

Prepared by: Klodiana Cankja, MA Reida Shahollari

Supported by: Intercooperation, Albania Decentralization and
Local Development Programme (dldp)

Funded by: SDC – Swiss Agency for Development and
Cooperation (SDC)

Tiranë – 2009

CONTENT:

- Abbreviations 4
- Aim and main Objectives 5
- Summary of the public procurement legal framework
and its approximation with EU Directive 7
- Frequently asked questions in public procurement
procedures 11
- Study Cases 27

Designed by: A. Toska

Pressing by:



Swiss Cooperation Office Albania

ABBREVIATIONS

PPL	Public Procurement Law
PPA	Public Procurement Agency
PAV	Procurement Advocate
NRC	National Registration Center
CA	Contracting Authority
EO	Economic Operator
TSD	Tender Standard Documentation
DCM	Decision of the Council of Ministers
PNB	Public Notice Bulletin
TS	Tender Solicitation
PO	Procurement Order
TCS	Technical Specification
ToR	Terms of Reference
EPS	Electronic Procurement System
EU	European Union
EC	European Commission
SAA	Stabilization and Association Agreement

AIM AND OBJECTIVES

This booklet is an effort of presenting readers with a comprehensive summary of the public procurement processes in Albania and an effective implementing capacity building. The booklet gains a certain value considering that neither any manuals nor commentaries on public procurement legal issues, has been published up to now in Albania. It has been thought as a modest publication aiming to encompass and provide an answer to the most frequent asked questions and most frequent issues rising in a public procurement procedure. The booklet is meant to be a useful tool not only to public procurement officers but also to other readers.

After reading this publication the reader shall:

- Be familiarized with the Albanian public procurement environment;
- Be familiarized with the Albanian public procurement legal framework;
- Have a comprehensive understanding of and use appropriately all types of public procurement procedures (as provided by law);
- Understand and easily comply with the requirements laid down in the Tender Standard Documents;
- Be able to promptly resolve a series of issues rising in a public procurement procedure.



PART I

SUMMARY OF THE ALBANIAN PUBLIC PROCUREMENT LEGAL FRAMEWORK. APPROXIMATION WITH EU DIRECTIVE

1.1. Introduction

Public Procurement is defined as a selection process carried out by a Contracting Authority, through a public competition procedure, of the Economic Operators with which shall be granted a public contract to provide certain goods or services or carry out a work (construction), in exchange of a payment from public funds. As it is directly related to public funds, such competitive procedure should be implemented accordingly with specific rules provided for in the public procurement legislation.

Main objective of public procurement process is to ensure cost effectiveness and value for money. Public procurement is an economic activity, which aims to use/expend taxpayers money in the most possible effective way, while the value for money in a public procurement context is the best quality for a reasonable price at the right moment. Meanwhile, quality of the public procurement system is directly related to the entire procurement cycle, which should be implemented within time boundaries, in the just manner and in compliance to the public procurement legislation. Implementation of a public procurement procedure requires the existence at the same time of all elements and parties of the procurement process

1.2. Historical background of the public procurement in Albania

Before 1990, due to the communist system in force in Albania, “public procurement” was an unknown definition. Giving the

fact that in such system there was not allowed private entrepreneurship, there was no reason of applying “public procurement”, which basically is an agreement between a public and a private entity

In 1990, although the system in power remained still the same, among many other political changes there was a reintroduction of the “private entity” definition, bringing about the initial steps toward a consolidated public procurement system in Albania. From 1990 to 1995 there have been passed several secondary legislation acts setting out the rules for the functioning of a public procurement system

1.3. First Law on Public Procurement in Albania

Although public procurement definition became a reality in the Albanian economic environment, Albania did not have a public procurement law until 1995, leaving a gap in the legal framework on the matter. The economic development of the country and the growing of trade made indispensable the existence of a law on public procurement and other secondary legislation. Since its approval in 1995 up to 2006 the PPL was subjected to many amendments, dictated by both the development of the economical environment and the practical applicability of the law.

1.4. Approximation of public procurement legislation with EU Directives

Accordingly with the engagement of the government in implementing the SAA with EU, in 2006 the Albanian Parliament passed a public procurement Law partially in line with the EU Directive on public procurement matters. Such a procurement law oriented toward the respective EU legislation shall bring about a radical change of the public procurement system in Albania.

