

ANAL ANALYTICAL NOTE

ANALYSIS OF UNFOUNDED CHALLENGES IN PROCUREMENT AND SOLUTIONS FOR STREAMLINING THE CHALLENGE PROCEDURE

Introduction

The right to challenge in public procurement procedures is provided for by the legal framework and is determined by two conditions: ***the interest to obtain the contract and the existence of the injured right***. In the Republic of Moldova, the body responsible for examining and settling appeals is the National Agency for the Settlement of Appeals (hereinafter ANSC), ***an autonomous and independent authority which is responsible for reviewing the decisions of contracting authorities and contracting entities in the process of awarding a contract***. The analysis is also important and topical from the perspective of the commitments deriving from the Republic of Moldova's status as a candidate country for accession to the European Union, namely ***improving public procurement at all levels of government***¹.

From the moment it was established and became operational to date, the ***ANSC has adopted 5179 decisions*** following the examination and resolution of some ***6276 appeals***. Over the last 3 years (2021-2023), the number of appeals is relatively stable, with a slight decrease in 2023 (1012 appeals) compared to both 2022 (1135 appeals) and

In general, the number of challenges lodged by economic operators in procurement procedures can be interpreted as an ***indicator of private confidence in the challenge system***. Respectively, a low number of challenges compared to the number of procurement procedures may signal a lack of trust in the system due to low credibility and integrity, high costs of the challenge procedure, short deadlines for filing a challenge, reluctance to file a challenge, especially in small markets, which is characteristic for the Republic of Moldova.

In the context of the launch of the initiative to create the National Platform for Public Procurement (hereinafter PNAP), IDIS "Viitorul" team held discussions with the main actors in the procurement sector in order to identify the problems that need to be solved by implementing the most effective policies and / or tools. The subject of challenges in public and, more recently, sectoral procurement procedures has been and continues to be of increasing interest, both for contracting authorities and economic operators, as well as for regulatory and policy institutions. On the one hand, contracting authorities claim that there are malicious challenges which would delay the award procedure. On the other hand, the economic operators claim that this is a right enshrined in law and, in addition, allege infringements admitted by the authorities in the procurement process. However, the review mechanism makes an essential contribution to correcting a flawed procurement process and holding contracting authorities/entities accountable.

Although it is complicated to categorize a challenge as frivolous, this note analyzes data on ***challenges dismissed as unfounded, challenges withdrawn, and the practices of other countries***. The conclusions will serve as an argument for policies to

¹ https://neighbourhood-enlargement.ec.europa.eu/document/download/d8ef3ca9-2191-46e7-b9b8-946363f6db91_en?filename=SWD_2023_698%20Moldova%20report.pdf

discourage economic operators from challenging maliciously, while ensuring the right to challenge for any economic operator interested in a procurement contract.

I. Right to challenge in the legal framework

According to Article 82, paragraph (1) of Law 131/15 on Public Procurement, *any person who has or has had an interest in obtaining a public procurement contract and who considers that in the public procurement procedures an act of the contracting authority has infringed a right recognized by law, as a result of which he has suffered or may suffer prejudice, is entitled to challenge the act.* Therefore, the right to challenge is determined by two conditions: the interest in obtaining the contract and the existence of the right adversely affected.

In addition, Law No. 396/2023 amended Law No. 131/2015 (in force from January 1, 2024) by Law No. 396/2023, and supplemented Article 82. Right to challenge. Thus, paragraph ¹¹ provides *"bidders shall be deemed interested if they have not been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been deemed lawful by the ANSC or is no longer subject to appeal to the ANSC. Bidders who have not been definitively excluded shall be deemed to be interested in challenging the re-evaluation decision if they have challenged the initial contract award decision/cancellation of the public procurement procedure."* And paragraph 5 provides that *the economic operator must exercise in good faith the right provided for in para. (1).*

Another relevant rule is contained in Article 85 paragraph (14) of Law No. 131/2015 which provides that *"In duly justified cases and in order to prevent imminent damage, the ANSC, until the merits of the case are resolved, may order, by decision, within 3 days, including at the request of the interested party, the suspension of the public procurement procedure"* and in paragraph (15) of the same article *"For the purposes of the provisions of paragraph (14), the ANSC shall resolve the request for suspension taking into account the consequences of this measure on all categories of interests that may be harmed, including the public interest"*.

