EVALUATING THE NATIONAL AGENCY FOR SOLVING COMPLAINTS (ANSC) ACTIVITY

AND PROPOSING RECOMMENDATIONS IN THE PUBLIC PROCUREMENT PROCESS ON BEHALF OF THE ACTORS INVOLVED

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CHISINAU, 2018

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The Institute for Development and Social Initiatives (IDIS) “Viitorul”

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SUMMARY

Reforming the public procurement system is necessary in order to adjust the national system to international standards and connect it to *acquis communautaire*, pursuant to the commitments assumed by the Republic of Moldova concurrently with ratification of the Association Agreement with the European Union. An efficient public procurement process requires not only an appropriate legislative framework, but also a functional and efficient system of judicial redress in the interests of all parties that could provide proper remedies and solutions in the event of legislative deviations and violations. In the result of amendments to the national legal framework on public procurement, a new claim settlement system has been established, and the National Agency for Settlement of Claims has been instituted as a special public administration body mandated to settle claims related to public procurement procedures.

The process of institution of the new body to settle claims lasted for some time, and the National Agency for Settlement of Claimsstarted its activity on September 2017, simultaneously with receipt of the first claims / contestations, submitted for settlement by the economic operators, and concomitantly with issue of decisions in the result of claims/contestations' examination.

Regardless the fact that the National Agency for Settlement of Claims has a relatively short period of operation, we consider it important and appropriate to perform monitoring of its decisions. Monitoring of the adopted decisions represents an important step towards detection of hidden interests tied up with public procurement, towards detection of corruption and schemes that mimic the competition process as well as towards compliance with the legislation, adoption of correct decisions and streamlining of practices while adopting solutions referring to claims / contestations.

The process of monitoring will help to observe certain tendencies, problems and shortcomings, to see the overall picture in relation to adopted decisions, to reveal the contestation-prone areas, to establish the most frequent breaches of law and regulations, committed in connection with public procurement procedures. The monitoring outcomes will help us draw up certain conclusions and formulate recommendations that are necessary for improvement of the process of examination of claims and for raising the quality of the National Agency for Settlement of Claims's decisions.

I. TRANSPARENCY OF SESSIONS AND DECISIONS OF THE NATIONAL AGENCY FOR SETTLEMENT OF CLAIMS (NASC)

In conformity with art.79, para. (6^1) of the Law on public procurement No.131/2015, the National Agency for Settlement of Claimswill organize open sessions to examine claims and will ensure that the information regarding the date and place of the unfolded sessions will be published 3 working days prior to the date on which the sessions will take place.

The web page of the National Agency for Settlement of Claims (hereinafter referred to as Agency) www.ansc.md contains the rubric "Communication" and the sub-rubric "Agenda of sessions" where information on date and place on unfolding of sessions, on parties involved in the procedures related to settlement of claims and on the number of Agency's jury members/counsellors that are supposed to examine the contestation/claim is placed. Although the date when these announcements are placed on the web page is not indicated, in the result of monitoring it was found out that the said announcements comply with the term stated by the law, being published 3 days prior to the date on which the sessions take place.

One should note that all the announcements are placed in a chronological order where the last sessions are found in the upper part of the web page, fact that facilitates the information search process. With reference to the above subject, we have to mention the non-functionality of the search engine that does not properly track the sessions and contains such search criteria as "Show all", "Past", "Upcoming", found on the web page only in English.

The IDIS "Viitorul" representatives have randomly chosen a session announced on the web page of the Agency in order to attend it. Thus, without any preliminary notice, on January 12, 2018, the IDIS "Viitorul" representatives were granted access to the Agency's Session Room where they attended the session scheduled for 11:00. In the present case, we have to state that the Agency complied with the legal rules, displayed openness relating to large public, and ensured free access of all the interested persons to the Agency's sessions.

The web page of the Agency contains the rubric "Claims/Contestations" which includes several sub-rubrics. And, namely, under the sub-rubric "Claims/contestations' submission" we find information on the right to appeal/claim, we see the Form for submission of claims that could be downloaded in "Word" format as well as the legal norms from the Law on public procurement No.131/2015 referring to the contestation period. Besides, we may see the sub-rubric "Pending claims/contestations", where the number and time of entry of claim/contestation is indicated along with the exit number, the name of the claimant and the contracting authority, the subject of the claim/contestation, the number and the type of the procedure, the subject matter of the procurement, the status of the claim/contestation and the jury members/counsellors in charge for examination of the claim/contestation. Here we note the search engine results under the keywords "No. of procedure", "Contestant", "Contracting authority". Another sub-rubric is meant for decisions adopted by the Agency, the search engine generating results under the keywords "Contestant", "Contracting authority", "No. of procedure", "Procurement subject matter", "Status of decision", "Contents of decision", "Elements of claim / contestation", "Claim / contestation subject matter".

Within the framework of the round table "Assessment of the perception of activity of the National Agency for Settlement of Claims(NASC) and advancement of suggestions from actors involved in the public procurement process", organized by IDIS "Viitorul" on January 23, 2018, the participants noted the need to improve the sub-rubric "Pending claims/contestations" on the Agency's web site.

As concerns the decisions of the Agency, they are published on the web site and any interested person could access them and analyse their contents. In the process of monitoring of the Agency's decisions published on the web site before January 23, 2018, we have identified and analysed 152 decisions.

At present, the Agency's web page represents a modern and efficient medium for open-source information that could be disseminated, and offers to the large public the possibility to access information pertaining to the sessions and decisions of the National Agency for Settlement of Claims/Contestations. During the event organized by the IDIS "Viitorul" on January 23, 2018, the representatives of the Agency provided information about the process of updating and improving of the www.ansc.md web page, and we hope that this fact will raise the level of transparency relating to the Agency's activity even more.

II. ANALYSIS OF NASC DECISIONS

1. Claims of economic operators

Based upon provisions from art.76, para.(1) of the Law on public procurement No.131/2015, any person who has or had an interest to obtain a public procurement contract and who considers that during the public procurement procedure an act of a contracting authority has affected his or her right, recognized by the law, in the result of which s/he suffered or might suffer damage, the injured person has the right to appeal/challenge a decision in compliance with the law. Pursuant to art.77, para.(1), the economic operator, whose right was violated, could bring the matter before the Agency for Settlement of Claimsin order to revoke the decision and/or to claim recognition of the alleged right through filing a claim/contestation.

In the result of analysis of the aforementioned 152 decisions of the Agency, we have to note that 172 economic operators used their right to appeal/claim. The majority of the economic operators that lodged claims are from Chisinau municipality (147 claims/contestations). The other 25 economic operators that filed claims have their legal address in 12 administrative-territorial units of Moldova and the Autonomous Territorial Unit of Gagauzia (ATU/UTA Gagauzia). Out of these, we could mention 5 economic operators from Straseni administrative-territorial unit, 4 from Causeni, and 3 from Singerei.

