THE NATIONAL COUNCIL
FOR SOLVING
COMPLAINTS

ACTIVITY REPORT 2015

CONTENTS

Foreword

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Preşedinte C.N.S.C.

Maintaining focus on delivering quick and quality results, combined with the experience gained during the 10 years of applying the Government Emergency Ordinance no. 34/2006, has strengthened the Council's position in the specialized judicial system and also attenuated the institution's vulnerabilities.

2015 was a year full of events and turmoil regarding the public procurement system in Romania, and this year promises to be the same, if we consider the obligation for completion, adoption and implementation of the new legislative assembly, whose impact will be felt for a long time across the whole spectrum of entities in the sector - contracting authorities, economic operators, control institutions, courts and, not the least, the National Council for Solving Complaints. Switching from one rules framework to another is a difficult process, where the issues of interpretation and enforcement are inherent.

Council experts have actively participated in the outlining of the new legislative projects, including the developing of the National Public Procurement Strategy, approved by the Government Decision no. 901/2015.

The number of complaints is an indicator of failures within the system and the entry into force of the new legal framework will most likely reveal further difficulties, especially related to its assimilation and proper reading.

The judicial mechanism provided by the Council has proved itself able to generate solid and legal solutions in a very short time, which led the majority of people injured by the contracting authorities to resort to it. Through the Council President Order no. 32/2015, the unitary addressing rules for the settlement of complaints by the 11 Council panels have been set, rules meant to signal, prevent and mitigate or eliminate inconsistencies in the tackling of the causes by the panels. To the same end, in 2015, the Council held multiple consultative meetings with magistrates involved in the settlement of disputes regarding public procurement, especially from the appeal courts, but also with experts from the National Agency for Public Procurement, ministries, management authorities, other central or local public institutions. It becomes increasingly obvious that we need, more than ever, the professionals' focused effort in order to face the changes that succeed at an accelerated pace.

For the junction between the old and the new legal framework, the Council aims to strengthen its operational capacity and to identify consistent and predictable practical solutions over complaints, which would exclude potential controversies. Of course, alongside the efficiency of the jurisdiction act, one of the assumed objectives remains the increase of the confidence of economic operators in the administrative jurisdiction.

As mentioned above, the system's weaknesses are best highlighted by complaints submitted to the Council by the business environment, which will continue to strive for the attainment of justice, but this primarily depends on the quality and consistency of the regulatory framework.

1. GENERALITIES

1.1. THE ROLE AND MISSION OF N.C.S.C.

THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.) is a specific jurisdiction body (in the field of public procurements), created with the purpose of guaranteeing the compliance with the legislation by the contracting authorities, due to its primary role of remediation and an auxiliary role of cancelling the illegal awarding procedures.

The Council is an administrative body, with jurisdictional attributions, of public law, which benefits from the independence required to implement the jurisdictional administrative act, not being subordinated any authority or public institution and which complies with the constitutional provisions regulated by the art. 21 par. (4).

Although the activity that it performs (resolving complaints submitted by the economic operators within the awarding procedures of the public procurement contract) leads towards the area of the judicial power, wherein, it cannot, however, be integrated due to its nature – this body is part of the executive – administrative power area.

According to the legal provisions[1], the 33 members of the Council, among which at least half are licensed in law, are public officers with special status, apointed through the prime minister's decision, at the proposal of the Council president, following a competition promotion[2].

The main task of the Council members is to solve the complaints submitted within the award procedures through specialized panels formed of 3 members[3].

Iniatially, the competence of the Council in solving the complaints submitted within the award procedures was limited until the moment of the contract conclusion, but, due to the amendments occured by Law no. 279/2011[4] at G.E.O. no. 34/2006, this competence limitation was eliminated, reason for the Council to be able to decide on the legality of the acts released within an award procedure, whether or not it had been legally apprised, regardless if the contracting authority chose to conclude or not the public procurement contract.

According to legislation, N.C.S.C operates based on its own Regulation for organizing and functioning approved by the Government Decision no. 1037/2011[5]. In its activity, N.C.S.C. is subject only to the law; in carrying out its activity, the Council makes decisions, and when it comes to conducting its work, it ensures the coherent application of the legislation in force, according to the principles of law expressly regulated[6]: legality, expediency, contradictory and the right of defence.

Under the provisions of art. 267, par. (1) from G.E.O. no. 34/2006, the complaints submitted by the economic operators to N.C.S.C. are electronically and randomly assigned for resolution to a panel formed by three members of the Council, of which one has the quality of the panel's president. Within each panel, at least its president needs to have an academic degree in law.

For the proper functioning of the institution and for the expeditiously resolution of the complaints submitted by the economic operators, each panel of complaint resolution is assigned with technical – administrative staff with a status of contractual personnel, with legal, economic or technical educational background.

The president of the Council, chosen among the members of the Council for a three years[7] period, by secret vote, with an absolute majority[8], needs to have an academic degree in law[9] and acts as the main credit release authority[10].

The volume of the activity performed within N.C.S.C. is mainly reflected by the number of complaints registered, by the number of decisions issued and by the number of files solves, while the effects / results of the Council's work is reflected in the number of decisions appealed in Courts of Appeal (in whose jurisdiction is the headquarters of the contracting authority) and in the number of complaints admitted.

One aspect that must be highlighted is the fact that, aside from the activity performed in the field of public procurements based on the G.E.O. no 34/2006, the Council also has other activies/competencies, such as:

- to solve, through administrative-jurisdictional means, the complaints submitted by any individual who considers oneself offended in his/her legal rights or in a legitimate interest by an act of the public partener, by breaching the legal provisions in the matter of public-private partnership[11].
- to solve, through administrative-jurisdictional means, the complaints submitted by any individual who considers oneself offended in his/her legal rights or in a legitimate interest by an act of the contracting authority, by breaching the legal provisions in the matter of public procurement contracts, including sectoral contracts, as well as framework agreements assigned in the fields of defence and security[12].
- to resolve disputes regarding the awarding of administration delegation to a community service of public utilities, for which the specific legislation refers to the application of O.U.G. no. 34/2006[13].

Thus, in order to exercise the competences regulated by the G.E.O. no. 114/2011, in force starting with October 1 2012, the NATIONAL COUNCIL FOR SOLVING COMPLAINTS becomes "Unit Holding Classified Information", and therefore the following actions were taken:

- the relational system with the Designated Security Authority – SDA (Romanian Intelligence Service specialized unit) was established;
- the legal procedures within The National Registry Office for Classified Information (NROCI) for initiating and performing the verification procedures were executed in order to issue the security certificates/acces authorizations to state classified information;
- security certificates and classified information acces authorizations were issued for a number of 80 persons;
- measures concerning the physical protections against unathorized access to classified information, personnel protection and information generating sources were initiated;
- the onset of the accreditation process for the information security system was approved;
- the Accreditation Security Strategy of the computer system was issued;
- the process of security system accreditation was initiated.

Considering the G.D. no. 215/2012, the Council joined the core values, principles, objectives and monitoring mechanism of the National Anticorruption Strategy 2012 – 2015 and adopted the sectoral plan of action in which it identified its own institutional vulnerabilities and risks, associated to the main work processes, as well as the measures for strengthening the already existing preventive mechanisms.

In 2015, the Council actively participated to all the meetings, work groups, sessions etc., organized by various public institutions (N.A.P.P.M, N.A.I., Competition Council etc.) for the interpretation, modification and development of a secondary legislation in the public procurement field, to elaborate the national stategy within the public procurement domain and to create a common practice concerning the approach of the G.E.O. no.34/2006 provisions and the implementation of the directive in the public procurement field.

1.2. HUMAN RESOURCES, MANAGEMENT AND ORGANIZATIONAL STRUCTURE

As an organizational structure, the Council operated in 2015 with a number of 33 resolution counselors in the field of public procurements, under the G.D. no. 1037/2011, organized in 11 complaints resolution panels in the field of public procurements.

The organigram of the Council also includes 54 people with the status of technical and administrative staff (through G.D. no. 1037/2011 for the approval of the Regulation of the organizational and functioning of N.C.S.C. provides a total of 64 posts for the administrative and technicall staff).

The management of the NATIONAL COUNCIL FOR SOLVING COMPLAINTS is provided by Mr. Lehel – Lorand BOGDAN, on his second term.

In exercising his attributions, the president of N.C.S.C. is helped by a board composed of three members (Florentina DRĂGAN, Silviu – Cristian POPA, Cătălin POPESCU), elected for a two years period, by secret vote, with absolute majority, by the counselors for solving complaints in the field of public procurements.

Within the NATIONAL COUNCIL FOR SOLVING COMPLAINTS, on December 31, there were 87 people (100% with higher education) employed, 60 of them women (68.96%) and 27 men (31.04%), the average age at institution level being of 44.

Out of the 87 persons employed at December 31 within N.C.S.C., 54 were listed as staff employed by contract, in addition to the panels for solving complaints, while 33 were counselors for solving complaints.

According to the Regulation for organizing and functioning of the Council[14], the administrative and technical staff operates in the following structures:

- The registry, archive and library department, which includes:
  - The registry, archive and library office;
  - The statistics and IT offices;
- The economic-administration and public procurements department which includes:
  - The human resources office;
  - The information and public relations office;
  - The financial-accounting division;
  - The public procurements division;
- The technical service in addition to panels;
- The legal department, which includes:
  - The legal and administrative law service;
  - The legal service in addition to the complaints resolution panels;
- The internal audit department;

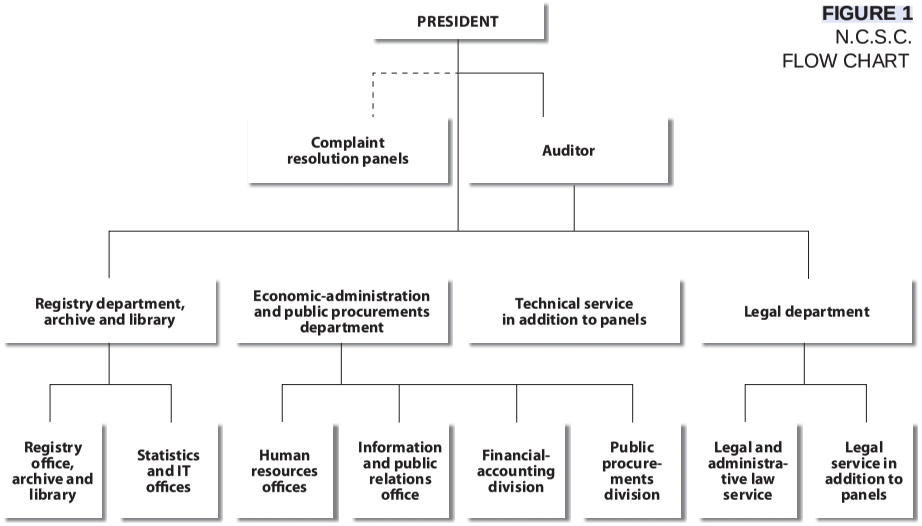


FIGURE 1
N.C.S.C.
FLOW CHART

2. THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st – DECEMBER 31st 2015

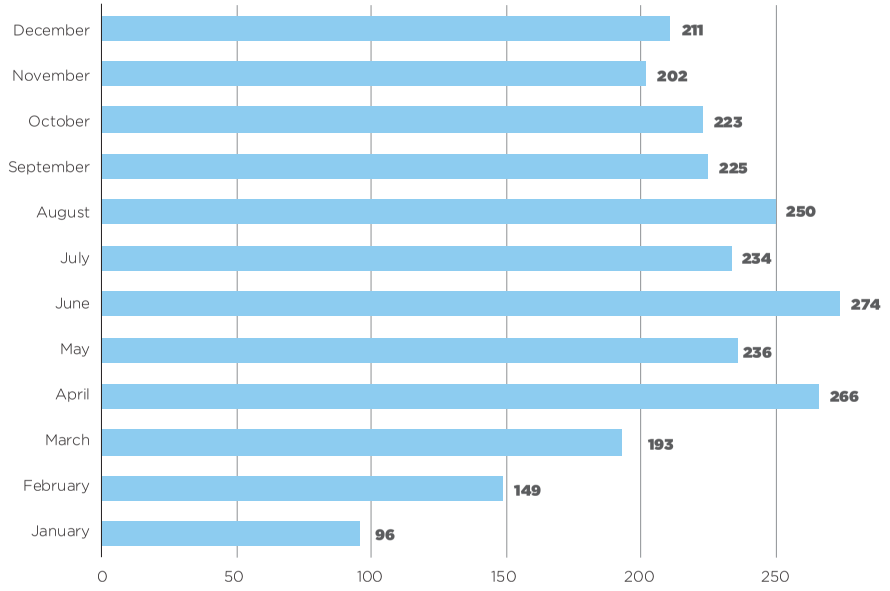
2.1. COMPLAINTS SUBMITTED BY THE ECONOMIC OPERATORS

The number of complaints formulated/submitted by the economic operators, their evolution, the object of complaints, their complexity, as well as the resolution manner, represents important indicators that can be used in the analysis of the activity performed by the Council.

2.1.1. EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

During the January 1st - December 31st, the number of complaints (case filles) submitted by the economic operators and recorded to N.C.S.C. reached the figure 2,559.

During the twelve months of 2015, the number of complaints submitted by economic operators and registered at the N.C.S.C. evolved as follows:



January	96
February	149
March	193
April	266
May	236
June	274
July	234
August	250
September	225
October	223
November	202
December	211

FIGURE 1
THE EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS TO N.C.S.C IN 2015

During 2015, out of the 2,559 submitted, in 168 cases, the economic operators gave up the contestation, representing 6.57% of the total complaints, and in 116 cases, the economic operators did not present the guarantee of a good conduct, meaning 4.53 % of the total complaints.

By analysing the number of complaints (case files) submitted by economic operators and registered at N.C.S.C. during 2014 and 2015, is has been found that in 2015, the number of complaints was

EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

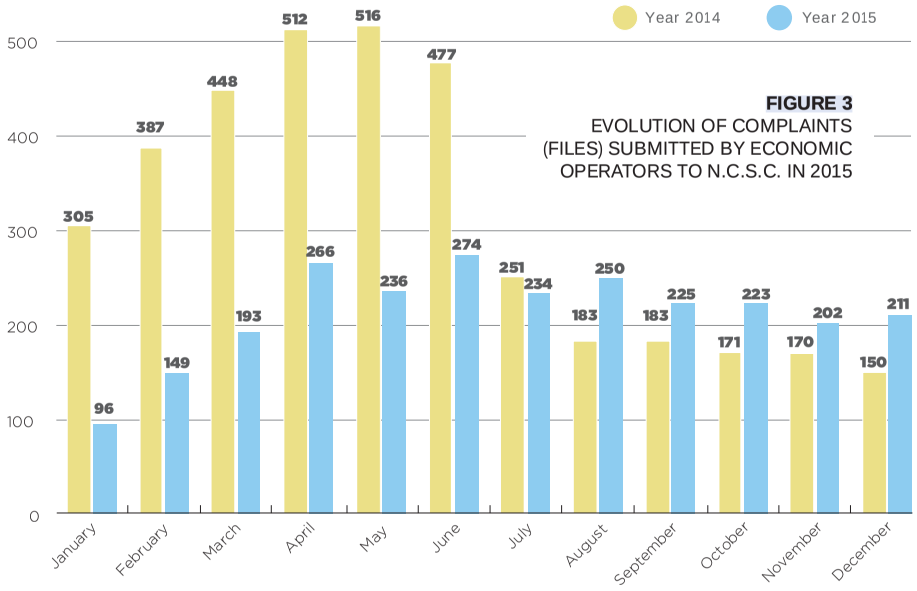


FIGURE 3
EVOLUTION OF COMPLAINTS (FILES) SUBMITTED BY ECONOMIC OPERATORS TO N.C.S.C. IN 2015

constantly compared to the second quarter of 2014, when there was a decrease in the number of complaints up to 41% compared to the first quarter of the same year, decrease due to the legislative amendments brought by G.E.O. no. 51/2004 through which was introduced the mandatory good conduct guarantee.

Comparing the total evolution of the number of complaints submitted in 2015 to the one registered in 2014, a decrease of 31.81%, which can be considered significant, was noted.

The reason for this decrease in the number of complaints submitted to C.N.S.C. by economic operators in 2015 compared to the previous year was the introduction of the obligativity of the economic operators to constitute a good conduct guarantee[15] for the entire period between filing the appeal and the date of the final decision of the Council to solve it, a guarantee which was established according to the type and value of the contract to be awarded, that could reach a maximum value of EUR 100,000[16]. Basically, the requirement of the economic operators to lodge a good conduct garantee for the entire period between the submission of the appeal and the date of the final decision of the Council for resolving it, in the second half of 2014, led to a decrease of appeals by 58.11% compared to the first half of the same year, decrease which continued in the first quarter of 2015; then, the number of complaints had an upward trend, due to the publication in the Official Gazette[17] of the Decision no. 5 / 15.1.2015 by which the Constitutional Court found that the provisions of the art. 2712 par. (1) and (2) of the Emergency Ordinance no. 34/2006 are unconstitutional[18].

The purpose of introducing this instrument which would protect the contracting authorities by any misconduct of an appellant was probably attained, economic operators being detained under the notification of the Council or of the law courts, but this instrument does not guarantee that the tender procedures, starting with 30/06/2014, were corretly and legally initiated and then carried out.

It should be noted that the decrease in number of complaints submitted by the economic operators in 2015 compared to previous years was due, on one hand, to the lower number of proceedings initiated in the Electronic System of Public Procurement (S.E.A.P) in 2015, as well as to the package of legislative changes initiated since the end of 2010, which decreased the economic operators'„momentum" to submit complaints.

These legislative changes designed to mitigate the excess of economic operators to submit complaints mainly consisted of:

- „sanctioning" of economic operators with retaining a participation guarantee share in the event of the Council dismissing the complaint on case or if the contestant gives up the appeal without the contracting authority having adopted remedial measures[19], regulation imposed in 2010[20];
- control regulation "ex ante", which involves the obligation of contracting authority to submit the award documentation to the National Authority for Regulation and Monitoring Public Procurement (N.A.R.M.P.P.) to be evaluated before submission to publication of the call/notice[21], imposed in 2011[22];
- protecting the contracting authorities from any misconduct by an appellant, by obliging the economic operators to lodge good conduct guarantee[23] for the entire period between the submission of the appeal and the date of the final decision of the Council solving it, regulation imposed in 2014[24]

The effect of these legislative measures implemented since 2011 also continued in 2015 and consisted in changing the procedure time/stage for submitting complaints. Thus, as in previous years and 2015 as well, given the new amendaments to the G.E.O. no.34/2006, there was a slight decrease in the number of complaints submitted by economic operators against the tender documentation compared to the number of complaints submitted after the results; however, compared to previous years, in 2015 this decrease is a major one and was due, on one hand, to the regulation of the „ex ante" control made by N.A.R.M.P.P. and, on the other hand, to the „blocking" of large sums of money for a period of time, because of the obligation to lodge a good conduct guarantee by the economic operators aiming to contest an act of the contracting authority issued through violation of the legal provisions on public procurement.

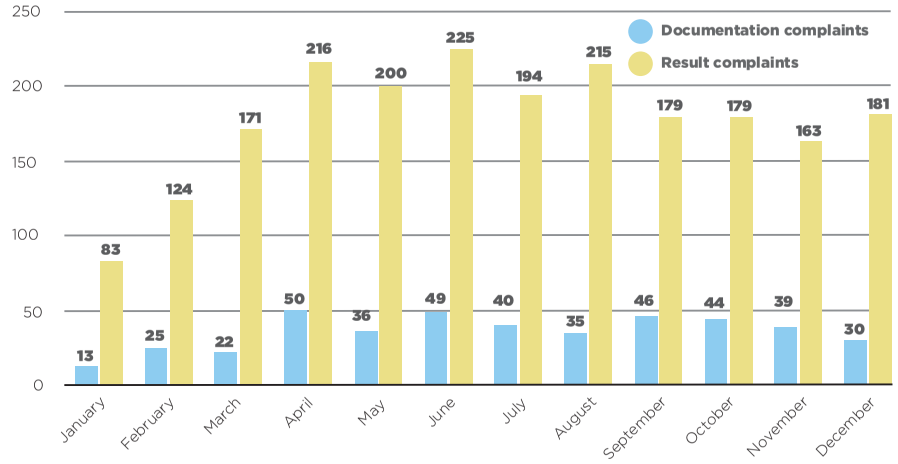


FIGURE 2
MONTHLY SITUATION OF THE COMPLAINTS SUBMITTED TO THE AWARD DOCUMENTATION COMPARED TO THOSE SUBMITTED AFTER THE RESULT OF THE PROCEDURE IN 2015

However, it should be noted that in 2015, 16.76% of the complaints submitted at N.C.S.C. by economic operators (429) were directed against the tender documentation – even if they went through the "ex ante" verification performed by N.A.R.M.P.P., and 83.24% were submitted against the award result (2.130).

THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st – DECEMBER 31st 2015

EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

Reporting the number of complaints submitted in 2015 to the proceedings initiated in S.E.A.P. as compared to 2014, we can see a 31.83% decrease in the number of complaints submitted in 2015 compared to 2014, considering that the number of proceedings initiated in S.E.A.P. in 2015 increased by 21.02% compared to 2014, as it can be seen in the chart below.

FIGURĂ 3
THE SITUATION OF COMPLAINTS SUBMITTED TO THE AWARD DOCUMENTATION COMPARED TO THOSE SUBMITTED AFTER THE RESULT PROCEDURE IN 2015

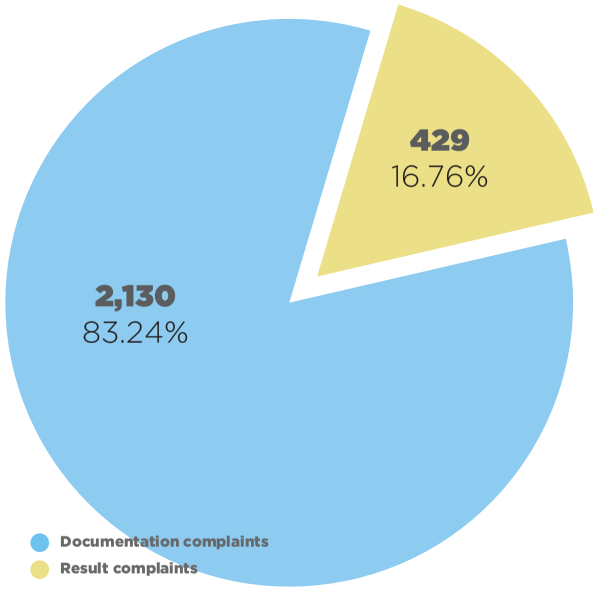
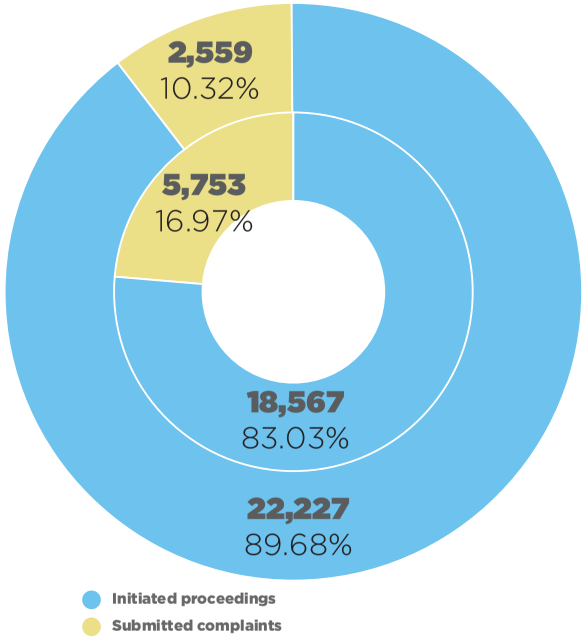


FIGURE 6
THE SITUATION OF COMPLAINTS SUBMITTED IN 2014 REPORTED TO THE PROCEEDINGS INITIATED IN S.E.A.P. COMPARED TO 2015

By analyzing this chart, it can be concluded that in 2015 the limiting effects produced by the legal obligation of a good execution guarantee execution continued, effects that started since the second half of 2014, even though its detaining by the contracting authority was declared unconstitutional by the Constitutional Court.In terms of distribution by administrative-territorial units (ATU), the number of complaints made by economic operators in 2015 evolved as follows:



Din punct de vedere al distribuţiei pe unităţi administrativ-teritoriale (UAT), numărul contestaţiilor formulate de operatorii economici a evoluat în anul 2015 după cum urmează:

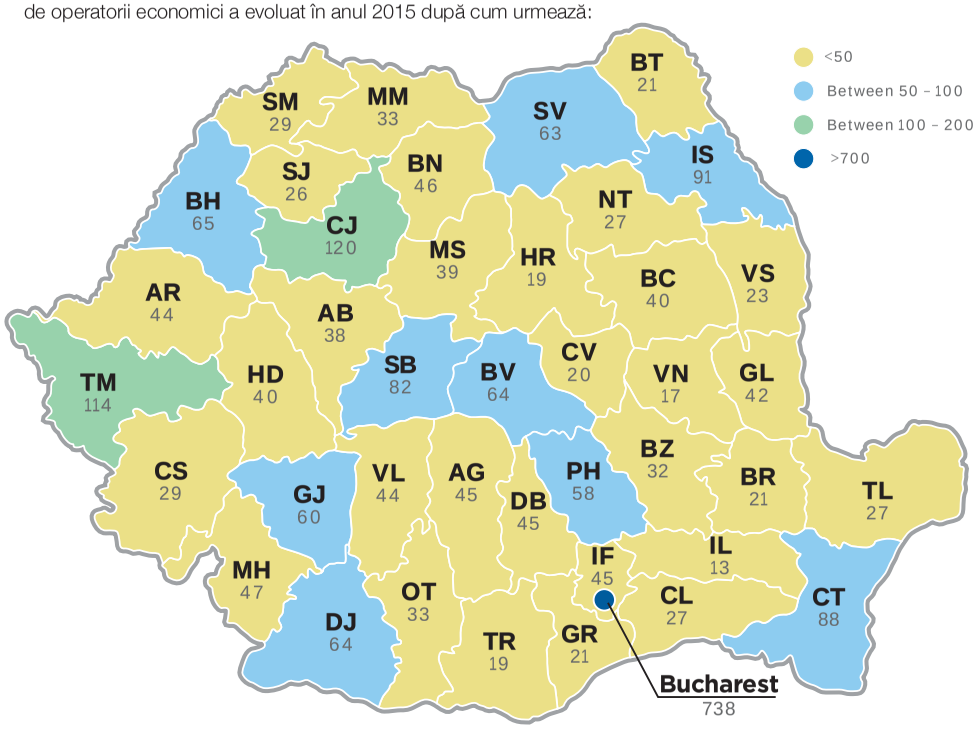


FIGURE 7
DISTRIBUTION BY COUNTY OF THE COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS IN 2015

COUNTY	COMPLAINTS	COUNTY	COMPLAINTS	COUNTY	COMPLAINTS
BUCUREŞTI	738	ARGEŞ	45	SATU MARE	29
CLUJ	120	DÂMBOVIŢA	45	CĂLĂRAŞI	27
TIMIŞ	114	ILFOV	45	NEAMŢ	27
IAŞI	91	ARAD	44	TULCEA	27
CONSTANŢA	88	VÂLCEA	44	SĂLAJ	26
SIBIU	82	GALAŢI	42	VASLUI	23
BIHOR	65	BACĂU	40	BOTOŞANI	21
BRAŞOV	64	HUNEDOARA	40	BRĂILA	21
DOLJ	64	MUREŞ	39	GIURGIU	21
SUCEAVA	63	ALBA	38	COVASNA	20
GORJ	60	MARAMUREŞ	33	HARGHITA	19
PRAHOVA	58	OLT	33	TELEORMAN	19
MEHEDINŢI	47	BUZĂU	32	VRANCEA	17
BISTRIŢA NĂSĂUD	46	CARAŞ SEVERIN	29	IALOMIŢA	13

EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

Regarding the number of complaints submitted in 2015 by economic operators under the procedures for the award of public procurement contracts financed by European funds, it should be emphasized that these were in number of 662, representing 25.87% of the total number of complaints submitted to the Council, while a number of 1.897 complaints submitted, meaning 74.13% of the total number of complaints submitted by economic operators to N.C.S.C. focused on the award procedure of public procurement contracts financed from domestic public funds.

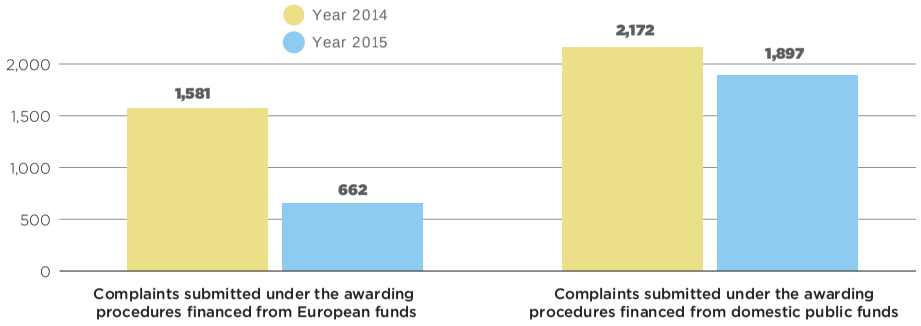


FIGURE 8
SITUATION OF COMPLAINTS SUBMITTED IN 2015 BY ECONOMIC OPERATORS BY THE ORIGIN OF FUNDS FROM WHICH THE AWARD PROCEDURES WERE FINANCED COMPARED TO 2014

From the previous chart we can see that the number of complaints submitted under the award procedures financed from European funds significantly decreased in 2015 compared to the previous year, respectively by 58.13% (919 complaints), on the contrary of the situation of the number of complaints submitted under the award procedures financed from domestic public funds, which, in 2015, registered a decrease of only 12.66% (275 complaints).