II. Analysis of the issue

Actors in the public/sector procurement system are debating the subject of unfounded, but also potentially abusive or malicious challenges. An abusive or malicious challenge is formulated in the absence of objective reasons and whose purpose is not the defense of an injured right but other reasons such as delaying the award procedure to a competitor, "revenge" on the contracting authority, blocking the procurement procedure, etc. Despite the fact that such challenges may exist in any challenge system and have a negative impact on the procurement process, it is difficult to categorize a challenge as being a priori maliciously filed even if it is later rejected by the decision of the competent body.

For the analysis of potential abusive or malicious complaints, data on complaints rejected by the ASNC as unfounded, complaints withdrawn by economic operators and those lodged by the top 5 economic operators with the most complaints were analyzed. Despite the fact that it is complicated to categorize a challenge as abusive or malicious, different instruments have been implemented in different countries to induce economic operators to exercise their right to challenge with good intention. The analysis of practices in other countries shows that also in EU countries, there is the phenomenon of maliciously challenging a procurement on grounds other than an injured right.

According to a ^{SIGMA/OECD} study², a fairly large number of EU countries reported that sometimes the reason why an economic operator lodges a challenge is to **obstruct the award of a procurement contract**. On the one hand, some economic operators are reluctant to lodge a challenge with good underlying reasons not to reduce their chances of winning a future contract with the contracting authority. On the other hand, some economic operators are ready to take all available measures to maximize their chances of winning a procurement contract, even at the risk of damaging relations with the contracting authority.

Furthermore, the same study mentions that some economic operators pursue **financial gains** through the contestation procedure, trying to gain a certain profit from a contract which was not awarded to them. Such situations have been reported in a small number of tenders in Slovakia, Portugal and Germany. Although, no exact figures are available, cases have been reported where economic operators have been discouraged from lodging a challenge by the high fees that are foreseen for the challenge or even in general by the high costs of the procedure (e.g. legal representation) and in some cases also by the long duration of the procedure.

There are situations where a challenge may be well founded and submitted with good intention, but for certain reasons, it is subsequently rejected by ANSC. These reasons refer to the fact that the economic operator declared winner has submitted additional qualification documents to the authority during the evaluation process (which does not take place electronically, by MTender in the absence of technical functionalities at the evaluation stage). Another reason is the fact that in the process of examining the contestation, the contracting authority remedies the problems that were rightly invoked by the challenger. Another reason may be the lack of capacity or experience of the tenderer, who is either new to the procurement market or does not have a thorough knowledge of the legislation and procedure.

Challenges submitted in 2023

According to the [report of the Public Procurement Agency](#), in 2023, a total of **6499 public procurement procedures** were carried out with a total value of **12.36 billion lei**. Through the MTender system, about 6042 procurement procedures. In 2023, 1012 complaints were registered with ANSC **on 760 procurement procedures, including 623 public procurement procedures**. As a result, **about 12.6% of the procurement procedures conducted through MTender were contested**. However, if we analyze the value of the contested procurements, then we find that this amounts to about **4.8 billion lei**. By comparison, in 2022, the value of contested procurements amounted to 6 billion lei, which is a **significant reduction of 19.5%**.

Out of the total 1012 appeals, 935 (92%) appeals were filed in the framework of public procurement procedures (governed by Law no. 131/2015) and 77 (8%) in the framework of sectoral procurement (governed by Law no. 74/2020). ANSC issued during 2023 - **846 decisions** on 927 ^{appeals}³, Out of these, 654 or 77% were examined on the merits, and 192 or 23% were rejected without examination on the merits.

² https://www.oecd-ilibrary.org/governance/public-procurement-review-and-remedies-systems-in-the-european-union_5kml60q9vklt-en

³ Multiple appeals lodged in the same procurement procedure are linked and examined by the ANSC in order to reach a single decision.

