



POSITION PAPER

Non-uniform practices in examining and settling appeals by the National Agency for Solving Complaints

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Abbreviations

- DE** – Deadline for examining and issuing the decision
- EA** – Elements of the appeal
- EO** – Economic operator
- EVP** – Estimated value of the procurement, calculated by the contracting authority, excluding VAT
- NASC** – National Agency for Solving Complaints
- OA** – Objective of the appeal
- OC** – Object of the complaint

Introduction

The functionality of the National Agency for Solving Complaints (henceforth NASC) is the key element for a sustainable and efficient public procurement system. Institutional development is the basis for the fundamental reform of the public procurement system.

According to the **Strategy for the development of the public procurement system** adopted by the *Government's Decision no. 1332 on December 14, 2016*, a public procurement system must provide wronged bidders with remediation possibilities, which must be fast, effective, transparent and non-discriminatory.

For this purpose, NASC is an autonomous and independent public authority in relation to other public authorities, as well as in relation to other natural and legal persons, which examines the appeals filed against public procurement procedures. At the same time, NASC is independent and cannot be subordinated to any other public authority or institution, having the obligation to defend, without any privilege or discrimination, the legitimate rights and interests of all parties involved in the disputes submitted for settlement. NASC is competent to resolve the disputes regarding public procurement procedures, and its main role is the remediation, and the alternative – the cancellation of the awarding procedures breaching the legislation.

In the context of this position document, we aim to evaluate cases from the decisions issued by NASC in the field of public procurement, in compliance with the *adversarial principle as well as those of legality, celerity, and of the right to defense* according to art. 84, par. (3) of Law no. 131 of 03.07.2015 *on public procurement*. At the same time, following the identification of non-uniform practices, a series of proposals and recommendations will be issued in order to increase the efficiency and efficacy of NASC's activity¹.

¹ http://www.legis.md/cautare/getResults?doc_id=113104&lang=ro

Methodology

In drafting this position paper we have analyzed the decisions issued by NASC concerning those appeals submitted by economic operators in the process of public procurement. By comparing the assessments issued by NASC with regard to the claims made by the economic operators, we have identified and outlined a series of non-uniform practices in the process of solving appeals.

By „non-uniform practice“ is meant the evaluation of similar claims through the non-uniform application of the legislation, therefore the examined appeals having different outcomes. Thus, there have been the claims invoked by economic operators with regard to different appeals but having the same traits, which could lead to non-uniform solutions issued by the ANSC.

The main data sources used for the analysis of the appeals and the elaboration of this document are:

- NASC web page - www.ansc.md, especially the sections „appeals under examination“, and „decisions“ under the „appeals“ heading.
- The automated information system the “State Register of Public Procurement” MTender - www.mtender.gov.md.

Another tool we have employed was the participation in NASC’s open sessions for examining the appeals, in order to determine the manner and format in which they are being organized.

Non-uniform practices in the activity of the national agency for solving complaints

Case 1. Decision no. 03D-287-19 of 28.05.19 vs. Decision no. 03D-371-19 of 27.06.2019

Decision	Decision no. 03D-287-19 of 28.05.2019	Decision no. 03D-371-19 of 27.06.2019
Involved parties	Luxgaz LLC vs. Codru City Hall, mun. Chişinău	PASC-CON JSC vs. Horodca Town Hall, r. Ialoveni
OA	Capital repair works of some streets in the town of Codru	Construction works for a small football field
No. in MTender	ocds-b3wdp1-MD-1556092840848	ocds-b3wdp1-MD-1558515361582
Procedure type	Open tender	Request for price offers
EVP	17 000 000 lei	375 434.34 lei
OC	Result of procedure	Result of procedure
EA	Rejection of the offer without CA's request for clarifications regarding the technical proposal/price offered, or the incorrect assessment of the answers to the clarifications.	Other
Content of the decision	Appeal admitted, remedial measures	Appeal admitted, remedial measures
DEI	6 working days	11 working days
EO's claims	<ol style="list-style-type: none"> 1. Appeal of the decision to cancel the public procurement procedure; 2. Pronunciation of the technical offer presented by Solcoci Prim LLC, ranked in the first place according to the lowest price awarding criterion, as non-compliant. 	<ol style="list-style-type: none"> 1. Not informing the CA about the results of the procurement procedure; 2. Dismissal of EO's offer due to lack of similar experience;

