



POSITION PAPER

Procurement of construction works–complaints and non-unitary practices

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Acronyms

- CA** – Contracting Authority;
- EC** – Elements of the complaint;
- EO** – Economic Operator;
- ESPD** – European Single Procurement Document;
- EV** – Estimated value of procurement calculated by the contracting authority, without VAT.
- OC** – Object of the complaint;
- OP** – Object of procurement;
- NACS** – National Agency for Complaints Settlement;
- PDS** – Procurement Data Sheet;
- SDNC** – The System of Normative Documents in Constructions;

Introduction

The National Agency for NACSS Settlement (NACS) is an autonomous public authority that is independent from other public authorities and natural and legal persons. NACS handles the complaints related to public procurement procedures.

NACS examines the complaints submitted by economic operators under Law no. 131 of 03.07.2015 *on public procurement*¹ and Law no. 121 of 05.07.2018 *on works and services concessions*².

The complaints submitted by economic operators are related to the procedures whose object of procurement includes goods, services and works.

According to the *Annual Performance Report for 2017*³, out of the total number of 200 complaints issued by economic operators and registered with the NACS, **60 complaints that were submitted pertained to works**, which represents **30%** of the total number of lodged complaints. According to the *Annual Performance Report for 2018*⁴, out of the total number of 596 complaints issued by economic operators and registered with the NACS, **204 complaints that were submitted pertained to procurement of works**, which represents **34%** of the total number of lodged complaints.

With the amendments that emerged through Law no. 169 of 26.07.2018, published in the *Monitorul Oficial* (Official Gazette) no. 321-332, with the date of entry into force 01.10.2018 and article 65, para. (5), the written and signed offer shall be submitted in line with the requirements laid down in the tender documentation, using the Automated Information System "State Registry of Public Procurement" MTender (AIS "SRPP") with the exception of cases foreseen in art.33 para. (7) and (11).

In the context of this position paper, we aim at **evaluating the cases related to the decisions delivered by NACS in relation to public procurement of works**. We shall pay greater attention to the decisions concerning the complaints of economic operators in terms of **means of developing expenditure estimates based on resources method**.

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

2 http://www.legis.md/cautare/getResults?doc_id=105485&lang=ro

3 https://ansc.md/sites/default/files/document/attachments/raport_de_performanta_ansc_pentru_anul_2017.pdf

4 https://ansc.md/sites/default/files/document/attachments/raport_de_performanta_ansc_pentru_anul_2018.pdf

Methodology

In view of developing this position paper, we analysed the decisions issued by the NACS on the complaints lodged by economic operators in the process of public procurement, between **October 2018** and **July 2019**. The selection departed from the object of procurement: **construction works** in which the contesting party made complaints regarding the breaches identified in the technical bids of other participants in the public procurement procedure.

Another tool that was used is the participation in **public hearings for handling complaints** organised by **NACS** in regard to the complaints lodged by economic operators:

1. **Danlevita SRL vs. Bălți city hall**, regarding open tender no. ocds-b3wdp1-MD-1556274343665; object of procurement: *"Fitting-out works for universal sports grounds"*.
2. **IM PRO EX 2005 SRL/Eurostil Construct SRL/Vicoliv Grup SRL vs. National Integrity Authority** regarding open tender no. ocds-b3wdp1-MD-155506899592; object of procurement: *"Repair and Resystematisation of premises situated on the 1st and 2nd floors, including the facade (D+P+1E), on 26, Mitropolit Gavriil Bănulescu-Bodoni bd., Chisinau"*.
3. **Luxgaz SRL vs. General Division for Public Transport and Communication Lines** regarding open tender no. ocds-b3wdp1-MD-1555937959953; object of procurement: *"Layout of parking areas, pavement of communication lines in Chisinau, for the year 2019"*.

Evaluation of NACS based on the COMPLAINTS related to the technical bid for works

AIS “SRPP” MTender became mandatory on 17 October 2018⁵, and the bid-related documentation is now public and can be viewed by all the participants in the public procurement procedure. Therefore, both the contracting authority and economic operators as well as the civil society can assess in parallel the bid of the economic operator that ranked 1st, according to the awarding criterion. In case of works procurement, the contracting authority is obliged to assess the compliance of the technical bid and namely, how the expenditure estimates were developed and which is the economic basis of the elements of the price.

Starting with 01.10.2018, economic operators frequently challenge the non-compliance of bid estimates of the competitors in the public procurement procedure. According to **article 65, para. (4)** of Law no. 131/2015, the submission of a bid implies the submission of *the technical proposal, financial proposal, of ESPD and if necessary, of the tender security* in a common set.