Table 1 Main indicators of procurement challenges in 2023

Value of contested procurements	4.8 billion lei
Number of procurement procedures carried out through MTender	6042
Number of challenges submitted	1012
Number of contested procurement procedures	760
Number of contested public procurement procedures	622
Average time to settle a challenge on the merits	18 days ⁴
Number of decisions issued by ANSC	846
Share of appeals rejected/returned, without substantive examination	23%
Share of appeals rejected as unfounded	50%
Proportion of appeals upheld in whole or in part	43%
Number of appeals withdrawn by economic operators	121

Source: compiled by authors based on data from www.tender.gov.md and www.ansc.md

Analyzed by subject matter (CPV code), the most contested purchases are: **purchases of construction works**, with 296 contested procedures and 391 challenges or 38.6% of the total number of challenges. **Procurement of medical equipment, pharmaceuticals and personal care products** are also frequently contested, **with** 87 procurement procedures contested and 125 complaints filed.

Statistics show that over the last 3 years (2021-2023), **the number of challenges is relatively stable, with** a slight decrease in 2023 (1012 challenges) compared to 2022 (1135) and 2021 (1095). In general, the number of challenges filed by economic operators in procurement procedures can be interpreted as an **indicator of confidence in the challenge system**. Thus, a low number of protests compared to the number of procurement procedures may signal lack of trust in the system, low credibility and integrity, high costs related to the procedure, restricted terms for filing a protest, reluctance to file a protest for business reasons, especially in small markets such as the Republic of Moldova.

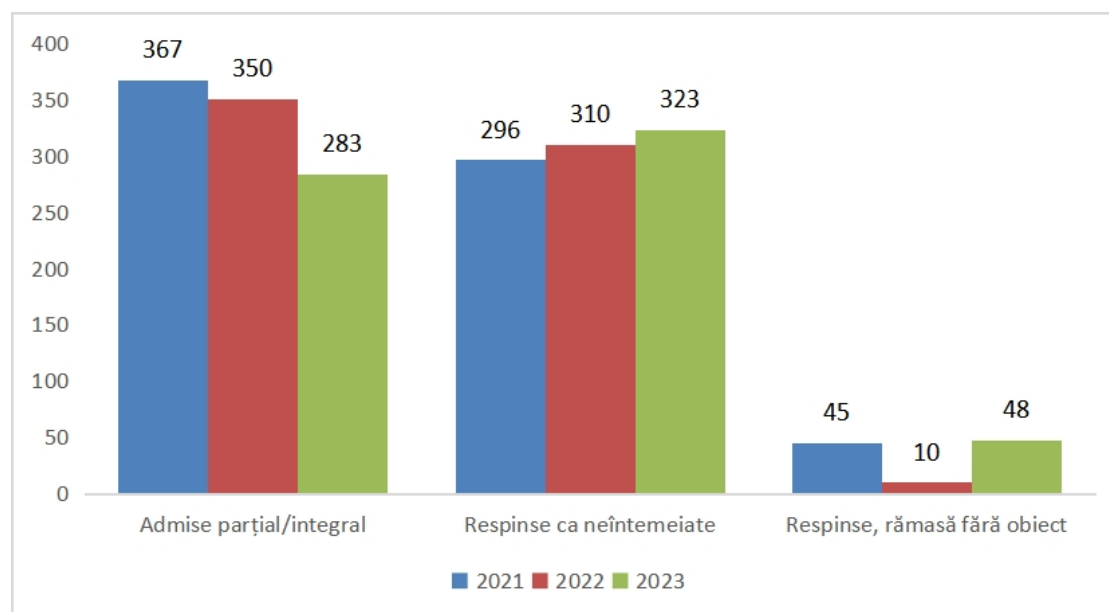
Analysis of ANSC decisions

Statistical data on appeals show that in 2023, **half (50%) of the total number of appeals examined on the merits by the ANSC (654 decisions issued) were rejected as unfounded (323)**. While 43% of the appeals examined on the merits were fully or partially admitted (283 appeals). And in the other 48 decisions (7%), the appeals were

⁴ The legal time limit for a substantive appeal is 20 working days, with the possibility of a 10-day extension.

rejected as without object. It should be emphasized that the decisive factor in the number of unsuccessful challenges is the **remedial/cancellation action taken by the contracting authorities**. These challenges cannot be categorized as abusive or malicious. On the contrary, it could be said that, by lodging a challenge, the economic operators have contributed to remedying the irregularities in the process of awarding the procurement contract or canceling the acts issued in breach of the legislation. Even under these conditions, in 2023 compared to 2022, **there was a significant reduction of 19.1% in the number of fully or partially admitted appeals**.

