



POSITION PAPER

**An efficient complaint settlement system
is instrumental for an efficient public
procurement system**

Chisinau 2019

POSITION PAPER

An efficient complaint settlement system is instrumental for an efficient public procurement system

Authors: Viorel Parvan, Diana Enachi

Viorel Pârvan and Diana Enachi contributed to this document.

This analysis was produced with the „Cutting edge improvements in the public procurement system in Moldova through inclusiveness, creativity and law-abiding practices” Project financed by the EU. Responsibility for the content of this publication lies with the authors and it does not necessarily reflect the EU's position.



Acest proiect este finanțat de către Uniunea Europeană.
Delegația Uniunii Europene în Republica Moldova
Str. Kogălniceanu, 12 MD 2001 Chișinău, Republica Moldova
Tel: (+37322) 210932 Fax: (+37322) 245714

Comisia Europeană este organul executiv al UE.

„Uniunea Europeană este constituită din 28 state membre care au decis să-și unească treptat know-how-ul, resursele și destinele. Împreună, pe parcursul unei perioade de extindere de 50 de ani, ele au creat o zonă de stabilitate, democrație și dezvoltare durabilă, asigurând diversitatea culturală, toleranța și libertățile individuale. Uniunea Europeană este decisă de a împărtăși realizările și valorile sale cu țările și popoarele de dincolo de frontierele sale.”



British Embassy
Chisinau



Proiectul este implementat
de Institutul pentru
Dezvoltare și Inițiative
Sociale (IDIS) „Viitorul”

Date de contact:
MD 2005 Chișinău
Str. Iacob Hâncu 10/1
Tel: (+37322) 210932
Fax: (+37322) 245714



The Institute for Development and Social Initiatives (IDIS) "Viitorul" is the successor of the Viitorul Foundation, maintaining the traditions, objectives and principles of action of the foundation, among which are: the formation of democratic institutions and the development of a spirit of an effective spirit of responsibility among politicians, civil servants and the citizens of our country, strengthening the civil society and critical spirit, promoting the freedoms and values of an open, modernized and pro-European society. IDIS "Viitorul" is an institution of research , training, and public initiative, active in a number of areas related to economic analysis, governance, political research, strategic planning, and the management of knowledge in the Republic of Moldova.

Any use of extracts or opinions belonging to the author of this publication should contain a reference to IDIS "Viitorul".

For more information on this publication or with regard to the subscription to the publications issued by IDIS, please contact IDIS "Viitorul".

Contact Address:

Chisinau, Iacob Hancu 10/1, 2004, Republica Moldova

Telephone: (373-22) 21 09 32

Fax: (373-22) 24 57 14

www.viitorul.org

TABLE OF CONTENTS

Introduction	4
Employed methodology.....	5
Evolution of appeals in 2018.....	6
Filing appeals against public procurement procedures	9
Causes determining the contestation in the procedures of public procurement.....	11
The procedure for examination and settlement of appeals	12
The transparency of NASC’s activity.....	14
Final conclusions and policy recommendations	15

Introduction

The deficiencies in the public procurement system are reflected in the appeals submitted by the economic operators. The **number of such complaints submitted by economic operators is another indicator of the deficiencies in the national procurement system, which can be both legislative and procedural.** The premise from which we start is that settling appeals is not a distinct field, but an integral part of the national procurement system which as a whole has to ensure compliance with and application of the basic principles of public procurement. In this context, permanent communication and a unique approach of all the institutions involved are needed, especially on issues that are under-regulated and therefore generate high discretion and corruption risks in their implementation.

The underlying objective of a dispute settlement system is to ensure the effectiveness of the ways of filing appeals and to remedy the inappropriate application of public procurement law, as well as the violations committed by contracting authorities in the course of a public procurement procedure. At the same time, it is a tool for economic operators to defend their rights that have been injured in a procurement procedure, a tool which, if effectively applied, strengthens their confidence in the procurement system and contributes to the development of the competition in the procurement market.