Law no. 9643 “On public procurement” approved on November 20, 2006 (enforced since January 1, 2007) abrogated the previous PPL no. 7971/1995 and other secondary legislation. Further on, the Albanian Government passed on January 10, 2007 the DCM no.1 on “Public Procurement Rules”. On the legal ground provided



for in this new PPL, there have been drafted and approved the Standard Procurement Documents.

Approximation of public procurement legislation with *acquis* communnataire in this phase is only partial. Such situation required amendments to the PPL, aiming to further approximation of the domestic legislation with the respective EU directive. Changes have affected also the secondary legislation.

In this spirit, the Albanian Government took another step forward by approving rules for the electronic public procurement by DCM no. 659, on October 03, 2007. Such Decision provides for a bunch of technical and legal rules necessary to implement public procurement procedures by electronic means in Albania.

Table No. 1: Summary of the public procurement legal framework in force and references to the EU Directive

1. Law no. 9643 of November 20, 2006 "On public procurement";
2. Law no. 9800 of September 10, 2007 "On some changes to the Law no. 9643";
3. Law no. 9855 of December 26, 2007 "On some changes to the Law no. 9643";

Directive 2004/18/EC of the European Parliament and the Council of March 31, 2004 on the coordination of procedures for the public procurement of works, goods and services. Gazette Official L 134, 30/04/2004 P. 0114 – 0240;

Approximation status: Partial

1. DCM no. 1 of January 10, 2007 "On public procurement";
2. DCM no. 153 of March 22, 2007 "On some changes to DCM no. 1";
3. DCM no. 135 of February 3, 2008 "On some changes to DCM no. 1 as amended";
4. DCM no. 392 of April 8, 2008 "On some changes to DCM no. 1 as amended";
5. DCM no. 46 of January 21, 2009 "On some changes to DCM no. 1 as amended";
6. DCM no. 659 of October 3, 2007 "Rules on implementation of public procurement procedures by electronic means"
7. DCM no. 45 of January 21, 2009 "On implementation of public procurement procedures by electronic means"

Directive 2004/18/EC of the European Parliament and the Council of March 31, 2004 on the coordination of procedures for the public procurement of works, goods and services. Gazette Official L 134, 30/04/2004 P. 0114 – 0240;

Approximation status: Partial**PART II****FREQUENTLY ASKED QUESTIONS ON
PROCUREMENT PROCEDURES****Question 1****Which are the parties of a procurement procedure?**

Proper implementation of a procurement procedure requires two parties:

- 1 The Contracting Authority, which owns the public funds for the purpose of public procurement and which has the right to enter in a public contract;
- 2 Economic Operators, which offers to undertake one or more works, supply of goods or services.

Question 2**What is considered public fund**

Providing that public entities in Albania may also benefit funds by other means than state budget, the PPL provides for a clear definition of which funds should be expended through a procurement procedure:

- 1 Any monetary values of the state budget, destined for use in public procurement;
- 2 Any monetary values of the local budget, destined for use in public procurement;
- 3 Aid funds or loans provided by international donors accordingly to the provisions of an international convention, which require/accept application of only the public pro-

curement procedure provided for by the Albanian legislation;

- 4 Other income from the state, local enterprises, commercial companies and other entities, whenever the state owns the majority of shares or of the capital.

Question 3

Should all public funds of an entity be expended through procurement procedures?

Not all funds of an entity (which to the effect of the PPL are referred to as the Contracting Authority) are to be expended through procurement procedures. Such funds include the fund for salaries, funds for rent or purchase of buildings, funds for advertising, etc. Any CA should carefully identify the need for works, goods or services and carefully check if all elements required by law to initiate and implement a public procurement procedure are present and effective. In order for a CA to arrive into the conclusion that a certain public fund falls under PPL, it should in any case refer to the PPL, namely article 3, paragraph 4 "Definition of public funds" and article 4. These provisions are the main reference points, but reference should be made also to other specific laws.

Question 4

Is it necessary a procurement procedure in the cases when the work, good or service is offered by a state institution?

No, procurement procedures provided for in the actual PPL, are not applicable on public service agreements signed by two Contracting Authorities, or by a CA in one side and a union of CAs on the other, based on an exclusive right granted by the enforced legislation. If a CA needs a work, good or service which is offered by another CA, an agreement between the two is considered exhaustive.