Diagram 1. Evolution of ANSC decisions between 2021-2023



Source: prepared by the authors based on ANSC reports for 2021, 2022 and 2023

The data on ANSC decisions and the analysis of the evolution of the results of the appeals lodged over the last 3 years (2021-2023) show an interesting picture. Thus, we have a **decreasing trend for totally/partially admitted appeals** and an **increasing trend for appeals rejected as unfounded**. The number of partially/fully accepted appeals has decreased by 22%, while the number of appeals rejected as unfounded has increased by about 9.1%.

If we compare the share of partially/fully admitted appeals with those rejected as unfounded, we find that in both 2021 (41%) and 2022 (46%) we have a higher share of partially/fully admitted appeals. However, in 2023, there is a higher share of appeals rejected as unfounded (50%). In conclusion, we observe an increase of 9 p.p. in the share of appeals rejected as unfounded, from 41% in 2021 to 50% in 2023. If we analyze from the point of view of the estimated value of challenged procurements, then the comparative analysis shows an **insignificant difference between the value of procurements whose challenges were rejected (1.97 billion lei) and those whose challenges were fully/partially admitted (1.81 billion lei)**.

Challenges withdrawn by economic operators

For the purpose of analyzing the extent to which unfounded challenges generate a negative impact on the procurement award processes, which were analyzed challenges withdrawn in 2023.

Although a withdrawn challenge may be generated by the acceptance of the arguments presented by the contracting authority, the implementation of remedial measures by the authority and therefore, rendered moot or considered by the challenger itself as unfounded. However, a challenge withdrawn without invoking the reasons for this decision **may signal possible risks**, including the risk of awarding the procurement contract in breach of the law, but also fraud, corruption. The legislation in force stipulates that once withdrawn, the challenge and the claims submitted by the challenger are no longer examined by ANSC. Even the withdrawal by the challenger of the challenge on the grounds that he no longer has any claims against the contracting authority does not necessarily denote the absence of illegality in the procurement procedure.

According to the data in the ANSC Report, in 2023, about **12% of the appeals were withdrawn** (121 out of a total of 1012 appeals submitted). Compared to 2022, **the number of withdrawn appeals decreased by 8.3%**, which can also be explained by the reduction in the total number of appeals filed (by 10.8%).

It is important to analyze **the reasons for the withdrawal of appeals** in order to establish their objectivity. Thus, in case a:

Table 2. Analysis of reasons for withdrawn appeals, year 2023

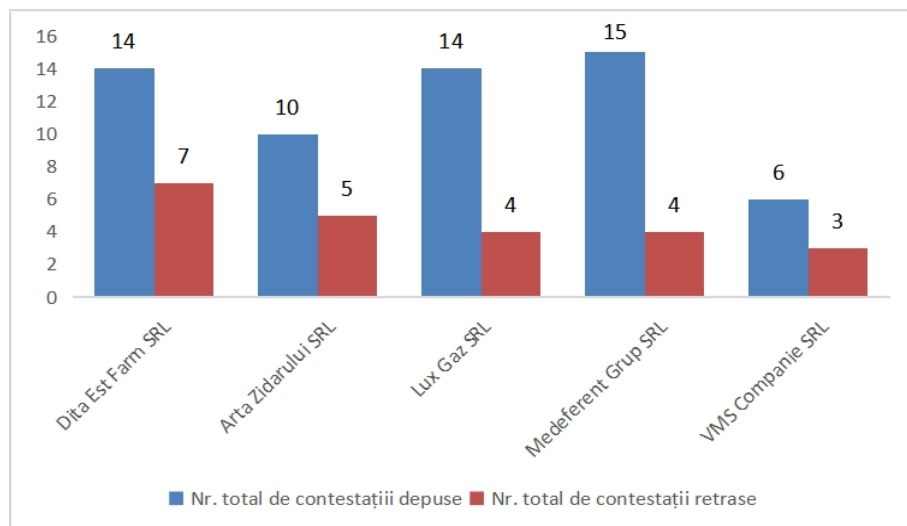
Appeals withdrawn			Reason for withdrawal
number	weight	%	
53	44%		arguments authority have were accepted by the objector
18	15%		withdrawn due to implementation of corrective measures by the contracting authority
14	12%		considered by the appellant to be unfounded
3	2%		the procedure was annulled and the complaint became devoid of purpose
33	27%		reason for withdrawal of the appeal not known
121	100%		

