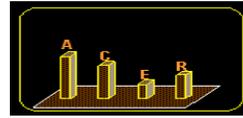




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**EXPLANATORY AND TRAINING
MANUAL ON
THE PREVENTION OF CONFLICTS OF INTEREST
IN PUBLIC PROCUREMENT**

- 2 -

**Prepared by
High Inspectorate of Declaration and Audit of Assets
(HIDAA)**

in collaboration with

**Albanian Center for Economic Research
(ACER)**

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ABBREVIATIONS

ACER	Albanian Center for Economic Research
ATRAKO	Agency of Concessions Treatment
CAP	Code of Administrative Procedures
CEC	Central Election Commission
HIDAA	High Inspectorate for Declaration and Audit of Assets
Ltd.	Limited Responsibility Association
PA	Procurement Advocate
PCI	Law on Prevention of Conflicts of Interest
PPA	Public Procurement Agency
S.a.	Societe Anonym
USAID	United States Agency for International Development



PURPOSE OF THE MANUAL

The Manual on Public Interest Protection

The Manual “On the Prevention of Conflicts of Interest in Public Procurement” is one of the most indispensable mechanisms aiming to respect the rules of cooperation and contracts between public institutions and private economic operators.

The procurement process, as a highly complicated competition process, the final act of which is the signing of the contract for public purposes, undertakes the risk of involvement in a conflict of interest situation.

The manual is useful to clarify the role and duties of the parties in two ways: first, it clearly defines the responsibilities of the contractual authorities, that is of public institutions, and secondly, to respect the legal regulations of private subjects during the procurement procedures of public funds.

Taking into consideration the complexity of the relationship, frequently the relations between public - private subjects are not administered in pursuance to legal requirements. The recent amendments on public procurement legislation and the new work practices on tendering processes encourage the drafting and developing of explanatory mechanisms, such as this manual, that provides a practical roadmap, providing accurate and useful explanations of the obligation of the parties in order to accomplish a rightful, duly and public service procurement process.

The law on the prevention of conflicts of interest widely covers and conceptually treats conflicts of interest cases in public procurement. Notwithstanding the many practical cases that the procurement structures face in their daily activity, especially in conflicts of interest cases, there is a need for further clarifications and legal interpretation, aiming to prevent conflicts of interest.

In depth, the manual provides answers for different questions that may arise during the public procurement process. The answers are provided through hypothetical examples at the end of each chapter.

The content of the manual includes 5 chapters:

- Characteristics and procedures of preventing conflicts of interest in public procurement;
- Roles and responsibilities of public agencies in the prevention, avoidance and administration of conflicts of interest in public procurement;
- Restrictions of private interests in the prevention of conflicts of interest in public procurement, in cases of a typical or absolute nature;



- Restrictions of private interests for the prevention of conflicts of interest in public procurement, in cases of a typical or relative nature;
- Invalidity of acts in public procurement of goods, works and services;
- Sanctions.

Practically speaking, the content of these chapters includes restrictions and prohibitions stipulated in the law, not only for public officials of procurement units and economic operators, but for all public functionaries that, in a certain situation, may be involved in a decision-making process for procurement with public funds.

Taking into consideration this fact, the manual is a mechanism of wide usage among the employees of public administration, aiming to achieve the highest public interest, in conformity with the legal requirements.

In addition, the manual is a guideline for all private economic operators, that are involved in the competition process to make use of public funds, and at the same time achieving the highest public interest.

The manual was developed by the High Inspectorate of the Declaration and Audit of Assets (HIDAA) with the support of United States Agency for International Development (USAID).

Experts of several areas were involved, such as from HIDAA, Albanian Center for Economic Research (ACER), Public Procurement Agency (PPA), Procurement Advocate (PA) and the Agency of Concession Treatment (ATRAKO).

A special thank you goes to USAID for its support in the accomplishment of this project, as well as for all the experts involved in developing this manual. At the same time, I am strongly convinced that this material will be a useful roadmap aiming to respect the legal requirements in the prevention of conflicts of interest in public procurement.

Inspector General of HIDAA

Adriatik LLALLA



INTRODUCTION

Public Procurement is the main field where private business interests are assorted with public interests through the implementation of procurement procedures of public funds. In fact, this is also a main field at the center of the corruption debate, centered around the existence of conflict of interest in this process. However, conflict of interest does not necessarily mean corruption. But, it is well-known that conflict of interest between private interests and public obligations of public officials, if they are not managed properly, can lead to corruption.

Citizens are interested to know the destination of their contribution to government paid through taxes, while business is interested to know the development of this process in the future, while considering themselves not only as indirect beneficiaries of public funds, but also as possible actors and beneficiaries when planning the redistribution process. In this process, the government must guarantee that public officials' interests and their private belongings shall not distort their decision-making, contrary to the citizens confidence toward the public institutions that can be seriously weakened and damaged.

These recent years, conflict of interest has been a crucial issue at the core of the public debate worldwide, both in the public and private sectors¹. The fall of the barriers between the public and private sector, and especially the privatization of services, public and private partnerships, staff exchange, have been increasing the so called "grey zones", where conflicts of interest between the private and public interests have drastically increased. In transition countries, conflicts of interest phenomena are even more noticeable due to the intensity of the above mentioned factors, but also due to the structures and fragile managerial procedures, influencing the economic and political system. Some of the main consequences are: distortion of competitiveness, unfair allocation of public resources, involving scandals which weaken the citizens' confidence in public institutions, etc. While evaluating these consequences, a majority of people consider the conflicts of interest issue as the main source of corruption and exploitation of the public duty from public officials. These phenomena are worldwide, but in some countries including this country as well, their level is critical. In order to be successful in managing these phenomena, it is highly important to identify the fields and factors which enable corruption: where there is a conflict of interest in public procurement and potential situations to avoid it.

The Manual "*On the Prevention of Conflicts of Interest in Public Procurement*" includes the conflict of interest's treatment in public procurement, tenders, concessions and all public contracts. The analysis of this manual tend to regulate conflicts of interest in all procurement phases starting with the preparation of tender documents and finalizing with the notification to the contract signing winner, along with concrete resolved causes which provide to this document above all a valuable practical use.

In this context, the "Explanatory and Training Manual for the Prevention of Conflicts of Interest", No.1 represents a notable value in the entire methodological existing framework of conflict of interest. The Manual develops and describes in general the content and functioning of law for the prevention of conflicts of interest, types of conflicts of interest, and law implementation field, but

¹ For more information see "Degrees of OECD for Conflict of Interests Management in Public Service" GOV/PUMA (2003)10



it does not emphasize and was not its intention to analyze particular issues and fields where engenders conflicts of interest.

This Manual No. 2 “For the Prevention of Conflicts of Interest in Public Procurement”, is the sequel to Manual No. 1 “Explanatory and Training Manual for the prevention of the conflicts of interests”, as such general issues treated in Manual No.1 are applicable also in the preparation of this Manual. Regardless of the value that this document has in the actual situation context, the Manual might need to be further reviewed and enriched in the future in accordance with the legislative amendments which influence its main field.

In pursuance to the functional laws upon which HIDAA operates, a series of sub acts are drafted and undertaken. In order to execute Article 42, point 2 of Law No. 9367 dated 7 April 2005 “On the prevention of conflicts of interest in the exercise of public functions”, the office of Inspector General has drafted and published some acts of an explanatory nature, which complete the regulatory framework of conflict of interests, such as:

1. Regulation for prevention of conflicts of interest in the exercise of public functions;
2. Decree No.7 “ On certain functions which have the obligation to declare”;
3. Decree for understanding of the preliminary and fundamental moment in a decision-making;
4. Methodology for the audit and verification of the declaration of private interests and prevention of conflicts of interest;
5. Legal Commentary No. 1, 2, 3 and 4, with concrete cases of conflicts of interest management;
6. Explanatory and Training Manual on the prevention of conflicts of interest, No. 1;
7. Document template of declaration according to categories and their explanatory manual.



MANUAL OBJECTIVES

The main objective of this Manual is to increase the level of understanding of the conflict of interest concept and content in public procurement cases in order to effectively manage situations by the responsible authorities and structures, designated by law on the prevention of conflicts of interest.

The main goal is to support the responsible authorities, at the local and central government, public managers at all levels, as well as officials who have the obligation to declare their private interests for the identification and efficient managing of conflicts of interest in public procurement. The Manual intends to raise public administration managerial capacities, whose activities include the organization of procurement procedures, as well as to facilitate their daily work in accordance with the legal regulations and international best practices.

The Manual will be useful for the economic operators to better understand the ways in which conflicts of interest cases appear in public procurement in order to identify and fight them by protecting their interests or the public interests, in general. This Manual does not replace the legal framework which regulates the avoidance of conflicts of interest in public procurement, and also does not compete with the importance of these regulations.

The opinions and regulations of these Manual are based on the assessment of the actual situation, evaluation of local factors, study of legal framework which regulates specifically or temporary conflict of interest in public procurement, as well as in the conclusions underlined in the progress reports of the European Commission². The theoretic analysis along with practical examples and solution recommendations for selected causes are suggested to help the identification and management of conflict of interest cases, particularly when they appear in public contracts in the procurement field. As far as examples are concerned, they are selected to represent the most probable situations in practice and every similarity with a real situation is not intentional but used only for illustration purposes.

It is expected that the publication of this Manual and its implementation will help increase the knowledge level and standards application, which form the bases of laws and regulations on the avoidance of conflicts of interest in public procurement. As such, it is recommended to deliver trainings and largely implement the Manual.

² European Commission Delegation, "Progress Report for Albania", 2008, Tirana
http://www.delalb.ec.europa.eu/files/albania_progress_report_2008.pdf



DEFINITIONS

The Manual has many terms, the definitions of which are described below to help better understand the exact objective and purposes of them. The definitions described below, as a defined terminology, are of the same context that these terms have in different laws when used and defined.

In cases when the definition is used “in the public procurement field”, it should also be noted that there are additional elements of this field such as tenders, concessions and all public contracts, in terms of this Manual.

In this Manual the terms of “prohibition of an absolute nature” and “prohibition of a relative nature” are broadly used. As explained in Manual No. 1 these terms are not terms of the PCI law, but are used for methodological purposes, and mean:

- *‘prohibition of an absolute nature’*: refers to prohibitions deriving from the official duty (point 1, 2 and 6 of the PCI Law)
- *‘prohibition of a relative nature’*: refers to prohibitions deriving from the role of the official in a concrete decision-making and existence of private interests (point 3 of Article 21 of the PCI Law)

All the other definitions used in the Manual, for which there is not a detailed explanation below, will be read according to the meaning that these terms have in specific laws and in accordance with the goal of this Manual.

In the Manual, the following definitions have this meaning:

- **“Conflict of interest”** is a situation of conflict between the public duty and the private interests of an official, in which he has direct or indirect private interests that affect, might affect or seem to affect the performance, in an incorrect way, of his public responsibilities and duties.
- **“actual conflict of interest”** is a situation in which the private interests of the official affect, have affected or might have affected the performance of his official duties and responsibilities in an incorrect way;
- **“apparent conflict of interest”** is a situation in which the private interests of the official seem, on their face or by their form, as if they have affected, affect or might affect the performance of his official duties and responsibilities in an incorrect way, but, in fact, the effect has not occurred, is not occurring or cannot occur;
- **“potential conflict of interest”** is a situation in which the private interests of the official might in the future cause an actual or apparent conflict of interest to appear, if the official were to be included in certain duties or responsibilities;



- **“case-by-case conflict of interest”** is a situation with a conflict of interest, in one of the three above natures, that appears case-by-case and is related to a particular decision-making;
- **“continuing conflict of interest”** is a situation in which a conflict of interest might appear repeatedly and/or often in the future;
- **“Contractual Authority”** is every entity that is obligated by the public procurement law for the execution of public contracts as well as every public authority which has the responsibility in entering into a contract or a concession contract.
- **“Vendor Authority”**, is the public authority, who by executing the law for the public tender has the right to vend the public property through the public tender and execute its vending contracts.
- **“Official”** is every person who performs duties and exercises public functions according to the definition of letters “a”, “b” and “c” of point 1 of article 4 of conflict of interest law;
- **“Public Funds”** are every monetary value of the State Budget or local budget, defined to be used in public procurement, assisting funds or credit for which implementation of public procurement law procedures is required as well as incomes from the state;
- **“Economic Operator”** is every contractor, supplier, and service entrepreneur, candidate or offeror;
- **“Offeror”** is the economic operator who presents an offer in a public procurement or tender procedure, or intends to participate or participates in a selection procedure in relation with a concession;
- **“Selection procedures of public procurement”** are the procedures undertaken by the responsible authority by law to select the winner of public contracts or procurement procedure;
- **“Candidate”** is the economic operator, who asks to be invited in a limited or negotiated public procurement procedure.



1. PECULIARITIES AND PROCEDURES ON PREVENTION OF CONFLICTS OF INTEREST IN PUBLIC PROCUREMENT

Activity of public officials must be governed by lawfulness, protection of public interest, rights of private persons, equality of rights, justice and impartiality, accountability, internal control, protection of confidentiality, efficiency and so on, regulated specifically by the Code of Administrative Procedures. The regulation which in principle regulates the relation between public officials and private persons is necessary for the existence and functioning of the rule of law.

Conflict of interest is the most likely phenomena which can affect and damage the implementation of the above mentioned principles. The law related, helps set out provisions for the prevention of conflicts of interest with the intention of combating it in its initial phase and avoiding its harmful and often quite costly consequences.

1.1. Basic Principles for Avoidance of Conflicts of Interest in Public Procurement

1.1.1. Overview

The principles summarized in this chapter are included in the Law for Public Procurement. However, the public administration in its daily activity is guided also by other important principles mentioned and sanctioned in other laws that regulate its activity in general, as well as by principles and regulations of an ethic and morale nature that regulate not only individual behavior but also that of groups and respective institutions.

The public, entering into a contract and selection process of a contract, is regulated by general basic principles such as non-discrimination, transparency and equality in considering the requests and obligations imposed on economic operators, etc. The implementation of these principles is threatened by the possibility of actual conflict of interest or apparent conflict of interest, as a result of which the whole process is under strain. The deviation from these principles goes parallel with the emergence of conflicts of interest. Therefore, it is axiomatic that a conflict of interest situation cannot exist if one of these principles is not impinged.

The implementation of principles considered below, as basic principles for the avoidance of conflicts of interest in public procurement, has a direct influence in the legal fulfillment of duties that public administration officials are required to perform who, in their failure to do so, are responsible for the damages caused to private persons.

1.1.2. Proportionally

Article 3 point 12 of the Law “On the Prevention of Conflicts of Interest” (PCI Law) provides the principle of proportionally by regulating the report between the importance of the duties, and responsibilities and competences of a public official with the measures for the prevention of conflicts of interest: the highest is the importance of the duties, responsibilities and competences of a public official, more are the restrictions of the interests and even more severe is the



punishment. The PCI Law intends to prevent the eventual conflict of interest of officials executing an important duty, responsibility and competences, as these officials are most exposed to interests and have a higher risk of circumstances when conflicts of interest may arise. Meanwhile, a particular attention in the PCI Law on preventing conflicts of interest to officials with important functions is directly related with the the institutions image and their leadership in front of the public.

Therefore, in a special section of the PCI Law, the types of private interests and restrictions are mentioned of the categories of officials who at a certain context contexts represent a wide spectrum, but do not compose and cannot be an exhaustive list. For this purpose, it is the obligation of particular laws which regulate special fields, to determine other restrictions to be executed in order to avoid conflicts of interest. In any case, it is foreseen to execute the law which stipulates the severest restriction so as that restriction which diminishes more the risk of conflicts of interest avoidance. As the interests restrictions for special official categories with regard to avoidance of conflicts of interest are regulated by different laws, the law has been very accurate in providing a solution without any misinterpretation, but with unambiguous references to apparent and measurable parameters such as “the severest restriction”.

The overall idea which characterizes this regulation is the avoidance of conflicts of interest in an appropriate way, in proportion with the importance of the public official duties and the importance of the situation, according to Chapter IV of the PCI Law “Ways of Treating and Resolving Conflicts of Interest”, Article 37 and the following provisions.

According to Article 44 of the PCI Law,, when it does not constitute a criminal offense but an administrative violation, every action mentioned in this article and with regard to the sanctions “...fines are higher according to the level of public official position...”

