover for the unforeseen increase in the price of these raw materials or energy carriers, to the extent exceeding this, the necessity does not exist, and as such the contract cannot be modified.

In terms of unpredictability, the parties have to prove that the rise in the price of raw materials or energy carriers could not have been foreseen even when due care was taken when concluding the given contract. Both the Arbitration Board (e.g. decisions of the Public Procurement Arbitration Board No. D.384/19/2018 and D.469/15/2021) and court practice (e.g. Kfv. No. VI.37.948/2018/5 judgment of the Supreme Court) pointed out that unpredictability according to Article 141 (4) c) ca) can be applied to the date of the conclusion of the contract or to the stage prior to the conclusion of the contract, therefore, when examining the legality of the contract modification, it cannot be ignored that the contracting authority has exercised due care during the preparation of the public procurement procedure. In the case of a fixed-price contract the contractual provisions assume from the outset that the contractor calculates in advance the increase in the costs necessary for performance and gives the offer price accordingly. In this case, only an extraordinary price increase that could not reasonably have been foreseen at the time of the conclusion of the contract can be considered unforeseeable.

The unforeseeable circumstance that necessitates the modification must be an objective circumstance beyond the contracting authority's control, so the need for the modification cannot arise from a change in the contracting authority's demand, it must be an external compelling circumstance.

II.2.3.3. The applicability of the price review within the scope of the modification according to Article 141 (4) c)

Unforeseen, as appropriate, force majeure situations (e.g. war, natural disaster, etc.) can form the basis of a legal contract modification, however, the force majeure situation alone is not a sufficient basis for modifying the contract on this legal basis, since in all cases it is also necessary to prove the existence of unforeseeable circumstances and the causal link between these circumstances and the request to modify the contract. If a circumstance necessitating a contract modifiction meets the conditions according to Article 141 (4) c) ca) and cb) of the PPA, then the amount of the change in consideration can be determined in accordance with the 50% limit, based on the agreement of the parties. One method of this can be the price review, for which the technique described in point II.2.1.1. of the guideline can also be an

exceptionally conceivable method, with the fact that limitations according to Article 141 (4) c) must be complied with during its application. With regard to the fact that in this case it is not a contract modification based on pre-fixed conditions according to Article 141 (4) a), the parties have to fix the conditions of the price review in the context of the contract modification according to Article 141 (4) c), bearing in mind that in this case it can only be aimed at dealing with changes that exceed the foreseeable level. The Council operating within the framework of the Public Procurement Authority draws attention to the fact that the contract modification according to the above cannot give bidders the opportunity to abuse, i.e. the incorporation of the price review technique in the context of the contract modification is only possible under exceptional circumstances and cannot result in the contracting party as the winning tenderer being exempt from the requirement of reasonable, economical and responsible performance.

If a contract is modified according to the above, in the framework of which a price review method is incorporated into the contract, special attention must be paid to preserve the general nature of the contract and to the maximum rate of 50% determined in terms of the increase in consideration in Article 141 (4) c) bc) and cc) , therefore the price review cannot be included without limit. The price review can be included in the contract to a certain maximum extent or for a certain period, taking into account the above limitations. In the context of Article 141 (4) c), it is important that the economic content of the original contract cannot be fundamentally transformed and that the price review clause can only be concluded in a narrower circle, to deal with price increases of an unforeseeable extent.

The Council operating within the framework of the Public Procurement Authority draws attention to the fact that, even in the case of framework agreements, it is only possible within the above limits that the parties, in view of the unforeseen circumstances and the necessity, later incorporate a price review method for unit prices into the contract based on Article 141 (4) c), provided that this method applies only to unit prices and that the framework amount of the framework agreement does not change. However, there is no obstacle to the fact that the consideration of the framework agreement is be raised based on one of the legal bases of Article 141 of the PPA.

If the price review incorporated in the contract, according to the above on the basis of Article 141 (4) c), although during the modification it will take effect as automaticity based on a predetermined method, but during its application it is necessary to take into account the legal basis limits according to Article 141 (4) c), so in particular the 50% limit of the increase in the consideration value. In this regard, the Public Procurement Authority draws attention to the fact that pursuant to Article 141 (4) c), the increase in the consideration may not exceed 50% of the original contractual consideration, which limit also exists in this case. In view of the fact that Article 141 (5) of the PPA applies in that case to the amendment according to Article 141 (4) c) of the PPA if the contract originally contained indexing according to Article

141 (4) a), so in that case Article 141 (5) cannot be applied if, subsequently, based on Article 141 (4) c), the price review is included in the contract as part of a contract modification.

The Council operating within the framework of the Public Procurement Authority draws attention to the fact that, if the contract - originally - for the management of future price increases, indexation according to Article 141 (4) a) has been incorporated for the entire spectrum of price changes (for all price elements), then later during the performance of the contract, due to price increases, the contract modification according to Article 141 (4) c) is subject to concern, since in this case unpredictability cannot be established, as the contracting authority already calculated the price increase before the conclusion of the contract, during the preparation phase of the public procurement procedure. In other words, the inherent error or deficiency of the indexing method originally incorporated in the contract based on Article 141 (4) a) cannot create a basis for a subsequent contract modification affecting the method.

The Council operating within the framework of the Public Procurement Authority draws attention to the fact that the parties must agree on an amendment to the extent that it only deals with the management of changes that exceed the level of normal business risk, that is to say, the contracting authority does not unreasonably assume risk from the tenderer, but the unforeseeable risks in this case, the parties will share its cost. The extent of this must be determined on a case-by-case basis, adjusted to the subject of the contract. The examination of Article 142 (3) is also relevant if one of the parties initiates a contract amendment due to an increase in the price of raw materials and energy carriers, in connection with which Point II.6. of the guideline contains more detailed guidelines.

II.3. Not substantial modification

According to Article 141 (6) of the PPA in addition to the situations provided for in paragraph 2 and 4, the contract may be modified without the conduct of a new procurement procedure, if the modification is not substantial. A modification of a contract is substantial, if the essential conditions established by the modification are substantially different compared to those set out in the original contract. A modification of a contract shall always be considered to be substantial, where

a) the terms affected by the amendment would have allowed the participation of other tenderers (candidates) as well in addition to the original tenderers (candidates) or the success of another tender instead of the successful tender, if those terms had been indicated in the procurement procedure preceding the conclusion of contract;

b) the amendment shifts the economic balance of the contract in favour of the successful tenderer; or

c) the amendment extends the subject-matter of the contract over a

new, significant element compared to the tenderer's obligations imposed by the original contract.

The conditions listed in Article 141 (6) of the PPA are alternative, so if any of them exist, the modification of the contract is considered substantial.

The substantial contract modification criteria set out in Article 141 (6) of the PPA are essentially the same as the contract modificatiom limits contained in Article 132 of the old PPA, with the fact that the extension of the tenderer's obligations to a new element is considered a substantial amendment only if this new element is significant.