Source: prepared by the authors based on statistical data from the ANSC report for 2023

In conclusion, we can see that in practically every second case, even if they were subsequently withdrawn, the complaints were most probably not made in bad faith but because of interpretations of the legislation containing evasive provisions, insufficiently developed technical functionalities of the electronic system, etc. This is demonstrated by the fact that in 44% of cases, the arguments of the authority were accepted by the complainant. In other cases (15%), it can be said that the grounds for the challenge were objective, and that the contracting authority found shortcomings which, however, it remedied, because it had pointed out these shortcomings in the grounds for the challenge and which, in all likelihood, would not have been remedied in the absence of the challenge. Therefore, by contesting, economic operators contribute to remedying the irregularities in the procurement process and preventing the award of the procurement contract in breach of the law. In conclusion, only the 33 withdrawn challenges (27%), the reasons for which are not known and therefore it is not possible to assess whether they were submitted with good reason or maliciously, pose a risk.

We have also analyzed the share of withdrawn challenges for the **top 5 economic operators with the most withdrawn challenges** (see diagram below). The share of withdrawn challenges ranges between 27% and 50%. Three out of the 5 companies withdrew half of their appeals - DitaEst Farm SRL and Arta Zidarului SRL, VMS Companie SRL - and for the other two companies the share of appeals withdrawn is 27% and 29% respectively.

Diagram no. 2 Analysis of the top 5 challengers by the number of withdrawn challenges, 2023



Source: authors based on ANSC reports for 2023

For the analysis, the top 5 challengers in the year 2023 that filed the most appeals in 2023 were selected. In particular, the aim is to analyze whether the share of unsubstantiated and withdrawn challenges is a problem and can serve as an argument to institute certain levers that would reduce their number.

Table 3. Analysis of the challenges formulated by the top 5 challengers in 2023

		Accepted or partially accepted		Withdrawn		Rejected as unfounded	
		No.	%	Nr.	%	Nr.	%
Manticora SRL	15	11	73%	1	7%	3	20%
Medeferent Grup SRL	15	8	53%	4	27%	3	20%
Polimer Gaz Constructions SRL	14	11	79%	2	14%	1	7%
Luxgaz SRL	14	6	42%	4	29%	4	29%
Dita Estfarm SRL	13	3	23%	7	54%	3	23%
TOTAL	71	39	55%	18	25%	14	20%

Source: prepared by the authors based on statistical data from the ANSC report for 2023

Based on the analysis of the results of the appeals of the top 5 challengers, we find that, on average, every 4th appeal was withdrawn (25%) and 20% of the appeals were rejected as unfounded. At the same time, more than half of the appeals (55%) were accepted or partially accepted

admitted. Despite the fact that we have a relatively high percentage of withdrawn complaints, in the vast majority of cases, the reason for withdrawal is either the complainant's acceptance of the arguments put forward by the authority or as a result of remedial action by the authority. Similarly, the share of complaints rejected as unfounded is relatively low (20%). We consider that these data and conclusions do not sufficiently substantiate the need for instruments such as a guarantee or a fee for complaints.

III. Identification of options and impact analysis

In line with the purpose of this analysis - to identify levers and solutions to prevent abusive litigation - we present below 4 options with an explanation of the benefits as well as the risks involved. The options below have been analyzed and proposed to respond to institutional needs and national priorities in the procurement sector.

Option 1. Setting a bond/guarantee when lodging a challenge

The introduction of a bond calculated on the basis of the value of the purchase has been a topic broached in the public space in recent years as a potential tool to reduce unfounded and even abusive challenges. The first attempt to introduce the bond upon the submission of a challenge was the [draft law No. 202 registered in the parliament on 24.08.2021](#). The authors of the legislative initiative, a group of MPs in the Parliament, proposed to introduce *the obligation to deposit a pecuniary guarantee in the amount of 1% of the value of the contested lot, but not more than 100 thousand lei*. If the ANSC rejects the contestation as unfounded, the amount of the guarantee would be transferred to the account of the Public Procurement Agency. And, if the challenge is admitted or partially admitted, it would be returned to the challenger within 10 working days. The draft provided that the funds would be accrued as revenue to the state budget.