When works are procured, the contracting authority initiates and carries out the procedures for public procurement of works in line with *the Standard documentation for the public procurement of works*, approved by order no. 176 of 05.10.2018⁶.

Under **pt. 20.1** and **20.3** of the Standard Documentation, the bid shall include the following forms:

1. The form of the bid (F3.1);
2. A letter of bank security (F3.2) in original;
3. **The technical bid** in line with the technical specifications;
4. Any other document required under pt. 3 of the PDS;
5. The European Single Procurement Document (herein after ESPD).

The bid shall encompass:

- 1. The technical bid** – the bidder shall develop the technical bid so that it fully meets the qualification requirements, as well as the requirements foreseen in the technical specifications. The technical bid shall encompass: the works execution time-schedule, **estimate documentation** (forms 3, 5, 7 in line with CPL.01.01-2012), according to Estimates Form no.1 – list with the amount of works.

⁵ Order of the Ministry of Finances no. 157 of 14 September 2018 and its subsequent amendments

⁶ <http://lex.justice.md/md/377590/>

- 2. The financial bid** – the bidder shall develop the financial bid, so that it provides the requested information on prices, tariffs, as well as commercial and financial conditions related to the object of the public works contract. The **form of bid F3.1** shall be accompanied by the estimate bid, drafted in line with the norms applied in the domain.

Therefore, the **estimate bid** is one of the core documents based on which the technical and financial bids are assessed.

Estimates for the participation in the public procurement process is developed by using the resources method approved by Governmental Decision no. 1570 of 9 December 2002 *“On emergency measures to switch to the new normative basis of estimates in constructions”*⁷.

Thus, upon procurement of works on a project and the estimates, the contracting authorities shall request the development of estimate documentation by using the resources method and applying the new normative basis of estimates, while economic operators shall submit the bid containing the expenditure estimates drafted in line with the technical specifications and by observing the following Moldovan norms and codes of good practice in constructions, according to the System of Normative Documents in Constructions (SNDC):

- 1. NCM L.01.01-2012** *“Rules to establish the value of construction items”*
- 2. CP L.01.01-2012** *“Instructions on the development of estimates for construction and assembly works based on the resources method”*
- 3. CP L.01.02-2012** *“Instructions to establish expenditure estimates related to wages in constructions”*
- 4. CP L.01.03-2012** *“Instructions regarding the calculation of overheads upon the establishment of the value of items”*
- 5. CP L.01.04-2012** *“Instructions regarding the establishment of expenditure estimates for the functioning of the construction machinery”*
- 6. CP L.01.05-2012** *“Instructions regarding the establishment of the value of the estimate benefit in price formation for the construction production”*
- 7. CP L.01.06-2013** *“Instructions regarding the establishment of estimates for adjustment and start-up works based on the resources method”*
- 8. CP L.01.07-2012** *“Instructions regarding the establishment of the value of purchase-storage expenditures in constructions”*

Considering the complexity of expenditure estimates developed for the bid, economic operators often challenge the estimate bids of the competitors taking part in the public procurement procedure. The most common complaints regarding the expenditure estimates refer to:

⁷ <http://lex.justice.md/md/299610/>

- ✓ **Non-compliance of amounts requested in the technical specifications with the bidder's expenditure estimates;**
- ✓ **Wrong implementation of estimate norms in the bid estimates of the participant;**
- ✓ **Amendment of estimate norms, and therefore, these do not comply with the technical specifications or the norms approved by the National Supervisory Body in Constructions (NBC);**
- ✓ **Inclusion of prices 0.00 (zero) to consumption resources of the bid;**
- ✓ **Costs for expenditures related to construction workers' pay, transportation expenditure, overheads, estimate benefit etc.**

The decisions that are examined further on tackle the assessment by NACS through the lenses of principles regulated in **art. 7** of Law 131/15, namely:

- *letter a) efficient use of public money and mitigation of risks of the contracting authorities*
- *i) proportionality.*