Question 5

What is the meaning of responsibility of a Contracting Authority in using public funds?

Responsibility of CA in using public funds becomes effective in the **planning** phase. The CA should carefully assess the needs referring to the quantity of works, goods or services required, so that those can fulfill its needs for the longest possible extent of time and in the mean time to show vision in planning. A key element is also the calculation of the contract price. The price of the contract should be calculated in reference to the paragraph 2 of Chapter II of DCM no. 1/ 2007, "On public procurement rules", bearing also in mind the main objective of an effective economic use of public funds. The CA should in any case avoid a fictive increase of the contract price, aiming to the most possible realistic one, as it should be as well careful not to calculate a lower price, which would result into a failure of the procurement procedures. Past the CA should select the procurement procedure by making reference to the monetary limits provided by DCM and define legal and technical requirements accordingly with the law provisions, favoring competitiveness and transparency.

Question 6

How to calculate the price of a public contract at the moment of publication of a procurement procedure?

Calculation of a public contract price is basically made upon the overall payable sum excluding VAT, at the moment of publication of the contract notice. For the purpose of selecting the proper procedure, the CA should beforehand deduct the value of VAT from the overall apposite fund and consequently categorize the procurement procedure respectively in a Small Value Procurement, a procedure under the low threshold, a procedure beyond the lower threshold, or a procedure beyond the upper threshold. The calculated price excluding VAT should also be evidenced in the forecast and implementation registries, while VAT should be calculated as a differentiated item.

Provided that the opened procedure is the preferred procurement procedure, it may be used by the CA in any case, disregarding the price of the contract.

Question 7

Does the value of the Offer Insurance fixed at the level of 2% of the contract price include VAT?

Any price referred to in the period between the publication of the Contract Notification and the moment of publication of the Winner Notification, either defined by the CA or presented by the EOs, are to be considered as VAT excluded.

Question 8

May a CA purchase more than once in the same year the same work, service or good?

The answer is yes!

Nevertheless the CA should be careful not to fragment the fund. The CA should plan at the beginning of the year its needs and realize normal procurement procedures. Purchase of the same work, service or good within the same year does not constitute a rule, but are exceptional cases that may occur only when the need of CA for such work, service or good could not be foreseen at the time of planning the procedures.

Question 9

What qualifications should have the members of the Procurement Unit? Is the membership of an economist within the Procurement Unit a must?

Referring to the procurement legislation provisions, members of the CA's Procurement Unit, should be at least 3 people having a University diploma, one of which should be lawyer. Actual legislation does not provide for any professional requirements for the other two members, but it states that the entire Procurement Unit should at least once a year attend trainings on public procurements issues.

So to legal purposes, it is essential that the other 2 members of the Procurement Unit have a good knowledge of the procurement legislation disregarding their profession/qualification.

Question 10

Is the Lawyer the main responsible person in a procurement unit?

No, the procurement legislation does not expressly define that the lawyer is the main responsible person for the Procurement Unit activity. Moreover the Procurement Unit is the only working group for which the legislation does not provide for a Chair person, but it is meant to act and be represented as a unique body and not by any of its members. The expressed legal requirement that one of the Procurement Unit should be a lawyer is to be attributed to the necessity of a professional presence that would ensure a better understanding and legal interpretation of public procurement rules.

Question 11

What should a contracting authority do in cases it does not have sufficient staff to establish the procurement unit?

In those cases when a CA does not have sufficient staff to establish a procurement unit, the Head of CA issues at the beginning of the year an order nominating staff members of other sectors to discharge such duties. When even this alternative is not applicable (due to staff shortage within the CA), than two or more CAs may establish a Common Procurement Unit

Question 12

What qualification should have the members of the OEC?

Public procurement legislation does not explicitly provide for the qualification of the Offers Evaluation Commission members. According to procurement rules OEC is composed by at least 3 members experts of the field (OEC may be composed of more than 3

members, but the number should always be even e.x. 5, 7, etc.). Members of the OEC vary in each procurement procedure depending on the object, thus their expertise is required only for and related only to said procurement procedure.

Question 13

What should be the qualifications of the members of the Small Value Procurement Commission (SVPC)?

