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Unfounded complaints: evolution, causes and solutions for streamlining the contestation and public procurement process

1. INTRODUCTION

The right to challenge in public/sectorial procurement procedures is provided for by the legal framework, being 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, an autonomous and independent authority which is responsible for reviewing contracting authorities in the process of awarding a contract.



STATISTICAL DATA

Since it was established and became operational and to date, the ANSC has adopted **5179 decisions following the examination and resolution of some 6276 appeals**. In the last 3 years (2021-2023), the number of appeals is relatively stable, with a slight decrease in 2023 (1012 appeals) compared to 2022 (1135) and 2021 (1095).

In general, the number of complaints lodged by economic operators in procurement procedures can be interpreted as **an indicator of confidence in the system of system**.



ARGUMENTARENE SI NECESSITATEA STUDIULUI

RATIONALE AND NEED FOR THE STUDY

In the context of the launch of the initiative to create the National Platform for Public Procurement (in PNAP), the IDIS "Viitorul" team discussed with the main actors in the procurement sector in order to identify challenges in the procurement process that need to be addressed and solved by identifying and implementing the most effective policies and/or instruments.

The subject of challenges in public and, more recently, sectoral procurement procedures has been and continues to be of increasing interest, both for the authorities contracting authorities and economic operators as well as for regulatory institutions.

Analysis of the subject of unjustified challenges 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 to improve public procurement at all levels of government.

SUBJECT OF THE STUDY

Although it is complicated to identify and, above all, to prove that some challenges are submitted maliciously, the study analyzes data on challenges rejected as unfounded, challenges withdrawn by economic operators and practices in other countries.

The findings will be used as an argument for policies to discourage economic operators from challenging maliciously, while ensuring the right to challenge for any economic operator interested in a procurement procedure.

RIGHT TO CHALLENGE

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 harm as a result of that act, is entitled to challenge that act. The right to challenge is therefore determined by two conditions:

- 1. the interest in obtaining the contract and**
- 2. the existence of the injured right.**

RIGHT TO CHALLENGE

In addition, Law no. 396/2023 amended Law no. 131/2015 (in force from 1 January 1, 2024), Article 82 was supplemented. Right to appeal.

Therefore, 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 are considered interested in challenging the decision to re-evaluate the tenders 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** **good faith exercise in good faith** of the right provided for in paragraph. (1).

ANALYSIS OF THE ISSUE. Analiza contestațiilor în 2023

Analysis

Valoarea achizițiilor contestate	4,8 <u>mlr. lei</u>
<u>Numarul contestațiilor</u> depuse în 2023	1012
Ponderea procedurilor de achiziție contestate în total achizițiilor desfășurate	10%
Durata medie de soluționare în fond a unei contestații	18 zile ⁴
Numărul deciziilor emise de ANSC	846
Ponderea contestațiilor respinse/restituite, fără examinare în fond	23%
Ponderea contestațiilor respinse ca neîntemeiate	50%
Ponderea contestațiilor admise integral sau parțial	43%
Numărul contestațiilor contestate la instanțele de judecată	121

