



## ***ASSESSING PROCUREMENT FRAUD: Policies and practice***

# **ROMANIA**

The Review & Remedy System

**NATIONAL COUNCIL FOR SOLVING COMPLAINTS**

N.C.S.C.

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# National rules for the transposition of EU law into national law



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- **G.E.O.** (Government Emergency Ordinance) **no. 34/2006** approved by Law 337/2006, regarding the award of public procurement contracts, public works concession contracts and services concession contracts was harmonized with the following EU legislation:
  - ***The Directive 2004/17/EC*** - *coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors;*
  - ***The Directive 2004/18/EC*** - *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;*
  - ***The Directive 2007/66/EC*** - *amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.*

# The legal system



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- The national legislation is structured on two levels:

## Primary legislation:

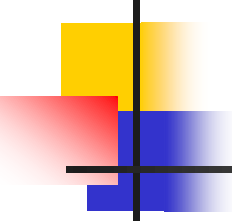
G.E.O. no. 34/2006 with subsequent amendments

## Secondary legislation:

G.D. (Government Decision) no. 925/2006 for approving of the application norms of the G.E.O. no. 34/2006

G.D. no. 1660/2006 for approving the application norms of the provisions referring to the award of procurement contracts by electronic means

**Procedures** – „In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of Directive 2004/18/EC” (article 28).



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- Open procedure
- Restricted procedure
- Competitive dialogue
- Negotiated procedure:
  - with prior publication of a contract notice
  - without publication of a contract notice
- Request for tender
- Design contest



# Special procedures/ Direct procurement

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- Framework agreement
- Dynamic purchasing system
- Electronic auction
- The estimated value of the direct procurement cannot exceed the equivalent in RON (Romanian official currency) of:
  - *30.000 EUR* (without VAT) for each products/ services procurement
  - *100.000 EUR* (without VAT) for each procurement of works



# Contract award criteria

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- The tender most economically advantageous
- The lowest price only



# The Romanian review system

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- **The Directive 2007/66/EC** – General statements:

*- „Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive (...).”;*

*- „Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement”.*

# Review bodies



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- Administrative – jurisdictional body:  
***The National Council for Solving Complaints***  
(N.C.S.C.);
- Administrative branch of justice: the courts at the level of each county/the contentious-administrative sections (Tribunal County)
- Claims against the N.C.S.C.'s decisions are submitted to the Court of Appeals (the contentious-administrative sections)



# The National Council for Solving Complaints (N.C.S.C.)

## – *First instance review body*

- **N.C.S.C.** is an administrative – jurisdictional body created with the purpose of guaranteeing the compliance with the public procurement legislation by the contracting authorities, due to its primary role of remediation and, subsidiary, of canceling the illegal designation procedures.
- **N.C.S.C.** has the independence required to the performance of the administrative – jurisdictional act, not being subordinated to any authority or public institution.

# N.C.S.C. Scope

## (pre – contractual review)

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- Claimant = any person considering suffering a damage in a right or a legitimate interest by an act of the contracting authority, through the violation of the legal provisions in matters of public procurement
- All contracts covered by the G.E.O. no. 34/2006
- All contracting authorities, including bodies obliged to comply with EU or national rules concerning the competition procedure for the award of public works, supplies and services contracts

# N.C.S.C. Structure (I)



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- N.C.S.C. functions on the basis of its own Organization and Functioning Regulation approved by the G.D. no. 1037/2011
- Exercising its attributions, N.C.S.C. adopts decisions, based on the coherent application of the legislation in force, according to the expressly regulated principles of: legality, expediency, contradictory and the right to a defense.



## N.C.S.C. Structure (II)

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- N.C.S.C. solves complaints through specialized 3-member panels (11 panels);
- N.C.S.C.'s members are civil servants (special status) assigned by the Prime Minister decision, based on winning a public contest;
- Members' professional profile: at least 9 years experience in legal, technical, economical field and two years public procurement experience;
- The president is chosen among the members of the N.C.S.C., on a three years period, by secret vote, with an absolute majority and must hold a law license degree.