Therefore, **the functioning of an effective dispute settlement system is also the key to an efficient public procurement system,** being beneficial for public authorities, economic operators, and the society in general. As also mentioned in the performance report of the National Agency for the Solving Complaints (henceforth ANSC)¹, **it is not sufficient to have an authority with competencies to resolve the complaints, but rather it is necessary that its activity should be fully in line with those best practices at European and international level.** According to the Strategy for the Development of the Public Procurement System for the years 2016-2020², it is necessary to ensure the full independence of NASC, the transparency and impartiality of its activities, as required by the European Union, the World Trade Organization (WTO) Government Procurement Agreement, and the provisions and commitments assumed by signing the Association Agreement.

Through this position paper, IDIS „Viitorul” aims to evaluate the functioning of the system for solving complaints in the field of public procurement and the **observance the principles of transparency, efficiency and impartiality by in the activity of NASC.** Also, following the analysis of the surveys and relevant observations, the authors present a series of policy measures and proposals with the goal of improving the transparency and efficiency of NASC’s activity, as well as the level of confidence in the system for resolving complaints.

¹ <https://ansc.md/ro/advanced-page-type/rapoarte>

² <http://lex.justice.md/md/368482/>

Employed methodology

For the purpose of this document, a series of empirical data gathered between July 2018 and February 2019 was collected and analyzed using an evaluation questionnaire distributed to the actors in the field. Thus, of the total of 64 completed questionnaires, 16 were completed by economic operators, 45 - by representatives of the contracting authorities (13 - central public authorities, and 32 - local public authorities), and 3 questionnaires - by representatives of the non-governmental organizations. The questionnaire included 3 core components, each comprising several sections / questions, as follows.

The participants in the evaluation have expressed their opinion, also putting forward some solutions on the following aspects:

- **What methods have been used to file an appeal with NASC ;**
- **If they have been satisfied with the decision issued by NASC;**
- **For those unsatisfied with the decision issued by NASC, if they have attacked it in the court, according to the legal framework;**
- **The causes that determine the formulation of appeals in public procurement procedures;**
- **Compliance with the adversarial principle, as well as that of legality, celerity, and of the right to defense in the process of examining and solving of appeals**
- **Aspects of the appeal procedure that need to be improved;**
- **Actions needed to improve the transparency of NASC's activity.**

Also, in the process of elaborating this document, the authors analyzed the provisions of the primary and normative-secondary legal framework regarding appeals, the NASC performance report for 2018, the data and information published on the NASC web page (appeals, decisions issued by NASC, complaint-solving sessions, NASC reports, etc.), field studies and analyses. Another instrument employed was the participation in the public sessions where the appeals were being reviewed by NASC.

The evolution of appeals in 2018

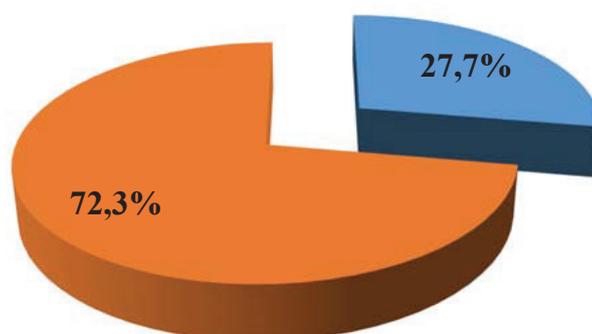
In 2018, the number of contestations filed by economic operators at NASC was 726, according to the NASC report quoted above. Comparing this number to the data published by the Public Procurement Agency (henceforth PPA) in its activity report for 2018, we find that about 3% (of total number) of public procurement procedures were contested, a fairly low indicator, which may be caused by various factors, including the lack of motivation/confidence of operators to defend their rights, the complicated or bureaucratized procedure, limited information, limited access to NASC's decision-making process, etc. However, the estimated value of the disputed acquisitions is very high and represents about 2.5 billion MDL. Considering that in 2018, the total value of purchases amounted to 10.5 billion lei, we deduce that, according to the value criterion, about 20% of the procurements were contested. According to PPA reports for 2015 and 2016, the percentage of contested procedures was around 8% between 2015-2016, which means that in 2018 it has fallen by almost two-thirds.