Subsequently, through an amendment, it was proposed to amend the draft law and, in particular, to rename it as *"payment for contestation"* and to reduce its size to 0.5% of the estimated value of the contested lot(s). At the same time, a minimum ceiling of 5,000 lei and a maximum ceiling of 25,000 lei were proposed. Likewise, it was proposed to change the method of transfer of payment and the institution responsible for collecting the payment being ANSC. The proposed payment refund mechanism provided that the ANSC would partially refund the challenge payment under certain conditions. However, in April 2023, the draft received a negative opinion from the Government and, respectively, was not proposed for consideration in Parliament.

If we look at EU practices, there are countries that have no fees for appeals: Belgium, France, Luxembourg, Portugal, Spain. However, there are also countries that have mandatory fees/payments when lodging an appeal: Estonia, Lithuania, Croatia, Czech Republic, Denmark, Latvia, Malta, Malta, Romania, Czech Republic. The provisions regarding the financial implications in the contestation process vary widely from one state to another depending on the authority, the remedy, the value of the contract, the thresholds set in the law, etc.

In Romania, since 2018, economic operators are legally obliged to lodge a **security deposit** at the time of lodging a challenge, the amount of which is 2% and is calculated according to the estimated value of the public procurement procedure and the procedural stage of the tender procedure at which the challenge is lodged. The statistical data on challenges show that this **has not been a barrier to an increase in the number of challenges** of about 13.4% in 2023 compared to 2022. The reason is that the instrument called "bond", as regulated by the Public Procurement Law no. 101/2016, has not proven its usefulness since

because the majority of contracting authorities refused to ask the courts, within 30 days from the date of the final decision of the National Council for the Settlement of Disputes (hereinafter CNSC), to find that an economic operator that has lodged a complaint has caused damage and to order it to pay damages to compensate for the loss caused by the delay in award procedures. Thus, in the overwhelming majority of cases, when economic operators requested the CNSC to reimburse the deposits, most contracting authorities expressly informed the CNSC that they had not suffered any damage as a result of the challenge/contests lodged by various economic operators in a public procurement procedure and had not brought any action before the competent courts to recover any damages they may have suffered.

Respectively, the CNSC's report concludes that **the purpose of the bonding was only partially achieved** by the legislator during 2023, in the sense that the legal provisions did not generate a reserve on the part of economic operators to refer the matter to the CNSC, as they were aware of the contracting authorities' behavior of hesitating to act firmly to prevent the abusive submission of a challenge or the existence of a damage caused by the submission of a challenge.

Advantages:

- Empowering economic operators who will thus be motivated to objectively analyze the appropriateness of challenging a procurement procedure with clear and relevant arguments.
- Reducing the number of unfounded complaints which would reduce the administrative burden on the contracting authority, the ANSC, improve the quality of decisions and potentially reduce the time taken to resolve appeals.
- Reduction of public procurement procedures that are either delayed and even end up being canceled, source of funding missed, etc.

Disadvantages and risks:

- Discouragement of challenge by economic operators, primarily because of the need to block financial resources, but also by setting up an additional procedure which, If not complied with, it may lead to the rejection of the challenge on this ground and not necessarily for the infringements detected in the procurement process.
- The increase in the number of procurement contracts awarded by contracting authorities/entities in breach of the law, given that, in practice, the challenge is the only mechanism through which a flawed procurement procedure can be remedied or even stopped, where appropriate.
- Increased risks, including those of corruption through the financial and organizational implications of determining who is responsible for collecting the guarantee and determining the correctness of the guarantee and, in the event of irregularities, to request that it be supplemented; the issue of proof of lodging of the guarantee, and the arrangements for the transfer and repayment of the guarantee in the cases provided for.

Option 2. Establishment of a mandatory fee when lodging an appeal

Establish a fee to be paid at the time of the submission of the contestation, usually in a fixed amount, which is not refundable to the challenger, irrespective of the outcome of the ANSC.