There is no legal provision defining the qualifications required for the SVPC members. Procurements rules oblige the Head of a CA to establish a special commission composed of three members, one of which appointed as Chair person, or authorize the procurement unit to implement such procedures. Members of the SVPC are not required to have any special qualification in spite they should have a good knowledge of the procurement legislation. This characteristic is the same as in the case of the Procurement Unit, but unlike the Procurement Unit SVPC does have a chair person and one of its members is not necessarily a lawyer.

Question 14

Which is the role of the CA Head in a procurement procedure?

Head of a CA, or the person authorized by him (usually the deputy) does not play any role in the content of a procurement procedure, i.e. does not have any competencies or decision-making attributes in approving tender documents, evaluating offers or selecting the winner. Competences of CA Head as provided by law are:

- Establish the Procurement Unit, the SVPC, the Offers Evaluation Commission, and the Complaining Commission if applicable;
- Issue the procurement order;
- Send for publishing the contract notice and the tender documents for the procurement procedures in paper form;

- Communicate in written to the procurement unit all complains or requests of economic operators in relation to the tender documents;
- Approve a summary report on the procurement procedure.

Question 15

How should the procurement unit act, when during the procedures of opening and evaluation of offers, it ascertains that some procedure or deadline has not been complied with by the OEC?

Accordingly with the procurement rules, members of the procurement unit are present in the opening and evaluation procedures of the offers presented by the economic operators, without having the right to vote or in any way affect the evaluation process. They may present their opinion only when asked for and in the meantime they assist by keeping the verbal, administering the documentation, etc. By rule procurement unit intervenes only when requested by OEC, but in cases of breach of any procedure or deadline the procurement unit should notify members of OEC on the fact. Attention! The procurement unit gives opinion only on procedure and legal deadlines to be met during opening and evaluation of offers, and in no way advice on evaluation of such offers.

Question 16

How should members of OEC act if they do not agree with one or more technical specifications?

OEC members are experts on the procurement object and they can provide professional opinions on the procurement technical specifications. If they do not agree with the technical specifications, providing written argumentation, they may initiate the modification of tender documents, legal deadlines permitting, or may decide the annulment of the procurement procedure.

Question 17

Who should sign declarations of conflict of interest during a procurement procedure and when should such declarations be signed?

Nomination of a procurement officer should be performed after assessing legal requirements on prevention of conflict of interests. Each person participating in a procurement process signs a statement in which declares that he or she is not in conditions of conflict of interest as follows:

- Members of the procurement unit signs a statement on conflict of interest at the beginning of each procurement procedure;
- SVPC members sign a statement on conflict of interest at the moment of nomination, by making reference to the small value procurement procedures provided for in the forecast registry of that year;
- OEC members sign a statement on conflict of interest at the moment of nomination and one statement at the moment offers are opened, for the purpose of declaring if there is or not an actual conflict of interest with economic operators that have submitted their offers;
- Members of the Complaining Commission sign a statement on conflict of interest at the moment of their nomination in duty.

Statement on conflict of interest is signed also by economic operators present, prior to the opening of their offers.

Question 18

Union of two or more economic operators should be conceived in front of a notary public or a simple written agreement among operators should be deemed sufficient?

Union of two or more economic operators should be performed in front of a notary public, otherwise it shall be deemed invalid.

Cooperation agreement should define the group representative, participation share of works/services/supply as well as the concrete elements to be performed by each member of the union. Each of the members of the union should specify in the agreement the share he shall implement. This is a key element as each member of the union shall at the same proportions have the obligation to meet the economic, financial, professional and technical requirements. The union agreement is part of the procurement application file submitted to the CA.

Question 19

What are the rights of the EO Union representative?

Representative of an EO Union acts in name and on behalf of the union and enjoys the following rights:

- To submit the procurement application file (qualifications and economic offer) to the CA within legal deadlines;
- To sign the economic offer of the Union; and
- To receive the Offer Insurance deposit, on behalf of the Union.

Question 20

Does an EO Union require to be registered with the National registration Center (NRC)?

No, a Union of Economic Operators is a temporary union, established for the purpose of participating in only one procurement procedure. A Union of EOs does not fall in the circle of those entities which are required by law to be registered with NRC, but its validity stems from a written agreement between its members in front of a Notary Public.

Question 21

Is a CA obliged to allow in any case subcontracting, or it has the right to decide case by case on allowing it or not?