Analyzed according to the object of the appeal, of the 726 complaints, 176 were submitted at the stage prior to bid opening and related to **awarding documentation (27.7%)**, and another **550 complaints related to the outcome of the procedure (72.3%)**. It is worth mentioning that this proportion has changed compared to the results of the analysis put forward in the Report concerning the evaluation of the appeal solving system drafted by DIS „Viitorul” and presented in November 2018. According to that paper, between January and September 2018, the complaints regarding the awarding documentation versus those referring to the results of the procedure had a ratio of about **19% to 81%**.

Figure 1. The ratio of the complaints filed against tender documentation and procurement procedure outcomes.

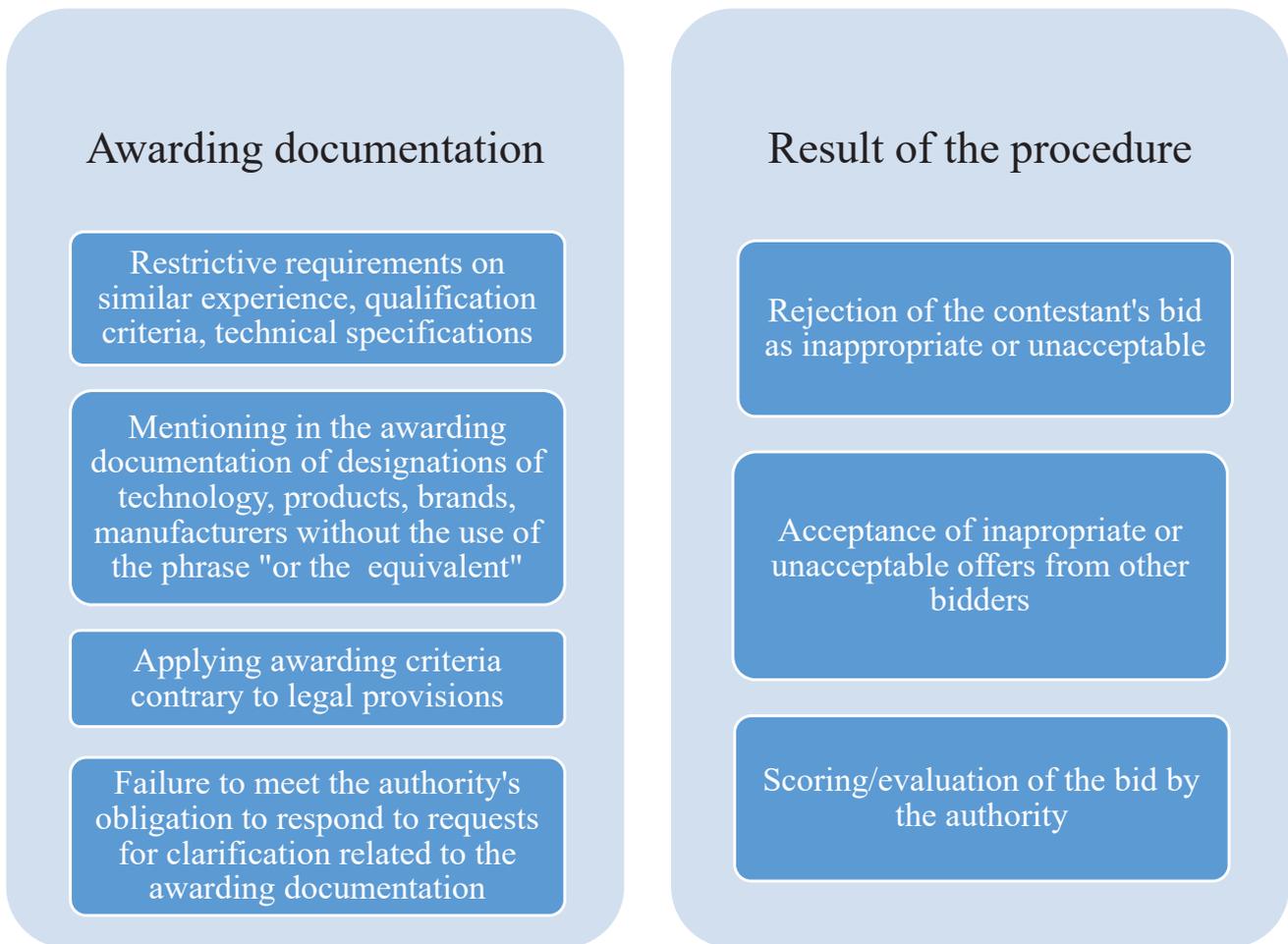
Appeals according to their object

■ Awarding documentation ■ Procedure result



³ <http://viitorul.org/files/library/Coperta%20Evaluare%20Sistem%20Achizitii%20WEB%20rev.pdf>

Below is a picture of the most frequent issues, grouped by the object of contestation and cited in the appeals filed by economic operators at NASC.