1.1.3. Non-discrimination and Equal Treatment

The principle of equal treatment is a basic principle, the concept of which is based on non-discrimination. According to this principle, every nature of discrimination obvious or hidden, direct or indirect, on every founded bases is prohibited. All participants and competitors should be treated equally to the extent that that the differences between them are not objective and justified. According to this logic, every preferential or favored treatment that can be provided to particular subjects due to direct or indirect related interests, hidden or obvious is prohibited. In summary, every case shall be categorized from the perspective of the law, and the execution of the law must be uniform. In this way, the principle of fair competition is fully respected among different economic operators.

More simply, the non discrimination principle or equal treatment requires that a bidder or candidate shall not be disqualified from the public procurement, concessions and tenders based on nationality, race, religion, gender or other criteria which are not connected with the qualification and other procedures defined by law or tender documents, but the entering into a contract authority or vendor can refuse an offer or request for participation to bid, or vending procedure if the offeror or the candidate is under a conflict of interest situation. In order to avoid the unequal



treatment for conflicts of interest potential reasons, it is foreseen the withdrawal from the Commission of Offers Evaluation of persons who can be in a conflict of interest relation with the bidders in public procurement procedures.

The principle of equality in the treatment of requests and obligations performed by the economic operators from one side expresses the duty that all elements composing a procurement procedure shall be non discriminating and offerors shall have an equal treatment between them in all phases of competitions and procurement, and from the other side it is related also with the expectations that offerors should have, that in the whole public sector they will face an equal implementation of the law and there will not be different interpretations of the law by different entities.

1.1.4. Transparency

This principle provides that public authorities have the obligation to make available to the public all information related with a procurement procedure, concession or auction. Further, all interested parties shall have access to the sources of information and the administration shall be open and professional in providing the information or the justifiable notification to offerors in cases when the information is under the regulation of another law which restricts or prohibits its distribution. The implementation of this law increases the confidence of the public and will encourage more operators to the selection and competition process and therefore more opportunities and quality for goods, work and services which can be procured at a lower price.

The transparency consists in all aspects: starting from the first phase of public procurement process through offering accurate information and easy access, offering equal information for all interested economic operators who have equal opportunities to understand the same distributed information, as well as in the following procurement phases where parties that have certain claims can clarify certain particular moments during the process concerning their interest. Transparency has a limit, though, which is justified by complementary principles such as the protection of state secrets or personal data and efficiency. Therefore, there are restrictions in order to protect national security and the protection of trade secrets. In the transparency framework, regulations of electronic procurement have been approved making possible an increase of information sources.

An important element of the transparency is the right of information that all interested persons have and shall execute through a request to obtain information about specific procedures of public procurement, concession or auction. In support of this important principle, all other requests of procurement and public contracts are regulated, while it is foreseen that all the documentation, advertisements, decisions, information and communication are executed or documented in a written form. The implementation of this principle is a very effective method to make private persons ask, verify and report cases of conflicts of interest.

The transparency component is also public surveillance, which refers to the involvement of citizens in the process of procurement procedures development. The surveillance includes as well an active role of citizens considering that they are the direct or indirect beneficiaries of the procurement process. This is not only because the financial sources of procured objects are their contribution, through paid taxes, but also because they are direct or indirect beneficiaries of goods, services and works accomplished through public contracts.



1.1.5. Integrity

The integrity principle has at its foundation the obligation for the perseverance of the procurement procedure and competition unaffected by the conflict of interest phenomenon, corruption and every other underground agreement on financial and moral benefit or provision of unlawful favors. Integrity must be at the core of every official morality. As such, the ethic behavior and accordance with ethic principles should be at the center of attention of officials and managers of public institutions who organize procurement procedures, concessions and auctions, as well as the guiding principles of their supervising authorities. Integrity shall characterize persons as bidders as well, who must evaluate properly the opportunities and chances and struggle with integrity for the evaluation of the best criteria, as well as for the impingement of phenomenon which compromises the procurement processes and damages their interests as competitors and citizens.

1.2. The Official in the Public Procurement of Goods, Works and Services

1.2.1. Overall

The Public Official in the position of a bidder, for the purposes of this Manual, will be all persons of all levels (technical, decision-making or executive) where public financing is present and public procurements are executed. In concrete terms, the concept of "official" is described in Law No. 9049 dated 10 April 2003 "On the Declaration and Audit of Assets, financial obligations of the elected people and certain public officials" (Amended with Law No. 9367 dated 7 April 2005, Law No. 9475 dated 9 February 2006 and Law No. 9529 dated 11 May 2006).

1.2.2 Interaction between the official and the offeror

Interaction between the official and the offeror occurs in cases when private interests exist for the official and because of them there is a conflict of interest situation. This interaction is reflected in the legislation as a restriction of certain elements of activity that the official is allowed to perform. They are reflected in the prohibition of entering into a contract by the official as an offeror, prohibition of ensuring incomes by him due to special function he executes, as well as prohibition of receiving gifts, favors, promises and preferential treatments.

1.3. Methodological Steps of Analysis and Treatment of Conflicts of Interest Cases in the Field of Public Procurement

In public procurement, conflict of interest has a special characteristic compared to other fields of public administrative activity due to its frequent risk of appearance. On this purpose, the declaration and audit of conflict existence shall be done case-by-case and cannot be covered entirely by periodic declarations. Therefore, there are high expectations of public officials that according to the circumstances they can avoid or resolve themselves any conflict of interest situation by effective means to avoid them in normal activity of public administration.

Article 7 of the PCI Law stipulates that: "...each official is obliged to make a self declaration, case-by-case, unless he is aware of the existence of a private interest, which can influence or



cause a conflict of interest..." The declaration must be filled in case-by-case, even when asked from the superior who based on a legal source or request might have been informed about the existence of a conflict of interest.

In order to come to a proper conclusion, as far as the existence of a conflict of interest in a particular case is concerned; the public official shall analyze and evaluate various factors, such as the following:

1. Which are the duties and concrete competences of the official in the process of selection or decision-making in a concrete public procurement case, concession, auction or public contract?
2. Does that official have an imperative and/or determinative competence?
3. Which are the private interests of the official that interfere in the procurement process?
4. Is there any possibility that private interests might be questioned in the future for procurement procedures that the public institution for which the official works, plan or might plan?
5. Is it possible that selection of the entering into a contract party might be influenced by the private interests of the official, in favor of the latter?
6. What possibilities exist that those interests might influence the position of that official in the selection process of entering into a contract party?
7. What possibilities exist that the private interests of the official might have potential for a possible conflict of interest?
8. What possibilities exist that the private interest of the official might produce a situation of an apparent conflict of interest?
9. Is there a good cause – consequence relation between interests and approved acts though the procurement processes or contract issued at the end of this process?

The other characteristic of the conflict of interest in public procurement is that the identification of its existence in a public procurement process, concession or auction might be difficult to be verified. This is due to the fact that the private interests and their role in a given process might not be easily identifiable.



2. ROLE AND RESPONSIBILITY OF PUBLIC AGENCIES IN THE PREVENTION, AVOIDANCE AND MANAGEMENT OF CONFLICTS OF INTEREST IN PUBLIC PROCUREMENT

2.1 Overall

It is the responsibility and obligation of every public institution, every public official, even of every citizen to influence as much as possible the prevention of conflicts of interest in public procurement. Public institutions have the duty, deriving from a legal obligation, to execute such duty in the functioning of a rule of law state. The PCI Law has noticeably stated this obligation in Article 10 regulating the active role that public institutions shall have in gathering information for private interests of the official.

“...The authority or structure responsible for the implementation of this law... in conformity with the amount, manner and order defined in this law and/or in sub statutory acts and internal rules ...is authorized, on behalf of the public institution, actively:

- a) To collect from lawful sources of information all data about the private interests of an official;
- b) To accept information obtained in a lawful manner;
- c) To verify the credibility of this information;
- ç) To make known to the official the information obtained about him;
- d) To give the official the possibility to prove the contrary if the official so requests;
- e) To record the private interests of the official.

From a legal point of view, and specifically referring to Article 7, point 1 of the PCI Law, any official executing his public duties or his competencies on the basis of his knowledge and in good faith, is obligated to make a self-declaration in advance, case-by-case, of the existence of his private interests that might become the cause for the appearance of a conflict of interest. In addition, public officials are encouraged to seek advice from their superiors or experts of HIDAA for unclear situations relating to conflicts of interest. According to Article 42 point 1/f of the PCI Law, “...the High Inspectorate, based on a request, is obliged to assist particular officials, superiors, and superior institutions, about specific cases of the appearance of a conflict of interest.”

Any official who acts in public procurement is obliged to issue an authorization for the respective public institution within 30 days from the starting date of working in that institution, which is necessary for every superior institution, through which they are allowed to control and provide from every legal source personal data related to private interests as defined in Article 5 of the PCI Law.

The offering of information on private interests of an official according to Article 8 of the PCI Law is:

- a) a duty of every other official who has knowledge, in particular of his superior;
- b) a duty of every public institution that has knowledge...”



In addition to that, officials who have an obligation to declare their private interests periodically to HIDAA, authorize the latter to verify private and public interests and financial obligations registered in their name, their spouse's, and their adult childrens' in all private and public matters, within the country or abroad. In order to facilitate the verification of the private interests declaration, HIDAA has signed a "Memorandum of Understanding between the High Inspectorate of the Declaration and Audit of Assets and the Ministry of Foreign Affairs", according to which the MFA³ engages diplomatically in the collection of the required information in all states where Albania has a diplomatic representation, as well as to establish contacts between HIDAA and its counterpart institutions.

Finally, any individual involved or not in procurement procedures shall play an active role in this regard, as he/she is a taxpayer of this state, the funds of which are coming through procurement procedures. Article 8 of the PCI Law, letter c and ç states the right of every interested person who might be affected by the actions of the official to offer information and identify the private interests of the official.

2.1.1. The Role of the Contractual or Vendor Authorities by Attribute of the Responsible Authorities

During procurement procedures, the contractual authorities, contractor and vender indicate in reports all selection process phases, as well as all inquires and their solutions. In accordance to the law, these authorities must refuse an offer or request for participation in a tender if the offeror or candidate, due to a given circumstance, implicate the responsible public official or might implicate them in a situation of a conflict of interest. The decision of the contractual authorities is reported in the respective registers, informed immediately to the petitioners or bidders, and can be appealed only in a judicial way.

The law empowers the responsible authorities, based on Article 41 of the PCI Law, for the prevention, audit and resolution of a conflict of interests, to have an active role and take all possible procedures for the identification of conflict of interest cases and their avoidance as much as possible⁴.

Conflicts of interest shall be identified, treated and resolved according to the situation by:

- The responsible structures of the contractual and vendor authorities
- Superiors of officials as per hierarchy and units of human resources of the contractual and vendor authorities
- Public Procurement Agency as responsible institution for public procurement
- Procurement Advocate, as an important institution, that defends the legal rights of candidates and/or offerors.

2.2. Role and Responsibility of HIDAA as the Central Authority Responsible for PCI

³ This Memorandum is signed on 8 November 2005 between the General Inspector and Minister of Foreign Affairs, and is part of the Manual No. 1, November 2005 of HIDAA, page 12 – 13.

⁴ On this concern, the Manual No. 2, February 2006, prepared by HIDAA, rank according to the opportunity and importance several steps that responsible authorities should undertake.



According to the PCI Law, HIDAA has a crucial role in the prevention, audit and solution of conflicts of interest as the central responsible authority for the implementation of this law. Its main duties and responsibilities are defined in Article 42 of the PCI Law “Competencies of the High Inspectorate for the Declaration and Audit of Assets”, according to which HIDAA is charged to:

- manage and improve policies and mechanisms of preventing and avoiding conflicts of interest;
- drafting and supporting legal and sub statutory initiatives for the prevention of conflicts of interest;
- monitoring, and assessing the implementation of the law, in general and special cases;
- administrative investigation of case-by-case conflicts of interests;
- advising to special officials, superiors, superior institutions on their request for special cases of conflicts of interest appearance, etc

Summarizing, the fundamental role of HIDAA consists of 3 stages:

- Drawing decisions and decrees of an explanatory nature and advising;
- Administrating and investigating the periodic declarations of private interests;
- Setting disciplinary administrative measures against public officials in its competency in conflict of interest existing circumstances.

In public procurement, when a conflict of interest situation has to be audited case-by-case and avoided with efficiency and on time, the advisory role of HIDAA for specific cases is indispensable. This institution plays a major role in the administration of the declarations of interests, which in the field of public procurement, concessions and auctions, involve a large group of officials. Also, the monitoring of conflicts of interest situations in procurement of public contracts, which is naturally disposed towards this phenomenon, has a major effect on and occupies a considerable part of HIDAA’s activities.

2.3. Role and Responsibility of the Public Procurement Agency

The Public Procurement Agency is the highest organ in the public procurement area. PPA is the central supervising organ for the coordination and verification of the public procurement process and is charged with policy making, implementing, advising and auditing functions. In this framework, it is engaged to ensure and monitor the implementation of the public procurement law and other laws including the legislation in force for the avoidance of conflicts of interest. The PPA runs this activity based on the authorization expressed by other laws in force, which regulate the concessions, auctions etc, as well as part of its daily work in the implementation of the public procurement law.

The existence of conflicts of interest can be identified by the PPA, which for all public procurement procedures including auctions and concessions has the role of the superior institution with advisory and auditing competences. According to the Law “On Public Procurement”, Article 13, among others, the PPA “...*verifies the implementation of the public procurement procedures in accordance in accordance to) the requirements determine by the law...*” part of which is the prevention of conflicts of interest in public procurement procedures. As far as the PPA undertakes



an administrative investigation for public procurement procedures and serves as an appellate stage for the decisions taken from the contractual, contractor and vendor authorities, its role in the avoidance of conflicts of interest in the public procurement procedures is important.

While explaining in detail the role of PPA in managing conflicts of interest as well as based on its duties determined by the law, we can consider the following:

- Developing the Standard Tender Documents to be used in the awarding procedures, PPA has foreseen the signing of the “declaration of a conflict of interest”. This is the most typical document, which is signed by all tender commission members after the submission of offers in a procurement procedure (This procedure must also be followed in every other process of public purchasing, concession, etc).
- Defines the steps that these persons shall undertake aiming to prevent and avoid conflicts of interest, by means of the qualification of the employees involved in the public procurement activity, elaborated progressively, including as well, the explanation of the conflict of interest concept.
- Conducting the administrative review of complaints lodged from interested parties regarding concession procedures, identified cases where members of commissions of other decision-making bodies are involved in the situation of a conflict of interest, which has damaged or can damage the procurement procedure or its following.
- PPA has the authority to investigate the submitted documents at the contractual authorities, to conduct an administrative investigation, withdraw the tender documentation, to ask for explanations (written form), to ask for an expert opinion, among others, even for issues related to conflicts of interest.
- PPA gives, on request, advice and provides technical assistance to authorities entering into a contract for the best composition of procurement procedures, in better managing the situation for the prevention of conflicts of interest, or when there is an identified conflict from the respective entities/contractual authorities, it gives advice and technical assistance to avoid it.
- PPA identifies how much a conflict of interest has affected the procurement procedure; in the event that an irregularity is identified which has been highly damaging to this procedure, PPA can cancel entirely or partly an action or decision of the contractual authority issued against the law.
- Impose fines and/or propose disciplinary measures for the persons who had the duty to execute the legislation concerning the conflicts of interest, safeguard the procurement procedure and report (if it has not be done) a conflict of interest situation.
- In the case of a conflict of interest identification that has damaged the procurement procedure but identified after entering into the contract, the PPA can have a declarative decision-making, on the basis of which the juridical power can compensate the complainer who has been damaged as a results of the infringement of the law;
- Undertake measures against the responsible persons or can denounce according to the case.

According to Article 64 point 4 of the Law “On Public Procurement”: “...After entering into a contract, when the Public Procurement Agency judge that a decision or action of the contractual authority is in opposition to any of the disposition of this law, has the right:



- a. To issue an interpretation in relation to regulations or legal principles that must be implemented with reference to the subject matter of complaint;
- b. To undertake a declarative decision, on the basis of which the juridical power can compensate a petitioner who has been damaged as a result of this infringement of the law;
- c. To penalize the responsible persons, as foreseen in this law...”

The PPA collaborates with HIDAA, based on the legislation in force and a Memorandum of Understanding ⁵ between the two institutions for consultation and reference, as well as anticipation of the legal procedures in cases of administrative investigation and prevention of conflicts of interest in public procurement, exchange information, etc.