Throughout 2014, and in 2015 as well, ignoring the lack of institutional transparency and legislative stability which favored the deficient management of the public funds, led, on one hand, to a large number of irregularities in the public procurement procedures initiated, and, on the other hand, to a severe lack of confidence of the economic operators towards the award system; there were voices who insinuated that the main reasons leading to a low degree of absorption of European funds would be the large number of complaints, and the lack of celerity of N.C.S.C. in solving complaints. The fact that these criticisms targeting the Council proved to be unfounded and the authorities did not take into account to solve the real problems faced by local procurement system is represented by the position of the European Commission in the latest CVM report. The document reveals that the domestic market of public procurement includes a combination of several factors that harm the ability of public purchasers ("lack of stability", "fragmented legal framework", "institutional system", "quality of competition in public procurement") and generate "a high proportion of award procedures subject to complaints". "There is a general perception of high levels of corruption, fraud and conflict of interest. The civil society observers noticed major differences in the number of cases identified and pursued in different areas of the country and through various agencies; local authorities are particularly affected by the lack of transparency in the allocation of public funds for public procurement projects and the risks of corruption in award public procurement is substantial at the local level", EC experts emphasized.

Stressing that "there are concerns about the capacity and level of expertise of the staff dealing with the award procedures at national and local level", the CVM report shows that "the number of professionals in public procurement seems to be insufficient in relation to the volume of work in this area – which leads to an inadequate bidding documents that trigger complaints from economic operators and makes the evaluation and contract execution difficult". The document also notes that "repeated use of exceptions affects the transparency and the openness of public procurement market and creates the potential for corruption".

Regarding the activity of N.C.S.C., the report cancels the critics brought on domestic level to the judicial administrative institution responsible with solving complaints submitted by economic operators in public procurement procedures, emphasizing that it "acts as an effective filter in preventing a substantial number of irregularities in award procedures, in projects funded both at national and European level".

Moreover, official statistics presented in the chart below shows that, in recent years, due to the legislative measures internally taken, the number of complaints filed has steadily decreased.

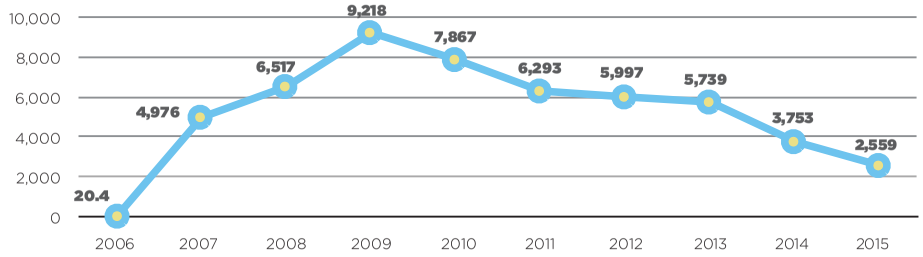


FIGURE 9
EVOLUTION OF COMPLAINTS SUBMITED BY ECONOMIC OPERATORS TO N.C.S.C. DURING 2006 - 2015

The fact that this judicial administrative body - N.C.S.C. - was not an obstacle to EU funds absorption is also extremely clear from the comparative evolution of complaints submitted to CNSC between 2013 and 2014 within certain proceedings financed by European funds and from the number of EU funded award procedures initiated in S.E.A.P.

Thus, if we compare the total number of complaints filed at CNSC during 2014 - 2015 within the EU-funded award procedures, it is noted that this decreased with 58,13% from 1.581 complaints to 662 in the forementioned period. The decrease in the number of complaints submitted by economic operators within the award procedures financed both by public funds (local budgets/state budget), but especially within the procedures financed from European funds was felt with the introduction of the obligation to guarantee a good conduct from 30 June 2014, decrease that also continued in 2015, as it can be seen from the charts below.

THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st – DECEMBER 31st 2015

EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

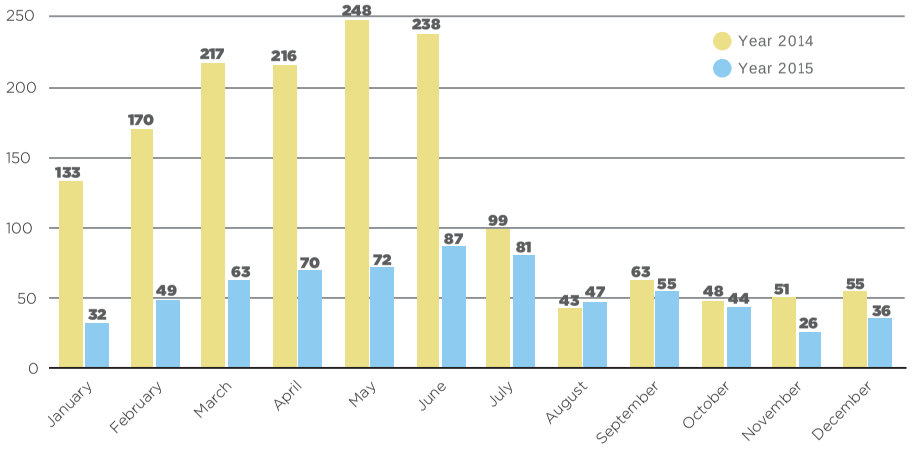


FIGURE 10
COMPARISON BETWEEN THE COMPLAINTS SUBMITTED BETWEEN 2014 AND 2015 UNDER THE AWARD PROCEDURES INITIATED FROM EUROPEAN FUNDS

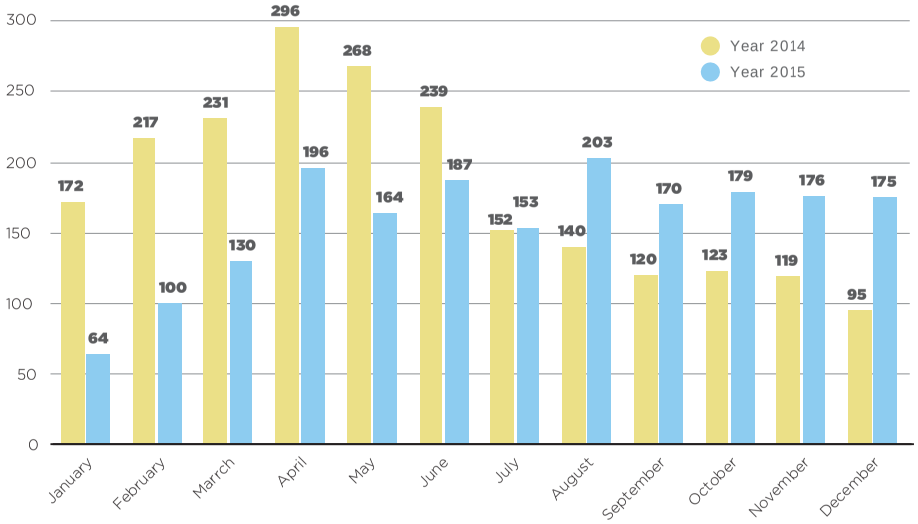


FIGURE 11
COMPARISON BETWEEN THE COMPLAINTS SUBMITTED BETWEEN 2014 AND 2015 UNDER THE AWARD PROCEDURES FROM DOMESTIC PUBLIC FUNDS (LOCAL BUDGET/STATE BUDGET)

Thus, in 2015, following the initiation of a number of 3,510 EU-funded procedures in S.E.A.P., at N.C.S.C. were filed only 662 complaints in this segment, which means a rate of only 18.86%.

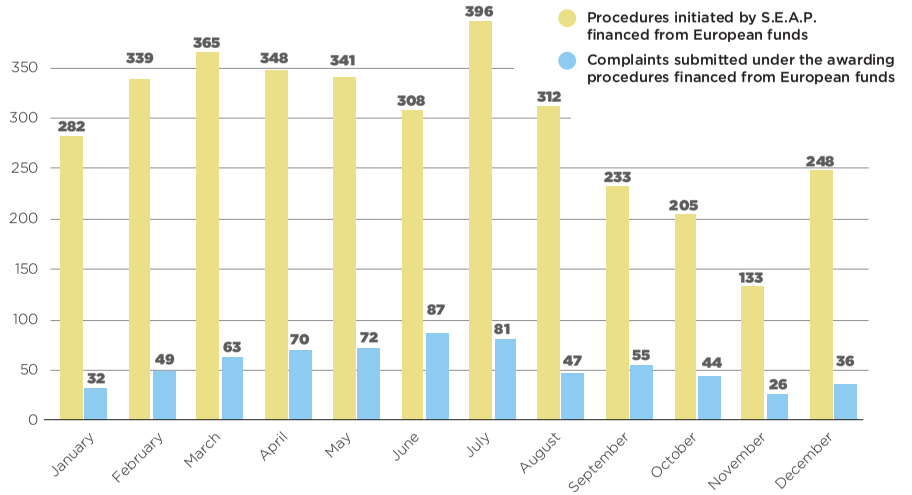


FIGURE 12
COMPARISON BETWEEN THE NUMBER OF COMPLAINTS SUBMITTED BY THE ECONOMIC OPERATORS IN 2015 WITHIN EU-FUNDED PROCEDURES AND THE EU-FUNDED PROCEDURES INITIATED IN S.E.A.P

Complaints submitted by economic operators under the award procedures may also be classified according to the subject of the public procurement contract, a situation which in 2015 was as follows:

- award procedures for public procurement contracts which have execution of works – 888 (34.70%) as object;
- award procedures for public procurement contracts which have provision of services - 855 (33,41%) as object;
- award procedures for public procurement contracts which have supply of goods - 816 (31.89%) as object;

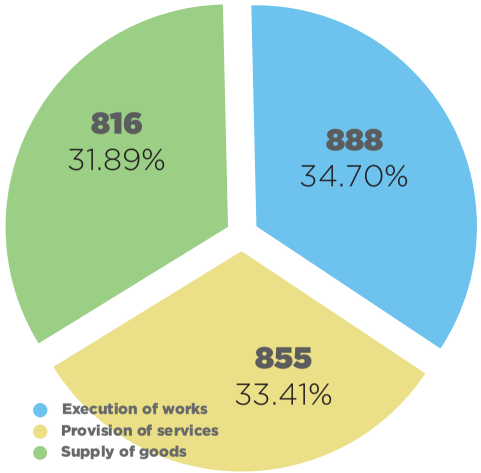


FIGURE 13
SITUATION OF COMPLAINTS SUBMITTED BY THE ECONOMIC OPERATORS IN 2015 BY TYPE OF CONTRACT

EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

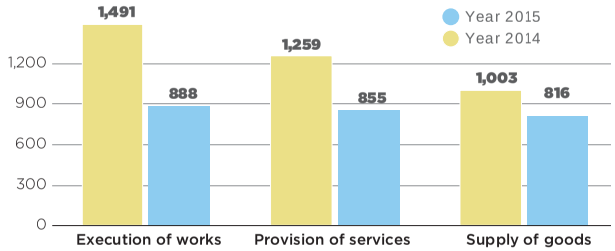


FIGURE 14
SITUATION OF COMPLAINTS SUBMITTED IN 2015 BY THE ECONOMIC OPERATORS BY TYPE OF CONTRACT, COMPARED TO 2014

Analyzing the chart above relating to the complaints submitted by economic operators based on the type/subject of the public procurement contract, it can be noticed that amid the diminishing of the number of complaints in 2015 compared to the previous year, the most important decrease was recorded in appeals made within the procedures for the award public procurement contracts having as their object the execution of works (-40.44%)

During 2015, the 11 panels for solving complaints were randomly, electronically assigned, in order to solve, an average of 233 complaints/files cases each.

Although the number of complaints submitted in 2015 by economic operators was relatively high and the complexity of the cases was also high, the 11 panels for solving complaints within our institution fully complied with the terms of settlement of disputes stipulated in art. 276, par. (1) from G.E.O. no. 34/2006, as amended[25]. Regarding the terms of the settlement of the disputes, it must be emphasized that it is among the shortest in the European Union, Romania topping Germany and Austria.

It is important to emphasize that, since its establishment and until 31 December 2014, a total of 53.592 complaints submitted by economic operators were recorded at the N.C.S.C.

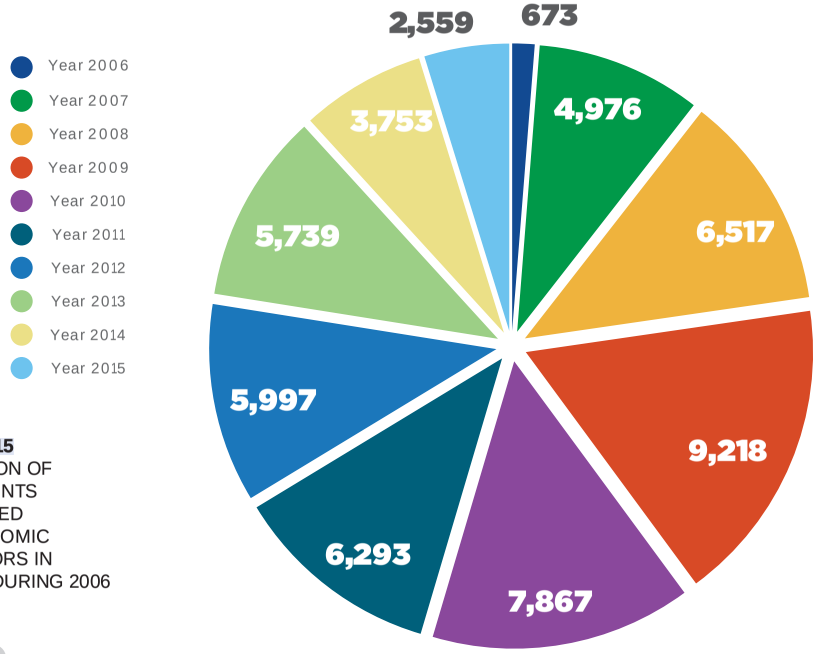


FIGURE 15
EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS IN N.C.S.C DURING 2006 - 2015

2.1.2. THE SUBJECT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

No matter what the subjective right (performance, abstention), the complaint submitted related to an award procedure always refers to the protection of this right, but there might be situations when the object could also be the protection of interests. When a complaint is submitted, this will individualize itself, becoming a trial / litigation and its subject is what the parties agree to submit to the settlement, what they will ask the advisors to review, assess, held, resolve. Thereby it results "ipso facto" that solving the complaint brings into question both a matter of fact and one of law, which the counselors are called to solve throught the decision of the Council in order to ensure the protection of the subjective right.

The subject of the complaint may be total or partial cancellation of an administrative act or ordering of a contracting authority (in terms of the G.E.O. no. 34/2006), which refuses to issue an act or to perform a certain operation.

As noted above, following the analysis of subject of 2,559 complaints submitted by economic operators to the N.C.S.C. in 2015, it resulted that 429 complaints (16.76%) of these complaints concerned the tender documentations and 2,130 concerned the outcome of procedures (83.24%).

Analyzing the subject of the complaints submitted against the requirements imposed by the award documentation, we noticed that the most frequently disputed are:

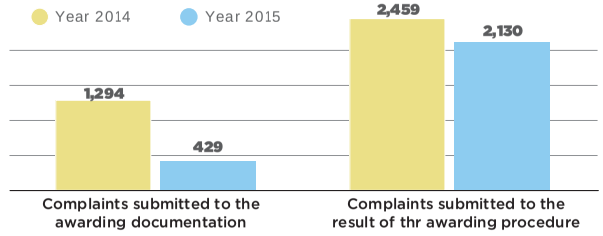


FIGURE 16
SITUATION OF COMPLAINTS SUBMITTED TO THE AWARD DOCUMENTATION AND THE RESULT OF THE PROCEDURE DURING 2014 - 2015

- restrictive requirements regarding similar experience, qualification criteria, technical specifications;
- award criteria and evaluation factors without algorithm or with nontransparent or subjective calculation algorithm;
- mentioning the names of technologies, products, brands, manufacturers, without the use of the phrase "or equivalent" within the award documentation;
- lack of a clear, complete and unambiguous answer from the contracting authority to the requests for clarifications regarding the provisions of the award documentation;
- the form of the participation guarantee constitution;
- imposing inequitable or excessive contractual clauses;
- not dividing the purchase per lots, for products / similar works;

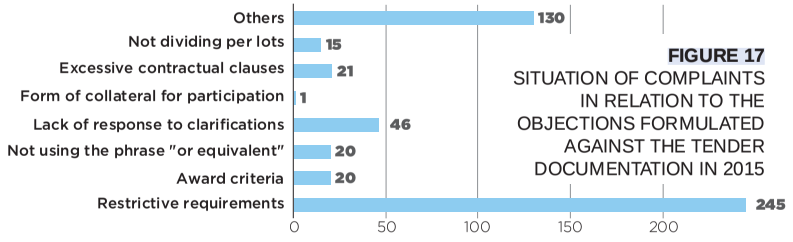


FIGURE 17
SITUATION OF COMPLAINTS IN RELATION TO THE OBJECTIONS FORMULATED AGAINST THE TENDER DOCUMENTATION IN 2015

In order to understand all these aspects, we present some cases in what follows:

1 NOT DIVIDING PER LOTS

The Council is not obliged to examine the complaints filed by the appellant in the order she described in her action. In this case, since the invalidation of the authority's ruling to group 20 types of products in lot 1 has as effect the cancellation of the tender, in terms of the impossibility of redistributing it, the Council considers that it's necessary to rule prevalently over the legality and rationality of the forming of lot 1. On this aspect notified by the appellant, the Council notes that, indeed, both in the contract notice, and the procurement data sheet, the authority provided that the procurement is divided into three lots, of which lot 1 has the highest value (8,766,393 lei, without VAT) and is comprised of:

- Negatoscope 43 x 80 cm, metal housing, circular fluorescent tube
- Negatoscope 40 x 43 cm, metal housing, circular fluorescent tube
- Digital diagnostic X-ray Machine
- Automatic machine for developing films
- Equipment for radiological protection
- CT
- Dental X-ray Machine
- Digital color Doppler ultrasound for the urology office with an automatic disinfection system of the probes
- Digital color Doppler ultrasound for the surgery office
- Peripheral Vascular Doppler with 2 MHz probes
- Digital color Doppler ultrasound for the internal medicine office
- Digital color Doppler ultrasound for the cardiology office
- Digital color Doppler ultrasound for the obstetrics and gynecology office
- Digital color Doppler ultrasound for the pediatrics office
- Peripheral Vascular Doppler with 4 and 8 Mhz probes
- Digital color Doppler ultrasound for the neurology office
- Digital color Doppler ultrasound for the nephrology office
- Digital color Doppler ultrasound for the gastroenterology office
- Full body MRI machine
- Arthroscope for musculoskeletal applications

Therefore, for lot 1, the tender organizer wishes to conclude a contract with a complex object, comprised of a plurality of different equipment: negatoscope, arthroscope, ultrasound, MRI, X-ray machines, CT, film developer. It certainly results that the authority does not intend to purchase a single product, but 20. Despite this diversity, the awarding is global, on the entire product range tendered in lot 1. Each product has its own specification sheet, with the particular technical specifications wanted by the authority. If one of these requirements is not met, the offer will be rejected for all the products, even if for some of them the specifications are met in their entirety. For the way the tender documentation for lot 1 is currently written, each economic operator is required to submit tenders for the 20 types of products, which means that the participants who will not tender for the full range will be excluded, by rejecting their tenders as inconsistent. By not accepting the splitting of the lot, the tender guarantee was set by reference to the estimated value of the entire lot (2% of the 8,766,393 RON, without VAT), the authority imposing the tenderers a tender guarantee of 175.327 RON. In addition, the qualifying criteria have been established also in relation to the 20 products, the tenderers having to be licensed by the Ministry of Health for marketing, repair, testing, and commissioning of each tendered equipment.

At the same time, the economic operators will show an average turnover covering overall business activity for the last 3 years (2012, 2013, and 2014) with a value of at least equal to 17,532,786 RON, for lot 1. As a similar experience, they will present the list of the main deliveries of products made in the past 3 years showing similar products providing of a minimum cumulative value of 8,766,393 RON, without VAT, for lot 1, under one, maximum two contracts.In relation to organizing the procedure to purchase the 20 products, even if they have similar destinations, from a single contractor, by prohibiting the dividing per lots, and imposing the above cumulative conditions,the Council considers that the contracting authority is detrimental to both the scope of the emergency ordinance no. 34/2006, to promote competition between economic operators, and also to the legal principles of non-discrimination, equal treatment, and proportionality, governing the awarding of any public contract, Despite the arguments brought by the authority, that the mentioned ordinance does not bind it to divide the contract, as the lots awarding represents a right and not an obligation, the Council stresses that the principles outlined above (non-discrimination, equal treatment, and proportionality) prevail for compliance, no matter if they are relative to rights of the contracting authority. In other words, the authority excercising its rights should not lead to the defeat of legal principles, named as such precisely for the fundamental and primordial role that these guiding rules have in relation to other rules, circumscribed to the first. Moreover, they also prevail before the easy management of the contract, the authority being required to promote market openness and competition among as many medical equipment providers as possible, even if they prefer the convenience of administering a single contract for lot 1. In other words, the competition cannot be sacrificed just because the employeesof... City or of the „Ioan Lascar" City Hospital prefer the convenience of managing the implementation of a single contract for 20 medical equipment.

Therefore, although it is not prohibited to group these non similar and independent equipment in a single contract (one lot), if this

grouping determines certain restrictions for the economic operators interested in the tender, then it becomes abusive and contrary to the principles and purposes of art . 2 of the ordinance (promoting competition between economic operators, guaranteeing equal treatment, and non-discrimination of economic operators).

Article 17 of the Ordinance expressly states that the contracting authority has the obligation to observe the principles set out in art. 2 par. (2) in relation to the economic operators interested in participating in the tender procedure, and art. 2 par.(1) of the Government Decision no. 925/2006 establishes that, in applying the procedures for awarding public procurement contracts, any situation for which there is no explicit regulation shall be construed in the light of the principles set out in Art. 2 par. (2) of the Emergency Ordinance.

By prohibiting the tender of the 20 products on separate lots, the number of potential tenderers significantly narrows to only those whose object of activity concerns the trade with all 20 product categories. It especially narrows the number since, on the niche market of medical devices, the manufacturers and their distributors usually focus on certain devices, and not on the full range marketed and set by the authority in the tender specifications. In other words, by accepting only the tenderers that have in their activity object the marketing of all 20 types of equipment, the

authority restricts the access to the tender of the specialized producers / distributors, as in the case of the appellant, SC ... SRL. Not all the CT providers are also arthroscope or ultrasound providers, for example, and vice versa.

After reading the specifications drawn up by the Authority, it can be observed that the provision of each type of device is independent to the other provisions. It is not stated that they must only be delivered together and by only one economic operator, especially since it is not the case of a unitary purchase of interconnected medical products, but the case of separate products.

As it was noted above, the authority's need to deliver the devices may be covered, even though they come from different tenderers, in terms of the actual drafting of the tender specifications drawn up by the authority. The ordinance does not prohibit an „exaggerated" number of lots, but it aims at also giving a chance to the small professionals, namely to promote a wide access to the procedure, by proper fragmentation of the procurement (there are numerous tenders on SEAP with hundreds of lots, especially on tenders for drugs). Art. 8 par. (1) of the Competition Law 21/1996 prohibits any action or inaction of the central or local government authorities and institutions that restrict, prevent, or distort competition.

The fear of being left with „non tendered lots due to low attractiveness" cannot be an excuse for restricting the operators' access to the entire tender procedure. As shown, if a CT manufacturer does not deliver arthroscopes, he will have no chance to participate in the tender and sell their product. Similarly, a manufacturer of arthroscopes will not be able to bid just because he does not deliver CT's. There are few cases where a manufacturer has in its current object the production of all 20 different products, including the CPV codes (the radiology, Doppler imaging, MRI imaging, tomography and endoscopy equipment don't have the same codes, as the appellant judiciously notified).

We can apply by analogy the argument of art. 51 of Ordinance no. 99/2000 on trading goods and market services, which expressly prohibits conditioning the sale of a product to a consumer to purchasing a compulsory quantity or the concomitant purchase of another product or service. It is also forbidden to provide a service to a consumer, conditioned by performing another service, or by the purchase of a product.

Similarly, art. 10 of Law no. 296/2004 of the Consumption Code prohibits conditioning the sale of a product to the consumer, to purchasing a mandatory quantity, or the concomitant purchase of another product or service. It is also forbidden to provide a service to the consumer, conditioned by performing another service or by purchasing a product.

According to art. 1 let. c) of Law no. 12/1990 on protecting the people against some production, trading, or illicit services activities, conditioning the sale of goods by the purchase of other goods represents an offence.

If the practice of purchasing other products along with the desired one is prohibited among traders, further more the authorities cannot force the operators to offer a product that is „unattractive" for them just to be able tobid on the products they wish to sell.

On the other hand, if some products are „unattractive", the „Ioan Lascar" Town Hospital risks to not even acquire the „attractive" ones, if the supplying companies, due to product grouping, are urged not to participate at the tender.

Neither the argument that group tendering by a single economic operator facilitates the drafting of the tender, transportation and handling can be validated by the Council. The possible existence of 2, 3 or 20 providers, each on their segment of medical equipment, does not at all hinder the tendering, shipping, and handling activities. The fact that there is only one supplier or 20 must not to concern the authority, but, as mentioned in previous pages, providing a big competition, respectively obtaining as many tenders as possible, so there is a large database of contractors to select from, at prices as favorable as possible.

The need to open the market by splitting the procurement in several lots, is even more justified from the contracting authority's perspective as the number of contracts to be concluded is of no relevance (for a global lot or for 20 lots), as long as the ultimate goal of the procedure is to purchase the required products and not to conclude a single contract, with a single economic operator, for a considerable value. Maintaining a group purchase, to award a single contract, is likely to raise suspicion, in the sense that the intention of the contracting authority is to favor one or a few certain companies, from the limited number of those who have as activity object the supply of the 20 types of devices (expressly prohibited by the public procurement legislation and the criminal one), without any connection with protecting the economic interests of the authority and the contract management, supported by the contracting authority.

Dividing the purchase into several lots, duly noted by the appellant, is likely to facilitate the small and medium enterprises' access to the tender. From Chapter II, Section 3, of Law no. 346/2004 results that the local publlic authorities (from which .... also takes part) have an obligation to encourage the increase of the SMEs' share in the value of the public procurement of goods, works and services, increase that in this case can be achieved by splitting the purchase on lots and, thus accordingly decrease the amount of the tender participation guarantee and qualification requirements.Moreover, in the European code of best practices to facilitate the access of small and medium enterprises to public procurement contracts (European Code of Best Practices Facilitating Access by Small and Medium-sized Enterprises - SMEs - to Public Procurement Contracts), the European Commission recalled that, although the contracting authorities are alowed to limit the number of lots for which one can submit the tender, they should not use this possibility to restrict free competition. [„The sub-division of public purchases into lots clearly facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialized sector of the SME). Furthermore, sub-dividing contracts into lots and thereby further opening the way for SMEs to participate, broadens competition, which is beneficial for the contracting authorities if this is appropriate and feasible in the light of the respective works, supplies, and services concerned. Against this background, contracting authorities should keep in mind that, while they are allowed to limit the number of lots tenderers can bid for, they must not use this possibility in a way that would impair the conditions for fair competition. In addition, making it possible to tender for an unlimited number of lots has the advantage that it does not discourage general contractors from participating and the growth of enterprises."].

In the same direction, within the Directive 2014/24 / EU of the European Parliament and of the Council on public procurement and repealing the Directive 2004/18 / EC states that: „Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to use the Code of best practices included in the working document of the Commission's services of 25 June 2008 entitled „European Code of best practices facilitating SMEs' access to public procurement contracts", providing guidance on how they can use the public purchase frame so as to facilitate the participation of SMEs. For this purpose and to stimulate competition, the contracting authorities should be especially encouraged to divide large contracts into lots. Such sharing could be achieved on quantitative basis, adapting the size of individual contracts so as to better match the capacity of small and medium enterprises, or on qualitative basis, according to the different trades and specializations involved, to tailor the content of the individual contracts more to the specialized sectors of SMEs or in accordance with the various subsequent phases of the project. [...]If the contracting authority decides that it would be inappropriate to divide the contract into lots, the individual report or the procurement documents

should contain a presentation of the main reasons to support the choice of the contracting authority. Such reasons could be, for example, that the contracting authority finds that such a division could restrict competition or might make the contract's execution technically excessively difficult or costly, or that the need to coordinate various contractors for lots would risk to seriously undermine the proper execution of the contract. „Although the national legislation in effect on public procurement does not explicitly provide the authority's obligation to divide into lots, it results indirectly from the principles governing the matter, according to which the authority should aime to increase competition in the procurement procedure, and not to restrict or reduce it by grouping products that might as well be purchased separately.

Compared to the listed principles and objective difficulties that may be encountered by an economic operator interested in tendering the full range of required products, difficulties that determine the restriction of the access to the initiated competitive procedure due to not dividing the purchase into several lots, the Council determines that it is necessary to redistribute the purchase, so that the challenging company will be able to participate in the proceedings, without resorting to subcontracting or association for that category of goods that it does not sell.

The necessity of market opening, by dividing the purchase into several lots, is all the more justified, that from the perspective of the contracting authority, the number of contracts to be concluded (for a lot or 20 lots) is of no relevance, as long as the ultimate objective of the procedure is to purchase the required products, and not the one to enter into a single contract, with a single operator.

By redividing on lots, and access to a larger number of operators specializing in the procedure, so to a wider competition, the authority creates the conditions for obtaining lower purchase prices, in line with the principle of efficient use of public funds, and not as argued by the contracting authority in the point of view no. 41379 / 21.07.2015.

Delivering the medical equipment through one, two or even 20 providers, is not open for debate, either of these being appropriate to ensure the necessary for the contracting authority. For instance, the CT can be delivered just as well if the arthroscope is delivered by another provider, or vice versa, as there is no impediment. In reality, the equipment desired by the authority can be delivered and settled individually, by various economic operators, with or without the supervision of a project integrator. Dividing the purchase on multiple lots implies no gap, being able to conclude separate contracts at the same time.

