THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

ACTIVITY REPORT

2013

CONTENTS

Foreword

BOGDAN LEHEL LORAND
N.C.S.C.
President

The Council's goal remains strengthening and improving its functional capacity of prompt, impartial, transparent examination of complaints submitted in accordance with the laws, to the highest standards.

This year marks eight years from the implementation of the Government Emergency Ordinance no. 34/2006 and also eight years of uninterrupted activity of the National Council for Solving Complaints. Together – the ordinance and the Council – have founded the legal and institutional system of remedies in Romania, a mature and efficient system whose results are appreciated not only nationally but at European level. It is beyond doubt that these results have thoroughly contributed to increasing transparency and legality of awarding public procurement contracts, i.e. the strengthening of overall capacity of the sector to standardize and absorb European good practices in the running of the procurement, process still vulnerable to corruption (aspect also highlighted in the last report of the European Commission regarding the progresses of Romania within the cooperation and verification mechanism).

By the celerity of case solving and the quality of decisions rendered to which the solid experience of its specialists has an important contribution, we can enclose the Council among the fundamental institutions of Romanian public procurement system as a genuine factor of stability and legality of this system, able to responsably assume the role of impartial and independent guarantor in the running of proper award of public procurement contracts, including by disposal of remedial measures.

Beyond any quantitative indicator regarding the last year activity of the Council, the downward trend and the stabilization of the number of complaints referred for settlement thereof are notable in contrast with the trend of increasing complexity of cases, namely the diversification of issues we were faced. Council had to deal with new challenges, in conjunction with both new expectations from both the economic operators and contracting authorities, interested primarily in obtaining sensible solutions as swift as possible. Of course, the efforts of our institution focused in that direction.

Furthermore, during 2013, the Council's attention was drawn to the assimilation of numerous legislative amendments to the Government Emergency Ordinance no. 34/2006, and, in particular, of the new Code of Civil Procedure, instrument without which we could not have been able to perform our administrative-juritictional activity.

However, the Council's goal remains strengthening and improving its functional capacity of prompt, impartial, transparent examination of complaints submitted in accordance with the laws, to the highest standards. In perspective, the main objectives of the Council are:

- Participating in implementing the new European legislative package and taking measures to enforce it, according to its responsibilities;
- Strengthening institutional capacity and confidence we enjoy among economic operators and contracting authorities;
- Increasing the transparency of our work;
- Focusing our efforts on reducing the duration of disputes and of fragmented nature of jurisprudence;
- Strengthening the independence of counselors in charge with the resolution of complaints against any external influence on their activity, promoting integrity, as well as improving individual performance.

1. OVERVIEW

1.1. THE ROLE AND MISSION 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), which was created with the purpose of guaranteeing the compliance with the legislation by the contracting authorities, due to its primary role of remediation and, subsidiary, of cancelling the illegal designation procedures.

The Council is an administrative body, with jurisdictional attributions, of public law, which enjoys the independence required to the performance of the administrative-jurisdictional act, not being subordinated to any authority or public institution that complies with the constitutional provisions regulated by art. 21 section (4).

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

According to the legal[1] provisions, the 36 members of the Council, wherefrom at least half are licensed in law, are public clerks with special status, assigned to their positions by the decision of the prime minister, at the proposal of the Council president as a result of winning a professional contest[2].

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

Initially, the competence of the Council in solving the complaints submitted within the awarding procedures was limited until the moment of the contract conclusion, yet, due to the amendments occurred by Law no. 279/2011[4] to 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 awarding procedure, whether 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. is a Self-Regulatory Organization (SRO), approved by the Government Decision no. 1037/2011[5]. In its activity, N.C.S.C. is subject only to the law; in exercising its attributions, the Council adopts decisions, and in performing its activity, the Council ensures the coherent application of the legislation in force, according to the principles of law expressly regulated[6]: legality, expediency, contradictory and the right to a defence.

Under the provisions of art. 267, sections (1) and (2) 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, wherefrom one has the quality of panel's president. Within each panel, at least the president needs to have an academic degree in law.

For the proper functioning of the institution and for the expedient resolution of the complaints submitted by the economic operators, each complaint resolution panel 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 Councils 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 chief credit officer[10].

The volume of the activity performed within N.C.S.C. is mainly reflected by the number of decisions issued and the number of files solved, while the effects/results of the Council are reflected by the number of the decisions challenged by complaints to the Complaint Courts (in whose jurisdiction is the headquarters of the contracting authority) and the number of complaints admitted.

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

- to solve by 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 partner, by breaching the legal provisions in the matter of public-private partnership[11];
- to solve by 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 partner, by breaching the legal provisions in the matter of public procurement contracts, including district contracts, and frame contracts assigned in the fields of defence and security[12].

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

- the status of the relational regime with the Security Designated Authority – SDA (Romanian Intelligence Service specialized unit) was established;
- the legal procedures within the relationship with The National Registry Office for Classified Information (ORNISS) for initiating and performing the verification procedures were executed in order to issue the security certificates/access authorizations to classified information of state;
- security certificates and authorizations for access to classified information were issued for a number of 29 people;
- measures concerning the physical protection against unauthorized access to classified information, personnel protection and information generated sources were 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 within we identified our institutional vulnerabilities and risks associated with the main work processes, as well as the measures for strengthening the already existing preventive mechanisms.

During 2013, the Council actively participated to the all the meetings, work groups, sessions etc. organized by various public institutions (N.A.R.M.P.P., U.C.V.P.P., N.A.I., Competition Council etc.) for interpretation, modification and development of secondary legislation on public procurement and to create a common practice in the approach of the G.E.O. no. 34/2006 provisions.

1.2. HUMAN RESOURCES, MANAGEMENT AND ORGANIZATIONAL STRUCTURE

As an organizational structure, the Council operated in 2013 with a number of 36 resolution counselors in the field of public procurements (wherefrom two are suspended from the public function) under G.D. no. 1037/2011, organized in 11 complaints resolution panels in the field of public procurements.

The organigram of the Council includes 55 people with the status of technical and administrative staff (GD no. 1037/2011 for the approval of the Regulation of N.C.S.C. organization and functioning provides a total of 64 posts for administrative and technical staff).

The management of the NATIONAL COUNCIL FOR SOLVING COMPLAINTS is provided by Mr. Lehel - Lorand BOGDAN, at a second term.

In exercising his attributions, the president of the N.C.S.C. is helped by a board composed of three members (Florentina DRAGAN, Silviu-Cristian POPA, Catalin POPESCU), elected for a period of two years by secret ballot with an absolute majority from the counselors for resolving complaints in the public procurement area.

Within the NATIONAL COUNCIL FOR SOLVING COMPLAINTS, on December 31, 2013, 91 people (100% with higher education) were employed, of which 63 women (69.23%) and 28 men (30.79%).

Of the 91 people employed at 31 December 2013 within the N.C.S.C., 55 people were listed as staff employed by contract, in addition to panels fot solving complaints, while 36 were counselors for solving complaints related to the awarding procedures (n.n. - two of counselors being suspended from public position).

According to the Council's Regulation on organization and functioning[13], the administrative and technical staff operates in the following structures:

- Registry department, archive and library which includes:
  - Registry office, archive and library;
  - Statistics and IT offices;
- Economic-administration and public procurements department which includes:
  - Human resources office;
  - Information and public relations office;
  - Financial-accounting division;
  - Public procurements division;
- Technical service in addition to panels;
- Legal department which includes:
  - Legal and administrative law service;
  - Legal service in addition to the complaints resolution panels;
- Internal Audit Department.

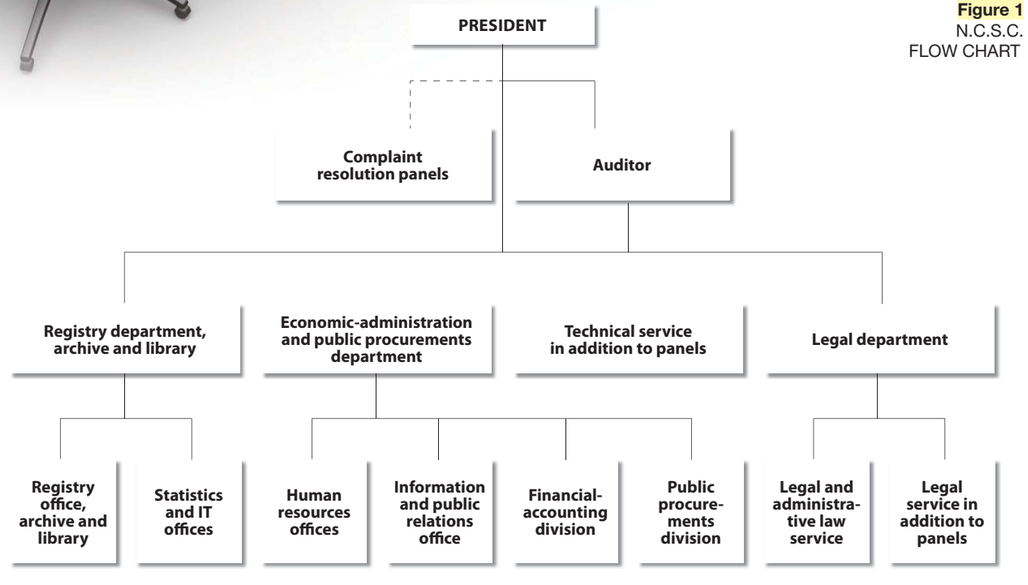


Figure 1
N.C.S.C.
FLOW CHART

2. THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 01st – DECEMBER 31st 2013

2.1. COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

The number of complaints formulated/formulated by the economic operators, their development, the object of the 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. DEVELOPMENT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

During January 1st – December 31st 2013, the number of complaints (case files) submitted by the economic operators and recorded to N.C.S.C. reached the figure 5.739.

During the twelve months of 2013, the number of complaints submitted by economic operators and registered at N.C.S.C. evolved as follows:

January	360
February	402
March	466
April	562
May	446
June	490
July	561
August	437
September	518
October	517
November	527
December	453

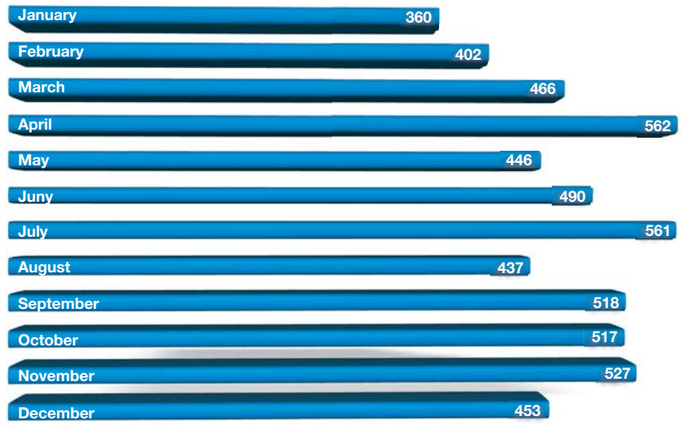


Figure 2
DEVELOPMENT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS TO N.C.S.C. IN 2013

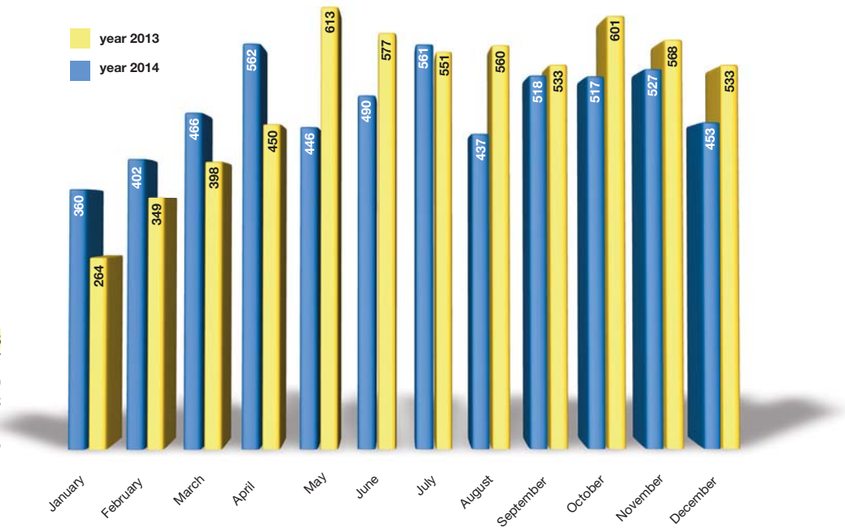


Figure 3
DEVELOPMENT OF COMPLAINTS (CASE FILES) SUBMITTED BY ECONOMIC OPERATORS TO N.C.S.C. BETWEEN 2012 – 2013

THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st - DECEMBER 31st 2013

DEVELOPMENT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

Analysing the number of complaints (case files) submitted by economic operators and registered at N.C.S.C. during the years 2012 and 2013, is has been found that in the first half of 2013 occured a 2.82% increase in the number of complaints compared to the previous year, but in the second semester there was a decrease of 9.96% compared to the same period of 2012.

However, comparing the development of total number of complaints submitted in 2013 to that of 2012, there was a decrease of 4.3%, which can be considered insignificant.

The decrease in number of complaints submitted by economic operators in 2013 compared to 2012 was due, on one hand, to the lower number of proceedings initiated in the Electronic System of Public Procurement (S.E.A.P.) in 2013, as wellas to the package of legislative changes initiated since the end of 2010, which decreased the "momentum" of economic operators to submit complaints.

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

– control regulation "ex ante", which involves the obligation of contracting authority to submit the awarding documentation to the National Authority for Regulating and Monitoring Public Procurement (N.A.R.M.P.P.) for being evaluated before submission to publication of the call / notice[14];

– "punishment" for economic operators, meaning retaining a share of the participation guarantee in the event that the Council dismisses the complaint on the merits or if the appellant waived complaint without the contracting authority to take remedial action[15] as follows:

- above the threshold stipulated in art. 19 - 420000 RON inclusive - 1% from this value;
- between 420,001 – 4,200,000 RON inclusive - 4.200 RON + 0.1% of the amount exceeding 420.001 RON;
- between 4,200,001 – 42,000,000 RON inclusive - 7.980 RON + 0.01% of the amount exceeding 4,200,001 RON;
- between 42,000,001 – 420,000,000 RON inclusive - 11,760 RON + 0.001% of the amount exceeding 42,000,001 RON;
- between 420,000,001 – 4,200,000,000 RON including - 15,540 RON + 0.0001% of the amount exceeding 420,000,001 RON;
- over 4,200,000,001 RON - 19,320 RON + 0.00001% of the amount exceeding 4,200,000,001 RON.

The effect of these legislative measures implemented during 2012 continued in 2013 and consisted in changing the procedure time / stage for submitting complaints. Thus, in 2013, given the new changes to G.E.O. no. 34/2006, there was a slight decrease in the number of complaints submitted by economic operators against the tender documentation (phase when the participation guarantee is not established) compared to the number of complaints submitted after result, the decrease due, on one hand, to the regulation control "ex ante" made by N.A.R.M.P.P. and, on the other hand, to the decrease in the number of awarding procedures, initiated in S.E.A.P.

For this reason, cc
number of complaints

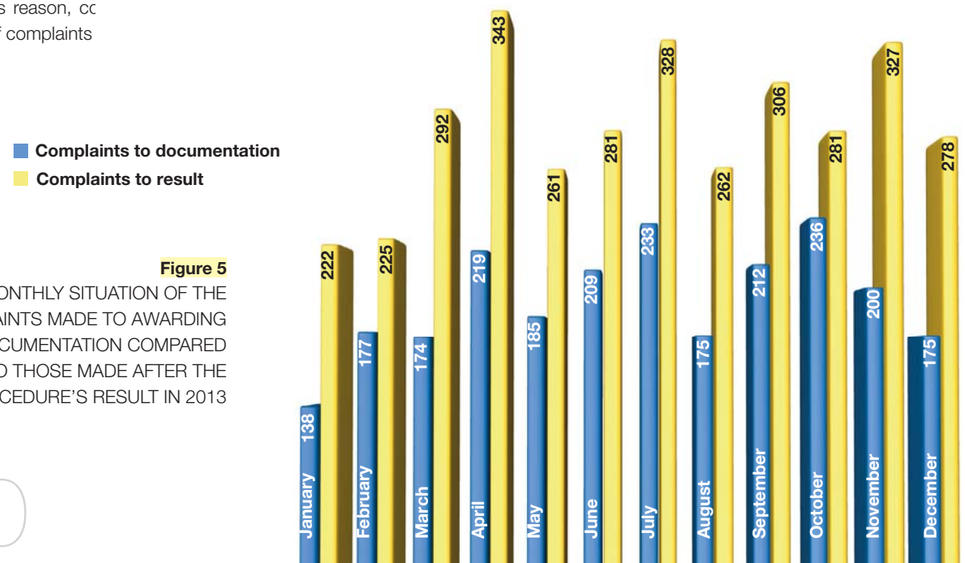


Figure 5
MONTHLY SITUATION OF THE COMPLAINTS MADE TO AWARDING DOCUMENTATION COMPARED TO THOSE MADE AFTER THE PROCEDURE'S RESULT IN 2013

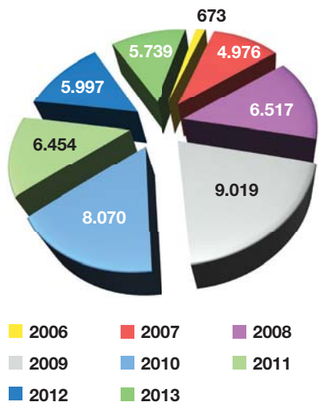


Figure 4
SITUATION OF COMPLAINTAS SUBMITTED BY ECONOMIC OPERATORS TO N.C.S.C. DURING 2006-2013

However, it should be noted that in 2013, 40.65% of the complaints submitted at N.C.S.C. by economic operators (2,333) were directed against the tender documentation (in the phase when the participation guarantee is not established) – even if they went through the verification „ex ante" performed by N.A.R.M.P.P., and 59.35% were submitted against the awarding result (3,406).

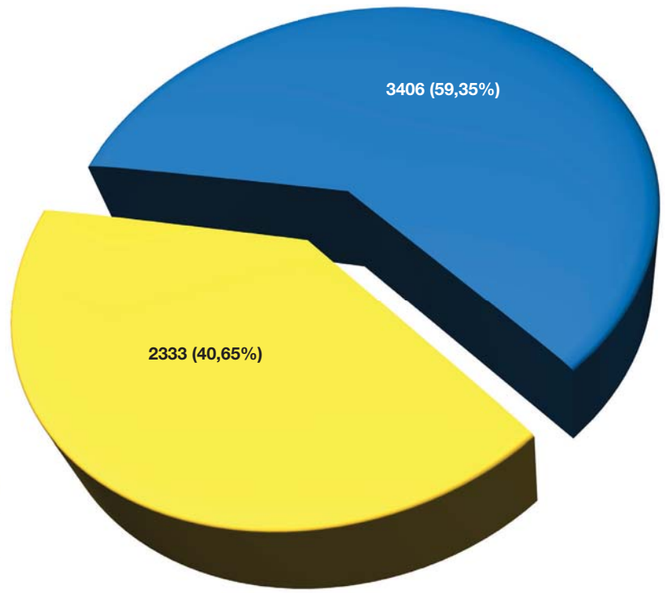


Figure 6
SITUATION OF THE COMPLAINTS MADE TO AWARDING DOCUMENTATION COMPARED TO THOSE MADE AFTER THE PROCEDURE'S RESULT IN 2013

But reporting the number of complaints submitted in 2013 to the proceedings initiated in S.E.A.P. as compared to 2012, there is an increase in the number of complaints submitted in 2013 by 8% compared to 2012, provided that the number of proceedings initiated in S.E.A.P. in 2013 decreased by 30.07% compared to 2013, as it can be seen in the chart below.

Analyzing this chart, it can be concluded that in 2013 the economic operators' confidence in the system of public procurement decreased, as they contested more awardin procedures compared to 2012 reported to the awarding procedures initiated, despite the sanctioning measures imposed by the legal changes of G.E.O. no. 34/2006, respectively the "ex ante" verification and the retaining of a percentage from the participation guarantee in case of the complaint rejection on the merits or if the appellant waived complaint without the contracting authority to be adopted remedial measures.

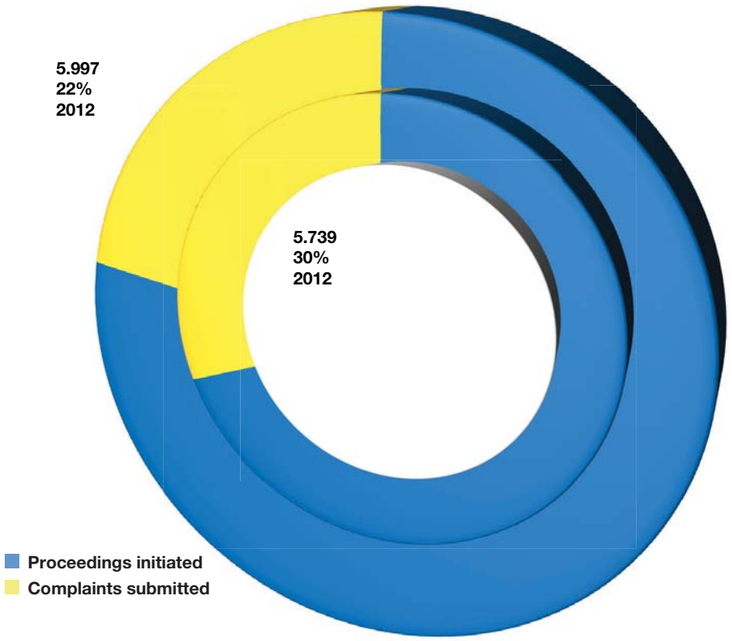


Figure 7
SITUATION OF COMPLAINTS SUBMITTED IN 2013 REPORTED ON PROCEEDINGS INITIADED IN S.E.A.P. COMPARED TO 2012

THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 1st - DECEMBER 31st 2013

DEVELOPMENT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

In terms of distribution by administrative-territorial units (ATU), the number of complaints made by economic operators in 2013 evolved as follows:

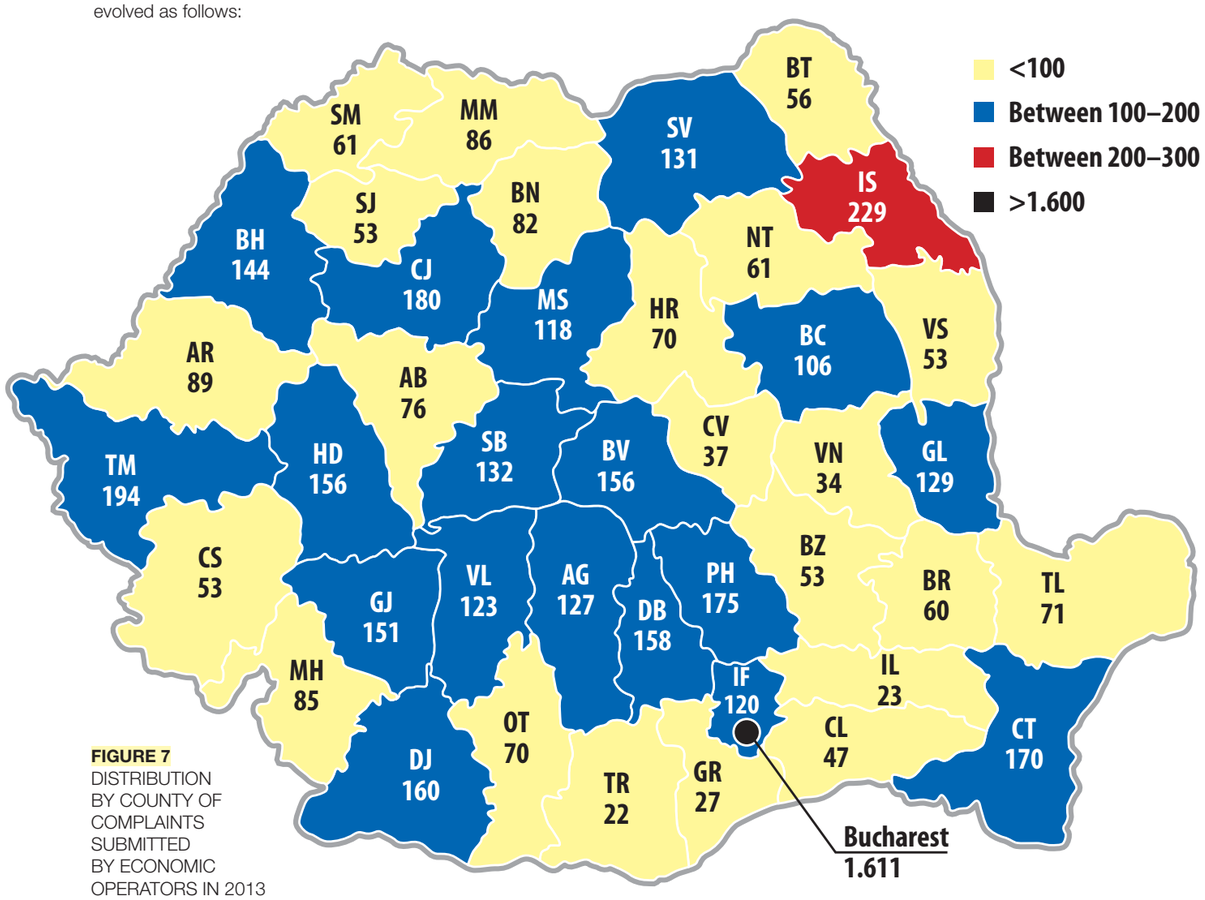


FIGURE 7
DISTRIBUTION BY COUNTY OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS IN 2013

COUNTY	COMPLAINTS	COUNTY	COMPLAINTS	COUNTY	COMPLAINTS
BUCHAREST	1611	GALATI	129	NEAMT	61
IASI	229	ARGES	127	SATU MARE	61
TIMIS	194	VALCEA	123	BRAILA	60
CLUJ	180	ILFOV	120	BOTOSANI	56
PRAHOVA	175	MURES	118	BUZAU	53
CONSTANTA	170	BACAU	106	CARAS SEVERIN	53
DOLJ	160	ARAD	89	SALAJ	53
DAMBOVITA	158	MARAMURES	86	VASLUI	53
GORJ	151	MEHEDINTI	85	CALARASI	47
BRASOV	156	BISTRITA NASAUD	82	COVASNA	37
HUNEDOARA	156	ALBA	76	VRANCEA	34
BIHOR	144	TULCEA	71	GIURGIU	27
SIBIU	132	HARGHITA	70	IALOMITA	23
SUCEAVA	131	OLT	70	TELEORMAN	22

Regarding the number of complaints submitted in 2013 by economic operators under the procedures for awarding public procurement contracts financed from European funds, it should be emphasized that they were in number of 2,207 which represented 38.46% of the total number of complaints submitted to the Council while a number of 3,532 complaints submitted, i.e. 61.54% of the total number of complaints submitted by economic operators to N.C.S.C. focused on awarding procedure of public procurement contracts financed from domestic public funds.