Nevertheless, based on the similarity of the conditions in Article 141 (6) of the PPA to the conditions in Article 132 of the old PPA - except for the above-mentioned change effecting Article 141 (6) c) - the previous jurisprudence can be considered as a guide in deciding the question of a substantial contract amendment.

All this means, on the one hand, it is sufficient for the existence of the provisions in Article 141 (6) a), to establish the possibility of participation of other tenderers (applicants to participate) in a given public procurement procedure, as well as the possibility of the possible winning of another submitted bid, in addition to those who submitted the bid (application for participation).

The case according to Article 141 (6) a) does not exist if the possibility of the modification and its circumstances were already known in the public procurement procedure.

Thus, for example, the prohibition set out in Article 141 (6) a) of the PPA according to which the parties may not modify the part of the contract concluded as a result of the public procurement procedure determined on the basis of the conditions of the invitation, the documentation, or the content of the offer, if the modification specifies conditions that if they had been included in the public procurement procedure prior to the conclusion of the contract, the participation of tenderers other than the originally participating tenderers would have been allowed, does not apply in the case of procedures according Article 98 and 115 of the PPA, due to the nature of the type of procedure, since Article 115 (2) allows the contracting authority to decide on the identity of the tenderers participating in the procedure by direct invitation. Therefore, the condition cannot be established that additional economic operators could have participated in the procedure based on the change[21].

The phrase of Article 141 (6) a), according to which the possibility of modification is also excluded if the modification would have made it possible for another bid to win instead of the winning bid, is also applicable in the case of procedures according to Article 115 of the PPA, as well as in the case of negotiated procedures without notice

[21] See Decison No. D.219/10/2014. of the Public Procurement Arbitration Board

conducted on the legal basis according to Article 98, taking place with the invitation of several bidders.

According to the position of the Public Procurement Authority, based on Article 141 (6) a) of the PPA the amendment of the contract is also significant if, as a result, the contract changes from a flat-rate to an itemized settlement, or from an itemized settlement to a flat-rate one.

When examining the conditions according to Article 141 (6) a) - and in general the Article 141 (6) of the PPA, the examination of unforeseeability is not necessary.

All of the above-mentioned conditions must be fulfilled to not be able to to speak of a substantial contract modification based on Article 141 (6) b) of the PPA. Regarding Section 141 (6) b) of the PPA, the previous and current jurisprudence[22], according to which the economic balance of the contract changes in favor of the winning tenderer, for example, if the release of debt or security (penalty) results in the amendment. In other words, the economic balance is not the same as the financial balance, so it is not just the price increase that must be taken into account when examining Article 141 (6) b) of the PPA, the price increase is only one possible case of a change in the economic balance. In other respects, the PPA left the value limit for a 5% increase in the consideration value, so this circumstance is not relevant when examining the change in the economic balance.

In its rulings[23], the Court of the European Union states that changing the economic balance of the contract in favor of the winning tenderer is considered a substantial contract modification excluding the possibility of contract modification, if it was not stipulated in the original contract.

According to the position of the Public Procurement Authority, an increase in the bid price alone does not typically qualify as a change in the economic balance of the contract in favor of the winning tenderer, as long as the increase in counter value, as consideration, is also linked to a service from the winning bidder. The reverse is also true, i.e. the deviation from the terms of the contract does not automatically affect the economic balance, only if it leads to a reduction of the technical content and is not followed by a proportional modification of the compensation. [24] Changing the economic balance in favor of the tenderer is also considered to be the case if, in the case of a flat-rate contract, the amount of the advance payment, rather than the full compensation included in the contract, increases.[25]

[22] See Decision No D.185/11/2017. of the Public Procurement Arbitration Board
[23] See for example the Pressetext case judgement (Case C-454/06.)
[24] See Decision No D.24/22/2017. of the Public Procurement Arbitration Board
[25] See Decisions D.356/11/2018., D.357/8/2018. and D.362/8/2018. of the Public Procurement Arbitration Board. The judicial review of the Arbitration Board's decisions is ongoing.

In connection with the modifications associated with the increase in consideration, Article 20 (4) of Épber. states that the use of the reserve within the framework defined in Article 20 (3) of the Épber. does not entail the need to modify the contract or conduct a public procurement procedure, however, the contract must clearly state the possible cases and financial conditions for the use of the reserve in a way that all bidders can get to know it in advance. If the contracting authority acts accordingly, we can talk about the change according Article 141 (4) a). However, in the event of a "price increase" beyond this, a modification to the contract becomes necessary, which may only be legal when other legal grounds in Article 141 exist.

Az ellenérték-növekedéssel járó módosításokkal összefüggésben az Épber. 20. §-ának (4) bekezdése rögzíti, hogy az Épber. 20. § (3) bekezdésben meghatározott keretek között a tartalékkeret felhasználása a Kbt. alapján nem vonja maga után szerződésmódosítás vagy közbeszerzési eljárás lefolytatásának szükségességét, a szerződésben azonban egyértelműen, minden ajánlattevő számára előre megismerhető módon rögzíteni kell a tartalékkeret felhasználásának lehetséges eseteit és pénzügyi feltételeit. Ha ajánlatkérő ennek megfelelően jár el, a Kbt. 141. § (4) bekezdés a) pontja szerinti módosulásról beszélhetünk. Ezen túli „áremelkedés" esetén azonban a szerződés módosítása válik szükségessé, amely csak a Kbt. 141. §-ának egyéb jogalapja fennállásakor lehet jogszerű.

Based on Article 141 (6) c) - as already mentioned above - a contract modification is essential that would extend the subject of the contract to a significant new element compared to the original contractual service, since in this case such an essential contract we can talk about a substantial modification that imposes the obligation to conduct a new public procurement procedure.

During the examination of the new element, it can still be stated that if the conditions of the public procurement procedure (public procurement documents) or the contract did not include the procurement becoming necessary compared to the original tenderer's obligations (this does not include entrepreneurial tasks that would otherwise be carried out on the basis of the basic contract, but not specifically named in the contract), we can talk about a new element. In judging whether this new element is significant or not, no general guidance can be given, it must be judged on a case-by-case basis by the contracting authority as the contracting party, considering the circumstances.

The Public Procurement Authority draws the attention of legal practitioners to the fact that pursuant to Article 141 (8) of the PPA, the contract can only be modified as a result of a new public procurement procedure, except in the cases covered by this Article. If the modification of the contract results in the unlawful omission of a public procurement procedure, the modification is null and void on the basis of Article 137 (1) a) of the PPA. Contrary to this, the modification of the contract is not null and void if the contracting authority did not carry out a public procurement procedure starting with the publication of a notice or concluded an agreement without a public

procurement procedure [Articles 9–14, 111], because he considered that he had the opportunity to enter into a contract by using the public procurement procedure that starts without a notice or by omitting the public procurement procedure according to this law, he published a notice of his intention to enter into a contract according to the standard form specified in a separate law, and he did not conclude the contract within the tenth day from the day after the publication of the notice [Article 137 (2) PPA].

