

Hungary's Public Works Projects Act has taken effect

Hungary's Act LXIX of 2023 on Public Works Projects (hereinafter: "Act") took effect on 8 November 2023. The Act creates a new and unified framework for public works projects. Many rules that apply to various elements throughout the entire lifecycle of public works projects, from pre-design to completion and operation, have been revised.

The Act includes provisions on certain mandatory terms and elements of construction contracts. In addition, it also reforms dispute resolution and legal recourse procedures, and appears to make the involvement of the Certificate of Performance Expert Board (hereinafter: "CPEB") mandatory before a lawsuit can be filed.

Scope of the Act

The Act applies to public works projects with a value equal to or higher than the national public procurement threshold, and to entities that participate in preparations for, and the completion of, such projects. A construction project qualifies as a public works project if its design and completion is funded from the central budget and/or more than 50% of its estimated value is indirectly funded by the EU, regardless of whether it serves a public purpose.

Model contracts

Construction contracts concerning public works projects must be concluded using one of the model contracts published on a government website. However, the model contracts have yet to be published. Consequently, it is not clear what impact these models will have on the freedom of contract and the parties' ability to determine the

terms of their contract as they desire. So, it remains a question whether the model contracts will serve as guidelines for the general framework of contracting, or whether construction contracts for public works projects may now only be concluded with specific, statutorily fixed clauses.

Mandatory elements

The Act lists certain elements that construction contracts must include. Some of the provisions can help prevent disputes. For example, contracts must contain (a) the rules and methods of determining and modifying technical specifications, and how extra work and additional work can be ordered; (b) the conditions of modifying contractor's fees and handling claims for extra expenses, including the management of increases in the price of materials and cases where the contractor is not entitled to extra fees; (c) rules pertaining to faulty performance, warranties and guarantees; (d) a force majeure clause; and (e) claim management and dispute resolution procedures.

Escalation clause

The construction industry is very sensitive to changes in general economic circumstances. The effects of this include wild fluctuations in the prices of construction materials, while fees can also increase drastically. In spite of all this, contractor's fees are more frequently charged at a flat rate. Under such an arrangement, the developer is exposed to the risk of price drops, while the contractor is exposed to potential price hikes. This system works well enough in normal market circumstances. However, market trends can be atypical at times. We believe that it is advisable to include an escalation clause in any construction contract as a preventive measure, to ensure the parties' obligations are clear in the event of excessive price increases due to hyperinflation.



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Subject to the parties' agreement, these clauses can be designed to manage the contractor's unexpected costs in ex-post negotiations or in an automatic manner with a predetermined methodology.

Therefore, it is a preferable innovation that Section 47 of the Act states that in the case of a public works project, the relevant construction contract must include a formula, based on objective market indicators, for the predictable management of risks associated with unforeseeable increases in the prices of construction materials and construction fees. However, price increases may only be recharged in the period between the date of the construction contract and the date when the relevant construction materials are ordered in line with the construction schedule attached to the construction contract, on the basis of the confirmed purchase date of the materials.

Dispute resolution and legal recourse

In disputes associated with the performance of architectural/engineering design contracts and construction contracts concerning public works, the opinion of the CPEB will have to be obtained as a first step. The primary objective of such an opinion is to facilitate an amicable resolution of the dispute between the parties.

If the parties are unable to reach a settlement and one of them intends to seek legal recourse against the CPEB's opinion, it may do so by filing a lawsuit within six months of receiving the opinion but no later than within thirty days after the completion of the relevant technical handover procedure [Section 54 (3) of the Act]. However, the Act does not state clearly whether such lawsuits qualify as what are known under Act XXXIV of 2013 (hereinafter: CPEB Act) as lawsuits based on CPEB opinions.

In another new development, the Court of Budapest will have exclusive jurisdiction in cases that are covered by the Act and have a net value in dispute of more than HUF 200 million. Every dispute will be adjudicated by a panel of three judges, where one of the judges will have to have an engineering degree or equivalent. However, Section 54(8) of the Act expressly states with regard to such cases that the provisions in Section 5/A of the CPEB Act (i.e. the rules on lawsuits based on CPEB opinions) "must be applied with the deviations specified in this Section".

Issues that require legislative or regulatory clarification

The Act states that the opinion of the CPEB must be obtained in the case of all "disputes associated with the performance" of public works contracts. However, it should be noted that the CPEB Act currently does not necessarily bestow adequate powers on the CPEB for this purpose. In procedures conducted under the CPEB Act, opinions may only be issued in matters included in an exhaustive list.

Compared to this, the phrase "disputes associated with the performance" of contracts could potentially result in the referral of a much broader set of cases to the CPEB. For example, legal disputes associated with the performance of contracts include disputes concerning late performance, the related penalty or even the costs incurred as a result of the extension of a deadline. In a procedure under the CPEB Act, the activities of the CPEB may not cover these matters.

Therefore, it remains to be seen whether the new Act extends the scope of the CPEB's procedures and whether all disputes associated with the performance of public works contracts will primarily



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have to be submitted to the CPEB, or only opinions on certificates of performance will have to be obtained from it in accordance with the CPEB Act.

It is also unclear whether a lawsuit filed after a “new” CPEB opinion is obtained under the Act will always qualify as a lawsuit based on the CPEB’s opinion within the meaning of Section 5/A of the CPEB Act.

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