As a result of the registered appeals, **NASC issued, in 2018, 596 decisions**, out of which 23% (135 appeals) were admitted, another 20% (119 appeals) were partially admitted, and over half (53% or 315 appeals) - were rejected. In the case of 27 complaints (4%), NASC determined that their examination is not within its competence. This high rate of rejection may be triggered by one or more of the following system deficiencies, including insufficient information from economic operators about the peculiarities of appeals procedures, lack of trust in the integrity of the appeal system, insufficient preparation of the argumentation of their case/position, lack of resources, etc.

The structure of the rejected complaints is also important in order to better understand the causes of a large number of rejected complaints. Thus, of the 315 rejected appeals, 197 were considered unfounded, 105 - submitted late, and the remaining 13 - non-compliant / without an object. **The large number of late submissions (about 17.6%)** is an indicator of a lack or insufficient information of economic operators regarding the appeal procedure and the legal terms of filing an appeal under the provisions of Law 131/2015 (art. 83). Therefore, actions are needed to inform and train economic operators to ensure compliance with the terms, but also to increase the quality of the appeals, **as late appeals will be rejected by ANSC without being examined in substance.**

In the first four months of 2019, the number of appeals filed increased significantly, by about 50%. If in 2018, 202 appeals were filed, then 293 appeals were filed at NASC in 2019. Of these, 33 complaints were filed against the awarding documentation (11.3%), and the other 260 appeals concerned the outcome of the procedure (88.7%). This indicator can be interpreted from two points of view. On one hand, as a result of information sessions, guides and information made public by both NASC and civil society organizations, economic agents are now more informed and more prepared to defend their rights. On the other hand, it can be judged as an indicator of a malfunction in the system, as the cause for the increase in the number of complaints is an aspect that needs to be further explored by NASC and other procurement authorities.

Filing appeals against public procurement procedures

The functioning of the appeal system, the procedure for filing and settling complaints against public procurement procedures is governed by Law 131/2015 as well as by the Parliament's Decision (No 271 of 15.12. 2016) on the establishment, organization, and functioning of the National Agency for Solving Complaints.

NASC **has the role of ensuring that economic operators have access to a way of appealing against** acts and actions of contracting authorities which are issued in breach of public procurement law, and to the public sessions in which the examination of the filed appeals is being conducted. NASC has the **obligation to defend the rights** and legitimate interests invoked in the appeals, **without privileges, and without discrimination.**

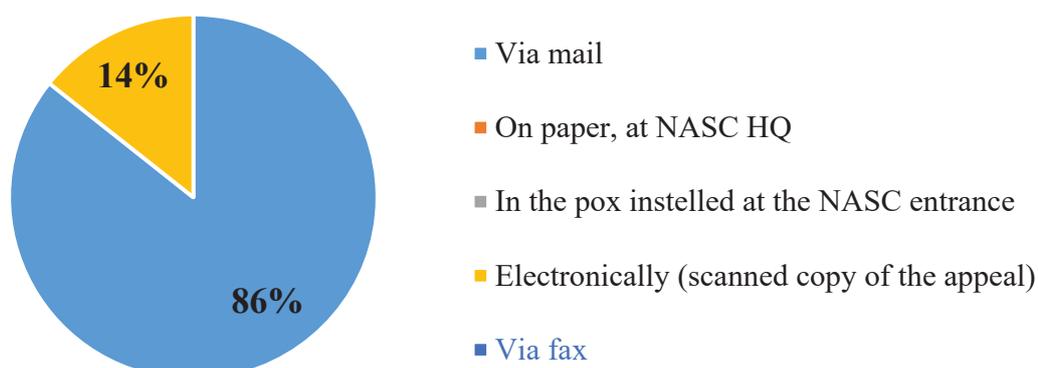
A **legislative novelty** in the field is that since February 17, according to the Law no.121 of 05.07.2018 (Official Monitor of 17.08.2018) regarding the concessions of works and the concessions of services, **the responsibilities of NASC cover also** the appeals against concessions in the field of works as well as against concessions of services.