We draw your attention to the fact that Article 141 (6) does not exhaustively determine when the modification of the contract is substantial. The legislator's intention with regard to substantiality is that it must always be established with regard to the unique characteristics of the given case. Thus, the extension of the deadline for the performance of the contract may be irrelevant if it is not to a large extent compared to the original deadline, does not affect the evaluation that took place in the public procurement procedure, and the original deadline was not so short that it could have deterred many interested parties from starting the procedure. However, the modification of the completion deadline can be considered substantial, for example, if the original deadline required urgent work in the given procedure, and knowing the longer deadline, presumably others would have been interested in the public procurement[26]. Substantial modifications pursuant to Article 141 (6) of the PPA typically include contract modifications of a type which, while leaving other elements of the contract unchanged, extend the temporal scope of the contract to further performance periods, given that the tenderers calculated the bid goods for the original period, however, the extended period could have already justified a different price calculation, on the basis of which other bidders could possibly have made an offer.[27] For the market players, winning a long-term contract that represents a secure source is certainly an advantage and makes it attractive to other potential tenderers as well.[28] Of course, even in this case, it can only be determined by taking into account the subject of the given contract, its specific conditions and market, whether a given modification of the contract's temporal scope would have a distorting effect on competition. According to the audit practice of the Prime Minister's Office, in the case of a framework contract or framework agreement, the modification is considered not substantial if the framework was not exhausted during the original period, and the quantity is not, but only the duration is changed to a non-significant extent.

According to Article 143 (1) a), the contracting authority may terminate the contract, or - in accordance with the provisions of the Civil Code – rescind the contract, if it is absolutely necessary to modify the contract in such a way that a new public procurement procedure must be conducted based on Article 141.

[26] See Decision No. D.86/9/2017. of the Public Procurement Arbitration Board
[27] See judgement No. Kfv.VI.38.014/2018/7. of the Supreme Court
[28] See Decision No. D.233/19/2018. of the Public Procurement Arbitration Board

II.4. Elements of the contract to be modified

Regarding the modification of contracts concluded as a result of the public procurement procedure, a common question for legal practitioners is which elements of the contract can be covered by the modification. The Public Procurement Authority draws the attention of the participants in public procurement procedures to the following in connection with the individual cases that typically arise and the reasons for contract modifications.

With regard to Article 141 (2) of the PPA, the change, increase, or decrease in the value of the contract - or the elements related to the change in value - must be examined (since the general nature of the contract remains unchanged or the adaptation to the original nature of the contract can be realized on a wider scale) must be investigated. It can also be said that if the modification essentially only changes the offer price (or an element related to it), on the basis of Article 141 (2), the contract can be modified in an extremely broad manner to the extent specified therein.

In the event of a price increase exceeding Article 141 (2) of the PPA, additional conditions must also be met [Article 141 (4) a), b) or c); Article 141 (6) of the PPA], and when applying the legal basis according to Article 141 (4) b) or c) the offer price may be increased by a maximum of 50% of the original net consideration [in the case of Article 141 (4) b) or c) this limit applies to the combined value increase of the contract modifications, in the case of Article 141 (4) c) to the individual contract modifications].
The price increase must also be examined in relation to Article 141 (6) b) of the PPA.

It is recommended to proceed with particular care in the assessment of modifications affecting the duration of the contract, given that in the case of fixed-term contracts, the expiry of the contract must be expected at a specific time. Consequently, the need that arises after the expiration of the fixed period, which exceeds the quantity or task that was originally the subject of the contract, is considered a new procurement need, which can only be dealt with in a very narrow way as part of the modification of the contract. This is also true in the case where, in the case of a continuous procurement need, the need to modify the contract arises due to the possible ineffectiveness of the public procurement procedure initiated before the contract expires. In this case, the contracting authority can also examine the possibility that this can still be handled within the scope of Article 141 (2) of the PPA.
(In connection with the previous ones, it should be noted that the standard form containing the notice initiating the procedure according to Article 112 (1) point b) of the PPA, and the invitation to tender/participation in Annex II of the EU standard form regulation (Commission Regulation 1986/2015/EU) also contains information on the extension of the contract.)

Based on Article 141 (4) ca)-cb) of the PPA the deadline for the completion of a construction contract may be extended - purely - due to unfavorable weather

conditions, if the development of particularly unfavorable weather conditions was not foreseeable or could be counted on, but not to the extent that actually occurred. However, a delay on the part of the contracting authority that can be traced back to inadequate preparation of the public procurement procedure does not base the application of the conditions of Article 141 (4) c) of the PPA, it is also necessary to examine how the tenderer took into account unfavorable periods from the point of view of the continuation of - outdoor - works when determining the completion deadline.

Regarding the change affecting the person of the winning tenderer, the Public Procurement Authority draws the attention of the participants in the public procurement procedures to the following.

The PPA essentially establishes the possibility of modifying the contract concluding the public procurement procedure with regard to the rights and obligations of the contracting parties, i.e. the content of the contract. The change in the identity of the parties is not a matter of modifying the contract, other provisions shall apply to that.

Based on Article 139 (1) of the PPA the party or parties entering into the contract as the winning tenderer may only be replaced in the following cases:
a) where, on the basis of a clear contractual provision that complies with Article 141 (4) (a), the succession is ensured by a project-company or a legal person which provides financing for the performance on the basis of a contractual provision aimed at guaranteeing performance or a legal person designated by the above-mentioned legal person; or
b) where the succession of the contracting party is a result of transformation, merger or division or any other way of termination of the legal person or it is due to partial succession in the course of which the entire branch of business, operating as a single economic unit, (together with the contracts, resources and the staff related to it), in the case of business organisations the entire organisational unit responsible for the given activity, passes to the successor or the contract is transferred in the course of insolvency proceedings against the original contracting party;
on condition that the successor entering into the contract is not subject to any ground for exclusion applicable in the procurement procedure - according to the rules pertaining to tenderers pursuant to Article 138(2)-(4) -, he meets the suitability criteria applied in the procurement procedure and the succession is not aimed at circumventing the application of the PPA.

Apart from the cases specified in paragraph (1), the identity of the contracting party as a tenderer may only change as a result of a new public procurement procedure. The provisions of Article 141 shall apply to changes in other elements of the legal relationship [Article 139 (2) of the PPA].

Section 3:39 (1) of the Civil Code considers the transformation of a legal entity into a different type of legal entity as a transformation, in which case the transforming legal

entity ceases to exist. In addition, unlike the regulations in force before March 15[29], 2014, the Civil Code recognizes mergers and divisions (and, of course, cases of termination without legal successor).

Based on the above, therefore, as a result of the legal succession process established by law and taking into account the responsibilities of legal successors declared in law, it is possible that instead of the tenderer determined as the winner in the public procurement procedure his legal successor executes the contract under the conditions specified in the public procurement contract.

However, the tenderer must examine whether the legal successor falls within the scope of the grounds for exclusion prescribed in the given procedure, and whether he meets the eligibility requirements [by applying Article 138 (2)-(4) of the PPA in accordance with the rules applicable to the tenderer] and the legal succession may not aim the circumvention of the PPA.