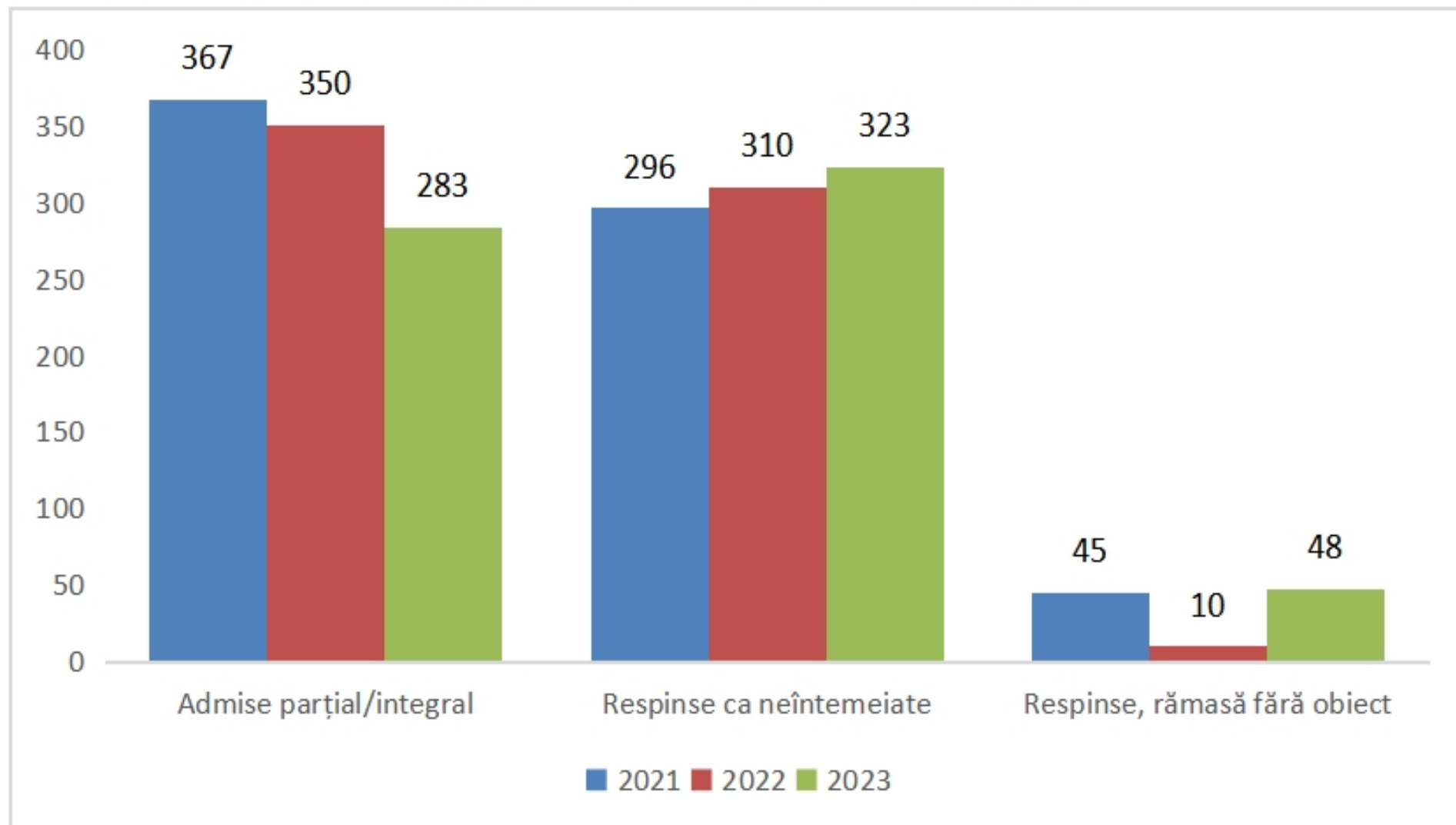
ANALYSIS OF COMPLAINTS REJECTED AS UNFOUNDED

Statistical data on appeals show that in 2023, half of the total number of appeals complaints examined in substance by 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 remaining 48 decisions (7%), the appeals were rejected as not having been examined. It should be emphasized here that this was due to the remedial/cancellation action taken by the contracting authorities. These challenges cannot be categorized as abusive or malicious.

On the contrary, we could say that, by lodging a challenge, the economic operators have helped to remedy irregularities in the process of awarding the procurement contract or annul acts issued in breach of the law. Even in these circumstances, in 2023 compared to 2022, there was a significant reduction of 19.1% in the number of appeals upheld in whole or in part.

ANALIZA CONȚESTĂȚILOR RESPINSE CA NEÎNTEMEIATE

Diagrama nr. 1. Evoluția deciziilor ANSC în perioada 2021-2023



CONCLUSIONS ON THE EVOLUTION OF APPEALS

Data on ANSC decisions and analysis of the evolution of the results of appeals lodged in 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%.

On the basis of the data in the chart, if we compare the percentage of admissible partially/integral with those rejected as unfounded, it can be seen that both in 2021 (41%), and 2022 (46), we have a higher share of partially/full appeals. However, in 2023, there is a higher share of appeals rejected as unfounded (50%). In conclusion, we observe an increase by 9 p.p. in the share of appeals rejected as unfounded, from 41% in 2021 to 50% in 2023.

ANALYSIS OF WITHDRAWN APPEALS

In order to analyze the extent to which unfounded challenges generate a negative impact on the procurement award processes analyzed appeals withdrawn in 2023.