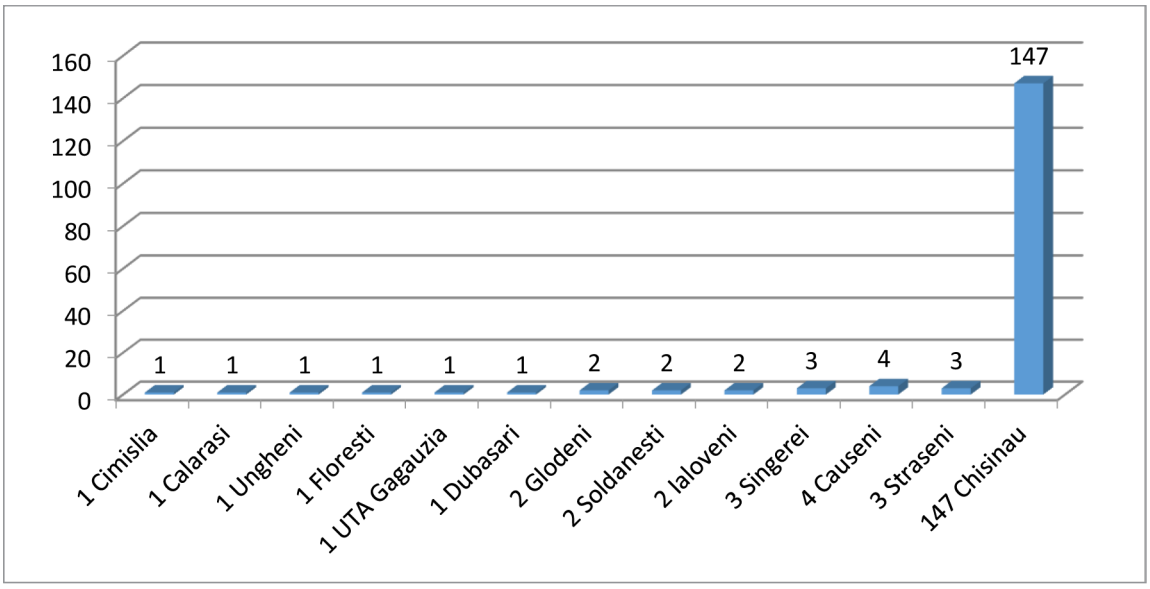


Diagram 1. Geographic distribution of economic operators

The large number of economic operators from the Chisinau municipality and a small number of those from other localities might be indicative of the economic viability of operators from the capital of Moldova, who participate in tendering procedures throughout the country, might be indicative of multiple tendering procedures that take place in Chisinau, and point at reduced capacities or lack of information referring to appeal/claim procedures that might be used by economic operators from the administrative-territorial units of the country.

A similar situation is observed with respect to contracting authorities, whose acts/decisions were appealed/challenged by the economic operators. Thus, out of the involved 152 contracting authorities, the majority were from Chisinau municipality (112), followed by the contracting authorities from Cahul district (5), Straseni (5), Cimislia (4).

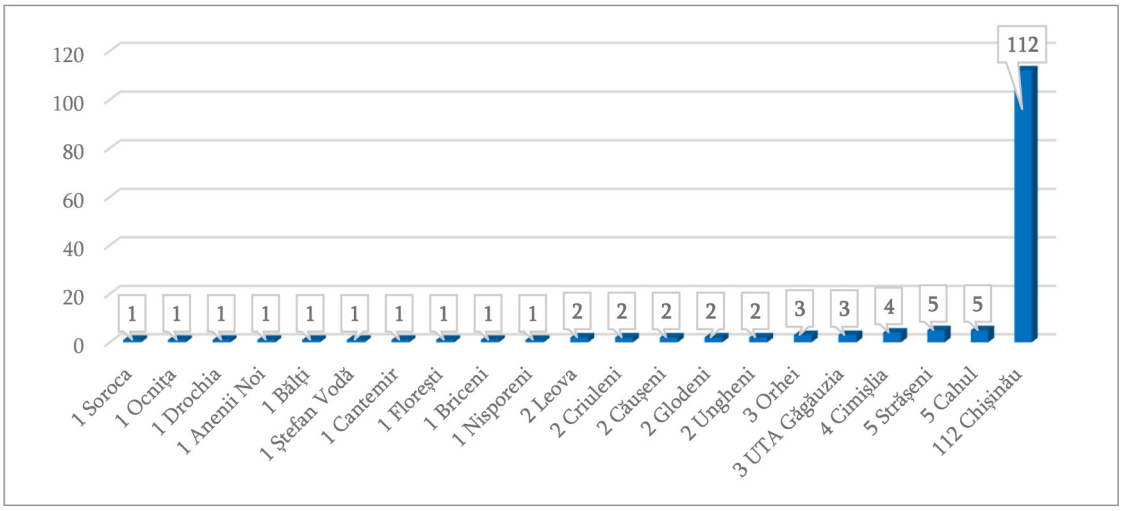


Diagram 2. Geographical distribution of contracting authorities

The majority of the contracting authorities are from the field of medicine (44), education, culture and sport (33), local administration (23), justice and home affairs (13).

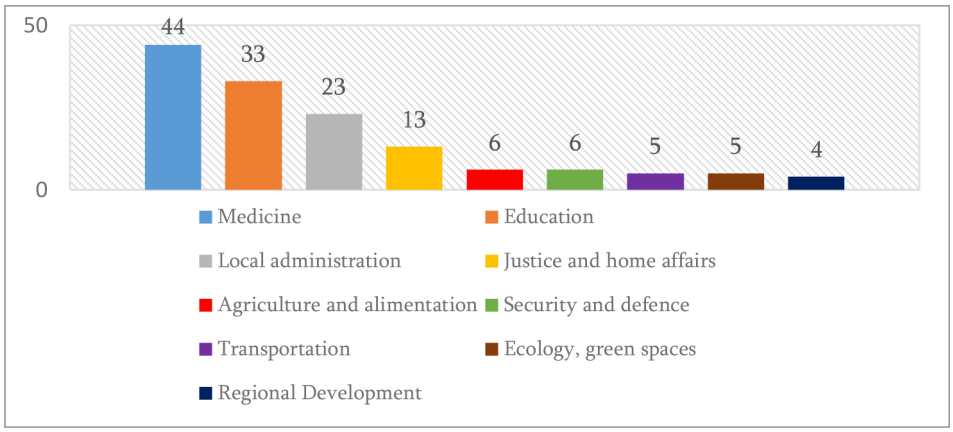


Diagram 3. Domains of activity of the contracting authorities

The performed analysis showed off that in a number of cases the same economic operator submitted 2 or more claims/contestations, moreover, there were situations when an economic operator filed 12 claims/contestations, other economic operators filed 9, 7, or 6 claims/contestations. This aspect was monitored for to elucidate the presence of malevolent economic operators who could use the right to appeal/claim without any justified reason, and for to detect certain arrangements between the economic operators and the Agency, resulting in issue of biased decisions.

Taking into account the fact that there could possibly exist some malevolent economic operators, one should analyse the possibility to compel the economic operators to pay a state fee while lodging claims/complaints. This is an idea discussed in the public space. Such a decision could be taken only after a meticulous analysis and only after consultations with all the interested parties. At the same time, the state fee could reduce the number of claims filed with ill-will, but it could represent an unjustified impediment with regard to settlement of cases for good-will economic operators who have limited financial resources.

Although in the European states various claim settlement systems have been created, and different forms of access to such systems have been established, we could make some comparisons as well as references to certain practices, which might constitute axis points/ guideposts for the local system.

In Bulgaria, the state fees for examination of claims are established based on the estimated value of procurement: 850 lev if the value of procurement is up to 1 million lev, 1700 lev if the value of procurement ranges from 1 million up to 5 million, and 4500 lev if it exceeds 5 million.

Table 1 Examples of state fees for examination of claims

	State fee
Bulgaria	850 – 4500 (in lev)
Macedonia	100 – 400 Euro (in denar)
Poland	3500 – 4700 Euro
Romania	0 lei
Lithuania	1000 LTL (300 Euro)
Denmark	10000 DKK (1300 Euro)

In Macedonia, the state fee is paid depending on the value of procurement: if it is less than 20.000 Euro, the state fee constitutes the equivalent of 100 Euros in denar, if the value of procurement is from 20.000 to 100.000 Euros, the state fee is of 200 Euros, if the value of procurement is between 100.000-200.000 Euros, the state fee is 300 Euros, and if the value of procurement exceeds 200.000 Euros, the state fee of 400 Euros is paid.