2.4. Role and Responsibility of the Procurement Advocate

The Procurement Advocate is an independent administrative organ, the role of which consists of monitoring and verifying the procurement and concessions procedures. The Procurement Advocate is established to defend economic operators, locals or foreigners from the unlawful actions of the contractual, contractor and vendor authorities in the public administration concerning the procedures of procurement, concession and auction. The establishment of the Procurement Advocate institution is significant as it handles an important role in the avoidance of conflicts of interest in public procurement; as such it is an additional opportunity for the public administration to fight this harmful phenomenon.

To verify the existence of conflicts of interest and undertake relevant actions, the PA can start its actions immediately after receiving a claim submitted from an interested persons. At a first sight, its competences seem limited, but from the other side its recommendations place a certain pressure at the responsible administration and have a crucial role in impeding this phenomenon to be repeated and to prevent practices which lead to conflicts of interest. The recommendations it draws at the end of each process, focus the attentions on the problems which can be identified including the existence or not existence of conflicts of interest, better orient the institutions of the public administration towards an appropriate decision making, as well as offer concrete technical and legislative solutions which ensure the prevention procedures progress in conflicts of interest cases.

As an observer, this new institution has comprehensive competences and duties towards the prevention and avoidance of conflicts of interest. Taking into consideration its position as an active monitor of administration activity dealing with procurement, concession and auction procedures, the Procurement Advocate has real opportunities to contribute to avoiding conflicts of interest in procurement procedures. In addition, he is active as far as the administrative investigation is concerned on conflict of interest cases.

The establishment of the Procurement Advocate Institution is a great achievement in the procurement system, and an additional opportunity to ensure transparency and equality in public

⁵ This Memorandum of Understanding agreed between the High Inspectorate of the Declaration and Audit of Assets and the Public Procurement Agency, was signed on 13 March 2008. For additional information please check the following website: www.hidaa.gov.al



procurement procedures, auditing the existence of conflict of interest cases and implementing the legitimacy in these procedures, in order to avoid conflicts of interest.

2.5. Role and Responsibility of the Agency of Concessions Treatment

The Agency of Concessions Treatment (ATRAKO) is an independent institution, established close to the Minister for Economy. Its role is to create incentives and assist contract authorities in assessment and concessions negotiations.

ATRAKO supports and advises entering-into-a-contract authorities for:

- Inspection and assessment of the concession projects as proposals especially concerning aspects of break even, feasibility, financial credibility and for the criteria of “value for money”,
- Drafting of standards documents of competition procedures,
- Evaluation of proposals,
- Determining the best offer,
- Negotiations and signature of the concession contract. In accordance with Article 21/4 of Law No. 9663 dated 18 December 2006 “On Concessions”, amended, ATRAKO prepares its opinion to the Council of Ministers, for the conditions of concessions contracts, as well for the criteria of “value for money” in concessions projects.

This agency has an active role in providing advice for issues dealing with changes, supplements or renewals of the financing of concession contracts, and participates in development and unification of standards documents (including the contracts) and methodologies for comparing concessions projects.

As far as conflicts of interest are concerned, the legal framework for concessions set out in Chapter VIII of Council of Minister No. 27, dated 19 January 2007 “On approval of the assessment regulations and concessions allocation”, amended, regulates directly the prevention and avoidance of conflicts of interest in the evaluation phase of offers determining that: in the Commission of Offers Evaluation persons who have a conflict of interest with the bidder according to the meaning of the law “On conflicts of interest” can not participate. The members of the Commission of Offers Evaluation sign the declaration, a template document drafted from the Public Procurement Agency for conflicts of interest, when opening the offers.

ATRAKO, unlike other specialized agencies, does not have the competence to inspect claims of private citizens, which are actually analyzed by the Public Procurement Agency.



3. RESTRICTIONS OF PRIVATE INTERESTS FOR THE PREVENTION OF CONFLICT OF INTERESTS IN PUBLIC PROCUREMENT ON ISSUES AND PARTICULAR CASES OF AN ABSOLUTE NATURE

3.1 Restrictions for High Level Officials of Central Institutions and Persons Related to them, according to Article 21, point 1 of PCI

The Law “On the prevention of conflicts of interest in executing public functions”, in Chapter III, section I starting from article 21 until 25, sets out the restriction of different officials private interests, for the prevention of case-by-case conflicts of interest. In relation with this section, we will consider mainly “prohibition of entering into a contract” for officials according to article 21 of PCI, in coherence with the interest restriction of persons related to the official according to Article 24 of the PCI Law.

The prohibition of entering into a contract according to point 1, 2 and 6 of Article 21 of the PCI Law is implemented in order to prevent a case-by-case conflict of interest and not the continuous one, which is interpreted as “incompatibility” between the public duty and private interests of the official. This means that the prohibition does not derive from the participation of the official in a given decision-making, but from his function, and this prohibition of an absolute nature is not related to the essential and determinative competence of the official in entering into a contract. This nature of prohibition is implemented even if the official of one of the categories to be considered below is not part of the decision making or can not be part of it. The prohibition of the absolute nature is applied only to some types of interests and to a limited category of officials, mainly high level officials (elected or appointed). It intends to prevent conflicts of interest of every nature, even an apparent conflict, especially because those officials are more exposed to public opinion.

3.1.1 *The meaning of case-by-case conflicts of interest for high level officials of central institutions of public administration and persons related to them*

The 1st Section of Chapter III of the PCI Law explains the restriction of the official private interests for the prevention of case-by-case conflict for particular cases. In this case we shall refer to the meaning of the case-by-case conflict of interest according to the definitions provided in article 3 of this law. According to article 3, point 4, letter ç, “case-by-case conflict of interest” is a situation of conflict of interest, one of three natures: *so as real conflict, apparent conflict and possible conflict of interests*, which appears case-by-case and is related to a particular decision-making.

According to Article 21, point 1 of the PCI Law:

Any natural person may not enter into a contract with a public institution, when this person coincides with an official in any of the functions defined in chapter III, section 2 of this law, or any commercial company, partnership or simple company in which this official owns, actively or passively, shares or parts of the capital in any amount.



As analyzed in Manual No. 1⁶ in terms of Article 21, completed by Article 25 of the PCI Law, a contract may not be entered into between:

- a public institution, whatever it is and
 - An official, as mentioned in Chapter III, section 2 (except low and middle level directors, judges and prosecutors of first degree and Appeal courts); or persons related to them (according to article 24: spouse; adult children and parents of the official and spouse) when they appear as individual, physical trade person, free lance, etc.
- or,
- A subject which undertakes a profit activity (commercial company, partnership or simple company, or any other profit organization), where the official or persons related to him (according to article 24: spouse, adult children and parents of the official and spouse) own shares or parts of the capital in any amount⁷.

As mentioned, not only direct ownership of interests, but even indirect from the official side or persons related to him means private interest of the official and the latest will bring to absolute restriction entering into a contract with public institutions. So as the private interests of the official is considered even if he/them own shares or parts of the capital in a company, which from its side shares or parts of the capital in a second company, when the second one is a party of entering into a contract.

Therefore, the absolute nature prohibition of entering into a contract according to Article 21 of the PCI Law is applied also for the persons related to the official, as set out in article 24 as below.

3.1.2 Officials categories involved in this prohibition

In this section, the categories of officials involved in the absolute prohibition of entering into a contract in terms of article 21 point 1 of the law, as well as persons related to them in terms of Article 24 of the PCI Law, to whom is being applied the same prohibition, are discussed.

This official category is defined in Chapter III, section 2 of the law and it is treated in the Descriptive and Training Manual No. 1 on the prevention of conflicts of interest. Article 27 – 33 of the law defines the categories of officials for whom are applied restrictions of private interests for the prevention of particular cases of continuous conflicts of interest, but in terms of Article 21, point 1 of the PCI Law with some exclusions, some restrictions for the prevention of case-by-case conflicts of interest are applied also. Absolute prohibition of entering into a contract apply to the following official categories:

- President;
- Prime Minister, Deputy Prime Minister, Ministers and Deputy Ministers;

⁶ See Manual No. 1, page 22

⁷ This is set out in article 25 of the PCI Law point 2, according to which: The prohibition of entering into contracts according to each case of article 21 of this law is also applicable to the case when owning Shares or parts of capital is related to a commercial company, partnership or simple company, which owns Shares or parts of capital in a commercial company, partnership or simple company, when the latter appears to be party of entering into a contract.



- Members of Parliament;
- Judges of the Constitutional Court and High Court; members of High Council of Justice; General Prosecutor; Head of the State High Audit; Ombudsman; members of the Central Election Commission; Inspector General of the High Inspectorate of the Declaration and Audit of Assets;
- Members of regulatory entities (Supervisory Council of the Bank of Albania, including the Governor and Deputy Governor, of Competition, Telecommunication, Energy, Water Supply, Insurances, Media); (this category of officials will be treated specifically below)
- General Secretaries, Directors of Departments and General Directors of central institutions and all the other officials, in every public institutions, which is at least equivalent from the functions with the General Directors.

Therefore, for these categories, the absolute prohibition applies in all types of contracts such as: public procurement of construction, goods or services, purchasing, exchange, rent, donation, provision, enterprise, transport and all other contracts which are not exempted from point 5 of Article 21 of the PCI Law.

In terms of Article 21, point 1 and 24 of the PCI Law, the above mentioned categories of officials and persons related to them, may not benefit from public funds which are procured *from any of the local or central public institutions within the territory of the Republic of Albania*. These are the official's categories for which the application of the absolute prohibition in entering into a contract is larger while, as we will see in the other chapters, the prohibition for other official's categories is related to the territorial competence or field of jurisdiction where the official executes his public duty.

Based on the prohibitions foreseen in the PCI Law, the Public Procurement Agency has also published the Declaration of conflicts of interest, which is made under full responsibility of his/her signatory and it is subject to further verification from the respective responsible authority in public institutions, and from HIDAA as the central responsible authority.

Article 21, point 1 of the PCI Law includes cases when the official of one of the above mentioned categories appears as a party in the contract, where from one side there is a public institution and from the other side the official is an individual, or commercial company, partnership, or simple company in which the official or persons related to him owns/own actively or passively the shares or parts of the capital in any amount.

The persons related to the official and the prohibition applicable for them

The prohibition of an absolute nature, as mentioned above, according to Article 21 point 1 of the PCI Law, is applied in the same way to persons related to the official mentioned above. Based on Article 24 of the PCI Law:

"The persons related to the official are the spouse, adult children and parents of the official and spouse".



As a conclusion, the main elements of the prohibition of entering into contract procedures are:

- 1. This prohibition is related to the official public duty and is implemented for the official category of **public administration central institution***
- 2. The prohibition is of an absolute nature, because it is not related to a concrete decision-making of the official entering into a public contract, but is related only with its public function execution according to the above mentioned categories.*
- 3. Absolute prohibition for the above mentioned officials' categories is valid when entering into a contract throughout the territory of the Republic of Albania, concerning all public institutions.*
- 4. Public Contract it is considered as the procurement, tender, concessions, and in this concern, the high level officials towards whom it is applied the absolute prohibition in entering into a contract, cannot benefit from public funds.*
- 5. The prohibition for the high level officials, to the same extent and manner, are applied even for persons related to the official (spouse, adult children, and parents of the official and spouse).*

These conclusions are valid for all official categories which are treated in this chapter, so as:

- 1. High level official of central institutions*
- 2. Elected officials and those of high level local governance units*
- 3. Officials, members of Regulatory Authorities organs*
- 4. Persons related with the officials as of above mentioned categories in terms of Article 24 of the PCI law*

3.1.3. Treatment and solution of it in particular cases (examples)

Example 1

The official A B is a Deputy Minister in X Ministry. His married daughter is a Shareholder in the Commercial Association "Dajti" S.a and owns 21% of the Shares. This association takes part in public procurement for a school reconstruction in the Municipality of city Z.

Issues to be discussed:

- 1. Is the above mentioned case a conflict of interest?*
- 2. If yes, analyze the case and give the respective solution*

- The analyzes, treatment and solution consists on the following:*

The legal bases for the case solution:

I-Article 21/1 of Law 9367 dated 7 April 2005 "On the Prevention of Conflicts of Interest in the Exercise of Public Functions"



- No person may enter into a contract with any public institution, when this person coincides with an official in one of the functions defined in chapter III, section 2 of this law, or any commercial company, partnership or simple company in which this official owns, actively or passively, Shares or parts in a capital in any amount.

II- Article 24/1

- The group of persons related to an official, in implementation of the prohibitions defined in Article 21, points 1, 2 and 6 and in Article 22 of this law, consists of the spouse, adult children and parents of the official and the spouse.
- The prohibitions and restrictions for an official defined in this section are also applicable to persons related to him, in conformity with the above points of this article.

III- Article 26 of Law No. 9643 dated 20 November 2006 “On Public Procurement”:

- The contractor authority refuses an offer or a request for participation to bid if:
 - b) The offeror or candidate is in a conflict of interest

Based on Article 21 point 1 and Article 24 point 1 of Law no. 9367 dated 7 April 2005:

- 1- **The officials involved in the prohibition**, are officials of a high level defined in chapter III, section 2 of this law. The Deputy Minister is **in this official category**.
- 2- **Natures of prohibited contracts**. The absolute prohibition nature includes all types of contracts: public procurement of construction, goods, and services, purchasing, exchange, rent, donation, delivery, enterprise, transport and every other contract which is not exempted from the point 5 of Article 21 of the Law. **The construction contract is part of this category**.
- 3- **Nature of interests**. For the purpose of the article 21 point 1 are considered only cases, when the official results as a contractual party with a public institution as an individual, commercial physical person, free lancer or any other profit organization in which the official own enrichment interests, Shares or part in the capital. **The daughter of the official owns shares in the commercial company “Dajti” S.a, which is presented in the public funds procurement organized from the Municipality of Z city.**

Based on the data and the above mentioned legal background, **the Commercial Company “Dajti” S.a where the daughter of the Deputy Minister is a Shareholder, is in a conflict of interest if presented in the public procurement for the school reconstruction in the Z Municipality, because:**

- The function of the Deputy Minister is a high level function, and his daughter is a related person and the prohibition **for the related person is the same as for the official**.
- The commercial company Dajti S.a where the daughter of the Deputy Minister is a Shareholder, if presented in the procurement organized by a public institution, based on Article 26 of Law no.9643 dated 20 November 2006, the Contractor Authority refuses an offer or request for participation to bid **if the offeror or candidate is in conflict of interest**.



Article 24, point 1 of Law no. 9367 dated 7 April 2005 defines related persons with the official: *the spouse, adult children, and parents of the official and spouse*. Based on this disposition, results that the commercial company where the related person, adult children (the daughter as above mentioned) own Shares, is in a conflict of interest situation, in the case when the daughter is in the same family with the official, as well when she has created her own family.

Solution:

Based on the Article 26 of the Law On Public Procurement, in the beginning the offerors who are in conflicts of interest are disqualified. In these circumstances the Commission for the Evaluation of the offers disqualifies the Commercial Company “Dajti” S.a, where the daughter of the Deputy Minister is a Shareholder and continues the procedures of selection with other offerors presented to bid.

Other Issues to be discussed:

What if in the commercial company “Dajti” S.a the spouse of the daughter would be a Shareholder and not the daughter herself, how it will be treated and resolved this case?

The law explains that the prohibition is not absolute for the spouse because he is not in the mentioned category of the persons related with persons related with the official. But, if the matrimony regime is a common regime as defined in the Family Code, the daughter of the official owns 50% of her spouse Shares. So, the analysis in such a matrimony regime, it will be as mentioned above.

Example 2

The official B N is a member of the Albanian Parliament (deputy). His married son owns 14 % of the shares in the Commercial Company “Drint” S.a. which has applied in the tender organized from the General Directory of the X Institution for the reconstruction of the settlement.

Issues to be discussed:

Is there any legal restriction for participation of the commercial company “Dajti” S.a in the tender organized from the public institution X?

The case analysis:

The commercial company “Drint” S.a. based on Article 26 of Law no. 9643 dated 20 November 2006 “On public procurement” has the obligation to declare conflicts of interest by fulfilling out the official document approved by Decision No. 1 dated 4 February 2009 of P.P.A. In this specific case the commercial company “Drint” S.a. has sent through email the necessary documentation to apply in the tender organized by the public institution X In the standard documents of the tender it has also fulfilled the Declaration on Conflicts of Interest. The daughter of the deputy B N is a Shareholder in the association, who owns 14% of the Shares.