Romanian practice shows that such a fee would not be an effective solution. However, prior to the current bond, in Romania there was a **guarantee of good conduct**, which is a bond

which was a condition for the resolution of the case and which was retained in case of rejection the appeal. However, by a decision of the Constitutional Court, it was declared **unconstitutional** on the grounds that it restricted free access to justice by discouraging economic operators from lodging an appeal, considering that any rejection is converted into a sanction for improper behavior. At the same time, **the right of the economic operator to have the security bond refunded, regardless of the outcome**, was recognized.

Advantages:

- A fixed fee would simplify the process of administration, collection, determination of the correctness of payment (compared to, bail, no refund is required in case of rejection of the challenge as unfounded);
- It would generate additional revenue to the state budget;
- It would potentially, but not necessarily, reduce the number of appeals, which could help to reduce the time it takes to resolve appeals and increase the quality of the decisions delivered by the ANSC.

Disadvantages and risks:

- It would restrict the right of economic operators to challenge, in particular, micro and small enterprises which could be discouraged from participating in public procurement;
- It would discourage bona fide economic operators from lodging a challenge to raise legal infringements in the procurement process and thus increase the number of contracts awarded in breach of the law.
- It would generate additional costs and resources, including human resources, on the part of the institution that would be responsible for managing the fee collection process, establishing the correctness of the fee, etc.

Option 3. Introducing a bank guarantee only for open tenders, e.g. by setting a ceiling of 15.000 lei which could help to reduce maliciously lodged abusive protests. In the case of procurement through POPs, it would not be valid given that small companies with lower financial capacities participate. In this case, there would be a high risk of discouraging SMEs from participating in public procurement procedures, which would run counter to the State's policies in this area.

In addition, in order not to discourage economic operators, especially those with no experience in the procurement market, from lodging a challenge, it is proposed to set a maximum number of challenges without payment, and when the EO exceeds the set ceiling, the bank guarantee is activated. However, there is a risk that the right to challenge could be restricted, in particular if the vast majority of challenges were to be fully or partially upheld. In this case, given the financial implications, even if entitled to challenge, there is a risk that the operator would hold back from lodging a challenge.

Advantages:

- Empower interested economic operators or participants in open tenders who will be motivated to objectively analyze the opportunity to challenge a procurement procedure, including in the context of a limited number of contestations that they can submit free of charge.

- Reducing the number of unfounded challenges which would reduce the burden administrative burden on the contracting authority, the ANSC, improve the quality of decisions and reduce the time taken to resolve appeals.
- Generate revenues, although not significant, to the state budget.

Disadvantages and risks:

- It could restrict some economic operators' right to challenge, in particular those who are active in the procurement market and participate in many open tender procedures.
- Complicated procedure to set up and manage;
- Potentially create discriminatory situations for some EOs compared to others, thus limiting the right to challenge which is provided by law to any EO
- It would generate additional costs and resources, including human resources on the part of the institution that would be responsible for managing the process of collecting the fee, establishing its correctness, etc.

Option No 4. Maintain current policy coupled with some improvements

The analysis of the data on appeals in general as well as on unfounded and withdrawn appeals did not reveal a pressing and urgent need to introduce a bond/payment/guarantee when lodging an appeal.

Despite the fact that the number and share of appeals dismissed as unfounded increased in 2023, however, this is not a significant increase. Moreover, it is very complicated to categorize a challenge as having been filed maliciously. And, putting tools in place should not discourage economic operators who are entitled to challenge and thus contribute to correcting a flawed procurement procedure. Therefore, keeping the current policy (without introducing a fee/audit/guarantees) would also be an option but improvements are needed as follows:

- Notwithstanding the fact that the appeals process and ANSC decisions are transparent, there is still a need to fully digitize the process of filing, resolving appeals and ANSC decision. For example, there is currently a lack of access to the process and data on withdrawn appeals, which makes it difficult to analyze them in depth.
- Improve the legal framework and standard documentation for goods/services and works in order to clarify which documents are mandatory and respectively submitted with the tender, as well as the documents that are subject to the SAD and can therefore be requested later by the authority in the evaluation process, which is not known by the other tenderers.
- Develop the functionalities of the e-procurement system to include the evaluation phase and thus make available to bidders information on clarifications/completions to the file arising at this stage. This would reduce the number of contestations submitted in good faith, but which are subsequently rejected as unfounded, given that the additional qualification documents have been made available to the Authority by the successful tenderer.
- Ongoing training programs for contracting authorities and economic operators, including e-learning platforms offering the possibility for any operator to access online a course on the stages of the contestation process, the legal framework, etc. These measures would help to reduce the number of late, insufficiently substantiated or infringing contestations which do not allow for a substantive examination of the substance of the contestation.