Name	<i>Case I. Decision no. 03D-355-19 of 13.06.2019</i>	<i>Case II. Decision no. 03D-513-19 of 14.08.2019</i>
EO vs. CA	SC Foremcons SRL vs. Colonița town hall, Chisinau municipality	Prestigiu-AZ vs. Ialoveni District Council
OP	General repair works and horizontal expansion of a construction for two groups of children, at the kindergarten no. 24, "IZVORAS"	Repair works of an access road segment towards the high school in village Costești, Ialoveni district
No. in MTender	ocds-b3wdp1-MD-1553772512373	ocds-b3wdp1-MD-1561557849882
Type of procedure	Open tender	Open tender
EV	7 885 242 lei	3 273 650 lei
OC	Outcomes of procedure	Outcomes of procedure
EC	The contracting authority accepted the non-compliant or unacceptable bids of other participants	The bid of the contesting party was dismissed as being non-compliant and unacceptable
Content of decision	Dismissed complaint; unfounded complaint	Dismissed complaint; unfounded complaint
Complaint of EO	Incorrect development of the expenditure estimates of the winning economic operator, by including different estimate norms than the ones requested by the contracting authority.	Rejection of the bid because of incorrect development of the expenditure estimates, by including different estimate norms than the ones requested by the contracting authority.

Arguments of the CA	The authority qualified as insignificant deviation the inclusion of different estimate norms than the ones requested by the contracting authority.	Did not present the opinion concerning the complaint that was submitted.
Assessment by NACS	The Agency maintains the arguments of the contracting authority: since the content and the essence of the works and their quantity were not modified, the CA considered this non-compliance as an insignificant deviation, given that the next bid in the price ranking is with over 1 180 000 lei higher, the rejection of the bid of “Comod Construct” SRL under such circumstances would be a disproportionate measure in relation to the identified deviation.	NACS attests the non-compliance of the technical proposal of the contesting party’s bid with the technical specifications developed by the contracting authority and this also ensues from the outcomes of the complaint – a situation that is contrary to provisions under pt. 20.3 of the mentioned standard documentation, according to which, the bidder is obliged to draw the technical bid in line with all the requirements foreseen by the technical specifications.
Decision of NACS	The complaint is dismissed as unfounded	The complaint is dismissed as unfounded

In the 1st case, Decision no. 03D-355-19 of 13.06.2019, the contesting party expressed its disagreement in relation to the decision of the working group which accepted the bid of the economic operator “Comod Construct” SRL. The inclusion of a different estimate norm than the one requested in the technical specifications under point 12, section no. 2-1-1, “*Constructive architectural solutions*” (CAS) is among the complaints that were invoked; namely, the estimate norm “**RpCB18D**”, was replaced by estimate norm “**RpCB18G**”, and accordingly, the contesting party considers that this is a mistake related to the development of the expenditure estimate.

In its assessment, NACS declares that demolition works of old concrete with mechanical means were requested according to the technical specifications in line with the estimate norm “**RpCB18G**,” the total volume being 11.2 m³. According to the bid estimate submitted by “Comod Construct” SRL, what was requested is demolition works of old concrete with mechanical means in line with the estimate norm “**RpCB18D**”. The volume is similar – 11.2 m³.

Hence, NACS specifies that under art. 69 para. (5) of Law no. 131/15, the contracting authority is entitled to consider the bid, even if there are minor deviations from the tender documentation, errors or omissions that can be removed without undermining its essence. Any such deviation is expressed quantitatively, to the extent possible and is taken into account when assessing or comparing the bids. Provisions under pt. 41.2 of the standard documentation on procurement of works, approved by the order of the Ministry of Finances no. 176 of 05.10.2018, considers that a deviation is insignificant if:

- a) *it does not substantially affect the scope, quality or performance of the services foreseen in the contract;*
- b) *it does not substantially limit the rights of the contracting authority or obligations of the bidder foreseen in the contract;*
- c) *does not unfairly affect the competitive position of other bidders that submit bids in line with the requirements.*

Consequently, based on the de facto and de jure circumstances aforementioned, NACS maintains the arguments of the contracting authority: since neither the content, nor the essence of the works were altered and their quantity is the same, the CA considered this non-compliance as an insignificant deviation, and bearing in mind that the next bid in the price ranking is with over (+) **1 180 000 lei** higher, the rejection of the bid submitted by "Comod Construct" SRL under such circumstances would have been a disproportionate measure in relation to the identified deviation.

In the 2nd case, Decision no. 03D-513-19 of 14.08.2019, NACS mentions that according to the technical specifications, the following works were requested under heading no. 8 of the List with work amounts: "*Milling and filling in the holes on the asphalt concrete covering, repaired surface up to 1m²: thickness– 7 cm*" in line with the estimate norm **DI158B**, with a total volume of 400 m². According to the bid estimate submitted by the economic operator "Prestigiu-AZ" SRL, under heading no.8, it offers works "*Cutting with the milling machine of the worn asphalt concrete; width of drum: 1000 mm, thickness of layer: 7 cm*" in line with the estimate norm **DI155B**. The volume is the same: 400 m². The next bid in the price ranking is with over (+) **195 302 lei** higher.