Based on this fact the contractor authority analyzes as follows:

- The official B N in this case is classified as a high level official and as a consequence is included in the absolute prohibition as provided for in point 1 of Article 21, Law no. 9049 dated 10 April 2003.



- The son is a related person and the prohibition is applied the same as for the official (article 24)
- The limits of owned shares are the same as defined in the Article 21 of Law no. 9049 dated 10 April 2003 even for the related person with the official.
- The General Directory of the X Institution is a public institution.

Based on this data the Commission of Offers Evaluation verifies that the participation of the commercial company Drini S.a in the tender for the reconstruction of the settlement is in a conflict of interest of an absolute nature. This restriction is not related to the decision-making for the act, but with the official category, so as with his function.

Solution:

While analyzing the above mentioned data the Commission of Offers Evaluation from the X public institution, based on point 1 Article 26 of Law no. 9643 dated 20 November 2006 decides to disqualify the commercial company “Drini” S.a. For the taken decision, it notifies by email the commercial company “Drini” S.a. and follows up with the other offers submitted from other commercial companies presented in this tender.

What if a Shareholder in the commercial company “Drini”, S.a is the spouse of the son?

In such case, in accordance with the Family Code, if the son and his spouse have a common matrimony regime, we believe it should be the same approach as in the above mentioned example.

Example 3

The official T.K. is a General Director in **an independent public institution D**. The parents of the General Director’s spouse are Shareholders in the commercial company “Blendi” Ltd and together own 17% of the capital. Blendi Ltd applies via email to the organized tender from the Council of District Z.

Issues to be discussed:

Is there any legal restriction for the Commercial Company “Blendi” Ltd to participate in the organized tender from the Council of District Z?

Case analyzes:

The commercial company “Blendi” Ltd, based on Article 26 of Law no. 9643 dated 20 November 2006 “On the public procurement” and Decision No. 1 dated 4 February 2009 of PPA has the obligation to declare conflicts of interest, if any, through the fulfillment of the official document approved on this purpose and part of the standard documents of the public funds procurement.

In this case, the commercial company “Blendi” Ltd has sent through email the necessary documentation to apply in the tender organized by the Council of District Z. In the standard documents of tender the Declaration on Conflicts of Interest is completed which shows that the parents of the official T.K. are Shareholders in the association “Blendi” Ltd and own 17% of the Shares.

Due to the above, the Commission of the Offers Evaluation concluded that:



- The official T.K. is qualified as a high level official and, as a consequence, is part of the category with an absolute nature prohibition as provided for in point 1 Article 21 of Law no. 9049 dated 10 April 2003
- Parents of the official are considered as related persons where the same prohibition as the official is executed on them (article 24)
- The restrictions of owned Shares are equal as defined in the Article 21 of Law no. 9049 dated 10 April 2003 for any of the persons related to the official.
- The council of District Z is a public institution.

As per reference to these data, the Commission of Offers Evaluation concludes that the participation of the commercial company “Blendi” Ltd in the public funds procurement organized by the Council of District is in a conflict of interest of an absolute nature.

This restriction is not related to the decision making for the act, but with the official category, as well as with his function.

Solution:

Finalizing the analysis of the above mentioned data, the Commission of Offers Evaluation of the Council of District Z, based on point 1 Article 26 of Law no. 9643 dated 20 November 2006, decides to disqualify the commercial company “Blendi” Ltd by notifying it in forming writing via email.

Example 4

The son of the official D. L., who is a member of the High Court, owns 15% of the Shares of an association with limited responsibility “A&R” Ltd. Another company, “R&M” Ltd, which owns 60% of the Shares “A&R” Ltd, takes part in the public procurement organized by the institution X.

Issues to be discussed:

Is there any legal restriction for the commercial company “R&M” Ltd to participate in the organized tender from the X institution?

Case analysis:

Article 25 of Law no. 9367 dated 7 April 2005 states that:

“The prohibition of entering into contracts according to each case of Article 21 of this law is also applicable to the case when owning Shares or parts of capital is related to a commercial company, partnership or simple company, which owns Shares or parts of capital in a commercial company, partnership or simple company, when the latter appears to be party of entering into a contract”.

The commercial company “R&M” Ltd, cannot participate in the organized tender from the X institution, because:



- The official D.L. is qualified as a high level official and, as a consequence, is part of the category with an absolute nature prohibition as provided for in point 1 Article 21 of the PCI Law
- The son of the High Court member is considered as related person where the same prohibition as the official is executed on him (article 24)
- The restrictions of owning Shares are equal as defined in the Article 21 of Law no. 9367 dated 7 April 2005 for any of the persons related to the official.
- The non-direct possession of private interests of the official's son in the corporation "R&M" Ltd
- It is a public institution

As per reference to these data, the Commission of Offers Evaluation concludes that the participation of the commercial company "R&M" Ltd in the public funds procurement organized by the Institution X is in a conflict of interest of an absolute nature.

Solution:

Finalizing the analysis of the above mentioned data, the Commission of Offers Evaluation of the Institution X, based on point 1 Article 26 of Law no. 9643 dated 20 November 2006 takes the decision to disqualify the commercial company "R&M" Ltd by notifying it in writing via email in the program approved on this purpose from PPA.

3.2. The restrictions for elected and high level officials of local governance institutions and persons related to them (Article 21, point 2 and Article 24 of the PCI Law)

Following the analysis of the restrictions to entering into a contract or to prohibition of an absolute nature, as mentioned above, this part will discuss another category included in these prohibitions and analyze in the PCI law, the category of local governance officials.

Article 21 point 2 of the PCI Law stipulates:

When the official is mayor or deputy mayor of a municipality or commune or the chairman of a regional council, member of the respective council or official of a high management level of a unit of local government, in the relative meaning of that term for the relevant laws, the prohibition due to the private interests of the official, is applied only in the case of entering into contracts, as the case may be, with the municipality, commune or region where the official functions. This prohibition is applied even in the cases of entering into contracts with public institutions, under the dependency of this unit (Article 21 point 2 of Law no.9367 dated 7 April 2005.

Also prohibitions of an absolute nature for entering into a contract are applied also for the persons related to the official in terms of Article 24 of the PCI Law, which states:

"The persons related to the official are the spouse, adult children and parents of the official and the spouse.



3.2.1. The meaning of case-by-case conflict of interest for high level officials of local governance institutions and persons related to them

The meaning of prohibition in entering into a contract for officials of local governance units is the same as with the meaning mentioned in section 3.1 of this Manual. The most important issue to be treated in case of prohibition in entering into a contract for officials of local governance units is the territorial jurisdiction of a public institution.

Causes of sections 3.1, 3.1.1, 3.1.2, 3.1.3, refer to officials of central institutions and persons related to them, who, as an individual, or when it coincides with commercial physical person, commercial company, partnership or simple company in cases when the official owns actively or passively Shares or parts of capital; in any amount cannot enter into a contract with any public institution. The prohibition "with any state institution", implemented in an absolute way, is applied throughout the Republic of Albania.

So the "absolute" nature, in the case of the local governance officials is applied only for contracts which are contracted from the respective local governance unit: commune, municipality, district and other depending institutions of them. So as, in the local governance officials case, it is prohibited the entering into a contract between them (or persons related to them) and local unit or depending institutions of this unit where these officials perform high level executing functions.

3.2.2. Categories of officials involved in this prohibition

Article 2, point 2 of the PCI Law sets out the categories of officials to whom the entering into a contract with local governance units where they are elected or works, as well as their depending institutions. This official's category is:

- *Head of the Municipality*
- *Deputy Head of the Municipality*
- *Head of the Commune*
- *Deputy Head of the Commune*
- *Head of the District Council*
- *Deputy Head of the District Council*
- *Member of the Municipality Council*
- *Member of the Commune Council*
- *Member of the District Council*
- *High Level Official leading a local governance unit*
- *Related individual with the official in terms of Article 24, point 1 of the PCI Law*

The PCI law does not define who is a high level official leading a local governance unit. In order to analyze which officials are within this category first, we refer to the Article 31 of the PCI Law, which defines a high level official under Law no. 8459 dated 11 November 1999 "Civil Servant Status". But, not all local governance units are part of the civil service: such as the municipalities and districts. Concerning the term analyzing of high directing level in local governance units, in



cases of communes and municipality units, it should be done case-by-case in accordance with the organizational chart of any institutions⁸.

3.2.3. *Treatment and solution in particular cases (examples)*

Example 1

The son of the Mayor of the Municipality of L city is a Shareholder in the commercial company “Beta” S.a and owns 29% of the Shares. *The Commercial Company “Beta” S.a* applies via email to an organized tender from the Municipality of L city.

Issues to be discussed:

Is there any legal restriction for the commercial company “Beta” S.a. to participate in the organized tender from the Municipality of L city?

Case analysis:

The commercial company “Beta” S.a. based on Article 26 of Law no. 9643 dated 20 November 2006 “On public procurement” as do all participants in the public fund procurement, has an obligation to declare a conflict of interest, if any, through the fulfillment of the official document approved for this purpose by Decision No. 1 dated 4 February 2009 of PPA. The commercial company “Beta” S.a. has sent through email the necessary documentation to apply in the tender organized by the Municipality of L city. In the standard documents of tender it has also fulfilled the Declaration of Conflicts of Interest, from which shows that the son of the Mayor of the L city is a Shareholder in the association “Beta” S.a.

As per reference to these data, the Commission for Offers Evaluation concludes that:

- The Mayor of the Municipality is qualified as an official to whom and persons relates to him it is prohibited to participate in public funds procurement organized by the municipality he leads. As a consequence, the prohibition has an absolute nature as provided for in point 2 Article 21 of Law no. 9049 dated 10 April 2003. The absolute prohibition is restricted within the jurisdiction of the municipality and the depended institutions of the municipality, but not to other public institutions which are not in the municipality of city L jurisdiction.
- The son of the Mayor is considered as a related person so the same prohibition of the official is executed on him (article 24) applies
- The restrictions of owned Shares defined in the Article 21 of Law no. 9367 dated 7 April 2005 apply the same for any of person related to the official.
- The Municipality of L city is a public institution.

As per reference to these data, the Commission for Offers Evaluation concludes that the participation of the commercial company “Beta” S.a. in the tender organized by the Municipality of L city is in a conflict of interest of an absolute nature. This restriction is not related to the decision-making for the act, but with the category of official, as well as with his function as a Mayor.

⁸ Law no. 8652 dated 31 July 2000, “On the organization and functioning of local governance”, has not explicitly defined who will be considered a high level director official of the local governance, so this law does not help the analysis and meaning of this term.



Solution:

Finalizing the analysis of the above mentioned data, the Commission of Offers Evaluation of the city L, based on point 1 Article 26 of Law no. 9643 dated 20 November 2006 takes the decision to disqualify the commercial company “*Beta*” S.a. and continues the evaluation of other offers to the tender.

Example 2

In the commercial company “M&N” Ltd, the parents of the spouse of a member of Council of District B’ owns 41% of the Shares in the capital. In January 2009, the Council of District B organized a tender for a feasibility study of the D region. The consortium, Alpha, where the commercial company is a part, applied via email to the organized tender on January 2009.

Issues to be discussed:

How shall the Commission of Offers Evaluation act at the moment when they realize that within the Alpha Consortium the commercial company “M&N” Ltd is part and 41% of the Shares of its capital are owned by the parents of a member of the Council of District B’s spouse.

Case Analysis:

The Alpha Consortium where the commercial company “M&N” Ltd is part, based in the Article 26 of Law no. 9643 dated 20 November 2006 “On public procurement”, has an obligation to declare a conflict of interest, if any, through the fulfillment of the official document approved for this purpose and part of the standard documents of public funds procurement. In the standard documents of tender the consortium has also fulfilled the Declaration of Conflicts of Interest, which states that the parents of the spouse of a member of Council of District’s are Shareholders in the association “M&N” Ltd which is part of the consortium Alpha.

Due to the above, the Commission for the Offers Evaluation concluded that:

- The member of the Council of District B is qualified as an official, including the related persons to him; who is prohibited to participate in public funds procurement organized by the Council of District B. As a consequence, the prohibition has an absolute nature as provided for in point 2 Article 21 of Law no. 9049 dated 10 April 2003. The absolute prohibition is restricted within the jurisdiction of the district and the depended institutions of the Council of District, but not to the other public institutions which are not in the B district jurisdiction.
- The parents of the member’s spouse are considered as related persons so the same prohibition of the official is executed on them (article 24) applies
- The restrictions for owned Shares as defined in Article 21 of Law no. 9367 dated 10 April 2003 apply the same for any of the persons related to the official.
- Owing indirectly private interests by the parents of the spouse of member of Council of District B in the consortium Alfa, where *the commercial company “M&N” takes part, and where Shareholders of 41% are the member of Council of District B spouse parents* is equal to the direct owning of private interests (Art. 25 of the PCI Law).
- The Council of District B is a public institution.



As per reference to these data, the Commission for Offers Evaluation concludes that the participation of the commercial company “M&N“ Ltd in the tender organized by the Council of District B is a conflict of interest situation of an absolute nature. This restriction is not related to the decision-making for the act, but with the official category, as well as with function with his function as member of the Council of District B.

Solution:

Finalizing the analysis of the above mentioned data, the Commission for Offers Evaluation of the Council of District B, based on point 1 Article 26 of Law no. 9643 dated 20 November 2006 decides to disqualify the Consortium Alpha and further considers the offers from the application of the other offerors to this tender.

Example 3

The official B.N. is Mayor of the D Municipality. His son owns 20% of the capital at a limited responsibility association “Arti” Ltd which executes a private activity in X city. “Arti” Ltd participates in the public procurement organized by the General Directorate of Customs of X city.

Issues to be discussed:

Is there any legal restriction for the commercial company “Arti” Ltd to participate in the organized tender by the General Directorate of Customs of X city?

Case analyzes:

Article 21, point 2 of Law no. 9367 dated 7 April 2005 states that:

When the official is mayor or deputy mayor of a municipality or commune or the chairman of a regional council, member of the respective council or official of a high management level of a unit of local government, in the relative meaning of that term for the relevant laws, the prohibition according to point 1 of this article, because of the private interests of the official, specified in this point, is applied only in the case of entering into contracts, as the case may be, with the municipality, commune or region where the official examples functions. This prohibition is applied even in the cases of entering into contracts with public institutions, under the dependency of this unit.

The commercial company “Arti” Ltd cannot participate in the organized tender, because:

- The Mayor of the Municipality is qualified as an official along with related persons; who is prohibited from participating in public funds procurement organized by the municipality he leads.
- The son of the Mayor is considered as related person so the same prohibition of the official is executed on him (article 24) applies
- The restrictions of owned Shares are equal as defined in the Article 21 of Law no. 9367 dated 7 April 2005 for any of the person related to the official.
- The absolute prohibition is restricted within the jurisdiction of the municipality and the depended institutions of the municipality, but not to other public institutions which are not in the Municipality of city D jurisdiction.



As per reference to these data and case-by-case analysis, results that the “Arti” Ltd association can participate in the tender organized by the General Directorate of Customs of X city.

Solution:

Finalizing the analysis of the above mentioned data, the Commission of Offers Evaluation of the General Directorate of Customs of X city, takes a decision to continue the procurement procedure where the commercial company “Arti” *ltd* will take part.

3.3. Restrictions for officials of Regulatory Authorities and persons related to them (Article 21, point 6 and Article 24 of the PCI Law)

Article 21, point 6 of the PCI Law applies the prohibition of entering into contracts even for officials defined in Article 30 of the same law. These officials are members of the Regulatory Authority organ.

According to article 21, point 6:

"For the officials defined in article 30 of this law":

a. It is prohibited to enter into contracts between the official, whether as a civil or natural commercial person, and any person in relation to whom the official has an interest of the nature defined in letters “a”, “b”, “c”, “ç”, “d”, “dh”, “I” (up to the second level) and “e” of point 1 of article 5 of this law, on the one side, and commercial operators-subjects who example activity in the sphere of the jurisdiction or influence of this authority, on the other side.

As mentioned before, the letter a of point 6, Article 21 of the PCI Law refers to article 5 of the same law to specify the private interests of the official, for which the absolute prohibition of entering into a contract is applied.