The state fee to lodge a claim/contestation at the Poland's National Appeal Chamber (a special authority for quasi-arbitrage from Warsaw dealing with settlement of claims regarding public procurement) ranges from 3.500 Euro to 4.700 Euro, depending on the value and subject matter of the procurement.

In Romania, no state fee is levied for filing a claim at the National Council for Settlement of Claims.

In some states, a fixed fee is applied. In Lithuania, the state fee to lodge a claim/contestation constitutes 1,000 LTL (cca 300 Euro) and it is not reimbursed as to whether the claim/contestation is accepted or not. In Denmark, a state fee of 10.000 DKK (cca 1,300 Euro) is applied, and it is reimbursed to the claimant regardless the fact the claim is accepted or not.

However, in many states there is no fee charged for the appeal/complaints procedure during the process of award of public procurement contracts/tender procedure.

As concerns examination of appeals/claims directly of via competent appeals courts, the European states foresee mandatory state fees.

Table 2. Economic operators that submitted multiple claims

Economic operator	Claims	Admitted	Rejected	Percentage %
E.	12	5	7	42 / 48
F.	9	4	5	44 / 56
D.I.	7	2	7	29 / 71
A.	6	3	3	50 / 50
S.P.M.	4	0	4	0 / 100
P.P.	4	1	3	25 / 75
A.E.	3	2	1	67 / 33
T.G.	3	1	2	33 / 67
E.G.	3	2	1	67 / 33
A.P.	3	1	2	33 / 67
P.	3	0	3	0 / 100

As concerns the possibility of existence of corruption schemes and agreements between the economic operators and the Agency, the results of monitoring and the statistical data could be of help. Even the economic operators that have the greatest number of filed complaints/contestations did not always obtain favourable decisions. For example, out of 12 claims filed by an economic operator, only 42% were admitted; out of 9 claims of another economic operator, only 44% were admitted, and the economic operator that filed 7 claims was successful only in 29% of cases.

The results of monitoring revealed the presence of 11 claims filed by 2 or maximum 6 economic operators. As a rule, the Agency connects and examines in a single procedure the claims that are referring to the same public procurement procedure.

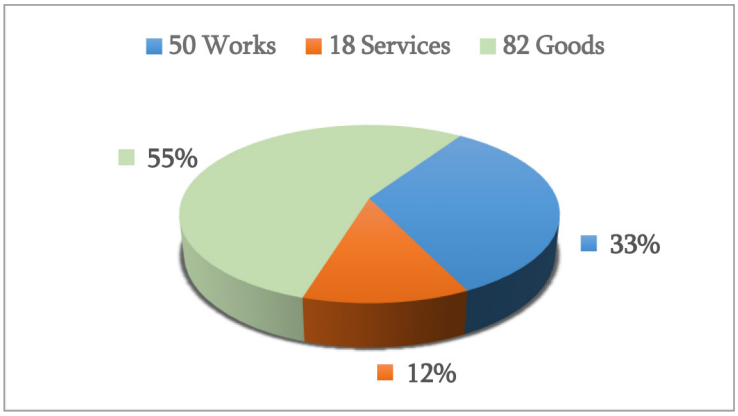


Diagram 4. Claims according to domains

Within the meaning of notion defined under art.1 of the Law No.131/2015, we understand by public procurement purchase of goods, execution of works, or provision of services for the needs of one or several contracting authorities. Given the above, we have analysed what kind of domains referring to the public procurement procedures were more often indicated in the claims of the economic operators. As an outcome, we could emphasize 82 claims referring to goods, 50 claims referring to works, and 18 claims relating to the field of services.

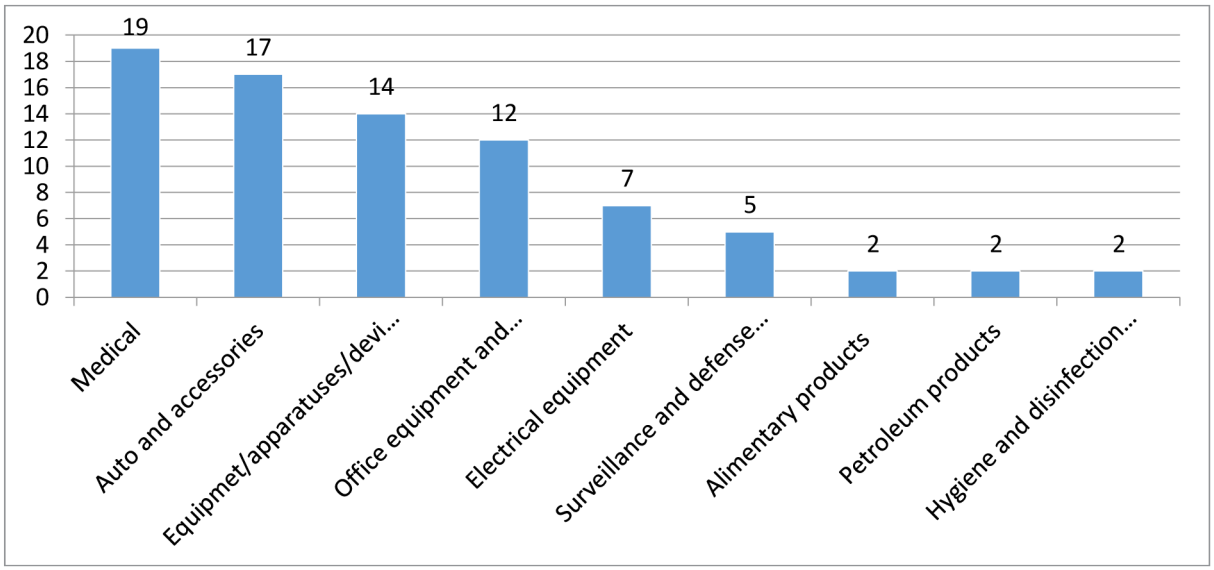


Diagram 5. Types of goods

The majority of goods relating to the challenged procurement procedures refer to commodities from the medical field (19), followed by commodities from the auto and accessories field (17), commodities related to equipment/apparatuses/ devises (14), as well as to such goods as office equipment and consumables (12).

Under the category of "works", the majority of the challenged procurement procedures are connected with construction works and repairs (43). As concerns "services", on top of the ranking are security services (4), auto services (3), insurance (3), cleaning and washing services (3), design and analysis (3).

Table 3. Contracting authorities with the highest number of disputes

Contracting authorities	Contenders	Admitted	Rejected
IMSP The National Center for Pre-Hospital Emergency Medical Assistance	7	3	4
Center for Centralized Public Procurement	7	2	5
Department of Penitentiary Institutions	5	1	4
General Department for Education Youth and Sports / DETS Buiucani	5	3	2
IMSP Emergency Medicine Institute	5	0	5
Security and Intelligence Service	4	0	4
General Department for Education Youth and Sports / DETS Botanica	4	2	2
ME The Urban Park of Busses	3	2	1
National Agency for Food Safety/ANSA	3	1	2
Ministry of Internal Affairs	3	2	1
Public Services Agency	3	1	2

There are 27 contracting authorities that participated 2 or more times at the claim/contestation examination procedures. The picture of the contested contracting authorities could help us observe what authority requires trainings for improvement of the public procurement procedures. We could also see to what domains of activity these contracting authorities belong to.