Another novelty that adds value to the appeal system is **the possibility of filing online complaints (electronically signed) on the NASC website, which facilitates the filing of the appeal** and encourages economic operators to defend the rights that they consider to have been injured in a public procurement procedure.

Regarding the **modalities used by participants in the questionnaire to lodge an appeal**, the results show that the most common way, used in 86% of disputes, is via mail, followed by the electronic way (submitting the scanned copy of the appeal) with 14%. No appeals were filed by the respondent economic agents on paper, at the ANSC headquarters, in the box installed at the entrance of the ANSC headquarters, or by fax.

Figure 2. Utilized ways of submitting appeals

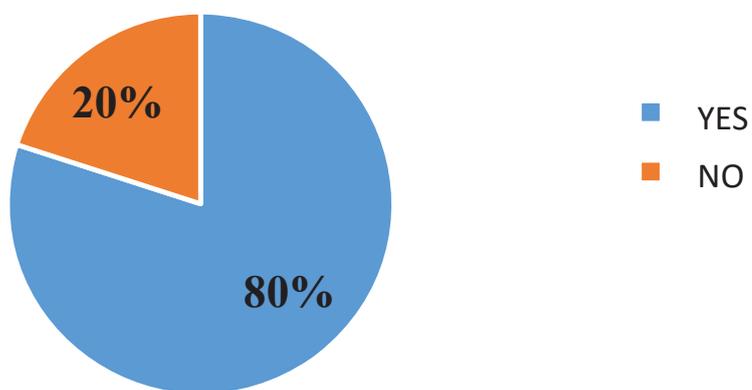
Utilized ways of filing appeals



In the case of the methods by which the appeal can be filed, it must be mentioned that with the introduction of the electronic means of communication, **the economic operators can sign electronically the complaint filed with NASC**, which, on one hand, reduces the time and resources required from the economic agent, while on the other hand motivates economic agents to defend their allegedly injured rights in procurement procedures.

Figure 3 below shows that of the total of respondents, about 80% remained satisfied with NASC's decision, while about 20% of economic operators were not satisfied. **However, none of the economic operators appealed NASC's decision in a competent court.** It is worth mentioning that during the year 2018, NASC was summoned in 20 lawsuits of administrative litigation with reference to the decisions issued on the appeals of the economic operators. Of these, 7 claims were dismissed as unfounded, for one the application was rejected as late, in one case the application was returned, and in another case, the plaintiff dropped charges.