The private interests of an official (and for which are applied the prohibitions of article 21, point 6) are those interests that coincide, contain, based or derive from:

- a) Property rights and obligations of any nature of nature;
- b) Every other juridical civil relationship;
- c) Gifts, promises, favors, preferential treatment;
- ç) possible negotiations for employment in the future by the official during the example of his function or negotiations for any other nature of form of relationships with a private interest for the official after leaving the duty performed by him during the example of duty;
- d) engagements in private activity for the purpose of profit or any nature of activity that creates income, as well as engagements in profit-making and non-profit organizations, syndicates or professional, political or state organizations and every other organization;
- dh) relationships: family or cohabitation;
- e) Prior engagements from which the interests mentioned in the above letters of this article have arisen or arise.

In order to apply the prohibition set out in Article 21, point 6 of the PCI Law, two conditions should be fulfilled at the same time:



- The official shall perform his/her public duty as a member of the Regulatory Authority, and
- Shall have private interests during procurement entering into a contract with operators party – commercial subjects, which execute activities in the field of jurisdiction or influences domain of this authority.

The issue of absolute prohibition of entering into a contract for the category of the officials in discussion is strongly related to the field of competence of the Regulatory Authority and not with the territorial as mentioned in the section 3.2 of this chapter, where we analyzed the prohibitions for the elected and high level officials of the local governance. In this regard, in order to prohibit the entering into a contract, the private interests of the official shall interfere in the jurisdiction or influencing the Regulatory Authority organ. On the other side, the PCI law is more severe in the prohibition of specific private interests of regulatory authorities while enlarging interests derives from e.g. family relations or cohabitation until a second degree. Moreover, the law states also cases when this absolute prohibition is not applied, such as the entering into a contract in relation with the provided services to the official. These cases will be treated in Chapter IV "Prohibition of relative nature of entering into a contract"

3.3.1. Officials Categories involved in this prohibition

The categories of officials involved in this prohibition are defined in the Article 30 of the PCI Law and are:

- *Members of the Regulatory Authority organ*
- *Governor of the Bank of Albania*
- *Deputy Governor of the Bank of Albania*
- *Members of the Supervisory Council of the Bank of Albania*

With regard to the Bank of Albania, the law has a clear definition about the application of prohibitions to entering into a contract in terms of the Article 26, point 6 of the PCI Law. In order to nominate the other officials where prohibitions are applied, first of all it shall be defined what is the meaning of entity or regulatory authority and than which are the established Authorities or Regulatory Entities working in the Republic of Albania.

In relation to the public entity meaning (the regulatory first of all are public entities), we shall underline that they are organs of the public administration established based on law as juridical persons of the public right, to realize a public interest. For example if referring to Law no. 9072 dated 22 May 2003 "On the sector of power supply" (amended), it is foreseen the establishment and functioning of the Regulatory Entity of the Power Supply Sector as regulatory institution of the power supply sector which acts according to this law. In this context, all the regulatory authorities are juridical persons, based on law, which function as regulatory institutions in a particular field of economy.

Some of the Regulatory Authorities in the Republic of Albania are:

- *Financial Supervising Authority*



- *Competition Authority*
- *Regulatory Entity of Power Supply*
- *Mail Electronic Communication Authority*
- *Regulatory Entity of Water*
- *National Council of Radio-Television*

The regulatory entities consist in decision-making board and the technical staff. In terms of PCI law, the prohibitions of absolute nature in entering into a contract are applied for the members of the decision-making board, or in few words to members of the entity, but always as abovementioned it is not related to the decision making, but with the function of the official.

3.3.2. *Treatment and Solution in particular cases (examples)*

Example 1

The official B.P is Deputy Governor of the Bank of Albania. His daughter owns 9% of the Shares at a limited responsibility association “Artit” ltd which takes part in the tender organized by X Ministry, for a feasibility study in the Y Region.

Issues to be discussed:

Can the commercial company “Artit” ltd participate in the tender organized by the public institution Ministry C in the Region Y?

Case Analysis:

Based in Article 26 of Law no. 9643 dated 20 November 2006 “On Public Procurement” every participant to bid has the obligation to declare conflicts of interest if any through the fulfillment of the official document approved on this purpose and part of the standard documents of the public funds procurement. The commercial company “Artit” ltd has sent the standard documents of tender, also the fulfilled Declaration of Conflicts of Interest, from which results that the daughter of the Deputy Governor of the Bank of Albania owns Shares of 9%.

Due to the above, the Commission of the Offers Evaluation concluded that:

- The official B.P is qualified for absolute prohibition as provided for in point 1 Article 21 of the PCI Law
- The daughter is considered as related person so as the same prohibition of the official
- The restrictions of own Shares are equal as defined in neither Article 21 of the PCI Law nor each of the persons related to the official
- The X Ministry is a public institution

As per reference to these data and case-by-case analysis, results that the participation of “Artit” ltd company in the organized tender for the settlement reconstruction is in a conflict of interest situation of absolute nature due to the official function and his daughter as a relative person due to the restriction in Article 21 point 6 of the PCI Law.

Solution:



Finalizing the analysis of the above mentioned data, the Commission of Offers Evaluation of the public institution X, based on point 1 Article 26 of Law no. 9643 dated 20 November 2006 decides to disqualify the commercial company “*Artit*” *ltd* and notifies the company via email.

Example 2

In the commercial company “Delta” *ltd* the member of Financial Supervisory Authority’s brother is a Shareholder of 47%. The financial association “Beta” S.a. where the state owns 55% of Shares will organize a tender for machineries and equipments on 28 February 2009.

Issues to be discussed:

Can the commercial company take part in the tender organized by the Financial Association “Beta” S.a.?

Based in the Article 26 of Law no. 9643 dated 20 November 2006 “On Public Procurement” every participant to bid organized by the public institutions has the obligation to declare conflicts of interest if any through the fulfillment of the official document approved on this purpose and part of the standard documents of the public funds procurement. The commercial company “Delta” *ltd* has sent the standard documents of tender, also the fulfilled Declaration of Conflicts of Interest, from which results that the brother of the member of Financial Supervisory Authority is a Shareholder.

Due to the above, the Commission of the Offers Evaluation concluded that:

- The brother of the member of regulatory entity is qualified for absolute prohibition as set out in point 1 Article 21 of Law no. 9049 dated 10 April 2003.
- The restrictions of own Shares are equal as defined in Article 21 of Law no. 9367 dated 7 April 2005 for any of the person related to the official.
- The Financial Association “Beta” S.a. is treated as a public institution due to the fact that the state is Shareholder of 55% of the Shares.

As per reference to these data, the Commission of Offers Evaluation concludes that the participation of “Delta” *ltd* company in the organized tender for purchasing equipments and machineries is in a conflict of interest situation of absolute nature due to the official A.G function and his brother as a Shareholder in this company. This restriction is not related to the decision-making for the act, but with the category of the official, as well as with his function and his brother as a relative person due to the restriction in Article 21 point 6 of the PCI Law.

Solution:

Analyzing the above mentioned data, the Commission of Offers Evaluation of the Financial Association “Beta” S.a., based on point 1 Article 26 of Law no. 9643 dated 20 November 2006 decides to disqualify the commercial company “*Delta*” *ltd*. Further, it notifies the company via email and continues the evaluation of other offers presents in the tender.



4. RESTRICTION OF PRIVATE INTERESTS FOR THE PREVENTION OF CONFLICTS OF INTERESTS IN PUBLIC PROCUREMENT IN CASES AND ISSUES OF A RELATIVE NATURE

4.1. Restrictions for high level officials of central institutions and persons related to them (Article 21, point 3 and Article 24 Law no. 9367 dated 7 April 2005 and Article 37 and 43 of the Code of Administrative Procedures)

The Chapter III of this Manual treated the restrictions of private interests for the prevention of conflicts of interest in public procurement, in particular and special cases of an absolute nature. These restrictions were carefully described from the theoretic perspective, as well as from the practical one through different examples of concrete cases of three main employee categories: those of the central institutions, local governance, and members of the regulatory authority's institutions, as well as for persons related with them. In this chapter, there will be treated restrictions of a relative nature during the process of entering into a contract for all employees categories, which refers also to Article 21, point 3 of the PCI Law:

Notwithstanding the definitions in points 1 and 2 of this article, a contract may not be entered into between the public institution and any public institution under this institution on the one side and a natural, civil or commercial natural person, or a juridical person, or any other form of partnership on the other side, when the following conditions are met at the same time :

- a) the official, that exercises his function in this public institution, has fundamental and definitive competence in the decision-making process in the evaluation of the offerors and the offers and the determination of the terms of the contract;*
- b) the official has private interests according to the definition of article 37 of the Code of Administrative Procedures and/or article 709 of the Civil Code or has an interest in the types of interests specified in points 1 and 2 of this article.*

Also, the restrictions of all levels officials are applied to the same measure to the persons related with them as defined in the article 24 of the same law and analyzed in Chapter III of this Manual.

If comparing the point 1 and 2 of the Article 21 of the PCI Law with point 3 of Article 21 of the same law, one can easily distinguish that in the first case the restrictions engender only from a certain public duty the official execute, so from his function, while in the current case the restrictions for all levels of officials, central and local, are strongly related with the decision making in the evaluation process of offerors and offers or in defining the terms of contracts, as well as in the official competences in the decision making. According to the same disposition, Article 21, point 3, letter a, of the PCI Law the official must have an imperative and determined competency in a given decision making, which is related with the evaluation of offers and offeror, or in the definition of the terms of contracts. From the other side, in order to make active these restrictions, it is not sufficient the above definition, but in the same time the employee must have private interests according to the definitions of article 37 of the Code of Administrative Procedures, or article 709 of the Civil Code, or have an interest of determined nature in point 1 and 2 of this article. So, both conditions must be fulfilled simultaneously in order to implement the restrictions of Article 23, point 3 of the PCI Law.



4.2. The meaning of case-by-case conflict of interest in public procurement

In order to better understand the cases of prevention to entering into a contract, two main cases shall be analyzed:

- What is the meaning of "imperative and determinative competency" in a decision-making, and
- What are the private interests of the official, due to which entering into a contract is prohibited

Concerning the first issue, the Legal Commentary No. 3 of HIDAA, June 2006 gives an interpretation of the disposition explaining the imperative and determinative competency, which clarifies in details the meaning of "imperative and determinative competency, as well as "preliminary moments of the decision making". As such, the imperative competency generates from:

- i) Imperative role, advisory, suggestive, executive, assistive,
- ii) from the possession of information, or
- iii) for particular cases defined in the interior regulations of each public institution

The additional issue that shall be treated is related with the types of private interests of the official, due to which the entering into a contract is prohibited. Article 21, point 3 of the PCI Law enlarges the types of private interests, regardless of those determined in point 1 and 2 of it, and with interests foreseen in article 37 of the Code of Administrative Procedures and article 709 of the Civil Code of the Republic of Albania, respectively:

Article 37 of the Code of Administrative Procedures: Disqualification Cases

1 No civil servant may participate in an administrative decision-making process or may represent the administration offices' part in a contract, in cases the civil servant has or/and is suspected to have the following vices:

- a) Has a direct or indirect personal interest in the case in question;*
- b) His spouse, the person living with him, or relatives up to the second degree has a direct or indirect interest in the case in question;*
- c) The employee or foreseen persons by the paragraph b) of this article have a direct or indirect interest in a similar case to the case in question;*
- d) The employee has been an expert, counselor or lawyer in the case in question;*
- e) The persons mentioned in paragraph b) of this article have participated as expert, counselor or lawyer in the case in question;*
- f) In opposition to the employee or employees mentioned
 - i. in paragraph b) of this Article has started a court proceeding*
 - ii. interested parties;**
- g) The case consists in an appeal to a decision taken by
 - i. Employees or persons provided in paragraph b)*
 - ii. of this article;**



- h) The employees or persons provided in paragraph b) of this Article are debtors or creditors of the interested party in an administrative proceeding or contract where
 - i. the Public Administration Office is a party;**
- i) The civil servant or persons provided in paragraph b) of this Article have received souvenirs [gifts?] from the interested party in the administrative proceeding or the contract before or after the administrative proceeding has started or the contract is created;*
- j) The civil servant or persons provided in paragraph b) of this Article have amicability or hostility with the interested party in the administrative proceeding or the contract.*

From the other side the article 709 of the Civil Code defines the following prohibitions:

Particular prohibitions of purchasing

Cannot purchase directly, or through another person in a bid:

- a. persons who administrate or conserve, extraneous items, based on law or appointment from the state, items which they administrate or;*
- b. official persons who are engaged to execute sales compulsory, items that they sale;*
- c. judges, prosecutors, executor, attorney and lawyers, items for which there is discussion at the court where they take part or execute their function, except when they are part-owner of them.*

Article 25, point 2 of the PCI Law, prohibits not only the owning of a direct interest but also an indirect one, based on this definition:

The prohibition of entering into contracts according to each case of article 21 of this law is also applicable to the case when owning Shares or parts of capital is related to a commercial company, partnership or simple company, which owns Shares or parts of capital in a commercial company, partnership or simple company, when the latter appears to be party of entering into a contract.

In order to determine the role of an official in a concrete decision-making, to evaluate if his competency in this decision-making is imperative and determinative, we shall describe different decision-makings in the procurement process, which lead to a public entering into a contract for works or purchasing goods and services with public funds, which are procured from the contractual authorities established by Law no. 9643 dated 20 November 2006, amended with Law no. 9800 dated 10 September 2007 and Law no. 9855 dated 26 December 2007 “On Public Procurement”.

The procurement process starts based on need assessment of the institution. These needs provide the basis to define the institution budget. Based on the approved budget, the contractor authority drafts the register of foreseen procurements procedures and according to the planning he initiates the procurement procedures.

The role of the official is strongly related with the decision-making in defining terms of references and in the process of offers and offeror evaluation. The determination of terms of



references is a process which starts after the public funding are intended to be procured. The definition of terms of references is a preliminary process and its two crucial moments are:

- preparation and description of the technical specifications
- accounting of the public value contract

The basic phases of procurement procedures are defined by law “On Public Procurement” and the officials, who potentially are in a conflict of interest for any of them, are the following:

Phases	Officials in a potential conflict of interest
1. Issuance of procurement decree	1. The Superior
2. Preparation of standard tender documents and notification of the contract (determining role of the unit)	2. Members of the procurement unit and experts of the respective field (if necessary)
3. Review of economic operators requests for modifying the tender documents, if any	3. The official appointed for this purpose based on legislation
4. Opening and Evaluation of offers	4. The Commission of Offers Evaluation
5. Administrative Complaint	5. The official or officials appointed by the superior to review the complaint (or the officials of complaint organ)
6. Entering into a contract	6. Superior (or the high official of the contractor authority from the Minister for the signature of the concession contract)
(in case of concession, preliminary negotiations)	(the negotiator group in case of concession contract)
7. Contract Monitoring, in case of concession	7. Appointed officials by the superior for monitoring the contract

As aforementioned, the decision-making in the procurement process is performed by an official or official groups established within the institution, which have different functions. As shown in the above table, in different procurement phases there are different officials who have decision-making authority in the process.

A normal question in these cases is: does the abstention in a decision-making, exclude the official possibility of being in a conflict of interest situation. The answer for it is given by the



Article 12 of Law no. 8480 dated 27 May 1999, “On the collegial organs”, in which is determined that the abstention of the members of collegial organs is not allowed in the decision making. As such, the participation in a decision making, despite the voting method, composes the preliminary condition that along with other factors: the role in the decision-making and private interests described above may lead the official to a conflict of interest. After this condition, the official shall simultaneously have fundamental and determinative competence in the decision-making and own private interests of the above mentioned nature.

Another important moment, especially as set out in the concession law, is the monitoring of the concession contracts, a process in which there might be circumstances of a conflict of interest. Due to the fact that the contractor authority has the right during the concession period (the concession contract time period can be 5, 10, 35 or 99 years), through persons authorized by him, to monitor the object of the concession in order to verify the implementation of the duties deriving from the contract in all its implementation phases: the conflict of interests can appear in all phases foreseen in the contract.

If referring to the above mentioned analysis for the case-by-case conflict of interest and prohibitions of a relative nature in entering into a contract, we can define now the conditions that an official of any level might be in a conflict of interest situation and being prohibited to entering into a contract are:

- Firstly, the participation in decision-making, in every moment determined above
- Secondly, his competence in this decision – makings to be evaluated as imperative and determinative
- Thirdly, to have a private interest as defined in point 3 of Article 21 of the PCI Law, article 37 of the Code of Administrative Procedures and article 709 of the Civil Code.

As mentioned before, in order to get applied the prohibition in entering into a contract; the three above mentioned conditions shall be fulfilled.