In connection with the above, the Public Procurement Authority draws attention to the following: based on the above, the PPA adopting the system of the Civil Code, did not include the change of the parties of the contract in the scope of modifying the contract, since it considers t only the amendment of the content of the contract as modification [Ptk. Section 6:191 (1)]. Regardless of this, however, in the event of a substantive change related to a change of parties, the modification of the contract cannot typically be avoided, in view of the interest in the transparency of the performance of contracts, the general provisions of the PPA on contract modifications are also applicable in this case. This also means that the contract modification must comply with the Article 141 of the PPA, the consent of the parties must exist, and a notice informing about the amendment must be published even in the case of the amendment of the contract in accordance with the above.

It should be noted that Article 139 (1)-(2) of the PPA record only the change in the person of the winning tenderer(s), while subcontractors, specialists, economic operators participating in the verification of suitability, persons and organizations presented for evaluation according to Article 76 (3) b) of the PPA may change according to Article 138 (2)-(4). An important difference compared to the regulation in the old PPA is that the legislator not only allows a new economic operator to enter into a contract instead of the winning tenderer in the case of universal legal succession (transformation, merger, separation of a legal entity or other termination by legal succession) that has occurred - as a general rule - with the termination of an economic operator, but also in case of partial legal succession. The latter is allowed in two cases by the PPA:

[29] See: Article 67 (1) of Act IV of 2006 on economic companies, according to which the company is terminated with a legal successor in the event of a change of corporate form, merger and division (hereinafter together: transformation).

• in the case of the transfer of the entire business unit operating as an economic unit, or in the case of a non-business company as a legal entity, the entire organizational unit performing the given activity is transferred, in which case the economic operator taking over the business unit or economic unit takes the place of the previous successful tenderer as legal successor;
• the contract is transferred during the insolvency procedure for the original contracting party, in which case the economic operator who "acquires" the contract becomes the legal successor of the winning tenderer;

In view of the mandatory manner of the PPA, of course, apart from the two cases defined above, partial legal succession is excluded on the part of the tenderer in contracts concluded on the basis of public procurement procedures.

The Article 139 (3) of the PPA regulates the change occurring in the person of the contracting authority in such a way that it stipulates: the succession of the party entering into the contract as contracting authority may not be aimed at circumventing the application of this Act. In view of this, in the absence of special rules, even in such cases, the general rules and principles must be followed, which means the following.

The PPA manages the public procurement procedure in a uniform manner, and – taking into account the public interests related to the transparency of public procurement procedures and the requirement of legal certainty – it starts from the fact that the contracting authority initiating the procedure appears as the subject of the contract resulting from the procedure, and fulfills the remuneration according to the contract. Nevertheless, according to the position of the Public Procurement Authority, changes and legal succession concerning the person requesting the contract can take place, as in previous legal practice, e.g. due to the provision of legislation or on the basis of the founder's decision contained in a resolution. In such a case, the rights and obligations of the entitled person are transferred to the legal successor.
Similar to the change in the person of the winning tenderer, the person of the contracting authority is also subject to legal succession only according to the rules applicable to the specific contracting authority, in line with the principles of the PPA.

II.5. Specific rules related to public works

Article 28 (1) of the Épber. allows the party contracting as the contracting authority and the party contracting as the winning tenderer to negotiate with regard to the items of the priced budget after the conclusion of the contract, during which they can finalize the individual items to be included.

During the consultation, the parties can only agree on a substitute product of technically equivalent or higher quality to the building materials and products indicated by the tenderer in his bid [Épber. Article 28 (2)].

If the parties agree on the installation of a substitute product in accordance with paragraph (2), the rules of Article 141 must be applied accordingly to the modification of the contract [Épber. Article 28 (3)].

The above provisions of the Épber. define a case in the legislation that typically arises in the case of public works, which, however, does not represent a new or different legal basis for modifying the contract compared to the provisions of the PPA.

The Public Procurement Authority draws the attention of legal practitioners that based on all the circumstances of the given procurement, can be determined on which legal basis in Section 141 of the PPA the contract can be modified. In particular, we draw attention to the fact that if the change involves an increase in the consideration of the contract, the value restrictions set there must also be taken into account when examining the given legal basis. At the same time, it is necessary to emphasize that the contracting authority is obliged to document the realization of equivalence.

II.6. Legal consequences related to illegal contract modifications

Regarding the modification of the contract, Article 141 (8) of the PPA states, that a new procurement procedure shall be required for those modifications of the provisions of a public contract which are not covered by this Article. Where the contract was modified with the unlawful bypass of the procurement procedure, the contract is void in accordance with Article 137 (1) (a).

Related to the above in accordance with Article 137 (2) of the PPA the contract is not void, if the contracting authority did not conduct a procurement procedure with the publication of a contract notice or it concluded an agreement outside a formal procurement procedure [Articles 9-14, Articles 111] because it presumed that this Act allowed him to apply a procurement procedure without prior publication of a notice or to conclude the contract outside a formal procurement procedure, furthermore, it published a notice in accordance with the standard form provided in a separate act of legislation about its intention to conclude a contract and it concluded the contract more than ten days following the publication of the notice.

Article 142 (2) states that when failing to enforce claims arising from a breach of contract (not including the exercise of the right of rescission or termination), the party entering into the contract as contracting authority violates the principles laid down in Article 2(1)-(4), if

a) the breach of contract is the result of non-compliance with an obligation which was taken into account by the contracting authority in the course of the assessment of tenders in the procurement procedure; or

b) as a result of the breach of contract, the performance deviates from the contents of the contract to such an extent that it would constitute a substantial modification according to Article 141(6), had the parties modified their contract to that effect.

Any modification of the contract which is aimed at exempting the party entering into the contract as successful tenderer from a breach of contract (or attempted breach of contract) for which he is responsible (or he would be responsible) and the legal consequences thereof (not including the exercise of the right of rescission or termination) or which is aimed at transferring extra costs of work from the successful tenderer to the contracting authority or transferring without reason to the contracting authority other risks to be incurred by the successful tenderer according to the contract, shall be null and void. [PPA Article 142 (3)]

Article 142 (3) aims to ensure that in addition to the rules contained in Article 141 on contract modifications, the expectations of responsible public spending in relation to contract modifications shall also be specified. As a result, in addition to the provisions of Article 141, modifications to public procurement contracts must also always comply with the limitations contained in Article 142 (3).

Article 142 (3) of the PPA qualifies as null and void any modification to the contract that either aims to avoid the application of the tenderer's - otherwise unexcusable - breach of contract (breach of contract) or its legal consequences, or results in the contracting party unjustifiably assuming additional work costs and risks burdened by the tenderer.

If the contract modification is aimed at avoiding a breach of contract or its consequences, the regulations will only accept the modification as valid if the contracting party could be excused from breach of contract on the basis of the rules of the Civil Code, the regulation does not bind the aspects of consideration in this way regarding the contracting authority's assumption of other risks.