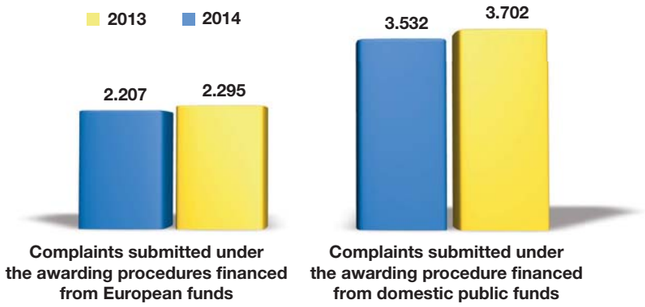


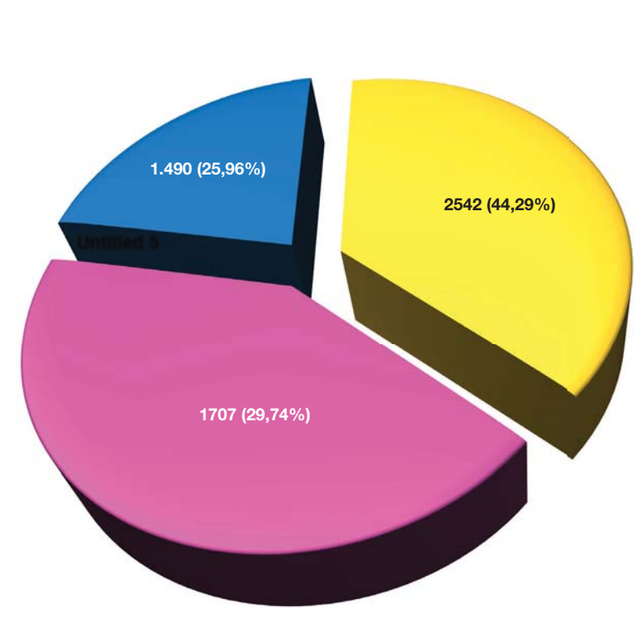
Figure 8
SITUATION OF COMPLAINTS SUBMITTED IN 2013 BY ECONOMIC OPERATORS BY ORIGIN OF FUNDS OF AWARDING PROCEDURES COMPARED TO 2012

From the chart above we can see that the the number of complaints submitted under the awarding procedures financed from European funds remained stable in 2013 compared to the previous year (registering only a slight decrease of 3.84%). The same thing happened with the number of complaints submitted under the awarding procedures financed from domestic public funds (the decrease was only 4.84% in 2013).

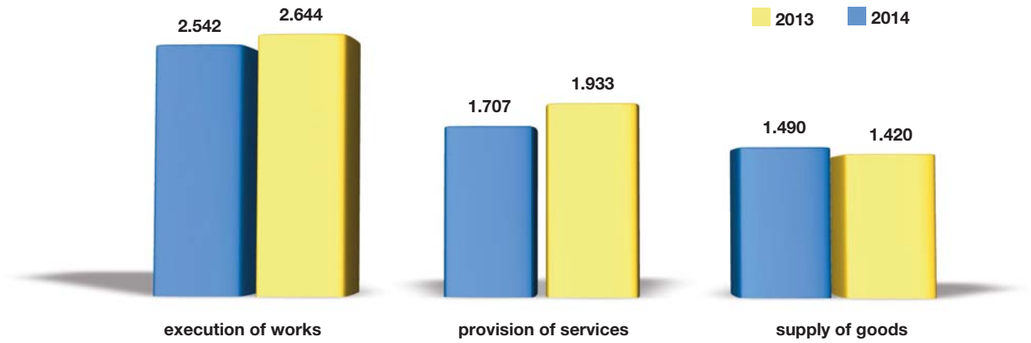
Complaints submitted by economic operators under the awarding procedures may also be classified according to the subject of the public contract, a situation which in 2013 was as follows:

- awarding procedures of public procurement contracts having as their object the execution of works - 2,542 (44.29%);
- awarding procedures of public procurement contracts having as their object the provision of services - 1,707 (29.74%).
- awarding procedures of public procurement contracts having as their object the supply of goods - 1,490 (25.96%).

Figure 9
SITUATION OF COMPLAINTS SUBMITTED IN 2013 BY THE ECONOMIC OPERATORS BY THE TYPE OF CONTRACT



DEVELOPMENT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS



Looking at chart on the complaints submitted based on the origin of the funds whereby the awarding procedures of public procurement contracts were financed and the chart on the complaints submitted by economic operators based on the type/ subject of the public procurement contract, it can be noticed that the number of complaints submitted in 2013 is close to that of the previous year.

Figure 10
SITUATION OF COMPLAINTS SUBMITTED IN 2013 BY THE ECONOMIC OPERATORS BY THE TYPE OF CONTRACT COMPARED TO 2012

During 2013, the 11 panels for solving complaints were randomly, electronically assigned an average of 522 complaints/file cases each, which means a monthly "load" of 44 cases per panel for solving complaints.

Although the number of complaints submitted in 2013 by economic operators was high and the complexity of cases was also high, the 11 panels for soliving complaints within our institution fully complied with the terms of settlement of disputes stipulated in art. 276, art. (1) from G.E.O. no. 34/2006, as amended[16].

It is important to emphasize that, since its establishment until 31 December 2013, a total of 47,280 complaints submitted by economic operators were recorded at the N.C.S.C.

2.1.2. THE SUBJECT OF COMPLAINTS SUBMITTED BY ECONOMIC OPERATORS

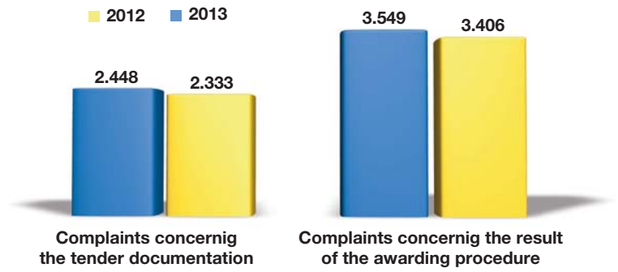
Regardless of the subject of the subjective right (performance, abstention), the complaint submitted related to an awarding procedure is always about the protection of this right, but there might be situations when the object could be the protection of interests.

When a complaint is submitted, this will individualize itself, becoming a trial / litigation and its subject is what the parties agree to submit to settlement, what they will ask to advisors to review, to assess, to held to resolve. Thereby it follows "ipso facto" that solving the complaint brings into question both a matter of fact and one of law, which counselors are called to solve by the decision of the Council in order to ensure the protection of the subjective right.

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 5.739 complaints submitted by economic operators to the NATIONAL COUNCIL FOR SOLVING COMPLAINTS in 2013, it resulted that 2,333 (40.65%) of these complaints concerned tender documentation and 3,406 concerned the outcome of procedure (59.35%).

Figure 11
SITUATION OF COMPLAINTS CONCERNING THE TENDER DOCUMENTATION AND THE RESULT OF AWARDIND PROCEDURE DURING 2012-2013



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

- restrictive requirements regarding similar experience, qualification criteria, technical specifications;
- awarding criteria and evaluation factors with no algorithm or with nontransparent or subjective algorithm;
- mentioning the names of technologies, products, brands, manufacturers, without the use of the phrase "or equivalent" within the awarding documentation;
- lack of a clear, complete and unambiguous answer from the contracting authority to requests for clarifications regarding the provisions of awarding documentation;
- form of collaterals for participation;
- imposing inequitable or excessive contractual clauses;
- not dividing per lots the purchase for products / similar works;

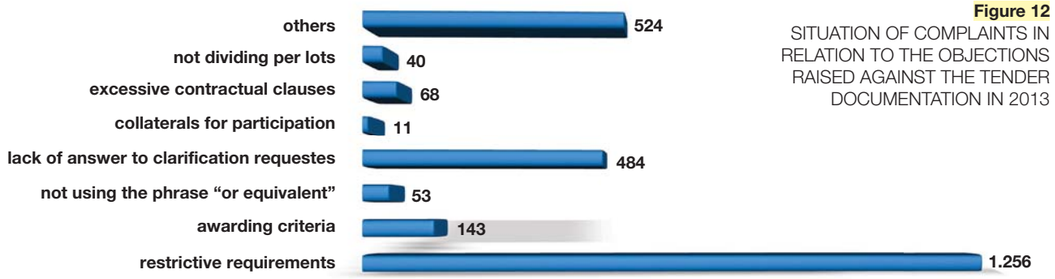
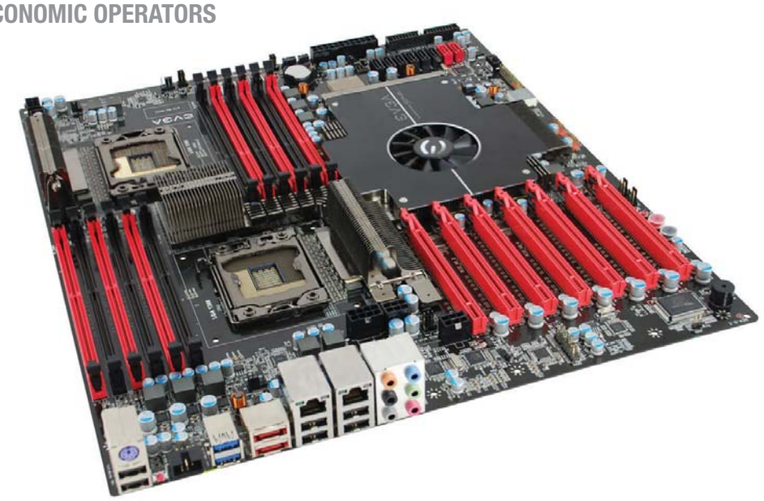


Figure 12
SITUATION OF COMPLAINTS IN RELATION TO THE OBJECTIONS RAISED AGAINST THE TENDER DOCUMENTATION IN 2013

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



1 "MOTHERBOARD, MONITOR, MOUSE, KEYBOARD AND CASE INDUSTRIALLY INSCRIBED BY THE SAME MANUFACTURER"

In regards to the complaint submitted, the Council remarks that the contracting authority specified, among others, on each computer system subject to purchase, the requisit "motherboard, monitor, mouse, keyboard and case will be industrially inscribed by the same manufacturer", which … they consider unjustified and restrictive, given that the smaller suppliers don't have all the parts manufactured by their own brand and on the other hand, the requisit does not reflect an objective technical feature of the products.

The authority repels the petitioner's view, stating only that discarding the requisit would bring serious damage to their reputation. Thus, the Council noticed that the University from … did not offer anything concrete in regards to the decision to accept by auction only computer systems with parts industrially inscribed by one manufacturer. Therefore, the conclusion that can be drawn is that the authority specified the requisit in question in order to block the acces to the procedure of some economic operators, respectively those who legally and on this market provide computer systems with parts from several manufacturers.

In this context, the requisit proves to be discretionary and illegal, prejudicing the provisions of Art. 35, paragraph 5 from G.E.O.no 34/2006 according to which the technical specifications must allow each tenderer equal access to the awarding procedure and must not bring in any unjustified obstacle that may restrict the competition among the operators.

Indeed, as the Court of Appeal (...) - Section 8 of contentious administrative and fiscal matters in the civil sentence no. 2762 from December 2008 also ruled, relative to its needs, the authority alone can decide upon them and how they should be met, but this decision must not bring in any unjustified obstacle that may restrict the competition among the economic agents, because it could break the principles underlying the awarding of the public procurement contract – no discrimination and equal treatment.

Insomuch as the contracting authority did not submit relevant documents and arguments for obtaining the right to ban computers without the industrial inscription of an exclusive manufacturer, but in accordance with its needs, by the above mentioned requisit, the authority seriously also broke the statutes of the art. 2, paragraph 2, a) and b) – the principles of no discrimination and equal treatment. The goal of the new legislation concerning the public procurement is to promote the competition among the traders, including by removing the unjustified obstacles, like requesting this inscription. Thus, the number of the participants in the procedure was lowered. In terms of the statutes of the public procurement, non-discrimination means ensuring the conditions for the real competition to take place so that any economic operator, regardles of their nationality, can be part of the awarding procedure and have the chance to become contractor; by equal treatment we understand establishing and applying, anytime during the awarding procedure, rules, requirements and identical criteria for all the economic operators, so that they can benefit from equal chances to become contractors.

According to Art 35, paragraph 5 of the statute and Art. 23 paragraph 2 from the Directive of the European Parliament and Council no. 2004/18/CE from March 31st 2004 concerning the coordination of the awarding procedures of public procurement contracts of works, goods and services, the technical specifications must allow any tenderer equal access to the awarding procedure shall not cause unjustified obstacles that could restrict competition among the economic operators; not accepting equipment that are in line with the needs of the authority, but other inscriptions or not such industrial inscriptions obviously represents an unjustified obstacle in this circumstance. This directive states also that: „The technical specifications established by the public buyers shall allow competition in the field of public procurement. To this end, we must make it possible to have offers that reflect the diversity of the technical solutions. Therefore, on one hand, the technical specifications shall be established in terms of performance and functional requirements and on the other hand, in case of reference to the European standard – or if there is no such a standard at the national level, the contracting authorities shall also consider the offers based on other correspondant solutions."

If the products are according to the specific European Standard, which was demonstrated under the conditions of the Art. 36 of the statute, the authority cannot reject an offer based on a certain inscription, especially if they ensure the same or superior performances to the inscripted ones. It is possible that the qualitative parameters of the products that do not comply with the requisit of the autohrity will exceed those of the products that abide by the requisit. In other words, the simple fact that there is an industrial inscription on the motherboard, monitor, mouse and keyboard does not guarantee a higher technical quality of the product or a greater reliability. Until otherwise proven, it is possible that some suppliers who integrate computer systems with components from more manufacturers, of higher quality and advanced technologically to get computer systems that outperform the industrial inscription of a single manufacturer.

As stated above, the requisit was not justified technically by the authority in any way, respectively, it did not mention its use, since the uninscribed industrially computers or with the inscription of other manufacturers on the mouse, keyboard etc can work just as well. Perhaps not even the organizer of the auction knows the details. The technical specifications from the tenderer's book must reflect a real and justified need of the authority, which must be supported by that specification and the assertion of specifications for the sake of overloading the tenderer's book or of hindering the auction for the suppliers of computer systems that use IT components from various manufacturers is suppressed by the rules in force. In this regard, as stated, the text in Art 35, paragraph 5 from the statute is clear – „the technical specifications must allow any tenderer equal access to the awarding procedure and shall not cause the unjustified obstacles that could restrict competition among the economic operators" - and shall not be broken or ignored by the authority.

If the technical compliance and the computers are not affected by their inscription, industrial or not, the Council will determine that by introducing this irrelevant requisit in the contract, the contracting authority intended to exclude some economic operators from the procedure, namely those who, although have products in good working condition, do not comply to the requisit.

The authority's statement that the products will be delivered under the same brand is truthful – any one of them – but, as it was said before, all these features must be introduced in order to respond to a real and objective need of the authority, and not to hinder the economic operators to participate in the procedure. The authority is not enabled to introduce technical requisits which are not useful or do not solely (illegally) exclude some tenderers from the auction. If operating according to the authority at this auction, it would mean that the latter is free to introduce any type of requisits and no one would have the right to censor them, even if they are anomalous and do not transpose any objective need of the authority (for ex, temperature resistance of the IT systems -100 Celsius degrees or nuclear radiations).

Article 35 paragraph 3 enumerate several types of technical specifications among which labeling and marking, which does not mean that the contracting authorities must or legally can introduce them all in the tenderers if those specifications do not influence the right fulfillment of the contract. As pointed aut, with or without inscription, on the motherboard, mouse, keyboard, box or monitor, the computers the authority needs are technically as operational.

The reputation damage claimed by the (...), as the most important educational institution, research and culture in Romania, as they say, beyond the fact that it is different from the inscription of a mother board (which is not even visible, being closed in the CPU), mouse, keyboard, box or monitor, namely by the manufacturer of these products, would have caused the contrcting authorities greats to say that it breaks

the rules of organizing public procurement, in favor of the economic operators who integrate IT systems with parts from several producers.

Therewith, the process of inscription indicated in the tenderer's book by the contracting authority, namely industrial inscription, is specific to the great manufacturers of IT components, who are, consequently, favored by the contracting authority. Yes, even they have ranges of products that they don't inscribe under their brand, leaving it for the final distributor to choose if they want to inscribe their brand on the product. Moreover, accepting just one type of inscription (industrial) takes from the competition out a large range of suppliers, who don't mark their products industrially, the decision about the process of inscribing products staying with them. Art. 38 paragraph (1) from the statutes expressly forbids defining in the tenderer's book technical specifications which indicate an origin, source, production, a special procedure, a brand (factory or commercial), a patent, a manufacture license which favour or dismiss economic operators or products. Thus, the Council considered that the contested requisit is exaggerated and abusive from the point of view of restricting the procedures of inscribing products.

Apart from the proof of the reputation damage, nowhere in its point of view the authority succeeds in explaining to the Council why a system with a computer unit manufactured by Lenovo (or other brand) could not work with a Compaq (or other brand) keyboard or with a Philips monitor (or from another brand), whether the components are inscribed or not. As we know, the hardware technical compatibility of the parts of a computer does not depend on the name of the manufacturer or their inscription, since there are compatibility standards and if they are abided by, the computer parts will certainly be compatible (for ex. MS HCL, as the authority required).

As shown before, to require that the computer parts have the same manufacturer affects the provisions of Art 35, paragraph 5 and Art 38, par 1 from the statutes:

– the technical specifications must allow any tenderer equal access to the awarding procedure and shall not cause unjustified obstacles that could restrict competition among the economic operators;
– it is forbidden to define in the tenderer's book technical specifications which indicate an origin, source, production, a special procedure, a brand (factory or commercial), a patent, a manufacture license which favour or dismiss economic operators or products.

The contracting authority did not show documents and plausible arguments that would entitle it to stop accepting products from various manufacturers, but compatible with one another. Not accepting them because they belong to different manufacturers is obviously an unjustified obstacle, for the nonce. If the products are compatible and their performances are equal or higher, proved in the provisions of art 36 from the statutes, the authority cannot reject the offer just because of its origin.

Taking into account the big picture, based on art 278, paragraph 2 from G.E.O. no. 34/2006, the Council will approve the appeal …. No…. in contradiction with (….) giving the authority the priviledge to remedy the corresponding tendering documentation, by removing the specification that the motherboard, monitor, mouse, keyboard and box must be industrially inscribed by the same manufacturer, so that the objecting company can participate in the tendering as well. The documentation will be posted by the authority in S.E.A.P. so that the interested economic operators can learn about it, before the due date for submitting the offers[17].

2 THE CONTRACTING AUTHORITY RESPONDED TO THE DEMANDS TO BRING CLARIFICATIONS, BUT DID NOT MODIFY THE TENDER'S DOCUMENTS

Annalyzing the content of the complaint formulated by …., The Council remarked that the answers 3 and 4 provided by the contracting authority are objected to through clarification from 13.09.2013, the objector claiming that through them,….. he modified the object of purchase when he compelled the tenders to update the feasibility study, given that such a service was not stipulated initially in the tender's docments. No value for this this service was estimated in the note for the estimated value.

Regarding this aspect, the Council notes that through clarification from 13.09.2013 and replying to requests addressed by an economic operator, the contracting authority formulated, besides others, the following answers:

„Question 3 (...) Please mention:

3.1. – if you think we should write a new feasibility study in the same technical offer (...)."

„Answer 3: Given the time that passed since drawing up the feasiblity study, (2009) the contracting authority would like all the studies to be updated so that they could offer complete, necessary technical-scientific data for the required documentation in the tenderer's book. That technical economical documentation prepared by the tenderer will answer the requests in the tenderer's book, the local authorities, and the utility owners. This documentation will be ellaborated under the agreed-upon conditions by the tendering documentation (value, land etc)..

„Question 4: (...) instead of being updated, the feasibility study must be redone and also a time set aside from the technical project and the details for a new feasibility study.(...)".

„Answer 4: That technical-economical documentation will be necessarily written under the conditions created through the tenderer's book, local authorities and utility owers.(...)".

The Council remarks that by the questions 3 and 4 addressed by an economic operator through clarification 1 dated 12.08.2013, the contracting authority answered similarly as in clarification 7 from 13.09.2013.

Thus, in regards to updating the feasibility study, the contracting authority mentioned in Answer 3 from clarification 1 from 12.08.2013 that „Given the time that passed since drawing up the feasiblity study, (2009) the contracting authority would like all the studies to be updated so that they could offer complete, necessary technical-scientific data for the required documentation in the tenderer's book.(...)".

So, in relation to the criticism that was expressed, the Council remarks that SC ... SRL, as an economic operator interested in the tendering procedure, had known about the clarification brought by the contracting authority regarding the update of the feasibility study since 12.08.2013, when clarification 1 through clarification from 13.09.2013 was posted in SEAP – which represents the administrative document objected to hearby – the contracting authority reiterating answers provided to questions 3 and 4 from clarification 1/12.08.2013.

Therefore, in relation to the provisions of Art. 256 par 1, b from G.E.O. no 34/2006 with the changes and additions, the Council remarks that criticism was brought to SC ... SRL rather late in relation to the clarification provided by the contracting authority cencerning the update of the feasibility study.

When finding the solution, take into account whether the contracting authority abided by the provisions of Art 78, paragraph 2 and 3 from G.E.O. no. 34/2006, according to which 2) The contracting authority must answer clearly, fully and without any ambiguity, as soon as possible any within a timeframe of three working days from the time they receive the request from the economic operator.

(3) The contracting authority has the obligation to provide the answers – accompanied by related questions – to all economic operators who obtained, under this ordinance, tender documentation, taking measures to conceal the identity of the requested clarifications".

Given the fact that the request for clarification was made on 09.10.2013, the Council finds that the contracting authority has not exceeded the three working days from the receiving a request for clarification, the answer being posted on 09/13/2013 (address no. 60055 / 82).