The decisions of the Agency have a certain structure, which is largely preserved for all the decisions. The introductory part of the decision indicates the economic operators' requests, set forth in the claims they submit. The analysis of the economic operators' requests reveals that they are different and diverse.

The most frequent requests of the economic operators are referring to:

- Annulment of the decision of the working group regarding disqualification;
- Annulment of the minutes on offer/bids evaluation;
- Re-evaluation of the offer/bid;
- Revision of technical specifications;
- Modifications in the task-book;
- Changing the participation announcement through exclusion of some requirements;
- Annulment of the procurement procedure;
- Re-evaluation of the results of the procurement procedure;
- Conclusion of a contract with the economic operator that filed a claim/contestation;
- Extending the deadline for tenders' submission;
- Disqualification of the winning tenderer;
- Revocation of the public procurement contract;
- Suspension of the procurement procedure.

In compliance with art.76, para (1) and (2) from the Law on public procurement No.131/2015, the economic operator could appeal/challenge an act of a contracting authority, which could be an administrative act, an action or an inaction, which produces or could produce legal effects in connection with the public procurement procedure.

Although the formulation used by economic operators is different, in essence they object:

- Tender documents/award documentation (all the information related to the subject matter of the public procurement contract and to the contract award procedure, information related to the task-book, qualification criteria, award criteria, evaluation factors, etc.);
- The acts/decisions related to procedure unfolding;
- The results/outcomes of the procedure.

In this context, we have to mention the cases when economic operators formulate requests that are contrary to law and, namely, solicit that the Agency sign a contract with the economic operator that filed a claim/contestation. In particular, taking into account the provisions of art.80, para.(8) of the Law on public procurement, the National Agency for Settlement of Claimscould not decide upon the attribution of a contract to a certain economic operator.

In order to increase the quality of the filed claims and ensure the correct wording of claims/requests, it would be expedient to organize trainings with participation of economic operators. Also the Agency could elaborate and publish, as recommendation or guidance, certain model templates to complete the claims/requests that could be used by economic operators.

In conformity with the provisions of art.77, para.(4), letter (d) of the Law on public procurement No.131/2015, the claim/contestation should contain the substance and grounds of claim/contestation, the legitimate rights and interests of the contesting party that have been trespassed within the public procurement procedure. In the Form for submission of claims/contestations, under the rubric "Subject of the claim/contestation" it is stipulated that the economic operator will provide indispensable explanations with regard to factual and legal grounds that provide a motivation to claim a legal right that was violated. As a result of an analysis we underline the factual and legal grounds that are most often invoked by the economic operators, as follows:

- Disqualification for non-submission of the requested qualification documents;
- Selection of another economic agent despite the fact that the value of the offer/bid was lower;
- Inclusion by the working group of some unsubstantiated requests that favour a certain economic agent;
- Inclusion by the contracting authority of a new evaluation factor that was not officially announced, resulting in discrimination of many participants;
- Technical specifications do not comply with the rules relating to description of the goods, indicating the manufacturer, the equipment models, the country of origin of such goods;
- Conflicts of interest of the winning agent;
- Failure to inform the tenderer about the grounds for disqualification;
- Abnormally lowered value of the offer/bid;
- Offer rejected without sound reasons, although it corresponded to the task-book;
- The participation announcement was modified, and major and significant changes were made without provision of an additional term to make the necessary adjustments;
- In the letter, the contracting authority did not mention the scoring and selection criteria related to the winner;
- The contracting authority did not comply with the technical requirements from the tender documents/award documentation;
- Erroneous, false or misleading information referring to the winner, etc.

The analysis of the factual and legal grounds, invoked in the claims/contestations, *de facto*, indicate the most frequent breaches committed during the public procurement procedures. They could constitute guideposts for public authorities and help them take the necessary measures as well as help the Agency to homogenize the judicial practice related to settlement of claims/contestations.

2. Statistics related to solutions resulting from NASC decisions

Out of those 152 decisions adopted by the Agency during September 8, 2017 – January 23, 2018, in 81 cases the claims were rejected (54%), in 37 cases, the claims were partially admitted (24%), and in 29 cases, it was decided to integrally admit them (19%). However, there were issued 2 decisions of revocation of previously adopted decisions, 1 decision related to modification of the text of a previously adopted decision, and 1 decision of claim/contestation rejection, with a note that the latter is of no interest.

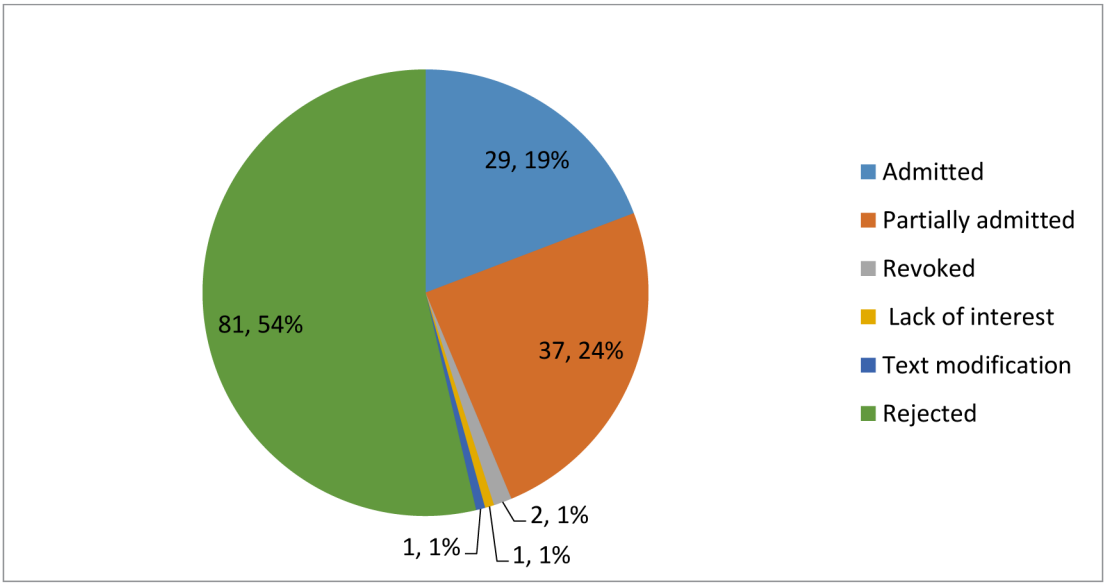


Diagram 6. Solutions adopted by the Agency

At the same time, we discovered that the decision No.38 of the Agency is not found on the web page. According to explanations provided by the Agency's representatives during the round table as of 23.01.2018, the given situation appeared due to a technical error committed during numbering and registering a certain decision.

In case of decisions related to acceptance of claims/contestations, in the majority of cases the Agency issued decisions of integral or partial annulment of the procurement procedure (33), annulment of contracts/acts pertaining to procedures (14), re-evaluation of the procurement procedures' results (14), and annulment of the tender evaluation minutes (10).