The cost of additional work that is borne by the winning tenderer based on the contract or the Civil Code, cannot be taken over, with regard to other risks - e.g. in the event of an extraordinary increase in the cost of raw materials or labor - there is room to examine whether the modification is justified. The last phrase of Article 142 (3) is therefore relevant in that case when based on the original contractual provisions, the burdens of one of the parties become disproportionate due to a change in circumstances in the meantime, and therefore the original contract is requested to be modified in a way that deviates from the risk distribution resulting from the contract.

Therefore, based on the above, pursuant to Article 142 (3) of the PPA in order to enforce the principle of responsible management of public funds, any contract modification due to the assumption of additional costs and risks, where the contracting authority unreasonably takes over the risks or costs that the winning tenderer would be required to bear during the performance of the original contract is null and void. The bidder's scope of risk includes the consideration of all factors that may affect the bid price. Thus, when establishing the price offered by him, he

must pay attention to expected price increases during the contract period and possible minimum wage increases, especially in the case of a longer-term contract.

In particular, the contracting authority may consider modifying the contract based on the following criteria in terms of risk:

- such a change in circumstances was not foreseeable at the time of the conclusion of the contract;
- the change in circumstances was not caused by the conduct of the tenderer;
- changes in circumstances do not fall within the normal business risk of the tenderer.

The contracting authority must interpret this section in accordance with the principle of proportionality. Obviously, it is not justified to assume costs that, or the extent to which changes in these costs could have been foreseeable for a careful economic operator. However, in the case of unforeseen and extraordinary changes that exceed this, it is reasonable to consider the economic consequences of not modifying the contract (e.g. failure of the investment and further increase in costs), and based on this, the contracting authority can be interested in modifying the contract while complying with the requirements of responsible management. In view of the above principles, the contracting authority is not justified in undertaking the full reimbursement of the cost increase that has become extremely disproportionate in an unforeseeable manner, but it is justified to strive for its proportional sharing.

Based on Article 145 (3a) of the PPA the Public Procurement Arbitration Board shall have the competence to state that the contract is null and void on the basis of the infringement pursuant to Article 137 (1) and to state, on the basis of the circumstances stipulated in Article 137 (3), whether the contract involving an infringement pursuant to Article 137 (1) is not null and void. Furthermore, the Public Procurement Arbitration Board has the competence to state, in case of a contract which is null and void for an infringement stipulated in Article 137 (1), whether or not the original condition can be restored in the course of applying the legal consequences of invalidity of the contract. Article 145 (3a) of the PPA also means that the determination of the invalidity of the modificationof the contract also falls within the competence of the Public Procurement Arbitration Board. It should be noted that in the case according to the second sentence of Section 6:245 (1) of the Civil Code according to which, contrary to the main rule, the customer is obliged to reimburse the contractor for any costs incurred in connection with the extra work that were not foreseeable at the time of the conclusion of the contract - the modification is not void, since according to the rules of the Civil Code, the contractor is responsible for costs related to additional work that the contractor cannot foresee, so in such a case, it is not a matter of taking over the costs of the winning bidder.

Pursuant to Article 142 (4) of the PPA the Public Procurement Authority shall be entitled to verify, according to Article 187 (2) (j), compliance with the requirements set out in this Act concerning the modification and the performance of contracts and,

in the event of violation of those requirements, initiate the proceeding of the Public Procurement Arbitration Board or the competent court [Article 153 (1) (c), Article 175].

The contract may be terminated or rescinded according to the Civil Code by the contracting authority, if, among others, it is absolutely necessary to carry out a substantial modification to the contract, which would require a new procurement procedure pursuant to Article 141; [Article 143. § (1) a) of the PPA].

III. Performance of the contract

III.1. Parties involved in the performance of the contract

Notification of parties and subcontractors participating in the performance of the contract

Article 138 (1) of the PPA stipulates that the contract shall be performed by the party entering into the contract as the successful tenderer or joint tenderers on the basis of the procurement procedure or, if the contracting authority required or allowed setting up a business organisation [Article 35 (8)-(9)], by the business organisation (hereinafter referred to as project-company) in which the winning tenderer (tenderers) or the contracting authority together with the winning tenderer (tenderers) have an exclusive share.

The party entering into the contract as tenderer shall make use, for the performance of the contract, of the organisation contributing to the certification of suitability in accordance with the commitment presented in the procedure pursuant to Article 65 (7), as well as in the cases and in a way specified in Article 65 (9), furthermore, he shall involve professionals presented for the certification of suitability in the performance of the contract. [First sentence of Article 138 (2) of the PPA]

In other respects the first sentence of Article 138 (3) of the PPA stipulates that the right of the tenderer to involve subcontractors cannot be limited, except where the contracting authority made use of the possibility under Article 65 (10).

The above mentioned Article 65 (9) of the PPA states that in order to certify the fulfilment of the criteria related to the availability of technicians, their educational and professional qualifications, as well as the reference works which prove the relevant professional experience prescribed by the implementation decree of this Act, economic operators shall only rely on the capacities of other entities if such entity will participate in the performance of the contract or in the performance of the element of the contract requiring the capacities to an extent ensuring that the competence and professional experience – together with the tenderer's own capacities - required by the suitability criteria is achieved during the performance. The economic operator shall rely on the capacities of another entity in order to certify the fulfilment of the

criteria laid down in Article 65 (1) (c)[30] of the PPA only if the given entity will perform the task in relation to which it is required to be included in a relevant register, to hold membership in a professional organisation or a permit. The commitment to be annexed according to Article 65 (7) of the PPA shall provide proof thereof. The commitment shall prove concerning the entity certifying the fulfilment of the requirement of reference works that such entity is actually involved in the performance, the contracting authority shall monitor during the performance of the contract that the level of involvement complies with the provisions set out herein.

Based on the tender documents attached during the procedure, the contracting authority must make sure that the commitment attached related to the economic operator providing capacity means actual participation in the performance, and that this cooperation is of a nature that - together with the tenderer's own capacity - ensures the professional knowledge prescribed in the suitability requirement and the professional experience required in the performance. The tenderer and the economic operator providing capacities are also obliged to perform in accordance with what they undertook at the time of the tender submission, otherwise they breach the law. In addition, the contracting authority is also obliged to check the involvement in accordance with the mandatory commitment during performance.

Pursuant to Article 65 (10) of the PPA in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, in the case of joint tenders, by one of the joint tenderers. In such cases, in relation to those tasks, for the purposes of certification of suitability according to paragraph (9) tenderers or candidates may not rely on the capacity of another entity and, contrary to the provision set out in paragraph (7), those tasks may not be delegated to a subcontractor in the course of the execution of the contract. It should therefore be emphasized that Article 65 (10) of the PPA may only apply to tasks that are actually of fundamental importance – critical in the sense of Article 63 (2) of the Directive – and its application may not lead to an unjustified restriction of competition.