While analyzing the PCI articles: “On Public Procurement” Law, Code of Administrative Procedures and Civil Code of the Republic of Albania, which define the prohibitions in entering into a contract in the relative meaning, differently to the absolute prohibitions in entering into a contract, as analyzed in the 3rd Chapter of this Manual, is the fact that:

- The category of officials towards whom are applied the prohibitions of entering into a contract is enlarged (so not only the officials to whom is applied the prohibition of the absolute nature as provided for in Article 21, point 1 and 2 of the PCI Law). The entire official's categories potentially can be subject of entering into a contract prohibition, regardless of their level.
- It is enlarged the circle of private interests for the official to whom the entering into a contract is prohibited.



- It is restricted the application of prohibition in entering into a contract, only when the official has imperative and determinative competency in the decision-making for entering into a contract.
- On behalf of the authorities and responsible structures, it is increased the difficulty with concern to identify and define the cases for those officials, who are part of the decision-making process in their daily execution of function in public administration.

The other difference between point 1 of Article 21 of the PCI Law and point 3 of the same law is that for the officials defined in point 1 it is applied the absolute prohibition in entering into a contract and this prohibition generate from the function, or the public duty of the official and no from the decision making, but always related with the interests defined in this point. If the official, toward whom is applied the above prohibition, has other private interests different from the ones defined in point 1 of Article 21 of the PCI Law and it is according to the above, than point 3 of the article 21 is going to be applied, while the attention is directed to the concrete role of the official (imperative and determinative role) in the concrete decision-making for entering into a contract, in order to conclude if we are in a conflict of interest situation.

4.3. Treatment and resolution of particular cases (examples)

Example 1

The official BM is the Director of the Economic Department, which supervises the public procurement in the public institution A. His spouse owns 25% of Shares in the “Artit” company. This company takes part in the tender organized by the public institution A.

Issues to be discussed:

Is the above mentioned case a conflict of interest case?

In this Manual are treated the public procurement phases and procedures. Tenders are organized electronically. The phase when the conflict of interest is declared occurs at the opening and evaluation day of offers. The Director of the Economic Department in not member of the Commission of Offers Evaluation, but has under his jurisdiction the Documentation Preparation Unit. Based on these data, the participation of “Artit” company in the organized tender from the public institution A is an apparent conflict of interest.

Solution

Based on Article 26 of the Law “On Public Procurement” this case is the cause for disqualification.

Example 2

The official S.N has been the Director of the public institution B until 30.09.2008. During the period of January – July, it has been prepared all the necessary documentation for the water supply tender in the tourist zone Beta. On 30 March 2009 the public institution B notifies about



the organization of the tender. Ex-director S.N is appointed legal director at Blendi S.a. which takes part in the organized tender at the public institution.

Issues to be discussed:

Does the participation of “Blendi” S.a. results a conflict of interest in the tender organized by the public institution B?

Legal Basis:

Law no. 9131 dated 8 September 2003 “On ethic rules in public administration”

Article 17

Prohibition of representation in conflicts with the public administration

For a 2 years period, after the dismissal from the duty, the former employee should not represent ant person organization in a conflict or commercial relation with the Albanian public administration for the duty he has been executed or in its following.

Analyzing the above mentioned case with the restriction of Article 17, it result that:

- The official SN as a director of “Blendi” S.a. represents this company in the tender organized by the public institution B, where he has been a director.
- The period after the dismissal from the duty and the date of the official representation in relation with the institution B is 6 months from 24 months which is the legal restriction in this case.

As a conclusion of the analysis, it results that the participation of “Blendi” Company in the organized tender represents a conflict of interest.

Solution

Based on Article 26 of Law no. 9643 dated 20 November 2006 “On Public Procurement”

The Contractual Authority refuses an offer or request for participation in tender if:

- Offeror or candidate is in a situation of conflict of interest

The unique solution in this case for the public procurement procedures is *the refusal for participation in tender.*

Example 3

The official K.L is the Head of the public institution D. On 16 May 2009 in this institution it is organized the tender for the construction of an object. In this tender participates the construction company Alb S.a in which the brother of the head of institution is a Shareholder. At the end, the Commission of Offers Evaluation by executing all legal procedures has been qualifying in first place the construction company “Alb” S.a.

After the notification made by COE, the construction company Dajti S.a. complains by notifying the contractual authority that the legal procedure has been correctly applied by the COE, but the brother of the head of this institution is a Shareholder in the construction company Alb S.a.



Issues to be discussed:

Does the participation of Alb S.a. represent a conflict of interest in the organized tender from the contractual authority of the public institution D?

Legal Basis:

Article 37 of Code of Administrative Procedures states:

- a. *None of the employees of administration organs can participate in a administrative decision making process or contracting where the administration he represents is a party in cases when the official has or potentially might have the below situation:*
- b. *Spouse or cohabitant or his relatives until second degree have a director indirect interest in the mentioned issue.*

While analyzing the data of the above mentioned case in the light of the restrictions of article 37 of CAP, it results that:

- The tender is organized by a public institution
- In tender participates the construction company “Alb” S.a where the brother of the contractual authority head is a Shareholder
- He brother is a relative of second degree
- All legal procedures are applied correctly

In such conditions the participation of the construction company Alb S.a in tender is a conflict of interest.

Solution

Based on Article 26 of Law no. 9643 dated 20 November 2006 “On Public Procurement”:

The contractual authority refuses an offer or request for participation in tender if:

- ***The offeror or candidate is in conflict of interest situation***

Considering the public procurement organization procedure, the unique solution is ***the disqualification of the construction company “Alb” S.a and continue the organization of the tender.***

Example 4

The official G.N is appointed member of Commission of Offers Evaluation in the organized tender for concession of “Rozafa” S.a. The tender for evaluation of offers is organized on 15 March 2009 in which participated as an offeror the commercial company “Kandi” S.a. The official G.N has been member of the Supervisory Council in “Kandi” S.a. and left the position on 14 March 2009.

At the end of the offers evaluation, “Kandi” S.a. has been classified at first place with 95 point followed by the second Consortium “Genti” S.a. After the notification, the Consortium “Genti” S.a. has submitted a complaint to the Contractual Authority, PPA and HIDAA notifying them, that selection of “Kandi” S.a has been made in conflict of interest situation because:

The official G.N has been member of the Supervisory Council of “Kandi” S.a and is the only expert in the Commission of Offers Evaluation for the evaluation of technical indicators submitted by the economic operators.



Issues to be discussed:

Is the participation of the official G.N in the COE for the concession of Rozafa S.a. a conflict of interest situation?

From the administrative investigation made form HIDAA, it results that:

In relation to the official G.N has been identified these data:

- He has been a member of the Supervisory Council at “Kandi” S.a for the period of 1 January 2007 until 14 March 2009
- He has benefited 50.000 ALL incomes per month
- Transactions are made via “Raiffeisen Bank”
- On 15 March 2009 he is a creditor of 100.000 ALL towards “Rozafa” S.a
- He has been the only expert in the Commission of Offers Evaluation for the evaluation of technical indicators submitted by the economic operators
- In the evaluation of technical indicators of submitted offers by the economic operators, he has given the maximal evaluation to “Kandi” S.a and minimal to other operators.

HIDAA based on legal disposition as following:

Article 5 of Law no. 9637 dated 7 April 2005

1. Private interests of an official are those interests that conform with, contain, base on or arise from:

e) Prior engagements from which the interests mentioned in the above letters of this article have arisen or arise

Article 37 of Code of Administrative Procedures

None of the administration organ employees can participate in an administrative decision-making or entering into a contract, where the administration he represents is a party in cases when the employee has or might have the following conditions:

a) He has a direct or indirect private interest in the issue;

e) The employees or the persons mentioned in paragraph “b” of this article are debtors or creditor of interested parties in the administrative proceeding or entering into a contracts, where the public administration is a party;

As well as

Data provided by the administrative investigation

Conclude that:

The participation of the official G.N in the Commission of Offers Evaluation to give in concession “Rozafa” S.a ***has been in a case-by-case conflict of interest situation.*** The PPA and Contractual Authority have been notified. The Contractual Authority disqualified “Kandi” S.a and applied a fine toward the official G.N.



5. INVALIDITY OF ACTIONS IN PUBLIC PROCUREMENT OF GOODS, SERVICES AND WORKS AND SANCTIONS

5.1. The Meaning of Invalidity of Actions in Public Procurement of Goods, Services and Works

The actions carried out by public institutions, which legally have the obligation and competence to oversee and monitor the procedures of public procurements, concessions, and tenders or take part in public contracts, are administrative actions. The nature of administrative actions, approved throughout the public procurement processes, is diverse.⁹ The administrative action of any nature, in terms of this manual and in relation with the public procurement process, based on the PCI law, chapter V, is or will be invalid if it is executed in a conflict of interest situation.

The sensitivity of invalid acts consequences is extensively high in public contracts procurement for any of the interested subjects, as well as for the large community taxpayers, and especially for the directly interested subjects, as well as persons who participate in the competition procedures. This is the reason why the goal of the law on public procurement, is, apart from others, to guarantee better use of public funds, non discriminative but equal treatment for all economic operators participating in public procurement procedures, as well as to ensure integrity, public trust, and transparency in such procedures.¹⁰

5.2. Invalidity Types of Actions and Contracts contracted/issued in conflicts of interest circumstances

PCI Law, Chapter V, Article 40, asserts clearly that acts and administrative contracts issued either in the actual interest circumstances or in apparent conflict of interest cases¹¹ are considered invalid. For a better comprehensive definition, research and determination of invalidity, this law is referred to the Code of Administrative Procedures.

CAP includes regulations on the invalidity in Section III – Invalidity of Acts, Article 115 – 118. The Article 115 of CAP defines that acts issued against the law (acts issued in a conflict of interest situation) are invalid. Theory of the administrative law legal defines invalidity of administrative acts as "...an invalid legal status created by the public administrative organ through the incorrect application of law or due to a vested willingness, which has appeared or influenced the concrete administrative act or action¹². The level of the violation of the law determines the invalidity degree of the administrative, relative or absolute.¹³ CAP does not include specific regulations on the validity of administrative contracts, but the logic of CAP itself,

⁹ Article 2 of the Code of Administrative Procedures defines the administrative acts, administrative contracts and real acts as types of administrative organ willing expression.

¹⁰ Article 1 of Law no. 9643, dated 20 November 2006, "For Public Procurement", amended by Law no. 9800 dated 10 September 2007, and Law no. 9855 dated 26 December 2007.

¹¹ Manual No. 1 analyses in Chapter V "Invalidity of acts in conflict of interests" where it describes in detail the indicators and reasons for invalidity. Therefore, the same regulations and legal references are applicable also for invalidity of acts and contracts in cases of apparent or possible apparent conflicts of interest in the procurement of public contracts. See page 94 of Manual no. 1.

¹² Sokol Sadushi, "The Administrative Right", 3rd publication (amended), Tirana 2005, pg. 129.

¹³ Article 115 of CAP- Invalid Acts, reads:

Invalidity of administrative acts, in terms of this Code, is apparent in the following forms:

- a) *Absolutely invalid administrative acts (acts issued against the law);*
- b) *Relative invalid administrative acts(acts issued against the law);*



and the analysis of the Code of the Administrative Procedures Commentary, clarifies that "... The same regulations that apply for the invalidity of the administrative act... are applied even for the administrative contracts..."¹⁴ Therefore, each regulation introduced in Section III of CAP, or each given clarification to interpret the invalidity of the administrative acts, is a regulation/clarification worthwhile even for the administrative contracts signed during the public procurement processes. In order to understand the invalidity of administrative acts, and public contracts issued during the public procurement processes, the meaning of CAP for the invalidity of acts should be clarified.

5.2.1. Absolute Invalidity

As aforementioned, the degree of impinging the law determines if the invalidity is absolute or relative. If the law impingement is flagrant the invalidity is absolute. Therefore, to determine the existence of an absolute or relative invalidity we should analyze the legal impingement: to understand the type of invalidity it should not be forgotten in any case its bases established by article 115 of CAP: the impingement or the flagrant impingement of law. The legislator in articles 116 and 118 of CAP has clearly defined the impingement or flagrant impingement of law.

Article 116 of CAP provides the exhaustive cases of the absolute invalidity. As such, the absolute invalid acts are those which are issued by:

- *An unidentified organ in terms of the procurement process*, which means that this process is realized by an organ not established by law or legal act, neither is created for procurement purposes;
- *An organ which surpasses the competencies*: the organ created by juridical acts executed the procurement process when it was not its competences (its rights or duty according to the law),
- *In contrary with the procedure and form*: the procurement process is accomplished through administrative acts or contracts issued without respecting procedural requests of law or particular laws on procurements; CAP in relation to the form that an administrative act or administrative contract must have, or procedural steps to be followed according to those laws.¹⁵

In order to have one of the above situations, the following conditions shall exist:

1. Public procurement must be implemented by the administrative organ as defined by law;
2. The implemented procurement shall execute clear legal competences,
3. The whole procurement process shall respect the required form by law, as well as the procedural steps in order to conclude the procurement process.

¹⁴ "Commentary on the Code of Administrative Procedures ", prepared by ISLP, Publishing House Toena, Tirana 2004.

¹⁵ In administrative law literature it has been discussed for long on this last point of absolute invalidity, establishing that in order to have absolute invalidity, it not necessarily to impinge both the form and the procedure. It is sufficient to impinge one of them. However, the literature has stated that in some cases, if considering a procedural impingement or any form which is not required specifically in the respective law (*lex specialis*), the invalidity can be also relative. The approach is strongly related with the degree of the procedural impingement. Concerning this last approach, the administrative organ or court has the duty to analyze the invalidity issue based on the above mentioned fundamentals, so as to analyze the type of invalidity.



Therefore, the respective administrative organ which has the duty to analyze if a procurement administrative process is developed or not in a conflict of interest situation, first of all shall analyze whether the form and procedure as required by law are applied (in case when an inexistent organ or an organ which surpasses the competency is easily apparent, it can lead to the absolute invalidity). The analyses of the procedures might result to be more difficult, as the law on public procurements requires that every administrative action has to be recorded in the written form, thus a specific form required can be easily verifiable.

5.2.2. Relative invalidity

In cases when an act impinges the law, if not at a flagrant level, i.e. not a violation resulted from the above-mentioned cases; this is *a relative invalid act*. Article 118 of CAP defines that law impingements or ultra-virus willingness of the administrative organ cases are relative invalidity cases.

The Code of the Administrative Procedures Commentary, as well as the theory of the administrative right categories these type of impingements or vested willingness as following:

A – Inconsistency with the law content, which means:

- *ordering the execution of acts, provision of favors, or rights when the law does not allow it, but quite in opposite prohibits them, e.g. in the procurement process it is selected a subject who does not fulfill the criteria of participation as defined by law;*
- *the rights which are permissible by law are prohibited or refused, e.g. it is exempted from the procurement process a subject which fulfills all preliminary conditions as defined by law;*
- *The process is based on unlawful acts issued by a higher organ: e.g. a public procurement is executed based on the Council of Ministers decision, which is against the law or abolished.*
- *The juridical acts are issued in a vested willingness situation: error/mistake, fraudulence, intimidation and physical violence.*

B – Inconsistency in contents of juridical acts issued during the process of public procurement intending the law. This requires a deep analysis from the authorities about the intention that the legislator had in drafting the law of procurement or particular laws related to this process. An illustration of such would be the definition of a public procurement based on some acts which does not respect the legal definitions for this issue.

As the theory defines, in relation to the relative invalidity as a law impingement or vested willingness, it shall be mentioned that the vested willingness is always a situation which arises as a consequence towards relative invalidity. In addition, the organ shall analyze favors and created or refused interests which are influenced by the private interests of the employee/s in the procurement process.

5.2.3. Continuation of the analyses

The analysis done for the invalidity of cases in Manual No. 1 of the PCI Law, facilitates the concluding process of absolute invalidity, clarifying that although it is always needed to verify the conflicts of interest and its sanctioning,



. . . the certainty of absolute invalidity act does not necessarily need the verification of the conflicts of interest existence. Therefore we might not be in the situation of verify the relation between the private interest and executing unlawful duty by an official, but is sufficient to analyze the product, meaning the act itself.¹⁶

Manual No. 1 suggests that the invalidity analyses shall be performed by concentrating at the conflict issue and answering to all questions in connection with the invalidity situations aforementioned. Such questions as:

- Did the private interests of the officials involved in the process have influence in offering favors, so favoring the winner at the procurement process, or
- Did the private interests of the officials involved in the process influence the disqualification of the subject in the procurement process, or
- Did the private interests of him/her influence the official vested willingness?