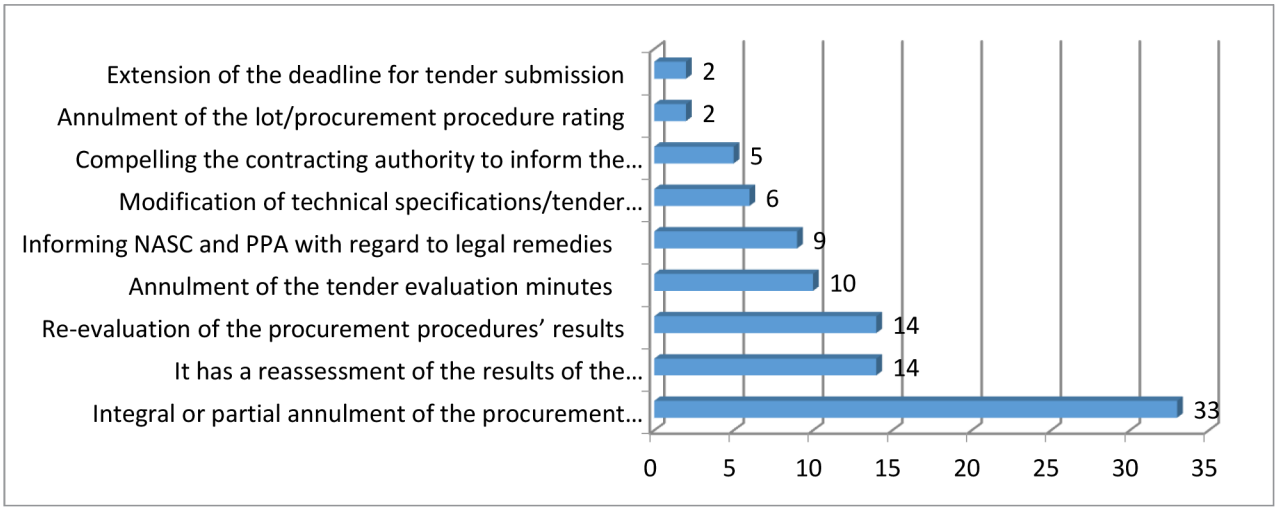


Diagram 7. Agency's solutions regarding decisions on claims admission

We would like to draw your attention upon some decisions of the Agency, which seemingly deviate from the provisions of the legal framework.

Upon examination of some claims/contestations, the Agency adopted 2 decisions on their rejection due to late submission. Subsequently, the Agency adopted 2 other decisions, revoking the previous 2 decisions and decided to reject the claims in both cases for the ground of late submission.

First of all, the Law on public procurement No.131/2015 does not endow the Agency with authority to revoke a previous decision. Art.80 of the given law expressly indicates the solutions/decisions that could be taken within the competence of the National Agency for Settlement of Claims/Complaints. Pursuant to para.(2) of the aforesaid article, during claim/contestation examination, the Agency either integrally or partially admits the claim/contestation, or rejects it.

Para.(3) and (6) of the same article dwell on the Agency's solutions that could: integrally or partially annul the objected/challenged act, force the contracting authority to issue an act/decision or prescribe any other remedy actions necessary to repair the acts/decisions that affect the tender award/attribution procedure, modify/eliminate any technical specifications from the task-book or from the other documents issued in connection with the tender award procedure, annul the tender award procedure under stipulations of art.67, decide upon continuation or annulment of the public procurement procedure, and decide upon annulment of the signed public procurement contract.

Secondly, given the provisions of art.80, para.(13), the decision of the National Agency for Settlement of Claimscould be appealed/challenged in the competent court of law. Respectively, the law foresees only a single modality to revise/modify the Agency's decisions via legal proceedings under law (court of law) that will emit a verdict in this regard.

Thirdly, with reference to those 2 cases mentioned hereinabove, the Agency seemingly acted under administrative legal proceedings. In the given case, those 2 decisions of the Agency could not be justified by reference to the Law No.793/2000. Article 14, para.(1) and (2) of the Administrative Litigation Law states that if a person who considers that his/her right, recognized by law was allegedly injured, s/he will solicit through an administrative act and a prior request that the issuing authority or the superior body effect the service of the documents within 30 days of reception of the act, and integrally or partially revoke the given right, provided that the law does not stipulate otherwise. In this case, we face different legal relations that give individuals the possibility to defend their rights with regard to the abuses committed by the public authorities in case of issue of certain administrative acts. Deriving from the definition of the administrative act, explained under art.2 of the Law No.793/2000, we see that it was issued for (definite) law enforcement purposes. In our case, the Agency's decisions could be labelled as administrative acts of jurisdictional competence. In other words, according to their definition under art.2 of the law, these are legal acts issued by an administrative authority under jurisdictional competence with a view to settle a dispute in conformity with a procedure established by the law. In this case, an administrative authority under jurisdictional competence means an administrative body or a sub-division of an administrative body, legally endowed with jurisdictional authority. In particular, the acts/decisions of the Agency, pursuant to art.80, para.(13) of the Law on public procurement No.131/2015, could be appealed/challenged only in a competent court of law. Last but not least, one should consider the provisions of art.4, letter (f) of the Law No.793/2000, which sets forth that administrative and jurisdictional acts subject to contraventional sanctions as well as other administrative acts for which dissolution or amendment/modification the law foresees another judicial procedure could not be appealed/challenged in the administrative litigation courts.

All the above-mentioned remarks are referring to the 1st decision adopted by the Agency, through which the text and some statements belonging to a previously adopted decision were modified, without any intervention in the subject matter of the initial decision.

As a corollary, we underline the need to clarify all the aspects that are not regulated by the Law on public procurement No.131/2015, in order to avoid erroneous interpretations of the legal framework and the potential deviations related to the activity of the Agency.

In addition to that, we consider it necessary to express our opinion with regard to the decision of the Agency through which a claim/contestation was rejected, with a note that it was of no interest. In that case, an economic operator participated in the previous tender and won it. The Agency annulled the tender owing to a contestation filed by another economic operator. Afterwards, the contracting authority unfolded a new tender. The economic operator that was the initial winner of the tender did not know about that tender. As he found out that a new tender was carried out and a new winner was announced, he lodged a claim/contestation at the Agency, requesting that the tender be annulled, invoking several irregularities, including the fact that the new tender winning bid had a higher value than the one offered by the economic operator during the first tender. In the decision referring to rejection of claim/contestation, the Agency provides an argument that the economic operator "had no interest", pursuant to art.76, para.(1) of the Law No.131/2015, and thus has no right to file a claim/contestation. In order to have this right, the economic operator had to participate at the repeated tender, according to the Agency.

As we have previously mentioned, art.76, para.(1) of the Law on public procurement No.131/2015 indicates who could object/challenge the acts of the contracting authorities; namely, it is anyone who meets the following 2 (cumulative) criteria:

- Has or had an interest to obtain a public procurement contract;
- Considers that during the public procurement procedures an act/decision of a contracting authority has injured his/her right, recognized by law, as a result of which he suffered or might suffer damage.

In the above-mentioned case, through the prism of legal norms, the economic operator falls under legal standing as a claimant. This is a more specific case, raising the conceptual issue of parties to the appeal proceedings. In particular, one should analyse the possibility and opportunity to revise art.76, para.(1) or to interpret the given legal norm for to provide the possibility of appeal not only to the participants [to the public procurement procedures], but also to other interested persons.

In this respect, it is advisable to study the European practices, characterized by different approaches with regard to every member state in part.

Table 4. The right to appeal in Europe

	The right to appeal
Finland	▪ tenderer/bidder ▪ potential tenderer/bidder
France	▪ participant at the tender procedure ▪ person lacking the right to participate ▪ any person that had an interest
Germany	▪ tenderer/bidder ▪ person hampered to file a claim/contestation

	The right to appeal
Ireland	▪ tenderers/bidders ▪ potential tenderers/bidders ▪ persons having sufficient interest in procurement results (e.g. syndicates)
Italy	▪ tenderer/bidder
Poland	▪ person who suffered damage ▪ person that might suffer damage
Portugal	▪ tenderer/bidder
Romania	▪ person claiming legal injury
Malta	▪ tenderer/bidder ▪ interested persons (before the expiry of the tender submission deadline)
Great Britan	▪ person who has an interest to obtain a certain contract ▪ person who had an interest to obtain a certain contract ▪ other parties (having sufficient interest in public procurement results)

In Finland, the claim could be filed by an interested party, as a rule, by a tenderer or a potential tenderer.