The Council notes that the Clarification no. 7/13.09.2013, posted in the S.E.A.P., the contracting authority has not made changes to the content of the award, but only responded to questions from operators interested in participating to the tender, thus it fulfilled its obligation to clearly, completely and unambiguously respond, as required by art. 78 of G.E.O No. 34/2006, reason for the Council to disprove the critics of complaintant in this regard.

Considering all the issues of fact and law above mentioned under art. 278 paragraph (5) and (6) of the G.E.O. no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and subsequent amendments, the Council rejects as unfounded the complaint submitted by ....., following the public procurement procedure to be continued[18].

3 RESPONSE GIVEN BY THE CONTRACTING AUTHORITY TO REQUESTS FOR CLARIFICATION VIOLATES THE PROVISIONS OF LAW NO. 72/2013 BY REFUSING TO MODIFY THE CONTRACT CLAUSES REGARDING THE TERMS OF PAYMENT

On 12.05.2013 the contracting authority remitted to complainant and published in S.E.A.P. the response from 05.12.2013, which is contested, response by which the contracting authority refused to modify the contractual clause that the complaintant referred to, objective of aligning with the requirements of legislation in force.

Moreover, the Council notes that both the content of the response to the request for clarification and teh considerations from the point of view, regarding the content of tender documentation, "the special quality of the beneficiary" or invoking the provisions of another article of the contract (art. 24) but which refers to the same issue in the same terms, can not be accepted even if we take into account that the document showed by the contracting authority added the phrase „under the law in force", on the ground that the contractual provision flagrantly contravenes the provisions of art. 6 and 12 of Law no. 72/2013 which provide that: "Contracting authorities have the obligation to pay the amounts of money resulting from professional contracts no later than: a) 30 calendar days from the receipt of invoice or any other equivalent request for payment; b) 30 calendar days from the date of receipt of goods or services, if the date of invoice or any other equivalent request for payment is uncertain or previous to the receipt of goods or services; c) 30 calendar days from acceptance or verification, whether by law or by contract it is set a reception or verification procedure to certify conformity of goods or services and the contracting authority has received the invoice or the equivalent request for payment on the date of verification or prior to this date. (2) The procedure of acceptance or verification referred to in paragraph (1) c) may not exceed 30 calendar days from the receipt of goods or services. Exceptionally, in duly justified cases by the nature or characteristics of the contract, the acceptance or verification may take longer than 30 days, if expressly set out in the contract and procurement documentation reception both the date for the receipt and the objective reasons, provided that this clause shall not be unfair, in the sense of Art. 12 (3) The parties may not agree on the date of issuing/ receiving of the invoice. Any clause stipulating a deadline for issuing/receiving of the invoice is null and void. (...)", respectively „The practice or the contractual clause which establishes manifestly unfair, against the creditor, the payment term, the interest rate for late payment or additional damages is considered abusive."

In this regard, the Council notes that to these clear provisions of Chapter III of the quoted law governing the payment period for contracts concluded between professionals and contracting authorities, that being exactly the type of contract to be concluded at the end of the procedure of awarding the public contract for services in question, no argument contracting authority can be retained, as it would be in total contradiction with the legal provision quoted as resulting from grammatical and teleological interpretation of the texts cited, including the fact that the contracting authority, by this clause and the disputed response, tried to circumvent the application of Law nr. 72/2013.

For the reasons given, the Council is to allow the complaint and, under the provisions of art. 278 paragraphs (4) and (6), the Council shall order the cancellation of the response to requests for clarification published in S.E.A.P. on 05.12.2013 and the issuing of a new clarification to comply with the provisions of Law no. 72/2013, within 10 days, then it will continue with the awarding procedure[19].

In the complaints brought against the result of the procedure, it was noticed that the most frequently disputed/criticized are:

- the report of the opening meeting for tenders (especially not considering the guarantee for participation and the conduct of the public opening meeting for tenders);
- rejection of appellant's offer as inadequate or unacceptable;
- unusually low price bids of other participants in the tender procedure;
- qualification documents submitted by other bidders or the manner of scoring / evaluation thereof by the contracting authority;
- the fact that, in the communication letter of the procedure's result, the contracting authority did not specify the reasons for rejection of the bid;
- rejection of the tender without contracting authority to seek clarification on the technical proposal/bid price or incorrect assessment of responses to clarification;
- cancellation without legal basis of the tender procedure by the contracting authority.

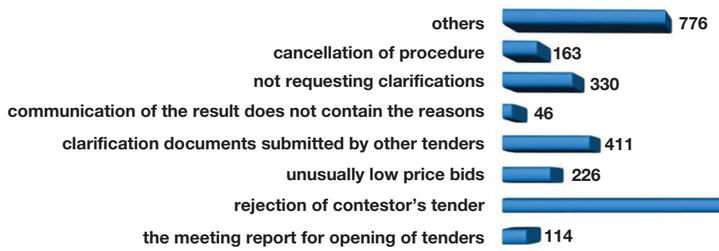


Figure 13
SITUATION OF COMPLAINTS IN RELATION TO CRITICS MADE AGAINST THE PROCEDURE'S RESULT IN 2013

4 THE GUARANTEE OF PARTICIPATION DOES NOT INCLUDE ALL CASES OF RETAINING

A number of 17 economic operators presented themselves at the procedure, among which ... whose tender for 63 lots was rejected by the contracting authority as unacceptable, since "it is not accompanied by the guarantee of participation in the form requested in the tender documentation (Form 10 - d) in the case of the rejection of the appeal by the N.C.S.C. as groundless or when the waiver of complaint is not due to the adoption of necessary remedial measures by the contracting authority.) - Rejected (unacceptable tender - GD no. 925/2006, art. 36, paragraph (1) a)" as recorded in the minutes of the public opening of tenders from 09.09.2013. Against this result, for the reasons outlined above, ... invested the Council to solve the complaint in the present case.

Regarding the aspects seized bu the claimant, the Council notes that the tender documentation was not disputed successfully by any economic operator, for which all its provisions have enhanced their binding force for both contracting authority and especially for the economic operators involved in the awarding process, including .... At this point, complaints or critics regarding the provisions of tender documentation

Pentru înţelegerea acestor aspecte, prezentăm, în cele ce urmează, câteva cazuri :

can not be issued as it would be manifestly late, reported to the deadlines prescribed by art. 256 ind. 2 paragraph (1) in conjunction with paragraph (2) of the ordinance on public procurement. Therefore, the argument of the second point of complaint proves to be delayed as the deadline for contesting the tender documentation being expired.

In conclusion, the documentation implicitly accepted by all tendering companies strictly required them to follow regulations, in the respect of art. 170 of G.E.O. no. 34/2006 – the tenderers are required to prepare their tender in accordance with the tender documentation. By submitting a tender within the procedure, it is assumed that tenderes have acquired the tender documentation unreservedly, which means that they can excuse any deviation from the requirements of its binding to the smallest detail (relevant is the decision no. 1555 of March 6, 2012, the Court of Appeal ... Administrative and fiscal department). As a contract is the law of parties, similarly the tender documentation accompanied by the clarifications posted in S.E.A.P. has the same value for the parties, and none of them can ignore or disregard its clauses.

In its jurisprudence [Judgment in Case, October 18, 2001, SIAC Construction Ltd and County Council of the County of Mayo, C-19/00 (paragraphs 42-44)], the Court of Justice of the European Comunnities concluded that the adjudicating authority must interpret the the criteria in the same way throughout the whole procedure. The principle of equal treatment requires that all participants in an awarding procedure to benefit from applying the same conditions imposed by the contracting authority so as to ensure that any risk of favoritism or arbitrariness from the Authority is removed.

Going beyond this brief introduction underlining the importance of fully respecting all the rules imposed by the contracting authority in the tender documentation, on the aspects seized by the claimant, the Council notes that, in section III.1.1) – Deposits and guarantees required, the contracting authority provided the tenderers with the obligation to provide a guarantee of participation: “The validity period of the guarantee for participation must be at least equal to the period of tender validity, i.e. 90 days after the deadline for submission of tenders. The way of participation guarantee formation: an instrument of guarantee issued by a banking company in benefit of the contracting authority under the law, (form no. 10) [...]” . The same provision is found in section III.1.1.A) - “Guarantee of paricipation“ in the data sheet of the acquisition.

Form no. 10 to which the reference is made represents the form of bank guarantee letter for tendering and its content states that the issuing bank commits itself to pay to the contracting authority, at its first written demand and without the authority be required to motivate its request, provided that the contracting authority should specify that the amount claimed and due to it is due to the existence of one or more of the following situations:

“a) the tenderer has withdrawn the offer during the validity period;

b) his/her offer being declared the winner, the tenderer has not established the guarantee of good performance within the validity period of the offer;

c) his/her offer being declared the winner, the tenderer refused to sign the procurement contract within the validity period of the offer;

d) the rejection of the complaint by the N.C.S.C. as groundless or when the waiver of complaint is not due to the adoption of necessary remedial measures by the contracting authority.”

This latter situation is the enforcing of the provisions of the Emergency Ordinance:

- Art. 43 ind. 1 paragraph (2)a): “The contracting authority shall require tenderers to submit a guarantee in order to participate to the contract awarding procedure when the present Emergency Ordinance requires publication of a notice or invitation to participat. The tender documentation must contain the following information: a) the amount of the participation guarantee, mentioned in the invitation / notice, a fixed amount not exceeding 2% of the estimated contract valu , but not less than the amounts referred to in art . 278 ind. 1 paragraph (1)”;

- Art. 278 ind. 1 paragraph (1): “To the extent that the Council rejects the merits of complaint, the contracting authority will retain the guarantee of participation of complainant in the estimated value of the contract in the following amounts: [...]”;

- Art. 278 ind. 1 paragraph (2): “The provisions of paragraph (1) applies where the complaintant waived complaint.”

Despite the clear and binding provisions described above, ... understood to submit in her tender for the 63 lots letters of guarantee which do not comply Form 10 given by the authority. Thus, in addition to various conditionalities entered by the issuing bank, the retention hypothesis of tender’s guarantee is misssing form the letters submitted “in case of the rejection of the complaint by the N.C.S.C. as unfounded or when the complaint waiver is not due to the adoption of necessary remedial measures by the contracting authority.”

Submitting these letters of guarantee not compliant with documentation, the tenderer violated the provisions established by the authority in the contract notice, in the data sheet of acquisition and in the section of forms. Consequently, the admission of tender by the evaluation committee was not possible ..., as it would have despised both the tender documentation and art. 170 and 200 of the G.E.O. no. 34/2006, art. 33 paragraph (3) b) , Art. 36 paragraph (1) b) , Art. 37 paragraph (1) and art . 81 of Government Decision no. 925/2006 . According to this latter legal provisions:

- Art. 33 paragraph (3) b) in the opening session it is not allowed to reject any offers, except those which are not accompanied by the participation guarantee in the amount, form and within the validity period requested in the tender documentation;

- Art. 36 paragraph (1) a) an offer is unacceptable if it falls into the category referred to in art. 33 paragraph (3);

- Art. 37 paragraph (1): tenders that do not fit into any of the situations referred to in art. 36 are the only tenders which can be considered acceptable;

- Art. 81: the evaluation committee must reject non-compliant tenders and unacceptable tenders.

Thus, by the formulation of participation guarantee in other way than the one provided by the authority, the complainant company must have realized that its tender falls under the provisions mentioned, in particular art. 33 paragraph (3) b) providing for the rejection of tenders which are not accompanied by participation guarantee in the form requested in the tender documentation. (...)

The reasoning of complaintant, that the authority was obliged to seek clarification on the tender documents is not judicious. According to art. 201 paragraph (1) of G.E.O. no. 34/2006, “during the awarding procedure, the contracting authority has the right to request clarification and, when appropriate, amendments to documents submitted by the tenderers / candidates to demonstrate that the requirements established by the qualification and selection criteria or to demonstrate the compliance of tender with requirements.” From its wording, it is observed that the authority has a right to request clarification on the tender, and the fact that the authority has agreed not to exercise this right, considering that the documents in the complaintant’s tender are eloquent can not be sanctioned by the Council. In the existence of an authority’s right, not an obligation, there are also the provisions of art. 35 of Government Decision no. 925/2006: “During the analysis and verification of documents submitted by the tenderers, the evaluation committee has anytime the right to request clarifications or additions to documents submitted by them to demonstrate fulfillment of the qualification, as these are provided in art. 176 of the G.E.O. no. 34/2006, or to demonstrate compliance of the tender with the requirements.”

On the other hand, through an eventual request for bringing other letters of guarantee from the bank or an addendum to the existing ones, the authority would have created an advantage for the complaintant over the other participants to procedure, contrary to art. 201 paragraph (2) of the G.E.O. Accordingly, it would have transformed her tender from unacceptable to acceptable. Moreover, such method is prohibited by art. 33 paragraph (3) b), according to, in the opening session, it is not allowed to reject any offers, except those which are not accompanied by the guarantee of participation in the amount, form and within validity period requested in the tender documentation, expression from which is inferred that the improper participation guarantee is sanctioned by rejection of the offer and not by sending a request for clarification or modification of that guarantee.

In light of the above mentioned, the Council determines that the contracting authority legally rejected the tender of ..., ant there are no reason to refute this measure, to cancel the minutes of the public opening of tenders, or to oblige the contracting authority for reassessment. Thus, under art. 278 paragraph (5) of the G.E.O. no. 34/2006, the Council will reject the complaint as unfounded[20].

5 THE CONTRACTING AUTHORITY HAS NOT REQUESTED JUSTIFICATION FOR APPARENTLY UNUSUALLY LOW PRICE

Communication on the outcome of the awarding procedure was made by the contracting authority by letter from 19.02.2013 against the outcome of the procedure being formulated this complaint ... bringing criticism, on the one hand, related to the fact that SC ... SRL, which was the winning tender, although he was required to submit a list of transport used exclusively for contract fullfillment as required by the qualification requirements in tender documentation, this company presented, within the technical proposal, type A1 and A2 ambulances bound by contract with the Health Insurance House ... and another contract concluded with... providing non-stop transport services, so that the requirement was not met, and on the other hand, related to the fact that the price of 1,425,600 RON proposed by the SC ... SRL can not be sustained.

On the first point regarding the list of means of transport used for the contract fullfillment, the Council considers that within the tender documentation, data sheet of aquisition, point III.2.3.a) "Technical and/or professional capacity - Information and / or minimum level(s) necessary for evaluating if requirements are met", the contracting authority provided that „3. Tenderers shall submit a list of owned vehicles used for fulfilling the contract, together with copies of the documents proving ownership, authorizations for use and related insurances. (...) 7. Documents certifying that transport services are intended solely to these sevices have permit / license / valid accreditation issued by the Ministry of Health or other bodies duly authorized and have the minimum equipment required corresponding to classification for A1/A2 type of ambulance."

From the content of qualification requirements given above, it is found that the tenderers were bound by presenting a list of owned vehicles used for fulfilling the contract, together with copies of the documents proving ownership, authorizations for their use and related insurances, as the vehicles will be used exclusively for the fulfillment of the contract.

By checking the qualification documents submitted by SC... S.R.L. – documents in the procurement file, sent by the contracting authority to the case – the Council finds that the winning tenderer has submitted "List including the quantities of equipment, plant and machinery used for provision of services" (tab 98 of DAP), which indicated a total of 10 ambulances which will be used in fulfilling the contract (by indicating the type/model and identification number/registration number), the list being accompanied by copies of documents proving ownership, authorizations for their use and related insurances.

The submissions of the complaintant that the ambulances type A1 and A2 provided in the technical proposal if SC ... SRL were engaged by contract with the Health Insurance House ... and by contract with... on providing non-stop transport services, so they can not be used exclusively for the fulfillment of the contract shall not be retained in the settlement as relevant, considering, on the one hand, the above mentioned issues related to the content of the qualification requirements, and on the other hand, noting that they are simple statement, unproven in any sort by ...

Regarding the second aspect of apparently unusually low price offered by SC... SRL., the Council notes that this criticism is justified given that the estimated value in the framework agreement was 1,987,200 RON and the financial proposal of SC... S.R.L. was 1,425,600 RON, which is 85% below the estimated value, which oblige the contracting authority to carry out sustainability of apparently unusually low price proposed.

Comparing the estimated value of the framework agreement and the amount proposed by the SC ... SRL. mentioned above, the Council notes that it is 85% below the estimated value, a situation that was supposed to lead the contracting authority to the provisions of art. 202 paragraph (1) of the G.E.O. no. 34/2006, as amended and supplemented, under which "(1) When a tender is abnormally low price in relation to what is to be provided, works or services, the contracting authority has the obligation to request the tenderer in writing, before making a decision to reject that offer, details and explanations considered significant on offer and verify the answers that justify that price" in conjunction with art . 36[1] of GD no. 925/2006, as amended and supplemented, under which "(1) For the purposes of art . 202 paragraph (1) of the G.E.O., an offer apparently presents an unusually low price compared to what is to be provided, works or services, when offered price, excluding VAT, is less than 85 % of the estimated contract value (...)".

In these circumstances, noting that prior to decision designating the winning tender, the contracting authority did not requested clarification on apparently unusually low price proposed, thus breaching art. 202 paragraph (1) of the G.E.O. no. 34/2006, in conjunction with art . 36 and art . 72 paragraph (2) g) of G.D. no. 925/2006, based on art. 278 paragraph (2), (4) and (6) of G.E.O. no. 34/2006, with subsequent amendments, the Council notes that it requires re-evaluation of offers, verification of sustainability of apparently unusually low price proposed by SC ... SRL, taking into account the submissions made by (...) the complaint submitted in terms of price offered, given that the contracting authority did not expressed ist views and that, in exercising its atributions, the N.C.S.C. can not replace the work of the evaluation committee which is responsible for clearly established atributions by law in this sense (checking the financial proposals submitted by tenderers in terms of framing in the funds which can be made available for the fullfillment of the public contract in question, and also, where appropriate, in terms of their framing in the statement referred to in art . 202 of the G.E.O. - art . 72 paragraph 2 g) of G.D. no. 925/2006).

For all these reasons, based on art. 278 paragraph (2), (4) and (6) of G.E.O. no. 34/2006, with subsequent amendments, the Council accepts the complaint submitted by ... against ... and cancels the procedure report 19.02.2013 and all its subsequent acts.

The Councils orders ... that within 10 days of receipt of this decision, the procedure for the award of the tender evaluation stage to be resumed and the provisions of art. 202 paragraph (1) of the G.E.O. no. 34/2006, with subsequent amendments, in conjunction with art. 36 from G.D. no. 925/2006, as amended and supplemented to be made, by requesting clarification to tender SC ... SRL on apparently unusually low price proposed, taking into account the mentioned reasons[21].

6 THE EVALUATION COMMITTEE PROCEEDED TO VERIFICATION OF INFORMATION RECEIVED FROM THE COMPLAINTANT TENDERER AND THEIR CORRELATION WITH THE PRICE TENDERED AND BY CHECKING THE TYPES OF PRODUCTS MARKETED

Thus, it is held that in the letter from 17.01.2013, the contracting authority communicated to the complainant tenderer the decision to reject its tender reasoned that "the tender provides an unusually low price for what is to be provided/performed /executed, so that the contract quantitative and qualitative parameters required in the specification can not be ensured", in evaluating the tender submitted by ..., the evaluation committee noting that this economic operator "for most of the products tendered in the specification presents an apparently unusually low price compared to what is to be provided" in the procedure report from 17.01.2013 being detailed the manner in which the verification of the proposed prices for certain products requested was made.

In this regard, it is considered that, in exercising its powers, the evaluation committee proceeded to request clarification to complainant tenderer in the sense that it has submitted to him an address on 03.01.2013, by which it required the price foundation for a range of products, among them being the products „desktop 16 digits Ws 1610T ..." and "A0 plotter paper (90G/914mm, 45m/roll) ...." .

The claims of the complaintan that the contracting authority may not require information to substantiate the price offered because it does not represent less than 85% of the estimated value are unfounded and will be rejected by the Council, provided that, in the evaluation phase of tenders, the evaluation committee has the right to conduct verifications on all aspects of the tenders, relevant in this respect being the provisions of art. 201 paragraph (1) of the G.E.O. no. 34/2006, as amended and supplemented, under which "During the awarding procedure, the contracting authority has the right to request clarification and, where appropriate, additions... to demonstrate compliance with requirements imposed" in conjunction with art. 34 paragraph (2) of G.D. no. 925/2006, as amended and supplemented, under which "the committee has the obligation to analyze and verify each offer both in terms of the proposed technical elements and in terms of financial aspects involved".

In this respect, it is noted that the address given on 04.01.2013 responded to the contracting authority stating that the value of its offer is due to low turnover in the past three years, staff and materials costs, very high labor productivity, the stock, the customer portfolio and its working points" in response enclosing "commercial sale and purchase contract frim 04.12.2012" concluded with SC ... SRL concerning "sale of stationery and other paper items" and "Annex from 04.12.2012" issued by SC ... SRL, where certain products are mentioned, including those previously retained in motivation with their unit prices, for product "computer desk 16 digits Ws 1610T ..." and for "A0 plotter paper (90G/914mm , 45m/roll) ....".

Council considers that in the assessment, the committee proceeded to verification

of information received from the complaintant tenderer and to their correlation with the prices tendered in the market for such products, and verification of the types of products sold by SC ... SRL by verifying the information presented on the company's website, the economic operator with whom the tenderer ... had contracted to supply, and after verifications conducted under the principle of accountability enshrined in art. 2 paragraph (2). g) of G.E.O. no. 34/2006, as amended and supplemented, the finding that at least the product "paper type Xerox A4-Optitext 80G/mp packing 500 sheets/ ream" is not marketed by SC ... S.R.L. although...claimed otherwise in letter from 19.12.2012.

In these circumstances, noting that in supporting of the complaint supported, ... brought as sole argument that the contracting authority has requested clarification on the price considering that it does not represent more than 85% of the estimated value and the fact that, in exercising its powers, the evaluation committee, prior to the decision to reject the tender, made verifications on sustainability of price offered by... offer, verifications supported by steps taken in this regard, the Council notes that the decision to reject the tendersubmitted by . .. was relevant and well founded, following to be maintained.

Consequently, for all these reasons, based on art. 278 paragraph (5) and (6) of the G.E.O. no. 34/2006, with subsequent amendments, the Council rejects as unfounded the complaint submitted by ... , against the contracting authority. The contracting authorities and maintan the decision to cancel the awarding procedure[22].

7 FOR JUSTIFYING THE PRICE – THE CONTRACTING AUTHORITY NEEDED TO REQUEST PRICING ANALYSIS FOR CATEGORIES OF RELEVANT WORKS AND DOCUMENTARY EVIDENCE IN SUPPORTING THEREOF; THE PRESENTATION OF THE RECOMMENDATION LETTER FROM THE BANK

Moving on to resolving the first complaint submitted within the procedure of..., the Council, analyzing the critics related to the failure of the winning tenderer (...) to submit the proof of payment for the participation guarantee, critics that is found in the complaint submitted by (...) who finds that in acquisition data sheet at section IV.4.3. "Presentation of the offer", it was provided that "In the case of a guarantee of participation issued by an insurance company, the insurance policy / contract insurance will be submitted in the original, accompanied by proof of full payment of the insurance policy / contract."

In the minutes of the opening session it was recorded the submission by... of a guarantee of participation issued by Onix Insurance, without proof of payment of the insurance premium. It was decided a further request thereof by the evaluation committee.

By adress, the contracting authority asked the bidder to submit the payment order proving the paymant of participation guarantee. The tender responded by letter to which she annexed the payment order from 06.08.2013 issued by bank on payment of the insurance premium.

Regarding the above mentioned, it should be noted that the provisions of art. 33 paragraph (3) b) of G.D. no. 925/2006 established the responsibility of the contracting authority, in the opening session, not to reject any tender, except those falling under any of the following circumstances or is not accompanied by the guarantee of participation in the amount established, form and period of validity requested in the tender documentation.

The insurance policy submitted by the tenderer met the three conditions above mentioned so that the contracting authority had no reason to reject the offer in accordance with the above statutory provisions relied upon.

Concerning the request of subsequent submission of proof for payment of the insurance premium, the Council notes that art. 86 paragraph (6) of G.D. no. 925/2006 ["In any event, proof of participation guarantee must be submitted no later than the date and time set for tender opening."] refers to the possibility of submitting a participation guarantee itself up to the date and time set for tender opening, not for an addition to it, as if the said evidence submitted by the tenderer.

At the date and time of tender opening, the guarantee of participation was submitted in one of the forms accepted by the authority (insurance policy) in the amount, form and validity required.

Acceptance of subsequent submission of the document presented would have not produced any injury to the contracting authority nor favored the tenderer, as long as the insurance policy was submitted on tender opening.