It is true that it is more convenient for ... to award a single lot to a single operator, but convenience does not entitle the public institutions to violate the principles governing the public procurement rules by assigning a diverse lot, where traders specialized on one type of medical equipment do not have access (either because of vast object of the contract, which exceeds its own field of activity, or because of the imposed qualification requirements).

Promoting the competition between economic operators also means, correlatively, repressing any practice of creating a monopoly in favor of such an operator, respectively to restrict the access of other operators to government contracts. Protection of free competition and freedom of trade have constitutional status (art. 135 of the Fundamental Law), and „The freedom of trade appears to be a fundamental requirement of the market economy, which is reflected in the unrestricted participation of the traders to trade in goods and services. [...] However, competition requires a fair confrontation between the traders active on the same market segment and offers similar products to the consumers. In order to create a favorable framework for the use of all factors of production, the state should support a corect competition policy, playing a vital role in facilitating the free movement of goods, to stimulate the initiative of the participants in the trade activity, also achieving the function to guarantee a free enterprise"- decision no. 230 of 14 March 2007 of The Constitutional Court of Romania.

The pretext of the management of the supplies cannot be validated by the Council. The possible existence of two or more providers, each on their segment of medical equipment, does not hinder the supplies management.

Finally, according to the Civil Code, art. 14 par. (1) and art. 15:

- any natural or legal person

shall exercise the rights and perform its civil obligations in good faith, according to public order and morals;

- no rights can be exercised in order to injure or defraud another or in an excessive and unreasonable way, contrary to good faith.

Assuming that the defendant would have no obligation to redivide the purchase, but only a right, from the reproduced text results that this right cannot be exercised in any way, but only in good faith, according to public order and morals, without the aim of injuring or defrauding another, reasonable and not excessive.

In the above circumstances, if placing the purchase on lots again does not affect it, and this kind of grouping - as highlighted - is absolutely necessary to the appellant and other professionals who deliver only one type of medical equipment in order to be able to take part in the pending tender, the Council considers that ... has no reason to refuse its achievement, except for the abuse, prohibited by the laws cited above. In other words, through the negative response, the authority demonstrates bad faith and is guilty of an abuse of rights against the appellant.

On the other hand, the current structure of Lot 1 disadvantages the authority, which risks rejecting a compliant offer for 19 products, just because they didn't respect a particular technical specification for the product 20. By remaining undivided, it is possible that the authority will not purchase any equipment, as a mere non-compliance, at any of those devices, leads to rejecting the tender for all the equipment. In another train of thoughts, if it would redivide lot 1, the chances of the authority to award the contract for each equipment would increase.

The defendant authority's position also reflects on the principle of proportionality, described the Constitutional Court's decision no. 266/2013 in the sense that any taken action must be appropriate - objectively able to fulfill that purpose, necessary – it does not exceed what is necessary to achieve the goal, and proportionate - according to the purpose. In the European Court of Justice case law, it has often been stated that „the principle of proportionality requires that the institutions' acts should not exceed the limits of what is appropriate and necessary to achieve the pursued objectives, being understood that, where possible to choose between several appropriate measures, the least coercitive one must be taken, and the disadvantages caused must not be disproportionate to the aims pursued „(Judgment of the Court of 5 May 1998, the National Farmers' Union and others, C-157 / 96, Rec., p. I-2211, par. 60). Under these conditions, it is clear that the defendant has exercised his right in an excessive and unreasonable manner, seeking or accepting to put in difficulty, to create inconvenience within the individual participation in the tender of the operators specialized in only one certain type of medical gases.

By dividing on lots, and access to a larger number of specialized operators in the procedure, so of a widest possible competition, the authority creates the potential to obtain lower purchase prices, in line with the principle of efficient use of public funds.

In a similar case, the court was filed the Council's decision of ordering the authority to split the lots, Ploiesti Court of Appeal, the Commercial Section and administrative and fiscal contentious , by irrevocable decision no. 1386 of 20 October 2009 confirmed its legality, reasoning that, by admitting

the Council's appeal, the possibility of participation in the tender procedure of several companies was created, respecting the principles governing public procurement, in terms of equal and non-discriminatory treatment, while promoting competition and efficient use of public funds. Following the same line, the Court of Appeal ..., Section VIII of Administrative and fiscal contentious, held in the irrevocable civil decision no. 2482 of 10 November 2008 that, if the product grouping in one lot determines certain restrictions for the economic operators interested in participating in the auction, it becomes abusive and contrary to the principles and purposes of the Ordinance, which the authority is obliged to observe. The fact that the authority is required to divide the purchase lots as not to restrict the competition was also confirmed in the civil decision no. 3501 of 19 September 2013 of the Court of Appeal ..., Section VIII of Administrative and fiscal matters:

On the merits of the complaint, the Court observes that the main criticism to the Council decision brought by the petitioner contracting authority aimed at the reasons of the Council in the sense that splitting the purchase on several lots was required.

This criticism is unfounded, since the contracting authority's exercise of rights should respect the principles enshrined in the ordinance, so that grouping of several different activities within a single contract or framework agreement does not entail certain restrictions for the economic operators interested in participating in the tender, in such situation becoming abusive and contrary to the principles and purposes of art covered by art. 2 of ordinance.

By prohibiting tendering on lots, the number of potential tenderers is significantly limited to those whose main activity has many types of services and works, especially since the traders usually focus on certain types of services or works, and not on the entire range covered by the contracting authority in the specifications.Thus, accepting only tenderers that have as activity the provision of all types of activities subject to the tender, the authority limits the access of the authorized professionals to the public procurement procedure.

Regarding of the petitioner's allegations that, under the rules of Community law, it is permissible to conclude a framework agreement with a complex object, composed of a multitude of services and different works, the Court does not deny this possibility of the contracting authority, but it is not an absolute one, however it must respect, as noted above, the principles and purposes enshrined in the ordinance.

The same court, in the civil decision no. 5445 of 2 December 2013 noted that, „indeed, under the provisions of the ordinance is not expressly provided the obligation of the contracting authority of splitting the public procurement contract, but it entitles its right to form lots, subject to certain conditions [in this respect is art. 23 and 27 to 29 of the ordinance, as well as art. 10 par. (1) of the Government Decision no. 925/2006]. However, the Court finds that, under certain circumstances, the right of the contracting authority to assess whether it is appropriate or not to make lots for awarding the contract can, at the same time, become an obligation and it derives from the need to respect all obligations set for it by the ordinance and the implementing rules and general principles stated in art. 2 of the ordinance. „

It cannot be imposed upon the economic operator to expand its object or to call associates or subcontractors only to participate in the tender, as duly noted and reasoned by the Court of Appeal ..., Section VIII of the Administrative and Fiscal Matters in civil decision no. 5480 of 5 December 2013: „Regarding the petitioner's defense on that bidders have the opportunity to associate, to subcontract, or to present submissions from various parties, the Court, in turn, will retain that according to Art. 44 of the Ordinance, it is a right of the tenderer and not an obligation imposed on it, so that in a potential lack of prior agreement of association, for the simple reason that the contractor could not foresee such a necessity prior to publication of the specification, many of the

small and medium enterprises are excluded from participation, without benefiting equal treatment along with the other participants. „

In such circumstances, the critics of the appellant aiming at the rejection of the further division into several lots being founded, the Council must order the authority to amend the documents for the tender, meaning to split on lots the products required in lot 1 and to accept the submission of tenders on several lots, thus accordingly reducing the amount of participation guarantee and the qualification requirements according to the lot/ lots for which you can submit the tender.

But splitting the purchase on lots, duly claimed by the appellant's company, is not permitted by the current technical configuration Electronic System of Public Purchases - SEAP, which does not support changing the procedure for awarding a single contract in a procedure of awarding on lots, aspect revealed to the Council in the contents of the address of the National Management Center for Information Society No. 10006 / 21.03.2013 („Where the contracting authority initiates the award procedure in SEAP by awarding a single contract or multiple contracts into lots, the technical configuration in SEAP does not allow redistributing the purchase into several lots or merging the lots. Please note that in the procurement data sheet, section II.1.8) - division into lots, the contracting authority shall decide whether the procedure is divided into lots or not. After publication of the call / notice it cannot be intervened technically on the data sheet"). Therefore, if the splitting request is just, the finality cannot be other than canceling the awarding procedure.

In the light of the submitted, given that remedial measures cannot be taken, under art. 278 paragraph (2) and (6) of Government Emergency Ordinance no. 34/2006, the Council will admit the complaint filed by SC ... SRL and cancel the open tender for awarding the contract for the supply, installation, commissioning and training for medical equipment for the investment project „Rehabilitation, refurbishment, upgrading, and equipping of the Integrated Ambulatory City Hospital ...from ..., county ...", lot 1 - Imaging radiology and ultrasound imaging equipment, CPV codes 33100000-1, 51410000-9 and others, with the date for opening the tenders 10.08.2015, organized by ....

Regarding the contractual clause 10.4: „The medical equipment to be procured under this procedure will be reliable and economical, suitable for intensive use (24 hours / day, 7 days a week) throughout the duration of use (both during the warranty and the post warranty period). " It can also be found in the tender specification, p. 7. It is true that the tenderers can propose amending the contract terms under art. 36 par. (2) let. b) of the Government Decision no. 925/2006, but is equally true that they cannot propose to amend the tender specifications.

The legislation for the public procurement does not hinder the use of the term of ‚intensive use during warranty and post-warranty", but indicates the authority to specify in the tender documentation any requirement, criterion, rule, and other information necessary to ensure the tenderer a complete information, accurate and explicit, with respect to the enforcement of the award procedure [art. 33 par. (1) of the Ordinance]. In this case, the significance of notions is also unclear and contradictory at times, thus contrary to art. 33 par. (1) of the Ordinance.

The expression „intensive use" is not to be confused with the „24 hours / day, 7 days a week", the latter meaning a permanent use, without interruption, without breaks, nonstop. From the explanations in the point of view results that, in reality, the authority does not intend to use the equipment nonstop, but only „if necessary, in the spare time being left to stand-by or under any condition recommended by the manufacturer". Therefore, there is a contradiction between the drafting of the clause and the will of the Authority. The fact that it refers to „the ability to use intensively 24 hours / day, 7 days a week" means just that apparatus must permit such use, but in the range of medical equipment required by the authority also enter high precision devices, such as CT, which does not allow the use for „24 hours / day, 7 days a week" during its 13 years of imposed warranty and post-warranty, because the technical progress is not so advanced to eliminate the risk of overheating / premature wear, respectively periodic breaks or maintenance cooling. It is unlikely that, at this time, there is an invented and

produced CT, with a non-interrupted functioning schedule during its 13 years established by the authority. The thermal storage capacity of at least 6 MHU, in conjunction with the dissipation one of less than 810 KHU / min, requires rest periods to avoid CT from overheating / imaging noise reduction.

The authority cannot require the operators, during the drafting of the tenders, to guess what they wanted to say by „24 hours / day, 7 days a week", respectively to base their offer on pure conjecture and, on the other hand, the condition that some high-precision medical devices that form lot 1 would operate continuously for 13 years should be regarded as technically impossible and therefore unwritten (art. 1402 of the Civil Code.). It is widely accepted that no one can oblige to an impossible obligation (ad imposibilum nulla east obligatio), and the inability to operate a CT non-stop for 13 years is a notorious and absolute one (objective), that such an operation schedule cannot be achieved by any CT nor assumed by any tenderer.

Indeed, the Council cannot force the contracting authority to acquire an equipment of lower performance, since it would limit the right of the contracting authority to contract products whose characteristics correspond exactly to its objective needs, referred to in Art. 35 par. (2) of the Ordinance, but also cannot overlook the impossible technical condition found at the contractual clause 10.4 and in the specifications.

Therefore, to respect the strictness of art. 33 par. (1) of the Ordinance, and to avoid unnecessary problems in the implementation phase of the contract, it is necessary for the authority to eliminate from the tender documentation the words „24 hours / day, 7 days a week" associated with the functioning schedule of the equipment from the disputed lot or to assign a real significance, beyond ambiguity. As currently written, basically, except those caused by Act of God, any failure of equipment arising in the course of its 13 years of non-stop operation would attract contractual liability of the supplier for breach of clause 10.4.

In the Guidance on the main risks identified in public procurement field, and the European Commission recommendations to be followed by the managing authorities and intermediate bodies in the verification process of procurement procedures, approved by Order no. 543 / 2.366 / 1.446 / 1,489 / 1.441 / 879/2013, Chapter IV - Recommendations for the management of the award procedure (applicable to the beneficiaries), point 5 - Drafting of the contract, it is stated that if the contract clauses are unreasonable, not in line with market practices, there is a risk to exclude the reliable economic operators. By way of example it is stated that the introduction of clauses requiring the contractor to take disproportionate risks related to the market practices, the candidates will tend either to withdraw from the race (thus artificially reducing the competition), or try to prevaricate:

a) by introducing reserves (which are normally unacceptable in an open procedure); or

b) by formally accepting them, but trying to bypass them in the stage of completion of contract.

In order to avoid these consequences, it is recommended that the tender documentation and terms of execution comply with the market standards in the field.

SC ... SRL also criticizes the contractual clause 18.5: „The products that, during the warranty period, replace the faulty ones benefit from a new warranty period running from the date of replacement of the product", but this clause is clearly formulated and not does not affect the legal provisions. The appellant herself recognizes that the properly functioning warranty period is the one agreed by the parties, respectively the conventional one.

We have to stress that any public contract is an administrative contract, not a commercial (civil) one, in the light of the definition of the public purchase contract and Law of Administrative Contentious no. 554/2004. Being a contract through which the public administrations (or similar entities) achieve part of its tasks, taking into account its purpose, it is considered that the legal regime applicable to the administrative contracts is one of unconscionable public law. The prerogatives of the administration as a public power are based on the fact that the administration concludes the contract in order to meet a general interest. Because of these powers, the administration is able to impose exorbitant clauses in the contract, to control the contract performance and to terminate it when the public interest does not receive a complete and continuous satisfaction through the implementation of the contract.

Any contract with a local or central public authority contains clauses that could be considered exorbitant for individuals, given the special quality of the beneficiary and the purpose regarding the public interest of the contract. Consequently, the public procurement contracts assume certain requirements that must be accepted by those who want to engage in a contractual relationship with the State or its public entities. Nothing stops the appellant to abstain from attending the tender in progress if he does not want to enter the exorbitant clause 18.5 of the public procurement contract model. The same Organic Law of the Administrative Contentious establishes the rule according to which the principle of contractual freedom is subordinate to the principle of priority of the public interest.

Art. 1.716, par. (1) and (2) C. civ. rule that the seller that guaranteed for a determined time, the proper functioning of the sold good, in the case of any failure occurred within the warranty period is required to repair the good on his expense. If the repair is impossible, or if its duration exceeds the time set by contract or by special law, the seller must replace the sold good. The clause is not unusual for the purposes of the Code (art. 1203), but rather frequently found in the awarding documentation, being assimilated to a common practice (a simple Internet search reveals several cases in which the clause was used in the practice of public procurement).

Neither these nor other legal texts prohibit the authority to propose the contract model that, for the product that replaces the faulty one, runs a new warranty period. The manufacturer should be aware that the durable products that are to be purchased should be technically appropriate at least for the warranty period declared. In other words, tendering a product that is unable to operate smoothly at least during the warranty period, attracts the culpable liability of the manufacturer, and the „Ioan Lascar" City Hospital beneficiary from ... cannot be made responsible for the faulty product under normal use during the warranty period.

For the appellant it would mean that a non-reliable product could be tendered, or one that needs to be replaced numerous times during the warranty period of three years, knowing that at the end of this period, they shall have no obligation to replace the unreliable product. Concurrently, the contractor will be encouraged to bring a faulty product, which will not work for at least three years, especially if its [inherent] failure requires replacement at the end of the warranty period.

In its point of view, the Authority pointed out that, naturally, they want the replacement product to meet the same technical characteristics as the original one, including in terms of the proper functioning during the warranty period established in the specification (three years).

Moreover, in the positive right, at some point, there was a provision according to which „durable products replacing the defective ones within the warranty period will benefit from a new warranty period, which runs from the date of exchange of that product" [Government Ordinance no. 21/1992 on consumer protection, Art. 14 paragraph (3), original form]. Art. 1.169 Civil code indicates that the parties are free to enter into any contracts and to determine their content, within the limits of the law, public order, and morals, and the contractual clause 18.5 shall fall within these limits and is not disproportionate.

Compared to the factual and legal situation outlined above, an analysis of the other issues claimed by the appellant is superfluous, it cannot change the fate of the award procedure initiated by the contracting authority, for the purposes of making it compatible with the legal provisions, but rather lead to confirming the existence of other irregularities, that would strengthen the solution to cancel the tender for lot 1, ordered above, especially because, despite the vehemence that transpires in the point of view of the of authority, the latter does not bring technical arguments against those underlying the appeal, namely to prove that the technical specifications imposed indeed reflect the objective needs of the hospital, and did not discriminate [among other things, the objecting company serious presented clues that only one type of CT / MRI unit (GE Healthcare) is fully compliant with the technical chart].

2 REMEDYING THE REQUIREMENTS OF THE SPECIFICATIONS

The appellant directly criticizes a number of 7 datasheets considered as belonging exclusively to the Toshiba manufacturer, and indirectly analyses a number of specifications in close contact with the criticised ones, claiming that there are „pair" specifications, a lower value of one being compensated by a greater value of another one, so the performance of a product cannot be assessed only with the analysis of a specification, being necessary to consider the full product. It also criticizes a series of specifications stating that they are unclear, their rephrasing being necessary.

In reply, the contracting authority claims that the technical specifications criticized belong to several producers, even the appellant having some products that meet those specifications. The appellant, both in the appeal, and in the submitted conclusions, explains what each of the criticised parameters means, respectively how to practically translate a lower or a higher value. The contracting authority, in its point of view, does not answer at all the technical arguments raised by the appellant, as it does not answer if there are several devices that answer individually to all the requirements of the tender documentation. On the other hand, the appellant asks the Authority to be ordered to eliminate or modify these technical requirements so that the Authority pursues a minimum performance of the equipment in the requested class (CT with 16 slices) (according to „the lowest price" awarding criterion), so as to allow more economic operators to participate in the Procedures. In other words, the appellant asks that the technical specifications are aligned so that the equipment with 16 slices can take part in the procedure, and not only those that have more slices ,'.

The appellant's requirement, as set out repeatedly, cannot be considered because the contracting authority has not required CT with 16 slices, but CT with minimum 16 slices, none of the economic operators criticizing this requirement. If the appellant holds an equipment with a bigger number of slices, that meets the criteria, nothing prevents it from participating in the procedure with that equipment. The appellant argues repeatedly that they checked the 16 slices CT equipment, but only found a Toshiba one to meet the requirements. As a source of information, the appellant indicates the ITN Table. However, in that table, attached to the statement of appeal, to demonstrate that the specifications are only met by one equipment, presents the comparative data of Toshiba Achilion RXL equipment with 32 slices. Therefore, the contester is trying to prove that although an equipment with at least 16 slices was required, the technical specifications do not allow any equipment in this range to participate in the proceedings, being related to equipment with a higher number of slices.

In the analysis, the Council will consider that the „number of sections rotation in the acquisition: minimum 16" specification („Number of rows" in the ITN table) has not been criticized by any operator, therefore „minimum 16" means that any tenderer may participate with an equipment with a larger number of slices. In addition, the comparison with Toshiba equipment made by the appellant is partially correct, as it compared the 16 slices equipment from three producers, with the Toshiba Achilion RXL, with 32 slices equipment.

The first technical specification criticized by the appellant is related to the „Vertical position of the table outside the gantry: minimum in the range 35-80 cm". The appellant states that no 16 slices CT equipment, whether manufactured by ..., GE or Philips, cannot lower the patient table to a minimum height of 35 cm. All the producers mentioned provide a minimum height of the table of 45-50 cm, which is considered optimal to position the patient. The only manufacturer to offer a minimum height of 31.2 cm table is the Toshiba manufacturer. From the point of view of the clinical / medical relevance presented by the technical specification, lowering the table below 45-50 cm presents no advantage for European patients, because including the case of bringing a patient on a stretcher or in a wheelchair; the convenient height is in the range 45-50 cm. From the point of view stated, the contracting authority showed that it has changed this requirement, in the sense of a greater access, in the response to clarifications offered another potential tenderer

In the reply given to the point of view expressed by the contracting authority, the appellant shows that indeed, the technical specification has been amended by inserting another interval, minimum 44-99 cm instead of 35-80 as it originally was, specific to another manufacturer, General Electric, respectively, also excluding Toshiba.

Analysing the ITN table, the Council notes that four General Electric equipment and a Hitachi one meet this parameter. The Toshiba equipment appears to be excluded because the maximum height is 95.6 for the Toshiba Achilion RXL equipment and 98.8 for other equipment. Philips equipment does not fall within that range, as for some, the minimum height is 57.9, and for the one with the height of 43 cm, the maximum height is of 97 cm, so neither this one can be accepted.

The appellant also shows that increasing the maximum lifting parameter is unjustified, because it does not take into account new construction techniques of the devices that do not require lifting the patient at bigger heights.

What is relevant in judging the correctness of range „Vertical position outside the gantry's table" (Patient table range of movement-vertical), is the practical usefulness of this parameter. As explained by both the appellant and the contracting authority, the minimum necessary level should be established so that it allows the patients to sit on the table. Lowering should be possible to patients on stretchers or wheelchairs, as well as smaller ones. Given that the authority agreed to amend the minimum level of 33 to 44 cm, its refusal to accept one more centimetre in addition is unacceptable, given that it cannot be considered that this centimetre would hinder the patients' access to the equipment.

Equally, the maximum lift is justified by the need to introduce the patient in the gantry, and not for him to stand at high altitude. The contracting authority does not justify, in any way, why they rose this parameter so much. Certainly, none of that equipment has been designed so that the table height does not allow scanning of the patient. If in terms of minimum height, the contracting authority has a number of explanations, lifting the patient table to 99 cm is not justified, since for some types of scanning equipment the scanning can also be done at lower heights.

The Council therefore considers that accepting the appelant's requests, namely the 45-80 range is justified, being common to several devices in the analysis presented in the ITN analysis.

On the technical specification „Large focus of min. 2 mm² „, the appellant claims that this requirement is an abusive requirement because it actually eliminates all the producers with better performance than the X-ray tube manufactured by Toshiba, given the fact that the size of the focuses should be as little as possible, justified by the fact that a small focus is a precondition for achieving the best possible spatial resolution of the image.

The contracting authority states that because of a typing mistake, this formulation was erroneously placed in the technical specification, the correct wording being the one for the small focus, maximum area, as, practically, this criterion could not fit any of the existing equipment on market. Thus, the authority suggest to the Council, as a corrective action for the documentation to rephrase this criterion: „Big focus max 2 square mm".

In recognition of the facts sustained by the appellant, and also the fact that in the written conclusions the appellant did not recall on this requirement, the Council will admit this head of claim and will order to amend the requirement as proposed by the contracting authority, respectively „Big focus max 2 square mm".

On the technical specification „Maximum cooling rate of the anode: minimum 850 KHU", the appellant shows that this feature of the equipment points out that the rate of cooling of the X-ray tube anode is closely related with another parameter referring to the storage of heat in the anode, namely the thermal storage capacity of the anode. If the Rx tube has a high capacity for heat storage, then there is no need for a high rate of heat storage, because the tube can hold more heat. However, if the storage capacity is smaller, as in this case, of at least 4 MHU (even the value of the equipment produced by Toshiba, for example), then it requires a higher cooling rate, and hence specification of the Authority for a high cooling rate - which the 16 slices CT equipment produced by GE, ..., and Philips (MX16 Evo) do not meet, these producers' bids would be eliminated, although their heat storage capacity is much higher.

Analysing the attached ITN comparison, it can be seen that none of the GE equipment or ... can fulfil this requirement („Dissipation rates, HU min"), and Philips equipment that would meet this technical specification, does not meet the technical specifications for the Thickness of the section.

The contracting authority's defences are irrelevant in the light of the appellant's allegations. Thus, although she righteously explains that this parameter must be correlated with the heat storage capacity of the anode „Heat storage', she only speaks about the specification of „Dissipation rates, HU min". The appellant does not ask, as it is clear from the complaint, to decrease this parameter, but calls for a correlation between the two parameters, so that the device has a capacity for proper operation. In this regard, the authority provides no explanation to the Council.

She claims that she cannot accept the decrease of this minimal parameter, since it would damage the quality of the requested equipment, exposing patients to additional risks and the hospital to adjacent unnecessary costs. More, she requires ... to quote better technology to the minimum requirements, because according to the observance of proportionality and efficient use of funds raised by the appellantand considered by the authority, the potential rating from ... the Somatom Scope equipment - the lowest one in the 16 slice range - can be exchanged for technically superior equipment, like Somatom Emotion 16 or Sensation - especially given that the budget allows quotation of flagship equipment in the category of min 16 slices, or even superior, to satisfy the minimum technical imposed by the specification.

The Council, checking Somatom Emotion 16 equipment's specifications, and also the Somatom Perspective 128 slices equipment in the upper range, notes that they do not meet this requirement, even though the contracting authority claims that they meet the specifications. Thus, the defence of the contracting authority is contradictory, on one hand, claiming that a number of devices are technologically superior and, still, excludes them from the procedure. The contracting authority does not take account in the drafting of specifications, of the offsetting of that parameter by another functional parameter, and furthermore, not even when notified, does not make a corroborated analysis of the technical specifications, to allow the widest participation possible of the tenderers to the procedure, with competitive products. On the other hand, although it indicates a series of equipment as technologically superior, we can clearly see that they cannot participate in the procedure.

Therefore, it is necessary for the contracting authority to reconsider both „paired" technical specifications to check how the storage capacity of the anode compensates for the low cooling rate of the anode.

On the technical specification: „The effective length of the detector on the z-axis (in the isocenter): minimum 24 mm" the appellant shows that this requirement cannot be met by any of the equipment ..., GE, Philips and is in total contradiction to the technical specifications of the specifications relating to the „minimum thickness of the sections in purchasing the spiral: max. 0.6mm" and „The minimum thickness of the sections in the axial purchase max. 0.6mm" but also with technical specification „Number of detecting items on the z axis: Minimum 24 „.

In the arguments that have been presented, the appellant shows that all the 16 slices CT equipment of the manufacturers ..., GE, Philips have 24 columns of detector, of which 16 columns have the thickness of 0.6 to 0.625 mm thin, in order to provide thin sections of 0.6 to 0.625 mm, and another 8 columns of detectors with double thickness, respectively 1.2-1.25 mm, in order to also provide sections of this thickness (and not only thin sections). If it is required that the detector's thickness is of 0.6 mm (a condition that cannot be fulfilled by the GE and Philips equipment- see ITN „Reconstructed slice with options mm") where the maximum effective length of the detector is (for a minimum of 24 columns detectors, as requested) 16 x 8 x 1.2 = 0.6 + 19.2 mm, so it is impossible to be 24 cm, as required in this technical specification. ..., that respects the requirement of Thickness of detector element of 16 mm, is eliminated (together with GE and Philips), because the effective length of the detector only reaches the value of 19.2 mm.

The appellant's argument is continued, showing that a small thickness of the detector element, which is likely to eliminate the GE and Philips equipment (but not ...), and on the other hand, requires a total effective length of detectors of minimum 24 mm, which cannot be obtained by the equipment ..., GE (and one of the Philips equipment) even if they meet the minimum number of detector columns (required

to be of at least 24). The Philips equipment that would meet the technical specification of the effective length of 24 mm of the detector has a minimum thickness of the section of 0.75 mm, so it doesn't respect the maximum thickness regarding the minimum section requirement (max 0,6mm).

By analyzing the submissions of the parties and the ITN table, the Council notes that the appellant company has made a reference above regarding the Effective length of the detector for the 16 slices equipment, without making reference to the equipment with a larger number of slices. The conclusion of the comparison is however made by reference to the Toshiba Achilion RXL equipment, with 32 slices. From the ITN table results that there are several units with a length of the detector bigger than 24 mm, even the appellant holding a number of 4

devices with a length of the detector bigger than requested (Somatom Definition Flash, Somatom DefinitionAS + Fast Care, Somatom Definition Edge, Somatom Perspective) for equipment with a higher number of slices. As a result, the Council will reject this request, with no indication that the appellant's participation would be restricted by the existence of this technical specification.

On the technical specification „Low contrast resolution „object „of up to 3mm for difference in contrast of 0.3% on the 20cm CATPHAN specter, detected with a loading dose of max. 20 mGy" the appellant shows that the resolution of low contrast is the ability of the equipment to differentiate an object that is hardly visible to the environment in which it resides, ability directly connected not only with the object size, with the difference of contrast and radiation dose indicated the specification of the Authority, but also with the scanning parameters used (rotation time, anode voltage, thickness of the slice used), and the algorithm used. What is relevant for the Council in analyzing this request is the appellant's claim that this parameter is defined differently by each manufacturer (the producer ..., defines the low contrast resolution, on the 20cm CATPHAN specter for a 5mm object, for a contrast difference of 0.3%, 3 HU (Hounsfield Units) respectively, at a rotation of 0.6s, a voltage of 130kV, on a section of 10mm, and a dose of 12.88 mGy).

Watching the attached ITN comparison („Low contrast resolution mm at %"), it can be observed, indeed, that each of the manufacturers (GE, Philips, ... and Toshiba, Hitachi) defines in a different way this parameter. In the point of view, the contracting authority shows that after the market study, this feature has been reported at a scanning standard of a specter used by all the manufacturers and requires reporting the workload - irradiation degree maximum allowed to detect a clinical detail- tissue, structure, of 3 mm.

The Authority shows that if the petitioner does not make measurements on a 3 mm detected object, but on another object, accepts the mathematical equivalence on the respective measurement, and therefore, the size of the object declared by the manufacturer is not relevant, but the maximum value of the permissible dose to scan a 3mm detail.

It will thus require a statement from the manufacturer, or a dose equivalence when detecting a 3 mm object in evaluating the classification in this criterion.

