Sarbu Partners

Practical Guide on Public Procurement Legal Remedies before the CNSC

Abstract

This material provides a structured and accessible overview of the key legal aspects concerning the Complaints filed before the National Council for Solving Complaints (CNSC) in relation to public procurement awarding procedures.

Designed as a practical tool both for Economic Operators seeking to protect their rights in awarding procedures and for legal professionals active in Romanian Public Procurement, the guide covers:

- *the time limits for filing a Complaint and the objection based on late filing;*
- *the obligation to notify the Contracting Authority of the Complaint within the applicable time limit;*
- *the categories of persons entitled to file a Complaint;*
- *remedial measures that may be adopted by the Contracting Authority after receiving a Complaint;*
- *the requirements regarding the content of the Complaint and the possibility to supplement the grounds based on newly discovered elements;*
- *the setting, lodging, and refund of the security deposit;*
- *the Complaint settlement procedure, including the types of evidence admissible and relevant procedural time limits;*
- *the possible solutions and the Council's decision.*

***Key words**: Romanian Public Procurement; CNSC Complaint; CNSC security; public procurement Complaint time-limit; public procurement Complaint procedure; intervention in a CNSC Complaint.*

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1. Introduction

The challenging procedure in the field of public procurement is characterised by its complexity and strict procedural rigor, being governed by mandatory rules and time-limits regulated by Law No. 101/2016 on Remedies and Appeals in Public Procurement.

Within such a clearly defined legal framework, a thorough understanding of procedural rules is essential for all parties involved in the award of public contracts - not only to safeguard their rights, but also to ensure the legality and transparency of the public procurement awarding process.

This Guide offers a detailed analysis of the Complaint filed before the National Council for Solving Complaints (CNSC), approached from both a procedural and legal perspective.

The analysis is grounded in the applicable legal provisions, supplemented by relevant doctrinal interpretations and case law, thereby providing a clear and comprehensive overview of the procedural mechanisms involved.

The Guide aims to serve as a practical tool for all companies engaged in administrative-jurisdictional proceedings in the field of public procurement, thus contributing to the improved implementation and application of the current legal framework.

2. Time Limits for Filing Complaints. Objection based on Late Filing

Complaints filed through administrative-jurisdictional proceedings must comply with the time limits and calculation methods regulated by Law No. 101/2016, which constitutes a derogation from the general rules established under the Romanian Civil Procedure Code (RCPC).

According to Article 8 of Law No. 101/2016, the time limit for filing a Complaint against an act considered prejudicial, issued by the Contracting Authority, is:

- **10 days**, where the estimated value of the awarding procedure is equal to or greater than the thresholds that require publication of the contract notice in the Official Journal of the European Union, in accordance with the applicable public procurement legislation; or
- **7 days**, where the estimated value of the procedure is below these thresholds.

Article 5 of Law No. 101/2016 provides that the time limit shall begin on the day following the communication of the act and shall expire at the end of the last hour of the final day of the time limit.

If the final day of the time limit falls on a non-working day, the deadline shall be extended until the end of the next working day, except where the time limit is expressed in hours.

The method of calculating time limits under Law No. 101/2016 differs from the general method regulated by RCPC.

While under the general rules the last day of the time limit is not included in the calculation[1], Law No. 101/2016 expressly provides for its inclusion: "*it ends at the expiration of the last hour of the last day of the time limit*" [2].

Consequently, any Complaint filed on the day following the last day of the applicable time limit shall be deemed late.

Pursuant to Article 8(1) of Law No. 101/2016, the time limit for filing a Complaint begins on the day following the date the Economic Operator becomes aware of the act of the Contracting Authority deemed unlawful.

Article 8(2) of Law No. 101/2016 establishes that, in the case of Complaints concerning the Awarding Documentation published in Romanian Electronic System for Public Procurements (SEAP), the date of publication shall be considered the date of becoming aware of it.

With respect to the moment from which the time limit for challenging the result of the awarding procedure begins to run, CNSC has ruled in one of its decisions that the mere publication in SEAP of a notice regarding the rejection of a tender does not meet the legal conditions to be deemed an administrative act within the meaning of Article 3 of Law No. 101/2016, and does not provide sufficient detail on the reasons for the rejection to allow for the filing of a reasoned Complaint.

CNSC held that:

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[1] Art. 181(1)(1) RCPC: "*When the time limit is calculated in days, neither the day on which it begins to run nor the day on which it expires shall be included in the calculation*".

[2] Art. 5 Law No. 101/2016: *"(1) The procedural time limits established by this law, expressed in days, shall begin to run from the first hour of the first day of the time limit and shall end at the expiration of the last hour of the last day of the time limit. (2) The day on which a procedural act is communicated shall not be included in the calculation of the time limit. If the last day of a time limit expressed other than in hours falls on a non-working day, the time limit shall end at the expiration of the last hour of the next working day*."

"*(...)* ***the information posted in SEAP does not produce the legal effect of rejecting the tender and triggering the right to challenge such a measure****, since, for the legality of a decision on the evaluation of a tender to be ensured, the procedure must include the drafting and approval of the procurement report. The right to challenge such an act of the Contracting Authority arises only after the communication of the result of the procedure is carried out in accordance with the applicable provisions of Law No. 99/2016*"[3].

Furthermore, the Council found that:

"*(...) the message posted in SEAP contains only a generic reason for rejecting the tender. (...) Consequently, it cannot be lawfully maintained that the right to challenge the Contracting Authority's decision to reject the tender arose on the date (...) when the Contracting Authority posted in SEAP the information regarding the rejection of the tender submitted by the complainant*"[4].