Figure 3. ANSC Economic operators' satisfaction concerning NASCS' decisions



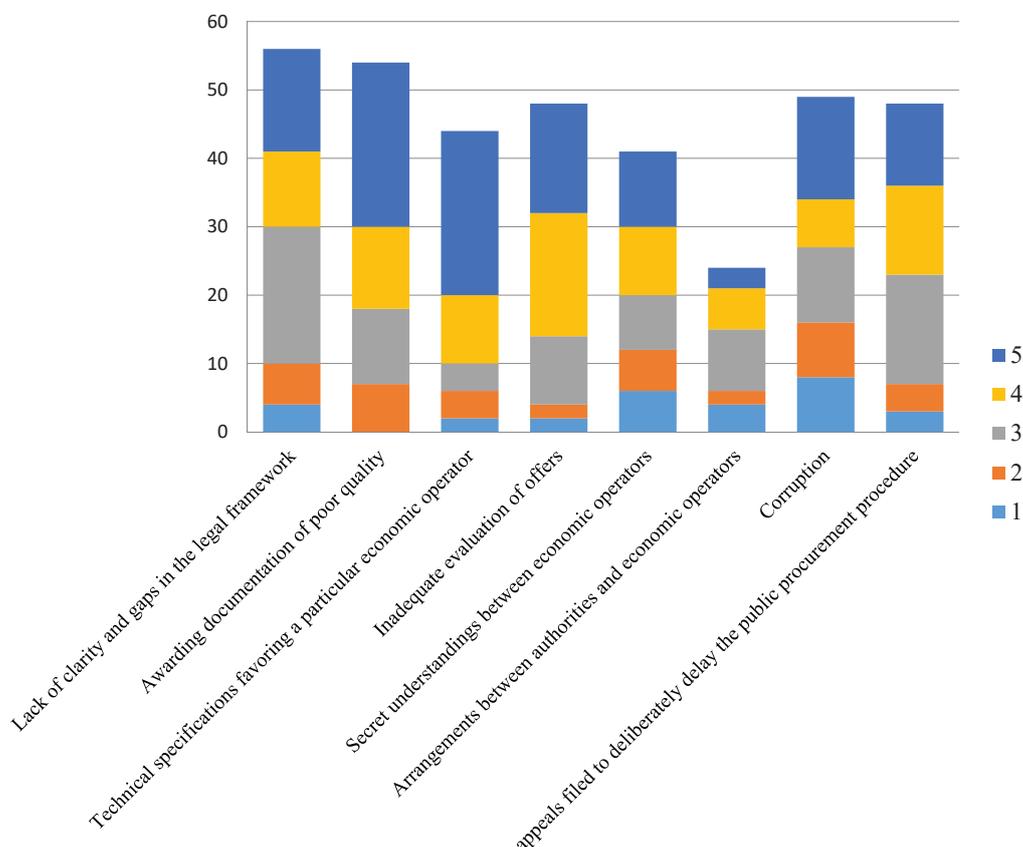
Causes determining the contestation in the procedures of public procurement

The participants in the questionnaire were asked to mention and evaluate, on a 1 to 5 scale, which are the most frequent factors that cause them to formulate an appeal against the public procurement procedures in which they participate or intend to participate.

Figure 5 shows that the most common causes of appeals in public procurement procedures are:

- ✓ **lack of clarity and gaps in the legal framework;**
- ✓ **awarding documentation of poor quality;**
- ✓ **technical specifications favoring a particular economic operator;**
- ✓ **inadequate evaluation of offers;**
- ✓ **secret agreements between economic operators;**
- ✓ **corruption;**
- ✓ **the bad faith of some economic operators (appeals filed to deliberately delay the public procurement procedure).**

Figure 4. Causes determining contestations in the procedures of public procurement.



The procedure for examination and settlement of the appeals

In the process of examining and solving appeals, NASC should be guided by the **adversarial principle, as well as by those of legality, celerity, adversity, and of the right to defense**. It should be mentioned that NASC first takes a decision on whether to accept the appeal or not, and that if it **decides that there are good causes for not doing so, the substantive examination of the case is not carried out**.

The process of examining appeals contains the following steps:

1

- NASC checks whether the legal terms for appeals have been respected;
- If legal terms have been breached, the appeal will be rejected.

2

- If the appeal does not contain all the necessary information, NASC will ask the challenger to provide them within 5 days;
- If the contestant does not comply, the appeal will be rejected.

3

- If the rules for submitting complaints have been complied with, NASC may request the contracting authority's point of view;
- The authority has the obligation to notify the participants (within 1 day) about the filed appeal and to provide them with a copy of it.