Based on the above, the contract:
- must be performed by the winning tenderer(s) or, where appropriate, by the project company established by them
- limiting the use of subcontractors when applying Article 65 (10) of the PPA.

It is important that if it is related to the specialist, reference or the tenderer/applicant requesting participation meets the suitability requirement according to Article 65 (1)

[30] Pursuant to Article 65 (1) c) the contracting authority may establish a suitability criteria to be fulfilled to tender by stipulating criteria related to the enrollment in the register of the country in which the economic operator is established or the permit, licence or membership in a professional organisation or chamber prescribed in his country of establishment, where this is necessary for the performance of the contract.

c) of the PPA by relying on the capacity of other entity Article 65 (9) of the PPA is to be applied.

Pursuat to Article 66 (6) of the PPA the contracting authority may prescribe in the procurement documents that the following information shall be indicated in the tender or, in the case of a procedure consisting of more than one stage in the request to participate:
a) those part (parts) of the public procurement for the performance of which the tenderer (candidate) intends to employ a subcontractor,
b) the subcontractors intended to be employed in those parts, if they are already known at the time of the submission of the tender or the request to participate.

In the absence of a requirement made by the contracting authority, it is therefore not necessary to indicate the participation of subcontractors in the offer, as stated above. One of the goals of Mod. Act No. 5. was to bring its rules into line with the Directive, in connection with which the rules for the notification of the subcontractor was amended as of February 1, 2021. Pursuant to Article 138 (3) of the PPA, the winning tenderer is obliged to notify the contracting authority in advance of all subcontractors at the time of concluding the contract and - with respect to subcontractors involved later - during the performance of the contract (in addition to the name, the contact details and the representative) , which participates in the performance of the contract. The winning tenderer is obliged to inform the tenderer about any changes in the data of the subcontractors provided in the notification during the period of performance of the contract. The winning tenderer declares in the contract that he will not use a subcontractor subject to the grounds for exclusion stipulated in the public procurement procedure for the performance of the contract. The contracting authority does not need to submit a separate statement or other proof of the implementation of this obligation.

In line with the Directive, the amendment introduced by Mod. Act No. 5. clarifies that in addition to the name of the subcontractors, it is also mandatory to provide additional data - the contact details of the subcontractors and those entitled to representation. In addition, the obligation of the winning tenderers to submit a statement regarding the absence of exclusion criteria for the subcontractors they wish to use will no longer apply; according to the amending provision, the winning bidder must confirm with a statement in the contract that they will not use any subcontractors subject to exclusion criteria. In view of this statement, the winning tenderer will continue to be responsible for not using a subcontractor subject to exclusion criteria, but it is no longer necessary to make a separate statement about this. The previous ones do not exclude the possibility of the winning tenderer requesting a statement from its subcontractors regarding the absence of exclusion criteria, thus ensuring the fulfillment of its contractual obligations.

All subcontractors[31] participating in the performance of the contract must be notified at the time of signing the contract, and subcontractors who become known later during the performance period must be notified in accordance with the above, no later than immediately before their actual involvement in the performance.

It should be noted that in the offer - or in the application for participation in the case of a multi-stage procedure - the tenderer's or applicant's declaration that he will not involve in the performance of the contract a subcontractor subject to exclusion grounds according to Article 62 and if prescribed in the procedure to Article 63 of the PPA must be submitted. The declaration must be submitted even if the contracting authority did not specify that the names of already known subcontractors in the procedure have to be declared. [Article 67 (4) of the PPA]. In several decisions of the Public Procurement Arbitration Board, it dealt with the obligation of those who contract as the winning tenderer to notify the contracting authority of the subcontractors they wish to hire that were not named in the tender. The PPA does not contain formal regulations on how subcontractors' notifications should be, it seems to be clear from the PPA that notifications must be made in writing and must be clear, immediate and properly documented.[32]

Mandatory case of using a subcontractor, change of person

Pursuant to Article 138 (2) of the PPA the party entering into the contract as tenderer shall make use, for the performance of the contract, of the organisation contributing to the certification of suitability in the cases and in a way specified in Article 65 (9), furthermore, he shall involve professionals presented for the certification of suitability in the performance of the contract. The tenderer may only choose not to involve those organisations or professionals in the performance or to replace them with another organisation or professional (including the cases of succession through transformation, division or merger), if the tenderer is able to meet - where, on the basis of the data presented for the given suitability criteria in the procurement procedure, the contracting authority reduced the number of economic operators participating in the procedure, the tenderer is able to meet in an equivalent manner - the same suitability criteria without that organisation or professional or with the new organisation or professional as those met by the party entering into the contract as

[31] Pursuant to Article 3 (2) of the PPA 'subcontractor': an economic operator who (which) participates directly in the performance of the contract concluded in a procurement procedure involved by the tenderer, except for
(a) economic operators who (which) pursue their activity on the basis of an exclusive right,
(b) manufacturers, distributors and sellers of parts and basic materials intended to be employed for the performance of the contract,
(c) sellers of building material, in case of public works;

[32] See Decision No. D.911/53/2015. of the Public Procurement Arbitration Board and Judgement No. 14.K.27.111/2016/36. of the Székesfehérvár Administrative and Labour Court

tenderer together with the organisation or professional nominated in the procurement procedure.

In the course of the procedure, the involvement of an organization or professional presented by the tenderer cannot be waived in the event that, taking into account the specific characteristics of the contract concerned, the use of the given person (organization) in the public procurement procedure was considered a determining factor in the evaluation of the tenders. In such a case, the involved organization may only change in cases of legal succession, if the new organization is the legal successor of the organization presented in the procedure with regard to all relevant circumstances taken into account during the evaluation - especially in the case of Article 76 (3) b) of the assessed personnel can be considered. The identity of the expert determining in the evaluation can only be changed with the consent of the contracting authority and in the event that an expert equivalent to the evaluated is presented with respect to all relevant circumstances taken into account during the evaluation [PPA Article 138 (4)]. The subcontractors, professionals, and economic operators participating in the verification of suitability according to Article 65 (9), and persons presented for evaluation according to Article 76 (3) b) of the PPA are therefore obliged to participate in the performance of the contract.