Regarding the lateness of critics at the time of complaint submision on the issues above investigated both the contracting authority and the intervener ... , the Council notes that, since decisions regarding the establishing of participation guarantee can be also taken in some subsequent meetings for tender opening, and the complainants were unaware of the decision of declaring admissible and the winning tenderer of the mentioned offer and had no reason to criticize the minutes of the public opening of tenders.

In that report it was recorded that a clarification will be required tegarding the participation guarantee, the effect of this application on whether the offer (rejected/ admissible /winning) being announced to complainants together with the communication on the result of the procedure.

Therefore the objections raised on the participation guarantee submitted by... are not late reported to the date of the act announcing that he/she is the winning tenderer.

It is also irrelevant in solving the above aspect investigated how the guarantee of participation was submitted and the decision was taken by the contracting authority in the procedure concerning the award of contract "The construction of the detour road around ...".

Referring to the criticism on the fulfillment of qualification requirements and provisions in the specifications, the Council finds that neither the complaint nor in addition thereto, submitted pursuant to the express request of the Council, the objectoe ... did not brring about any reasons in fact and in law to support its claim.

The fact of listing the qualification requirements in the data sheet of the acquisition, allegedly claimed unfulfilled by the winning tenderer can not be considered a statement of reasons in accordance with Art. 270 of complaint.

Regarding the price offered by (...) also criticized by (...), the Council notes that by letter from 10.10.2013, the contracting authority , in accordance with art. 202 of G.E.O. no. 34/2006, asked the company documents and information related to: prices from suppliers, the stocks of raw and materials, the organization and methods used in the work process (purchase, transport, reception, manufacturing / preparation, commissioning work), the wage labor, the cost of machinery or work equipment used for the execution of works for the main categories of items in the financial tender, performances and costs of certain machinery or work equipment.

The tenderer responded with letter from 17.10.2013, where she punctually answered to acquirer's requests by submitting price offers from vendors, the site organization, performances and costs of equipment, the wage labor.

According to art. 202 paragraph (1) of the G.E.O., "If an offer has apparently an unusually low price compared to what is to be provided, executed or performed, the contracting authority has the obligation to request the tenderer, in writing and before taking a decision of rejecting that tender, details and explanations considered significant regarding the tender and check the answers justifying that price."

Also, according to art. 36 paragraph (3) of Government Decision no. 925/2006, "For the purpose of verifications referred to in paragraph (2), the contracting authority shall request the tenderer including documents, if applicable, regarding prices from suppliers, stocks of raw and materials, organization and methods used in the work process, the wage labor, performance and costs of certain machinery or work equipment."

Reported to the laws in force, it is noted that the contracting authority only listed those mentioned in the above quote with no specific reference to the tender submitted.

The contracting authority's request did not contain "significant details and specifications" referred to the above stated article, the request being formal, simplistic and general, submitted by the authority to the tenderer, her response for justifying being as such.

The way in which the presentation of the financial proposal (price based descriptions) was required, the contracting authority needed to request pricing analysis for categories of relevant works and documents to support trereof (price offer for materials, pricing analysis for means of transport rates and equipment etc.). Only by doing so, the company could check the unit prices of the categories of works included in the financial proposal and therefore apparently unusually low price submitted by (...).

Quotation prices in general, as requested, could be required only if the tender had highlighted unit prices for the main resources (material, labor, equipment, transportation). However, in this case, the tender is expressed unit prices for types of works, and the verification may be performed starting from the analysis of their value.

The acquirer should have precisely indicated which information analysis that could have helped to verify the reality of the offered price, the details and significant specifications on the

tender (categories of relevant work) with special reference to the prices that seeks to verify, to the the cost of transportation equipment, depending on, for example, the actual distances to be traveled, the cost of materials, the concrete possibility of the company to perform the works at the offered price, compliance with specific provisions, such as, for example, those of Mining Law no. 85/2003.

The evaluation committee had to do a thorough analysis of the tender, to identify which are the essential information and documents which seeks to obtain for checking the price, to ask therefore explicitly, with the possibility to ensure correlation of information submitted by tenderers.

The contracting authority sought to formally fulfill the obligation to require justification for the unusually low price by sending a general clarification, but not to obtain all the information and documents they needed to check in detail the price offered, their approach not having an objective pursued, namely that of price offered being justified.

Only after obtaining all information and documents necessary to prove in detail the apparently unusually low price, the evaluation committee could determine whether the tender ... is admissible.

For compliance with the principle of efficient use of public funds, taking into account the complexity of the contract (its estimated value being 382,637,890.65 RON, excluding VAT), the contracting authority should have considered awarding the tenderer who submitted an actual, justified price and could ensure the fulfillment of contract within the quantitative and qualitative parameters stipulated in the specifications.

The tenderer submitted its response as she thought appropriate, listing information on the site organization, performances and cost of equipment, submitting tenders for materials without specific correlation to be possible made in order to allow a verification of the correctness of the formation price. Moreover, in any document drawn up by the evaluation committee, it doesn't appear that the documents received were analyzed, being only mentioned thate they were considered conclusive to justify the the price.

It is therefore found that the evaluation of the winning tender was conducted formally, contrary to legal provisions in force and, consequently, the criticism of complainant companies regarding the illegality of evaluation is founded.

The statement that in other proceedings, the offer... has been declared non-compliant is irrelevant in the settlement as long as the present procedure, the complainant was not able to prove this in the procedure that is the subject of the case.

Moving on to the settlement of the second complaint referred to within the procedure of (...), the Council notes that, in the absence of payment proof of insurance premiums to Onix Insurance and of price offered ... the above findings remain valid.

Regarding the justification of the price offered by (...), as also pointed out in reference to the price offered by (...), the request of the contracting authority (letter from 10.10.2013) was formal, general, including listing of the elements referred to art. 361 paragraph (3) of Government Decision no. 925/2006, without specific information required for analysis which could have helped in particular to the verification of the price offered.

Regarding the fulfillment of the requirement on access to lines of credit worth 87 million RON by (...), the Council notes that, following requests for clarification of the contracting authority, letter from 06.09.2013, the tenderer submitted a letter of recommendation from the bank confirming that the company has or has access to liquidity, credit lines or other financial means necessary to cover the cash flow 87,000,000 worth for the development of works for a period of six months within the contract „The constuction of the detour road around ....".

By analyzing the letter of recommendation, it can be noticed that it does not have identification data of the bank, the person signing and his/her capacity are not mentioned and the letter is presented in Romanian language, without any mention that it wsa translated from Spanish.

Since the issuer is a foreign bank, taking into account its presentation, the contracting authority offer needed to clear with the tenderer the way of releasing and presentation of the letter and to pursue the obtaining of information and supporting documents to ensure of the existence of this access to credit lines of required value.

Regarding the violation of Art. 181 lit. c) of G.E.O. no. 34/2006 by the third supporter of (...), company (...), the Council notes that, in the data sheet of the acquisition, section III.2.1), note 5, it was provided: "If, for contract fullfillment, the economic and financial capacity or technical capacity / professional of the tenderer is also supported by another person (third party supporter), it is mandatory to present the Declaration on inconistency with art. 181 of G.E.O. 34/2006 (Form no. 2 of Section 2 „Forms" – Volume 1 of the Awarding Documentation) signed by the legal representative of the third supporting party with only the letters a), c), d)".

According to art. 186 of G.E.O. no. 34/2006 "(1) The economic and financial capacity of the tenderer / candidate can be supported, in fullfilling a contract, by another person, regardless of the legal relations between the tenderer / candidate and person. (2) If the tenderer/applicant demonstrates his/ger economic and financial situation invoking the support, in accordance with paragraph (1), by another person, then the latter is required to prove the support the tenderer receives, usually by providing a commitment of that person which confirms that he/she will provide the financial resources requested to the tenderer / candidate. The person who provides financial support should not be in the situation leading to exclusion from the awarding procedure under art . 180 and Art. 181 lit. a) , c1) and d)". Similar provisions are found in art. 190 of the G.E.O. in reference to the support given to technical and professional capacity of the tenderer /candidate.

Therefore, the third party supporter (...) should not be in the situation leading to exclusion from the procedure, according to art. 181 lit. a), c1) and d), respectively) went bankrupt as a result of the decision issyed by syndic judge, c1) in the last two years did not fulfill or improperly fulfilled contractual obligations due to issues attributable to the tenderer in question, which caused or is likely to cause serious damage to its beneficiaries d) has been convicted in the last three years, by final judgment of a court, for an act that violated the professional ethics or for committing a professional error.

In the qualification documents it is found Form no. 2 - Declaration of inconsistency in the cases provided for in art. 181 of the G.E.O., given by (...) and the certificate acknowledging isued at 24 July 2013, stating that, in the company's information to date, there are not mentions regarding convictions of the trader for criminal offenses impose prohibition, establishment of guardianship, trusteeship, declaration of insolvency or bankruptcy, is not in the merger or division, process of dissolution or liquidation, reorganization or bankruptcy.

Given the the documents submitted by (...) and the fact that, by the complaints submitted, the complainant did not demonstrate that the third party supporter is in one of the situations listed above, the Council finds th complaints to be unfounded in reference to this point investigated.

Regarding the critics of the two complainants on the fulfillment of the specifications provisions, certain qualification criteria and some aspects related to the price offer of (...), namely those submitted by (...) related ro the same issues related to the offer (...) the Council establishes that the companies did not provide a statement of reasons in fact and in law relating to the allegations raised. Th doubt or assumptions of complainants do not have factual and legal grounds, and the Council is the body of control to make an overvaluation of tenders following the request of tenderers who have doubts or assumptions about whether or not the requirements of the tender documentation by competitors are fullfilled. The complainants can not instruct the Council to conduct research in integrum of a tendering procedure or an overvaluation of offers based on assumptions.

The complaints of the two complainants against the winning tender, i.e. by (...) on offer (...) after studying the file, are to be rejected for the following reasons:

Under the law, the Council may decide purely on legal issues legally seised, within the complaits limits, the object being settled by the teh complainant and decision being issued only on complaint object submitted to resolution.

On the other hand, the full grounds of the complaint must be completed at the time of writing it, so in that art. 270 paragraph (1). e) of G.E.O. no. 34/2006 oblige to including of motivation in fact and in law within complaint, and not to be subsequently submitted or completed, in relation to what the complainant hopes to discover after consulting the case file. The provisions of art. 270 paragraph (1). e) of the G.E.O. no. 34/2006 do not represent unessential, simple formulation of the legislature – the complaint must include the factual and legal motivation and not just part of its reasoning, which the complainant can supplement at will, after the term of complaint submition against the result of procedure whichwas known to her since 11.06.2013.

In relation to the actual reasons of the complaints, studying the offer submitted by the economic operator awarded winner also aimed to identidfy new reasons to appeal. It is not admissible nor allowed that a complaint to be submitted to the Council only to have access to documents and study the others' documents in order to discover reasons that might support his/her submitted complaint. Such behavior of an economic operator is both against the law and abusive, and must be sanctioned as such.

In light of ordinance regarding procurement, thecomplaint submitted to the Council is an appeal for the injured person, and not a mean of obtaining information from the public procurement file when settling the case. In other words, the purpose for which it was prescribed by the delegated legislature, the appeal of the complaint is not to allow the appellant to study various acts of the contracting authority, but to claim an unlawful act, for reasons of illegality what are known to him/her at the time of the complaint, and not unknown and possibly found on the way.

It irrefutably follows that, as a result of studying the documents of the winning tender, th complainant understood not to formulate new critics regarding the tender submitted by the winner, but only to supplement existing criticism within the complaint, on the assessment of her tender.

Regarding these issues, the Council noted that, of the documents on file which they studied, the complainants could have formulated written conclusions to support detailed application in appeal, not to formulate new criticisms'.

The injured person notifies the Council, within a certain point, by a complaint that must contain the factual and legal motivations.

Nowhere in the contents of chapter IX od the Ordinance is mentioned that the injured party may change the complaint's reasoning defining the trial, so that the Council to consider other reasons than those with which it was invested within the statutory appeal.

The procedure before the Council is extremely prompt and subjected to rigors as such. It is not possible to come after the legal deadline for bringing an appeal with new grounds of appeal, as it is not posible to come up with a complaint without motivation and for the reasoning to be formulated later. Such an option would lead to delay of time limits for appeal and the celerity of the procedure itself, the Council being subject to a continuously "shooting" of reasons subsequently discovered by the party claiming an act of authority.

It is true that the Ordinance in art. 275 paragraph (6) cited above, recognizes the right of parties to file written submissions during proceedings, but the legal institution of written submissions is not be confused with the completion of essential elements of the appeal, such as subject, motivation or even signing.

Therefore, the complainants of the analyzed case have a wrong perception on the concept of "written findings", meaning by that they can bring new charges against the winner.

In the lawsuit, the written findings are nothing but a mean to synthesize the discussions, punctual referring to the evidence, the factual and legal grounds on which defenses or claims of the parties are based.

Ordinance on public procurement states at art. 275 paragraph (5) and art. 276 that the proceedings before the Council is written, so with no oral hearing and shall be concluded within 20 days from receipt of public procurement file, its main advantage being the maximum rapidity. Adversariality, transparency and the right to defence in case of the appeal is manifested by sending the complaint to the contracting authority that in turn sends it to the other tenders in the auction (in order to associate to it or fight it) and submit to the Council its point of view on it. Written conclusions can not change the process by increasing the grounds for appeal as they are not subject to the rules of communication above, on one hand, and on the other hand, it would compromise the main advantage of a procedure for solving complains, which is the celerity. In other words, once invested within deadline by complaint with grounds of illegality of the contracting authority act, the Council can not be reinvested after the deadline prescribed for dispute with dozens of reasons of illegality, for which, for example, there would be neither contradictoriality nor transparency and which it could not even analyze within less than 20 days of settlement remaining at its disposal.

Thus, the additional grounds of appeal filed by the two complainants in the contents of "written conclusions" submitted to the Council on 12.03.2013 and 12.06.2013 data will be removed by the Council as inadmissible on the way of "written submissions" and will not be retained for analysis as they overcome procedural framework with which it was invested.

Thus, under art. 278 paragraph (2) and (4) of the G.E.O. no. 34/2006, the Council will fully accept the complaint and, in part, that of (...) and cancel the report of the awarding procedure regarding the offers of the objecors and company (...) and the communications transmitted to them. This will oblige the contracting authority to revaluation for tenderers (...) complying with the motivation and the legal provisions on public procurement. The result of this procedure will be communicated to operators involved in the legal term.

Since the complaints were accepted, the Council will reject the application to intervene made by (...)[23].

8 INFORMATION PRESENTED IN THE ANNEX TO AFFIDAVIT (CONFIRMING FULFILLMENT OF QUALIFICATION REQUIREMENTS) WERE NOT DETAILED FOR THE PURPOSE PROVIDED

Regarding the merits of complaints against the rejection of her tender as unacceptable under art. 36 paragraph (1) b) of G.D. no. 925/2006, the Council noted that, by letter from 17.10.2013 containing the result of the procedure, the complainant was indicated: ".. although you understood to refer to the right to submit in order to demonstrate minimum qualification requirements for personnel responsible for the fulfillment of the framework agreement, a statement regarding this requirement by the tender documentation it has not been prepared in accordance with Art. 11 paragraph (4) of GD 925/2006, respectivly it has not been mentioned briefly, but specifically, the concrete manner of fulfillment of that requirement. Thus, in this factual statement, you didn't provide information on the names of the experts proposed to fulfill the framework agreement, didn't provide information on education, certificates and similar experience thereof (information such as the project title, the beneficiary authority, the project value, the position of the expert within that project and so on), you didn't provide information on diplomas or certificates held by the proposed experts, nor identification data of contracts where these experts involved in developing of the framework agreement had accumulated similar necessary experience requested as requirement of qualification".

The Council also noted that, based on the reason for rejecting the offer of the complainant, by the sheet data acquisition at chapter III 2.3.a) "Technical and / or professional capacity", there were asked, among other things: 2.1 Project manager - 1 person: Completed bachelor's degree, project management skills proven through nationally / internationally recognized certification (such as PMP or equivalent); Competencies in risk management proven by nationally / internationally recognized certification (like M_o_R or equivalent); Specific experience of minimum 3 years as project manager; 2.2 Technical coordinator of software subsystem - 3 persons: University degree (bachelor's degree); Knowledge of software development methodology, nationally / internationally recognized, proven by certification in the field, proven project management knowledge through diploma course / certification; Specific experience of minimum 3 years as Technical Coordinator; 2.3 Software subsystem architect - 2 persons: University degree (bachelor's degree); Skills in Enterprise architectures, proven by nationally / internationally recognized certification (such as TOGAF or equivalent); Experience of at least one contract development / updating or expanding an integrated informatic system where the expert had similar responsibilities to those required for the project, namely participation in defining the architecture of a software system / integration architecture of integrated system components; Database programming exert - 2 persons: University degree (bachelor' degree) [...]"

To the requirement qualification mentioned in the documents submitted by ..., respectively the "Initial Statement of qualification requirements" and the corresponding annex, the tender indicated:

Faţă de cerinţa de calificare amintită, în documentele prezentate de ... respectiv „Declaraţie iniţială privind îndeplinirea cerinţelor de calificare" şi anexa corespunzătoare acesteia, ofertantul a indicat: "Technical and / or professional capacity", there were asked: "Technical and / or professional capacity, there were asked, among other things: Project manager - 1 person: Bachelor's degree, project management skills proven through nationally / internationally recognized certification (such as PMP or equivalent); Competencies in

risk management proven by nationally / internationally recognized certification (like M_o_R or equivalent); Specific experience of minimum 3 years as project manager; Technical coordinator of software subsystem - 3 persons: University degree (bachelor's degree); Knowledge of software development methodology, nationally / internationally recognized, proven by certification in the field, proven project management knowledge through diploma course / certification; Specific experience of minimum 3 years as Technical Coordinator; Software subsystem architect - 2 persons: University degree (bachelor's degree); Skills in Enterprise architectures, proven by nationally / internationally recognized certification (such as TOGAF or equivalent); Experience of at least one contract development / updating or expanding an integrated informatic system where the expert had similar responsibilities to those required for the project, namely participation in defining the architecture of a software system / integration architecture of integrated system components; Database programming expert - 2 persons: University degree (bachelor' degree)".

Analyzing the affidavit, including the corresponding Annex presented by the complainant in accordance with Art. 11 paragraph (4) of G.D. no. 925/2006 [To demonstrate the fulfillment of the qualification referred to in art. 176 of the G.E.O. no. 34/2006 the tender is entitled to

submit only an affidavit in the original, signed by his/her legal representative, confirming that he/she meets the qualification requirements as requested in the tender documentation. The declaration shall be accompanied by an appendix/annex where the tenderer must mention briefly, but specifically, the concrete way of fulfillment of these requirements – including, if requested, different values, quantities or the like.], The Council notes that those retained by the acquisitor in reference to the acceptability of the offer are founded.

The right to demonstrate compliance with the qualification requirements imposed by the data sheet based on an affidavit is subject to the presentation of a corresponding annexes made by the tenderer, the being required to submit a brief, but precise, concrete way to fulfill these requirements – including, if requested, different values, quantities or the like.

Or, in this case (...) she did not comply with the obligations imposed by the article above mentioned, the information contained not being detailed for the purpose intended.

It thus appears, as intervener also found that (...) she took the qualification requirements imposed by the data sheet of the acquisition, without specifying concretely how to achieve them, as required by art. 11 paragraph (4) G.D. no. 925/2006, under which the tenderer submitting the declaration and annex in question.

The fact sustained by the complaintant to have been mentioned briefly, but specifically, the concrete way of fulfillment of certain requirements, such as the average turnover of the last 3 years (over 10 million euro), the aggregate value (minimum EUR 4,000,000) of a maximum number of 3 contracts completed within the past three years, the number of persons proposed for each position, the number of years of specific experience for them, where requested by the tender documentation, is considered irrelevant, as long as they indicated only documentation requirements, and no concrete way to achieve them.

However, the claim of the complaintant regarding that information presented in the Annex of the affidavit (confirming fulfillment of qualification requirements), is the way she understood to mention “briefly, but specifically, the concrete way of fulfillment of these requirements” of qualification, as noted in the N.C.S.C.’s decision no. (...) is considered unfounded by the Council.

By simply taking / copying qualification requirements from the data sheet in the Annex prepared by the tender pursuant to art. 11 paragraph (4) of G.D. no. 925/2006, it can not be considered in any case that it was presented “briefly, but specifically, the concrete way of fulfillment of such requirements” as claimed.

According to the legal provisions mentioned, which confirms the exceptional right to use an affidavit to prove the requirements of qualification, the complaintant was obliged to present the concrete way that meets the qualification so that, later, at the request of contractors, to submit documents certifying their achievement.

Contrary to the complaintant’s claim, the contracting authority was not obliged to indicate, in any document issued previously to communication of outcome of procedure, the elements which tenders should have indicated in the original statement and within the Annex to this, in order that the presentation of fulfillment of requirements to be considered “briefly, specifically” as long as applicable legal provision in question is very clear.

Being obliged to indicate briefly, but specifically, the concrete way of fulfillment of the requirementst, the tenderer shall include the information that describes, in particular, the requirements imposed on the staff required for the fulfillment of the contract at issue: nominees, their completed education, their skills and experience, the contracts in which they acquired similar experience.

Without this information, there is no correlative obligation of the acquiring entity to require the submission of documents on the requirements for qualification, as required by art. 11 paragraph (5) of G.D. no. 925/2006.

On the other hand, the fact that the contracting authority has returned upon the request for clarification (regarding submitting the qualification), following the comments of UCVAP representatives does not mean that it has substituted the evaluation committee. Individuals designated as observers noticed some illegal aspects which the contracting authority has also found, actimg accordingly, did not result in any violation of legal provisions.

Therefore, the claim of the complaintant regarding the fact that the invocation of missing detail in the Annex to affidavit (names of experts, education, certificates, diplomas, similar experience, concrete information on the projects in which they were involved) would be a blatant breach of transparency provided by art. 2 paragraph (2) d) of the G.E.O. no. 34/2006 can not be retained in the present case.

Regarding the complaint raised by the complaintant that her financial proposal presented the lowest value is considered irrelevant, given that the award criterion applies for admissible tenders, category which her offer does not fall under as being considered unacceptable.

It these conditions, it can be observed that the complaintant’s ternderer was correctly rejected as unacceptable under art. 36 paragraph (1). b) G.D. no. 925/2006, the critics from this poit of view being considered to be unfounded. (...)

Than those used under art. 278 paragraph (5) and (6) of the G.E.O. no. 34/2006, Council rejects as unfounded the complaint submitted by the ... contradictory to ... and disposes the continuation of the award procedure.

Consequently, the complaint (...) being dismissed, the Council accepts the application to intervenent made by...[24]

9 REQUIREMENT CONCERNING THE SIMILAR EXPERIENCE FOR EXECUTION WAS NOT MET BY THE SUCCESSFUL TENDERER

Regarding the criticism of the claimant against the successful tenderer, motivated by the fact that it does not meet the qualification requirement on similar experience in execution, the Council finds that in Chapter III.2.3.a) “Technical and/or professional capacity” in the Procurement data sheet, the following were stated: “Requirement no. 2 Similar experience: The tenderer shall submit to evidence its similar experience as the only contractor, associated contractor or subcontractor, a proof of performance and completion (according to art. 14 of the Order no. 509/2011), of at least one contract and maximum 2 contracts for similar works, concerning construction of desulphurization facilities with a cumulative value of at least RON 50,000,000, excluding VAT, in the last 5 years.”

In order to prove the requirement stated, ... indicated two projects in the proposal: 1. To decrease pollution in the Thermal Power Station ... - Flue gas desulphurisation plant with a total value of RON 62,098,682 and 2. To refurbish the flue gas electric dust extraction plant from block 3, in order to reduce dust emissions in the flue stack below 50 mgN/m3, with a value of RON 30,699,770.31, submitting relevant documents for both contracts as required.

Since the critics of the claimant were directed against the project for reducing pollution at the Thermal Power Station ... - Flue gas desulphurisation plant, the Council will review its classification in the requirement concerning the similar experience requested for execution.