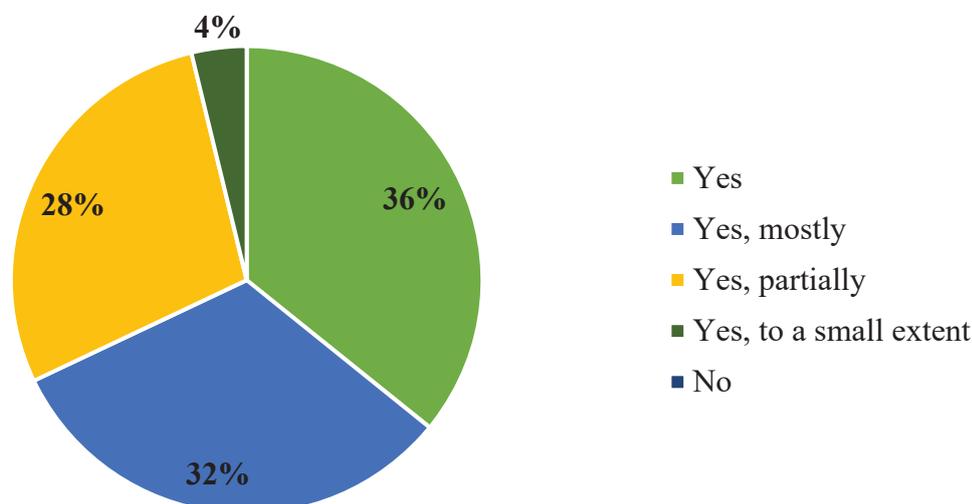
4

- The Authority has the obligation to transmit its point of view within 5 days, with the annexation of the relevant documents, both to NASC and to the objector;
- The Authority has the obligation to respond to any NASC request regarding the submission of documents relevant to the appeal within 5 days.

The purpose of this section of the questionnaire was to identify the perception regarding NASCS's compliance with the adversarial principle as well as those of legality, celerity, and of the defense during the procedure for the examination and settlement of appeals.

Figure 5. To what extent are respected the adversarial principle as well as those of legality, celerity and of the right to defense in the procedure of examining and solving complaints?

Compliance with the adversarial principle as well as those of legality, celerity, and of the defense



As a result of the analysis of respondents' answers, we obtained the following picture: **36% of the respondents fully agreed (yes)** that NASC complies with the adversarial principle as well as with those of legality, celerity, and of the right to defense in the procedure of examination and resolution of appeals. Another **32% responded with yes, mostly** and **28% agreed, but only partially, while 4%** thought that the examination and resolution sessions did little to respect the stated principles.

The transparency of NASC's activity

Regarding the transparency of the appeal process, the legal framework provides for NASC to hold **open sessions for the examination of appeals and to ensure that information on the date and venue of the sessions is published** on the website 3 working days before the date on which they will take place. Any interested person can participate in these meetings without prior registration. At the same time, at least 3 working days before the date of the meeting, the NASC sends the invitations for participation to the contracting authority and to the challenger. The ANSC may also invite at the hearing the economic operator designated as the winner in the public procurement procedure the appeal against which will be examined. The contracting authority and the opposing party have the **obligation to attend public hearings** on examination of appeals so as to put forward their arguments.

As far as ANSC decisions are concerned, **they are published on the website within 3 days** of adoption. A positive novelty in terms of transparency is the **inclusion of a new heading in the „Decisions“** section, namely the rubric **„Enforcement of decisions“** by the concerned authorities. However, most of the time the information under this heading is either missing or is simply stated as „reported“ or „missing information“, which is insufficient and does not accurately reflect the actions taken by the contracting authority as a result of the NASC's remedial measures. The legal framework stipulates the obligation for the authority **to report on actions taken to enforce the decision ordering remedial measures**.

The recommendations provided by the respondents regarding the **actions that could increase the transparency of NASC** are the following:

- Publication of the information on NASC's activity in various sources;
- Online broadcasting of the sessions for reviewing appeals, placing them on the web page, as well as archiving them so that they can be viewed later;
- Avoiding the violation of the legal term of publishing the decisions issued by NASC, as some decisions were published too late on NASC's web page;
- Placing information in the appropriate sections and columns of the web page so that it is easily accessed and navigated; Display all of the reviewed appeals on the agency website;
- Selection of qualified specialists;
- Respecting the principles of equality, impartiality and equal treatment;
- Appeal-solving counselors of integrity;
- Data about counselors should be public;
- Organization of information and training activities.

As regards transparency, there is a tendency towards the **need to digitize the review and resolution process**. This is evidenced by the fact that a significant percentage of respondents **identifies digitization as a potential solution to problems in the appeal system**. In the same way, the wide dissemination of information on NASC's activity is seen as a way to bring the agency's work to the attention of the public and thus to compel it to maintain a high standard of transparency.