With regard to the exchange of subcontractors, professionals, economic operators participating in the verification of suitability, persons and organizations presented for evaluation according to Article 76 (3) b) of the PPA it can be established that:

- the involvement of the professional, reference or in the case of verification of the suitability requirement according to Article 65 (1) c) of the PPA, the subcontractor or professional may only be missed or their person replaced if, without this organization/professional, or with the new organization/professional, the tenderer meets the - jointly certified - suitability requirements; this rule also applies to cases of legal succession through transformation, merger, separation;
- the involvement of an organization or professional that is considered a determining factor in the evaluation cannot be dispensed with, except
  - in the case of an organization, if the new organization is the legal successor of the originally presented organization with regard to all relevant circumstances taken into account during the evaluation (especially the personnel),
  - in the case of a person, if the contracting authority agrees to the exchange and the new professional is equivalent to the originally presented professional with regard to all relevant circumstances taken into account during the evaluation;
- in other cases, the person of the subcontractor can be changed without conditions, provided that the successful tenderer must notify the contracting authority in advance of all such subcontractors at the time of the conclusion of the contract and, in the case of subcontractors involved later, during the performance of the contract (in addition to the name, the contact information and with the designation of the person entitled to representation), which participates in the performance of the contract. The winning tenderer is obliged to inform the contracting authority about any changes in the data of the subcontractors provided in the notification during the

period of performance of the contract. Based on its contractual obligations, the winning tenderer may not use a subcontractor subject to the grounds for exclusion provided for in the public procurement procedure. (The latter conditions apply in all cases)

In the case of a subcontractor not named in the offer, the contractual obligation to declare that the subcontractor is not under the scope of exclusion grounds means that, together with the notification regarding inclusion in the performance (name, contact information, and indication of the person entitled to represent), no repeated declaration is necessary regarding that the specific subcontractor intended to be used is not subject to the grounds for exclusion in the public procurement procedure. (However, there is still the possibility that the winning tenderer may request a statement from its subcontractors regarding the absence of exclusion grounds, thus ensuring the fulfillment of its contractual obligations.)

The change in the person of the organization as stipulated by Article 138 (4) of the PPA is basically realized when the given - to be evaluated - activity [for example, customer service and technical activity according to Article 76 (3) a) of the PPA] will be carried out by the legal successor in accordance with the contract on legal succession, or by a specialist assessed in the framework of the personnel [Article 76 (3) b) of the PPA] will be added to the personnel of the legal successor.

The fact that the tenderer in his offer has declared according to Artivle 66 (6) of the PPA that there is no part of the public procurement in connection with which he uses a subcontractor, is not an obstacle for him to use a subcontractor during the performance of the contract.

The newly hired subcontractor must meet only the eligibility requirements, which have been verified together with the tenderer, which the tenderer met together with the eliminated subcontractor. Since the manner of meeting the requirements in the public procurement procedure is regulated by the PPA, as well in detail Government Decree No. 321/2015. (X.30.) on the method of proving suitability and exclusion grounds in public procurement procedures, as well as the method of determining the technical description of public procurement - in the absence of a different legal provision - it can be established that the compliance of the subcontractor newly involved in the performance must be verified in the same way as during the public procurement procedure the original - eliminated - subcontractor - if applicable together with the tenderer - met the given eligibility criteria. The contracting authority - in the same way as during the public procurement procedure - is obliged to examine compliance with these minimum suitability conditions.

With regard to the above investigation of the contracting authority, it should be emphasized that it must be done in advance in all cases, that is, it cannot be done afterwards, because an infringement cannot be legalized afterwards.[33]

Related to the above Article 27 (1) of Épber. stipulates that the contracting party or the person (organization) acting on its behalf, when inspecting the performance of the contract checks based on the data of the construction log that only a subcontractor in accordance with Article 138 (2) and (3) participates in the performance.

We would like to note that the inclusion of the new subcontractor in accordance with Article 138 (3) is not considered a modification of the contract. Modification of the contract in accordance with Section 6:191 (1) of the Civil Code is done by mutual agreement of the parties, while the inclusion of the new subcontractor according to Article 138 (3) of the PPA is based on a unilateral act of the tenderer. The involvement of a subcontractor may still mean modifying the contract if, for example, the area of subcontractor cooperation has been made part of the contract and this is also changed with the involvement, or even the subcontractor himself has been named in the contract and his identity is changed, since in this case the parties' mutual agreement on the identity of the subcontractor is realized, however, in such a case - since it is a contract modification – the rules of Article 141 of the PPA are also applicable.

III.2. Payment of consideration

The PPA stipulates rules on the payment of consideration in the following cases:
- public works
- public contracts carried out using subsidies, for the payment of suppliers.

Pursuant to Article 135 (3) of the PPA in case of public works, specific rules - other than those set out in Section 6:130 (1)-(3) of the Civil Code - may be laid down in a Gov. Decree on the payment of the consideration stipulated by the contract.

Article 32/A. of Épber. regulates the following on the payment of consideration in case of public works:

Article 32/A (1) The contracting authority as a contracting party, as well as - in the case of European Union support for the payment of suppliers - the organization liable for payment, if the tenderer as a contracting party uses a subcontractor for performance, contrary to the provisions in Section 6:130 (1)-(2) of the Civil Code is obliged to provide compensation according to the following rules:

[33] See Decision No. D.156/14/2011. of the Public Procurement Arbitration Board and Judgement No. 13.K.32.029/2011/19. of the Metropolitan Court

a) the contracting parties as tenderers are obliged to make a statement to the contracting authority no later than the date of acknowledgment of performance, which of them is entitled to which amount of compensation;
b) all parties contracting as tenderers are obliged to make a statement no later than the date of acknowledgment of performance as to how much compensation the subcontractors involved in the performance are each entitled to, and at the same time call on the subcontractors to issue these invoices;
c) all parties contracting as tenderers shall issue an invoice after the performance has been acknowledged, detailing in the invoice the extent of the subcontractor's performance as well as the tenderer's performance;
d) in accordance with point c), the contracting authority as contracting party − in the case of European Union support, the organization obliged to pay during supplier payments − transfers the consideration for the subcontractor's performance indicated in the invoice to the tenderers within fifteen days;
e) the contracting parties as tenderers settle the invoices of the subcontractors immediately, or withholds a part of the subcontractor's fee in accordance with the provisions of the contract concluded with the subcontractor;
f) the contracting parties as tenderers shall hand over copies of the certificates of transfers according to point e);
g) the consideration for the performance of the main contractor specified in the invoice submitted by contracting parties as tenderers shall be transferred by the party contracting as a contracting authority - in the case of European Union support, the organization obliged to pay during supplier payments - to the parties contracting as tenderers within fifteen days;
h) if one of the contracting parties as a tenderer fails to fulfill its obligations under points e) or f), the remaining part of the compensation is kept by the contracting authority (or the organization obliged to pay), and it belongs to the tenderer if he proves it to the contracting authority, that he has fulfilled his obligations according to points e) or f), or proves with credible documents that the subcontractor or specialist is not entitled to the amount declared by the tenderer according to point b) or part of it;
i) in the case of a public procurement implemented partly or entirely with European Union support, the deadline according to point d) is thirty days.
(2) The parties may agree on the deferred payment of compensation according to paragraph (1) point g) in accordance with Section 6:130 (3) of the Civil Code. Article 32/B (2) can be applied to the contracting party as a tenderer only for the amount according to paragraph (1) point g).
(3) If the consideration is performed in several installments by the contracting party as contracting authority or the organization obliged to pay, paragraphs (1) and (2) shall apply to each installment.
(4) If the winning tenderer(s) have created a project company in order to fulfill the public procurement contract, for the purposes of this section, the party contracting as the winning tenderer shall mean the project company.
Article 30-32/B. of Épber. also contains additional special payment provisions.

Article 32/B. of Épber. contains provisions on the submission of subcontractor certificates related to public debt and the tenderer's right of retention in this context.