In France, the claim could be filed by the participant at the process, the per.son deprived of the right to participate at tender as well as any other person who might have an interest to submit an offer.

In Germany, the claimant should have an interest in the attributed contract that is usually proved by submission of an offer/bid. Submission of an offer/bid is not a requirement in the event the alleged infringement of law on public procurement precludes the claimant from submitting an offer/bid.

In Ireland, the ways of judicial appeals are available to a person who has or had an interest in obtaining a public procurement contract/ In general, this means that the tenderers or potential tenderers have the right to appeal. The other parties do not have the right to initiate legal procedures, with the exception of the parties that have sufficient interest in public procurement (e.g.syndicates).

In Italy, any person who decided not to participate in public procurement procedure, has no right to request its annulment, even if s/he claims an interest.

In Poland, right to appeal have the persons who suffered or might suffer damages in the result of violations of legal provisions, committed by a contracting authority.

In Portugal, any tenderer could file a claim, provided that s/he proves that s/he was directly affected due to violation of legislation.

In Romania, the right to appeal has any person who considers that his or her right or any legitimate interest was injured.

In Malta, the tenderers at the procurement procedures lodge claims/contestations, and the interested persons could file claims only before the expiry of the tender submission deadline.

In Great Britain, any economic operator could file an appeal (as a matter of fact – any entity that had or has an interest to obtain a certain contract). Other parties could use this right provided that they are able to demonstrate that they have sufficient interest in the tender results.

3. Rejection of claims on the ground of delay

Out of the said 81 cases of rejection of claims by the Agency, 39 were considered unfounded (47%); in 35 cases the claims were rejected on the ground of delay (43%), and 8 cases were rejected due to incomplete claims (10).

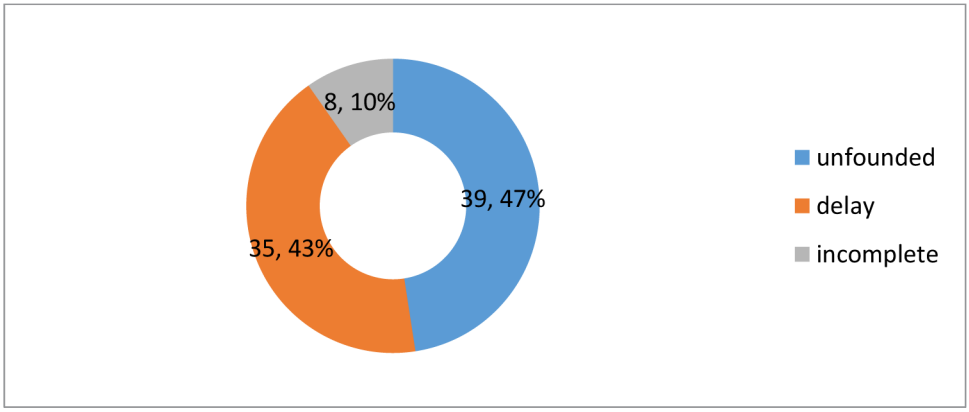


Diagram 8. Decisions related to rejection

The percentage of claims rejected on the ground of late submission is a high one, even alarming. The given statistics is the consequence of lack of information that could have been provided to economic operators with regard to the legal framework, legal procedures and appeal terms. The above brings benefits neither to the claim settlement system, nor to the overall public procurement system. Rejection of claims on the ground of late submission means, *de facto*, non-examination of the alleged deviations and illegalities, claimed by the economic operators. The given situation discourages economic operators, and to a greater extent affects the public interest. In case of eventual examination in a first instance court of a claim/contestation (late submission), one might make a claim to recover for injuries, including unjustifiable public expenditure.

The analysis of the decisions rejected on ground of late submission point at a range of cases when the Agency stated the omission of the term foreseen under art.77 of the Law No.131/2015, one day, or even one hour prior to the expiry of the deadline. In this respect, it would be expedient to amend the law for to provide the economic operators the possibility to restore their legal rights with regard to the omitted terms, for justified reasons, similarly to the provisions of the art.116 of the Civil Procedure Code No.225/2003.

In the process of monitoring, certain inconsistent practices have been detected with regard to the given issue. In some cases, the Agency expressed its opinion in the matter of late submission of claims when such claim was invoked by a contracting authority or another party to the process. In other cases, despite the fact that none of the parties claimed late submission, the Agency has stated/confirmed late submission of contestations on its own initiative. In a series of other decisions, which have been examined by the Agency, there are no mentions apropos of late submission of claims/contestations. In particular, we consider it necessary to homogenize the aforementioned practices. It is possible to analyse the possibility to elaborate a single standard, a sample template for decisions, even using an electronic template, which will indispensably include a note on compliance with/omission of the legal term to file a claim/contestation by an economic operator.

At the same time, we stress the necessity of informing and training the economic operators with regard to the deadlines for claims submission that would entail a decrease in the number of claims filed after the deadline. Also, it would be propitious to inform and train the interested parties in relation to the contents of a claim/contestation and its correct completion. The results of monitoring indicate that 10 % of contestations are rejected on the above ground.

4. Arguments of law invoked by the NASC to motivate its decisions

In order to motivate the adopted solutions and decisions, the Agency invokes and cites a series of norms from the Law on public procurement. Most often, the Agency is referring to the norms contained under art.65 and 67 of the given law: prohibition to use by the contracting authority of criteria unforeseen in the tender documents while determining the winning offer/bid; non-acceptance of offer if it does not comply with the qualification requirements; non-acceptance of offer if it does not correspond with the requirements stipulated in the tender/attribution documents; the right of the contracting authority to accept the offer if it contains minor deviations from the tender/attribution documents; annulment of the award/attribution procedure of the public procurement contract in case of serious deviations like non-observance of principles or rules on transparency and communication etc.

