

Explanatory Opinion of the Office for the Protection of Competition on Demonstration of the Fulfilment of Qualification Prerequisites in Respect of Simplified Below-the-Threshold Procedure after 1 April 2012 (After the Amendment of the Act on Public Contracts No. 55/2012 Coll. entered into force)

The manner of demonstration of the fulfilment of qualification prerequisites in respect of below-the-threshold contracts – Article 62 of the Act

- **Article 62(1)**

The Article 62(1) implies that in respect of below-the-threshold contracts the contracting entity is obliged to require demonstration of the fulfilment of basic and professional qualification prerequisites and where the contracting entity requires demonstration of technical qualification prerequisites, Article 56 shall be applied by analogy. The contracting entity may require declaration pursuant to Article 50(1c) as well.

- **Article 62(2)**

In respect of below-the-threshold contract, the economic operator shall demonstrate the fulfilment of basic qualification prerequisites by the submission of solemn declaration, if the contracting entity does not set out in the contract notice or in the call for competition an obligation of the economic operator to demonstrate the fulfilment of basic qualifications prerequisites with evidence referred to in Article 53(3).

The manner of demonstration of the fulfilment of qualification prerequisites in respect of simplified below-the-threshold procedure (hereinafter referred to as “SBP”) – Articles 52, 57(2), 59(4), 62(1), 62(2), 62(3), 82(4)

- **Article 62(3) – SBP**

Provision of the Article 62(3) provides for the manner of demonstration of the fulfilment of qualification in SBP, so that the qualification is demonstrated in the form of solemn declaration from which content is apparent that the economic operator fulfils qualification prerequisites required by the contracting entity.

Given that the provision of the Article 62(3) does not provide for the time limit within which this should take place, it is necessary to apply a general provision, Article 52(1). The solemn declaration about the fulfilment of the qualification by the economic operator is therefore necessary to submit to the contracting entity within the time limit for the submission of tenders.

Regarding the content of the solemn declaration in respect of SBP, the Act leaves the details of the solemn declaration up to the economic operators (e.g. whether, for the purposes of technical prerequisites, they will specify in more details the public contracts that they executed or they will solemnly declare that they fulfil the prerequisites that were defined by the contracting entity).

Unlike the Article 62(2), the Article 62(3) implies that in respect of SBP the contracting entity is not entitled to require the submission of evidence demonstrating the fulfilment of qualification prerequisites pursuant to Article 53(3) in the call for competition.

Despite the facts stated above, it may occur that in respect of SBP the tenders of economic operators will contain the own evidence demonstrating the fulfilment of qualification besides or instead of the solemn declaration. However, there is no reason why the contracting entity should not accept this kind of evidence if it demonstrates the fulfilment of qualification, when in respect of other types of award procedures this manner of demonstration of fulfilment of qualification is sufficient for the contracting entity and the purpose of the solemn declaration is a declaration of facts confirmed in this evidence. The contracting entity assesses such evidence according to its content.

The submission of evidence prior to the conclusion of the contract

Article 62(3) provides for that ***the tenderer with whom the contract is to be concluded (i.e. only the selected tenderer) is obliged to submit the originals or officially authenticated copies of the evidence demonstrating the fulfilment of qualification prior to the conclusion of the contract.*** Failure to fulfil this obligation is considered to be failure to provide due cooperation for the conclusion of the contract pursuant to Article 82(4).

If the tenderer **fails to submit the evidence, the contracting entity shall not exclude the tenderer** from the participation in award procedure (however in this case, the contracting authority may make a claim to the tender security – Article 67(7)) and is entitled to conclude the contract with the tenderer that has placed second in the ranking. If the contract is not concluded even with this tenderer, the contracting entity is entitled to conclude the contract with the tenderer that placed third in the ranking.

In order to maintain the principle of transparency, it is recommended that the contracting entity informs the tenderer about the fact that the evidence submitted by him does not demonstrate the required qualification. In terms of due cooperation for the conclusion of the contract it is possible that the contracting authority asks the tenderer for submitting or supplementing the evidence of the qualification, if the selected tenderer did not submit all evidence required by the law or the evidence is unclear. It is recommended that the contracting entity sets **the reasonable time limit** to the selected tenderer for the submission of the evidence in order to conclude the contract **within 15 days after the expiry of the time limit for the submission of tenders.**

If the selected tenderer submitted the evidence (the originals or officially authenticated copies of the evidence – pursuant to 62(3)) in the tender and this evidence is in accordance with the Act, the contracting entity **shall not require the evidence prior to the conclusion of the contract.**

Age of evidence and time within which the evidence is assessed prior to the conclusion of the contract in respect of SBP

Article 52(1) of the Act (the economic operator is obliged to demonstrate the fulfilment of qualifications in SBP within the time limit for the submission of tenders) and Article 59(4) of the Act (the facts conclusive for fulfilment of qualification must occur within the time limit pursuant to Article 52) **shall not be applied prior to the conclusion of the contract as these provisions are related to demonstration of qualification in tender/request** (in which the qualification was demonstrated by the solemn declaration), not to the due cooperation for the conclusion of the contract.

Pursuant to Article 62(3), the originals (officially authenticated copies) of the evidence demonstrating the fulfilment of qualification are submitted prior to the conclusion of the contract **in terms of due cooperation for the conclusion of the contract.**

For the age of evidence demonstrating the fulfilment of qualification is possible to apply the general provision of Article 57(2), pursuant to which the evidence demonstrating the fulfilment of **basic qualification prerequisites and the extract from the Commercial Register shall not date more than 90 days** (from the date on which the tender/request to participate/dispatch or forward an indicative tender was submitted – according to the type of award procedure), and it shall not exclude the possibility of the economy operator to submit evidence which is **“younger/fresher”** and such an evidence may be related to the time after the expiry of the time limit for the submission of tenders.