In this regard, it was noted that, with reference to the project analysed, the tenderer has submitted the following documents:

Form 18 “Experience as a contractor/designer” which contained details of the contract considered similar in nature and complexity to the contract to be awarded;

Form 19 “Similar experience”, indicating the contract from 15.05.2008 together with transfer agreement from 16 March 2011, employer ... the quality in which performed the contract - subcontractor, initial and final value of the contract EUR 15,256,404 and EUR 16,856,320 respectively, completion time 53 months, Taking-Over Certificate upon completion of works, no. (...)/30 November 2012;

Recommendation of the employer... of 05.02.2013, “very good”;

Purchase order no. (...) concluded between ... as the contractor and SC … SA;

Purchase Order (...) rev. 1;

Taking-Over Certificate upon completion of works no. (...)/30.06.2011 (for Absorber Unit 4, Absorber Unit 5. Common and pipelines), (...)/28.10.2011 (for a Flue gas desulphurisation plant - Unit 5, including Common and pipelines), (...)/30.11.2012 (for a Flue gas desulphurisation plant - Unit 3, including Common and pipelines), (...)/28.10.2011 (for a Flue gas desulphurisation plant - Unit 4) and (...)/31.12.2012 (for a Flue gas desulphurisation plant - Unit 6).

In the recalled Form 18, in connection with the work under review, the tenderer has submitted the following details: “... has executed in the project decrease of pollution in the power plant from ... (Flue gas desulphurisation at ...) the following works: a. Mechanical assembly and installation works for all project facilities relating to the four absorbers serving the boilers no. 4, 5, 3, 6 (in order of assembly), and common facilities for limestone and gypsum, including site management, management of materials, plant and equipment, assembly and installation works on site, cold tests and samples and participation with the main contractor (...) to commissioning of the following: static machinery and equipment - absorbers with internal jet formation equipment and outdoor equipment, tanks, silos, flue gas pipes, metal detectors, filters, etc.; dynamic machinery and equipment - mixers, discharge facilities and limestone crushers, ball mills for grinding limestone, primary and secondary fans, blowers, pumps, compressors, vertical and horizontal conveyors, loaders and distributors in the gypsum warehouse, etc.; pipes made of carbon steel, stainless steel, FRP (glass fibre reinforced polyethylene) and PP (polypropylene) for industrial water and technology products on trestles and around equipment; sensor connections, thermometers, flow meters and other automation devices, resistance steel structures to support the equipment, machinery and gas pipes, trestles for pipes and cables etc. Mainly, assembly and installation were made by welding and removable fasteners. In total, about 12,000 tons of machinery, equipment, steel structures and pipelines were mounted; b. Manufacturing and on site delivery of carbon steel, stainless steel and FRP pipes, steel structures and supports for pipes, totalling about 450 tons. All facilities are operational.”

In terms of the contract under review, the contracting authority has determined that the Joint venture ... - ... meets the qualification requirements and was declared accepted, as resulting from the report no. (...)/23.10.2013.

However, given the qualification requirement in question, as required by the data sheet, being necessary to prove the execution of construction works for a desulphurisation plant, the Council notes that, given the description provided by the tenderer in Form 18 for the contract under review, execution of such plant is not evidenced.

With reference to the contracting authority statement concerning the fact that the work performed by ... namely manufacture/construction of the absorber and gas pipes, assembly and installation of equipment (taking into account the desulphurated gas flow, probably the largest in Europe), cold tests and checks, commissioning, have been associated to a desulphurisation plant, the requirement of similar experience not requiring classes/volume/quantity of works, but their value, the Council notes that for the qualification requirement in question, no classes/volume/quantity of works were required, but the proof of achievement (construction) by the tenderer of a desulphurisation plant, so that not only the value of the contract stated by the tenderer (if the case of the contract

under review) should be considered by the contracting authority (the value of RON 62,098,682 being higher than the threshold of RON 50,000,000), but also the categories of works performed, that is, whether they concern construction of a desulphurisation plant.

Thus, in relation to the qualification requirement, construction of desulphurization plants, the contracting authority, by the evaluation committee, should have had determined whether the categories of works submitted by the tenderer in the contract description concerning decrease of pollution at the Thermal Power Station - Flue gas desulphurisation plant, for the part effectively executed by subcontracting, correspond to the execution of a desulphurisation plant, in the meaning of the requirement imposed.

For the disputed qualification requirement, categories of works nominated by the partner (...) as suitable (related) for a desulphurisation plant are not relevant, as long as the requirement, as stated by the contracting authority, involves making such a desulphurisation plant and not parts, even important thereof.

The wording of the requirement concerning the similar experience for execution (construction of desulphurization plants), specifies execution of "plants" and not parts thereof.

Given that the qualification requirement it was not criticized as imposed, should have been respected both by the tenderer in the submission of documents to prove similar experience in the execution of similar works to the one intended to be awarded, and by the contracting authority in the evaluation of biddings received.

Given the findings, the Council believes that the contracting authority, by the evaluation committee should have had clarified with the tenderer, pursuant to art. 201 of the G.E.O. no. 34/2006, in connection with art. 35 and 78 of the G.D. no. 925/2006, how the categories of works conducted by the tenderer as a subcontractor, are considered a project involving building of a desulphurisation plant, in the meaning of the requirement imposed.

Considering those shown by the claimant concerning the fact that the work "Project for decrease of thermal pollution at the Thermal Power Station - Flue gas desulphurisation plant" is not yet completed, since commissioning of the desulphurisation plant in power block 6 was not yet performed, the Council notes that, for the requirement in question would have been necessary to prove execution and completion, according to art. 14 of Order no. 509/2011 [The wording "works executed and completed" and "completed contract for works" means:

- Works partially accepted, accompanied by a Partial Taking-Over Certificate; or
- Works accepted together with the Taking-Over Certificate upon completion of works; or
- Works accepted together with the Final Acceptance Certificate.

(2) Provided that the contracting authority uses exclusively the wording "presentation of a completed contract for works" and "work executed and completed", will be required to accept and consider the requirement met if the economic operator submits as similar experience any of the versions provided in par. (1)].

As required in such a way (proof of execution and completion), the qualification requirement in question could have been carried out through any of the three methods mentioned above; the fact that the desulfurization plant of the power block 6 was not commissioned, may influence the qualification/disqualification of the tenderer, considering that the achievement of the desulphurization plant is subject to this part, issues that the purchaser should have had checked.

However, what the claimant stated about the fact that the joint venture (...) does not benefit from technical and professional support of a third party, provided that, in the bid no commitment was submitted, is considered irrelevant by the Council, given that the demonstration of fulfilment of some of the qualification requirements imposed, through a supporting third party is a possibility regulated by the ordinance, being the right of tenderers to choose in this respect.

In this case, the tendering joint venture understands to evidence its similar experience for execution, through the partner (...).

Regarding the statement of the claimant, that a part of the work subcontracted by ... was subcontracted to other companies, so that the value of the contract submitted to fulfil the value criterion must be reduced accordingly, it is considered by the Council ungrounded in relation to art. 249 of the New Civil Procedure Code, the burden of proof falling with the one who submits a complaint. In this sense, the claimant has not submitted any evidence to prove its claims.

Regarding the recommendation submitted by the tenderer, in the meaning of those claimed by the claimant, the Council believes that the tenderer should submit such a document issued by the employer of that work, SC ... SA, as requested by the Procurement Data Sheet (...) as a general contractor.

The claim of the contracting authority about the alleged lack of relevance of the issuer of the recommendation concerning the execution of works, as long as it confirms the experience of the contractor, moreover, that the applicable statutory provisions (art. 178 (2) and 188 (3) of the G.E.O. no. 34/2006), state that the employer of works may be even a private client, it is considered by the Council as ungrounded.

Since the contracting authority requested under the Procurement Data Sheet (chapter III.2.3.a "Technical and/or professional capacity"), without a trace of doubt, a recommendation of the employer, had no reasons to accept a recommendation issued by a person other than the employer of the work in question.

For the mere fact that the emergency ordinance provides for the situation when an employer can be a private client, the contracting authority should not have been itself considered entitled to accept a recommendation of (...) that was not issued by the employer of the work, as the authority itself requested, but of its general contractor.

Contrary to the intervener, the fact that the direct employer for (...) under one of the contracts submitted concerning the similar experience was (...), through the Procurement Data Sheet not being requested that similar experience to result solely from contracts/projects executed with contracting authorities or from contracts where the contractor was not a subcontractor (recommendations, protocols to have been signed directly with the final employer) and, moreover, the opportunity to submit as similar experience contracts executed with private clients, could not entitle the tenderer to submit the recommendation other than requested.

As long as for this bidding case, the employer in this contract was not a private client, but a contracting authority, case for which was provided in the data sheet submission of the recommendation issued by the latter, the tenderer was obliged to comply with the requirement imposed explicitly (chapter III.2.3. of the Procurement Data Sheet).

Referring to the criticism of the claimant against the successful bid, motivated by the alleged failure to comply with the qualification requirement regarding similar experience for design, the Council notes that, in Chapter III.2.3.a) "Technical and/or professional capacity" in the Procurement Data Sheet, was requested: "The tenderer shall submit as similar experience as the only designer, associate designer or subcontractor, a proof of execution and completion of design services (according to art. 13 of Order no. 509/2011), of at least one contract and maximum 2 contracts for similar services in thermal power stations, with a cumulative value of at least RON 1,000,000, excluding VAT, in the last 3 years."

In order to prove the qualification requirement mentioned, the Joint venture ... - ... indicated two contracts: 1. modernization of the flue gas dust extraction plant from block 3 in order to reduce dust emissions to the flow stack below 50 mgN/m3, in the amount of RON 2,551,732.71, excl. VAT, conducted by ... and 2. implementation of a heating network rehabilitation project in the city of ... in the amount of RON 1,370,040, excluding VAT, conducted by (...); for these, relevant documents were submitted as requested.

Since the claimant criticized the contract covering the "Implementation of a heating network rehabilitation project in the (...), the Council will review its classification in the requirement concerning similar experience in design.

In this regard, it was noted that, with reference to the contract under review, the tenderer has submitted the following documents:

Form 18 "Experience as a designer" in which the list of contracts of a similar nature and complexity executed in the last five years was comprised and details concerning the contract no. (...)/19.05.2011 covering "Implementation of a heating network rehabilitation project in the city of... and the total amount of EUR 12,912,919, of which thermal design services EUR 317,161 or RON 1,370,040, excluding VAT;

Form 19 "Similar experience" concerning the contract no. (...)/19.05.2011 executed with the (...) as employer, the quality in which the contractor acted - leader of the joint venture, the initial value of the contract RON 55,779,936, the equivalent of EUR 12,912,919 (of which RON 1,370,040 excluding VAT, for design and technical assistance), completion period 36 months, the design documentation handover protocol with favourable endorsement from 20 September 2011 and Taking-Over Certificate upon completion of works from 18 June 2012;

Recommendation from the contracting authorities dated 18 June 2012, both for the design and the works corresponding to the thermal transmission and distribution network, executed by (...) with a "very good" grade;

Contract from 19.05.2011 concluded between the (...) as employer and (...) as contractor, confirming the total contract value of the contract of RON 55,779,935.71, excluding VAT;

Design documentation handover protocol dated 20.11.2011.

Given the qualification requirement and documents submitted by the tenderer, contrary to the claimant, the Council believes that the contract for the "Implementation of a heating network rehabilitation project in the city of (...) with the design value of RON 1,370,040, excluding VAT, proves similar design experience.

That claim of the claimant that the rehabilitation design of a district heating network is not "even by far" similar to designing a flue gas desulphurisation plant, which primarily involves the design of the desulphurisation process itself, it is considered irrelevant by the Council.

Through the tender documentation, the contracting authority explicitly requested that

similar design experience to be proved by the tenderers based on contract (s) in the thermal power field, which the successful tenderer has submitted, as noted in the above.

If it was unsatisfied with the form of the similar experience qualification requirements for design, could have had challenged it, under art. 255 of the G.E.O. no. 34/2006, any critical with reference to this requirement cannot be accepted at this time for the case settlement.

Under these conditions, determining that the successful tender evaluation was not done as required by art. 72 of the G.D. no. 925/2006, re-evaluation of this bidding being necessary, in connection with similar experience requirements for execution and the recommendation issued by the employer of the work, the Council notes that the criticism of the claimant is not grounded in this regard.

Regarding the claim of the claimant that the offer of the joint venture (...) was admitted unlawfully and contrary to the N.C.S.C. decision no. (...), the Council finds its lack of rationality, given that by that decision no obligation was ordered to the contracting authority, both complaints being dismissed as ungrounded and continuation of the procedure was ordered.

In this respect, what was retained by that decision it is relevant: "... Resolution on the merits of the complaint, concerning the issues criticized by the claimant regarding the bid of the joint venture (...), that is, the fulfilment of the qualification requirements, the Council finds that the contested document, the Protocol no. (...) of 18 July 2013, prepared during the meeting to review the bids, it is not the document by which the contracting authority determines the winning bid, based on the award criteria stated in the contract notice and tender documentation.

In this context, the following provisions of the G.D. no. 925/2006 shall apply in this case:

I. - of the G.E.O. no. 34/2006:

- Art. 176 letter d) - "The contracting authority has the right to apply qualification and selection criteria relating only to: ...

d) technical and/or professional capacity; ..."

- Art. 178 (1) – "Where, for criteria of the kind referred to in art. 176 letters c) and d), the contracting authority considers justified to impose certain minimum requirements that tenderers/applicants must meet in order to qualify, these requirements must be specified according to the principle of transparency in the call for proposals/contract notice';

- Art. 201 (1) – "During the award procedure, the contracting authority has the right to request clarifications and, where appropriate, amendments to the documents submitted by the tenderers/applicants to demonstrate compliance with the requirements established by the qualification and selection criteria or to evidence compliance with the bid requirements".

II. – of the G.D. no. 925/2006:

- Art. 34 (1) - "Where in the tender documentation was provided for the obligation to fulfil certain qualification criteria as those set out in art. 176 of the G.E.O. no. 34/2006, the evaluation committee shall verify the fulfilment of these criteria by each tenderer";

- Art. 35 - "During the analysis and verification of documents submitted by the tenderers, the evaluation committee has the right to request any clarifications or additions to the documents submitted by them to demonstrate fulfilment of the qualification criteria, as they set out in art. 176 of the G.E.O. no. 34/2006, or to demonstrate compliance with the bid requirements".

Furthermore, pursuant to art. 72 paragraph (2) letter b) of the G.D. no. 925/2006, the evaluation committee is required to "verify fulfilment of the qualification criteria by the tenderers/applicants, if they have been requested in the tender documentation."

This legal obligation requires a thorough analysis by the evaluation committee of the documents made available by the tenderers and requesting the necessary clarifications so that the decision of the admission/rejection of a bid is adopted in full knowledge, based on all relevant information available. Only if the evaluation committee made ensure whether a tenderer meets one or more qualification requirements, may proceed to accept or reject the bid in question.

Or, in its view concerning the second complaint of S.C. ...S.R.L., the contracting authority has indicated that it agrees with the proposal of the claimant to verify that the work submitted by the joint venture (...)., in proving its experience similar experience is not yet complete.

Therefore, it results that the allegations of the claimant are ungrounded because the Council cannot replace or oblige the contracting authority regarding its legal obligations, to declare the bids unacceptable/compliant/acceptable, and winning/losing or, where appropriate, cancellation of the proceedings, as might prejudice the independence and impartiality of the evaluation committee.

Since the procedure report was not prepared, the act by which the evaluation committee shall decide on the admissibility of the bids received, the Council determines that it is premature to challenge the legal situation of the bid filed by the joint venture (...), while the evaluation committee has not completed the analysis of this bid yet."

The fact that during the reasoning of the N.C.S.C. decision no. (...) was referred to the duty of the evaluation committee concerning a thorough analysis of the documents provided by the tenderers, cannot be construed as meaning that would be required in this regard, as long as "challenging of the legal status of the bid filed by the joint venture ... - ... " was dismissed as premature, the procedure report not being compiled and the complaint against the Protocol no. (...)/18.07.2013 was dismissed as ungrounded.

The claim of the claimant in reference to the fact that ... declared as a subcontractor the company "2... based ... on ... – in design and engineering services, supervision services and technical assistance for implementation of works and commissioning of the desulfurization plant, provision of the main equipment and materials related to the desulphurisation plant (40%)", which shows clearly that (...) will not execute the desulphurisation plant itself, but a subcontractor who has not taken responsibility for technical and professional support, it is considered ungrounded by the Council.

According to art. 45 paragraph (1) of the Emergency Ordinance no. 34/2006, without diminishing the responsibility regarding fulfilment of the future public procurement contract, the tenderer has the right to include in the technical proposal the possibility to subcontract a part of that contract, applicable legislation not imposing any requirement concerning the part (s) of the contract to be awarded if it can or cannot be subject to subcontracting.

Thus, for the fact that ... decided to subcontract parts of the procurement contract which is to be awarded, cannot find any reason of illegality of this bid in the procedure. As resulting from the Form 23 "Statement concerning the part (s) of the contract executed by subcontractors and their specialization" was indicated ..., its involvement having 40% share of the contract value, to achieve the following service categories: 1. design and engineering 2. supervision and technical assistance for the implementation of works and commissioning of the desulfurization plant 3. provision of key equipment and materials related to the desulphurisation plant.

On the other hand, according to applicable law, the quality as a subcontractor it is not conditioned in any form of that of a supporter of the technical and professional capacity of the tenderer, so that it cannot find any unfulfilled obligation.

Regarding the claims of the claimant that the joint venture ... - ... it is not holding a certificate or license for desulphurisation technologies, as resulting from the response to clarification of the contracting authority no. (...) of 22.02.2013, the Council finds its lack of rationality.

In its appreciation, the Council considered that with reference to the requirement in question, by letter no. (...)/22.02.2013 published in the S.E.A.P. on 22.02.2013, regarding the question "Please confirm that the qualification requirements do not oblige us to provide any specific explanation about the origin of our desulphurisation technology", the contracting authority has provided the following response: "Qualification criteria and how their fulfilment is evidenced, are those specified in the Procurement Data Sheet. Owning patents, licenses, etc.. are legal obligations for all tenderers. Any mismatch of the information in the bidding detailing any rights to use certain technologies, may be subject to further evaluation of the bids or even their exclusion, as provided in art. 181 letter e) of the G.E.O. no. 34/2006, if the tenderer submits false information, aspect noted also by the N.C.S.C. in its decision no. (...).

Analysis of the winning bid documents and of the subcontractor's ...., respectively, to which the contracting authority referred in its opinion about the complaint (subsequently submitted to and registered by the N.C.S.C. under no. (...)/21.11.2013 and no. (...)/21 .11.2013), the Council finds the existence of the following documents:

List of CFB - FGD patents - translation from English and German (bilingual document);

Notary certificate by which was renamed ... with effect from 01 December 2011 ..., limited liability company based in ... and a share capital of EUR 26,000.00 - translation from English and German (bilingual document);

Certificates held by ... according to EN ISO 9001:2008, EN ISO 14001:2009 and OHSAS 18001:2007 - not translated into Romanian;

Form 28.A5 "Information concerning the Technology Provider Partner" on the partnership established by the Joint venture (...) with the company (...), to participate in the proceedings in question, aiming the design and execution of works covered by this contract, the proposed technology for flue gas desulphurisation - CFB FGD (semi-dry/ semi-wet technology).

Given that the Procurement Data Sheet did not require as a criterion for qualification, by clarification no. (...)/22.02.2013 published in S.E.A.P. being stated that they are legal obligations for tenderers and the documents in the case file (initially and submitted by the contracting authority, and registered with the N.C.S.C. under no. (...)/21.11.2013 and (...)/21.11.2013), show the existence of patents held by the subcontractor ... for the technology proposed by the joint venture (...) the Council considers that the requirement is fulfilled and criticism of the claimant in this regard is considered ungrounded.

Regarding the criticism of the claimant brought against the illegal execution of the participation bond submitted, provided that the contracting authority has notified on 24 October 2012 ... (the bank issuing the bond), requesting the payment of "RON 12,308.80" pursuant to art. 278[1] (1) of the G.E.O. no. 34/2006 due to the N.C.S.C. decision no. (...), reasoned by the fact that no decision was taken on the merits concerning the qualification of (...) the Council finds its lack of rationality.

Given that, by the N.C.S.C. decision no. (...) both complaints lodged by the claimant that filed the complaint and in this case under consideration, were rejected as ungrounded, correctly, the contracting authority has made application of art. 278[1] (1) of the G.E.O. no. 34/2006 in order to retain the participation bond established by the claimant, in accordance with the clause raised.

The fact alleged by the claimant that by the decision in question was not taken a decision on the merits regarding the qualifications of the joint venture (...) it is irrelevant, given that the decision in question was taken following the analysis of the complaints on the merits.

Indeed, the analysis referred to by the claimant, concerning the qualification of the bid submitted by the joint venture (...) was not performed during the settlement of the connected cases for which were the N.C.S.C. decision no. (...) was issued, because the evaluation of bids was not completed, the report of the procedure was not drawn, the criticism being considered premature, but the complaint was dismissed as ungrounded, which attracted the application of art. 2781 (1) of the Ordinance.

Or, given that the decision became final by non-challenge, the contracting authority was obliged to comply with art. 2781 (1) of the Ordinance, being imperative [To the extent that the Council rejects the complaint on the merits, the contracting authority will retain the participation bond of the claimant pro-rata to the estimated value of the contract, namely the following amounts ...].

Request addressed by the claimant to issue an intermediate decision obliging the contracting authority to remove notification no. (...)/24.10.2013, it is rejected by the Council as inadmissible, since the emergency ordinance does not provide for such a possibility.

Regarding the criticism of the claimant against the first reason to reject its bid, the Council finds that, by letter no. (...)/23.10.2013, which includes the outcome of the procedure with reference to this reason, the tenderer was informed: "The proposal is considered non-compliant pursuant to art. 36 (2) a) of the G.D. no. 925/2006 - does not adequately meet the requirements of the specifications for the following reasons: the bid does not meet all of the specifications (Vol.3 and Vol.4), namely:

Requirement of the Specifications relating to the Documentation delivery schedule - Volume 3 Chapter 1 section 1.3 is: "The period allocated for designing and obtaining all authorizations and approvals is of maximum 6 months including the period for approval of the execution design projects by the Supervising Consultant and Contracting Authority.

The response given by letter no. (...)/24.07.2013) to the clarifying question is: "According to the work schedule given in the technical proposal, we confirm that the design for the desulphurisation plant is completed at the end of the 5th month, with the delivery of documents required for acquiring the building permit".

In your bid, the schedule shows that the design is completed in nine months as follows:

1 - delivery of documentation in order to obtain the building permit is made after 5 calendar months in accordance with the response no. (...)/24.07.2013) and the schedule on the technical proposal. We note, however, from the same schedule, that in the sixth, seventh, eighth and ninth months, you still had to complete the following: a) the detailed design - without which the project cannot be used; b) development of the procurement specifications; c) design of electrical installations.

As a conclusion, the schedule on page 354-355 shows that the project is not completed in five months in accordance with your answer no. (...)/24.07.2013) and not even in six months, as required by the specifications.

Your response is not conclusive, because the design execution schedule shows that the design does not end with the delivery of documents for obtaining the building permit, as specified in the response for clarification, but in the next four months other documentation/projects are prepared, so that the whole design according to this schedule ends in nine months.

In addition, the design execution/ documentation delivery schedule does not comply with the structure (i.e. requested documentation are not submitted, but others) and deadlines for each design phase required in the table specifying the Mandatory schedule for submission of documentation is listed below.

This requirement is not fulfilled because the delivery of design documentation is not in line with Chapter 1.3.1, vol. 3, concerning the documentation requested, in the bid, deadline for design documentation delivery is of nine months compared to the six-month requirement and, in order to meet the overall duration for the cumulative schedule, of 20 months, execution of works will start before completion of all design documentation.

Requirement in vol. 3, table, in Chapter 1.3.1 clearly states that all design documents, (documentation for obtaining approvals and agreements, documentation for obtaining the authorization for the work organization/decommissioning works (if necessary), technical design and detailed design by specialties (construction, mechanical, electrical and automation), should be prepared prior to obtaining a building permit, and implementation can begin within one month after obtaining the building permit, therefore, it is not allowed commencement of works before completion of all design documentation. Design documentation requested in Chapter 1.3.1 comply with Law no. 50/1991 as further amended and supplemented, and G.D. no. 28/2008".

In reference to the presentation of the execution schedule in chapter IV.4.1) "Presentation of the technical proposal" in the procurement data sheet, was stated: "Will submit the time schedule concerning the 1st activity in the contract (Design), broken down by each phase of design. Important: the technical design to be delivered to the Employer/Engineer for review and approval must be prepared according to Order no. 863/2008 and must contain all items listed in this order. Will submit the time schedule for the 2nd activity in the contract (performance of works). Will submit the centralized time schedule for the overall performance of the contract. This schedule will combine the two schedules related to the 1st and 2nd activity in the contract, in order to highlight all phases of the contract performance as a whole, the natural order of execution, taking into account the details of the Employer's Specifications on the deadline for the execution of works".