In case of public contracts carried out using subsidies, for the payment of suppliers, the entity obliged to make payment shall do so according to the rules to which the party entering into the contract as the contracting authority is subject, i.e. according to the rules set out in Article 6:130 (1)-(3) of the Civil Code, paragraph 3 herein or the government decree drawn up on the basis of the empowerment of this Act, respectively. [Article 135 (4) of the PPA]

Article 135 (4) of the PPA "confirms" that Article 135 (3) of the PPA and Section 6:130 (1)-(3) of the Civil Code - and the rules defined in the government decree issued on the basis of the empowerment of the PPA - are applicable if the procurement is carried out with subsidies and payments are made to suppliers.

Based on the above in the case of public supply and public services the consideration can be paid pursuant to Section 6:130 (1)-(3) of the Civil Code.

The PPA still allows for an agreement on payment in instalments [Article 135 (5) of the PPA] and compared to the general rules of the Civil Code, it limits the set-off on the contracting authority's side to claims acknowledged by the other party [Article 135 (6) of the PPA].

Rules on advance payment

Article 135 (7) and (9) of the PPA related to advance payments are part of the contract even if the parties have not agreed on it or otherwise [Article 135 (10) of the PPA]. The amount specified in the PPA represents a minimum requirement for the advance payment, therefore if the separate legislation[34] for procurement made from EU subsidies requires the provision of a higher % advance payment, then this higher amount of advance payment applies to procurement made from EU subsidies.

Regarding the provisions of Article 135 of the PPA, the Public Procurement Authority wishes to emphasize that the request for an advance payment is an option granted to tenderers in the case of public works, which the contracting authority cannot attach to additional conditions beyond the criteria set out in the PPA. Thus, for example, it may not limit the application deadline, nor may it impose disproportionate formal requirements as a condition for a valid application. Overall, it can be concluded that if the tenderer wishes to use this option according to Article 135 (7) or (9), the contracting authority is obliged to do so.

IV. Publication of notices on the modification and performance of the contract

[34] Gov. Decree No. 272/2014 (XI. 5.) on the procedure for using subsidies from European Union funds in the 2014-2020 programming period.

Pursuant to Article 37 (1) j) of the PPA the contracting authority shall publish a notice on the modification of the contract. The notice shall be dispatched not later than five business days[35] after the modification of the contract.

According to Article 141 (7) of the PPA in the case of a contract modification pursuant to Article 141 (4) a), no notice on the amendment must be published.

Regarding the performance of the contract, the contracting authority must publish the data specified by law in the Public Procurement Database operated by the Public Procurement Authority, if publication in the Public Procurement Database is not possible, on its own website or that of its maintainer, in the case of contracts concluded on the basis of public procurement procedures started after April 1, 2019, in the public electronic contract register operated by the Public Procurement Authority (hereinafter: CoRe), and if the legislation created on the basis of the empowerment of this law makes it mandatory with regard to certain documents and data, also in the EKR [Article 43 (1) of the PPA].

The Public Procurement Authority draws attention to the fact that in accordance with the provisions of Mod. Act No. 5 Article 43 (1) is amended in such a way that starting from July 1, 2021, the contracting authority is obliged to publish the data specified by law regarding the performance of the contract in the CoRe and in the EKR through the EKR. According to Article 43 (1a) of the PPA, with entry into force on July 1, 2021, this data provision must be completed in the EKR, which ensures the automatic transmission of the data to the CoRe, immediately after uploading, without changes.

Pursuant to Article 43 (1) c) of the PPA the following data concerning the performance of the contract shall be published:

- a reference to the notice launching the procurement procedure (to the invitation, for procedures without prior publication of a contract notice);
- the name of the parties to the contract;
- the establishment whether the performance was in compliance with the contract;
- the date of the acknowledgement by the contracting authority of the performance of the contract; and
- the date of the payment of the consideration and the value of the paid consideration, within thirty days following the performance of the contract by each party or, in the case of public procurements carried out using subsidies, in the context of the payment of suppliers, following the performance by the entity which is obliged to make payment.[36]

[35] In case of procurements started after 1 February 2020.

[36] Pursuant to Article 39 (1) of MvM Decree No. 44/2015 (XI. 2.) on the rules for dispatching, controlling and publishing public procurement and design contest notices, the standard forms and certain content elements of the notices, and the annual statistical summary in case of publication of data related to the performance of the contract according to Article 43 (1) c), the standard form in Annex 16 shall be used.

The above-mentioned data regarding the performance of the contract must be published within thirty days of the fulfillment by all parties to the contract, in the case of public procurement carried out with subsidies by the organization obliged to pay to the contract [Article 43 (1) c) of the PPA]. In the case of a contract concluded for a period longer than one year or for an indefinite period, the published data must be updated every year starting from the conclusion of the contract [Article 43 (7) of the PPA]. The Public Procurement Authority draws attention to the fact that in accordance with the provisions of Mod. Act No. 5. that entered into force on July 1, 2021 Article 43 (7) of the PPA was added according to which, in the case of a framework agreement or a dynamic procurement system the special rules regarding the publication of contracts, contract modifications, and performance data, as stipulated by Article 43 (1) b)-c) of the PPA are determined by government decree. The mentioned data, information and documents must be available on the website for 5 years from the date of performance of the contract [Article 43 (5) of the PPA].

In connection with the modification of contracts, the Public Procurement Authority draws the attention of the participants of public procurement procedures in particular to the fact that in the notice containing the information on the modification of the contract, it must be indicated whether the modification of the contract affects a contractual condition according to the evaluation criteria, as well as the content and exact reason for the modification of the contract must be given in such a way that the legality of the modification of the contract can be determined.[37] As a result, justifications formulated at the level of generality, such as additional work arising from technical necessity, bad weather conditions, or circumstances arising in the bidder's sphere of interest, do not in themselves meet the expectations, because based on this, compliance with the provisions of Article 141 of the PPA, or a specific reason for modifying the contract cannot be established. The Public Procurement Authority draws the attention of legal practitioners to the fact that according to Article 187 (2) j) of the PPA that has to be used pursuant to Article 142 (6) of the PPA, the Authority monitors the notices on the modification of the contracts concluded on the basis of the public procurements and the concessions in the framework of official control according to the rules of Ákr. Detailed rules of contract control are defined in particular by Gov. Decree 308/2015 (X. 27.) on the control of the execution and modification of contracts concluded as a result of the public procurement procedure by the Public Procurement Authority. (X. 27.) Defined by government decree. This task practically covers checking these notices and published data for compliance with the conditions of the PPA. Therefore, it is also in the interest of legal practitioners to provide the reason for the modification in sufficient detail in each case.

In view of the fact that Article 37 (1), as well as Article 43 (1) and Article 141 (7) have been defined in a general manner, they are applicable in all public procurement procedures - thus in the procedure according to Article 115 and Article 117 as well.

[37] See judgement No. 25.K.34.479/2007/10. of the Metropolitan Court.