Rules of Public Procurement provide for the right of a CA to allow subcontracting for the implementation of a part of the public contract. In this context it is obvious that the CA does not necessarily allow in any case subcontracting, but rather decide on a case by case manner. In any case the CA has the obligation to clearly state in the tender documents whether subcontracting is allowed or not. A main argument for allowing subcontracting is to encourage participation of small and medium economic operators. However, subcontracting should not exceed 40% of the price of the contract and it may be limited in particular works, goods or services.

Question 22

Is an EO who declares that 40% of the contract shall be given in subcontracting, required to meet at 100% the CA conditions or 60% would be sufficient?

Subcontracting is an economic relationship between the EO and the CA in one side and between the EO and the Subcontractor on the other. This relationship is different from the one established between two or more EOs grouped in a Union and the CA. In case of subcontracting the CA acknowledges the main contracting party as the only responsible for the implementation of the contract, although he has declared that part of the contract shall be given in subcontracting. For this reason the main contracting party is required to meet at 100% the CA conditions. Further on it should be mentioned that even if the CA has selected as winner a EO who has declared that part of the contract shall be given to a subcontractor, the CA may not approve the subcontractor.



Question 23

Is an EO eligible to participate and be qualified in a procurement procedure if it is involved in an appeal process at the tax authorities? What is the fiscal payment status of such EO?

An EO involved in an appeal process at the tax authorities may freely present its offer in a public procurement procedure, but it cannot be qualified as it does not comply with the legal obligation set forth in article 45, paragraph 2dh. Such EO shall be deemed as not having paid fiscal dues until a final decision of the relevant authorities.

Question 24

Should the CA accept or reject the offer of an EO which is going through an exclusion procedure?

EO is considered as a possible winner of a public contract, up to the moment it is excluded from the right to participate in procurement procedures for a certain period of time (from 1 to 3 years). This means that until a final decision of exclusion has been given, the offer should be considered by the CA as valid.

Question 25

Does the Procurement Advocate accept a valid complaint if it has not been filed with the required form?

Yes, the Procurement Advocate may accept a complaint when it has not been filed with the required form, or even if it has been filed after the legal deadlines. The Procurement Advocate has a monitoring and recommending role.

Question 26

Which are the cases when the procedure of negotiation without publication should be used?

Procurement legislation provides for a clear definition of the procedure of negotiating without publication. It is quite evident that

this procedure is less transparent and as such it is not a preferred procedure, but may only be used in certain cases. Rules for this procedure are quite strict and leave no ground for interpretation.

Article 33 of the law lists the cases when the procedure of negotiation without publication may be used. The most frequent are:

- Cases when despite the opened or limited procedure there weren't presented any valid offers. It should be mentioned that the initial terms of the contract should not undergo substantial alteration;
- Cases of additional goods, services or works;

And particularly in:

- Cases when for reasons of extreme need, caused by events that could not be foreseen by the contracting authority, the deadline provided for in article 43 related to the contract notice in opened, limited procedures or procedure of negotiation with publication cannot be met. Conditions that justify the extreme need should not be a result of the CA's activity or inactivity Procurement rules defines the conditions for using such procedure;

The other cases provided by law are more specific and strictly defined, while the cases mentioned above have often been misused.

The CA should be careful to evidence the fact that all the following required elements provided by law are simultaneously present, otherwise the case does not fall under this article:

- Extreme need;
- Unforeseen event (an event that could not be foreseen by the CA, such as earthquakes, floods, epidemics, or other similar events);
- The CA cannot meet the deadlines of the other procedures provided by law. The CA should explain why?
- The situation should not be a result of the CA's activity or inactivity.

After having justified and documented as above, the CA shall purchase through such procedure works, services or goods in such an amount that would be necessary to resolve the extreme situation and in no way to enter a long term contract.

Question 27

What are the deadlines in a procedure of negotiation without prior publication?

There are no deadlines in a procedure of negotiation without prior publication. Giving the fact that the law limits the use of such procedure mainly in emergency situations (among other cases provided by law), it is obvious that it should be realized in the shortest possible time, in order to resolve the emergent situation.

Question 28

In the "request for proposal" procedure the contract notice is required to be published in the Bulletin of Public Notice and be sent to 5 EOs as well. If in a procurement procedure participate only EOs that got the notice from the Bulletin and none of those invited, are these EOs eligible?

Yes, regardless the notification manners, those EOs which submit the proper documentation, the day of opening the tender, are considered eligible. Accordingly with the public procurement legislation a procurement procedure may continue even if remains only two valid EOs. These economic operators may be either of those invited by the CA, or others that may have been notified by the Bulletin.