Likewise, in the Specifications, Chapter 1.3 "Work Schedule" was stated: "Design and execution of the works proposed are requested. The schedule is as follows: the total period for completion of works is 32 months including: the period of execution of works, manufacturing and procurement shall not exceed 20 months and includes: the time allocated for design and obtaining all permits and approvals shall not exceed six months, including the period for approval of the execution design projects by the supervising consultant and contracting authority; the time for manufacture/procurement/construction itself plus the testing period before termination, trial period and test period until the issuance of the Final Acceptance Certificate. It is up to the contractor to organize the work in such a way to start as soon as possible the construction-assembly works, without exceeding a total duration of 20 months (the period of manufacture of the main equipment overlaps with the design period which is one of assembly); Defects Notification Period is less than 12 months from the date of issue of the Taking-Over Certificate. This period is subject to compliance with the guaranteed quality requirements and guaranteed consumptions. The period may be prolonged by the employer up to 24 months depending on the fulfilment of the guaranteed quality requirements and guaranteed consumptions.

At the same time, Chapter 1.3.1 "Schedule for submission of documents by the contractor" states: "The schedule below gives an oversight and a time schedule for the main technical and planning documents that are to be forwarded by the Contractor for approval to the Supervising Consultant, according to the Contract. The documents shall be forwarded according to national legislation and shall include the requirements specified in this documentation. The mandatory schedule for submission of documents ... : General design: A1 Quality Assurance Plan - DI + 2 weeks; A2 Quality Control Plan - DI + 2 weeks, A3 Documentation for obtaining permits and approvals: DI + 1 month; A4 Authorization documentation for work organization/decommissioning works (if applicable) - DI + 1 month; A5 Investigation reports and measurements - DI + 1 month, Detailed design: B1 Technical design. Preliminary version. Comments from the supervising consultant and contracting authority - Preliminary version at DI + 2 months. The final version in maximum one month from receipt of comments For comments of the consultant and authority, no more than 2 weeks; B2 Detailed design of the construction works - Preliminary version DI + 4 months. The final version within 2 weeks of receipt of comments; B3 Detailed design for mechanical plants - Preliminary version DI + 4 months. The final version within 2 weeks of receipt of comments; B4 Detailed design for electrical and automation plants - Preliminary version DI + 4 months. The final version within 2 weeks of receipt of comments; B5 Documentation for obtaining the authorization for the construction works - DI + 5 months. Deadline for completion of design - DI+6 months. Schedules: C1 Schedule for submitting the documentation DI + 2 weeks; C2 Schedule for execution - DI + 2 months continuous updating and detailing in accordance with the actual situation on site; ... Manufacture and supply of machinery and equipment - Starting after approval B1 + 2 months. Completion in accordance with the schedule of the contractor; C4 Inspection and testing schedule - According to the schedule of the contractor. Manuals and as built documentation: ... ".

The time schedule submitted by the claimant in the bid shows the following activities: "Delivery of basic engineering for the building permit, initiation of design and planning - within one month; civil engineering - civil investigations - within one month; civil engineering - completion within four months; structure engineering - within five months, process design - within five months, structure design - within five months, design of drawings for procurement - due for completion in the 9th month, mechanical engineering - within five months; specifications for procurement - due for completion in the 8th month, electrical and automation design - within five months; project for electrical installation - due for completion in the 9th month ... ".

However, the tenderer submitted Form 31 in the technical proposal, "Physical and monetary work schedule", in which indicated: "Work schedule: Works will be performed in accordance with the Gantt chart attached. Design phases can be divided as follows: 1. Basic engineering for the technical design: a. definition and review of the design criteria and base; b. layout and calculation of receipts; c. field studies and on site measurements; d. establishment of plans for rules, quality control and documentation; e. structural, civil mechanical and inspection design; f. plan concerning the fire prevention services, personnel protection and HVAC; 2. Authorizations: a. submission of documents to acquire authorization of procedures; 3. Procurement: a. detailed design and specifications for procurement; b. release of purchase orders; c. shipment and delivery; 4. Site works: a. site endowment with mobile offices, utilities, warehouses, establishment of the general site organization plan, etc.; b. development of access roads and work areas; c. demolition and removal of surplus materials, including topsoil, etc.; d. excavation and soil preparation;

e. civil works and foundations... ".

Given the information presented by the claimant, the Council notes that, with reference to the time schedule, by letter no. (...)/19.07.2013, the contracting authority asked for clarifications: "a) The technical design execution schedule shows that the total design period is of nine months while in accordance with the requirements in vol. 3, chapter 3.1 and 1.3.1 the maximum period of six months was imposed. Please clarify".

Given the mentioned request, by letter no. (...)/24.07.2013 the tenderer has submitted the following answer: "According to the work schedule given in the technical proposal, we confirm that the design for the desulphurisation plant is completed at the end of the 5th month, with the delivery of documents required for acquiring the building permit (in accordance with Vol. 3, chapter 3.1 and 3.1.3). This is confirmed in the DESIGN EXECUTION PLAN, page 14, Chapter 4.21. Design: When the design is defined and sufficient information is available, will prepare the documentation required to acquire the building permit. We want to emphasize that in a project of such complexity, engineering activities are equally complex. Engineering activities are conducted during the design phase itself; continue with development of the necessary supply documentation and for suppliers' follow-up, for the documentation required by the implementation team and engineering activities during commissioning and tests."

Given the answer of the tenderer about the time schedule given in the bid, with reference to the specification requirements in chapter 1.3 and 1.3.1 above, the Council considers that the decision to reject the bid as non-compliant, in accordance with art. 36 paragraph (2) letter a) of the G.D. no. 925/2006, is correct.

The fact that the contractor did not comply in terms of the time schedule submitted with the requirement of the contracting authority (imposed in the specifications), that is, the time allocated for designing and obtaining of all permits and approvals shall not exceed six months, including the period for approval of the execution designs by the supervising consultant and contracting authority, correctly led to sanctioning of its bid under art. 36 (2) a) of the G.D. no. 925/2006 [The proposal is considered non-compliant in the following situations: a) does not adequately meet the specification requirements].

Contrary to the claimant, the clarification response regarding scheduling of design work cannot be considered conclusive, because there was no argument in reference to the activities provided, given that the specifications specifically requested that the design will complete within a maximum of six months, and the time schedule given shows a longer achievement period.

Just because in the clarification response, the tenderer confirmed completion by the end of the 5th month of the design concerning the desulphurisation plant, cannot accept conformity of the bid submitted in this regard, given that the time schedule submitted highlights design completion in a longer period than required, that is, nine months (maximum six months requested).

On the other hand, should consider that for the procedure in question, in addition to the period of maximum six months for design and obtaining of all required permits and approvals, including the approval of execution design by the supervision consultant and contracting authority in the Specifications, vol. 3, chapter 1.3 and 1.3.1, included detailed information referring to the "Program of submission of documents by the contractor."

However, the claimant prepared the execution schedule without considering the specifications, components of the activities provided proving achievement of the design services requested in a period longer than required, that is, of nine months compared to a maximum of six months.

Given the acknowledgment that during the 6th, 7th, 8th and 9th months the following activities are executed: detailed design, drafting of the procurement specifications, design of the electrical installations, as shown in the work schedule, the claimant virtually acknowledged non-compliance of its bid from this viewpoint, the specifications imposing a period allocated to designing and obtaining of all permits and approvals not exceeding six months, including the period for approval of the execution design by the supervision consultant and contracting authority. As noted in the pages above, in chapter "Schedule for submission of documents by the contractor" the term of six months was provided for both the completion of design and design details.

The claimant knew the tender documentation since its publication in SEAP and could challenge it subject to the ordinance, otherwise having the obligation to prepare the bid according to Art. 170 of the G.E.O. no. 34/2006 [The tenderer shall prepare the bid in accordance with the tender documentation].

Reference of the claimant in support of compliance of the time schedule submitted with the relevant legislation [G.D. no. 273/1994 regarding the approval of acceptance of construction works and related installations (art. 9), Law no. 440/2002 approving the G.O. no. 95/1999 on the quality of assembly works for machinery, equipment and industrial plants (art. 12, 13 and 15)], which shows that the design does not end with handing over of the detailed design, it is considered irrelevant by the Council.

Specific actions of the designer during the execution of work, including the acceptance, cannot constitute a justification of the fact that for the design services the tenderer provided nine months, and not six months as requested by the contracting authority.

The claim of the claimant concerning the fact that the design of the desulphurisation plant cannot be completed within the specified term of six months as the designer work during the project implementation are equally design activities, that cannot be removed or allocated to a period of time when there are no activities of procurement, manufacture or assembly, is considered late by the Council.

Given that the requirements of the tender documentation, including the specifications, were known since their publication in the S.E.A.P., 21.12.2012 respectively, date of publication in S.E.A.P. of the contract notice no. (...), the claimant would have had the possibility to challenge the period of six months required to complete the design services, within the time provided in art. 2562 (1) a) and (2) of the Ordinance. Calculated according to Art. 3 letter z) of the same regulation, the deadline for contesting the tender documentation, including the specifications, at the time of the appeal is exceeded by far.

Therefore, rejection of the proposal submitted by the claimant as non-compliant, from this point of view is considered correct and criticism of the claimant is ungrounded.

Regarding the criticism of the claimant against the second reason for rejection of its bid as non-compliant for failing to send the response to requests for clarification no. (...)/08.08.2013, the Council notes its lack of rationality.

In appreciation of that objective, the Council considered that the complaint authority filed a complaint against the contested measure, request for clarification no. (...)/08.08.2013, requiring the contracting authority to cancel that letter (by which it was asked to unconditionally withdraw the comments to the mandatory contractual requirements and those related to the non-mandatory contractual requirements), being dismissed as ungrounded by decision no. (...) of (...).

It was also noted that, by letter no. (...)/08.08.2013, the contracting authority requested clarifications from the claimant, establishing that the response to be communicated by 14.08.2013, 3:00 p.m.

Against the stated clarification letter, the claimant filed a complaint on 19.08.2013, being filled with the N.C.S.C. under no. (...)/19.08.2013.

In these circumstances, it is determined that except for the period during which it should have had to provide a response to the request for clarifications of the contracting authority, namely the 5th day, the claimant criticized the clarification letter.

Or, art. 79 (1) of the G.D. no. 925/2006 [...] is imperative in terms of response time from tenderers and the contracting authority correctly took the measure for rejecting the bid of the claimant for late reply.

Moreover, the claimant did not take any precaution to avoid rejection of its bid, which could take place even since 14.08.2013, date established as response deadline by letter no. (...)/08.08.2013, challenging it in the 5th day after the completion of this period, which made the award procedure to run freely, nothing precluding the purchaser to adopt the measure of rejecting the bid after that date.

Contrary to the claims of the claimant, the Council believes that the contracting authority had no reasons to renew the request for clarification, provided that, after 14.08.2013, the bid of the claimant was not compliant due to lack of response to the clarifications that were required, and complaint filed against this request was rejected as ungrounded.

The claim of the claimant with reference to the fact that, if it would consider that a new request for clarifications was not required, the decision to reject its bid on the grounds that it has maintained the proposals to change some of the contractual clauses would be erroneous, because, due to the previous disputes, its right to negotiate certain types of contractual clauses was already considered, its proposals targeting also those in this category, is considered by the Council as ungrounded.

It is true that, in this procedure, concerning the possibility of negotiating certain categories of contractual clauses, the Council has decided by decision no. (...) of (...), but it should be considered that, by decision no. ... pronounced also concerning the criticism of the claimant against the letter for clarification no. (...)/08.08.2013 (by which, the unconditional withdrawal of the comments made in reference to the mandatory and special (non-mandatory) clauses in the proposed contract was requested), dismissing the complaint as ungrounded.

In these circumstances, it is found that the proposal of the claimant was fairly rejected as non-compliant pursuant to art. 36 (2) letter a) and art. 79 (1) of the G.D. no. 925/2006, critics in reference to this result being considered ungrounded.

In light of those findings, under art. 278 (2) and (4) of the G.E.O. no. 34/2006, the Council admits, in part, the complaint filed by (...) against the (...) and cancels the procedures report no. (...)/23.10.2013 and its subsequent documents. It obliges the contracting authority to re-assess the proposal submitted by the joint venture (...) and the outcome of the procedure by drafting of a new procedure report within 10 days of the receipt of this document. Communications on the outcome of the procedure will be sent within the legal deadline

Consequently, the complaint is allowed and the Council rejects the request to intervene filed by (...) as leader of the joint venture (...)[25] as ungrounded.

10 RE-MAKING THE LETTERS USED TO COMMUNICATE THE OUTCOME OF THE PROCEDURE ACCORDING TO LAW

Unsatisfied with the new result of the award procedure, communicated by letter dated 13.02.2013 (...) invested the Council with the competence to solve this complaint.

In this regard, the Council notes that in letter from 13.02.2013, the contracting authority informed the claimant that its bid has not been declared winning, being ranked the 2nd In addition, the claimant was informed who was the winner, namely, the Joint venture (...) and the fact that it has accumulated 71.45 points.

Analysing the contents of the tender documentation, the Council finds that the contracting authority stated that the award criterion is the "most advantageous proposal in economic terms" with its corresponding evaluation factors, their weights and computational algorithms, as follows:

- The royalty level, 40 points - "The minimum royalty to be paid to the (...) is EUR 2,000/month; a) for the highest royalty is granted the maximum score allocated, that is, 40 points, b) .. . "

- Bid price 60 points: "a) for the lowest prices offered, will give the maximum score allocated specified in the Appendix with the scores given; b) ...; The final score in this rating factor is the sum of the scores obtained for the prices in the summary of prices: ... ", being noted the fact that the Summary of prices specifies a number of ...operations that have distributed a number of points each, totalling the maximum of 60 points that can be given to the evaluation factor "Bid Price".

Therefore, the Council finds that the letter communicating the outcome of the procedure has not detailed the scores obtained by both the bid of the claimant and by the successful bid, for the evaluation factors set out, in violation of art. ... (2) c) of the G.E.O. no. 34/.... According to the clauses mentioned In the communication referred to in art. ... (2), the contracting authority has the obligation to inform the tenderers/applicants who have been rejected or whose bid has not been declared the winner, of the reasons which led to the decision, as follows: ... c) each tenderer who has submitted an admissible and compliant bid, and therefore admissible, but has not been declared winner, the characteristics and relative advantages of the winning bid (s) in relation to its bid, the name of the tenderer to whom the procurement contract is to be awarded or, if applicable, the tenderers with whom is to conclude a framework agreement. Or, the mere statement of the total score obtained by the winning tenderer may not be considered as equivalent to the presentation of the successful bid compared to the bid of the claimant.

In the absence of express statement of the information prescribed by law, the claimant was unable to know what were the scores obtained for each of the evaluation factors listed in the documentation (including the ... operations) and evaluate their reality.

Given the foregoing, the Council believes that any criticism of the claimant in this case, referring to alleged illegalities committed by the contracting authority (through the evaluation committee), in the evaluation of its bid, as well as of the one declared winner cannot be investigated at this time, especially since the tenderer does not know the reasons why its bid received lower scores.

On the other hand, the analysis of the procedure report and its appendices shows that the contracting authority has indicated in the acceptable bids evaluation, the score of each tenderer for the evaluation factors listed in the documentation (including the operations), so that the Council considers that it is necessary to re-make the letters of communication of the procedure outcome in this regard.

The claim of the contracting authority that "each participant in the procedure could have calculated the procedure ranking from the first day of opening of bid" as would have received a copy of the minutes of the bid opening session accompanied by appendices, it cannot be retained in the settlement, in relation to the duties of the evaluation committee under art. 72 (2) j) of the G.D. no. 925/2006 and its obligations under G.E.O. no. 34/2006.

Moreover, the letter of communication of the outcome did not specify the way of aggregation of the scores given by the intermediate prices in the financial proposals or which bids were admissible, in order to compare the prices of the claimant's bids with those in the other accepted bids. Therefore, the claimant could not assess whether art. 82 of the GD no. 925/2006 was properly applied by the contracting authority in the evaluation.

Taking into account the issues of fact and law, under art. 278 (2), (4) and (6) of the G.E.O. no. 34/2006, the Council accepts the complaint filed by (...) and cancels the letters of communication of the procedure outcome. It orders to continue the award procedure within 10 days of receipt of this document, by re-making them in compliance with G.E.O. no. 34/2006 in accordance with the motivation[26].

11 NOT OPENING ALL BIDS SUBMITTED IN THE PROCEEDINGS AT THE MEETING FOR OPENING OF BIDS

Unsatisfied that its bid was rejected at the meeting for opening of bids, for the reason stated above the company (...) filed a complaint in the analysis.

Seeing the contents of the tender documentation, the Council notes that the Contracting Authority's account for establishment of the participation bond was not indicated and in the clarification dated 17.10.2013, following a request in this regard, the contracting authority has indicated: "account for the bond is ...".

Since the claimant failed to pay the bond in the account indicated above, requested by phone and received on 18.10.2013, by e-mail, the right account, that is ..., date when it also made the payment of the participation bond and sent it to the accountant of the contracting authority, who confirmed receipt of proof by e-mail.

Since the bond payment was made on 18.10.2013 prior to submission of bids (21.10.2013), the Council notes that, in fact, art. 129 of the Ordinance, in connection with art. 33 (4) of the decision were violated by the evaluation committee, under which it was required to record the main elements of the bid and the list of documents submitted.

Basically, the contracting authority proceeded to reject a bid for absence of the participation bond attached to the bid package, although after the opening session, as a result of minimum steps, it was found that, the claimant had made the payment on 18.10.2013, by wire transfer, its proof being sent to one of its servants who confirmed receipt by e-mail, (money being in the account of the contracting authority before the date of submission of bids).

The fact that the tenderer did not submit a physical act to reveal the participation bond attached to the package containing the bid, as the contracting authority claimed in the view expressed, would not have entitled the contracting authority not to record in the minutes the main elements of the bid and the list of documents submitted, and to reject the bid in question.

Therefore, nothing prevented the contracting authority to reject the bid after the opening meeting if, after verification would have found that the participation bonds were not paid, art. 33 (2) of the decision containing the right to exclude such bid and not the obligation, since the opening session.

The obligation of the contracting authority to open the bids at date and time indicated in the invitation and to record the key elements of the bid and the list of documents is not subject to the requirements concerning the participation bond.

Therefore, critics of the claimant are grounded, its exclusion from the procedure being incorrect. However, the Council notes that no remedial measures can be ordered in the procedure, for compliance with the principles laid down in art. 2 (2) of the Ordinance, the main elements of the bid submitted by the claimant not being stated in the minutes of the public opening of bids, in accordance with art. 33 (4) of the G.D. no. 925/2006.

In light of the findings, based on art. 278 (2) and (6) of G.E.O. no. 34/2006, the Council accepts the complaint filed by (...) and cancels the tender procedure.[27]

12 INFORMATION PRESENTED IN THE APPENDIX TO THE AFFIDAVIT (CONFIRMING FULFILMENT OF QUALIFICATION REQUIREMENTS) HAS NOT BEEN LISTED IN ACCORDANCE WITH THE STATUTORY REGULATIONS

Thus, the qualification documents submitted by the claimant in the proceedings show that it has submitted, for proving that the qualification requirements are met, some of the supporting documents, a statement under art. 11 (4) of the G.D. no. 925/2006 and an Appendix thereof.

Analysing the Statement Appendix, the Council finds that in its contents were given the registration numbers of the tax clearance certificates, of the one issued by the Trade Register, and the value of similar contracts for works, but for the following requirements, namely certifications of good performance, acceptance certificate, recommendation, list of facilities and equipment, data concerning the personnel responsible for the contract implementation, and certification of quality and environmental standards, the claimant merely copied the data in the Procurement Data Sheet requirements.

Method for drafting the Statement Appendix, as noted, is not likely to satisfy the legal requirement to state "briefly, but precisely, fulfilment of the specific requirements (...)".

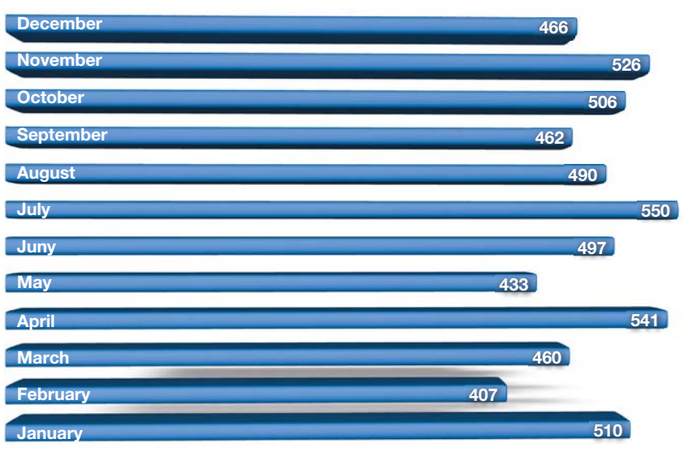
For the reasons given, pursuant to art. 278 (5) and (6) of the G.E.O. no. 34/2006, the Council will reject as ungrounded the complaint filed by (...), against contracting authorities and will order to continue with the procurement procedure[28].

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

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

During 2013, the complaints resolution panels within N.C.S.C. issued 5.730 decisions, fact that meant the resolution, within the mentioned period, of 5.848 case files.

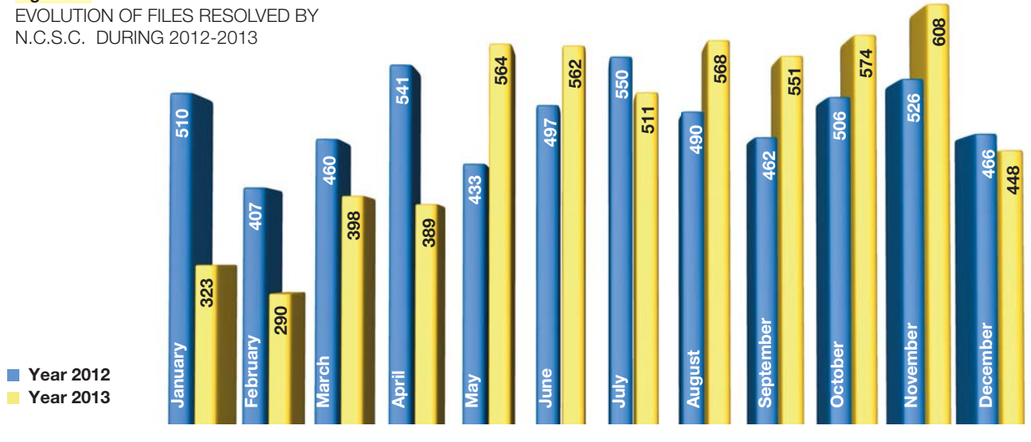
The annual evolution of the case files resolution by the complaints resolution panels within the Council is as it follows:



January	510
February	407
March	460
April	541
May	433
	497
	550
	490
ber	462
	506
er	526
er	466

Figure 14
EVOLUTION OF FILES RESOLVED BY N.C.S.C. IN 2013

Figure 15
EVOLUTION OF FILES RESOLVED BY N.C.S.C. DURING 2012-2013



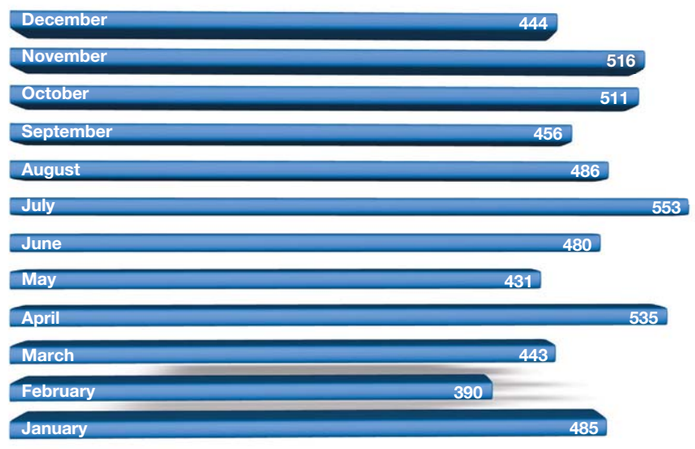
Nevertheless, we have to specify that since the Council was established until December 31, 2013, the total number of cases settled by the complaints resolution panels within the institution was of 47.343.

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 1 - December 31, the 11 complaints resolution panels within N.C.S.C. issued 5.730 decisions.