NACS found a non-compliance of the technical proposal of the bid with the requirements of the technical specifications developed by the contracting authority and the arguments of the contesting party that it accepted a mechanical error when editing the bid to the estimate norm relating to heading no. 8 cannot be maintained, respectively, the cost difference shall be paid by the company. According to art. 69 para. (5) of Law no. 131/15, the contracting authority is entitled to consider the compliant bid if it contains insignificant deviations from the provisions of the tender documentation, errors or omission that can be removed without affecting its essence. Concerning the case, on the one hand, other types of works are tendered than the one requested by the technical specifications and on the other hand, the requirements foreseen in the technical specifications are not fully met and also, the price of contesting party's bid has a direct impact and in this context, such issues are tackled by art. 69 para. (4) of the same Law, which lays down that the contracting authority shall not accept changes in the bid, including in its price, which would make the bid meet some requirements that it would initially fail to.

Therefore, we found that NACS, in the aforementioned decisions, interprets differently the notion of "**insignificant deviation**", especially the use of estimate norm that is different from the one requested in the technical specifications. In the **1st case**, NACS qualified this mistake as an insignificant deviation according to pt. 41.2 from the standard documentation on works procurement to the extent that the next bidder according to the awarding criterion had a higher price, while in the **2nd case**, NACS found that the estimated of the economic operator does not comply with the technical specifications and the use of different norms than the ones required by the technical specifications cannot be qualified as an insignificant error, despite the fact that the bidder declared it was a mechanical mistake and the cost difference would be paid by the company. Therefore, in this case, the unitary price for this heading remains unchanged. To respect the principles of proportionality means to ensure the correlation between need, the object of procurement and requirements. The contracting authority shall ensure that the bidder is capable to implement the contract, requesting in this way, explanations regarding the bid lodged by the economic operator, and if a choice between several appropriate measures

is possible, one shall opt for the less restrictive, and the caused inconveniences shall not be disproportionate to the pursued aim.

Therefore, the notion “**insignificant deviation**” is interpreted differently in similar cases and such interpretations can lead to the violation of the proportionality principle and impact the efficiency of public procurement. Hence, the technical errors identified in the assessment process shall be clarified through a request of information from the contracting authority made by the economic operator. After receiving and assessing the provided clarifications, the contracting authority shall decide the compliance of the bid, so that the technical bid meets the requirements foreseen in the technical specifications. If the bid corresponds to the terms, conditions and specifications from the tender documentation, and there are no essential deviations or there are insignificant deviations, errors or omissions, it shall be accepted.

Conclusions and recommendations

The cases that were examined allow the identification of requirements in the process of handling the complaints lodged in relation to works procurement procedures. It is essential to establish some definitions and limits regarding the significant and insignificant deviations when developing the estimate bids and inform the economic operators about the outcomes of the cases by examining the complaints in similar cases. The document based on which the economic operator expresses their consent on the participation conditions and commits to implement the contract is the Form of the bid F3.1, including by establishing the conditions related to the participation security and the security of good execution of contract. Therefore, the following measures would be recommended:

- ✓ **Application of the principle of proportionality**, regulated in art. 7 letter i) of Law no. 131/15 to the relationship between the object of the public procurement contract and the requirements to be met by economic operators, and also, to the assessment of the bid lodged within the framework of the procedure, so that the rejection of economic operators' bids, who had major omissions while drafting the estimate bids, but fully assume to execute the contract in line with the technical specifications, would be contrary to the principle of efficient use of public money.
- ✓ **The contracting authorities shall be encouraged to publish the information from the catalogue of unitary prices (Form no.5) along with the lists of work amounts**, so that all economic operators have equal opportunities in interpreting the estimate norms.
- ✓ **Development and publication of unified solutions**. Like in the case of the unified solution regarding the quantum of construction workers' pay, NACS shall express its opinion on the quanta of other elements that form the price in the area of construction and assembly works: transportation costs, overheads, estimate benefit etc. Thus, the contracting authorities shall not disqualify the economic operators because they included in their bid estimates a lower quantum than the one foreseen in the *Informative normative letter no. 10/1 0086 of the Ministry of Economy and Infrastructure of the Republic of Moldova on the establishment of the value of construction items, starting with 1 May 2018*.

The measures enlisted above would lead to a decrease in the number of complaints related to the works procurement procedures and would accelerate the process of complaints examination and settlement.