Question 29

What is the definition of "small deviations"?

The law does not provide for any exhaustive list of small deviations. The only definition is provided for in article 53, paragraph 4: "The contracting authority considers an offer as valid even if it may contain small deviations, which do not materially alter or do

not deviate from the characteristics, conditions and other requirements, set forth in the tender documents, or mistakes, which may be corrected without affecting its content”

Thus the contracting authority should during the evaluation judge whether a fault is related to the content of the offer or it does not affect at all the submitted offer.

Let us present two short examples:

- If a EO submits a document issued by the tax authorities, which presents as well information on the status of social and health insurance payments also, but in the mean time has not submitted, as required by the CA (in the tender documents), a document issued by the social insurance authorities, it may be said that we are in a small deviation situation. The EO has not submitted a document as required, but the necessary information may be retrieved by the submitted documented issued by the tax authority and finally this is what the CA is interested in i.e. an economic operator without unpaid social insurance.
- The EO has not submitted a document issued by the tax authorities certifying it has no unpaid dues and the CA considering this a small deviation asks the EO to submit it. In this case we obviously do not have a small deviation situation. This document has not been submitted thus the CA cannot have the required information if the EO has paid all fiscal dues. The CA acting this way is turning an invalid offer into a valid one, which is totally against the law.

Question 30

Public procurement is a form or a procedure?

Procedures of public procurement are made in two forms: in the documentary form (in paper) or in electronic form. Electronic procurement is not a new procurement form, but only a form of procurement, and in the mean time applicable rules and procedures does not change from those of the documentary form of procurement.

Question 31

Which part of the procurement procedure is implemented electronically?

Electronic implementation of a procurement procedure means that all documents including contract notice and tender documents are published electronically by the CA; all offers by economic operators are submitted electronically; and all evaluations are made electronically by the members of OEC. Nevertheless if in the course of the procedure economic operators wish to file any complaints they should file them in written. Complaint reviewing and resolution is also made in written form. At process ending the CA updates the electronic system with the winners notice and the notice of the signed contract.

Question 32

How can a Contracting Authority access the electronic procurement system?

Electronic Procurement System is accessed through the PPA homepage in the web (www.app.gov.al). In order to implement an electronic procurement procedure the CA should provide each member of the Procurement Unit and the Offers Evaluation Commission with user accounts. A user account is composed by a username and a password, which are unique for each of the above mentioned individuals and are issued by PPA.

Question 33

If a CA is implementing an electronic procurement procedure is it necessary to send in written to the PPA the contract notice and the tender documents?

No. If a procurement procedure is being implemented electronically, written communication with PPA it is no longer necessary. Written communication shall be maintained only in those cases when the CA postpones the offers opening date (if modifications have been operated) and also when EOs file any complaints.

Question 34

Is there any possibility for unauthorized persons to change the contract notice or the standard tender documents after the CA has uploaded them in the system?

No, in order to access the system and create a procurement electronic file, any person should be provided with a username and a password in the quality of members of the Procurement Unit. No one else can access the system in the area reserved to the Procurement Unit members. The same is worth for the OEC members reserved area.

Question 35

When can OEC members access the electronic offers of the economic operators?

OEC members may access names and offers of the economic operators only after the designated date and time for the opening of the offers. Even if an economic operator submits his offer through the system in the very first day of a procurement procedure publication (respectively in the Procurement Bulletin and the PPA homepage), his name and offer cannot be seen until the designated day and hour for the opening of the offers. In addition the offers may be seen only by the OEC members, and only after all of them have accessed the system. Even if one of them has not accessed the system, none can see names.

Question 36

Does the electronic procurement system allow an operation tracking?

Yes, one of the characteristics of the electronic procurement system is that it allows tracking of all actions performed. Any action creates a record which contains data on the account from which the action has been generated (from one of the members of the Procurement Unit or the OEC) and what concrete action has each of them operated in the tender file.

PART III

CASE STUDIES

Case Study I

Having a reserve of medicaments sufficient for a couple of months, the Hospital of A City did not start any procurement procedure for medicament purchase. On July, having exhausted the reserve, the hospital remains without medicaments and starts the procurement procedure for purchase of medicaments twice in a row, which finally is annulled for legal reasons. Facing this situation and having no medicaments the CA is forced to use the procedure of negotiation without publication aimed in resolving the emergency situation. Can be the actions of the CA considered as correct?