The point of view expressed by the contracting authority is relevant, in that it admits that each producer establishes another way of measuring this parameter, so what the appellant claims` is correct. The Council also notes that the contracting authority indicates that they will ask for statements from the manufacturer, and will mathematically equate the measurements, if they are performed differently, but the mathematical equivalence of these measurements had to be indicated, in accordance with the principle of transparency, in the tender documentation. Also, the manufacturer's statement in proving this parameter should have been required in the tender documentation, including the information that should have been contained in it.

As shown in the data presented by the appellant, its low contrast measurements were made on 5 mm objects, not 3mm, a lesser workload - irradiation than the one required by the authority, 12.88 mGy, respectively. Other manufacturers measure smaller objects with a bigger workload -irradiation. As stated by the appellant, the scan quality also takes into consideration other parameters than those indicated by the contracting authority. Therefore, in case the contracting authority wishes to equate these measurements, it should clearly indicate the validation mode and testing conditions, as well as the information that the manufacturers must give in the respective statements. These data should be made available to the economic operators before submitting their tenders, requiring specification within the tender documentation.

It is therefore necessary to publish this information in SEAP, by means of clarification.

On the technical specification „mA range: 10-300 mA minimum interval" the appellant appeals to the ITN comparative analysis („mA range"), the minimum required value for the anodic current, of 10 mA, can only be met by the 16 slices CT equipment manufactured by Toshiba and GE, not being able to be met by ... and Philips.

The appellant considers that value of 10 mA has no clinical application because no CT imaging protocol can use a current so small as to obtain medical diagnostic images. Therefore, this requirement does not show any clinical / medical relevance, representing an unjustified obstacle to the participation of economic operators, and is contrary to the principle of proportionality.

The Authority considers this technical feature as an important criterion that defines the quality of a scan, especially in cases where very small doses are needed - children, people who are exposed very often to X-rays examinations, being fundamental in defining picture quality and, consequently, establishing the imaging diagnostic.

Many of the scans made with this type of device are carried out in scanning conditions requiring low amperages (values at the lower limit of the mA interval), but that achieve a very image quality, thus a flexibility and large range of this parameter allows for an optimal selection of this parameter, so that it allows various scans with safety conditions of the patients, and generating diagnostic images.

Comparing the information submitted by the parties, the Council notes that there is no scientific evidence showing that an amperage of 20 mA, an amperage of an ordinary camera battery, would be harmful to the scanned patient, or that it generates a greater amount of radiation. On the contrary, the amount of radiation is adjusted depending on the patient, and a lower or higher amperage is important for the possibility to capture an image by scanning. Moreover, the analysis of other tender documentation published in SEAP of other contracting authorities, for similar devices, made the Council observe that these values started from 25-30 mA, the fore documentation being one of the most restrictive in this regard. It is worth noting that none of the devices ..., including the ones with a large number of slices, meets the requirement of such a small amperage, despite the assertions of the contracting authority.

On the technical specification „Dose reduction through iterative type system - in standard configuration- iterative dose reduction system performance of at least 50-60% reduction of dose", the appellant calls for the insertion in this technical specification of the insertion of the claim that the amount of reduction of the dose must be certified by an accredited international body (ex. FDA – Food and Drugs Authority). It requests that the minimum value of the parameter required, being a relative one (the indicated percentage is compared with another value), and not an absolute one, leads to the paradoxical situation in which a manufacturer compares, for a specific organ, the dose from a standard protocol (eg. 20 mSv) with the dose for the same organ obtained with the iterative image algorithm, 10 mSv, and states that the dose reduction is of 50%, and another producer who uses the low dose protocol for the same organ (low dose) of 10 mSv (and not a standard protocol 20mSv), and with the iterative reconstruction procedure uses a dose of 8mSv, reduces the dose by only 20%. In this manner, the manufacturer who provides the lowest dose for the patient (8mSv) is rejected because it does not reduce the dose by at least 50%

although it uses a much lower dose than the other producer using a higher dose (10mSv), but reduced the initial one by 50% fulfilling the mandatory requirement of the specifications!

The contracting authority, in the point of view, formulates defenses that are foreign to the requests of the appellant. They explain the importance of this functional parameter, although no one denied this importance, as it claims that this specification should not be removed, although no one has requested this. In addition, it hasn't submitted any defense in regards with the existence or absence of a uniform assessment criteria of this parameter.

Iterative dose reduction level is not found in the ITN Comparative Analysis document, the appellant claiming that there are no common measurements for all manufacturers, so that the results could be compared fairly, transparently and objectively. They considers when accredited by a specialized international body, all these relative percentage values are neutrally certified, and do not represent only uncertified and / or unproven statements from the producers.

Having to rule on this issue, the Council observes that none of the parties shows if there are standards for measuring this parameter, in order to ask an authorized laboratory or body to perform these measurements. Meanwhile, none of the parties provides any information showing what a check by an approved body consist of, which would be its duration, and the costs. Also, given that there are no uniform standards for measuring these parameters, the risk of using different methods also exist if the producers would address an authorized body. The only way to uniformly compare the offers should be the clear statement of the testing conditions in the tender documentation, ie using a standard protocol, for example, 20 mSv, or low dose, for example, 10 mSv, so that all tenders can be uniformly comparable. It is therefore necessary for the contracting authority to publish clarifications on this aspect.

As for the requests of petitioner regarding the technical specifications considered "ambiguously filed and unproportional to the procedure aim", the Council notices that the contracting authority accepts as founded the following requests:

- „high speed processor min dual core 2 GHz for acquisition console", in „high speed processor min dual core, minimum 2 GHz for acquisition console"
- „high speed processor min dual core, minimum 2 GHz for post-processing console"
-"Acquisition and reconstruction console of 1 LCD colour monitor, screen size 19 inch, resolution 1280x1024" in „Acquisition and reconstruction console of 1 LCD colour monitor, screen size minimum 19 inch, minimum resolution 1280x1024"
-"post-processing console 1 LCD colour monitor, screen size 19 inch, resolution 1280x1024" in ,,1 LCD colour monitor, screen size minimum 19 inch, resolution minimum 1280x1024"

Therefore, the Council will dispose the elaboration of a clarification regarding these remedies.

As for the technical characteristic „physical number of detectors on the detector column min: 670- 800 elements of detector", the appellant requests the specification of minimum number, not an interval, because as the number is higher, the best-performing is the equipment. It claims that any number of elements above 670 would meet the requirement, so it is useless to establish an interval. The defences of contracting authority are different from the requirements of appellant. It claims that ... it misleads the Council with own statement, trying to lower the minimum level of specification to Somatom Scope with the device from lower range of....

The Authority claims that it wants to impose a minimum quality level and access to current state-of-the-art technology and requests the Council to reject the remedy request proposed by SC ... SRL.

The Council finds founded the criticism filed by appellant. Checking the table ITN, the Council notices that the producers expressed this parameter by a fixed number because these detectors physically exist and can be counted. The higher the number of detectors, the more performing is the device. The appellant does not claim the reduction of number of detectors, as the contracting authority unfoundedly claims, but wants to eliminate the interval so that there are no doubts of interpretation. Minimum 670 detector elements do not mean that their number can lower below this number, but it means that any number from 670 to maximum technological number can be accepted. Therefore, it is necessary to accept the change of tender documentation.

Just as in case of previous specification for the technical specification „examination table travelling field on horizontal 150-170 cm" the appellant makes the same clarifications: it is not necessary to mention an interval, because the higher this parameter is, the more performing is the device. Thus, it must be mentioned only the minimum accepted, respectively „minimum 150 cm". Just as in the previous case, the authority did not understand the requests of the appellant, who argued that the requirement was „clear and covering for the minimum technology level required because various producers have different values for this fundamental parameter, which assures a good quality of scanning and a diagnosis image after this scanning. Moreover, the characteristic of this parameter requires the covering of a field of movement, scanning which allows for the covering at any time of various examination requirements". Checking the table ITN, the Council notices that this parameter is provided for all the producers as fixed number, not as interval, respectively 150 cm, 170 cm, 160 cm, 190 cm, 200 cm, 239 cm. The Council acknowledges that the two Parties, although they do not agree, in reality claim the same thing, „minimum 150 cm"

which means any size higher or equal to this number. Therefore, even if „difference manufacturers have different values for this fundamental parameter", they can participate in the procedure, even superior devices from the range ..., to which table travels 200 cm. It is clear that the contracting authority did not understand the statements of the appellant, its reasons even enforce its statements. As the requirement of contracting authority is now formulated, the devices which have a travelling field higher than 170 cm would be excluded or its points of view shows otherwise, it accepts any parameter higher than 150 cm, including 200 cm.

Therefore, it is necessary to change the requirement, meaning that „examination table for travelling on horizontal: minimum 150 cm"

This is the correct interpretation and it results from the other technical parameter criticised by the appellant, respectively „Horizontal length of scanning minimum interval 150- 170 cm", to which the appellant requires the exclusion of upper limit and the establishment of minimum limit, ,,minimum 150 cm". If we took into account the allegations of contracting authority, it would result that the table travels in gantry from centimetre 150 to centimetre 170, which are the minimum requirements. In reality the requirement is the scanning should be on a surface above 150 cm, from centimetre 1 to maximum, the larger the scanning surface, the more can the device be used on taller patients.

The Authority claims that the "characteristic of this parameter imposes the coverage of a movement, scanning field which allows for the coverage at any time of different examination requirements. It is comprehensive from the point of view of European height average - between 160- 175 cm, man/woman, so it is fully justified".

The specification ,,minimum 150 cm" covers this specification because in the previous parameter the manufacturers express it as fixed number, not as interval, respectively 150 cm, 170 cm, 160 cm, 190 cm, 200 cm, 239 cm.

If the contracting authority wanted a higher limit of this parameter, it

should have indicated it expressly, not indicated an interval, because no manufacturer has expressed this specification as an interval.

Thus, the Council considers as relevant the following legal provisions: - Art. 35 of GEO no. 34/2006: ,,(2) The technical specifications represent requirements, prescriptions, characteristics of technical nature which allow each product, service or work to be described objectively so that it corresponds to the needs of contracting authority.

(3) The technical specifications define as applicable, without limitation to the following characteristics regarding the quality, technical level and performance, requirements regarding the impact on environment, safety in operation, sizes, terminology, symbols, tests and testing methods, packaging, labelling, marking and user instructions for the product, technologies and production methods, and quality assurance systems and conditions for certification of conformity with the relevant standards or such similar standards. (..)

(5) The technical specifications must allow any bidder equal access to the awarding procedure and must not have as effect the introduction of unjustified obstacles which can restrict the competition between economic operators."

- Art. 33 par. (1) of GEO no. 34/2006 „The Contracting Authority has the obligation to specify in the tender documentation any requirement, criterion, rule and other necessary information to assure the bidder/ applicant complete, correct and explicit information regarding the application of awarding procedure".

It results that the role of technical specifications is to describe better the product so that it corresponds to the objective needs of contracting authority, and not to fence in the access of bidders to the awarding procedure. What the contracting authority wants is a state-of-the-art CAT scan computer produced in 2014, with a series of superior technical specifications. Therefore, the manufacturers who meet these requirements must not be restricted by introduction of restrictive technical specification which can generate interpretation in the tender evaluation stage. It is important that the bidders know from the beginning the documents and information they need to know, the method in which the contracting authority considers a technical specification fulfilled.

Considering the above, by virtue of art. 278 par (2) şi (4) of GEO no. 34/2006 for the awarding of public procurement contracts, contract for concession of public works and contracts for concession of services, further amended and supplemented, the Council will partly admit the contestation filed by SC ... SRL, in contradictory with S... and will dispose:

- the changing of technical specifications regarding „The position on vertical of table outside of gantry: minimum in interval 35-80 cm", „Large focal point minimum 2 mm²", the maximum cooling rate of anode: minimum 850 kHU", range mA: minimum range 10-300mA, as it results from motivation;

-rephrasing of technical specifications „Physical number of detector elements on detector column: minimum between 670-800 detector elements", Requirement of patient examination table: travelling field on horizontal: minimum interval 150-170cm", „Acquisition console: "high speed processor: minimum dual core 2x2 GHz", „Post-processing console: high speed processor: minimum dual core 2x2 GHz"; Scanning parameters: - Horizontal scanning length: minimum interval 150-170cm"; Acquisition and reconstruction Console: -2 LCD colour monitors, screen size: min. 19", resolution: min.1280x1024"", Post-processing console: -1 LCD colour monitor, screen size: min. 19", resolution: min.1280x1024 for comparison and follow-up studies ", as it results from the motivation;

- clarification of technical specifications „Low contrast resolution: "object" of maximum 3mm for a contrast difference of 0,3% on phantom CATPHAN 20cm detected with dose charging of max.20 mGy», ,,reduction of dose by iterative system in standard configuration, performance of iterative dose reduction system minimum 50-60% dose reduction", as it results from the motivation.

By virtue of art. 278 par (5) of GEO no. 34/2006, it rejects as unfounded the criticism filed by appellant regarding the technical specification „Effective length of detector on axis z (in isocentre): minimum 24 mm".

3 DOCUMENTATION OF RESTRICTIVE ATTRIBUTION

In this regard, he developed the documentation of the related attribution and published, in S.E.A.P., the invitation of participating nr. .../..., which states that the estimated value of the contract, without VAT, is worth RON 150,000, representing the equivalent of EUR 33,928.20, without VAT.

Unhappy with the specification requirements, S.C. ... S.A. handed in the present appeal, requesting the deletion of the requirements / conditions stipulated in the complaint considered restrictive in its opinion. Analyzing criticisms made by S.C. ... S.A., the Council notes that they concern aspects stated at paragraph 6, chapter III – "The purpose and the object of the contract", paragraph 2 of chapter V "Provider obligations" and paragraph 17 of the chapter previously mentioned.

Moving on to the analysis of the first requirement criticized by S.C. ... S.A., the Council retains the following aspects:

the subject of the service contract submitted to the attribution procedure in question is the acquisition of maintenance services, repairs and the periodic technical inspection for the FSA rolling stock, in order to ensure normal parameters for the functioning of cars, taking into account the technical characteristics imposed by the producer and to ensure travel conditions of maximum security for passengers. In the annex 1 of the specification there are presented car brands from the contracting authority endowment that make the subject of providing repair and maintenance services;

S.C. ... S.A. criticizes the request provided by the contracting authority within the specification at chapter III "The purpose and the object of the contract", paragraph 6, namely "Provision of services will be ensured by a service unity authorized under the law, the holder of the technical authorization of functioning (classes I and II) issued by RAR and checked for the current year, equipped with machinery, equipment and specific SDVs, specialized personnel and qualified for the car brands listed in Annex 1", in conjunction with paragraph 2 from the chapter V "Provider obligations", which states that "The service supplier must be approved by SC Automobile Dacia and he has to provide service under warranty conditions for Dacia Duster vehicles as well as the F.S.A.'s rolling stock includes this brand also.";

The reasoning of the appellant in favor of the arguments that state that the requirement concerning the unlawful request of the contracting authority of S.C. Automobile Dacia S.A.'s agreeing upon the Dacia Duster auto-vehicles is based, on one hand, on the fact that the technical authorization issued by the Romanian Car Registry is the document certifying the economic agent's technical capability to perform repair, maintenance etc. operations in accordance with the legislation in force (the document is issued to the economic agents that meet the service, technical documentation and technological conditions, that hired skilled workers eligible for performing operations and that fulfill the good repute and professional competence requirements), and on the other hand, according to the Enactment no. 82/2000 regarding the authorization of the economic agents that perform repair & adjustment operations, constructive changes, reconstruction of road vehicles as well as dismantling ELVs, approved with amendments through Law no. 222/2003, the economic agents that perform these specific operations within the guarantee period of new vehicles must also have the manufacturer's or its authorized representative empowerment. Therefore, from the interpretation of the law text it is clear that, for vehicles that have exceeded their warranty period, the manufacturer's empowerment condition is not compulsory, and from the 31 vehicles that form the rolling stock of the FSA only 4 Dacia Duster cars are still under the warranty period given by the manufacturer.

Also, by examining the copy documents in the case's file, the Council notes that as a result of the complaint made by S.C. ... S.A., following the 256 ind. 3 of O.U.G. no. 34/2006 directives, published in the ESPP, on 28.09.2015 the contracting authority made the following remedial action:

"Restrictive requirement according to documentation: The service supplier must be approved by SC Automobile Dacia and he has to provide service under warranty conditions

for Dacia Duster vehicles as well as the F.S.A.'s rolling stock includes this brand also."

Retrieval measure adopted: The service supplier must be rehabilitated by S.C. Renault Commercial Roumanie S.R.L. or by the authorized representative of the supplier to provide service under warranty for the new Dacia Duster vehicles, as the F.S.A. rolling stock includes 4 vehicles of this type under warranty".

regarding the cause background, the Council will proceed to solve the criticisms in question, analyzing the way in which the contracting authority has submitted the documentation of attribution, taking into consideration the legislation on public acquisition domain and the arguments submitted by petitioners and also, taking into account the retrieval measure adopted by the contracting authority;

The Council determines that in this case, there are considered incidents the following legal provisions:

Ordinance no. 82/2000 regarding the authorization of economic operators which develop repair activities, adjustment, constructive changes, reconstruction of road vehicles and also, dismantling ELVs, approved with amendments by Law no. 222/2003, namely:

Art. 1.

par. (1) This ordinance applies to all economic agents developing activities that could influence constructive, functional and quality parameters of road vehicles towards the legal regulations on the technical conditions regarding the admission and maintenance into service on public roads.

par. (2) For the purpose of this ordinance, the activities that can influence constructive, functional and quality parameters are the following:

a) repair activities, maintenance and functional adjustments of road vehicles;

b) repair activities, refurbishment, installation, verification and calibration of components and equipment of road vehicles;

c) constructive changes and the reconstruction of road vehicles;

d) the dismantling activities of ELVs, for marketing and recycling purposes.

par. (3) The activities listed in par. (2) can take place only in specialized workshops, based on the technical authorization.

(4) The technical authorization is document certifying the technical capability of an economic agent to perform, in accordance with the current legislation, the activities referred to in par. (2). Art. 2

par. (5) Economic agents that perform specific activities within the guarantee period of new vehicles must also have the vehicle manufacturer or its authorized representative's empowerment.

Ch. II point 1 provisions: Procedure rules regarding the assessment of the technical capability and the authorization of economic operators that perform repair, maintenance and / or functional adjustments operations to road vehicles, product reconditioning, replacement of chassis and / or bodywork of road vehicles in regulation RNTR 9 / 2005, approved by Order no. 2131/2005, subsequently amended and supplemented, which specifically states that repair, maintenance and / or functional adjustments operations to road vehicles, product reconditioning, as well as replacement of chassis and / or bodywork of road vehicles can only be provided by economic operators that have the proper technical capability and that, following an assessment, were authorized by RAR;

Minister of Transport Order no. 1022/2013 regarding Ch. II Classifying economic operators depending on the type and complexity of the activity from Appendix 1 to the Minister of Transport no. 1022/2013 on amending and supplementing regulations regarding the authorization of economic operators that that perform repair, maintenance and adjustment operations, constructive changes, reconstruction of road vehicles as well as dismantling ELVs RNTR 9 adopted by the Minister of Transport, Construction and Tourism Order no. 2131/200 defines the concepts of classes I and II as follows: „Class I – economic operators that meet the authorization conditions to carry out all the provided operations to at least one of the A1.8 - A1.1 systems and that have the empowerment from a vehicle manufacturer or its authorized representative; Class II - economic operators that meet the authorization conditions to carry out all the provided operations to at least one of the systems A1.8 - A1.1 and that do not have the empowerment from a vehicle manufacturer or its authorized representative. „

Taking into account the above legal texts, the Council notes that the legal possibility for the economic operators to provide the operations can be acquired through RAR authorization after the assessment.

The Council also notes that the requirement requested by the contracting authority on the empowerment from the respective manufacturer or its authorized representative to the economic agents that carry out specific activities within the guarantee period of new vehicles is fully justified under the provisions of art. 1 par (4) in conjunction with art. 2 par (5) of the Ordinance no. 82/2000 stated above. In relation to the above mentioned, the complaint made by S.C. ... S.A. regarding the technical authorization request issued by the Romanian Car Registry is unfounded and the complaint regarding the agreement from the respective manufacturer or its authorized representative, is devoid of purpose given the remedial action taken by the contracting authority, action that was published in the ESPP, on 28/09/2015.

It is also relevant in the settling the argument made by the contracting authority in favor of the request that the provider has to be authorized by the manufacturer or its authorized representative, namely that the corrected requirement is related to the contract's object, is required in strict correlation with the needs of the contracting authority, whereas this requirement has been established pursuant to the provisions of the supply vehicles contract no. 29 / 05.27.2015 concluded by the contracting authority with S.C. Renault Commercial Roumanie LLC, which in art. 15.4 states that „if the malfunction is covered by the warranty, repairing and replacement of the faulty parts is free of charge, the Supplier being obliged to repair the malfunction or replace the product (if there is no technical solution for the repair) within the agreed period, without any additional costs for the Purchaser. „Therefore, the contracting authority notes that this contractual obligation cannot be fulfilled by an automobile repair services company unless authorized by the vehicle manufacturer; car repairs to an operator which is not approved by the manufacturer can only be made against payment, which implies additional costs for the contracting authority to perform them.

Regarding the last complaint made by S.C. ... S.A. towards the request of the contracting authority of being provided a vehicle in exchange for the whole duration of immobilization of the vehicle in the car service, the Council notes its groundlessness because of the following reasons:

In chapter V „Provider obligations", at pt. 17, the contracting authority mentioned the next prevision: „The service supplier will provide the Beneficiary, for the whole duration of the vehicle immobilization, a vehicle in exchange";

the complaining company criticizes the fact that the contracting authority, by requesting a car in exchange, it actually requests another service, in addition to the one of vehicle repair and maintenance, namely the vehicle renting (even if it is not charged a rent per day, it is obvious that the price at which the contract will be assigned will include that cost regarding the use of the vehicle)

in response to the allegations of the complaining company, the contracting authority states in the expressed point of view that "it has been requested a vehicle, it did not ask the operator to own a one. This provision concerning the request of the contracting authority to provide a vehicle to exchange for the whole duration of the immobilization of the vehicle in car service is a common practice of the companies that have car services as object of activity";

analyzing the way in which the contracting authority has

developed and produced the requirement in question, the Council considers that by this requirement the contracting authority wants its activity not to be disturbed, so it rightly applied the principle of precaution, for respecting the services supplying terms by the provider, managing in this way the risk of activity interruption;

in consideration of those previously mentioned there are relevant in settlement the allegations of the contracting authority, according to which "FSA has a small number of cars in relation to the work they perform and as a result, the restraint of a vehicle over a long period of time blocks the developing of the activity in good conditions and creates disturbances that can be important in terms of economy, finance and image, depending on the type of activity that is affected"'

in terms of establishing the related estimated value of the public acquisition contract in question, according to the art. 25 par. (1) of the O.U.G. no. 34/2006, "the contracting authority has the obligation to estimate the value of the public acquisition contract based on the calculation and summation of all amounts payable to fulfill the respective contract, without the tax added on value, taking into account any form of options and, as far as these can be anticipated at the moment of estimating, any possible additions or increases in the value of the contract";

in a correlative way, according to the art. 26 of the emergency ordinance mentioned above, "the estimated value of the public acquisition contract must be determined before initiating the procedure of assigning the respective contract. This value must be valid at the moment of sending to publishing the notice of participation or, if the procedure of assignment does not require the publication of such a notice at the moment of sending the participating invitation".

taking into account the previously established legal framework, the Council considers that the estimated value is on the one hand, a tool available to the contracting authority to determine the amount of the sums to be made available from the budget, and, on the other hand, is a barometer used by the contracting authority to assess the submitted financial proposals. In other words it is the contracting authority's duty to correctly estalish the estimated value of the public purchase contract by calculating and summing up all payable amounts to fulfill the contract in question, taking into account any form of options;

the Council will not take into account in the settling the criticism regarding the fact that the requirement in question is restrictive in terms of creating an advantage to those economic agents that are car dealers as well but also own a car service, since, according to the legislation in force on public purchasing, the bidder may participate in the procedure by assinging a service contract in their own name, may associate, may subcontract and can benefit from third party support;

- For the above stated reasons, the Council rejects the criticism as unfounded, given that the information provided for the preparation of the offer reflects the needs of the acquiring unit according to Art. 35 par (2) O.U.G. no. 34/2006. For the mentioned provisions, the technical specifications stand for requirements, prescriptions or technical features that allow each product, service or work to be described objectively in such a way as to meet the need of the contracting authority;

In this given context, the Council considers that the contracting authority is the only entity that knows exactly the needs of its objectives, any acquisition that would not lead to their complete fulfillment would represent an inefficient use of public funds, as long as the contracting authority is the only one that is able to know exactly their needs and objectives and to request from the economic agents the drawing of offers which reflect their own needs acquiring unit according to art. 35 par (2) O.U.G. no. 34/2006;

In relation to the above retained, the Council notes the unfoundedness of the complaint concerning the request of the contracting authority of having a car at its disposal for the whole period of immobilization of the vehicle in the car service, being rejected by the Council as unfounded.

Given all the issues in fact and law mentioned above, under art. 278 par. (5) and (6) of Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession, as amended and supplemented, the Council will reject as unfounded the appeal filed by SC ... S.A., in contradiction with ... and will continue with the award procedure.

4 RESTRICTIVE TENDER DOCUMENTATION

By analysing the criticism filed by S.C. ... S.R.L., the Council acknowledges that it targets issues related to the way in which the contracting authority drew up the tender documentation.

With reference to the case merits, the Council will proceed to the settlement of appeals, by analysing the way in which the contracting authority drew up the tender documentation, taking into account the legislation in force in the field of public procurement and the reasons transmitted by petitioners.

The object subject to the awarding procedure in question represents the purchase of a compact snow fraser for removing the snow from the airports in the guarantee period. In the tender book the contracting authority specified all the technical characteristics which the machine to be tendered must fulfil.

In this procurement procedure, from the examination of documents which are in copy to the case file, the Council acknowledges that for the technical specification mentioned, imposed for the air nozzle from the snow blower, the appellant addressed the contracting authority a request for clarification to which the contracting authority replied according to the letter no. 3144/26.10.2015, published on SEAP, as follows:

„Request for clarification no. 1

In the Tender Book related to the contract notice no. .../... you request that the compact snow fraser be equipped with snow blower (point e) and in "Requirements for snow blower", line 8, "the air nozzle will be located in the center behind the real axles of the snow fraser".

We hereby ask you to accept for the Requirement for snow blower, the point "the air nozzle will be located in center behind the rear axles of the snow fraser" (page 4/6 of Tender Book) and the variant "the air nozzle will be located in center in front of the rear axles of the snow fraser".

The technical variant offered by the equipment we propose, respectively the nozzle is in front of the rear axles, assures a thorough cleaning of snow remains after the passage of snow plough (which removes the largest part of the snow), then comes the brush (located in the center between the axles of the chassis), then comes the snow blower – in the variant which we kindly ask the Contracting Authority to accept, the snow blower is located in front of the rear axles, so that it blows and dries up the area previously cleaned by the snow plough, the brush, and the wheels will roll on a cleaned surface and it will not remain any trodden snow (for the removal of this snow we must intervene again).

The positioning of the nozzles is not so important, but mounted after the axle, it has low efficiency because the passage of the wheel over the snow leads to its hardening, so that its removal becomes more difficult.

Having in view the above, please complete the requirement regarding the nozzle as follows: "the air nozzle will be located in front or behind the rear axles", because its positioning in front of the rear axles proved an increased efficiency in the cleaning of the snow from the airport surfaces.

Answer to request no. 1:

The Contracting Authority maintains the requirements of the tender book.

The requirements of the Tender Book are minimum requirements which must be fulfilled by the tendered product."

The criticism of S.C. ... S.R.L. from the appeal targets the issue presented above for which we required the clarification mentioned above. Thus, the appellant requests the Contracting Authority to change the requirement included in the tender book in chapter II – Specifications and technical characteristics, point e) Requirement for the snow blower „the air nozzle will be located in the center behind the rear axle of the snow fraser" with the „the air nozzle will be located in front or behind the rear axles of the snow fraser".

The reason brought by the appellant for the Contracting Authority to accept the two technical variants is that „the technical variant offered by the equipment we propose, respectively the nozzle should be in front of the rear axles, assures a thorough cleaning of the snow remains coming after the passage of the snow plough (which removes most of the snow) then comes the brush (located between the axles of the chassis), then comes the snow blower – in the variant we request the contracting authority to accept, it is located in front of the rear axles, so that it blows and dries up the area previously cleaned by the snow plough and the brush, so that the wheels will roll on a cleaned surface and there will be no trodden snow".

The Council considers the mentions above as relevant in the settlement, the purpose of the air nozzle is to blow the snow and dry up the surface previously cleaned, before it is trodden by the wheels, so that its location

in front or behind the rear axles of the snow fraser cannot prevent its purpose.

Concerning this problem under analysis we must have in view the provisions of art. 35 paragraph (2) of Government Emergency Ordinance no. 34/2006, according to which the technical specifications included in the tender book aim at objective description of the product we want to purchase so that it corresponds to the requirements of the contracting authority.

The constant practice of the Council is that the requirement or opportunity of purchase of products which reflect a certain performance is established by each contracting authority depending on the objective necessities and priorities communicated by the departments from the contracting authority [art. 3 paragraph (1) point a) and art. 4 paragraph (3) point a) of Government Decision no. 925/2006]. The censorship or change of performances or technical characteristics imposed by the authority can make the object of contestation by the economic operators interested in case of violation by the authority of hypothesis of art. 35 paragraph (5) – the technical specifications must allow any bidder the equal access to the awarding procedure and must not have as effect the introduction of unjustified obstacles which can restraint the competition between the economic operators - and art. 38 of ordinance – we prohibit the definition in the tender book of technical specifications which indicate a certain origin, source, production, a special procedure, a factory mark or trademark, a patent, a manufacturing licence which have as effect the favouring or elimination of certain economic operators or certain products.