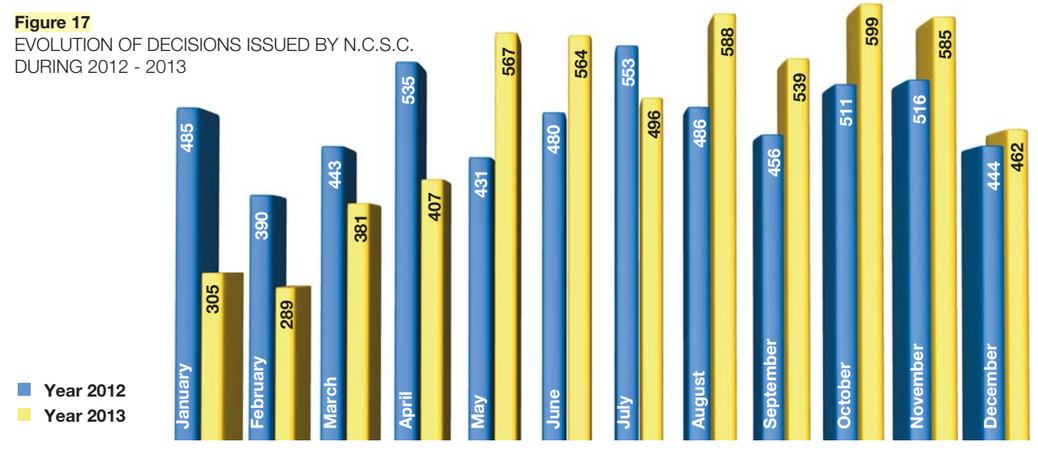
The situation of decision taken in 2013, broken down by months developed as it follows:



January	485
February	390
March	443
April	535
May	431
	480
	553
	486
ber	456
r	511
ber	516
ber	444

Figure 16
EVOLUTION OF DECISIONS TAKEN BY N.C.S.C. IN 2013

Figure 17
EVOLUTION OF DECISIONS ISSUED BY N.C.S.C. DURING 2012 - 2013



In 2013, the number of decisions issued by N.C.S.C. remained almost equal to those issued in the previous year, recording only a slight decrease by about 0.90% (52 decisions).

Overall, since the Council was established until December 31, 2013, the total number of decisions issued by the institution was of 42,166.

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

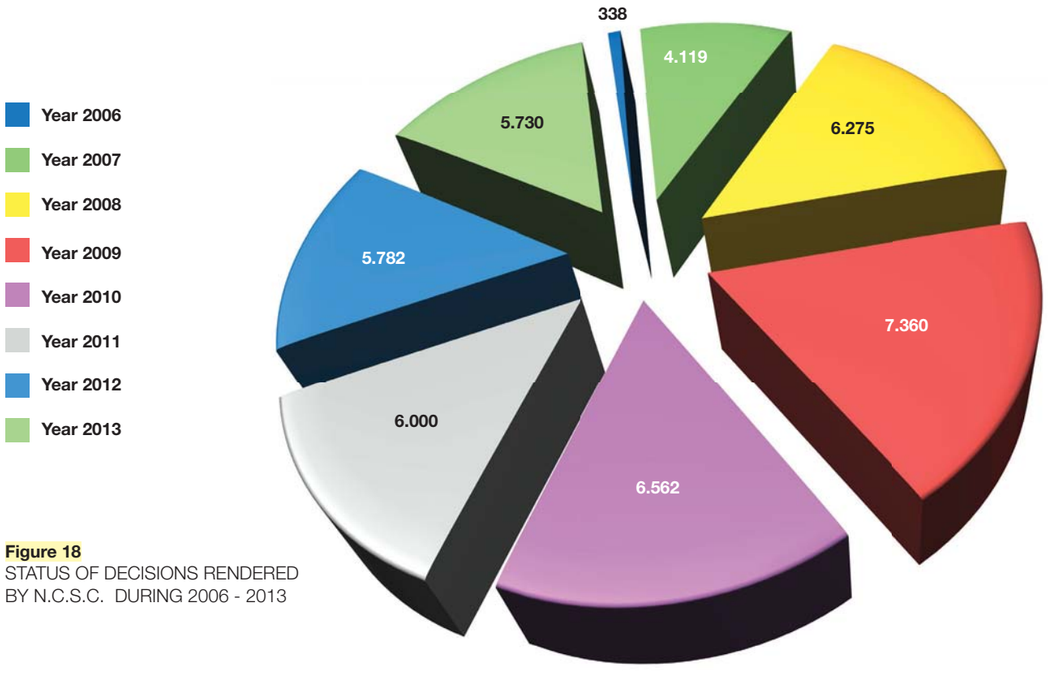


Figure 18
STATUS OF DECISIONS RENDERED BY N.C.S.C. DURING 2006 - 2013

As we have specified before, between January 1st - December 31st 2013, there were 5.730 decisions issued by the 11 Councils for solving complaints within N.C.S.C.

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

– 2,000 decisions for which it disposed to admit the complaints formulated by the economic operators. For these cases, it was considered regarding the content of the litigation legal relation formulated for settlement, giving favour to the Claimant. The solution requested by the Claimant and adopted during the deliberations of the Council for Solving Complaints, 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 for it.

– 3,730 decisions by which the denial of complaints of the economic operators was decided as:
  - 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 ungrounded/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 introduced lately, 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 Claimant used its right to waive the complaint formulated, cancelling thus its litigious action. Thus, the simple waiver application to the complaint formulated by the person that initiated the litigation, results in immediate cancelation of the file.

Analysing the chart above, it is obvious that the percent of decision given by the Council by which the complaints were admitted and that of the decisions by which the complaints were rejected for 2013 has no significant changes compared to 2012.

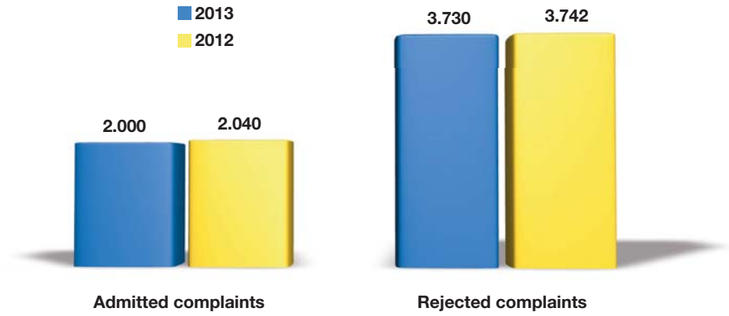


Figure 19
STATUS OF SOLUTIONS GIVEN BY N.C.S.C. DURING 2012-2013

Figure 20
STATUS OF SOLUTIONS GIVEN BY N.C.S.C. IN 2013

Figure 21
MEASURES ORDERED BY N.C.S.C. FOLLOWING THE APPROVAL OF COMPLAINTS IN 2013

The chart above indicates that following the settlement of complaints formulated by the business operators, in case of 34.90% of the decisions issued by N.C.S.C. during 2013 the complaints were admitted, while for 65.10% of the decisions taken by N.C.S.C., the complaints were rejected and the public procurement procedures continued.

Regarding the decisions admitted (2,000 decisions taken by the Council), of statistic data existing it is obvious that for 1.876 decisions the remediation of the awarding procedures was decided, to provide a continual compliance with legal provisions, which for 124 decisions the cancellation of the awarding procedure was decided; 37 of these award procedures were financed from European funds, therefore remediation was impossible to be performed without any violation of the legal provisions in force.

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

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

In 2013, N.C.S.C. issued decisions within certain public procurement procedures with an estimate total value of RON 43,717,176,243.77 (equivalent of EUR 9,893,002,091.82)[29], resulting thus a value by 29.34% lower compared to 2012.

Figure 22
EVOLUTION OF DECISIONS ISSUED BY N.C.S.C. COMPARED TO THE VALUE ESTIMATED DURING 2012-2013

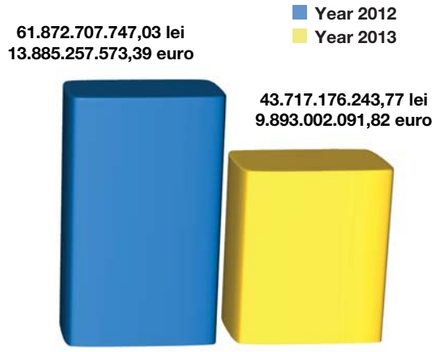
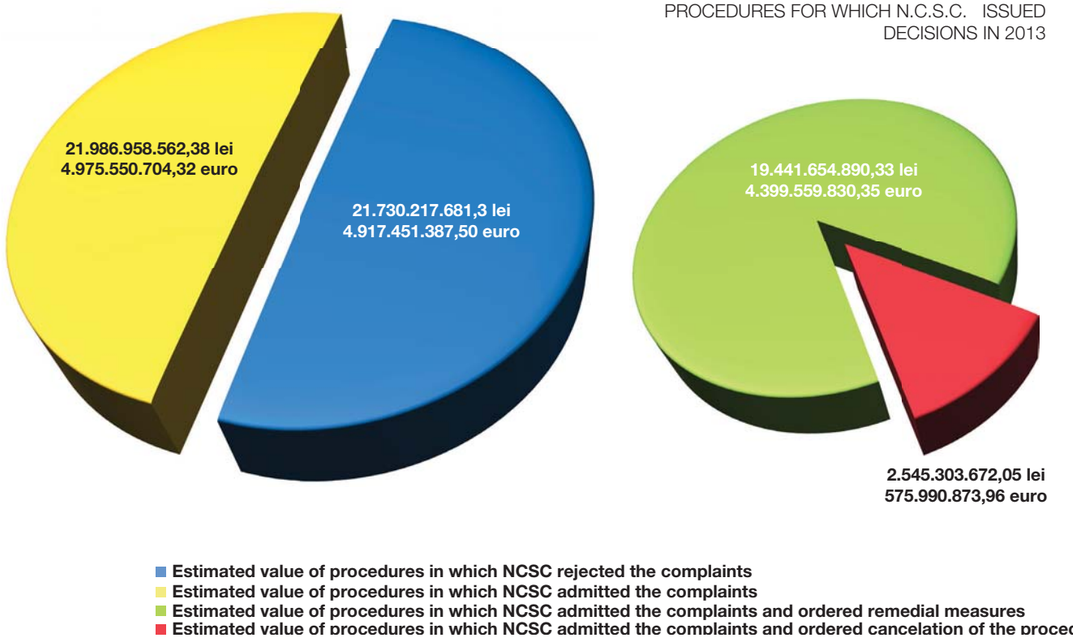


Figure 23
TOTAL ESTIMATED VALUE OF THE AWARDING PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS IN 2013



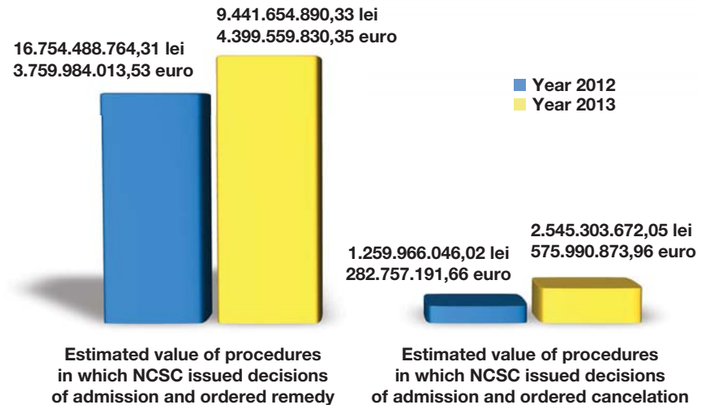
In terms of value, in 2013, the total estimated value of the awarding procedures in which N.C.S.C. made decisions to admit the complaints formulated by the economic operators was of RON 21,986,958,562.38 (equivalent of EUR 4,975,550,704.32)[30].

During 2013, the total estimated value of procedures for which N.C.S.C. made decisions to reject the complaints formulated by economic operators was of RON 21,730,217,681.39 (equivalent of EUR 4,917,451,387.50)[31].

Of the total estimated value of the procedures for which decisions to admit the complaints, the total estimated value of public procurement procedures for which the Council decided to cancel them was of RON 2,545,303,672.05 (equivalent of EUR 575,990,873.96)[32], and that of the awarding procedures for which remediation measures were decided amounted to RON 19,441,654,890.33 (equivalent of EUR 4,399,559,830.35[33].

Analysing the chart above it is obvious that in 2013, the total estimated value of the awarding procedures for which N.C.S.C. gave approval decisions for the complaints of the business operators (RON 21,986,958,562.38) represented 50.29% of the total estimated value of procedures in which N.C.S.C. made decisions (RON 43,717,176,243.77), while the value of procedures for which the Council decided to reject the complaints formulated by the economic operators (RON 21,730,217,681.39), represented 49.71% of the total estimated value of the proce

Figure 24
EVOLUTION OF THE ESTIMATED AWARDING PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS IN 2012-2013

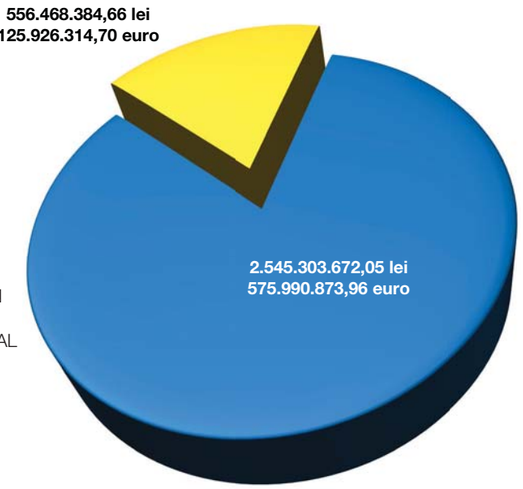


As it can be seen, in 2013, both the estimated value of the awarding procedures for which the Council admitted the complaints and cancelled procedures (102.01%) and the estimated value of the procedures for which the Council made decisions for admissions and ordered the remedy of the procedures (16.03%), are higher than in the previous year, that is, 2012.

From this chart, it can be seen that the estimated value of the procedures in which N.C.S.C. issued decisions for admission of complaints and for were ordered either remedial measures or even cancellation of procedures because remediation of the aspects notified was impossible, worryingly increased.

Of the estimated value of RON 2,545,303,672.05 (equivalent of EUR 575,990,873.96) of the award procedures for which the Council ordered cancellation, the amount of RON 556,468,384.66 (equivalent of EUR 125,926,314.70), are EU funded award procedures, that is, 21.86% of the total award procedures for which cancellation was ordered and 1.27% of the total award procedures challenged.

Figure 25
ESTIMATED VALUE OF THE EU FUNDED PROCEDURES FOR WHICH CANCELLATION WAS ORDERED, IN RELATION TO THE TOTAL ESTIMATED VALUE OF PROCEDURES FOR WHICH CANCELATION WAS ORDERED

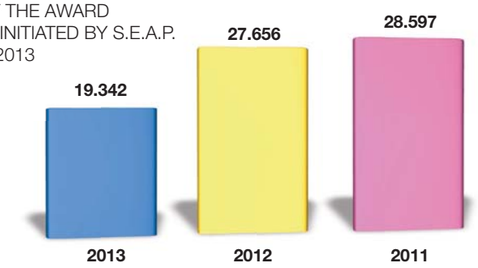


2.4.2. THE ESTIMATED VALUE OF PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS TO ADMIT THE COMPLAINT, COMPARED TO THAT OF PROCEDURES INITIATED IN S.E.A.P.

The official data provided by the Electronic System for Public Acquisitions (S.E.A.P.) indicate that in 2013, within the communication platform used in the awarding process of the public procurement contracts, 19.342 awarding procedures were initiated, with a total estimated value of RON 74,615,096,072.24 (equivalent of EUR 16,885,063,605.39)[34].

Compared to 2012, when in S.E.A.P. 27,656 awarding procedures were initiated, and to 2011 when 28,597 procedures were initiated, it is observed that in 2013 the number of awarding procedures decreased by 30.06% compared to 2012 and by 32.36% compared to 2011.

Figure 26
EVOLUTION OF THE AWARD PROCEDURES INITIATED BY S.E.A.P. DURING 2011-2013



Comparing the total yearly estimated value of the procedures initiated in 2013 in S.E.A.P. (RON 74,615,096,072,.24) and the total estimated value of the awarding procedures in which N.C.S.C. issued a decision (RON 43,717,176,243.77), results that the later represented 58.59% out 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 2013 in S.E.A.P. (RON 74,615,096,072.24) with a total estimated value of the procedures in which N.C.S.C. admitted the complaints formulated by the business operators and decided remediation/cancellation measures of the procedures (RON 21,985,958,562.38), results that the later represented 29.46% out of the total estimated value of the procedures initiated in S.E.A.P.

At the same time, if we compare the total yearly estimated value of the procedures initiated in 2013 in S.E.A.P. (RON 74,615,096,072.24) 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 was of RON 19,441,654,890.33 (26.05% out 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 was of RON 2,545,303,672.05, (3.41% out of the total estimated value of the procedures initiated in S.E.A.P.).

By comparison in terms of value between 2013 (RON 74,615,096,072.24) and previous years, respectively 2012 (RON 99,030,708,109) and 2011 (RON 71,349,308,543.61), it is found that in 2013 there was a decrease in the estimated value of the awarding procedures initiated by S.E.A.P. (-24.65%) compared with 2012 but there was a slight increase (+4.58%) compared with 2011.

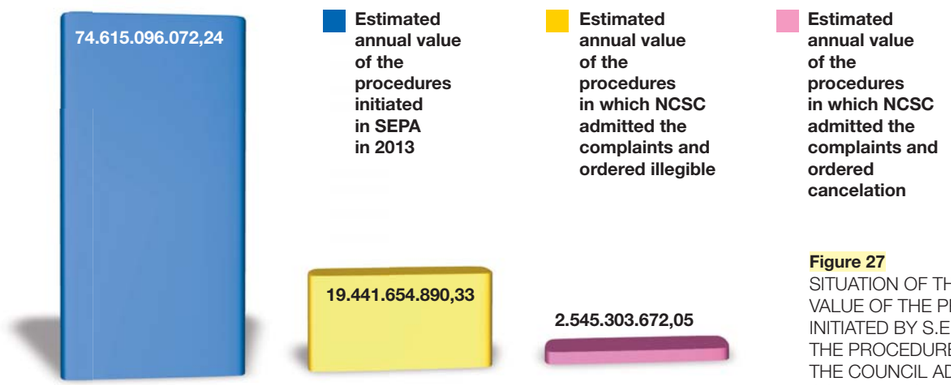


Figure 27
SITUATION OF THE ESTIMATED VALUE OF THE PROCEDURES INITIATED BY S.E.A.P. AND OF THE PROCEDURES IN WHICH THE COUNCIL ADMITTED THE COMPLAINTS AND DISPOSED REMEDIATION MEASURES OR THE CANCELATION OF THE PROCEDURE

3. THE QUALITY OF N.C.S.C. ACTIVITY

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

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 COMPLAINTS SUBMITTED

Observing the constitutional principle of "double degree of jurisdiction", the law maker determined that it is necessary for the decision given by the Council following the settlement of the complaint by administrative and legal means to be "controlled" by a court of law, as to remedy any error occurred during the first settlement. Thus, for the decisions given by administrative and legal means by the Council, they are "verified" by a superior office, respectively the courts of appeal where the contracting authority is registered of 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 control is a guarantee for the parties involved, meaning that any injustice can be settled/repaired and for the solving counsellors, it provides incentives to fulfil their duties with the utmost rigor and exigencies, 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, its 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.

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/several economic operators participant in the procedure, or by the contracting authority together with one or several economic operators involved in a public procurement procedure.

THE QUALITY OF N.C.S.C. ACTIVITY

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

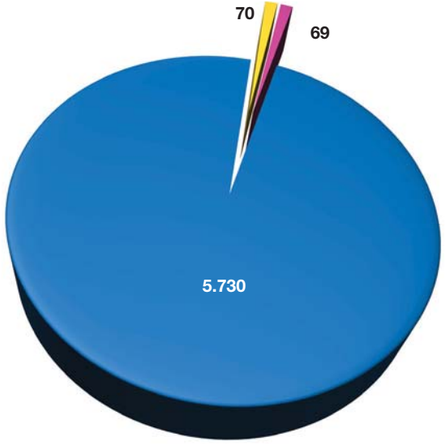


Figure 28
STATUS OF COMPLAINTS FORMULATED AGAINST THE DECISIONS ISSUED BY N.C.S.C. IN 2013

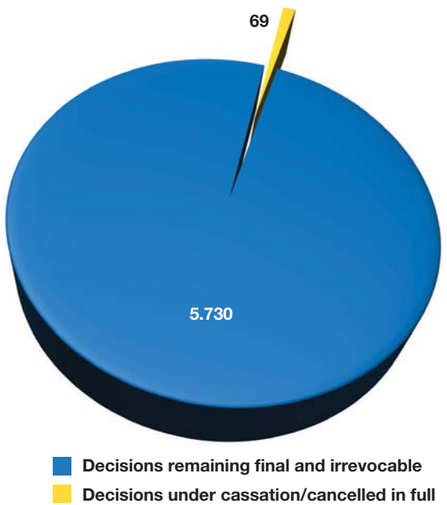


Figure 29
NUMBER OF DECISIONS ISSUED COMPARED TO THOSE UNDER CASSATION/CANCELLED IN FULL IN 2013

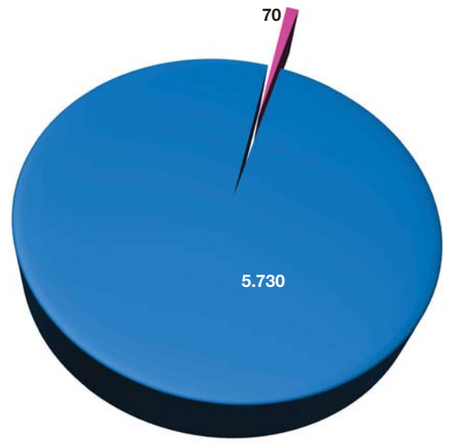


Figure 30
NUMBER OF DECISIONS ISSUED COMPARED TO THOSE AMENDED IN PART IN 2013

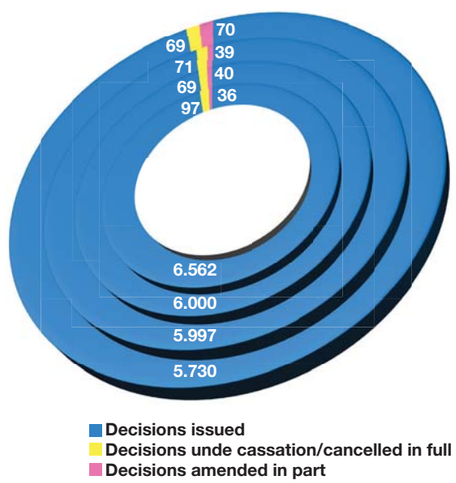


Figure 31
SITUATION OF COMPLAINTS FORMULATED AGAINST THE DECISIONS ISSUED BY N.C.S.C. DURING 2010-2013

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

During 2013, out of the total of 5.730 decisions issued by the N.C.S.C., 868 (15.14%) decisions were appealed with complaints addressed to the competent Court of Appeal where the contracting authority is registered.

In 2013, following the complaints filed with to the competent Courts of Appeal[35] in which the contracting authority is registered, 69 decisions issued by the N.C.S.C. were under cassation/cancelled in full by the courts (1.20% of all decisions issued by the Council) and 70 were amended in part (1.22% of total decisions of the Council).

Therefore, it results that during 2013, 5.591 decisions issued by the Council (which means 97.57% out of the total of decisions issued in 2013) 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 percent of the decisions issued by the Courts of Appeal after the Council was established and until the end of 2013 it is constant and, at the same time, very low compared to the percent of the decisions issued by it which remained final and irrevocable.

If we summarize the decisions issued by N.C.S.C. from its establishment and until the end of 2013, our institution issued 42,166 decisions.

If we compare, for the period between September 2006 - December 31st 2013, the decisions under cassation/amended in full by the competent Courts of Appeal following the complaints of the economic operators/contracting authorities (789 decisions), with the number of decisions issued by the Council, it is noted that 41,377 decisions issued by our institution (98.13%) were final and irrevocable.