CA's arguments	<ol style="list-style-type: none"> 1. Cancellation of the public procurement procedure due to the incorrect determination of the estimated value of the purchase. 	<ol style="list-style-type: none"> 1. The participants have been informed through Letter no. 1 of 04.06.2019; 2. The EO was rejected due to lack of similar experience
NASC's assessment	<ol style="list-style-type: none"> 1. The incorrect determination of the estimated value is not a legally-argued motivation and therefore cannot constitute the basis for canceling the public procurement procedure; 2. Finding deviations in the offer of the EO Solcoci Prim LLC, a fact that the CA will take into account in the process of examining and evaluating the offers. 	<ol style="list-style-type: none"> 1. The AC made an error when sending the notification letter regarding the results of the procedure to the contestant.
NASC's decision	<ol style="list-style-type: none"> 1. The filed appeal is admitted. 2. The decision to cancel the public procurement procedure shall be annulled. 3. The Codru City Hall is obliged, as a remedial measure, within up to 5 days from the receipt of this decision, to evaluate the offers received during the public procurement procedure 4. The Codru City Hall is obliged to report to NASC within 7 days on the implementation of the remedial measures imposed by this decision. 	<ol style="list-style-type: none"> 1. The filed appeal is admitted; 2. The Horodca City Hall is obliged, within 3 days from the receipt of this decision, to inform the contestant about the results of applying the contract awarding procedure to the procurement procedure. 3. The Horodca City Hall is obliged to report to NASC on the implementation of the remedies imposed by this decision within 3 days from the date of their execution.

Non-uniform practice no. 1

The common feature in the appeals analyzed above is that the economic operators have invoked more claims towards CA.

In the first case, Decision no. 03D-287-19, NASC has pronounced on both claims invoked by the contestant, including on the non-conformity of the offer ranked first according to the lowest price award criterion, that even if it doesn't want to, AC is obliged to reject its offer. Considering the price difference between the two offers of **(+) 1 479 762.14 lei**, and the non-conformity of the technical offer, which falls into the category of minor deviations and does not substantially affect the scope of action, as well as the quality or the performance of the works specified in the contract, a bidder is thus indirectly favored in the award of the contract.

In the second case, Decision no. 03D-37, NASC has pronounced only on the fact that the CA did not inform the EO correctly, but did not comment on the claim whether the CA has correctly appreciated the technical capacity, namely the lack of the contestant's experience, and thus obliged the CA just to inform the EO in conformity with the legal norms. Despite the fact that NASC considers that it is not fair to state its position with regard to some claims if the contestant has not been properly informed, it is recommended that the Agency also examines the opportunity of the pronouncement also on the rest of the claims, thus reducing the risk of the contestant repeatedly addressing the same claims after receiving information about the results of the procedure in question.

Therefore, it is found that NASC, in its issued decisions, examined only superficially and electively the claims invoked by the contestants. It is recommended to standardize the judicial practice by issuing decisions including in relation to claims that would generate an increased risk of repeated submission of appeals by the contestant with regard to the public procurement procedure.

Case 2. Decision no. 03D-306-19 of 31.05.2019 vs. Decision no. 03D-24-17 din 18.10.2017

Decizia	Decision no. 03D-24-17 of 18.10.2017	Decision no. 03D-306-19 of 31.05.2019
Involved parties	Talimax Grup LLC vs. Ivanovca Nouă Town Hall, r. Cimișlia	Foremcons LLC vs. Palanca Town Hall, r. Ștefan-Vodă
OA	Water supply works for Ivanovca Noua village, r. Cimișlia	The reconstruction of the culture center of Palanca, r. Ștefan-Vodă
No. in MTender	No.371/17 din 19.09.2017*	ocds-b3wdp1-MD-1553507547775