All the presented situations require that the conflict of interests must be analyzed in order to facilitate the process of concluding in the case of a flagrant inconsistency according to Manual no.1 suggestions. The PCI law, same as the CAP – disqualifications – seeks that before any decision-making moment during the procurement process to:

- identify in advance if we are in a situation of private interests of an official in relation with the decision-making, and than
- treat and avoid the conflict of interest

In Chapter IV, Article 37 of the PCI Law treatment forms of resolving the conflict of interest cases are provided. The official and superior have concrete duties established by law to use the most effective method in order to avoid the conflicts of interest in advance. Such legal requirements seek from the decision-maker, as well as from his superior to analyze all situations that can lead to invalidity due to conflicts of interest. Such analysis must be done in advance and from everybody who examines the validity of contract or its absence.

The above analyzing in relation to invalidity indicates that issued acts during the procurement process in a conflict of interest situation, can be absolutely or relatively invalid. This is due to the concrete situation of issuing the act. The appearance of conflicts of interest in most common case can lead to a relative invalidity. Also, referring to the law, the existence of conflict of interest occurrence most commonly can produce a relative invalidity. Despite this, the analysis must be comprehensive in order to prevent wrong conclusions. This is not only because of the importance when impinging the law, but also due to the juridical consequences in resolving the situation or given measures to adjust the situation thereafter. What really favors the analysis in the public procurement case is the fact that all communications, according to law which regulate the public contracts, must be in the written form or documented as such. Thus, the administrative investigation can be based on a sustainable analysis.

5.3. Review or Solution of Consequences Deriving from Invalidity

¹⁶ See Manual No.1, Chapter V, point 2.1, pg. 97



As far as the impingement is of different levels, the consequences derived from absolute invalidity are much greater than the relative one. In this concern, the legislation treats differently the resolution of consequences derived from the invalidity of both cases.

Firstly, due to the extent of impingement the time period within which it can be asked for verification, declaration and notice of invalidity by interested subjects alters. As such, if the invalidity is absolute its verification can be of any time, while it is relative within the time period defined by law for appealing the act.

Secondly, every interested party or the administrative organ itself can ask to verify the invalidity for an absolutely invalid act (Article 117 of CAP). The absolutely invalid acts never produce juridical effects, although they might have effectively produced consequences. Therefore, if a procurement process is absolutely invalid, it is considered null, meaning it never occurred and in this concern the return of the situation can happen any time.

The relatively invalid acts can be appealed from the interested parties or revoked by the respective administrative organ (Article 123 of CAP), so as in a public procurement by the procurement agency which has executed the procurement, or be suspended by the respective administrative organ (PPA) within the time frame determined for appeal. If this does not occur within the time defined by law, the act will produce the same effects of a valid one (article 11 of CAP). Last, the administrative organ shall pay attention to treat the situation as lawful one although occurred under a conflict of interest effect/ consequence and for this the following shall be analyzed:

- is the revoking/ suspending prohibited,
- have lawful interests been produced: i.e. has the procurement contract been entered into,
- is there any consensus to be reached between the parties to remove their interests, and
- is there any legal interest as such as not to waive those (Article 122 of CAP)

Considering that the public procurement includes concessions, tenders and all public contracts, the respective legal regulations will regulate the deadline of appealing and identify the relevant public institution to whom the request for invalidity shall be addressed.

Thirdly, in order to clarify the appealing procedure due to invalidity caused by a conflict of interest, it shall be considered the relevance of not only the regulation of public procurement law, but also of PCI and CAP. As such, depending on the appealing moment, the last presents at the superior of the employee participator in the procurement process before the procurement process is about to finish or the respective administrative organ which has executed the procurement process to revoke the act (or declaration of invalidity referring to the cases of absolute invalidity), or at the superior organ or the organ which controls administratively the procurement process to suspend it take measures if the process has been concluded. The latest can be presented close to PPA or PA according to the legislation on procurement.¹⁷ According to the public procurement law, the decisions of PPA and PA are administratively final and after this they can further be addressed to the court in accordance in accordance to the Civil Code of the Republic of Albania within 30 days from the issuance of the highest administrative decision.

¹⁷ See Chapter II of this Manual.



5.4. Administrative and Juridical – Civil Contracts

As mentioned previously, the above analyzing mechanism provides also to administrative and civil contracts. In the administrative contracts case both the definitions of Article 40, point 1 and 2 of the PCI Law is applicable, which determines that the administrative contracts,¹⁸ issued in actual or apparent conflict circumstances are invalid. This law does not refer to the invalidity nature while leaving the analysis dependant of the factual situation. Obviously, the invalidity analysis must take into consideration all the elements analyzed before. With regard to this means that a contract will result invalid varying from the analysis about the acts issued by the administrative organ, so as the procurement authority.

It shall be clarified that analyzes to the validity or the extent of the invalidity of administrative acts of the procurement authority will not have always the same influence on the invalidity of administrative contract. This is due to the legislation as well as the Albanian jurisprudence, which is developed to the extent to provide juridical insurance in order to realize the public interest, for which there is an administrative entering into a contract. Secondly, it intends to protect the contractor's interests, private party, who has to be defended from irregularities caused by irregular and illegal administrative decision-making.

In order to better clarify this concept, we shall mention that the invalidity conditions of procurement contracts are defined at the Civil Code - Article 92 -102, on invalidity of the juridical action and concretely actions which:

- are against to an orderly disposition of law
- are executed to defraud the law
- are made by children under 14 years old
- are completed based on agreements between parties not intending to have juridical consequences

There are cases explicitly foreseen by law for the invalidity of contracts:

- Firstly, according to Article 40 of the PCI Law, public procurement entering into a contract in conflict of interest circumstances leads to the invalidity of contracts.
- Secondly, Article 58, point 6 of Law no. 9643 on public procurement states that if the entering into a contract is made before the notification period or the administrative clearance have finished, the contract is absolutely invalid.¹⁹

Also according the Civil Code, due to the fact that two above degrees are legal, impinging them will lead to the invalidity of the contract.

¹⁸ CAP stipulates in Article 150 administrative contracts in non exhaustive way. This article is not exhaustive and the Albanian legislation has foreseen as such other contracts: e.g. concession or contracts for casinos, etc. See Sadushi S., "The administrative Right", Publishing House Ora, Tirana, 2005.

¹⁹ Article 58 of law on public procurement provides that: the entering into a contract before the deadline of classification notification or before the administrative analyses has finished, according to article V of this law, makes the contract absolutely invalid.



What is the meaning of the invalidity: invalidity means that the contract shall not be taken in consideration, as well as not existing in order to allow the administrative organs to review acts and procurement procedures?

The public procurement law defines that the Public Procurement Agency or the Procurement Advocate cannot declare as invalid a contract which has entered into force (been signed). The law has considered inexistent the contract only when it has entered in force before the notification deadline, by determining so that administrative organs, such as the Public Procurement Agency or the Procurement Advocate, and the procurement administrative organ itself cannot help revoking or suspending the contract although it might have entered in force in invalidity conditions. This interpretation derives from some articles of the procurement law, as Article 58, 64, 66 or 71. So as, it will be the court deciding on the invalidity of the contract and resolve the consequences of it.²⁰ The court has accepted that parties can ask for compensation of the damage caused if the contracts results invalid, a request presented on the bases of the non-contractual responsibility.²¹

This means that every organ who executes public procurement procedures can provide an opinion only on administrative acts and as a result the analysis of consequences deriving by a conflict of interest situation when entering into a contract will be an issue not responsibility of any administrative organs but to the court only. The administrative acts perform their analysis concerning the invalidity of the public contracts only related to the administrative acts.

The reasoning is similar also for the juridical-civil contracts which are not administrative, and “contracted against to a law decree do not have juridical consequences” or in few words are absolutely invalid.²² The examination of their invalidity will be done in any case by the court based on requests of the Civil Code and Code of the Civil Procedures.

²⁰ See the Court Decision of the District Court Tirana, No. 3127 dated 7 April 2008.

²¹ See the High Court Decision, No. 822 dated 12 May 2005.

²² Article 92 of the Civil Code defines the cases when a civil juridical act does not lead to any juridical consequence (acts which violate a law disposition, to defraud the law, fictive juridical acts or stimulated as agreed between parties intending to emerge juridical consequences, etc.)

Remind:

In order to accomplish the objective of the PCI Law, the public institution shall undertake the necessary measures to reduce the damages caused by the act issued in a conflict of interest circumstance.

This would require that the administrative organ have to take measures for every employee:

- To be informed about the meaning of the administrative activity and essentials of its validity.
- To be trained on the understanding of impartiality in his/her decision-making
- To understand that his proper actions in a conflict of interest situation lead to invalidity of acts/actions and administrative contracts
- To understand that administrative contracts will be declared invalid by the court and definitely the reimbursement will be part of the court decision making
- To understand that abusing or violating the law, including the public procurement entering into a contract in a conflict of interest situation, has consequences so as taking responsibilities to compensate the administration organ (established by court decision) by the employee who violate the law

and why not, the administrative organ:

- To establish in his/her institution a suitable and individualized regulation on this issue, etc....

Attention:

Every effort to contract in total invalid conditions **will lead to consequences** to the **offeror/candidate himself**. According to Article 26, e.g. procurement law, the offeror who is in a conflict of interest situation is excluded from the participation in the procurement procedure, as well as according to the same law, he is excluded from the procurement procedures for a period up to 3 years. Therefore, all parties must be attentive in order to prevent all legal consequences also for the private subject (additional to consequences arising for employees acting in a conflict of interest situation).

Example 1

In procurements for the construction of a highly important public investments in the city A, the Municipality A and his Major have accepted the offers of a company where he results to be the legal director and administrator. In addition, in the entering into a contract documents for the public procurement between the Municipality A and this company, his wife results to be the representative of the company.²³

Is this situation a conflict of interest?

²³ The Constitutional Court Decision, no. 30, dated 28 December 2006, in which it has interpreted: the demander acts for accepting the offers and entering into a contract are serious impingements in terms of article 115 of the Constitution, which damage the personality of public authorities. They violate the content of Law no. 7971 dated 26 July 1995 "On public procurement" and with the Code of Administrative Procedures, Article 37, point 1 where it is explicitly prohibited for a public administration employee to participate in a decision-making process and contract where the administration which he represents has or there is suspicion to have a direct or indirect personal interest in the issue or the spouse and his/her relatives.



According to Article 37 of CAP and based on Article 21 of the PCI Law, the above case poses a conflict of interest. Especially in these cases, the high official of the municipality, so as the Major is prohibited to contract absolutely certain beneficiaries contracts from public funds in the municipality jurisdiction. The situation is a conflict of interests' case due to an absolute prohibition, because of a direct profit that the Major and his spouse could benefit from public funds of the Municipality.

What administrative and juridical actions shall be taken in order to conclude this situation? How to resolve the consequences of such contract?

The consequences are first of all related to the Major, because he has been in a conflict of interest situation. As this is a situation already occurred, the respective organs to resolve this issue are superior organs of the Municipality and the court.

First of all, it has to be clarified that the Major does not have an administrative superior organ to review its decisions or take measures in relation to the decision-making in a conflict of interest situation. However, the Constitution, article 115 exclusion for high impingements of Constitution laws, provides that the Council of Ministers can take the highest administrative measure, so as dismiss the Major.

In a similar case, the decision -making was the same as in the Constitutional Court, where it was considered the Major pretense for anti-constitutionality of the dismissal decision. It was reinforced the idea that entering into a contract by the Major in conflict of Interests situation was a high impingement of the laws and constitution.²⁴

What about the contract already issued?

Concerning to the contract, the parties can ask for its invalidity and the solving the consequences in the Court. The Court when considering the contract will first of all evaluate if we are in front of an absolute or relative invalidity situation and than decide if the private party will be reimbursed for the occurred works. Based on the private law regulations, the trust will be considered as a necessary precondition for reimbursement.

In addition, every participating party, which is not declared winner in the procurement process, can ask for reimbursement for the non-contractual damages caused due to the declaration as a winner in this process a subject in invalid circumstances. Their requests will be considered and decided by the court.

²⁴ The Constitutional Court Decision, no. 30 dated 28 December 2006, in which it has interpreted: the demander acts for accepting the offers and entering into a contract are serious impingements in terms of article 115 of the Constitution, which damage the personality of public authorities. They violate the content of law no. 7971 dated 26 July 1995 "On public procurement" and with the Code of Administrative Procedures, article 37, point 1 where it is explicitly prohibited to the public administration employee to participate in a decision-making process and contract where the administration which he represents has or there is suspicion to have a direct or indirect personal interest in the issue or the spouse and his/her relatives.



The established reimbursement, along with the correct reference at the existence of the fault of the Mayor, is to be provided by the Major, in accordance with the law on the non-contractual responsibility.

Example 2

In a tender for public working of a Contractor Authority, a juridical person applies, where the Shareholder is the spouse of an engineer, who works in this Contractor Authority. The engineer is neither in the procurement Unit, nor in the Commission for Evaluation of Offers, but he is engaged from the Contractor Authority to supervise the contract implementation.

Cause: Does the entering into a contract in such conditions pose a conflict of interest? What is the solution in this case?

The engineer as the supervisor of the contract implementation is in a conflict of interest situation. This is due to the family relations between the decision-makers, so the supervisor of the contract implementation – the engineer and the juridical person winner of the contract, representing one of the situations defined as private interest by Article 5 of the PCI Law. In such conditions, Article 37 of CAP provides for the disqualification of such cases from the decision-making.

In addition, the contract will not be considered as entering into a contract in the situation of a conflict of interest, because the engineer has not declared in any moment of being participant in the decision-making until the entering into a contract.

Example 3

In a concession procedure, the mother and the son of a deputy is Shareholder in the association which participates as an offeror, sharing 20 % and 30% respectively. Based on this fact, another participating company in this procedure submit to the PPA a complain claiming that the first offeror is in a conflict of interest situation. In this situation, the PPA asks the opinion of HIDAA to treat the case and the latest starts the administrative investigation.

What is the decision in relation to this situation?

HIDAA will first consider if there is any prohibition provided in the law. The PCI law provides particular prohibition for certain situations. Article 21, point 1 of the PCI Law states that any of the officials who hold one of the functions mentioned in Chapter III, section 2 of the PCI Law cannot contract with any public institution. Article 24 of the PCI Law specifies that all the prohibitions foreseen for the official are applicable for all individuals related to him. Particularly, Article 28, Chapter III, section 2 also includes deputies in these officials groups. In the category of persons related to the official, according to Article 24, point 1 and 3, are included the spouse, adult children and parents of the official and spouse.

Considering these legal regulations, in the finalization of the administrative investigation HIDAA concludes that the participation of an association in which there are persons related to deputies, in competition procedure for concession, consists in a conflict of interest.



Solution

Based on Article 26, point b, of the public procurement law, PPA will decide the refusal of the offer/request for participation in the competition of the association where the mother and the son of the deputy own 20% and 30% of Shares respectively.

If the respective organ does not take decision to disqualify, the tender procedure will be against the law and the contract will be invalid. Afterward, all consequences in the above mentioned examples will be applicable for this case as well.

5.5. The Following Consequences of Procurements Accomplished in a Conflict of Interest Situation

In Chapter V of the PCI Law, it is specified not only the invalidity, but also other consequences deriving as a result of an administrative process (procurement in our terms) developed in a conflict of interest situation.

After declaring that the act or contract is invalid the administrative organ must take measures to resolve the situation as it was previously and compensate every caused consequence. In addition, the Article 40 of the PCI Law clearly specifies that measures are to be taken even towards employees who have been acting unreliably or have not prevented the conflict of interest as a legal obligation, as well as the measure to safeguard the assault image of the institutions.

As far as the employee who caused the invalidity is concerned, the same article no. 40, provides that:

- To undertake the penalizing procedures: in case of a civil servant employee, the respective authorities must respect the Law on Civil Service to impose sanctions.
- The compensation entirely charges to the responsible employee: this is taken in according to law on non-contractual responsibility of the state administrative organs, who asks the employee to be responsible on cases when he/her has been acting untrustworthy.²⁵
- Files a request for criminal charges against the official, if judging impingement made from him is a penal act.