Final conclusions and policy recommendations

First of all, it is of paramount importance that NASC should uniformize the decisions it issues, including through the development and publication of **uniform practices** that provide predictability on appeals and exclude potential controversies and different interpretations. Although this was mentioned by NASC's management during a public event in November 2018⁴, as of May 2019 only a single case was published on NASC's page, namely the one regarding the objections concerning the decision of a working group to reject the offer on the grounds that the amount of the wages of the construction workers indicated in quotation, does not correspond to the amount of the salary regulated by the informative-normative letter of the Ministry of Regional Development and Constructions no. 05-806 of 02.05.2017 regarding the determination of the value of the construction objectives starting with 01.05.2017⁵. Additionally, **two other uniformized solutions** were mentioned in the NASC Performance Report for 2018⁶. The first concerns the use of electronic signatures in public procurement, and the second concerns the decision of the working group to accept offers on security services that are drafted without taking into account labor legislation. Therefore, it is recommended that NASC periodically analyze the most frequently committed violations in public procurement procedures in order to undertake the necessary measures and **to uniformize the judicial practice of settling appeals, thus maintaining a high level of objectivity and impartiality in the process of solving appeals.**

It is also necessary to **involve NASC in the process of public procurement policy development** through various activities, such as information, interpretations, collaboration protocols, inter-institutional working groups on narrow subjects. Thus, it is recommended for NASC, which is one of the components of the public procurement ecosystem, **to communicate and collaborate permanently** with public authorities that have the role in elaborating, controlling and supervising the electronic purchasing system, i.e. the Ministry of Finance, the Public Procurement Agency, Center of Information Technologies in Finances, Court of Accounts and Financial Inspectorate, and the courts of law; **it is also recommended that NASC strengthens its cooperation with the institutions which govern the sector to which the object of the contested procurement procedure relates.** Effective and ongoing collaboration between these institutions will result in the uniformization of practices in the field of public procurement and, implicitly, the resolution of the issue concerning aspects which are vaguely or insufficiently regulated in the primary legal or normative-secondary framework. In this respect, at the beginning of this year, a joint meeting organized by NASC on the topic of public procurement reform through joint efforts, as results from a post-event communiqué published on the NASC web page⁷.

The participants in the surveys were asked to identify those aspects of the dispute resolution procedure, which, in their opinion, require improvements and the intervention of authorities tasked

⁴ <http://viitorul.org/ro/content/rezultatele-evalu%C4%83rii-contesta%C8%9Bilor-%C3%AEn-achizi%C8%9Bii-%C8%99i-bunele-practici-europene-discutate-la>

⁵ <https://ansc.md/ro/advanced-page-type/intrebari-frecvente>

⁶ <https://ansc.md/ro/advanced-page-type/rapoarte>

⁷ <https://ansc.md/ro/content/continuarea-reformei-sistemului-achizitiilor-publice-prin-eforturi-comune>

with the development of procurement and appeal policies. The table of recommendations on improvements needed in the appeal system is presented below. In it, we see various proposals and recommendations provided by the participants. **It should be stressed that the live transmission of the sessions and/or the possibility of visualizing appeals in the SIA RSAP** was proposed by some 26% of respondents, highlighting the tendency among them towards the need to **digitize the appeal system** and to increase, in this way, its transparency. In the same context, the participants in the questionnaires ask the authorities **to integrate the system of solving complaints into the electronic public procurement system** so that they are automatically present in the system, thus ensuring the timely information of the participants as well as the transparency of the process. At the same time, out of the total of sum of answers, stands out the need **to introduce a possibility of sanctioning** the economic operators, which, through filing appeals, deliberately delayed the procedure of awarding the contract by the contracting authority. Another suggestion mentioned by **10.5% of respondents is to attract experts to the appeal examination sessions**, as well as other proposals that are found in the scheme below.

Introducing a possibility of sanctioning the economic operators, which, through filing appeals, deliberately delayed the procedure of awarding the contract by the contracting authority.

Improving the transparency of public complaint settlement sessions through their live broadcasting

Use of mediation as a means of resolving the disputed decision.

Reducing / limiting the number of documents requested by NASC in the dispute resolution process.

Elaboration of a "Questions and Answers" section on the NASC web page with the publication and permanent updating of the information.

Attracting experts to attend the sessions for solving appeals.

A deeper analysis of the filed appeals.

Introducing and visualizing complaints directly in the electronic procurement system.

Improving the level of professionalism of the counselors as well as the speed of solving appeals.

Organization of training seminars, with the analysis of specific examples.