Procedure type	Open tender	Open tender
EVP	1 961 420 lei	6 024 733 lei
OC	Results of the procedure	Results of the procedure
EA	Rejection of the contestant's offer as non-compliant or unacceptable	Acceptance by the CA of non-compliant or unacceptable offers from other participants
Content of the decision	Appeal admitted, Annulment of the public procedure	Appeal admitted, Remedial measures
DEI	14 working days	19 working days
EO's claims	Rejection of the offer, due to the failure to present the site manager's certificate concerning the electrical aspect.	From the offer of the EO designated as winner lacks the technical-professional attestation certificates of the specialists to be involved in the execution of the contract.
CA's arguments	The CA rejected the offer of the EO on the grounds of not presenting the certificate of the site manager for installations and electrical networks, since the works related to electrical networks represent 12.89% of the total sum of the works.	According to the participation notice, the CA requested the presentation of only one site manager for the construction works and not that of all the site managers.
NASC's assessment	With regard to the claim of the contestant regarding his disqualification due to the non-presentation of the certificate of technical-professional attestation of the site manager for installations and electrical networks it is worth mentioning that, according to the datasheet of the acquisition, the CA requested the presentation of the certificate of technical-professional attestation of site manager, without precisely mentioning specific works for electrical installations and networks.	NASC notes that they concern aspects related to the way in which the public the procurement working group analyzed and appreciated the bid submitted by the designed winner, which did not, allegedly, submit the technical-professional attestation certificates of the site manager/managers for all the fields related to the technical specifications from the task book and which are said to be necessary for the execution of the works.

	In this context, NASC reaches the conclusion that the working group disqualified the EO incorrectly, inasmuch as the latter presented a certificate of technical-professional attestation of the site manager for the works which are the object of the open tender.	Thus, the CA's arguments that «it requested the certificate of attestation only for a single manager, with which the winner complied» cannot be accepted, as, from among the documents attached to the offer of the EO nominated as the winner, there lacks a certificate that would cover all the fields necessary for the execution of all works in accordance with the task book.
NASC's decision	<ol style="list-style-type: none"> 1. Appeal is partially admitted; 2. Cancellation of the procurement procedure, no. 371/17 of 19.09.2017, initiated by the Ivanovca Nouă City Hall, including all the documents related to this procedure 	<ol style="list-style-type: none"> 1. The appeal is partially admitted 2. The decision to award the public procurement contract shall be annulled 3. The City Hall of Palanca, is obliged, as a remedial measure and within 5 days from receiving this decision, to re-evaluate the offer presented by the I.C.. "Alexandru Pădureț" 4. The City Hall of Palanca is obliged, within 3 days from the adoption of the decision to re-evaluate the offers, to report to NASC regarding the implementation of the remedial measures imposed by this decision.

Non-uniform practice no. 2

The common trait of the issued decisions is the fact that the lack of certificates of technical-professional attestation of the site managers was the basis for rejecting the submitted offers.

In the first case, through Decision no. 03D-24-17, NASC establishes that it is not necessary for the EO to present technical-professional certificates for all the fields related to the works specified in the task book unless the CA has explicitly specified this requirement in the participation notice.

In the second case, through Decision no. 03D-306-19, NASC establishes that it is necessary for the EO to present technical-professional certificates for all the fields related to the works specified in the task book, without the CA to expressly indicate this requirement in the participation notice.

Therefore, it is found that concerning the issued decisions, NASC has examined in a different manner the decisions of the working group regarding the conformity of the economic operators with the professional capacities in the qualification documents attached to the offer. Thus, within about 2 years, a different approach is adopted with regard to the presentation of the documents attesting the professional capacity. In this case, it is recommended that NASC adopts a uniform solution, commensurate with the complexity of the works of the future public procurement contract.

Case 2. Branches of the principle of celerity in the activity of NASC

In this case, the violation of the principle of celerity is examined. In the case of the submission of repeated appeals on the same public procurement procedure, NASC, instead of examining urgently the appeal (taking into consideration that the appeal file is essentially known) and of reducing the time required for issuing the decision, it, on the contrary, examines the appeal addressed on one and the same procedure in an increasingly slow manner.