The Council retains in the settlement that in the point of view regarding the contestation, communicated by letter DA no. 31153/27.10.2015, recorded by the Council under number 21088/30.10.2015, the Contracting Authority did not present the technical reasons for which it refused to change the requirement for the positioning of the air nozzle of the snow fraser by accepting the variant of location in front, de facto it did not present any kind of reasons for which the requirement of the contracting authority should be strictly observed.

The Council cannot retain as relevant in the settlement of contestation, the motivation of contracting authority by which the „definition of technical requirement was made for the purpose of allowing for the objective description of the product which will be purchased according to the need…... SA and without the restriction of participation in the awarding procedure, with observance of art. 35 paragraph (2)", because it is not motivated the need of the contracting authority underlying this technical requirement.

In this case, from the statements of contracting authority, the way in which the succinct explanation of the contracting authority is drawn up, it results that the only reason for which it required the location/positioning was its objective necessity. This reason, although it is authentic, is not enough to justify the affecting of principle provisions from art. 2 of ordinance regarding the promotion of competition and the provisions from art. 35 par. (5) of the same normative act.

The reason brought by the contracting authority in favour of selecting this variant of localization/positioning of the air nozzle of the snow fraser is on one hand that the appellant cannot force the contracting authority to purchase another product because it would limit the right of the contracting authority to contract the product which corresponds exactly to its necessity, and on the other hand, the imposition of requirement, as the appellant required has as effect the introduction of unjustified obstacles which can restrict the competition between economic operators.

Contrary to the allegations of contracting authority, in the meaning of provisions evoked (art. 35 paragraph (2) of GEO no. 34/2006) the technical specifications represent requirements, prescriptions, characteristics of technical nature which allow each product, service or work to be described objectively so that it corresponds to the necessity of the contracting authority, but the acceptance of contracting authority that the air nozzle should be located/positioned in front or behind the rear axles of the machine does not represent a restriction, on the contrary this requirement allows more economic operators (including the appellant) to participate in the awarding procedure.

Even if the contracting authority requires the unchanged maintenance of requirement from the tender book regarding the positioning of the air nozzle „according to the need ... SA", this aspect can prove that this requirement is the only variant which corresponds to its needs, especially the request of appellant („the air nozzle will be located in front or behind the rear axles") does not exclude the initial requirement of the contracting authority („the air nozzle will be located in the center behind the rear axles of the machine"), it only completes it (in front or behind the machine).

Having in view the above, the Council will retain as relevant in the settlement the mentions of S.C. ... S.R.L., according to which „We consider that the introduction of the two technical variants in requirement does not have as effect the appearance of unjustified obstacles and does not restraint the competition between economic operators and the favouring/elimination of participation in the awarding procedure, but the introduction of this variant widens the scope of economic operators to participate in equal chances of treatment in this awarding procedure".

It is worth mentioning that the contracting authority requested in the procurement data sheet, in chapter IV.4.1) „The presentation method of technical proposal", that the „technical specifications of the compact snow fraser for the removal of snow from airports must be approved by the Romanian Civil Aviation Authority (AACR), according to Order no. 66/2008. To prove the fulfilment of this requirement, the Authorization of AACR will be submitted for the technical specifications of the offered machine – copy „compliant with original".

From the examination of tender book, the Council retains that in chapter III „Obligations of supplier", the contracting authority requested the economic operators the obligation to obtain the Authorization of Romanian Civil Aviation Authority for the technical specification for the snow fraser.

The Order no. 66/2008 for the use of equipment, installations, machinery and technical means of the aerodrome and protection of air navigation in the deployment of civil aviation activities, provides in article 1 that „In the deployment of civil aviation activities, the civil aviation agents are obliged to use only equipment, installations, machinery and technical means of aerodrome and protection of air navigation whose technical specifications are approved by the Autonomous Public Entity „Romanian Civil Aviation Authority" hereinafter referred to as AACR, compliant with the requirements of national technical norms and international standards in the field, having the technical condition and maintenance compliant with the assurance of the highest degree of safety of activities and being served by qualified authorized staff".

In other words, by requesting the authorization of Romanian Civil Aviation Authority for the technical specification for the snow fraser, the contracting authority took the measure of safety regarding the compliance of technical specifications with the requirements of the national technical norms and the international standards in the field, having the technical condition and maintenance compliant with the assurance of the highest degree of safety of activities.

For the purpose of legislation on public procurement, when the contracting authority introduces certain requirements for bidders in the tender documentation, it has to limit itself to the strictly necessary things and the thresholds which constrain the least the economic operators. It must be preoccupied that the requirements are sufficiently reasonable not to entail an excessive restraint of the exercise of economic operators to compete in winning the contract in order to prevent possible abuses.

For the reasons stated above, the Council allows as founded the criticism of appellant because the information made available for the drawing up of the tender does not reflect the needs of the purchasing unit according to the provisions of art. 35 par. (2) of GEO no. 34/2006. In the meaning of the provisions invoked, the technical specifications represent requirements, prescriptions, and characteristics of technical nature which allow each product, service or work to be described objectively so that it corresponds to the needs of Contracting Authority.

For the reasons stated above, by virtue of the provisions of art. 278 paragraph (2), (4) and (6) of GEO no. 34/2006, further amended and supplemented, the Council will admit the contestation filed by S.C. ... S.R.L., in contradictory with C.... S.A. and will dispose the completion of tender book in Chapter II – Specifications and technical characteristics, point 2 – Technical Functional Requirements, point e – Requirements for snow blower, within 10 days from the reception of this notice, as follows: „the air nozzle will be located in center behind the rear axles of the machine", as follows: „the air nozzle will be located in front or behind the rear axles of the machine" and will dispose the continuation of awarding procedure with the observance of the previous decisions.

The changes will be brought to the knowledge of economic operators by their publication in SEAP, in the same deadline.

EVOLUTION OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

In the contestations filed against the result of procedure we noticed as the most frequently contested/criticized the following issues:

- Report of the tender opening meeting (not taking into account the participation guarantee, the deployment of tender opening meeting);
- Rejection of appellant's tender as incompliant or inacceptable;
- The unusual low price of the tenders of other participants in the awarding procedure;
- The qualification documents submitted by other participants or the method of scoring/evaluation of these documents by the contracting authority;
- The fact that in the notice of procedure result, the contracting authority did not specify the reasons for rejection of the tender;
- The rejection of tender without the contracting authority requiring clarifications for the technical proposal/offered price or the incorrect appreciation of answers to clarifications;
- Annulment without legal virtue of the awarding procedure by the contracting authority;

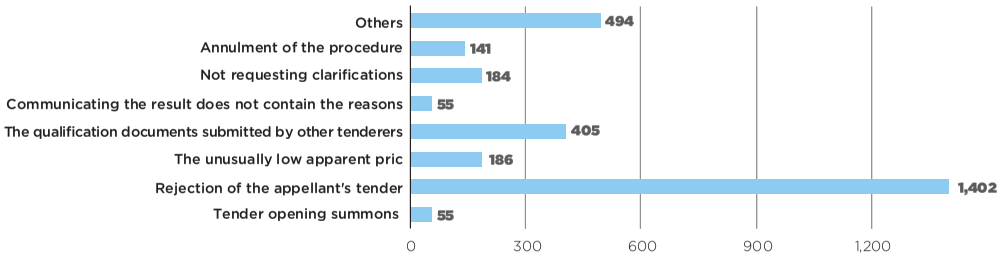


FIGURE 18
SITUATION OF COMPLAINTS COMPARED TO THE CRITICS SUBMITTED AGAINST THE RESULT OF THE PROCEDURE

For the understanding of these issues, we present below the following cases:

1 REJECTION OF THE APPELLANT'S TENDER

Proceeding to the resolution of contestation, the Council acknowledges that in the procurement data sheet, chapter III 2.3 a) The technical and/or professional capacity, we required holding under any form of a warehouse space with destination of archive on the territory of Municipality…. and/or county ... which meets the requirements for preservation and conservation of documents according to the provisions of 12 of National Archive Law no. 16/1996 further amended and supplemented, and the Instructions for the archiving activity in creators of documents, approved by the National Archives by presentation of Operating Licence issued by the National Archives from... in which the functioning address of the warehouse should be mentioned.

For the fulfilment of the requirement quoted above, SC ... SRL submitted the operating licence for the provision of archiving services no. 2/27.02.2014, attached to it they submitted the letter no. ... of 07.03.2014, issued by National Archives in which it is mentioned that the operating licence is valid for the space from commune ..., village ..., county ... - ..../km 22, warehouse ..., street DC..., Land Book no. .../N, solar..., plot ....2.

By letter no. 8074/21. 10.2015, the Buyer required clarifications to

the appellant regarding the fulfilment of requirement concerning the territorial limitation of warehouse for Municipality ... and/or county ....

The Bidder answered by letter no. 3970/26.10.2015, in which it mentioned that the „location of warehouse was at 12 km from the exit ... from Highway ... – ... and at 23,7 km from km 0 ...; this location is the closer than the towns located in..., such as ... – 56,9 km which is in ... (according to the map attached); the access time to documents for consultation fulfils the conditions imposed in the tender book; the location of the warehouse is authorized by the Department of Municipality... of National Archives so that it cannot be an obstacle to qualification.

After the analysis of the answer communicated by SC ... SRL, the evaluation commission drew up the evaluation note no...../27.10.2015, according to which the appellant's tender was declared inacceptable, according to art. 36 paragraph (1) point b) of Government Decision no. 925/2006, because it did not fulfil the requirement from the procurement data sheet, in chapter III 2.3 a) Technical and/or professional capacity according to which the economic operator must prove that it holds in any form a warehouse with destination of archive on the territory of Municipality... and/or county.... The argumentation by which the economic operator claims that the archive warehouse it holds, located in Giurgiu county, is very close to Municipality... cannot be taken into account because the territorial limitation for the archive warehouse was not defined as number of kilometres, but as area, respectively Municipality .../county .... Thus, the tender submitted by SC ... SRL cannot be accepted because this would represent a preferential treatment of this economic operator compared to other bidders who have as location of warehouse up to 12 km from the edge of Municipality ... and who wanted to submit a tender.

In the report of procedure no. .../04.11.2015, the Buyer repeats the statements from the Evaluation Note no.. ...27.10.2015, regarding the reasons for rejection as inacceptable of the tender of SC ... SRL.

We can see that as the contracting authority retained, from the operating licence for provision of archiving services no.. .../27.02.2014, it results that the bidder did not observe the requirement expressly imposed by the data sheet from chapter III 2.3 a) Technical and/or professional capacity.

The reason invoked by the bidder by letter no.... 26.10.2015, that the location of warehouse is 12 km from the exit from ... on Highway ... – ...and 23,7 km from km ... Square ... cannot be retained by the Council because the archive warehouse was not defined in relation to a certain number of kilometres, but as an area on the territory of Municipality.../ county ....

Contrary to the statements of appellant, in the data sheet, in chapter III 2.3 a) Technical and/or professional capacity, it was expressly mentioned the requirement of holding under any form a warehouse space with destination of archive on the territory of Municipality... and/or county .... The fact that the requirement was not resumed in column „Method of fulfilment", does not mean that it was not compulsory for bidders as long as the column „Information and/or minimum levels necessary for the evaluation of observance of requirements mentioned" specifies the quoted requirement.

According to the provisions of art. 170 of ordinance, the bidder has the obligation to draw up the tender with the strict observance of requirements of tender documentation and according to art. 36 paragraph (1) point b) of Government Decision no. 925/2006, the tender which does not fulfil one or more qualification requirements will be considered inacceptable.

If it had ambiguities about the method of fulfilment of the requirement or if it considered it restrictive from the point of view of limitation of warehouse space with destination of archive, the bidder had the right to request clarifications according to provisions of art. 78 of emergency ordinance or to submit a contestation in the legal deadline. The whole pleading of bidder for the appropriate fulfilment of the contract and without the fulfilment of requirement under discussion, considered

restrictive, could make the object of a contestation against the tender documentation.

The requirement of procurement data sheet once established and unchanged before the deadline of tenders becomes compulsory both for the contracting authority and for economic operators.

As long as the bidder presented the tender without observing the requirements of tender documentation, respectively holding the warehouse with destination of archive on the territory of Municipality ... and/or county ..., undertook the risk that his tender is rejected as inacceptable, which happened. The distance between the warehouse and „km 0" is without relevance.

If it had accepted his tender, the contracting authority would have privileged the bidder and would have violated the fair treatment principle.

We determine under these conditions that the tender of SC ...SRL was correctly rejected as inacceptable, according to the provisions of art. 36 paragraph (2) point b) of Government Decision no. 925/2006 [the tender is considered inacceptable in the following situations: b) it was submitted by a bidder who does not fulfil one or more qualification requirements established in tender documentation], the criticism of appellant is unfounded.

Considering the above, by virtue of art. 278 paragraph (5) of Government Emergency Ordinance no. 34/2006, The Council will reject as unfounded the contestation of SC ... SRL.

2 THE REQUEST OF CONTRACTING AUTHORITY REGARDING THE JUSTIFICATION OF APPARENTLY UNUSUAL LOW PRICE MUST NOT BE FORMAL

Proceeding to the settlement of contestation, the Council acknowledges that for this procedure the evaluation factors were:

1. Tender price 40 %
2. Proof of holding the space 15 %
3. Domicile in the territorial radius in which there is the veterinarian assistance clinic where it will provide veterinarian services 25 %
4. Minimum compulsory equipment 5 %
5. Professional experience in the field of titular veterinarian PFA/SC/CMV 10 %
6. Holding of vehicles 5 %

Maximum score of technical component: 60.

By report of awarding procedure no. 9037/04.08.2015, we appointed winner the tender of Veterinarian Practice dr. ... with 100 points, of which for evaluation factor price – 40 points, and the second place was won by tender of... SRL with 79.28 points of which for price 19.56 points.

Prior to the appointment of winning tender, we notice that both tenders have financial proposals below the threshold 80% of estimated value, the contracting authority requested the presentation of supporting documents (for the substantiation of financial proposals submitted) from which should result the capacity of the company to fulfil the contract at the indicated price.

The winner bidder submitted clarifications regarding the bid and supporting documents by letter recorded by the authority under no. 8446/20.07.2015.

In the letter of clarification (209/20.07.2015) it specified that:

„The average income earned for the last four years is 300,000.00 lei by medical practice/year (year 2011 the amount RON 264.592,47, for this amount we enclose THE RECEIPTS AND PAYMENTS LEDGER for period 01.01.2011-31.12.2011; year 2012 amount RON 329.709,38, for which we enclose THE RECEIPTS AND PAYMENTS LEDGER for period 01.01.2012-31.12.2012; year 2013 the amount was RON 195.450,13 for which we enclose THE RECEIPTS AND PAYMENTS LEDGER for period 01.01.2013-31.12.2013 and for 2014 the amount was RON 331.901,29 for which we enclose THE RECEIPTS AND PAYMENTS LEDGER for period 01.01.2014-31.12.2014).

These amounts include as you can see from the enclosed documents, both the veterinarian actions provided by contract to C.S.V.A. ... and C.S.V.A. ... to D.S.V.S.A. ... and the value of other veterinarian services contracts concluded between C.M.V. Dr. ... and third parties, natural and legal persons, which we submit in copy. Because the fees used for the calculation of tender are provided by GD no. 1156/2013 they were used for the payment of veterinarian actions of concessionaire physicians by D.S.V.A. ... in 2014 for the clarification of financial tender for CSVA ... we analysed the incomes and expenses of C.M.V. Dr. ... for the year 2014.

In 2014 C.M.V. Dr. ... received from D.S.V.A. ... the amount of RON 145.720,27 without VAT for the veterinarian actions performed at C.S.V.A. ... and RON 121.942,05 without VAT at C.S.V.A. ....

In 2015 according to the last report at the end of quarter II the numbers of cattle, sheep, caprines, horses, swine and birds are equal between the two clinics, for which the expenses incurred by C.M.V. Dr. ... for the realization of veterinarian actions are in amount of RON 121.946,30 as it results from the document enclosed DETAILS OF EXPENSES FOR THE YEAR 2014. If the tender proposed by C.M.V. Dr. ... were accepted for the concession of veterinarian actions for C.S.V.A. ... with total amount of RON 180.062,00 without VAT the financial earnings at the end of each month would be 15.057,76 lei for the concession C.S.V.A. ... and RON 4.287,19 for the concession C.S.V.A. ... to which we add the certain amount of RON 2.533,33 /month (the annual amount is 30,400 lei) from 11 contracts for provision of veterinarian services with legal persons (see enclosed copies). The total incomes will be RON 21.878,28 /month/practice while the monthly expenses will remain RON 10.162,19 /month using the calculation of expenses for the year 2014.

In these conditions, we believe that the amount of RON 262.539,36 /year/practice will be sufficient amount to assure the carrying out of veterinarian actions according to contractual provisions at C.S.V.A. ... and C.S.V.A. ... .

We firmly state that because in 2013 for the same activities C.M.V. Dr. ... received during the year the amount of 157.621,07 lei without VAT.

Considering the above and that C.M.V. Dr. ... earns substantial incomes from the activities described above, we believe that our financial tender for C.S.V.A. ... covers all the expenses incurred for the provision of veterinarian services provided in contract."

We can see from the above as the appellant showed that the whole justification of the price offered by Medical Practice Veterinarian dr. ... includes invoices, receipts and payments ledgers and contracts signed by this medical practice during the period 2011-2015. From any document presented there does not result any concrete justification for the price 180.062 lei offered.

Relevant for the substantiation of the price was not the description of the whole activity of the practice, but the formation of the price offered in this procedure.

Indeed for the expenses which will be incurred or for the prices practiced, documents from previous years could be submitted, but we cannot consider that the price for this contract could be justified by relating to the whole activity of the medical practice, respectively contracts signed with third parties or for other veterinarian clinics.

Moreover, from the analysis of the comparative table presented by the appellant, including the unit fees for each category of activities which will be carried out, we can see that they are much lower than the level of the year 2011, which was not envisaged by the contracting authority in the appreciation of correction of the price formation.

Contrary to the statements of buyer in its point of view, the fact that the bidders have the freedom to justify their price as they think fit, does not mean that the buyer is exonerated from the obligation set forth by art. 202 paragraph (1) of Government Emergency Ordinance no. 34/2006, to indicate in the price justification request the details it considers significant about the tender.

Having in view the particularity of the contract, the contracting authority had to request and check all the costs with the carrying out of framework agreement, which implies expenses with materials used, equipment, rents (if applicable), salary expenses, indirect expenses, profit etc.

We can also see that the justifications of the winner bidder include a reference to the whole activity of the medical practice, regarding contracts signed with third parties or regarding other veterinarian clinics, they relate to the activity for 12 months, while the framework agreement has a term of 42 months.

Although from the annex to tender form, it results that the price was calculated for the period 2015-2018, in the justifications transmitted, the Medical Practice Veterinarian dr. ... refers to receipts and payments for a period of one year. Thus, in the letter of clarification no. 209/20.07.2015, it is mentioned that „In 2014 CMV dr. ... received from DSVSA ... the amount of RON 145.720,27, exclusive of VAT, included for the veterinarian actions performed at CSVA ... and RON 121.942,05, without VAT, at CSVA ...", and the offered value for the framework agreement (period 2015-2018) is 180.062 lei, exclusive of VAT.

The Council retains that according to art. 202 paragraph (1) of Government Emergency Ordinance no. 34/2006, "In case of a tender which has an apparently unusually low price compared to what will be provided or executed, the contracting authority has the obligation to request the bidder in writing and before making a decision to reject that tender, details and clarifications which it considers significant about the tender and to check the answers which justify that price".

According to art. 361 paragraph (3) of Government Decision no. 925/2006, "For the purpose of performing the checks set forth by par (2), the contracting authority will require the bidder documents regarding prices of suppliers, situation of stocks of raw materials and materials, method of organization and methods used in the working process, the remuneration of workforce, the performances and costs of certain machines or equipment".

Considering the legal provisions in force, we can see that the contracting authority in the letter of price justification only indicated art. 202 par. (11) of ordinance without a concrete reference to the tender submitted.

The request of contracting authority did not include "details and significant clarifications" to which the article above refers, being formal, simplistic and general forwarded by the authority to the bidder, its justification answer was as the bidder thought fit.

The Buyer had to analyse the financial proposal of the winning bidder, had to indicate concretely what was the analysis information by which it checked the reality of the offered price, details and significant clarifications about the tender, taking into account the requirements of tender book.

The evaluation commission had to establish the essential elements, information and documents which it wanted to obtain for checking the price, had to ask explicit clarifications to be assured the correlation of information presented by the bidders with the requirements imposed. The Evaluation Commission had to make sure that it would receive the information based on which it can certainly determine the accuracy of offered price.

The contracting authority formally fulfilled the obligation to request the justification of apparently unusually low price by transmission of a general clarification without obtaining all the information and documents it needed to check in detail the offered price, its step did not have the finality pursued, to receive the justification of offered price.

Only after the obtaining of all information and documents necessary for justification of apparently low price, the evaluation commission could establish whether the tender submitted by the Medical Practice Veterinarian dr. ... was admitted.

We can see that the evaluation of winning tender was formal, with the non-observance of legal provisions in force and therefore, the criticism of appellant regarding the illegality of evaluation is founded.

Indeed, for this procedure, the awarding criterion is „the most advantageous tender from economic point of view", there are also evaluation factors on technical component, apart from the financial tender, but prior to applying the awarding criterion, the contracting authority was supposed to check the accuracy of offered price with observance of legal provisions and to establish the admissibility of tenders according to the answers received.

Considering the above, the evaluation of tenders was done by not observing the legal provisions quoted above, by virtue of art. 278 par (2) and (4) of Government Emergency Ordinance no. 34/2006, The Council will partly admit the contestation filed by SC ... SRL and will annul the report of awarding procedure no. 9037/04.08.2015 and the communications regarding the result of procedure transmitted to the two economic operators who participated in the procedure. It will oblige the contracting authority to re-evaluate the tender submitted by Medical Practice Veterinarian dr. ... and to establish the result of procedure within 10 days from the reception of this notice, with the observance of motivation, tender documentation and the legal provisions in force in the field of public procurement. The result of procedure will be communicated to bidders in the legal deadline.

By virtue of art. 278 par (5) of ordinance, the Council will reject as inadmissible the count regarding the nonconformity of tender submitted by Medical Practice Veterinarian dr. ..., the establishment of incompliant tenders is the exclusive competence of contracting authority by evaluation commission, according to its assignments set forth by art. 72 par. (2) of Government Decision no. 925/2006.

3 THE ELECTRONIC TENDER STAGE IS CONDUCTED THROUGH THE S.E.AP., THE CONTRACTING AUTHORITY HAVING NO INTERVENTION UP UNTIL THE COMPUTER SYSTEM SHALL PROVIDE THE RANKINGS

Unhappy with the outcome of the procedure, which was communicated to her through the letter no. T453 / 17.9.2015 ... submitted the curent appeal, calling for those mentioned in the introductory part of the decision.

In regards of the application for action filed by... SRL, seeing that it has quality and legal capacity and has showed a legitimate own interest as a result of promotion the request, being the successful tender, as reflected in the procedure report no. A ... / 16.09.2015, in accordance with art. 64 of the Civil Procedure Code, the Council approved it as an accessory intervention application in the interest of the contracting authority.

Turning to the settlement of the request, the Council notes that, in the procurement data sheet section. IV.2.2, it was foreseen that there will be an electronic auction stage. The following observations were made:

In order to participate in the electronic auction all the economic operators shall take all the necessary measures in order to register in SEAP.

Available information for logging and registration, at electronic address www.e-licitatie.ro. At the electronic auction are entitled to participate only operators registered in SEAP (according to Art. 42 and 44 par. 2 of GD 1660/2006, updated) and who have been sent the invitation to participate at this stage by the contracting authority (according to provisions of art.165, par. 2 of GEO 34/2006, updated). The participation invitation will be sent electronically, simultaneously, to all bidders that submitted admissible tenders and will contain the date and time of the start of the electronic auction, as well as any information necessary to achieve individual connection to the used electronic equipment.

The tender invitation will specify the information needed regarding the manner of operation of the electronic auction, given the provisions of the GEO 34/2006 and HG1660 / 2006. The contracting authority does not have the right to start the electronic auction sooner than 2 working days, after the date on which invitations were sent, according to art. 165 of GEO. 34/2006, updated; The computer system will instantly provide the tenderers will all necessary information, in order to determine at any time, the position they occupy in the rankings; The information system will provide all tenderers information on: - the best financial offer; - number of participants in the electronic auction; - the conditions under which the bidders will have the right to bid: - within the electronic auction, tenderers can only improve the last bidder; - number of rounds: 1; - the duration of a round: one day; If the tenderer

declared admitted does not change the elements of the bid subject to the repetitive tendering process during the phase of electronic auction, the offer submitted during the procedure of the tenders' initial evaluation is taken into account for the final ranking, in accordance with the award criteria set by award documentation; The contract award will be made according to art. 200 of O.U.G. 34/2006, based on the result obtained after completion of the electronic auctions. The element of the bid that will be subject to the repetitive tendering process is the bid price. Considering the provisions of art. 165, par 2 of GEO no. 34/2006, updated, the tenderers will submit at the headquarters of the contracting authority within 2 working days since completion of the electronic auction round, the final offer corresponding to the round. The final offer corresponding to that round, submitted (through a letter of submission according to form no.1.) following the electronic auction round, will include the final total financial proposal (form 15 and 16).

According to the proceedings interim report no. A3710 / 07.09.2005, the following bids were declared admissible: SC ... SRL, SC ... SRL, SC ... SRL and SC ... SRL, these operators being invited to participate in the final stage of the electronic auction.

On 14/09/2015, the contracting authority was informed by the SC ... SRL that during the electronic auction, it wrongly submitted a bid in the amount of RON 630,000 wrong, instead of RON 6.3 million. With the address T441 / 09.15.2015, the purchaser replied to the tenderer, stating that the error produced during the course of the electronic auction is caused solely by her, that all the electronic auction participants were informed about the ranking results following the electronic auction and that no further steps to be followed in addition to those specified in the notice and the invitation to participate in electronic auction stage can be indicated to her.

On 09/15/2015, ... SRL informed the military unit that it cannot support the offered price.

Through the award procedure report no. A3849 / 16.09.2015 the SRL… offer was rejected as non-compliant because it has not filed the financial bid, amended following the final stage of the electronic auction. The standings after the electronic auction was as follows:- SC ... SRL – RON 5.9955 million, without VAT;

SC ... SRL – RON 6.17 million;

SC ... SRL – RON 6.3 million.

The outcome of the procedure was communicated to tenderers on 09/17/2015.

Referring to the criticism brought by SC ... SRL, the second ranked tenderer, the Council finds that they are in reference to the conduct of the electronic auction.

As noted above, through the procurement data sheet, economic operators were informed that the computer system will instantly provide all bidders with the information they require in order to determine at any time the position they hold in the ranking; The information system will provide all bidders information on: - the best financial offer; - the number of participants in the electronic auction; - the conditions under which the bidders will have the right to bid: - in the electronic auction bidders can only improve the last bidder; - number of rounds: 1; - the duration of a round: one day.

So, at any time, bidders who participated in the electronic auction phase knew the position they occupy in the rankings and the best financial offer, something which also results from the completion of the appeal, the challenging company stating that between 13:15-13:45, its tender was ranked 4th, while between 13:55-13:59 it rose to 3rd place.

The aspect that the financial proposal of the tenderer who occupied the first position was 10 times lower than it was at the beginning of the auction cannot be considered a reason to hinder the appellant to bid the price required to win the auction and sustainable at the same time, all the

The offering of a wrong price by a participant, which was subsequently rejected as non-compliant, cannot attract the sanctioning of the contracting authority, this only designating the winning bid based on the ranking generated by the computer system (SEAP).

Contrary to the appellant's sayings, the contracting authority did not infringe art. 168 par. (1) of the Government Emergency Ordinance no. 34/2006, according to which „Throughout each phase of an electronic auction, the contracting authority is obliged to instantly communicate to all tenderers at least sufficient information for them to determine, at any time, the position they occupy in the rankings. [...], the position of the appellant being known by her during the course of the electronic auction, as she said. The fact that a bidder has entered a wrong price, sanctioned with the rejection of the tender does not mean that the contracting authority violated the law.

In this respect, the following provisions of the norms for implementing the provisions relating to the award of public procurement contracts by electronic means, approved by Government Decision no. 1660/2006 are incidents:

- art. 43 par. (1) At any time during the progress of the electronic auctions, the computer system provides the participants of the repetitive tender process with the necessary information in order to determine the position they occupy in the rankings.

(2) The information system provides the participants of the repetitive tender process with the necessary I information on prices or new values submitted in the electronic auction, as well as the number of participants of that electronic auction, if the contracting authority has provided at the initiation of this phase the possibility of communicating such information.

(3) During electronic auctions, the computer system will not reveal the identity of the participating tenderers.

(4) Tenders submitted during the electronic auction by participating tenderers can only improve the bids submitted prior to this phase.

- art. 44 par.(1) Upon completion of the electronic auction, the computer system will provide the contracting authority with the ranking resulted from the conduct this phase, determined by consideration of the final offers made by the participating tenderers and on the basis of the award criteria established under the provisions of. section 3, chap. V of the Emergency Ordinance.

Therefore, the electronic auction phase is carried out through the SEAP, the purchaser having no intervention until the computer system shall provide the ranking.

Also, contrary to the appellant's sayings, it cannot be claimed that, through the conduct of the procedure, provisions of the Art. 162 of Government Emergency Ordinance no. 34/2006 have been breached [The contracting authority does not have the right to improperly or abusively use the electronic auction so that:

a) it would prevent, restrict or distort competition;

b) it would amend the subject of the public procurement contract, as provided in the contract notice and the tender documentation.]

Moreover, it is noted, from the ranking obtained from the SEAP, that the tendering by a participant of a price 10 times lower did not prevent the other tenderers to propose the prices that they thought they can support, improved as they deemed necessary, knowing the position they occupy in the rankings. The price erroneously offered by another operator is irrelevant, as long as the appellant had to propose a price that she considered that it ensures fulfillment of the contract according to her own costs and, less, towards a price or another, being solely responsible for the sustainability of the offered price and position in the ranking at a certain time.