As far as the institution image is concerned, Article 40 states that:

- The institution asks to the respective court to determine recompense in favor to the institution for the moral damage caused: this means that the employee responsible of the conflict of interest is obliged to recompense the moral damage to the institution.

²⁵ Article 4 of Law No. 8510 "On non contractual responsibility of the public administrative organ" dated 15 July 1999.



Reminder:

The responsible authorities to evaluate conflicts of interest situations are:

- superior of officials, according to the hierarchy;
- departments or human resources units of every public institution who executes public procurement;
- superiors institutions such as PPA and PA and in lack of actions from the above authorities, the authority who undertakes any measure is: The High Inspectorate in collaboration with the Advocate of State

5.6. SANCTIONS

Article 43 of the PCI Law clarifies that none of the treatments and solutions of conflicts of interest, according to articles of Chapter V of this law, are not defined as sanctions. Anyone shall be clear that apart the solutions given to avoid or to treat a conflict of interest, the representative provides as well the defined sanctions to punish the performed infringement.

5.6.1 Administrative Infractions

The PCI Law in its article no. 44 determines that some impingements of articles of this law are considered administrative misdemeanors. The administrative misdemeanors are regulated by Law no. 7697 dated 7 April “On administrative infractions” (amended). This law defines that administrative misdemeanors is “...the violation of the obligations defined in this law, when it does not constitute a criminal offense, constitutes an administrative infraction and is punished”.

The completing of the procurement process (and of administrative decision-makings) in a conflict of interest situation will provide to the respective punishment measure. It has to be mentioned that this penalization shall be verified and issued in accordance to the time frames that law sets out on administrative misdemeanors (verification within 15 days until 2 months after the infraction, or 1 year from the decision issuance if the penalization is not executed). If this does not happen in due time, in accordance to the respective rules of rehabilitation, even the violation of the rules on conflict of interest will not be administratively condemned any more, or the measures taken will not be executed.

The PCI Law – Article 44 – defines that the superior of the institution or the superior institution can issue respective penalizations. The penalizations are fines which vary from 5000 (five thousand) ALL to 400 000 (four hundred thousand) ALL. The PCI Law sets out an important principle in defining the extent of the penalization, of the proportionality with the impingement degree and the official position. So as, greater is the impingement and higher is the official position in the procurement process executed in conflict of interest situation, higher is the sanctioning measure.

The fines can also be issued by HIDAA, with a proposal of its superior or superior institution, or when the impingement is verified directly from the High Inspectorate. In such cases, when the administrative misdemeanor decision is issued by HIDAA, the latest always informs the direct superiors of the superior institution.



5.6.2 *Disciplinary Measures*

The Article 45 of the PCI Law states that every violation of the obligations defined in this law by officials constitutes a disciplinary violation. This means that toward responsible persons, regardless of the defined measures as infraction penalization, disciplinary measures are also provided. In order to clarify which are the disciplinary measures to be executed by the institutions who apply public procurement, we shall consider that:

- PCI law in general defines that the disciplinary shall be stipulated by the respective law
- PCI law provides for specific cases the dismissal of the responsible person, as an administrative measure– article 45/2
- The measures shall be defined according to the work status which the concrete employee who violates has: this means that if the employee is a civil servant, the taken measures are foreseen by law on civil service, and if not the measures shall be given in accordance with the Labor Code or interior regulation of the respective institution (if existing), and
- Law on procurement does not set out any disciplinary measure, as such for unforeseen cases by the Article 45/1 of the PCI Law or for the violation cases done by non civil servants employee; the reference will be at the Labor Code or the interior regulation of the respective institution.

5.6.3. *Damages*

Each administrative act (non acting) which in illegal or legal way has create damages for the subjects interests according to Article 40 of the PCI Law, the latest based on Article No. 14 of PCI as well as Law no. 8510 “On non-contractual responsibility of state administrative organs”, dated 15 July 1999, shall be compensated. This compensation in principle is institutional, but as well as foreseen by PCI, CAP and Law no. 8510, if the employee has acted unreliably, the latest has to compensate.

It shall be taken in consideration in defining this compensation the administrative organ considers:

- damages
- moral damages and
- lost profit

Obviously this process is performed based on request of the subject having the (non) decision-making of the administrative organ and in accordance with a special administrative investigation. The law on the non-contractual responsibility of the state administrative organs is the fundamental law to be consulted for legal details of compensation regulations.

5.6.4. *Penal Acts*

Article 44 of the PCI provides that if the violations of obligation defined in the law on the prevention of conflicts of interest constitute a criminal offence, it will be treated as such. Moreover, article 26 of law on public procurement – corruptive measures and conflicts of interest – foresees that the contractor authority undertakes some actions in order to avoid or treat the



conflict of interest, but meanwhile if acts or actions in relation to the public procurement executed in a situation of a conflict of interest constitute a criminal offence, the competitive authority files the criminal charges with the respective organs. In the article 71 on public procurement it is provided that the Advocate of Procurements, who can verify a public procurement procedure in circumstances of an inquiry for its application, if he judges that an official of the contractor authority has intentionally impinged this law or doubts that criminal offence has occurred, he reports this impingement to the competent authority and the latest encourages the prosecutor office.

It should be mentioned that in cases when acting or not acting constitute a criminal offence, the responsible persons will take the penal responsibility regardless if they might have faced one or several penalization or sanctions of administrative or disciplinary character. In addition, if the penal investigation starts immediately for a conflict of interest case, this does not exclude the responsibilities of the administrative character for the responsible employee.

The Penal Code²⁶, although explicitly does not use the term “conflict of interest”, comprises several offences which depending on the concrete situations can be activated. Such list (but not exhaustive) can be:

- Abuse of office (Art.248): Committing acts which aim at hindering a person who holds a state function to apply the law, when those acts have caused serious consequences to the citizens or state’s interest, is punishable by a fine or up to seven years of imprisonment.
- Denying equality of the citizens (Art. 253): Discrimination by a worker holding a state function or public service conducted because of his capacity or during its exercise, when the discrimination is based upon origin, sex, health situation, religious or political beliefs, trade-union activity or because of belonging to a particular ethnic group, nation, race or religion, which consists in creating unfair privileges or in refusing a right or benefit deriving from law, is punishable by a fine or up to five years of imprisonment.
- Active corruption of persons who execute public functions (Art. 259)
- Passive corruption of high public officials or local elected (Art. 260)
- Asking for kickbacks (Art. 259): asking for or demands remuneration to which he is not entitled or which exceeds the amount allowable by law, is punishable by a fine or up to seven years of imprisonment, and
- Receiving a bribe (Art. 260) Receiving remuneration, gifts or other benefits by a person holding state functions or public service and during their exercise, in order to carry out or to avoid carrying out an act related to the function or service, or to exercise his influence toward different authorities in order to provide to any person favors, gratuities, jobs and other benefits, is punishable by three to ten years of imprisonment.

Certainly, the specific situations determine the type of the criminal offence and the Prosecutor acts to investigate and decide in relation to the existence or not of criminal offence elements, and also initiating a criminal proceeding against the employee.

²⁶ Law no. 7895, “Penal Code of the Republic of Albania”, date 27.1.1995, amended



**ANNEX I
GROUP OF EXPERTS**

Alban SERANI	High Inspectorate of Declaration and Audit of Assets
Andi NANO	Albanian Center for Economic Research
Elvira DABERDAKU	High Inspectorate of Declaration and Audit of Assets
Dr. Eralda ÇANI (METHASANI)	University of Tirana, Law Faculty Albanian Center for Economic Research
Fatbardh VRIONI	Procurement Advocate
Fjorida KALLÇO	High Inspectorate of Declaration and Audit of Assets
Flori KARAJ	High Inspectorate of Declaration and Audit of Assets
Gjon NDREJA	Audit and Supervising Expert, Rule of Law Program, DPK/USAID
Gëzim Çopa	High Inspectorate of Declaration and Audit of Assets
Hysen ÇELA	Albanian Center for Economic Research
Loreta JARAZI (KRIQI)	Albanian Center for Economic Research
Reida S.AHOLLARI	Public Procurement Agency
Zef PREÇI	Albanian Center for Economic Research
Zyhrada KONGOLI	Albanian Center for Economic Research
Ilijana NANO	“Luarasi University”, Law Faculty, Tirana Albanian Center for Economic Research
Najada Rama	Agency of Concession Treatment



ANNEX II
LAWS AND DECISIONS RELATED TO
THE PREVENTION OF CONFLICTS OF INTEREST²⁷

1. LAW NO. 9367 DATED 7 April 2005
“ON THE PREVENTION OF CONFLICTS OF INTEREST IN THE EXERCISE OF PUBLIC FUNCTIONS” (PUBLISHED IN THE OFFICIAL GAZZETTE NO. 31 MAY 2005)
2. LAW NO. 9690 DATED 5 MARCH 2007
“ON THE AMENDMENT OF LAW NO. 9367 DATED 7 APRIL 2005 “ON THE PREVENTION OF CONFLICTS OF INTEREST IN THE EXERCISE OF PUBLIC FUNCTIONS”, AMENDED

PUBLIC PROCUREMENT

3. LAW NO. 9643 DATED 20 NOVEMBER 2006
“ON PUBLIC PROCUREMENT”, AMENDED
4. DECISION OF COUNCIL OF MINISTERS NO. 1 DATED 10 JANUARY 2007
“ON PUBLIC PROCUREMENT REGULATIONS”, AMENDED WITH DECISION OF COUNCIL OF MINISTERS NO. 153 DATED 22 MARCH 2007, DECISION OF COUNCIL OF MINISTERS NO. 135 DATED 3 FEBRUARY 2008, DECISION OF COUNCIL OF MINISTERS NO. 392 DATED 8 APRIL 2008, DECISION OF COUNCIL OF MINISTERS NO. 822 DATED 18 JUNE 2008 AND DECISION OF COUNCIL OF MINISTERS NO. 46 DATED 21 JANUARY 2009
5. DECISION OF COUNCIL OF MINISTERS NO. 45 DATED 21 JANUARY 2009
“ON PERFORMANCE OF ELECTRONIC PROCEDURES”
6. DECISION OF COUNCIL OF MINISTERS NO. 659 DATED 3 OCTOBER 2007
“ON REGULATIONS FOR APPLYING PUBLIC PROCUREMENT PROCEDURES ELECTRONICALLY”

CONCESSIONS

7. LAW NO. 9663 DATED 18 DECEMBER 2006
“ON CONCESSIONS”, AMENDED
8. DECISION OF COUNCIL OF MINISTERS NO. 87 DATED 16 JANUARY 2008
“ON SOME AMENDMENTS AND ADDS IN DECISION NO. 27 DATED 19 JANUARY 2007 OF COUNCIL OF MINISTERS “ON THE APPROVAL OF EVALUATION RULES AND CONCESSION PROVIDING”, AMENDED

²⁷ Entered into force after the publication of Manual No.1



9. REPORT ON HEC GIVEN ON CONCESSION FROM THE CONTRACTUAL AUTHORITIES

AUCTIONS

10. LAW NO. 9874 DATED 14 FEBRUARY 2008
“ON PUBLIC AUCTIONS”
11. DECISION OF COUNCIL OF MINISTERS NO. 1719 DATED 17 DECEMBER 2008
“ON THE APPROVAL OF THE RULES ON PUBLIC AUCTION”



**ANNEX III
DECLARATION FORMS**

**DECLARATION
CASE-BY-CASE OF OFFICIAL PRIVATE INTERESTS IN THE EXECUTION OF
PUBLIC FUNCTIONS**

Who has the obligation to declare:

All the officials defined in Article 4 of Law No. 9367 dated 7 April 2005 and in the Interior Regulation of the institution.

Types of Declaration:

- 1- Preliminary Self Declaration, case-by-case on the existence of private interests, which can cause the existence of conflicts of interest.
- 2- Declaration case-by-case of private interests to an official when it is required by the superior or the superior institution.

Personal Data:

First Name – Paternity – Last Name – Function – Institution

Declaration type: (mark x in the declaration type box)

By request of _____
Self Declaration

Hereby, I verify that the following declaration is complete, accurate and I have legal responsibility for its accuracy.

1. Detailed Description of private interests which may cause a conflict of interest:

2. The content of the legal restriction in the execution of the public functions, which may cause a conflict of interest:

3. The solution of conflicts of interest:

Declaration submission Date _____

Name

Surname

Signature



ANNEX IV
MODEL OF CONFLICTS OF INTEREST REGISTER

Register of Conflicts of Interest

NO.	NAME OF OFFICIAL FUNCTION	DECLARATION DATE	DETAILED DESCRIPTION OF THE CONFLICT INTERESTED PARTIES	PHASES FOR THE CONFLICT SOLUTION TAKEN DECISIONS	INFORMATION SOURCE	SIGNATURE



DECLARATION
On Conflicts of Interest

Of the economic operator participating in the public procurement procedure organized on _____ by the Contractual Authority _____ with subject _____ with a limit fund _____.

The conflict of interest is the conflict situation between the public duty and the private interests of an official, direct or indirect private interests which affect or might affect or it seems to affect the performance, in an incorrect way, of his public responsibilities and duties.

In terms of Article 21 of PCI Law no. 9367 dated 7 April 2005, the officials category defined in Chapter III, section 2, to whom is absolutely prohibited to benefit directly or indirectly from the entering into a contract with a public institution are:

- The President of the Republic; Prime Minister, Deputy Prime Minister, Ministers and Deputy Ministers; Members of the Parliament (Deputies); Judges of the Constitutional Court and High Court; members of the High Council of Justice; General Prosecutor; Head of the State High Audit; Ombudsman; members of Central Election Commission; General Inspector of the High Inspectorial for the Declaration and Audit of Assets; Members of the regulatory entities (Supervisory Council of the Bank of Albania, including the Governor and Deputy Governor, of Competition, Telecommunication, Energy, Water Supply, Insurances, Media); General Secretaries, Directors of Departments and General Directors of central institutions and all the other officials, in every public institutions, which is at least equivalent from the functions with the General Directors.

When the official is the head or deputy head of the Municipality (major), commune, or District Council, member or the respective council, or a high level official of a local governance unit, the prohibition due to private interests of the official, defined in this point, are executed only in entering into a contract, according to the case, with the municipality, commune, or district council where the official executes his function. This prohibition is implemented also when the public institution is a party in the contract, depending of this unit (Article 21 point 2 of Law no. 9367 date 7 April 2005).

The prohibitions established in Article 21, point 1, 2 of Law no. 9367 dated 7 April 2005, with respective exclusions, are executed to the same extent also for the persons related to the official who in terms of this law are: **spouse, adult children, or parents of the official and spouse.**

I, the undersigned _____, representing the juridical person _____ declare under my personal responsibility that:

I am aware of the requests and prohibitions defined in Law no. 9367 dated 7 April 2005 “On the prevention of conflicts of interest in the exercise of public functions” amended, as well as sub legal acts issued for its implementation by the High Inspectorate of Declaration and Audit of Assets, and Law no. 9643 dated 20 November 2006 “On public Procurement”, amended.

In accordance with the above mentioned, I declare that any official as defined in **Chapter II, Section II** of Law no. 9367 dated 7 April 2005, and in this declaration, does not own direct or indirect private interests with the juridical person I represent hereby.

Issuance of Declaration Date _____
Name Surname Signature _____



(On the headed notepaper of the Contractual Authority)

DECLARATION FORM

Name Surname: _____
Position: _____
Work Place Department / Sector _____

Based on Chapter V, point 1 of CoM Decision no. 1 dated 10 January 2007 “On the approval of public procurement regulations”,

I _____ the _____ undersigned
(Name, Father’s name, surname)

Member in the procurement unit/technical specification drafting/ commission of offers evaluation/ commission for small value purchasing, today on ____/____/____ under my full responsibility and knowledge, declare that, _____ in conflict of interest situation foreseen by Law No. 9367 dated 7 April 2005 “On the prevention of conflicts of interest in the exercise of public functions”

This declaration has been prepared based on data in the declaration day

____/____/200__

Undersigned _____

(On the headed notepaper of the Contractual Authority)

DECLARATION FORM

Name Surname: _____

Based on article 26, point 1/b of Law no. 9643 dated 20 November 2006 “On public procurement”,

I _____ the _____ undersigned
(Name, father’s name, surname)

Candidate/ Offeror for the procurement procedure organized by your contractual authority, today on ____/____/____ under my full responsibility, declare that, _____ in a conflict of interest situation foreseen by the Albanian legislation into force.

This declaration has been prepared based on data in the declaration day

____/____/200__

Undersigned _____