They would also contribute to increasing the capacity of the authorities and, consequently, the quality of the tender documentation, evaluation and contract award process.

- Monitoring the implementation of ANSC decisions by contracting authorities that, by circumventing the law, ignore ANSC decisions. Such cases have been monitored by civil society. In the case in point, AGER wrote about [a contract awarded by the Pretura of the Center Sector to, "Credo Industry" SRL contrary to ANSC decisions](#). Another similar case monitored by AGER is [the procurement procedure carried out by the Directorate of Education, Youth and Sport Briceni](#) which was challenged 6 times, of which in 5 cases the challenge was admitted by ANSC, and in one case it was filed late. The repeated admission of the economic operator's claims shows that the contracting authority admitted violations, refusing to comply with ANSC's remedial provisions.
- Urging the implementation of the system of professionalization and certification of public procurement specialists, including the finalization and approval of the Regulation on certification specialists in the field of public/sectoral procurement).
- Develop and widely distribute short information materials in the form of infographics or videos on the challenge procedure,
- Development and publication on ANSC's website of a *"Questions and Answers"* section and unified solutions on frequently contested topics in order to increase the predictability of ANSC solutions in similar cases.

Advantages:

- Requires no legislative and institutional interventions and has no financial and administrative implications;
- The right to challenge is guaranteed without discrimination to any economic operator having interest in a procurement contract

Disadvantages and risks:

- The number of challenges rejected as unfounded is increasing, a trend which is likely to likely to continue;
- It does not sufficiently empower economic operators who submit frivolous challenges, lacking objective arguments and aimed at delaying the process, preventing awarding the contract to a competitor, revenge, etc.
- Some contract award procedures are delayed, with knock-on negative effects for the contracting authority, the budget and citizens in general.

IV. Proposal of the optimal option

The above analysis and options were presented and discussed at the NAPAP meeting on May 16. NAP members presented their views on the 4 options and in particular on the appropriateness of introducing fees that would discourage economic operators from filing frivolous complaints and reduce malicious complaints.

While a number of NAPAP members were in favor of introducing fees/charges, most members consider that, despite some cases of abusive challenges, there is currently not enough reason to introduce a fee.

On the one hand, **members who would support the introduction of a fee/charge** (in one form or another) put forward the following arguments:

- Unfounded appeals delay the procurement process and sometimes lead to stalled procurement including loss of funding source;
- some procurement procedures are repeatedly contested by different tenderers, which delays the procurement process and the procurement process and creates difficulties in the work of the authority activity of the contracting authority and the achievement of institutional objectives or the provision of public services to beneficiaries;
- The introduction of a fixed fee in view of the large number of unsuccessful appeals.

And, on the other hand, **the arguments put forward by members against the introduction of a fee/cautions** were:

- although cases of abusive challenges were identified, including in the process monitoring process, these are isolated cases;
- the cause of unfounded challenges is insufficient reasoning in the authorities' decisions rejecting a tender as non-compliant/unacceptable, which generate appeals that appear justified but are subsequently rejected as unfounded;
- action should be directed towards improving the quality of legislation, the capacities of contracting authorities and economic operators, the electronic system and the procurement process in general and not by imposing fees;
- the introduction of a fee/charge would put pressure on the budget of the contracting authorities on the grounds that the amount of the fee/charge will be included by the operators in the tender;
- Discouraging and reducing abusive rebuttals can be achieved by solutions that make economic operators accountable and not by penalizing them.

In conclusion, the current situation and the results of the analysis of appeals lodged, appeals rejected and appeals withdrawn do not sufficiently justify the introduction of a fee/charge involving other risks. The need to implement such instruments would be appropriate in the event of a significant increase in the number of complaints or unfounded complaints. Analysis of the problem shows that most of the complaints rejected as unfounded are due to shortcomings or inconsistencies in legislation, standard documentation or malfunctions in the electronic system. Therefore, analyzing and remedying these problems would help to reduce the number of unfounded or withdrawn complaints under the current complaints procedure by ensuring the right to appeal to any economic operator.

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