Likewise is the Council's decision no. ... / C5 / 1839 / 24.05.2013, invoked by the intervener, where were mentioned, among other things: „Bidding by another economic operator of a price considered by the

appellant as dumping, cannot be accepted by the Council as an impairment of the principle of efficient use of funds and promoting competition between economic operators, motivated by the fact that such a tender, sanctioned by the legislator with an offer rejection, is not an act of the contracting authority, the only measure that this could take being the rejection of the offer in question. [...]

Moreover, according to the appellant's own claims, the reason for the lack of a bid within the final stage of the electronic auction was the bidding by one of the participants of a price which she has considered dumping and not the SEAP's operating mode, so that the lack of a price improvement in the final stage of electronic auction represents the appellant's exclusive decision, resulting that nothing prevented the appellant nothing to improve her offer, so that the appellant's attitude cannot be attributed to the contracting authority."

Considering those presented, not finding reasons that would attract the cancellation of the report procedure and the resumption of the electronic auction stage, pursuant to Art. 278 par. (5) of the Government Emergency Ordinance no. 34/2006, the Council will reject as unfounded the appeal of SC ... SRL.

The appeal being dismissed, pursuant to art. 278 par. (2) of the Ordinance, the Council will grant the accessory intervention application filed by SC ... SRL.

4 THE ANSWER FOR CLARIFICATION OF THE FINANCIAL PROPOSAL SHOWS THE EXISTENCE OF PRICES OTHER THAN THOSE MENTIONED ABOVE

Moving on to the analysis of the appeal, the Council notes that, through the procedure report no. 2579 / 03.05.2015, the tender submitted by SC ... was declared non-compliant and rejected, in accordance with Art. 79 par. (3) of the Government Decision no. 925/2006 because, through its response to the clarification requests nr. 2349 / 02.27.2015, amended its financial proposal.

In the acquisition data summary, chap. II.2.1) The total amount or area, stated: cleaning at university dormitories for the duration 12 months, while on chap. II.3) Duration of the contract: 12 months from the award of the contract / issue of services commencement orders.

Also, chap. IV.4.2) Presentation of the financial proposal, the contracting authority provided: Presentation of the financial proposal: filling in financial proposal forms (according to Form 10). The tenders will be expressed in RON, without VAT. Tenders shall be submitted to the SEAP. If two or more tenders ranked first have the same price, in order to delimit tenders, the contracting authority will request through SEAP loading into the system by economic operators of a document showing the improved financial proposal. Prices will be calculated with up to 2 decimals.

In the tender specification, at chap. 1, was set: The amount of requested services: complete cleaning services packages, broken down into phases / game / activities / specific operations corresponding to the 8 buildings in the table below: [...]. At chap. 1.1 was set the amount of requested services - a package of cleaning services, broken down into phases / game / activities / specific operations as detailed in the tables below: [...]; at chap. 1.2 were provided, also under all tabular form, specifications and surfaces for the cleaning / maintenance of the building; at chap. 1.4 particularities of the cleaning premises; at chap. 1.5 effective areas that belong to the cleaning and maintenance service. At the end of chap. 1.5, there was made the specification that 11 months / year, when there's activity, the values are those specified in the table; during the holiday month (one month) values are the ones listed in the table in parenthesis.

In the tender form provided by the contracting authority it was stated:

„Examining the tender documentation, the undersigned, representatives of the tenderer _____, offer, in accordance with the provisions and requirements of the above documentation, to provide _____ for the sum of _____ plus the value added tax in the amount of _____. We undertake, if our bid is successful, to provide services in the term of_____. „

Analyzing the appellant's offer, the Council notes that, in the tender form, it was stated: „Having examined the tender documentation, the undersigned, representatives of the tenderer SC ... offer to, in accordance with the provisions and requirements of the above documentation to provide "cleaning services in university dormitories" for the sum of RON 30,337.49 / month [...]. We undertake, if our bid is successful, to provide services within 12 months since the date of the service delivery commencement order".

It is noted that, after evaluation of the technical and financial proposal, the purchaser drew up the protocol analysis no. 2316 / 27.2.2015, in which she said that, moving from the phase of financial evaluation, after decrypting the prices in the SEAP, there were offered the following prices, without VAT, as follows: SC ... – RON 30,337.49, SC. ..SRL – RON 369,850 and SC ... SRL – RON 369,990.

The evaluation committee considered it necessary to seek clarifications from all bidders in the sense of having submitted the centralizers' financial bids, broken down by month relative to the price cryptically introduced in the SEAP application.

Through the letter no. 2349 / 02.27.2015, SC ... the purchaser asked SC…for the centralizer's financial bids, broken down by month relative to the price cryptically introduced in the SEAP application.

The tenderer replied with the letter no. 345 / 03.02.2015, in which she presented the monthly value for each month of performance, as follows: for March 2015 - June 2015 the value of 29,048.48 RON / month, and for the months July 2015 - February 2016 value of RON 30,982 /month. The total amount / 12 months – RON 364,049.92. It results: RON 364,049.92 / 12 months: 12 months = RON 30,337.49.

In the award procedure report no. 2579 / 05.03.2015, in reference to SC…'s offer, was recorded: the tenderer has submitted the financial bid calculation, which contains monthly totals, without specifying how the price formed. The value from the bid form and encrypted in the SEAP application amounts to RON 30,337.49. From the bid form results that value of RON 30,337.49 accounts for one month of activity. In the bid form there is not mentioned the contract's total value. Through the response sent following the response to requests for clarifications no. 2349 / 02.27.2015, the tenderer modifies the monthly value worth noting 29,048.48 RON for four months and a value of 30.982 RON for 8 months. The evaluation committee considers that the provisions of Art. 80 par (1) of the Government Decision no. 925/2006 are not applicable. In the tender documentation it is stated that the contract is concluded for 12 months, months with different amounts of service required. The evaluation committee names the offer submitted by SC ... inconsistent and rejected in accordance with Art. 79 par (3) of the Government Decision no. 925/2006, as it adjusted, through its response to the clarification request no. 2349 / 02.27.2015, the financial proposal.

Compared to the above, the Council finds that, as stated by the contracting authority as well, on the one hand, in the tender form, SC ...listed one service / month price, and on the other hand, this price was modified through its response to the clarification request no. 345 / 02.03.2015.

Regarding to the appellant's allegations the price in the financial proposal „is not the price for one month of activity" but „the value which applies to each month of providing cleaning services", nowhere in the tender documents or the response to the clarification no such reference was made, on the contrary, the price is indicated as amounting to RON 30,337.49/ month.

However, regarding the indication of the price / month, and not the total contract value, the Council notes that, neither in the procurement data sheet nor the tender specifications, was there a demand for expressing the price of services / month. All the contracting authority references targeted service provision for 12 months. There was no specification in the sense that, for the proceedings in question, the award will be made for price / month. Moreover, in the tender specification it is clear that there will be concluded a 12 months contract but the effective areas were the ones in the table in chap. 1.5 of the tender specification for 11 months, one month being for other areas, listed in parenthesis in the table, leading to the obvious conclusion that it could not be asked for a price / month. Contrary to the appellant's statement, not specifying the manner of presentation of the bid price (monthly amount or value / 12 months) does not mean that in the bid form, it

is possible the interpretation given by her, as to which the total services value will not be provided, but a monthly amount, as long as the total amount of services was clearly foreseen to be covering 12 months from the award of the contract.

Moreover, it can be seen that the other two other tenderers have offered the total value, the same way the tender's preparation results from the award documentation.

At the same time, contrary to the appellant's statements, it cannot be supported that the amount for the 11 months was to be unchanged for the month of vacation, given the significant surfaces differences. Even if the clean sweep requires a thorough cleaning of all types of surfaces only one single time, and not every day, it is difficult to admit that the labor's monthly value would remain unchanged. Moreover, the appellant did not bring the authority of the Council any evidence to that effect.

Besides these aspects, analyzing the appellant's offer/ documents from the financial proposal's content and the answers regarding it (Form no. 10, letter no. 345 / 02.03.2015), the Council notes that, the same way the contracting authority remembers, SC... modified the monthly value originally tendered.

It appears that both for the tender form no. 10 and for the SEAP encrypted, the initial tender amounted to RON 30,337.49, and following requests for clarification through letter no. 345 / 02.03.2015, the appellant presented service monthly values for each month in the amount of RON 29,048.48 and RON 30,982, values that do not coincide with the sum originally tendered.

Through the appeal, SC ... claimed an amount „that applies to each month of providing cleaning services", claim which is not supported by any mention in the offer or in the response to requests for clarifications.

In the bid form, namely Form 10, the appellant said that she offers to provide the tendered services for the amount of 30,337.49 RON / month, which is why the Council considers that the response for clarification of the financial proposal shows the existence of prices other than those mentioned above. Her commitment is thus canceled by specifications emphasized by the clarifications, indicating other prices, different from those initially specified, on the one hand, and on the other hand, the bid form didn't indicate the total value of services.

Consequently, the contracting authority's decision to reject the appellant's for this reason is justified.

In light of those submitted, pursuant to art. 278 par. (5) of the Government Emergency Ordinance no. 34/2006, the Council will reject the appeal filed by SC .... as unfounded.

5 FULL COMPLIANCE WITH THE REQUIREMENTS OF THE TENDER DOCUMENTATION TOWARDS THE APPELLANT'S OFFER AND THE INITIAL DESIGNATION AS WINNER DOES NOT MEAN THAT THE MEASURE OF ANNULMENT OF THE PROCEDURE CANNOT BE IMPOSED

Turning to the settlement of the appeal, the Council notes that, by letter no. 100642 / 07.12.2015, the contracting authority informed the appellant company that its offer was declared the winner, as it fulfilled the qualification requirements, the technical proposal meets the requirements in the specifications and submitted the lowest price, according to the award criterion. The bidder was invited to sign the contract after the expiration of six days upon receipt of the address.

After receiving a statement through letter no. 15-1322 / 10.12.2015, SC ... SRL informed the contracting authority that, as it received the draft contract, found that art. 8 „Implementation of the contract," the term for making the entire risk analysis documentation is mentioned as 12/15/2015, while the execution of the contract should begin at this time, if no dispute occurs. The bidder called for a realistic completion date in conjunction with sightseeing opportunities and access to information and data required for the risk analysis, taking into account the downtime in schools and kindergartens, starting with 12.18.2015 (the winter break), but also the specificity of this period characterized by non-working days officially granted during Christmas and New Year.

Also, by letter no. 15-1327 / 11.12.2015, the bidder explained to the contracting authority that it agrees with the completion deadline of 11 working days, provided that the implementation of the contract will start not after its signing, but after the order is issued by the contracting authority and the good execution guarantee is constituted by the provider. She added that she will be there to sign the contract the day following the formal receipt of the statement that the conditions for signing the contract will be met.

Through letter no. 103554 / 14.12.2015 / IA ... ... informed the bidder the following:

- according to the Framework Agreement which is part of the tender documentation, the contract shall enter into force on the date of its signature section. 7.2, the date the provider's obligations begin;
- details mentioned concerning the contract execution date, after the issuance of the commencement order and after the establishment of performance guarantee, should be subject to clarification requests, submitted prior to the date of the tenders opening;
- the term of 11 working days was calculated taking into account the working days in the period from 26.11.2015, the opening date and 12.15.2015, the date mentioned in the framework agreement, the one referring to the completion of its execution;
- the students' winter break does not constitute an impediment to carrying out the contract, the contracting authority providing access into schools in order to obtain the necessary information.

Through the letter no. 15-1334 / 14.12.2015, the appellant company informed the contracting authority the entry relating to the fact that any observation about the contract should have been made prior to the opening of tenders cannot be assimilated because the framework contract was not submitted through the assignment documentation, instead being made known on 08.12.2015 as a result of its request. The entry relating to the term achieving the 11 working days performance that would have been determined taking into account the working days in the period from 26.11.2015 - opening of the tenders – and 15.12.2015 - the date of completion of the framework agreement cannot be assimilated because transmitting the result of the procedure, signing the contract and provision of the performance security cannot be achieved simultaneously on the tenders' opening day, more so since the waiting for the legal period when possible claims may be filed is necessary.

Through the letter no. 104 169 / 15.12.2015 / IA ... informed the bidder that, following analysis of the address no. 103 892 / 14.12.2015, the evaluation committee decided to cancel the procedure under art. 209 par. (1) let. c) in conjunction with art. 209 par. (4) b) of the Government Emergency Ordinance no. 34/2006.

In response to the mayor's office, the bidder has submitted address. 15-1349 / 16.12.2015, where it detailed reasons why she considers the decision to cancel the procedure unlawful and requested the communication of serious deviations from legal provisions and what makes the conclusion of the contract impossible.

The City Hall replied to the letter no. 105 298 / 17.12.2015 / IA, where it said it decided to cancel the procedure, since the term of document preparation specified in the contract documents was established on 12.15.2015, omitting to take into account the period provided by the legislation in terms of tender evaluation duration, the deadline for submission of appeals and the duration of the contract closure, against the date of the tender opening, meaning 26.11.2015.

Checking tender documentation published in the SEAP attached to the invitation no. ... / ..., The Council notes that it includes the procurement data sheet, the tender specifications and the statement section, without providing the model contract.

In the acquisition summary data, there was provided in section. II.3 Duration of the contract / framework / or time limit for completion: 2 months from the award of the contract / issue orders to start services or works.

The tender specification, the limit for filing the documentation for risk analysis has been mentioned as 12.15.2015.

However, in the bid form (Form 12), SC ... SRL undertook that if its bid is successful, to perform the service until 12/15/2015.

Given that the complainant received the communication on the outcome of the procedure on 12.07.2015 and the contract could not be signed only after the expiry of the withdrawal periods provided for in Art. 205 of the Ordinance, obviously, the services could not be provided until 15.12.2015. Also, the contracting authority made an obvious error when it provided, in the tender specification, the term for the making of the analysis documentation until 15/12/2015, while the date for the opening of tenders was 11/23/2015, later deferred to 11/26/2015. Besides, in the letter no. 105 298 / 17.12.2015 / IA, the City Hall acknowledged that the deadline for the documentation stated in the tender specification was established on 15.12.2015, omitting to take into account the period provided by the legislation regarding the evaluation of tenders, the deadline for submission of appeals and the duration for terminating the contract, compared to the tenders' opening date, 26.11.2015.

According to art. 209 par. (1) let. c) „The contracting authority shall cancel the procedure for awarding public procurement contract if serious violations of legislative provisions are affecting the award procedure or if the conclusion of the contract is impossible" and par. (4) let. b) provides that „For the purposes of paragraph. (1) let. c) by serious violations of the laws is understood: during the analysis, evaluation and / or completion of the award procedure there are errors or omissions found, and the contracting authority is unable to take corrective action without this leading to violations of principles laid down in art. 2 par (2) let. a) -f) „.

Noticing the fault of the contracting authority in the preparation of the tender documentation and setting the date until which services can be completed, as well as the failure to make the model contract available to the operators, correctly, against the provisions invoked above, the contracting authority decided to cancel the procedure. The Council considered that, on the one hand, in the data sheet of the acquisition, there was provided a term of two months from the award of the contract / issue of orders to start services or works, so it is unknown whether services begin with the award of the contract or with the issue of orders for starting the services, which represent different dates, and on the other hand, it was indicated in the tender specifications, mistakenly, the deadline for completion of the service provision: 15/12/2015.

Also, it must be taken into consideration that, after finding the error in the documentation, from the correspondence between the parties, submitted to the file by the challenging party, results that they have not reached an agreement on the period of performance, determined precisely by inconsistencies in the tender documentation. Thus, through letter no. 15-1327 / 11.12.2015, SC ... SRL informed the contracting authority that it agrees with the completion deadline of 11 working days, provided that implementation of the contract will start not after its signing, but after the issuance of the commencement order by the contracting authority and establishment of performance guarantee by the provider.

With no expressly established date on which services will start, with an incorrectly referred completion date (15/12/2015), date indicated in the bid form submitted by the appellant and considering the fact that at the conclusion of the contract must be taken into account the provisions of the tender documentation and the technical and financial proposal of the winning bidder, regarding the duration of the contract, in the presented case, the term for service provision cannot be established, especially since the parties have not reached a consensus on this point.

Requests made by the appellant in the correspondence with the purchaser, namely to establish a realistic deadline, in conjunction with the possibility to review the objectives and access information and data required for the risk analysis, taking into account the downtime in schools and kindergartens, as of 12.18.2015 (winter break), but also the specificity of this period characterized by weekends granted formally or informally on the occasion of Christmas and New Year, could have been addressed before the closing date for submission of tenders, the term 12/15/2015, while she knew this from the tender specification, term which, though incorrectly set, was assumed in the bid form. The appellant knew

both the dates for filing / opening tenders and the 15/12/2015 term, but did not notice the authority regarding the discrepancies between the datasheet and the tender specification and failure to comply with this term, while the bids were to be evaluated and the deadline for the contract signing respected.

At this point (after opening and evaluation of tenders and designating the successful tender), as the shortcomings of the tender documentation relating to the deadline for service provision cannot be removed, the only measure that can be applied is the cancellation of the procedure.The Council cannot indicate a time for service provision and cannot consider as correct the proposal of the contracting authority or the appellant, provided that this term shall be determined on the basis of the tender documentation and in the present case this term cannot be determined due to errors / inconsistencies in the documentation.

However, it is noted that, through the establishment of a random term in the contract, term which was not provided in the tender documentation, it would ultimately breach the principle of equal treatment towards other participants in the proceedings or other interested economic operators who did not know the date of the service provision, term that also influences the price formation. Granting a term proposed by the appellant, as a result of errors in the preparation of the tender documentation, would lead to a discrimination in her favor and breach of the principles underlying the award of the contract.

The fact that the appellant's offer fully complies with the requirements of the tender documentation and was initially designated as a winner, does not mean that the procedure annulment measure cannot be imposed, in view of the above.

In light of those presented, finding fault for the contracting authority in the preparation of the tender documentation and the impossibility to take a remedial measure, the Council will maintain the decision to cancel the procedure and, pursuant to art. 278 par. (5) of the Government Emergency Ordinance no. 34/2006, will reject as unfounded the appeal of SC ... SRL.

2.2. FILES SOLVED BY N.C.S.C.

2.2.1. EVOLUTION OF FILES SOLVED BY N.C.S.C.

During 2015, the solving complaints panels within N.C.S.C. issued 2.562 decisions, fact that meant the solving, within the mentioned period, of 2,530 complaints (files).

The annual evolution of the case files solved by the solving complaints panels within the Council is as it follows:

January	138
February	117
March	160
April	220
May	223
June	264
July	286
August	213
September	245
October	234
November	236
December	194

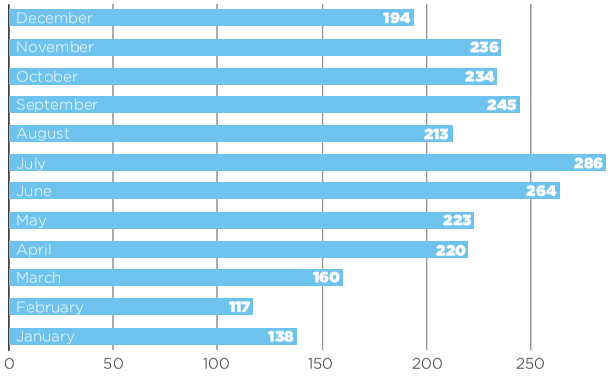


FIGURE 19
EVOLUTION OF FILES SOLVED BY N.C.S.C IN 2015

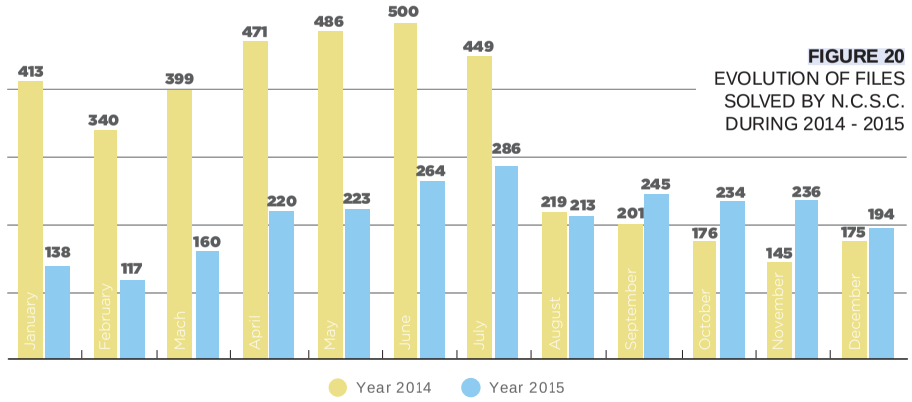


FIGURE 20
EVOLUTION OF FILES SOLVED BY N.C.S.C. DURING 2014 - 2015

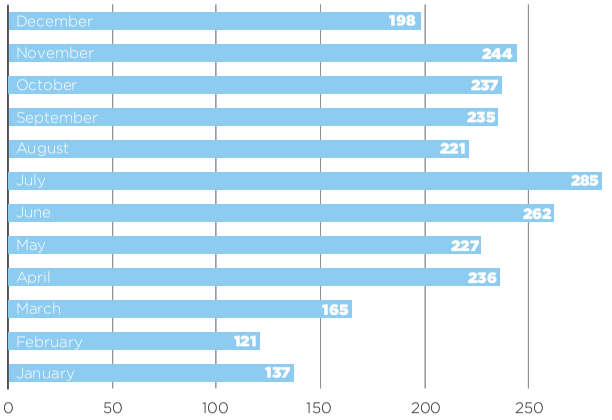
2.3. DECISIONS TAKEN BY N.C.S.C.

2.3.1. EVOLUTION OF NUMBER OF DECISIONS TAKEN BY N.C.S.C.

During January 1st – December 31st, 2015, the 11 solving complaints panelswithin N.C.S.C. issued 2,568 decisions.

The situation of decision taken in 2015, broken down by months, develops as follows:

January	137
February	121
March	165
April	236
May	227
June	262
July	285
August	221
September	235
October	237
November	244
December	198



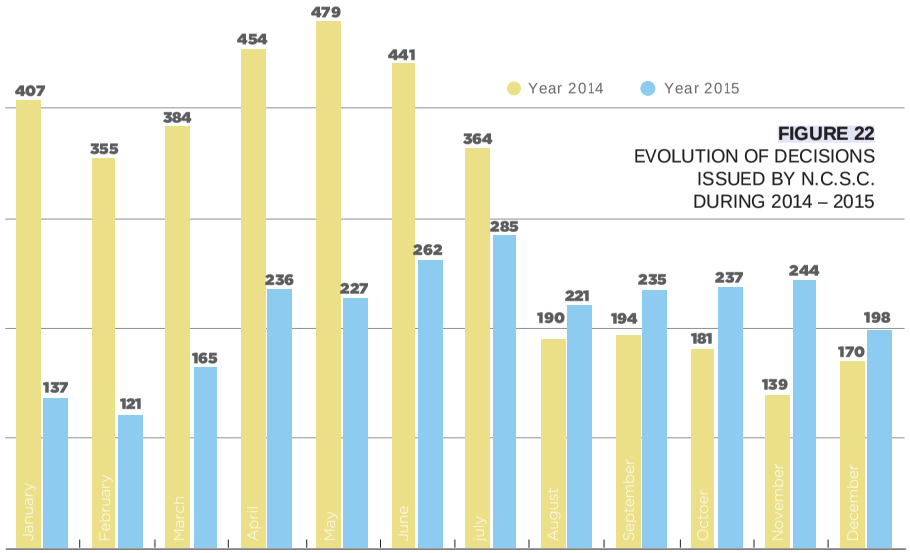


FIGURE 22
EVOLUTION OF DECISIONS ISSUED BY N.C.S.C. DURING 2014 – 2015

THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st – DECEMBER 31st 2015

EVOLUTION OF NUMBER OF DECISIONS TAKEN BY N.C.S.C.

In 2015, the number of decisions rendered by the N.C.S.C. decreased by 31.67% compared to the previous year (1,190 decisions).Overall, since the Council was established and up until December 31st, 2015, the total number of decisions issued by the institution amounts to 48,492.

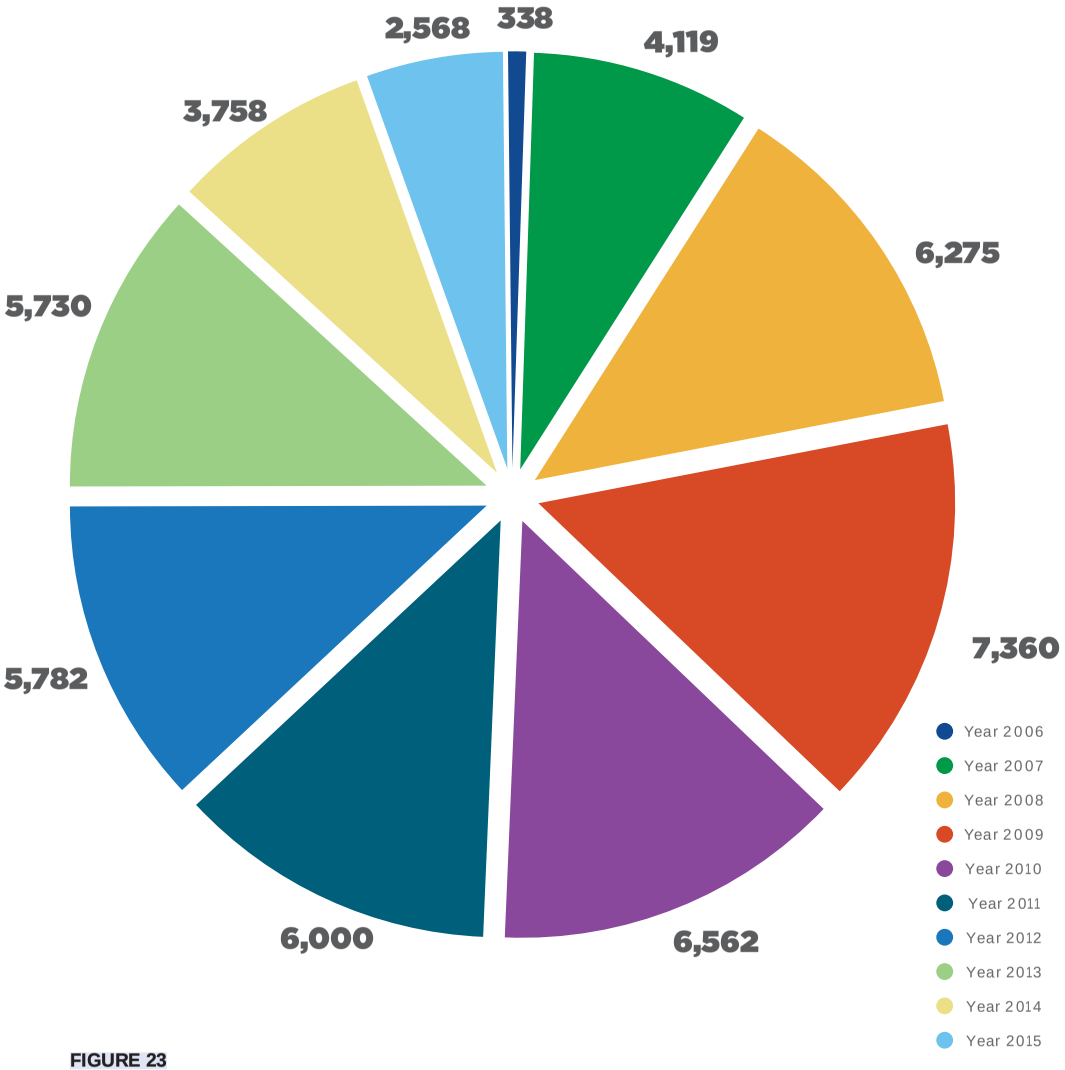


FIGURE 23
STATUS OF DECISIONS ISSUED BY N.C.S.C. DURING 2006 - 2015

2.3.2. THE SITUATION OF COMPLAINTS REGISTERED TO N.C.S.C.

As we have specified before, between January 1st and December 31st 2015, there were 2,568 decisions issued by the 11 solving complaints panels within N.C.S.C.

Following the settlement of complaints formulated by the economic operators, the Council issued:

– 893 decisions for which it disposed to admit the complaints formulated by the economic operators. For these cases, it was considered, regarding the contents of the legal contentious report formulated for settlement, giving favour to the appellant. The solution requested by the appellant and adopted during the deliberations of the settlement panel, is in line with the administrative - legal defence necessity of the subjective right violated or unrecognized and reconsidering it as to provide for its holder the advantages the law acknowledges.

– 1,675 decisions by which the denial of complaints of the economic operators was decided as:

- the appellant failed to prove the security of good conduct under Art. 2711 of G.E.O. no. 34/2006.
- the Council considered, regarding the content of the complaint settled, to favour the contracting authority, due to the fact that the merits of the complaint formulated by an economic operator were proved to be unfounded /without merits; the Council had to "keep silent" due to the fact that an exception on the merits or a procedural plea (the complaint was belatedly introduced, has become devoid of purpose, was unacceptable, lacking its object, lacking its interest, was introduced by individuals without any interest in it etc.) was invoked by the parties or ex officio;
- The appelant used its right to waive the complaint formulated, thus cancelling its litigious action. Thus, the simple application for waiver ofthe complaint formulated by the person that initiated the litigation, results in immediate annulment of the file.