Although a withdrawn challenge may be generated by the acceptance of the arguments put forward by the authority, the implementation of remedial measures by the authority and thus rendered moot or considered by the challenger itself as unfounded. However, a challenge withdrawn without stating the reasons for the decision may signal possible risks, including the risk of awarding the procurement contract in breach legislation, but also fraud, corruption. The legislation in force provides that once withdrawn, the challenge and the claims submitted by the challenger are no longer examined by ANSC. In despite the fact that the operator withdraws its complaint, and therefore no longer has any claim against the contracting authority, this does not mean that the procurement procedure was not illegal.

ANALYSIS OF WITHDRAWN CHALLENGES

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

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

- 53 (44%) of the 121 appeals withdrawn, the arguments of the authority were accepted by the appellant;
- 18 challenges (15%) were withdrawn on the grounds of implementation of remedial measures by the authority;
- 14 challenges (12%) were withdrawn because the complainant considered them as unfounded;
- 3 contestations (2%), the procedure was annulled and the contestation became moot.
- 33 appeals withdrawn (27%), the appellants did not state the reason for withdrawal.

Conclusion: in most cases, even if they were subsequently withdrawn, the appeals were most likely to have been

initially well founded. Moreover, by contesting, the economic operators contributed to correcting the irregularities in the procurement process and preventing the award of the procurement contract in breach

of the legislation.

ANALYSIS OF THE CHALLENGES BY THE TOP 5 CONTESTANTS

→ Tabelul nr. 2. Analiza contestațiilor formulat de 5 top contestatori în anul 2023

<u>Contestator</u>	Contestații depuse	Contestații admise și parțial admise		Contestațiile retrase		Contestații respinse ca neîntemeiate	
		Nr.	%	Nr.	%	Nr.	%
Manticora SRL	15	11	73%	1	7%	3	20%
<u>Medeferent</u> Grup SRL	15	8	53%	4	27%	3	20%
Polimer Gaz Construcții SRL	14	11	79%	2	14%	1	7%
<u>Luxgaz</u> 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%

Sursa: elaborat de autori în baza datelor statistice din raportul ANSC pentru 2023

ANALYSIS OF THE APPEALS LODGED BY THE TOP 5 CONTESTANTS

Conclusions:

On the basis of 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 upheld or partially upheld.

Despite having a relatively high percentage of withdrawn appeals, in the vast majority of cases, the reason for withdrawal is either the appellant's acceptance of arguments put forward by the authority or as a result of remedial action by the authority. Similarly, the proportion of complaints rejected as unfounded is relatively low (20%), which is insufficient to argue the need for instruments such as a guarantee or a fee for complaints.

Options identification and impact analysis

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

The introduction of a bond calculated on the value of the purchase has been in recent years as a potential tool to reduce unfounded and even abusive challenges. The first attempt to introduce the introduction of a deposit filing an appeal was the bill No. 202 registered in the parliament on 24.08.2021. The authors of the legislative initiative, a group of Members of the Parliament, proposed to introduce the obligation to deposit a pecuniary guarantee in the amount of 1% of the amount of the contested lot, but not more than 100 thousand lei. If ANSC rejects the challenge 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, the guarantee 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.

Option 1. Setting a deposit/guarantee when lodging an appeal

Subsequently, by an amendment, it was proposed to modify 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 project received a negative opinion from the Government and was not submitted to Parliament.

PRACTICES IN OTHER EU COUNTRIES

If we look at practices in the EU, there are countries that have no fees for contestation: Belgium, France, Luxembourg, Portugal, Spain.

However, there are also countries that have mandatory fees/payments when lodging an appeal: Estonia, Lithuania, Croatia, Denmark, Latvia, Malta, Czech Republic, Romania, Latvia, Malta.

The provisions regarding the financial implications in the rebuttal process vary widely from one state to another depending on the authority, the remedy, the value of the contract, the thresholds set by law, etc.

In Romania, as of 2018, economic operators are legally obliged to lodge a 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 stage of the award procedure at which the challenge is lodged. Statistical data on challenges show that this was not a barrier to an increase in the number of challenges of about 13.4% in 2023 compared to 2022.

Option 1. Setting a deposit/guarantee when lodging an appeal

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 challenges which would reduce the administrative burden on the contracting authority, the ANSC, improve the quality decisions and potentially reduce the time taken to resolve appeals.
- Reducing public procurement procedures which are, either delayed and even end up being canceled, source of funding missed, etc.