# N.C.S.C. Activity performance

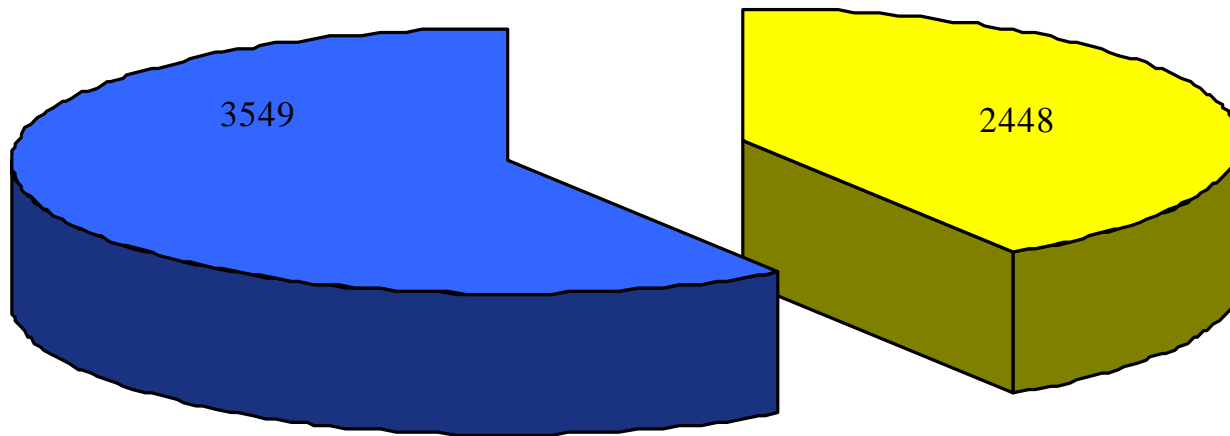
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- According to the law, the cases regarding the legal disputes are electronically randomly distributed to the panels;
- Total number of complaints, September 2006 (establishment date) - December 31<sup>st</sup> 2012: **41,541**;
- Complaints submitted by the economic operators during January 1<sup>st</sup> – December 31<sup>st</sup> 2012: **5,997** (4.7 % less than 2011; an average of 545 complaints/ panel/ year)

# Types of complaints – 2012

## A) Based on procedures' phase

- tender documents – 3,549
- procedures' result – 2,448

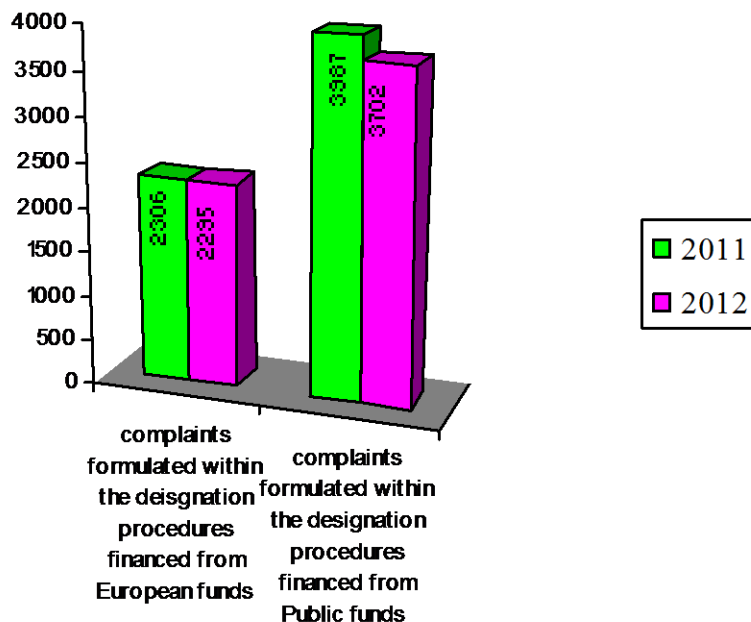


■ complaints to documentation ■ complaints upon the result

# Types of complaints - 2012

## B) Based on financing source

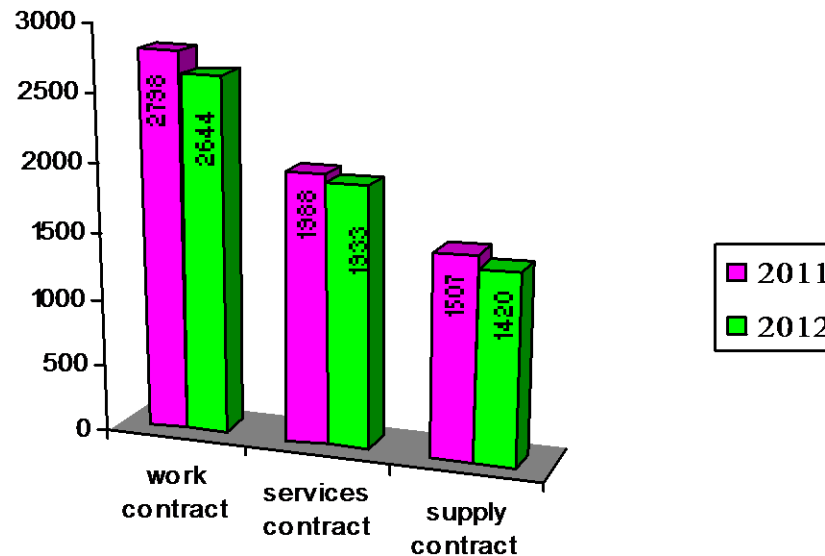
- public procurement contracts financed from European Funds – 2,295 (38.27%)
- public procurement contracts financed from internal public funds – 3,702 (61.73%)