Looking at the chart above, it appears that the percentage of decisions rendered by the Council through which have been admitted the appeals and the decisions through which 2015 appeals were rejected have not undergone major changes compared to 2014. Figure 25 – STATUS OF SOLUTIONS GIVEN BY N.C.S.C. ÎN 2015

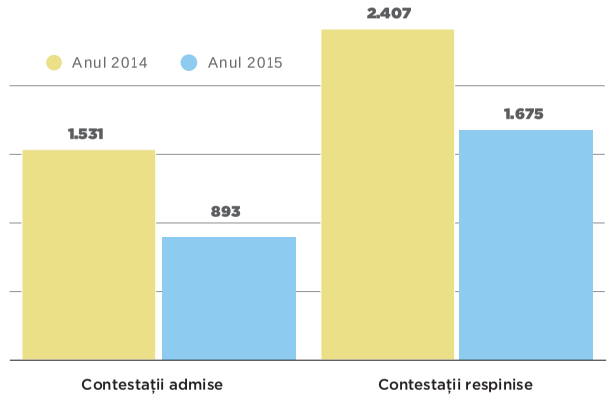


FIGURE 24
STATUS OF SOLUTIONS GIVEN BY N.C.S.C DURING 2014 - 2015

THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st – DECEMBER 31st 2015

THE SITUATION OF COMPLAINTS REGISTERED TO N.C.S.C.

The chart above proves the fact that following the settlement of complaints formulated by the economic operators, in case of 34.77% of the decisions rendered by N.C.S.C. during 2015 the complaints were accepted, while for 65.23% of the decisions taken by N.C.S.C., the complaints were rejected and the public procurement procedures continued.

Regarding the admitted decisions (893 decisions taken by the Council), from the existing statistical data we can see that in the case of the 31 decisions, the annulment of the award procedure was disposed, in other cases, the remediation of the award procedures was ordered - so it can continue under the law; a number of 6 of these award procedures being financed from European funds – the fix is impossible to make without violating laws.

Looking at the figures above, we can notice that due to the settlement of appeals formulated by the economic operators, the percentage of admissions solutions to challenge the appeals made by economic operators to the decisions of the C.N.S.C. since its foundation until now is constant, at approximately 33%, while in the case of 64% of the decisions issued by C.N.S.C., in the same time, it was decided rejection of the appeals by economic operators and the continuation of the procurement procedures.

FIGURE 25
STATUS OF SOLUTIONS GIVEN BY N.C.S.C. ÎN 2015

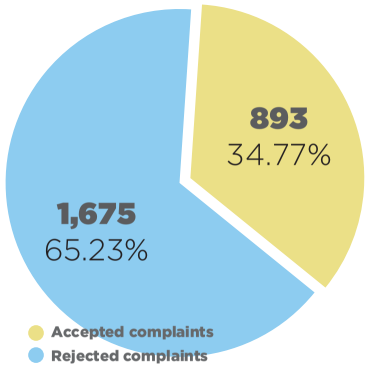
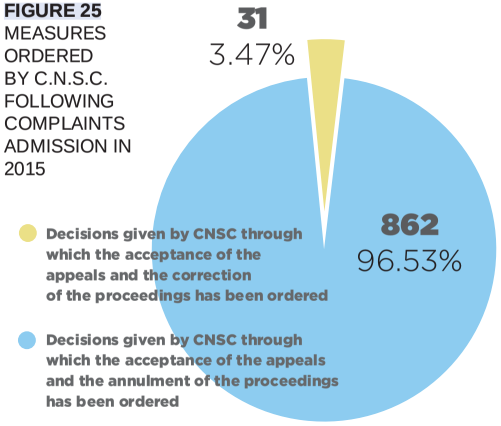


FIGURE 25
MEASURES ORDERED BY C.N.S.C. FOLLOWING COMPLAINTS ADMISSION IN 2015



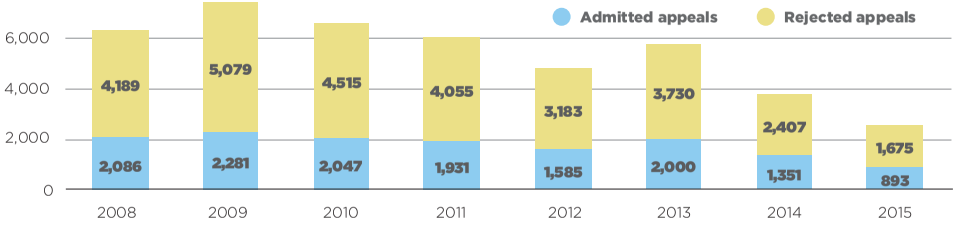


FIGURE 26
COMPARATIVE STATEMENT OF SOLUTIONS PROVIDED BY C.N.S.C. DURING 2008- 2015

2.4. N.C.S.C. ACTIVITY COMPARED TO THE ESTIMATED VALUE OF THE AWARDING PROCEDURES

2.4.1. ESTIMATED VALUE OF THE AWARDING PROCEDURES FOR WHICH THE N.C.S.C. ISSUED DECISIONS

In 2015, N.C.S.C. issued decisions within certain public procurement procedures with an estimate total value of RON 29,045,603,386.37, equivalent of EUR 6,534,443,956.44[26], thus resulting a value with 24.26 smaller compared to 2014.

In terms of value, in 2015, the total estimated value of the awarding procedures where N.C.S.C. pronounced appeals admission decisions formulated by the economic operators amounted to RON 14,392,863,804.07, the equivalent of EUR 3,237,989,607.21[27].

During 2015, the total estimated value of the awarding procedures in which N.C.S.C. made decisions to reject the complaints formulated by the economic operatorswas amounted to RON 14,392,863,804.07, the equivalent of EUR 3,237,989,607.21[28].

Out of the total estimated value of procedures where appeals admission decisions were issued , the total estimated value of the awarding procedures which the Council decided to cancel amounted to 2,562,502,180.81 RON, the equivalent of EUR 576,490,929.32[29], and that of the awarding procedures for which remediation measures were decided amounted to RON 12,090,237,401.49, the equivalent of EUR 2,719,963,419.91.

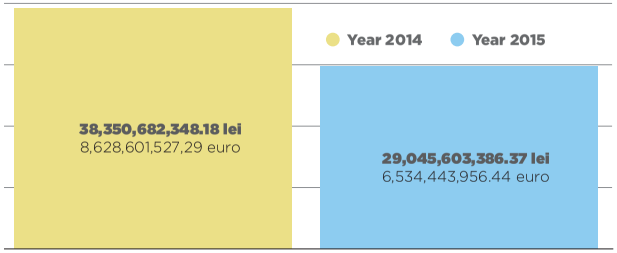


FIGURE 28
EVOLUTION OF DECISIONS ISSUED BY N.C.S.C. COMPARED TO THE VALUE ESTIMATED DURING 2014 - 2015

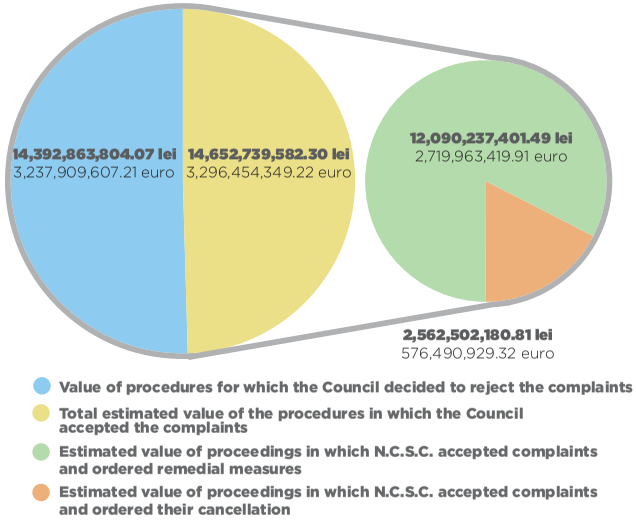


FIGURE 29
TOTAL ESTIMATED VALUE OF THE AWARDING PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS IN 2015

ESTIMATED VALUE OF THE AWARDING PROCEDURES FOR WHICH THE N.C.S.C. ISSUED DECISIONS

Analyzing FIGURE 29, it is obvious that in 2015, the total estimated value of the awarding procedures for which N.C.S.C. rendered decisions for the complaints of the business operators (RON 14,652,739,582.30) represented 50,45% of the total estimated value of procedures in which N.C.S.C. issued decisions (RON 29,045,603,386.37), while the value of procedures for which the Council decided to reject the complaints formulated by the economic operators (RON 14,392,863,804.07), represented 49.55% of the total estimated value of the procedures in which the Council rendered decisions.

As it can be seen from FIGURE 30, compared to the previous year, in 2015, the estimated value of the awarding procedures for which the Council accepted the complaints and cancelled procedures decreased by 31.87% compared to the previous year, but the estimated value of the procedures for which the Council rendered decisions for admissions and ordered the remedy of the procedure increased by 27.34%.

Looking at the chart above, we can see that although the estimated value of the award procedures where C.N.S.C. pronounced decisions by which the appeals were admitted and the cancellation the procedure ordered decreased, however, it must be stressed that there are still irregularities in procurement field, the Council demonstrating once again its role of efficient filter in preventing them.

Out of the estimated value of RON 2.562.502.180,81, equivalent of EUR 576,490,929.32 award procedures where the Council ordered the cancellation, the amount of RON 56,424,212.65, equivalent of EUR 12,693,861.11 represents the awarding procedures funded with European money, meaning 2.20% of the award procedures total value in which the annulment was decided 0.16% of the total value of the disputed award procedures.

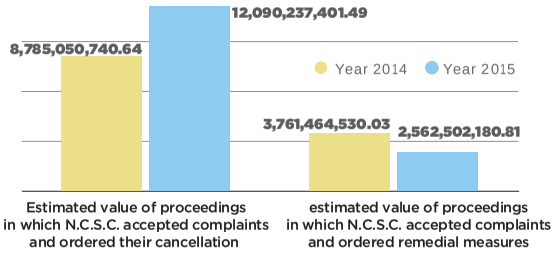


FIGURE 30
EVOLUTION OF THE ESTIMATED AWARDING PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS OF ADMISION DURING 2014 - 2015

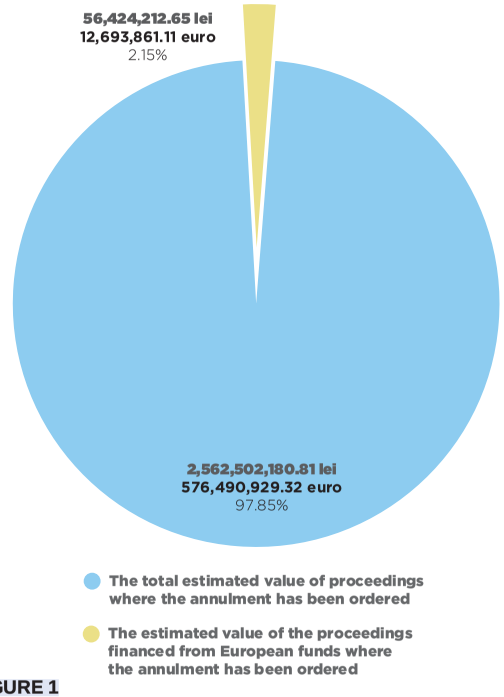


FIGURE 1
THE ESTIMATED VALUE OF PROCEDURES FINANCED FROM EUROPEAN FUNDS WHERE ANNULMENT HAS BEEN DISPOSED RELATIVE TO TO THE TOTAL ESTIMATED VALUE OF PROCEEDINGS WHERE THE ANNULMENT HAS BEEN ORDERED

2.4.2. THE ESTIMATED VALUE OF PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS TO ADMIT THE COMPLAINT, COMPARED TO THAT OF PROCEDURES INITIATED IN THE S.E.A.P.

The official data provided by the Electronic System for Public Acquisitions (S.E.A.P.) indicates that in 2015, within the communication platform used in the awarding process of the public procurement contracts, 22.227 awarding procedures were initiated, with a total estimated value of RON 49,912,795,668, the equivalent of EUR 11,228,975,403.41[30].

Compared to 2014, when 18,367 awarding procedures were initiated, and to 2013, when 19,342 procedures were initiated, it is observed that in 2015 the number of awarding procedures increased by 21.02% compared to 2014 and by 14.92% compared to 2013.

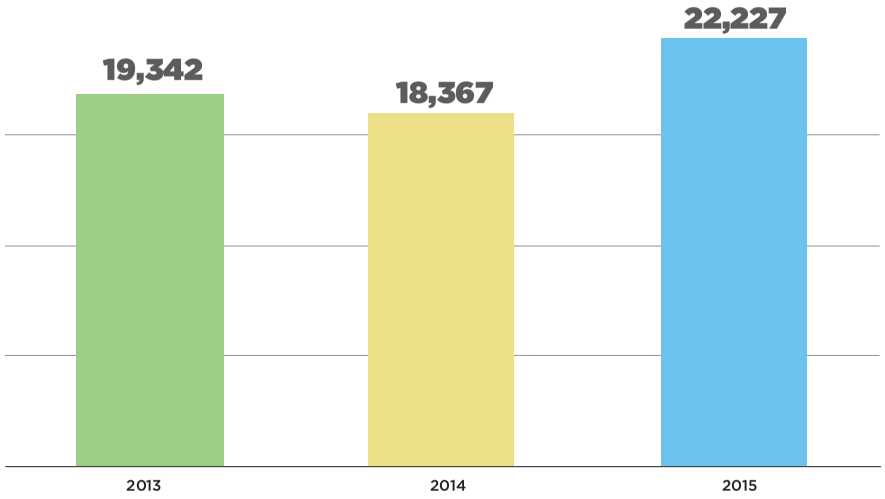


FIGURE 2 EVOLUTION OF THE AWARD PROCEDURES INITIATED BY S.E.A.P DURING 2013 - 2015

Comparing the total yearly estimated value of the procedures initiated in 2015 in S.E.A.P. (RON 49,912,795,668) and the total estimated value of the awarding procedures in which N.C.S.C. issued a decision (RON 29,045,603,386.37), it results that the later represented 58.19% of the total estimated value of the procedures initiated in S.E.A.P.

But if we compare the total yearly estimated value of the procedures initiated in 2014 in S.E.A.P. (RON 49,912,795,668) with a total estimated value of the procedures in which N.C.S.C. accepted the complaints formulated by the business operators and decided measures of remediation/ cancellation of the procedures (RON 14,652,739,582.30), results that the later represented 29.36% out of the total estimated value of the procedures initiated in S.E.A.P.

THE ESTIMATED VALUE OF PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS TO ADMIT THE COMPLAINT, COMPARED TO THAT OF PROCEDURES INITIATED IN THE S.E.A.P.

At the same time, if we compare the total yearly estimated value of the procedures initiated in 2014 in S.E.A.P. (RON 49,912,795,668) with the total estimated value of the procedures in which N.C.S.C. issued decisions to admit the complaints formulated by the economic operators and disposed certain measures, the following are observed:

- the estimated value of the procedures for which N.C.S.C. disposed remediation measures amounted toRON 12,090,237,401.49 (24.22% of the total estimated value of the procedures initiated in S.E.A.P.);
- the estimated value of the procedures for which N.C.S.C. disposed their cancellation amounted to RON 2,562,502,180.81 (5.13% of the total estimated value of the procedures initiated in S.E.A.P.).

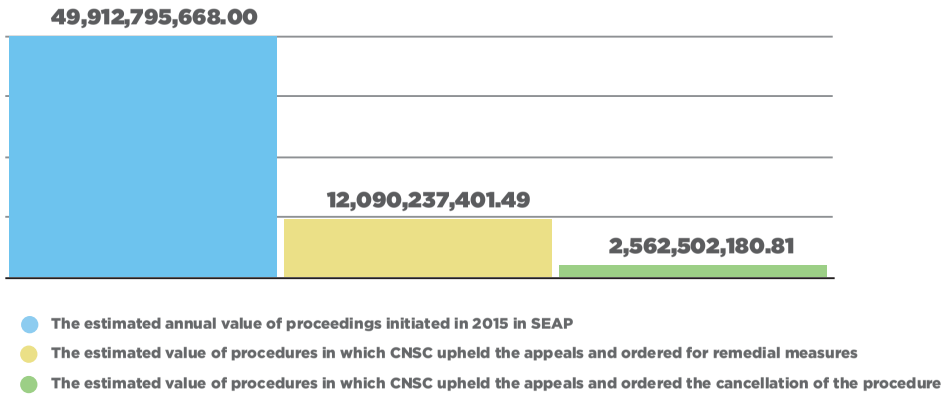
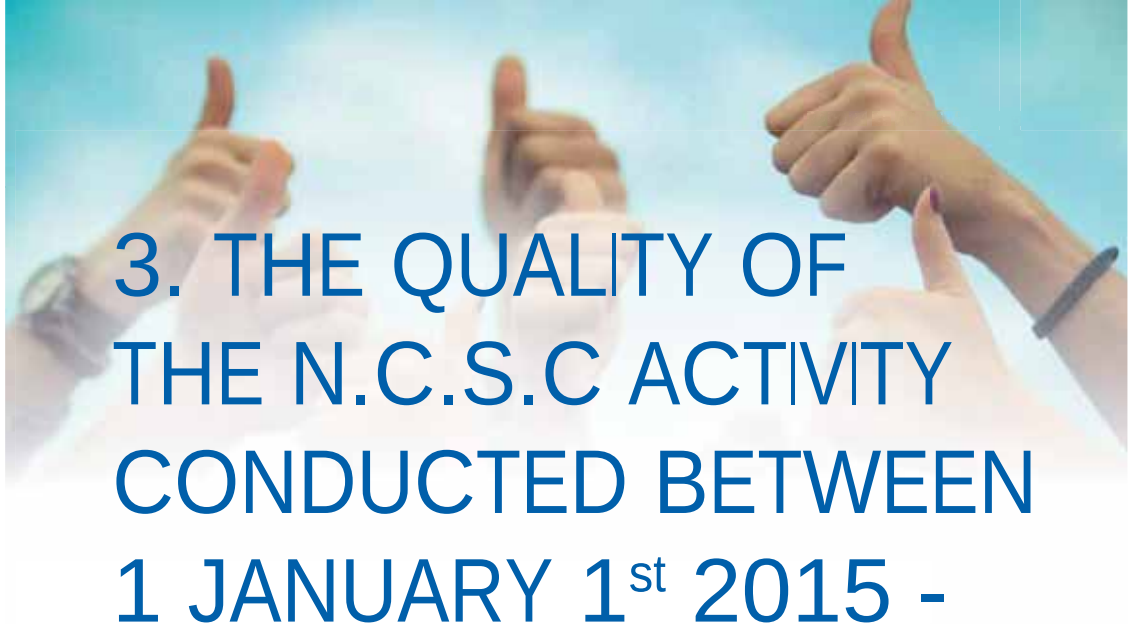


FIGURE 3
THE SITUATION OF THE ESTIMATED VALUE OF PROCEDURES INITIATED BY N.C.S.C. AND THE PROCEDURES IN WHICH THE COUNCIL ACCEPTED THE COMPLAINTS AND DISPOSED REMEDIATION MEASURES OR THE ANNULMENT OF THE PROCEDURE

By comparison in terms of value between 2015 (RON 49,912,795,668) and previous years, respectively 2014 (RON 77,401,933,025.29) and 2013 (RON 74,615,096,072.24), it is found that in 2015 there was a 35.51% decrease in the estimated value of the awarding procedures initiated by S.E.A.P. compared with 2014 and by 33.11% compared with 2013.

Comparing the estimated value of the award procedures where C.N.S.C. ordered their cancellation with the estimated value of the award procedures initiated in in SEAP, which represents 5.13% in 2015 and 4.86% in 2014, results a 0.27% growth in 2015, compared to 2014, of the award procedures' estimated values of which the Council ordered cancellation, while the estimated value of proceedings initiated in SEAP 2015 decreased by 64.49% compared to 2014, yet another proof that this administrative body - judicial - CNSC - is an efficient filter for the prevention of a significant number of irregularities under the public procurement procedures.



3. THE QUALITY OF THE N.C.S.C ACTIVITY CONDUCTED BETWEEN 1 JANUARY 1st 2015 - DECEMBER 31st 2015

3.1. SITUATION OF DECISIONS ISSUED BY N.C.S.C. AND AMENDED BY THE COURTS OF APPEAL FOLLOWING THE SUBMITTED COMPLAINTS

3.1.1. SITUATION OF DECISIONS ISUED BY N.C.S.C. REGARDING THE MERITS OF COMPLAINTS AND AMENDED BY THE COURTS OF APPEAL FOLLOWING THE SUBMITTED COMPLAINTS

Respecting the constitutional principle of access to justice, the legislature has determined that it is necessary that the decision of the Council part of the appeal settlement through administrative - judicial process to be „controlled" by a court of law, as to remedy any error occurred during the first settlement. Thus, for the decisions made by an administrative - judicial process by the Council, they are "verified" by a superior office, respectively from the area where the contracting authority is established or the Bucharest Court of Appeal in case of filling complaints against the decisions given by N.C.S.C. in procedures for award or services and/or works in connection with transport infrastructure of national interest.

The existence of such a control is a guarantee for the parties involved, meaning that any injustice can be settled/ repaired and for the solving counselors, it provides incentives to fulfill their duties with the utmost rigor and exigency, knowing that their decision could be controlled by a higher court.

Following settlement by the Council of the complaints formulated by economic operators made in accordance with art. 281 (1) of G.E.O. no. 34/2006, the Council's decisions on the settlement of a complaint may be appealed to the court under art. 283 (1) of the same law, within 10 days following the notification, for reasons of illegality and groundlessness.

THE QUALITY OF THE N.C.S.C ACTIVITY CONDUCTED BETWEEN 1 JANUARY 1st 2015 - DECEMBER 31st 2015

In compliance with the legislation in force, the complaint against the decisions of N.C.S.C. can be initiated either by the contracting authority, or by one or several economic operators participating in the procedure, or by the contracting authority together with one or several economic operators involved in a public procurement procedure.

For this reason, against a decision issued by N.C.S.C. there are often several complaints registered, formulated to competent Courts of Appeal, in the area where the contracting authority is situated.

During 2015, out of the total of 2,558 decisions issued by the N.C.S.C., a number of 537 (20.91%) decisions were appealed with complaints to the competent Court of Appeal where the contracting authority is registered.

In 2015, following complaints to the competent court of appeal, in whose jurisdiction the contracting authority is situated, 42 decisions issued by N.C.S.C. were scrapped / abolished entirely by the court (1.64% of all decisions issued by the Council) and 32 have been modified in part (1.25% of all decisions issued by the Council).

Therefore, it results that during 2015, 2.494 decisions issued by the Council (which means 97.12% out of the total of decisions issued in 2014) were final and irrevocable as they were issued by our institution, which maintains the credibility and trust of this institution.

From the statistic documents we can draw the conclusion that the percentage of the decisions issued by the Courts of Appeal after the Council was established and until the end of 2015 is constant and, at the same time, very low compared to the percentage of the decisions issued which remained final and irrevocable.

If we summarize the decisions issued by N.C.S.C. from its establishment and until the end of 2015, our institution issued 48,492 decisions.

If we compare, for the period between September 2006 - December 31st 2015, the decisions under cassation/ amended in full by the competent Courts of Appeal following the complaints made by economic operators/contracting authorities (896 decisions), with the number of decisions issued by the Council, it is noted that 47,596 decisions issued by our institution (98.15%) were final and irrevocable.

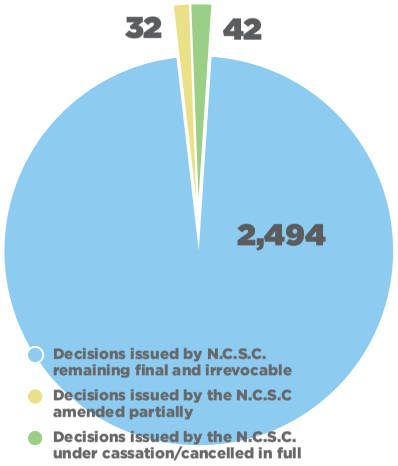


FIGURE 31
STATUS OF COMPLAINTS FORMULATED AGAIST THE DECISION ISSUED BY N.C.S.C. IN 2015

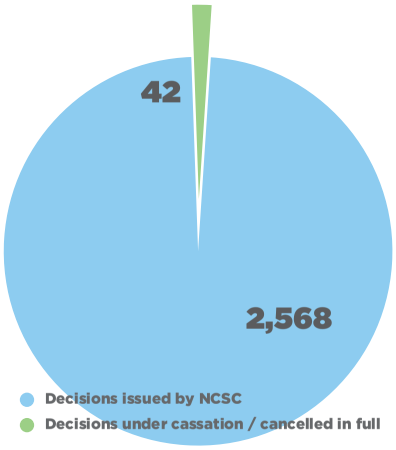


FIGURE 32
NUMBER OF DECISIONS ISSUED COMPARED TO THOSE UNDER CASSATION/ CANCELLED IN FULL IN 2015

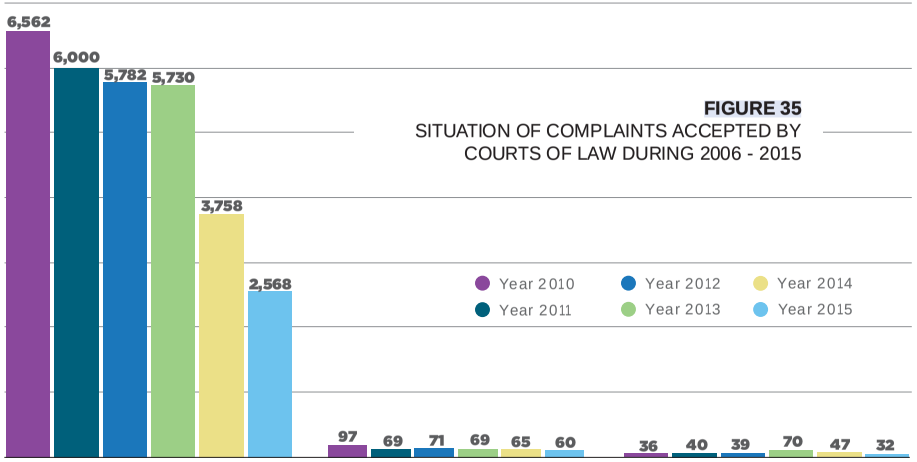


FIGURE 35
SITUATION OF COMPLAINTS ACCEPTED BY COURTS OF LAW DURING 2006 - 2015

As it can be noticed from the chart above, the credibility share of the Council is still high in 2015, up to a level of 98.15%, the same as in 2014 (98.14%).

Due to the total independence that the Council had and still has, but also to the profile and competence of its employees, in 2016 as well, the quality of our institutional activity and the fast solving of complaints formulated by the economic operators (within the 20 days term provided by G.E.O. no. 34/2006, further amended and completed), shall be considered main elements of the N.C.S.C.'s performance.

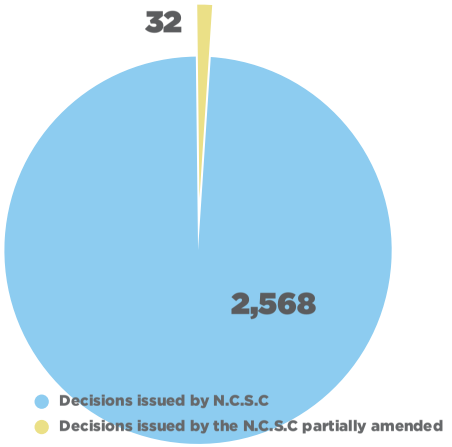


FIGURE 33
NUMBER OF DECISIONS ISSUED COMPARED TO THOSE PARTIALLY AMENDED IN 2015

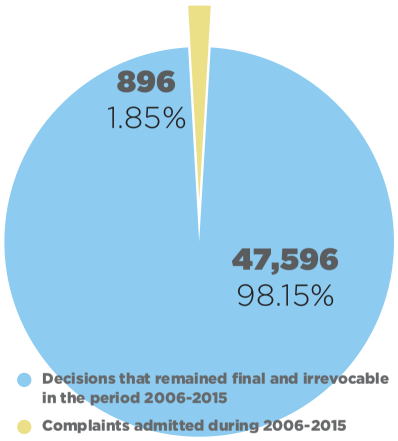
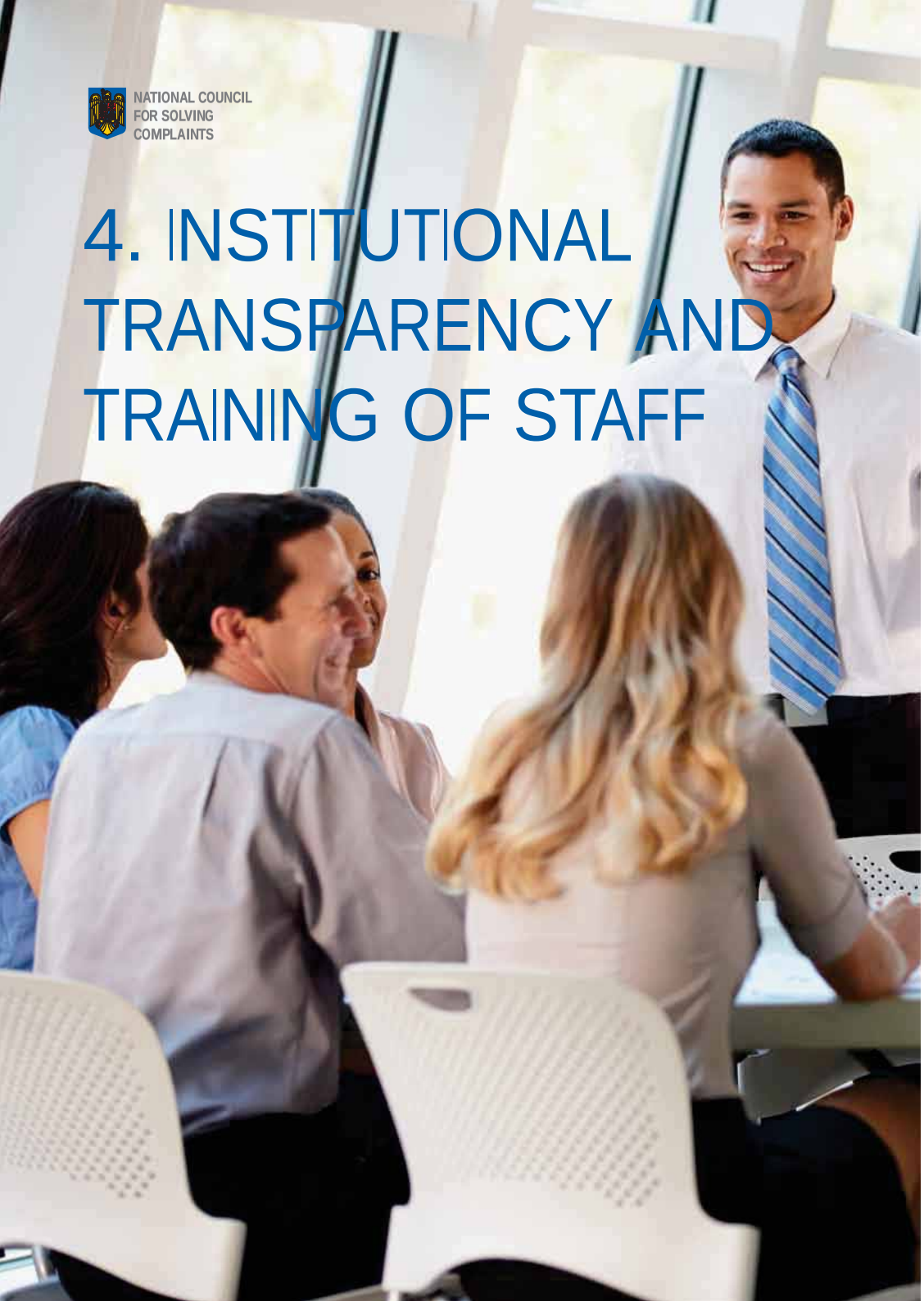


FIGURE 34
SITUATION OF COMPLAINTS FORMULATED AGAINST THE DECISIONS ISSUED BY N.C.S.C. DURING 2010-2015



4. INSTITUTIONAL TRANSPARENCY AND TRAINING OF STAFF

4.1. INSTITUTIONAL TRANSPARENCY

During 2015, the NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.) was continuously concerned with increasing the transparency, competition and efficiency of public procurement market, as well as promoting the best practices at European level and disseminating its own experiences in the area to its institutional partners.