Option 1. Setting a deposit/guarantee when lodging an appeal

Disadvantages and risks:

- To discourage economic operators from contesting, primarily because of the need to freeze financial resources, but also by introducing a procedure which, if not complied with, may lead to the rejection of the challenge on this ground and not necessarily for the infringements detected in the procurement process.
- [?] Increasing number of procurement contracts awarded by authorities/entities
Contracts awarded by contracting authorities/entities in breach of the law, given that, in practice, a challenge is the only mechanism by which a flawed procurement procedure can be remedied or even stopped, where appropriate.
- [?] Increased risks, including corruption through financial and organizational implications of determining who is responsible for collecting the guarantee and determining its correctness and, in the case of irregularities, requiring the completion the issuing of proof that the security has been lodged, as well as the arrangements for the transfer and return of the security in the cases provided for.

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

Establish a fee to be paid at the time of lodging the challenge, 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. Previously the introduction of the current bail, in Romania there was a guarantee of good conduct, which was a security conditional on the settlement of the case and which was retained in the event of rejection of contestation. However, a decision of the Constitutional Court declared unconstitutional, on the grounds that it restricted free access to justice by discouraging economic operators from lodging an appeal, as any rejection was considered to be a sanction for improper conduct. At the same time, it recognized the right of the economic operator to have the security bond refunded, irrespective of the outcome.

Option 2: Establish a mandatory fee for lodging an appeal

Advantages:

- [?] A fixed fee would simplify the process of administration, collection, determination of (in comparison with bail, there is no need to refund in case of rejection of the appeal as unfounded);
- [?] It would generate additional revenue for the state budget;
- [?] Potentially, but not necessarily, reduce the number of appeals, which could potentially contribute to reducing the time taken to resolve appeals and increase the quality of decisions rendered by the ANSC.

Option 2: Establish a mandatory fee for lodging an appeal

Disadvantages and risks

- [?] Would restrict the right of economic operators to appeal, in particular micro and small enterprises which could be discouraged from participating in procurement public procurement;
- [?] It would discourage bona fide economic operators from lodging a challenge to raise breaches of the law 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 its correctness, etc.

Option 3. Establish bank guarantee only for tenders auctions

Introducing a bank guarantee for public tenders only, e.g. by setting a ceiling of 15.000 lei, which could help to reduce abusive, malicious and abusive challenges.

intention. In the case of procurement through POPs, it would not be valid given that small companies with lower financial capacities. In this case, there would be a high risk of discouraging SMEs from participating in public procurement procedures, which is contrary to the State's policies in this respect.

In addition, in order not to discourage economic operators from lodging a challenge, the in particular those inexperienced in the procurement market, it is proposed to set a maximum number of contestations without payment, and when the EO exceeds the set ceiling, the bank guarantee is activated. However, there is a risk of restricting the right to challenge particularly if the vast majority of challenges were to be upheld in whole or in part. In such a case, given the financial implications, even if entitled to challenge, there is a risk that the operator would refrain from lodging a challenge.

Option 4. Keep current policy with improvements

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

Despite the fact that the number and proportion of challenges rejected 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 to help correct a flawed procurement procedure.

Therefore, it would be an option to keep the current policy (without the introduction of a fee/charge/guarantee) but improvements are needed as follows:

Improvements needed under current conditions

Although the transparency of the appeals process is at a fairly high level, however, there is still a need to fully digitize the process of filing, resolving the appeal and issuing the ANSC decision. Currently, the public has no access to the process and data on withdrawn appeals.

Improvement of the legal framework and standard documentation for goods/services and works in order to clarify which documents are mandatory and, respectively, to be submitted with the tender, as well as which documents are subject to the DUAE and therefore can 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 dossier 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 authority by the successful tenderer.

Improvements needed under current conditions

?? Ongoing training programs for contracting authorities and operators economic operators, including through e-learning platforms offering the possibility for any operator to access online a course on the steps of the challenge process, legal framework, etc. These measures would help to reduce late, insufficiently reasoned or in breach of the appeal procedure which does not allow for a substantive examination of the appeal. At the same time, it would contribute to increasing the capacity of the authorities and the quality of the tender documentation, the evaluation and award process contract.

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 this case, 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.



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QUESTIONS? SUGGESTIONS? PROPOSALS?