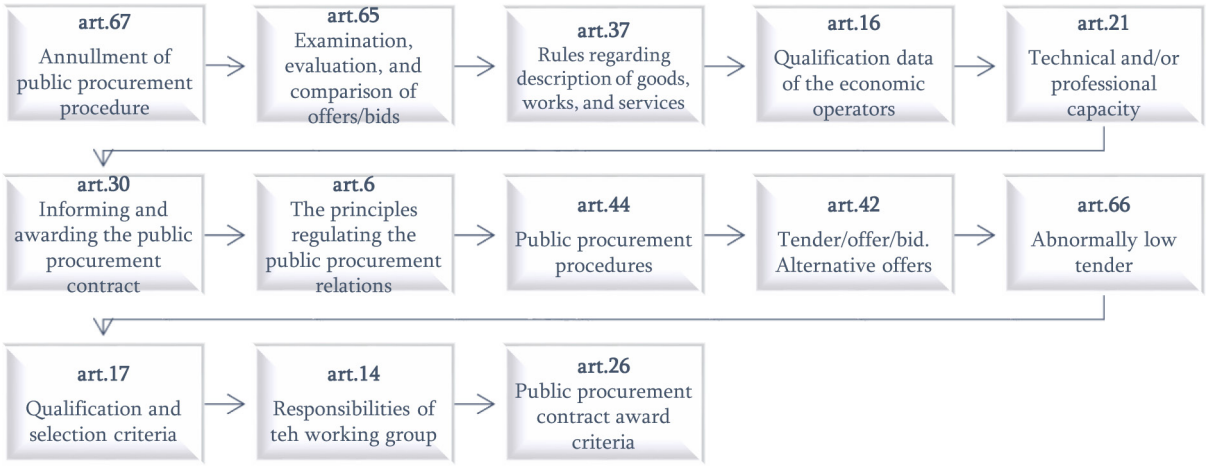


Figure 1. Norms invoked to motivate decisions

5. Nonuniform practices in the Agency's decisions/solutions

Remarks on the burden of proof

- ☑ In one case, the Agency labeled the claims of an economic operator referring to the abnormally low tender of the competitors as being "unfounded declarations". In such situations, the Agency had at least to verify if it is true or not, and to indicate that in its decision;
- ☑ The Agency could expressly indicate in its decision that the burden of proof falls on the claimant and s/he did not provide any proofs. However, in other cases, the Agency, from its own initiative, meticulously investigates the case searching for proofs, arguments;

Agency's own initiative

- ☑ In some cases the Agency examines the dossier under all aspects, stating its standpoint with reference to some circumstances that have not been invoked by the economic operator in his/her claim/contestation and finds deviations;

Remarks on wording of solutions

- ☑ In case when the Agency partially admits the claim/contestation with multiple requests, it rarely expressly indicates in its decision what kind of claims are rejected, and in the majority of cases it does not provide any specifications as to the types of rejected claims;
- ☑ In one of its decisions the Agency rejected the claim/contestation and in parallel stated several illegalities, ordering the contracting authority

to re-evaluate certain offers. As a rule, if a claim/contestation is rejected, there are no other items/clauses in the decision;

Remarks on different solutions in similar cases

- ☑ In one case, the Agency stated that the winning offer had insignificant deviations from the provisions of the tender/award documents and decided to annul the procedure. In a similar case, the Agency stated that the winning offer had insignificant deviations and decided to reject the claim/contestation.
- ☑ As a rule, the Agency admits the claim/contestation when it is revealed that the contracting authority did not inform the contender about the decision referring to the motivation and tender results. There are cases when the Agency rejected the claim/contestation on the ground that the above omission could not constitute a reason for revision of procedural acts of the contracting authority. In other cases, the Agency did not provide any motivation or explanation in relation to such a claim/contestation from an economic operator.
- ☑ In 2 separate cases, the economic operators invoked the fact that the trade mark was expressly indicated without the phrase "or the equivalent". As a corollary, the Agency adopted 2 decisions with diametrically opposed solutions. In one case, the Agency rejected the claim/contestation on the ground that the contracting authority already uses similar equipment and its replacement would entail expenses, taking into account the principle "efficient use of public money and minimization of contracting authorities' risks". In another similar case, the Agency compelled the contracting authority to modify the technical specifications and expressly indicate the phrase "or the equivalent". We should mention that the given decisions were adopted by the same jury/counselors.

It is expedient to to express our views on the Agency's decisions that have the same subject matter, but different solutions via the prism of the European Court for Human Rights (ECHR) jurisprudence. The ECHR sets forth in its decisions that different treatment in similar or compatible situations is construed as discriminatory, and violates art.14 of the Convention and art.1 of the Protocol No.12 to the Convention (Case-law Frette vs France, 26.02.2002; case-law Pretty vs United Kingdom, 29.04.2002). At the same time, different interpretation and application of the same legal norms to similar legal relationships, but with reference to different cases, leads to violation of the principle of fair process and therefore to violation of legal relations' safety. To this effect quite relevant is the ECHR decision as of 06.12.2007, issued under the case-law Beian vs Romania, through which there was stated a violation of the provisions of art.1 of the Protocol No.1 to the Convention, combined with the provisions of art.14 of the Convention, and the provisions of art.6 (1) of the Convention.

In particular, through this practice, the Agency for Settlement of Claimshas become the source of legal instability, fact that could bring about dicreased levels of confidence of the large public in the system meant to settle claims related to the public procurement procedures. As a consequence, we consider it necessary to homogenize the Agency's jurisprudence, because in similar situations/cases similar solutions are required.

Positive uniform practices

- ☑ There are cases when a consistent practice has been created and this is observed in several decisions of the Agency. We may provide an example referring to the "per hour median wage of the construction workers",

that will be calculated in conformity with the legal framework regulating wages in real sector of economy. In particular, we could mention the government decision nr.165/2010 on the minimum guaranteed quantum of the salary in the real sector, and the government decision nr.743/2002 on the wages of employees in entities with financial autonomy.

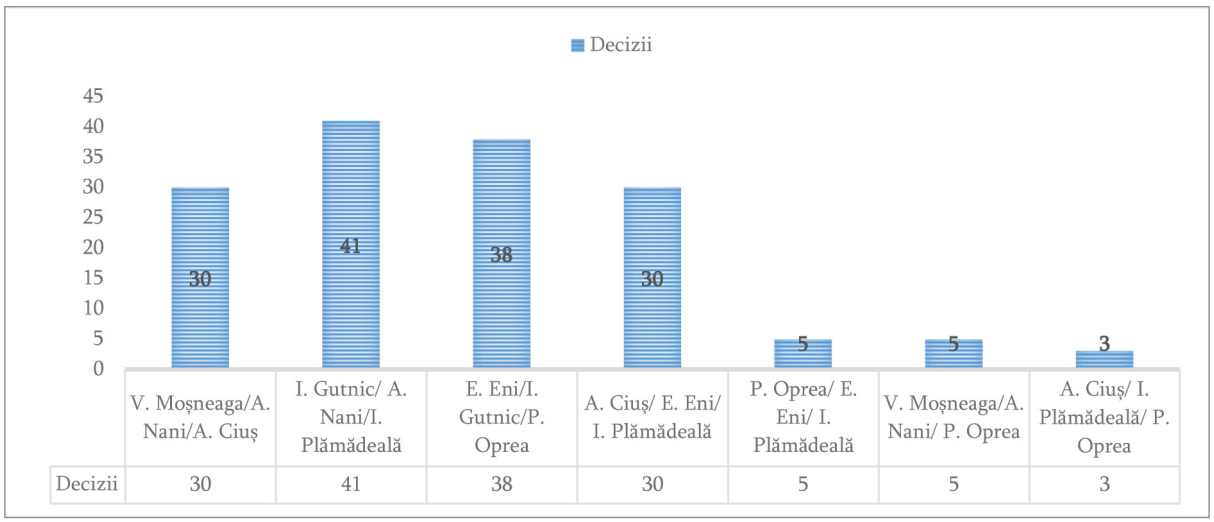
As a result of monitoring we discovered that there is not a single case of suspension of public procurement procedure. The Law on public procurement No.131/2015 foresees in art.79, para.(7) that in duly justified cases and for to prevent an impending damage, the National Agency for Settlement of Claims/Contestations, prior to the settlement of the merits of the case, may order through a decision, within 3 [working] days, including upon the interested party's request, the suspension of the public procurement procedure.

Moreover, we found out that the issued decisions contain no separate opinions of any jury member/ counsellor. Pursuant to art.79, para.(4^5), the member of the jury could have a separate opinion on the subject matter, which is to be indicated only in the minutes of the session. In this respect, we have to mention the contradiction of these norms with the norms contained under entry/clause 41 of the parliament decision No.271/2016 on the setting up, organization and operation of the National Agency for Settlement of Claims/ Contestations. According to the aforesaid norms, the separate opinion of a jury member is to be expressed by the jury panel. In particular, it is necessary to make amendments to the Law on public procurement No.131/2015 in order to expressly provide for the possibility to indicate in the Agency's decision the separate opinions of the jury members.