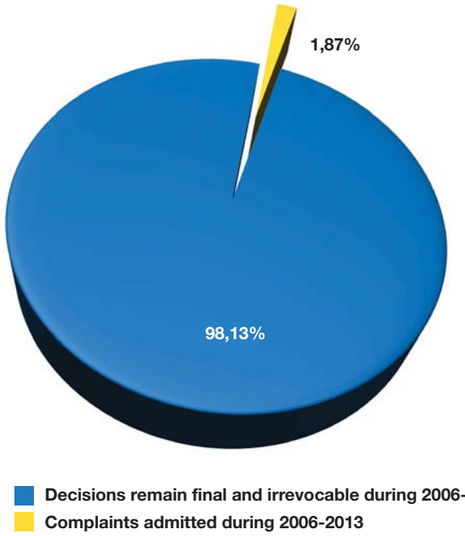


Figure 32
SITUATION OF COMPLAINTS ADMITTED BY COURTS OF LAW DURING 2006-2013

As it can be noticed from the chart above, the credibility percent of the Council is high for 2013 as well, with a share of 97.57%, same as for 2012 (98.22%).

Due to the total independence the Council had in the past and still has, and to the profile and competence of its employees, in 2013 the quality of our institution activity and the fast settlement of complaints formulated by the economic operators (N.B. - within the term of 20 days provided by G.E.O. no. 34/2006, as further amended and completed), shall be considered main elements of the N.C.S.C.'s performance.

4. INSTITUTIONAL TRANSPARENCY AND TRAINING OF STAFF

4.1. INSTITUTIONAL TRANSPARENCY

In 2013, the NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.) was continuously concerned with increasing the transparency, competition and efficiency of public procurement market, with promoting the best practices at European level and disseminating its own experience in the area to its institutional partners. Additionally, special attention was given to its own staff continual training, alongside with activities to discourage and fight anti-competitive practices within 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., Unit for Coordinating and Verifying Public Procurement - U.C.V.P.P., National Agency for Integrity - N.A.I.).

Being interested in establishing and coherent operation of the Romanian public procurement system and absorption of EU grants, the Council continued to send on 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 following the complaints of economic operators.

In November 2012, the Commission for Monitoring Progress in Romania under the Cooperation and Verification Mechanism, approved by tacit procedural the Methodology for monitoring the implementation of the National Anticorruption Strategy for the Period 2012-2015 and evaluation themes for 2013: declaration of assets, access to information of public interest and conflicts of interest. In June 2013, the National Council for Solving Complaints was evaluated by a team of experts, consisting of three experts from the Technical Secretariat of the NAS and three expert evaluators, who developed the Evaluation report in which it was held, inter alia, as an example of good practice, the institution opening beyond the strictly legal framework, to proactively and voluntarily provide on its website a series of information held and the system of random assignment of files.

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, Fraud Investigation Division of I.G.R.P., the National Authority for Regulating and Monitoring Public Procurement, 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.

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 and to be in line with best training practice in this field at European level;
- 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 the cases of fraud, corruption and other crimes in public procurement and on their ability to cooperate.

ANSA, National Association of Experts in Procurement
No. 09/07 March 2014
To: The National Council for Solving Complaints
Mr. Bogdan Lorand LEHEL, President
Office: Bucharest, sector 6, Calea Giulesti, no.23
TIN 29269652
office@illegible, illegible website
Tel./Fax: 031 418.28.99, Dear Mr. President,

In 2013 we developed with you and another 16 institutional partners activities relating to a Successful project in the public procurement field – “Defrauding of National and European Funds: a penal and administrative approach”, project con-funded by the Programme “Prevention and Fight again Crime”, by the European Commission, Directorate-General Home Affairs, Embassy of the United Kingdom of Great Britain and Northern Ireland in Romania, Ministry of Justice, Superior Council of the Magistrature and Public Minister.

Objectives of this Projects were ambitious and the professional challenges received from the target public – magistrates and judicial police officers – were equal.

N.C.S.C. was represented by the members of the Council College during the Opening Conferences and six seminars conducted between June and November 2013, and the contribution of your institution was exceptional. Moreover, we remarked appreciations from the body of magistrates judging appeals lodged against Decisions issued by the N.C.S.C. I believe that nobody should be surprised by the clear and unequivocal message, expressed in support of this institution, by those who see in the 11 panels a first benchmark in the quest of judicious application of the GEO no.34/2006. ANSA supports this opinion and considers that the practice resulting from the decisions issued in 2013 consolidated the efforts towards protection of rights and lawful interests of the parties concerned in the award of public procurement contracts.

As a conclusion, in my quality as a co-manager of the ISEC Project, I express my warm appreciation and I thank you for how N.C.S.C. contributes to the activities we conduct within this partnership. I am convinced that you will continue to successfully face the new challenges determined by the changes to the European Directives, so that we can walk the next steps with the same professionalism and seriousness.

Bets Regards,
Sorin FUSEA
President of ANSA [illegible signature] [round seal affixed]

Mr. Bogdan Lehel Lorand,
President of the National Council for Solving Complaints
7 March 2014
Dear Mr. President,

First, we would like to thank you for your support in the project “Fighting Public Procurement Criminality”, a project financed by the European Commission, DG Home Affairs, through the Programme “Prevention and Fight against Crime”.

We were, together with other institutional partners – from Romania and other Member States – since the Opening Conference of the project, on 20 March 2013 – “Public Procurement. An Operational Approach”, the best practice workshop on 24 May 2013 – “Defrauding of National and European Funds: a penal and administrative approach” (that set the basis for the seminars’ curricula) and then in all eight training seminars concerning the magistrates and operative officers that took place by now.

We highly appreciated the N.C.S.C. contribution to these seminars held in various parts of the country, which were attended by around 200 judges of law and administrative law, Prosecutors of the National Anticorruption Directorate and General Prosecutor’s Office, judicial officer within the National Anticorruption Directorate and Fraud Investigation Directorate.

Presentations, responses to questions and challenge of debates within these seminars with the N.C.S.C. representative, Mr. Silviu Cristian POPA, have allowed the magistrates and judicial officers to broaden their perspective concerning this extremely complex field, which requires an inter-institutional approach, with vast knowledge in related fields, with a high stake: a market where there are 13,000 contracting authorities, operating approx. EUR 15 billion, public funds.

Particularly, the administrative law judges, those judging the appeals lodged against your decisions, appreciated the presence of the N.C.S.C. to these seminars, information provided, legal clarifications and how a remedial institution that can act faster than justice can solve certain complaints.

By the end of 2014, there are another six training seminars under this project. We continue to count, Mr. President, on the valuable input provided by your institution and on the assistance to be provided in development of the operational guidelines for magistrates and operative officers.

Best Regards,
Cristina Guseth
Director Freedom House Romania
[Illegible signature] [round seal affixed]
Bd. Ferdinand I no. 125, sector 2, Bucharest, postal code 021367, Romania
Tel: (+40) illegible Fax: (+40) 21 illegible 253.00.63
Mobile: (+40) 731.909.907, email and site illegible

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 from 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 and that concerning competition, which makes possible to identify any possible conflict of interests between the contracting authority and different economic operators, or of unfair competition following different "agreements" between several economic operators.

Within this context, we specify that in 2013, the N.C.S.C. informed the National Agency for Integrity (N.A.I.), the National Authority for the Regulation and Monitoring of Public Procurement (N.A.R.M.P.P.) and the Unit for Coordinating and Verifying Public Procurement (U.C.V.P.P.) regarding 13 awarding procedures for which the existence of potential conflicts of interests was invoked (the respective cases are to be found on the web page of the institution - www.cnsc.ro, section "Decisions 2013")

To facilitate the understanding of information presented in this chapter, we detail the settlement given for certain complaints formulated within the awarding procedures, where issues concerning the existence of any potential conflict of interests were invoked.

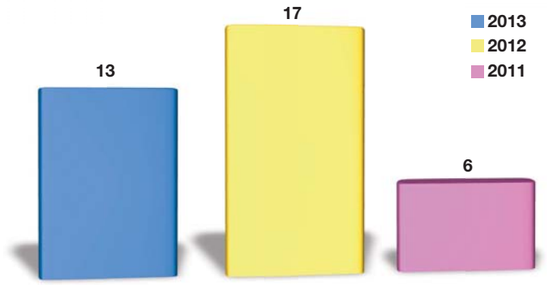


Figure 33
SITUATION OF THE DECISIONS ISSUED BY THE N.C.S.C. REGARDING THE EXISTENCE OF ANY POTENTIAL CONFLICT OF INTERESTS IN 2013 COMPARED TO 2011-2012

1 REJECTION OF CRITICS REGARDING THE EXISTENCE OF ANY POTENTIAL CONFLICT OF INTERESTS

The Council rejects the criticism of the claimant, who reports alleged conflict of interest, justifying its claims that company (... is both "developer of the feasibility study underlying the tender documentation" and "subcontractor declared of the winning joint venture" finding in this regard that the concept of "conflict of interest" is provided exhaustively, within art. 69 and art. 69[1] of the G.E.O. no. 34/2006, according to which:

"Art 69 - The following persons are not entitled to be involved in the verification/evaluation of applications/bids:

a) persons holding shares, parts of interest, stocks in the subscribed capital of one of the tenderers/applicants, subcontractors or persons in the board of directors/management or supervisory body of one of the tenderers/applicants or subcontractors;

b) husband/wife, relatives or relatives by affinity up to the fourth degree, to persons in the board of directors/management or supervisory body of one of the tenderers/applicants;

c) persons who are found that may have an interest that could affect their impartiality in the process of verification/evaluation of applications/bids;

d) persons who, when acting in their office within the contracting authority are in a position of a conflict of interest as it is regulated by Law no. 161/2003 on measures to ensure transparency in the exercise of public dignities, public offices and business environment, the prevention and punishment of corruption, as further amended and supplemented.

Article 69[1] *) - The Tenderer/Applicant/Associated Tenderer/Subcontractor/Supporting third party who has as members of the board of directors/management or supervisory body and/or have shareholders or associates who are husband/wife, relatives or relatives by affinity up to the fourth degree or who are in trade relations, as they are set out in art. 69 a) with persons holding decision functions within the contracting authority, is excluded from the award procedure"[36].

2 THE AUTHORITY PROCEEDED IN DISAGREEMENT WITH LAWS AND THE PRINCIPLE OF AVOIDING CONFLICTS OF INTEREST

Instead, it proves to be founded the objection of the claimant regarding a conflict of interest relating to SC (...) SRL, the company declared the winner, conflict that the contracting authority was obliged to remove, as provided in art. 66 of the G.E.O. no. 34/2006 - "During the awarding procedure, the contracting authority has the obligation to take all necessary measures to avoid situations likely to cause a conflict of interest and/or unfair competition."

The conflict stems from the fact that Mr. (...) is an employee of (...) and developed the tender documentation and was a member of the bid evaluation committee establishing that the bid of SC (...) SRL is the winner, given that previously, the same person was employed with individual employment contract in SC (...) SRL. Although Mr. (...) presented a statement that is not an employee of SC (...) SRL anymore, since 20.03.2011, enclosing the decision of termination of the individual employment contract issued by SC (...) SRL, the authority omits the prohibition prescribed by the Penal Code - "Conflict of interest" where "The act of a public official who in the exercise of its duties, performs an act or participates in a decision through which acquires, directly or indirectly, a material advantage for itself, its spouse, a relative or a relative by affinity up to the second degree including, or for another person with whom was in commercial or work relationships in the last five years or from whom received or receives services or benefits of any kind, shall be punished with imprisonment from six months to five years and a prohibition to hold a public office for the maximum period."

Art. 147: "Public official" means any person exercising permanent or temporary, with any title, no matter how it was invested, a duty of any kind, remunerated or not, in the service of the unit referred to in art. 145.

Art. 145: The term "public" means all public authorities, public institutions, institutions or other legal bodies of public interest, administration, use or exploitation of public property, public services and goods of any kind, which, by law, are of public interest.

Since Mr ... was in labour relations in the last five years with SC (...) SRL, the company to whom the same gentleman (...) as a member of the evaluation committee, proposed to be awarded the public contract, worth RON 73,485, excluding VAT, it is obvious that the act falls within the category of conflict of interest.

Moreover, art. 69 of the G.E.O. no. 34/2006, prescribes in letter c) that people who can have an interest that could affect their impartiality during the bid evaluation process have no right to be involved in the bid evaluation, which is the case of Mr. (...).

The Public Procurement Ordinance does not define, nor states restrictively the cases consisting in a conflict of interest or incompatibility, but both the G.E.O. no. 34/2006 and the G.D. no. 925/2006 [Art. 2 (3)], require the contracting authority to take all necessary measures during the awarding procedure to avoid situations likely to cause a conflict of interest. It shows thus the intention of the lawmaker to prevent any conflicts of interest, the authority not being obliged to wait for the conflict in order to take appropriate measures.

In the present case, the Council determined that the contracting authority should have taken into account that Mr. (...) was an employee of one of the tenderers and to order his removal from the evaluation committee, in order to eliminate a potential conflict of interest. The contracting authority could not award or sign a procurement contract with SC (...) SRL based on the proposal submitted by a former employee of SC (...) SRL.

On the other hand, the principle provisions of art. 66 of the G.E.O. no. 34/2006 must be interpreted in the widest sense - even the activity of Mr. (...) as an employee of SC (...) SRL can be considered as a factor influencing his co-workers in the evaluation committee.

Related to the above, it appears that the authority acted inconsistent with laws and the principle of avoiding conflicts of interest, in which situation, according to art. 278 (2) of the G.E.O. no. 34/2006, the Council will admit the complaint[37].

4.3. PROFESSIONAL TRAINING

In compliance with provisions of Law no. 188/1999[38], training and continuous professional training is both a right and an obligation of public clerks.

In order to enforce the principles of a good operation within the public sector, a solid knowledge of the administrative system and especially of public procurement system, and 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 regulations in force, the Council holds full competence in planning the professional training, in procuring professional training services and in controlling and assessment of the professional training of public clerks.

Strengthening of the institutional capacity of the Council is strictly determined by a proper professional training of the counsellors resolving complaints within the public procurement area, by their offices as special public clerks, within areas and subjects regarding the professional training and continuous professional training which should reflect the real need of the administrative system and especially of the public procurement system and public sector.

Provision of 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 of 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 skills within the Council, are strictly connected to the need of continual professional training of its staff.

Thus, taking into account the obligation to improve their skills and professional training at all times[39] and being interested in the permanent professional training of their staff, the members of the Council attended two workshops in 2013, with the following subjects:

– **The New Civil Procedure Code - applicability in the public procurement field**

The course, initiated by N.C.S.C., was organized to discuss with the judges within the Court of Appeal Constanta the implications of the new Civil Procedure Code on the public procurement system and especially on the administrative and legal settlement procedure of the complaints formulated by economic operators. Within the meeting, different cases were analyzed and interpreted, which were modified by the Courts of Appeal following the complaints lodged.

– **Implementation of new regulations on public procurement. Debates on judicial and administrative bodies. Administrative acts.**

The course, initiated and organized also by the N.C.S.C. aimed at interpretation, with University Professors specialists in administrative law from the "Lucian Blaga" University, "Simion Barnutiu" Law School in Sibiu, of the new public procurement regulations - secondary legislation. It was also discussed the role of the judicial and administrative bodies in the Romanian legal system.

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

4.4. RELATIONSHIP WITH MASS MEDIA AND GENERAL PUBLIC

Concerning the relation with the media and general public, the activity developed by N.C.S.C. in 2013 materialized in an interactive approach, meant to grant the institutional transparency.

Beside the answers given periodically to media representatives, in compliance with Law no. 544/2001 on free access to public information, the National Council for Solving Complaints periodically provided Official Press Releases regarding its activity for correct information of the public. Periodically, information concerning the activity of the N.C.S.C. were sent by e-mail to the journalists accredited with the institution.

In parallel, in 2012, the Information and Public Relations Office, in collaboration with the Statistics and IT Office within the N.C.S.C organized and managed the web page for this institution; they also published the Official Journal of the National Council for Solving Complaints

Regarding the number of request from the media, during 2013, 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 70 requests of the journalists accredited and from different individuals/legal entities.

We also must mention the intense activity of this office, consisting of elaboration and forwarding of periodical press releases and the yearly activity report of 2013 concerning the institution to more than 300 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., the management of this institution created since 2011 a Statistics Department and continued the measures dedicated to the upgrade of an integrated IT system, actions which:

– were finished in 2012 by the elaboration and implementation of an IT application to provide the random electronic distribution of the complaints;
– the implementation of an IT application was initiated starting with January 1, 2013, intended to render anonymous the decisions in order to fulfil the obligations falling within the responsibility of the Council to publish on its own website, in the Official Bulletin, the motivated decisions within 5 days following the adoption "with no reference to the identification data of the decision and of the parties, to personal data and that information the economic operator specifies in its tender as being confidential, classified or protected by an intellectual property right"[40];
– at all times, provided the economic operators interested, general public and media with official data on the complaints lodged within the public procurement procedures and decisions issued by the Council.

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

Budget of N.C.S.C. afferent for 2013 was in the amount of RON 10,190 thousand and it was distributed as follows:

– Budgetary provision for Current expenses: RON 10,155 thousand, of which:
  • Expenses with the personnel: RON 8,634 thousand
  • Products and services: RON 1,521 thousand
– Budgetary provision for Capital expenditure: RON 35 thousand.

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

Thousands of RON

Code	Indicator	Budget	of total per year, of which,			
			Trim I	Trim II	Trim III	Trim IV
5000	Total budget	10.190	2.630	2.580	2.534	2.446
01	Current expenses	10.155	2.630	2.545	2.534	2.446
10	Title I expenses with the personnel	8.634	2.190	2.131	2.144	2.169
20	Title II products and services	1.521	440	414	390	277
70	Capital expenditure	35	0	35	0	0
5001	Expenses - state budget	10.190	2.630	2.580	2.534	2.446
01	Current expenses	10.155	2.630	2.545	2.534	2.446
10	Title I expenses with the personnel	8.634	2.190	2.131	2.144	2.169
20	Title II products and services	1.521	440	414	390	277
70	Capital expenditure	35	0	35	0	0
5101	Public authorities and external actions	10.190	2.630	2.580	2.534	2.446
01	Current expenses	10.155	2.630	2.545	2.534	2.446
10	Title I expenses with the personnel	8.634	2.190	2.131	2.144	2.169
20	Title II products and services	1.521	440	414	390	277
70	Capital expenditure	35	0	35	0	0
5101	Executive and legislative authorities	10.190	2.630	2.580	2.534	2.446
510103	Executive authorities	10.190	2.630	2.580	2.534	2.446

CONCLUSIONS AND FORECAST

Generally, as it can be seen from the whole report, the activity of the Council developed during January 1st - December 31st, 2013 was not increasingly changed compared to the activity of 2012, the complaints settlement procedure totally observing the principles expressly regulated by G.E.O. no. 34/2006 and those of common law as may be:

- PRINCIPLE OF CONTRADICTION - according to which each party must know the claims, requirements and defences formulated by the other part, being able to express its defences/claims in fighting the claims and defences of the other party.
- PRINCIPLE OF THE RIGHT TO DEFENSE – this principle is granted by art. 24 of the Constitution, which, formally, is resumed to the right to employ a defender, and materially, it consists in the right to express requests, to propose evidence, to be informed on the documents in the cases, or to submit conclusions or to challenge in court. It is obvious that between this principle and the principle of contradiction there is a strong connection, they go alongside.
- PRINCIPLE OF THE ACTIVE ROLE OF THE COMPLAINTS SETTLEMENT COUNSELOR in public procurement area which is taken into account under the following main aspects:
  - specifies exactly the complaint, compared to its content, and not concerning the name given by the party.
  - counsellors lead the development of the process, supervise compliance with legal regulations and instruct the measures necessary for the settlement of the complaint (submission of writs, connections, splitting files, suspension of complaint settlement, etc.).
- PRINCIPLE OF AVAILABILITY - which represents the right granted for the parties to dispose of the object of the process, meaning the material right, and the means of law concerning the defence of this right, meaning the proceedings. Therefore, this principle comprises the following rights:
  - the person interested has the right to initiate or not the action in the area of public procurement by administrative and jurisdictional means;
  - determining the limits of the complaint and defences;
  - waiving the settlement of the complaint or its subjective right and acquiescing;
  - challenging or not the decision by the remedies at law;
- PRINCIPLE OF LEGALITY - according to which, state authorities, public institutions and citizens have the obligation to observe and be subjected to the law. This principle actually institutes the supremacy of law for any social activity. Thus, in a state of law, the obligation to observe the law is essential, and the importance of complying with this obligation essentially consists in knowing the law, from the moment of elaboration compared to the moment when it was published in the Official Gazette, in compliance with art. 78 from the Constitution of Romania. It is obvious that for complaint settlement in public procurement area, the complaint settlement counsellors must observe the legal regulations which regulate the litigation legal relation, the proceedings and those relating to the organization and operation of the Council;
- PRINCIPLE OF IMMEDIACY - the source of this principle comes from the obligation which falls within the responsibility of the Council to verify immediately, directly and in full, the elements that have a determinant role in the settlement of a complaint in compliance with art. 297 of G.E.O. no. 34/2006 in connection with art. 22 (2) of the Civil Procedure Code
- PRINCIPLE OF FINDING OUT THE TRUTH - which means that all the circumstances of the case must be established by the Council in compliance with reality and involves that the facts of the case must be materially determined.
- PRINCIPLE OF SPEEDY TRIAL - according to which the case must be settled as soon as possible, before any other liabilities of the Council as it is specified by the provisos of G.E.O. no. 34/2006. Moreover, this procedure is an efficient and fast procedure for the settlement of litigation and without the possibility to delay the terms. To this end, art. 276 (1) of the G.E.O. no. 34/2006 sets a settlement term for the complaints of 20 days following the submission of the public procurement case by the contracting authority which can be extended once and only in reasonable cases by maximum 10 days. For settlement of cases by way of exception, this term is of 10 days.

Even if compared to previous years the number of complaints decreased as a result of a decreased number of initial procedures in S.E.A.P., it is considered that this was compensated and even exceeded by the complexity of the complaints formulated for settlement, which meant supplementary efforts from the whole personnel of the Council.

Taking into account the issues previously presented, the Council focused on the identification and efficiently addressing the causes which can generate malfunctions such as:

- settlement of a high number of complaints existing, in spite of the legislation adopted;
- considering the issue of conflict of interests in the public procurement process from Romania;
- considering the mismatching and inconsistent practices within the public procurement process from Romania;

Settlement of a high number of complaints existing, in spite of the legislation adopted

The Council implemented an integrated IT system in order to provide multiple functions/functionalities, which, among others, allows random distribution of cases, rendering the decisions anonymous and offers the parties the possibility to verify, in real time, the settlement phase of their complaint.

In 2013, given the new changes to the G.E.O. no. 34/2006, there was an increase in the number of appeals made by the economic operators reported to a lower number of award procedures initiated in S.E.A.P. compared to the previous year, despite the measures imposed by the law maker to “sanction” the economic operators by retaining a share of the participation bond in the award procedure, and if they waive the appeal without the contracting authority to have taken remedial action.

Considering the issue of conflict of interests in the public procurement process in Romania

The issue of conflict of interest in the public procurement process in Romania is reflected inclusively within the last report issued by the European Commission for the Cooperation and Verification Mechanism.

The Council brought its own contribution to the decrease of such issue, by sending the decisions concerning the complaints which comprise information on potential conflicts of interests to the National Agency for Integrity. Likewise, when the “Integrated IT system to prevent and identify the conflicts of interests” is developed by the National Agency for Integrity, the Council shall be prepared to take any actions in order to provide the interoperability with it.

Considering the mismatching and inconsistent practices within the public procurement process in Romania

In order to eliminate such deficiencies, the Council had a pro-active approach, powering the collaboration protocols already concluded in the previous years with the National Authority for the Regulation and Monitoring of Public Procurement and the Unit for Coordinating and Verifying Public Procurement. Thus, during 2012 the representatives of the Council participated both in the events organized by different institutions with a key role within public procurement, and within the joint working groups, presenting, any time it was needed, specific recommendations and pertinent actions.

In order to line up the afferent practices and interpretation, this time within N.C.S.C., meetings were organized periodically during 2013 between the members of the Councils for Solving Complaints.

In conclusion, we believe that in order to achieve an efficient public procurement system, thus leading to increased confidence of the participants in the manner of awarding publicly financed contract, the following measures should be taken:

- legislative stability so that the parties are allowed to acquire and deepen it;
- training development in public procurement, because lack of experts it is found in the market, capable to advise both the contracting authorities in the preparation/initiation of the award procedure and subsequently, during the proposal assessment phase and the economic operators - tenderers, in preparing tenders ;
- increased transparency throughout the award process, in order to remove all possible suspicions, measure which could implicitly lead to removal of the conflict of interest and/or incompatibilities;
- decreased number of contracting authorities by creating centralized procurement units;
- strengthening the institutional capacity of authorities in public procurement.