Decision	03D-156-19 of 01.04.2019 03D-229-19 of 03.05.2019 03D-332-19 of 12.06.2019
Parties involved	Foremcons LLC vs. Strășeni City Hall
OA	Sewerage networks in the "Podiș" and "Aleea Plopilor" districts of the Strășeni municipality
No. in MTender	ocds-b3wdp1-MD-1549532848188
Procedure type	Open tender
EVP	2 612 850 lei
DEI	03D-156-19 – 14 working days 03D-229-19 – 16 working days 03D-332-19 – 18 working days

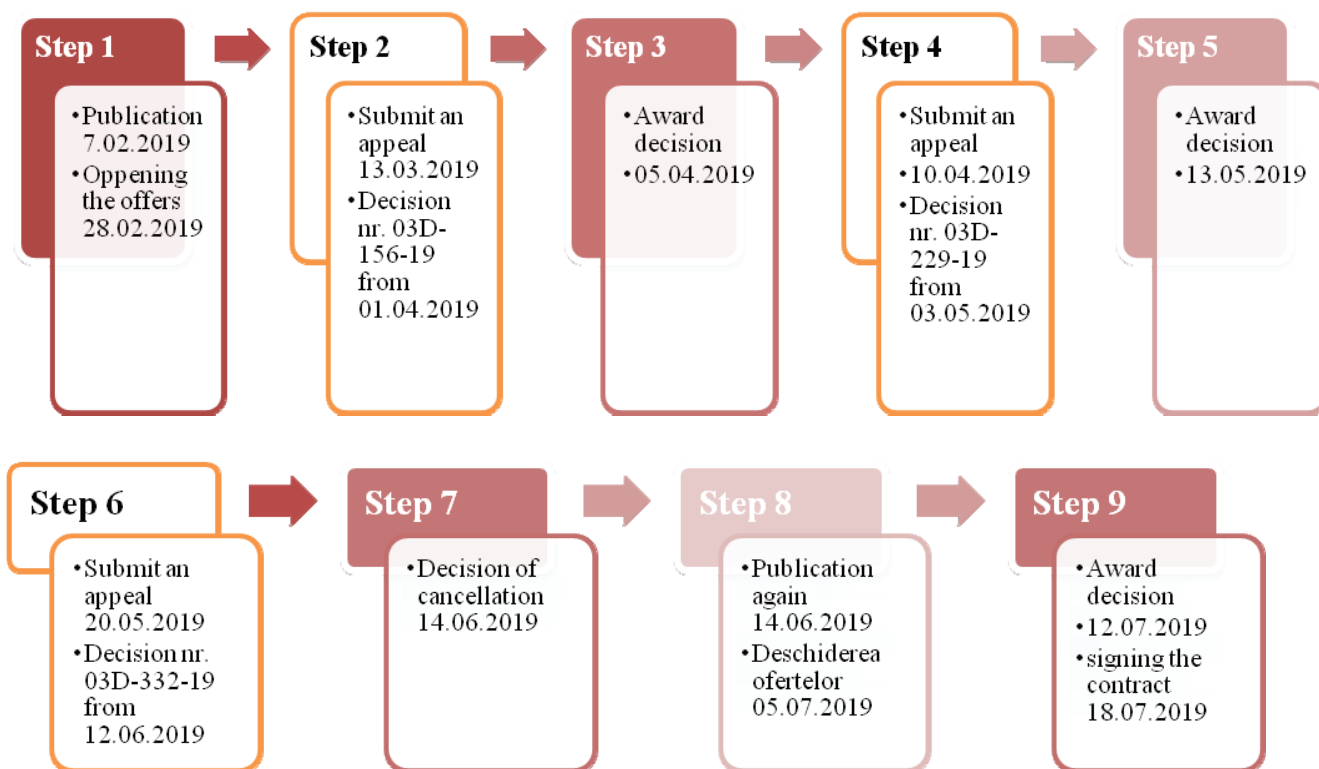
In the first case - Decision no. 03D-156-19 - the contestant expresses his disagreement with the decision of the working group to reject his offer. Considering that the CA expressed its position on the issue of identification of the non-conformities in the technical offer, which represent errors in the technical offer, NASC has resolved the dispute in 14 working days.