6. The activity of NASC jury panels and counsellors

In order to have an ample picture with regard to the level of involvement of the counsellors and jury panels of the Agency in examination of the adopted decisions, we analysed how many decisions devolve on each counsellor and jury member.

The most prolific jury panel included the following persons: Irina Gutnic, Angela Nani and Iacob Plamadeala, who adopted 41 decisions. It is followed by the jury panel composed by: Eugenia Eni, Irina Gutnic and Petru Oprea, who adopted 38 decisions in the same period of time.



	V. Moșneaga/A. Nani/A. Ciuș	I. Gutnic/ A. Nani/I. Plămădeală	E. Eni/I. Gutnic/P. Oprea	A. Ciuș/ E. Eni/ I. Plămădeală	P. Oprea/ E. Eni/ I. Plămădeală	V. Moșneaga/A. Nani/ P. Oprea	A. Ciuș/ I. Plămădeală/ P. Oprea
Decizii	30	41	38	30	5	5	3

Diagram 9. The activity of the Agency's jury panels

The percentage of decisions relating to admission of claims was analized versus the percentage of decision relating to rejection of claims for every jury panel in part. A higher pecentage of admitted claims we find in case of decisions adopted by the jury panel consisting of Irina Gutnic, Angela Nani and Iacob Plamadeala (57%). Also, a higher percentage of admitted claims versus those rejected we observe with reference to jury panels that adopted fewest decsions (3 or 5 decisions).

Table 3. Admitted vs rejected claims within jury panels, in percentage terms

	V. Moşneaga A. Nani A. Cius	I. Gutnic A. Nani I. Plamadeala	E. Eni I. Gutnic P. Oprea	A. Cius E. Eni I. Plamadeala	P. Oprea E. Eni I. Plamadeala	V. Mosneaga A. Nani P. Oprea	A. Cius I. Plamadeala P. Oprea
Total No. of decision	30	41	38	30	5	5	3
Admitted	9	23	15	11	4	4	2
Rejected	21	18	23	19	1	1	1
%	**30 / 70 %**	**57 / 43 %**	**39 / 61 %**	**37 / 63 %**	**80 / 20 %**	**80 / 20 %**	**67 / 33 %**

If we analyse how many decisions have been examined by each counsellor within the jury panels, we should mention that Irina Gutnic adopted 79 decisions, Iacob Plamadeala adopted 79 decisons, too. Angela Nani adopted 76 decisions and Eugenia Eni – 73.

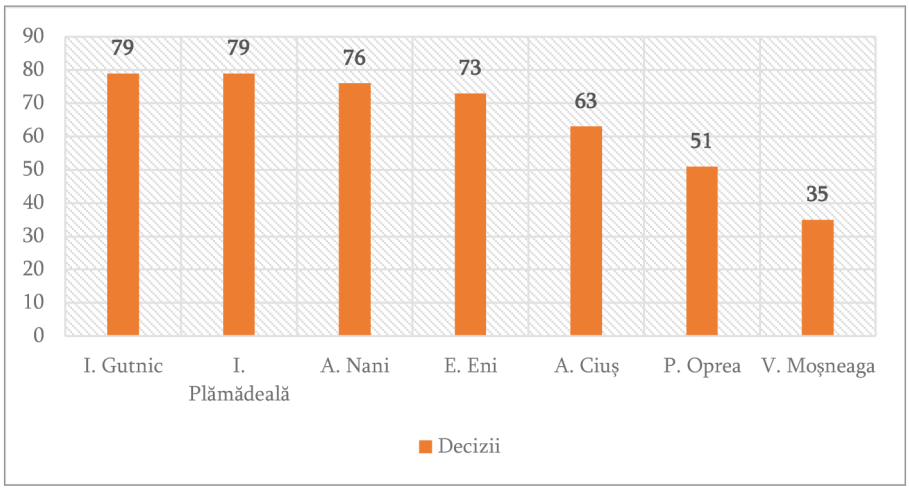


Diagram 10. Decisions examined by the counsellors

III. RECOMMENDATIONS

1. In the process of updating the web page www.ansc.md, the Agency has to take into account the proposals of the economic operators to improve the sub-rubric "Pending claims/contestations".

2. It is necessary to organize information campaigns and trainings for the economic operators, especially for those from the administrative-territorial units of the country with regard to:
   a) Appeal procedures;
   b) Terms to file claims to avoid rejection on ground of late submission/tardiness;
   c) Contents of a claim/contestation;
   d) Correct wording/formulation of pending claims in order to raise their "quality".

3. The Agency could elaborate and publish, as recommendation or guidance, certain model templates to complete the requests/solicitations that could be used by economic operators.

4. It is necessary to conduct trainings for the contracting authorities in order to improve the public procurement procedures, especially for the authorities from the domains that received a greater number of claims/contestations.

5. One should analyse the possibility and opportunity to revise art.76, para.(1) or to interpret the given legal norm for to exactly establish the parties at the appeal procedure and to offer the possibility of appeal not only to the participants to the public procurement procedures, but also to other interested persons.

6. One should analyse, based on public consultations with all the interested parties the possibility to compel the persons to pay a state fee while submitting claims in order to reduce potential abuses from the side of malevolent economic operators.

7. It would be expedient to amend the Law on public procurement No.131/2015 for to provide the economic operators with the possibility to reinstate the term for sound reasons, fact that would lead to lower percentage of claims rejected for ground of late submission.

8. We consider it necessary to homogenize the practices of examination of late submission of claims through elaboration of a sample template for decisions, even using an electronic template, which will indispensably include a note on compliance with/omission of the legal term to file a claim/contestation by an economic operator.

9. It is necessary to revise the Agency's practices related to revocation of its own previously issued decisions that are erroneously interpreted and are not regulated by the Law on public procurement No.131/2015.

10. It is necessary to homogenize the practices with regard to submission, requesting, examination and analysis of proofs to support the claims. Although the burden of proof is placed on the claimant, the Agency should play an active role in identifying, obtaining, investigating, and using all the proofs that are necessary for correct examination of the procedure.

11. The Agency should permanently, and not only in sporadic cases examine the circumstances of the case under all aspects, including the circumstances and the deviations that have not been invoked by the economic operator and have been stated by the Agency in the process of examination of the case/subject matter.

12. In the event the Agency partially admits the claim/contestation with multiple requests, the Agency should expressly indicate in the decision the claims/complaints that are rejected.

13. The Agency should revise the practices related to adoption of decisions through which, on the one hand, the claim/contestation is rejected, and, on the other hand, certain illegalities are stated, and actions are prescribed to be taken by the contracting authority.

14. In order to enhance public confidence in the claim settlement system in relation to public procurement procedures and in order to avoid practices that contravene ECHR jurisprudence, the Agency should adopt similar solutions/decisions with regard to similar situations.

15. The Agency should periodically analyse the most frequent infringements committed in the matter of public procurement procedures in order to take the necessary actions and to homogenize the judicial practice of claim settlement.

16. It is expedient to continue the positive practices related to homogenization of the Agency as well as the practice referring to "per hour median wage of the construction workers" that could be found in many decisions.

17. It is necessary to amend the Law on public procurement No.131/2015 to expressly provide the possibility to indicate in the Agency's decision the (separate) opinion of each jury member/counsellor.

Knowledge
creating
development