Additionally, special attention was given to its own staff's continual training, alongside with activities of discouraging and fighting anti-competitive practices within the public procurement area.

In this regard, N.C.S.C. gave an increased attention to institutional collaboration with offices on the public procurement market (Competition Council, National Authority for the Regulation and Monitoring of Public Procurement - N.A.R.M.P.P., the Unit for Coordinating and Verifying Public Procurement - U.C.V.P.P., National Agency for Integrity - N.A.I.).

Being interested in the establishing and coherent operation of the Romanian public procurement system and absorption of EU funds, the Council continued to send on a weekly basis to N.A.R.M.P.P. - based on the protocols concluded with this institution - official reports on the assessment terms given by the contracting authorities for different projects in progress, decisions of the Council and settlement measures decided by it as a result ofthe economic operators' complaints.

4.1.1. PROJECTS AND INITIATIVES

The Council, along with a number of public authorities and institutions, such as the Ministry of Justice, the National Anticorruption Superior Council of Magistracy and the National Institute of Magistracy, the Fraud Investigation Division of IGRP, the National Authority for Regulating and Monitoring Public Procurement, the National Agency for Integrity and the Public Ministry, are partners in the transnational project for Fighting public procurement fraud initiated by Freedom House Romania, which has received funding from the ISEC, project completed in February 2015.

The project, called „Fighting Public Procurement Criminality. An Operational Approach", focuses on:

- promoting the exchange of experience between trainers, experts and managerial staff from institutions in Romania and other European countries;
- conducting training seminars for magistrates and operative officers, including both theoretical modules and practical exercises with an emphasis on the inter-institutional collaboration, which are in line with best training practice in this field at European level;
- the development of operational guidelines for magistrates and operative officers.

The project aims to achieve a beneficial effect on both the institutional capacity of the Romanian authorities to solve cases of fraud, corruption and other crimes in public procurement and on their ability to cooperate.

4.2. DECISIONS ON THE OCCURENCE OF POTENTIAL CONFLICTS OF INTEREST

The issue of conflict of interest within the public procurement has multiple aspects addressed in the report "Assessment of the Public Procurement System in Romania" elaborated by the company Deloitte and acknowledged by the European Commission.

Due to the collaboration protocols specified above, N.C.S.C. contributed and contributes at all times to create a general frame for the unitary application both of specific legislation, but also the one concerning competition, which makes possible to identify any possible conflict of interests between the contracting authority and different economic operators, or for unfair competition followingcertain "agreements"

In this context, we mentione that in 2015, N.C.S.C has not been in the situation to refer the National Agency for Integrity (N.A.I.), the National Authority for Public Procurements – N.A.P.P., regarding the awarding procedures where an alleged existence of potential conflicts of interest was invoked.

4.3. PROFESIONAL TRAINING

In compliance with provisions of Law no. 188/1999[31], training and continuous professional training is both a right and an obligation for public officers.

In order to enforce the principles of a good operation within the public sector, a solid knowledge of the administrative system and especially of the public procurement system, as well as the requirements and exigencies imposed by such system are needed.

Under such circumstances, the training and continuous professional training are considered a national priority; support of such process falls within the competence of each central and local public authority or institution.

In compliance with the regulations in force, the Council holds full competence in planning the professional training, in procuring professional training services and in controlling and assessingf the professional training of public officers.

Strengthening the institutional capacity of the Council is strictly determined by a proper professional training of the counselors that solve complaints within the public procurement area as public officers with special status, within training / professional developmentareas and topics which should reflect the real need of the administrative system and especially of the public procurement system and public sector.

Providing such professional training and continuous professional training service, at high quality standards, in line with the requirements of a modern public administration, in a permanent change, is the key element of the general process providing quality professional training to the staff within the public administration. Continuity of the public offices reform, within the context of an ample reform of the whole administration, can be stimulated by a qualified, motivated, competitive and highly trained staff.

Maintaining and subsequently increasing/developing the professional performances within the Council, is strictly connected to the need of a continuing professional training of its staff.

Thus, taking into account the obligation to improve their skills and professional training[32] at all times and being interested in the permanent professional training of their staff, the members of the Council attended two workshops in 2015, with the following subjects: I

- Interpersonal communication – „Me and us"

The course, initiated and organized by N.C.S.C., aimed for communication, which means relationship and a good relationship with others is accomplished by a successful work. As part of the settlement of disputes, communication between members is essential in order to reach a fair and lawful solution. But communication is not an easy process: errors may occur that turn into true barriers between members of a panel. Therefore it is necessary to identify and overcome them.

- Debates concerning the draft law on public procurement.

The course, also initiated and organized by the CNSC aimed for the interpretation, together with NAPA representatives; given the legislative changes at Community level in the public procurement area, the debate for the bills transposing those directives is necessary.

In parallel, the N.C.S.C. management gave serious concern to the improving of the administrative and technical staff, encouraging and financially supporting the employee participation in various training courses.

4.4. RELATIONSHIP WITH THE MASS MEDIA AND THE GENERAL PUBLIC

Concerning the relation with the media and general public, the activity developed by N.C.S.C. in 2014 materialized in an interactive approach, meant to grant institutional transparency.

Beside the answers given periodically to media representatives, in compliance with Law 544/2001 on free access to public information, the National Council for Solving Complaints periodically provided Official Press Releases regarding its activity for a correct information of the public. Periodically, information concerning the activity of the N.C.S.C. was sent by e-mail to the journalists accredited with the institution.

In parallel, in 2015, the Information and the Public Relations Office, in collaboration with the Statistics and IT Office within the N.C.S.C, organized, modernized and managed the institution's web page; they also published the Official Journal of the National Council for Solving Complaints.

Regarding the number of request from the media, during 2014, the Information and Public Relations Office within the N.C.S.C. received, in compliance with Law no. 544/2001 on the free access to public information, more than 100 requests fromthe accredited journalists and from different individuals/legal entities.

We also must mention the activity of this office, also materialized through elaboration and forwarding of

periodical press releases and the yearly activity report of 2015 to more than 350 mass-media institutions, news portals, freelance journalists, public institutions (Parliament, Local Councils, Municipalities, etc.) or NGOs.

We have to specify that in order to provide a total transparency regarding the activity of the N.C.S.C., this institution's management created, starting with2011, a Statistics Department and continued the measures dedicated to the upgrade of an integrated IT system, actions which:have materialized by 2012 through the elaboration and implementation of an IT application which provides the random electronic distribution of the complaints; the implementation of an IT application was initiated starting with January 2013, intended to automatically render the decisions anonymous, in order to fulfill the obligations falling within the responsibility of the Council of publishing on its own website, in the Official Bulletin, the motivated decisions within 5 days since the adoption "with no reference to the identification data of the decision and of the parties, of personal data but also information that the economic operator specifies in its tender as being confidential, classified or protected by an intellectual property right"[33]; at all times, provided the interested economic operators, general public and media with official data on the complaints submitted within the public procurement procedures and decisions issued by the Council.

In order to improve the quality and the efficiency of solving complaints in a transparent environment and to ensure access to accurate, detailed, prompt and easy information on the activity of N.C.S.C., all those interested in public procurement (including litigants), developed by Community and / or national financing, the Council concluded the financing contract no. CTRF 1.1.146/07.05.2014 of the project "Improving the management of the National Council for Solving Complaints afferent tospecific competencies related to the successful implementation of projects supported by structural instruments, based on streamlining of the procurement process", SMIS code 48792.

The project is co-financed from the European Regional Development Fund through OPTA 2007 - 2013 (Priority Axis 1 Support for the implementation and the coordination of structural instruments; Area of Intervention: DMI 1.1 Support for managing and implementing structural instruments) and has an implementation period of 16 months.

According to the grant application, it was provided:

- organizing two seminars of exchanging best practices on public procurement of projects financed through structural instruments, which targeted other institutions in the management and monitoring process of structural instruments (Unit for Coordination and Verification of Public Procurement, National Authority for Regulation and Monitoring Public Procurement, Certifying and Payment Authority, Competition Council, Management Authorities, Intermediary Bodies);
- performing an analysis of the curent internal processes and procedures (gender, performance external audit), in order to reflect the organizational level and the general institutional performance by N.C.S.C, namely its capacity to achieve their mission and objectives;
- organization of the of best practice exchange seminar for institutions with attributions, at national level, in the management and monitoring of structural instruments field, with the participation of experts from other Member States/ on European Union level;
- implementation of a diagnostic analysis on procurement-related problems faced by the contracting authorities: data gathering, centralization and processing of data from the cases solved by the N.C.S.C;
- developing a best practice guide (collecting test cases) in the domain of public procurements of projects financed from structural instruments;
- organization of a seminar with the topic „Judicial practice unification" with the participation of judges from all Courts of Appeals - being the first event of this kind;
- organization of 8 workshops of disseminating information from the best practices guide-collection of test cases within the 8 development regions;
- creating and installing an IT platform for access to the collection of test cases and other relevant information for the prevention of irregularities in the public procurement area, which wouldensure business optimization; it will also provide acces and consulting of test cases both to N.C.S.C members and to outsiders, which will help to prevent irregularities in the public procurement area. Also, the IT platform will provide access to those interested in informing on the status of theirown causes, searching for topics of interest by keyword, examples of best practice, legislation in the procurement field;
- purchasing an infokiosk, as part of the IT platform.

Within this project, there were conducted the following activities:

- Development of an internal diagnostic analysis on public procurement issues faced by the contracting authorities and the beneficiaries of grants through structural instruments

The diagnostic analysis looks at, exclusively, analysis of the current situation resulting from the practical experience of N.C.S.C, respectively from the subject of the cases brought before solving by the Council and from the solutions adopted by it.

- Elaboration and printing of a best practices guide (collection of motivated decisions) in the public procurement area for projects financed from structural instruments and information dissemination.

Based on the analysis and developed methodology, ia best practice guide in public procurement field was elaborated, for projects financed with structural instruments.

The guide contains neccesary measures to improve the implementation of structural instruments through a proper functioning of the public procurements and improvement of the communication and collaboration between the managing authorities and beneficiaries, as well as a collection of test cases, from the casuistry of the Council and courts. This was published in 1,500 copies, while respecting the existing rules of information and publicity for projects financed through the Operational Programme of Technical Assistance, designed to inform the contracting authorities, the management authorities, the supervisory authorities, the beneficiaries of structural funding, etc.

- Organizing 8 seminar - events - to disseminate the information from the guide

8 events were held, one in each development region, for the presentation and dissemination of information from the best practice guide issued by the N.C.S.C. At each event, it was recorded the participation of between 80 and 130 beneficiaries / responsible for the projects financed by structural instruments, from the place related to the organizational region.

The events considered the practical presentation and analysis of information, activities performed in the

service of improving the way procurements conducted within the projects financed with structural instruments and took place (during 01 - 09.11.2015) in the following cities: Iasi, Galati, Pitesti, Craiova, Timisoara, Cluj - Napoca, Brasov and Bucharest.

- Organizing seminars for best practices exchanges with the institutions involved in the management of structural instruments and procurement regulations

Two seminars were organized for best practices exchanges on public procurement from projects financed through structural instruments, which concerned the participation of experts from the institutions under the management and monitoring of structural instruments (The Unit for Coordination and Verification of Public Procurement, The National Authority for Regulation and Monitoring Public Procurement, The Certifying and Payment Authority, The Competition Council, The Management Authorities, The Intermediary Bodies); The conclusions of these meetings, which exceeded the anticipated number of participants, can be viewed on the project website: www.proiecte-cnsc.ro.

- Creating and installing an IT platform for access to the collection of test cases and other relevant information for the prevention of irregularities in the public procurement area

The National Council for Solving Complaints aims, through the development of the IT platform, to ensure an optimization of the information activity, from outside and inside, including access to a collection of test cases solved by the N.C.S.C. Also, the IT platform will provide access to those interested about knowing the status of their own causes, searching for topics of interest by keyword, examples of best practice, legislation in procurement field;

The implementation of an IT platform will provide structural support for the beneficiaries of structural funding, and not only, and will provide access to best practices examples in the field.

By installing an infokiosk in the N.C.S.C headquarters that enables all stakeholders, in a transparent and operative way, access to information about the status of files solving and to official bulletins which can be selected according to specific criteria.

- Organizing a seminar to exchange best practices for institutions with attributions, at national level, in the area of management and monitoring of structural instruments, with the participantion of experts from other Member States / European Union

The event was sucessful and paved the way for the meeting with specialists from institutions with role in coordinating, management, control and monitoring of projects financed with structural instruments, as The Unit for Coordination and Verification of Public Procurement, The National Authority for Regulation and Monitoring Public Procurement, The Certifying and Payment Authority, The Competition Council, The Management Authorities, The Intermediary Bodies etc, with 5 experts from 5 member states (Austria, Danemarca, Lituania, Marea Britanie) from the European Union (among them, a CE official).Topics of common interest were debated, including specific solutions for countries / regions that have enabled foreign experts, over a period of 2 days. The informative materials issued for works can be viewed on the project website: www.proiecte-cnsc.ro.

- Organizing a seminar for best practices exchange with judges involved in causes in the area

According to the grant application, related to the activity 7 (according to the amendament brought through the additional act 2), was conducted the seminar on the topic „Judicial practice unification".

The participants at this event, which lasted 3 (three) days, were judges from Courts of Appeal, SCM and the High Court of Cassation and Justice, but also Councillors for complaints solving from the public procurement area. Also, there were representatives of the National Institute of Magistracy and the Ministry of European Funds and the National Authority for Public Procurement.

During the work sessions, which included debates in plenary and group work, the participation interest was high, about 70 people being present.

The organization of the event was also brought to public knowledge through a press release, including on the site dedicated to the project.

The general objective of the project consisted of the optimization of National Council for Solving Complaints activity in the specific area of responsibility.

The specific objectives of the project:

Identifying problems from key stages of the procurement process and proposals for solving them; Identifying and promoting coherent solutions applicable in moments that generate incidents during the procurement procedures, so as to prevent different considerations from other respondents from the field;

Optimization of the complaints solving activity, through optimization and developing of communication networks with those involved in the acquisition process (including the beneficiaries of the structural instruments);

Organizing experience exchanges (national) on matters relating to public procurement financed from structural instruments;

Elaboration and implementation of an electronic platform to store structured information on areas of interest;

Conducting a review of internal processes and procedures, current (gender, external performance audit).

Physical indicators of the project

- 15 public procurement contracts;
- a diagnostic analysis of the system and a methodology of streamlining the public procurement and reducing irregularities;
- A best practice guide, containing a collection of test cases (1,500 copies);
- 8 events in each of the 8 regions of development;
- 2 seminars of best practices exchange, organized with the staff from The Unit for Coordination and Verification of Public Procurement, The National Authority for Regulation and Monitoring Public Procurement, The Certifying and Payment Authority, The Competition Council, The Management Authorities, The Intermediary Bodies etc;
- a seminar organized for exchange experience with the participation of five experts from other Member States / European Union;
- a seminar on the topic „Judicial practice unification"
- the installement of an IT platform for acces to the collection of test cases and other relevant information;
- review of the internal processes and procedures, current (gender, external performance audit), regarding the N.C.S.C organizational and institutional general performance ,respectively its own capability to achieve its mission and objectives;2 information and publicity events and 6 press releases (including 2550 advertising materials: 500 informative packages consisting of posters, brochures, flyers and pens, 2 banners, 200 custom presentation folders; 200 USBs);
- A functional website for the project - www.proiecte-cnsc.ro;
- Project management activities (tangible and intangible assets, and supplies aquired for the project team, awarding procedure initiated in SEAP- 6; refund applications and progress reports - 6; correspondence with the sponsor – AM POAT etc.).

Total project value - 4.418.443 lei (RON 7,849,862.28, initially), from which:
RON 3,755,677 - Reimbursable financial assistance from the European Regional Development Fund – 85%
RON 662,766 lei – N.C.S.C. Cofinance (through state budget) - 15%

General conclusions – seminars conducted (www.proiecte-cnsc.ro)

I.

1. the need of maintaining professionals in the public procurement system;

2. the need to facilitate the interinstitutional informational exchange;

3. overlapping of atributtions at the level of ex-post control (AM and OI/CC-AA) should be reduced / eliminated;

4. extension of the ex-ante control competence of N.C.S.C. and ANRMAP on the cross-border procurement programs;

5. insufficient regulatory on the situations regarding conflicts of interest resulting from carrying some procedures by private bodies benefiting from public funds / community;

6. takeover of the N.C.S.C. practice/ national courts in legislation (as Intermediate Quality Bodies – assimilated to local authorities);

II.

1. IN THE PROCESS OF TENDERS' EVALUTION, the need to clarify them should be a priority, at the expense of some formal, direct rejections.

2. THE ELECTRONIC SIGNATURE attached to the tender / to a party of the tender has to be appreciated as an element of data securing from it, not as a mandatory feature of the offer, which would ensure the acceptance in the competition.

3. TENDER SUPPORT granted by a third party must be accepted by the contracting authority under the back log of a full analysis of its mode of intervention.

4. CLARIFICATION OF THE TENDER must be understood as a necessary step for its evaluation process, without being subordinated to a concealed endeavor that would follow its rejection.

III.

1. The awarding documents should, effectively, allow the group tendering - standardized forms of presentation of the bidders and the involved parties (including standard contracts that would be concluded between the members of the group: association, subcontracting). The time allocated to planning the procurements must be sufficient to evaluate all the possible procurement options and all the risks of non-fulfillment of the future contract.

1. Evaluation of tenders must be demanding, but not formalist.

The descriptive part of the tender may contain explicit explanations on the way of carrying all activities, indicating the responsible parties related to the activities described.

Subcontracting may concern only part of the contract, not the whole contract.

Evaluation of all the documents submitted by all participants in the group (associate, subcontractor, third party supporter of the bid) is required, in order to verify the truthfulness of the sustained.

3. There is a preference (in many EU countries) for the use of electronic procedures, and communication components (forums discussions type pages) between economic operators can also be found in the electronic system.

4. The centralized procurement entities (on regional / national level) can provide both a competitive environment, adapted to the purchase need profitable for the procurement, but also extra comfort of the latter due to exemption of its correlative administrative obligations (organizational procedure, management contracts etc.).

5. The concession contracts concerning all types of public services or public works are put into service of some private bodies or joint ventures - public-private. There is no specific legislation for public-private partnerships, these being the exclusive result of some concession procedures.

6. Predilect use of the evaluation factor. The most economically advantageous tender represents an objective of the newly adopted Community legislation (new directives in the field), respectively a conduct that should be adopted by all EU states (the lowest supply price is still being used as an awarding criteria).

7. The amendment of contracts must be subordinated, solely, to the public interest, in order to achieve the purpose intended in the contracting phase.

5. BUDGET OF N.C.S.C.

The budget OF N.C.S.C. afferent for 2015 was in the amount of RON 14,247 thousand and it was distributed as follows:

– Budgetary provision for Current expenses: RON 14,008 thousand, of which:
  • Expenses with the personnel: RON 8,248 thousand
  • Products and services: RON 1,491 thousand
– Budgetary provision for Capital expenditure: RON 239 thousand.

The budget of N.C.S.C., detailed on budgetary titles and chapters is presented in the table below.

- RON thousands -

Code	Indicator	Buget	whole year, of which,			
			1st quater	2st quater	3st quater	4st quater
5000	**Total buget**	14.247	4.763	3.381	3.699	2.404
01	**Current expenses**	14.008	4.703	3.321	3.635	2.349
10	**Title I expenses with the personnel**	8.248	2.077	2.061	2.059	2.051
20	**Titlul II products and services**	1.491	414	415	364	298
56	**Titlul VIII projects financed from post-accession external funds (NEF)**	4.269	2.212	845	1.212	0
70	**Capital expenditure**	239	60	60	64	55
71	**Titlul XII non-financial assets**	239	60	60	64	55
5101	**Public authorities and external actions**	14.247	4.763	3.381	3.699	2.404
01	**Current expenses**	14.008	4.703	3.321	3.635	2.349
10	**Title I expenses with the personnel**	8.248	2.077	2.061	2.059	2.051
20	**Titlul II products and services**	1.491	414	415	364	298
56	**Titlul VIII projects financed from post-accession external funds (NEF)**	4.269	2.212	845	1.212	0
70	**Capital expenditure**	239	60	60	64	55
71	**Titlle XII non-financial assets**	239	60	60	64	55
01	**Public authorities and external actions**	14.247	4.763	3.381	3.699	2.404
03	**Executives authorities**	14.247	4.763	3.381	3.699	2.404

CONCLUSIONS AND FORECAST

Quite often, the Constitutional Court, in accordance with the provisions of the first article of the Fundamental Law, ruled on the nature of Romania's „rule of law", whose essential feature is represented by the supremacy of the Constitution and the obligation to respect the law. The same Court noted that the Parliament has the duty to enact appropriate rules for a genuine ensuring of compliance with free access to justice, without which one cannot conceive the rule of law. Without fulfilling this duty, constitutional rules would have a purely declaratory nature, an unacceptable situation for a country that shares the democratic values that are part of the European public policy.

Although there is no doubt that justice is carried out by the courts envisaged by art. 126 of the Constitution, we venture to believe that in its 9 years of activity, the National Council for Solving Complaints, body belonging to the executive power, proved to be an active, capable and credible partner in terms of justice enforcement, as a service of public interest, aiming for compliance with the rule of law, fundamental freedoms, rights and legitimate interests for individuals and legal persons, law enforcement and ensuring its supremacy. Thus, within the state mechanism, to the duty of restoring the rule of law by the judiciary authority, the National Council for Solving Complaints successfully contributed.

Regarding the constitutional legitimacy of the administrative - judicial proceedings, the Plenum of the Constitutional Court, by decision no. 1/1994, recognized the exclusive competence of the legislature to institute such proceedings, mainly intended to ensure a faster resolution for certain categories of disputes, the courts' decongestion of cases which can be solved through this means and avoid the court costs. From this perspective, the Council's outstanding efficiency in achieving its objectives cannot be denied, throughout the 9 years of operation, the institution managing to relieve the courts of more than 50,000 complaints, and the average duration of solving this impressive volume of cases did not exceed 20 days since receiving the necessary documents from the parties. Also, the absence of any charge for access to the jurisdiction of the Council, in contrast to the fees charged upon notification of the courts, represented a major advantage for operators harmed by the unlawful acts from contracting authorities, the latter unhesitatingly calling to the impartial jurisdiction of the Council.

Unfortunately, in 2014, following the imposition of the emergency decree of mandatory deposit of a guarantee of good conduct for each appeal, there was a decline in the number of complaints on public procurement, traders hesitating to exercise their right of access to a court (administrative or judicial), as enshrined by the Constitution. The regret that we manifest is that the reduction in the number of complaints in the area was not caused by a decrease in the number of possible abuses done by the contracting authorities in awarding contracts, but by a tightening of the conditions for injured persons' access in the Council and the competent courts. Obviously, the reluctance to act induced to injured parties led to the restriction of the Council and the courts' intervention in restoring legality in the cases of suspected fraudulent award of contracts.

The access to the Council must be unfettered, free from any guarantees and available to anyone injured, with or without financial means. Only then Romania will be able to reduce and prevent corruption in the public procurement field, a phenomenon reported in all monitoring reports by the European Commission. Thus, in the last report on the progress made by Romania under the Cooperation and Verification Mechanism, presented in Brussels on 01.28.2015, it is again said that „Procurement procedures, especially at local level, are still encumbered by corruption and conflicts of interest - a fact widely recognized by Romanian authorities when it comes to integrity and enforcement. This has had negative consequences for the EU funds absorption". Finally, the European Commission invites Romania to step up its preventive and repressive measures directed against conflicts of interest, favoritism, fraud and corruption in public procurement.

Increasing the awards transparency will implicitly lead to the prevention of conflicts of interest.

Facilitating the access of economic operators, together with a strengthening of the Council's role is certainly a measure to prevent and combat fraud and corruption in the public procurement sector. Besides, the European Commission itself states that „Regarding appeals, the National Council for Solving Complaints receives complaints about public procurement. These act as an efficient filter to prevent a significant number of irregularities within the procurement procedures, both for projects funded through national and European funds".

It should be understood by anyone that irregularities in the public procurement sector have an effect on the whole society, which has to bear not only higher costs of public services, but also their questionable quality. We hope that 2016 will mark a rethinking and a mitigation of the conditions of access for economic operators to the jurisdiction of public procurement, the desired effect being its increased involvement in the fight against fraud and corruption in this field, namely in disciplining the conduct of contracting authorities.

Finally, we assure our readers that in the next period as well, our goal remains the strengthening and improving the Council's functional capacity to undertake a prompt, impartial, transparent and in line with legal provisions, to the highest standards, of all complaints submitted to it.

NOTES

1. Addendum no. 1 to The Regulation for organizing and functioning of the Council of the National Council for Solving Complaints approved by G.D. no. 1037/2011, published in the Official Gazette, Part I, no. 775 from 02.11.2011.
2. organized according to the art. 20 from G.D. 1037/2011, in accordance with the dispositions of the Law no. 188/1999 concerning The Status of the public officers, republished with further changes and additions, as well as those of the Government Decision no. 611/2008 for the approval of standards regarding the organization and development of the public officers career, with further changes and additions.
3. art. 267 from G.E.O. no. 34/2006.
4. published in the Official Gazette, Part I no. 872 from 09.12.2011.
5. published in the Official Gazette, Part I no. 775 on November 2nd 2011, normative act that revoked the G.D. no. 782/2006.
6. art. 269 from G.E.O. no. 34/2006.
7. with the possibility of only one renewal of the term.
8. art. 258 from G.E.O. no. 34/2006.
9. according to the Law no. 278/2010 approving G.E.O. no. 76/2010 for amending and supplementing the G.E.O. no. 34/2010.
10. according to the Law no. 278/2010.
11. art. 28 from the Law no. 178/2010 of the public-private partnership, published in the Official Gazette No. 676/05.10.2010.
12. art. 188 G.E.O. no. 114/2011 concerning the designation of certain procurement public contracts in the field of defence and security, published in the Official Gazette no. 932/29.12.2011.
13. art. 255 par. (5) of the G.E.O. no. 34/2006.
14. approved by G.D. no. 1037/2011.
15. according to art. 2711 brought by pt. 4 of GEO. 51/2014 for modifying and completing the Government Emergency Ordinance no. 34/2006 regarding awarding og public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette no. 486 from 30.06.2014.
16. at BNR exchange rate at the time of submitting the security.
17. Official Gazette, part 1 no. 188 from March 19 2015.
18. https://www.ccr.ro/files/products/Decizia_nr5_2015.pdf
19. art. 2781 from G.E.O. no. 34/2006 repealed at the moment of carrying the reported activity, respectively 2015;
20. by Emergency Ordinance no. 76/2010 for modifying and completing the Government Emergency Ordinance no. 34/2006 regarding awarding of public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette, part I no. 453 from July 2 2010.
21. art. 331 from G.E.O. no. 34/2006.
22. by Emergency Ordinance no. 279/2011 for modifying and completing the Government Emergency Ordinance no. 34/2006 regarding awarding of public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette, Part I no. 872 from December 9, 2011.
23. art. 2711 par. (1) from G.E.O. no. 34/2006.
24. by Emergency Ordinance no. 51/2014 for modifying and completing the Government Emergency Ordinance no. 34/2006 regarding awarding of public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette, Part I no. 486 from June 30, 2014.
25. The Council has the obligation to solve the complaint in 20 days since the date of receiving the public procurement file from the contracting authority; respectively within 10 days in case of an exception incidence that prevents the analysis of the complaint, under art. 278 par. 1 (1). In cases solidly justified, the resolution due date of the complaint may be extended only one time by another 10 days.
26. the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4.4450 RON/EUR.
27. the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4.4450 RON/EUR.
28. the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4.4450 RON/EUR.
29. the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4.4450 RON/EUR.
30. the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4.4450 RON/EUR.
31. regarding the Statue of Public Officers, republished, as further amended and completed.
32. Art. 50 of the Law no. 188/199, as futher amended and completed.
33. art. 279 par. (4) of the G.E.O no. 34/2006.