The answer is no! The CA was not in the conditions to select this procurement procedure, as one of the conditions required by law, i.e. the emergency should not be caused by the actions or inactivity of the CA. In this case the emergency has been a direct result of the CA inactivity. The CA was fully aware of the reserves of medicaments it possessed, thus it should have exactly calculated the moment to start the procurement procedure.

Case study 2

Having a reserve of medicaments sufficient for a couple of months, the Hospital of A city did not start any procurement procedure for medicament purchase. On May, there is a blast of epidemic and the hospital exhausts all medicaments. The CA having remained without medicaments is forced to use the procedure of negotiation without publication aimed in resolving the emergency situation. Can be the actions of the CA considered as correct?

The answer is yes! The CA chose the right procurement procedure as it is within the conditions set forth in the procurement legislation for the use of this procedure.

Case Study 3

The Commune A lacks drinking water. After the necessary funds have been allocated, the commune starts the procurement procedure, which in a certain phase, has been annulled by the Public Procurement Agency. In these conditions, to resolve the situation created in some of the villages of this commune, it selected the negotiated procedure without prior publication. Is the selection of this procedure correct?

The answer is no! This situation has not been created suddenly, but has been present over a long period. The Contracting Authority is not within the conditions required by law in reference to the duration of this investment, thus it has no more the meaning of emergency. The procedure has been annulled also because the CA was in default by applying requirements not in compliance with the law.



Case study 4

The Institution A after having finished the total reconstruction of its offices, finds itself without computers and other equipment, which impede a normal continuation of work. To avoid this situation, the CA purchased the necessary equipment through a procedure of negotiation without publication. Has the CA acted correctly?

The answer is no! The CA was aware of its needs in relation not only to the reconstruction of the new offices but also regarding their equipment. To this end the CA should have undertaken the necessary steps to implement a normal procurement procedure.

Case study 5

The Authority A needs to buy a transport vehicle. The CA starts twice the procurement procedure, but in both cases they fail due to lack of competitiveness. The CA verifies some mistakes related to technical specifications and thus makes changes to them, and giving the fact that the procedure failed twice, the CA selects the procedure of negotiation without prior publication to purchase the vehicle. Has the CA acted correctly?

In this case the CA is in breach of the law provisions. The CA has altered the technical specifications. Such specifications may have been the cause of failure of the procurement procedures. So the CA itself may have caused this situation. Further on the CA cannot justify any emergency situation, as long as there is no evidence of harm of a general interest of a wide community.

Case study 6

After the qualification phase and final listing in a procurement procedure it is verified that there are two economic operators A and B still in competition. Economic Operator A, listed first, does not agree to sign the contract. What are the next steps to be followed by the CA?

If this scenario is verified, the CA should confiscate the Offer Insurance deposited by the first listed economic operator. Further on the CA verifies the monetary difference between the offers submitted by the first listed EO and the second listed one. If such difference is not smaller than the sum of the confiscated insurance deposit than the CA should continue and sign the contract with the second listed economic operator.

Case study 7

After the qualification phase and final listing in a procurement procedure it is verified that there are two economic operators A and B still in competition. Economic Operator A, listed first, is expelled by decision of the Public Procurement Agency (PPA). What are the next steps to be followed by the CA?

The CA can neither enter a contract with the first listed economic operator because it has been expelled, nor continue and sign a contract with the second listed economic operator, regardless of the difference between the two offers. In this scenario the second listed economic operator remains the only participant thus the procedure should be annulled for lack of competitiveness.

Case study 8

The Authority A has published a procurement procedure for the implementation of the reconstruction of a road. After the publication the CA notices that the limit fund published is not correct. The CA recalculates the fund and sends a request to PPA to publish the modification. Has the CA acted correctly?

No. The limit fund is defined in the Procurement Order, which is issued prior to the publication of the procedure. Thus the CA should issue a new procurement order and publish again the procurement procedure.

Case study 9

After fail of a procurement procedure, the contracting authority publishes it again, using the same Procurement Order. Is this action correct?

No! The procedure ends with the Decision of Annulment. After that the CA starts a new procedure with a new procurement order.