In the second case - Decision no. 03D-229-19 of 03.05.2019 - the objector expresses his disagreement with the decision of the working group to accept the offer ranked in the second place according to the awarding criterion. At the same time, it invokes a violation of the principle of free competition. NASC finds that the claims regarding the non-conformity of the technical offer submitted by the designated winner are sound, and rejects the claims regarding the violation of the principle of free competition. In this case, NASC issued the decision on the appeal in 16 working days.

In the third case - Decision no. 03D-332-19 of 12.06.2019 - the objector expresses his disagreement with the decision of the working group to accept the offer ranked in the 3rd place according to the awarding criterion, claiming that the technical offer does not correspond to CA's requirements. NASC notes that the decision of the working group to accept the offer ranked in the 3rd place is incorrect and contrary to the legal provisions. In this case, 18 working days were required.

Therefore, it is found that, in the above-listed decisions, NASC breached the principle of celerity. Instead of reducing the time limit for examining the appeal, it increased it from 14 days to 16 days, and then to 18 working days. Taking into consideration the fact that the dispute settlement panel was one and the same, and that the claims of the contestant in all 3 cases were focused on the technical non-compliance of the offer, namely on errors in the estimates of the expenses of the economic operators, the deadline for solving the appeal should have been reduced so that the CA can purchase the works in a timely manner.

Figure 1. The stages of the public procurement procedure regarding the procurement of works for sewerage networks in the districts „Podiș” and „Aleea Plopilor” from Strășeni.



At the same time, it is necessary to mention that, following Decision no. 03D-332-19 of 12.06.2019, in which NASC ordered remedial measures, namely the re-evaluation of the offers in the public procurement procedure, the CA canceled the open tender, invoking technical impossibilities on the electronic procurement platform. After this, it repeatedly launched a new procedure with the same purchase object on 14.06.2019 (procedure no. in MTender: ocds-b3wdp1-MD-1549532848188), with the opening of bids on 05.07.2019. In the repeatedly launched procedure, the EO which contested the previous auction results - Formecons SRL, did not participate. In conclusion, it can be said that filed appeals did nothing but prolong the duration of the public procurement procedure in a completely unjustifiable manner, while NASC, by examining the appeal within the above stated time limits, demonstrated a lack of interest in speeding up the public procurement procedure and contributed to violating the principle of celerity. In total, the acquisition of the sewerage works lasted an exaggerated period of 5 months from the initiation of the procedure until the signing of the enterprise contract.

Final conclusions and recommendations

The examined cases allow identifying the deficiencies in the process of challenging the documents issued by the contracting authorities. There are outlined, in some cases, non-uniform practices of examining and settling appeals. It is necessary that through the issued decisions, NASC establishes as few contradictory precedents as possible.

NASC will periodically analyze the most frequent violations committed in the public procurement procedures in order to take the necessary measures and to standardize the judicial practice of solving complaints in the public procurement system. In parallel, following the experience of other states (ex: Romania), it is recommended that NASC develops a Guide of good practices containing a collection of cases in the field of public procurement, through which NASC would conduct an internal diagnosis - based on the submitted complaints - of the problems in the field of public procurement facing the contracting authorities, but also to propose measures to make public procurement more efficient and to reduce the irregularities present in the procurement processes.

Another recommendation concerns the development of the application of unified solutions related to the filed appeals, which would considerably reduce the time required to examine and resolve the appeal. Thus, the same situation is to be treated equally in all the appeals filed, which would increase the degree of confidence in the decisions made. NASC must play a pro-active role in obtaining, administering, identifying and researching all the evidence necessary for the correct examination of the procedure. This would ensure consistency and coherence in NASC's decision-making process with regard to previous decisions issued in similar cases and the avoidance of conflicting decisions while interpreting the law.

In relation to appeals that are repeatedly submitted on one and the same procedure, NASC will examine them as a priority in order not to delay the progress of the procedure, and in accordance the principle of celerity.