# Type of complaints

## C) Based on the scope of the public procurement contract

- work execution – 2,644 (44.09%)
- products supply– 1,933 (32.23%)
- services provision – 1,420 (23.68%)





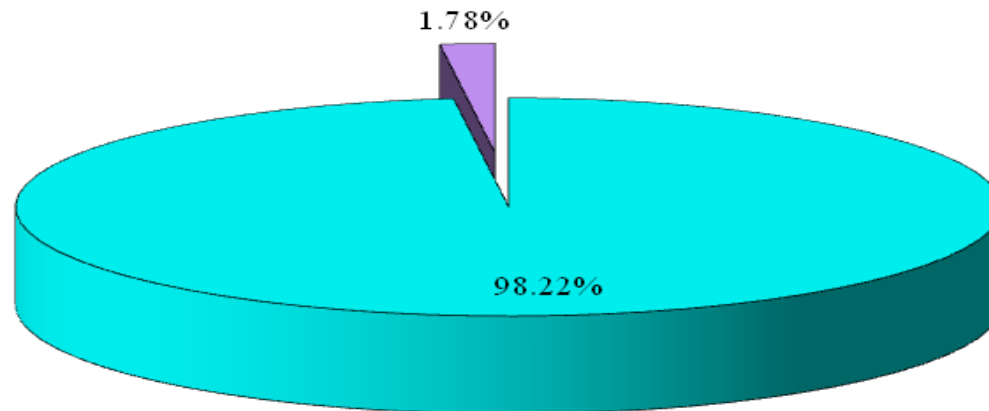


# Situation of decisions issued by N.C.S.C. and amended by the Courts of Appeal

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- During 2012, out of the total of 5,782 decisions, only 750 (12.97%) were appealed with complaints addressed to the competent Court of Appeal, where the contracting authority is registered (the number of complaints formulated decreased by 1.70% compared to previous year and by 18.21 % compared to 2010);
- Eventually only 71 decisions were fully canceled by the courts of law (**1.23%** out of the total of decisions) and only 39 were partially modified (0.67% out of the total of decisions).

# Situation of N.C.S.C.' decisions challenged in the Court of appeals during 2006-2012



■ decisions remained final and irrevocable during 2006-2012    ■ complaints admitted during 2006-2012

# Top reasons for complaints about tender documents



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- restrictive requirements concerning the qualification criteria or technical specifications;
- award criteria and assessment factors;
- mentions within the designation procedure of certain technologies denominations, products, marks, etc. without using „or the equivalent“ phrase;
- lack of a clear answer, complete and free of ambiguities from the contracting authority to the clarification inquiry targeting the tender documentation;
- requested form of the participation warranty;
- imposition of certain excessive contractual clauses;
- the failure to divide the procurement into batches.

# Top reasons for complaints about the result of the procedure



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- offers' opening meeting report;
- challenger's offer rejection as non-conform or unacceptable;
- the apparently unusually low price;
- qualification documents formulated by other bidders or the manner to assess them;
- reasons for the rejection of the offer missing from the result communication notice;
- contracting authority's failure to request clarifications during the evaluation process;
- concerning one's offer or incorrect appreciation of the answer to the clarifications request;
- annulment of the designation procedure.



# Managing a more effectively process to solve complaints

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- forging legislative stability;
- providing an adequate staff training which develops activities within public procurement area for the contracting authorities and staff selection in line with their real competencies;
- increasing the transparency and reducing the bureaucracy regarding the awarding procedures initiated in order to conclude the public procurement agreements;
- determining certain efficient mechanisms to find the incompatibility situations or conflict of interests within public procurement area.



# Final remarks

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- „Complaining isn't wrong it's a right”;
- Romanian procurement remedy system starts to pay off;
- N.C.S.C. 2012 report is available at:  
[www.cnsc.ro](http://www.cnsc.ro)