Case study 10

The Authority A has published a procurement procedure for the construction of an aqueduct. In the meantime an economic operator B, within the deadlines, files a complaint regarding the qualification requirements. The authority does not examine the complaint and in the defined date opens the offers. The economic operator B exercises his right to complain to the PPA, which on its side orders the authority to suspend the procedure until the complaint was reviewed. The CA informs PPA that operator B and some other operators were explained orally that their pretensions were right, but that was not to make ground for disqualification of the economic operators participating in this procedure and as such the B operator should have participated in the procedure. The procedure was regular and as such it should proceed. Is the argument of the CA right?

No! The CA is required by law to communicate in written with each economic operator, complying with the principle of transparency. There could have been other economic operators which after having checked the tender documents did not participate because otherwise they would have been disqualified. This case is a breach of the PPL and as such it is cause for annulment of the procurement procedure.

Case study 11

Economic Operator B submitted its offer in the procurement procedure implemented by a CA. The CA does not examine the offer submitted by B operator, bringing as argument the fact that the economic operator is in breach of the terms of a previous contract by not delivering the goods. Has the CA acted correctly?

No! All economic operators are entitled to participate in a procurement procedure. The Authority may disqualify them only for legal reasons (non compliance with the requirements set forth in the tender documents). If a CA pretends that the economic operator is in

a contractual breach, based on article 13, paragraph 3/ç of the PPL, the CA should have proposed to the PPA to expel of the EO. Only after the EO is expelled the CA is entitled to not consider the offer submitted.

Case study 12

On October 10 the CA opened the offers submitted by the economic operators. After reading the offers, all economic operators participating in the procurement procedure signed a statement declaring that they agreed with the implementation of the procurement procedure and that they would not file any complaint. Within the legal deadlines one of the participants files a complaint related to the implementation of the procurement procedure. The CA does not examine the complaint reasoning that the operator had signed a statement declaring that will not file any complaints. Does this action of the CA find any legal support?

No! The right of complain is guaranteed by law and any different agreement is not valid. The EO has the right to file a complaint at any time it pretends that the decisions of the CA are in breach of the procurement legislation.

Case study 13

Finalizing the Offers evaluation process, the Offer Evaluation Commission decides on the final classification of the economic operators participating in a procurement procedure. All participating EOs were personally presented to retrieve the decision for the classification declaring as well that they had no complaints regarding the classification. In this situation the CA sends the winner notice for publication without waiting for the 5-day-deadline provided by law for the submission of possible complaints by the EO. Has the CA acted correctly?

Written statements of the EO participating in a procurement procedure, waiving the right of complain against the classification

decision, bears no legal value. The CA in any case should respect the deadline provided by law for the submission of possible complaints by economic operators.

Case study 14

In a procurement procedure implemented by the Authority A participate 7 economic operators. Three of them are disqualified for faults in the tender documents. At the end of the procedure the CA recalculates the abnormally low value by making reference to the seven submitted offers. Is this recalculation correct?

No! Recalculation of the abnormally low value is based only on the qualified offers.

Case study 15

At the end of a procurement procedure, the Authority A disqualifies Operator B, because his offer was abnormally low. The B Operator files a complaint to the CA. The CA explains to the Operator B that the offer submitted by him after recalculation resulted abnormally low and it has a considerable difference with the limit fund. Due to these facts, the CA does not believe that the economic operator could successfully fulfill the contract. Is disqualification correct?

Disqualification in this case is not legally justified. The CA may draw such conclusion only if it manages to argument on the cost analyze. To this end the CA should communicate in written with the EO, asking to argument based on facts, the price offered for the realization of the service, work or good or the purchase of goods as requested by the CA.

Study case 16

Operator B results winner of a procurement procedure for the purchase of medical equipment. The CA and the operator sign the contract agreeing to change some of the technical specification of the equipment. Is this action correct?

No! Tender documents are integral part of the contract and as such cannot be changed.

Study case 17

Operator B participates in the procurement procedure implemented by the contracting authority A. To certify his experience the EO submits a 3-year-term contract which is in the second year of its implementation. Can the EO be qualified in this case?

The contract is not finalized and as such by submitting this contract the EO does not comply with the conditions set forth in the tender documents related to the similar experience of the EO.

Study case 18

Technical director of the Company A is at the same time employed as teacher in a high school. Is this in breach of the public procurement rules?

The technical director of a private company may not be employed at the same time in another entity either public or private.