Therefore, the mere publication in SEAP of a generic notice regarding the rejection of a tender does not trigger the commencement of the time limit for challenging the procurement report.

3. The Obligation to Submit the Complaint to the Contracting Authority within the Time Limit for Filing the Complaint before the CNSC

The Complaint, accompanied by supporting documents, must be submitted to both the CNSC and the Contracting Authority within the legal time limit for filing, pursuant to Article 16 (1) of Law No. 101/2016

Although it is not required that both entities receive the submission on the same day, both communications must occur within the statutory time limit for filing the Complaint. Failure to comply with this requirement will result in the Complaint being dismissed as late filed.

The communication sent to the Contracting Authority must be identical to the one sent to the Council and must include both the Complaint itself and all annexed supporting documents.

[3] CNSC, Decision No. 804/C2/758 of 23 May 2019, available online at: www.sintact.ro.
[4] *Ibidem*.

In practice, it has been held that mere notification of the Contracting Authority regarding the filing of a Complaint is not sufficient to fulfil the requirement set out in Article 16 of the Law.

In a relevant case, the Council ruled as follows:

"*In this case, it is found that the complainant, in fulfilling the legal obligation to notify the Contracting Authority of the filed Complaint, failed to comply with the mandatory provision of the law, the Complaint was registered with the Council on 27.01.2009 (...), whereas the Contracting Authority was only notified on 17.02.2009, thus the time limits provided (...) were not observed.*

Consequently, the Council rightly and lawfully rejected the Complaint as being filed late, in accordance with the express and mandatory provisions of the law, and therefore the complainant's appeal shall be dismissed as unfounded"[5].

The same interpretation was upheld by the Bucharest Court of Appeal, which ruled that a notification sent to the Contracting Authority does not equate to the communication of the Complaint:

"*The Court cannot uphold the arguments made in the appeal, as Article 271(1) of Government Emergency Ordinance No. 34/2006 (i.e., the former public procurement legislation in Romania) does not provide for any equivalent form of communication, and therefore the Complaint cannot be replaced by a notification or any other document, even if it contains the same content.*"[6]

Therefore, in order to avoid the risk of the Complaint being dismissed as late filed, it is essential that the Complaint and the supporting documents are transmitted within the legal time limit, in full and in identical form, to both the Council and the Contracting Authority.

4. Persons Entitled to File a Complaint

According to Article 2(1) of Law No. 101/2016, a Complaint may be filed by any person who considers themselves to be harmed in a right or in a legitimate interest by an act of the Contracting Authority.

[5] Alba Iulia Court of Appeal, Decision No. 590/2009 of 29 April 2009, available online at: www.sintact.ro.
[6] Bucharest Court of Appeal, Decision No. 3127/2015 of 28 May 2015, available online at: www.sintact.ro.

For the purposes of Article 3(1)(f) of Law No. 101/2016, a person who considers themselves harmed refers to an Economic Operator who: (i) has or had an interest in relation to an awarding procedure, and (ii) has suffered, is suffering, or risks suffering harm as a result of an act of the Contracting Authority capable of producing legal effects, or due to the failure to resolve, within the legal timeframe, a request concerning an awarding procedure.

With regard to the requirement of interest in the award procedure, Article 3(3) of Law No. 101/2016 provides that this requirement is deemed fulfilled as long as the Economic Operator has not been definitively excluded from the awarding procedure. An exclusion is considered definitive if it has been notified to the concerned candidate/tenderer and has either been upheld as lawful by the Council or a court, or can no longer be subject to remedies.

Consequently, supporting third parties, subcontractors, or suppliers may not file a Complaint on behalf of the tenderer, as they do not hold a direct interest in the resolution of the case.

However, pursuant to the provisions of Article 61(3) of RCPC[7], it is considered that supporting third parties or subcontractors may file an application for intervention in support of the tenderer with whom they intend to sign a contract in the event of that tenderer's success in the awarding procedure.

A particular situation arises when the successful tender (which includes supporting third parties or subcontractors) is challenged, but the successful tenderer does not intervene in the Complaint in support of the Contracting Authority.

In such cases, it is considered that the supporting third parties or subcontractors may intervene in support of the Contracting Authority, as they hold an interest in the awarding procedure because they are expected to perform part of the contract, and may suffer harm if the awarding procedure is annulled and relaunched.

With respect to consortia of Economic Operators, Article 2(2) of Law No. 101/2016 provides that any member of the consortium may individually file a Complaint.

This right is based on the existence of a personal interest: in the event of contract award, each member is expected to perform a part of the contract. Therefore, even in

[7] Art. 61(3) RCPC: "*Intervention is accessory when it solely supports the defense of one of the parties.*"

the absence of consensus among the consortium members, any one of them may challenge an act that affects their chances of being awarded the contract.

5. Remedial Measures the Contracting Authority May Adopt Upon Receipt of the Complaint

According to Article 9(1) of Law No. 101/2016, the Contracting Authority has the possibility to adopt, within 3 days from the receipt of the Complaint, the remedial measures it considers necessary.

In legal doctrine, this time limit has been criticized as being too short, especially in the context of complex awarding procedures that may involve technical clarifications or detailed assessments requiring a longer period. It has been argued that the Contracting Authority should be allowed to adopt remedial measures even after the expiration of the 3-day term, as long as this occurs before the Complaint is settled by the Council or the court[8].

According to Article 9(1) of Law No. 101/2016:

- remedial measures adopted before the deadline for the submission of requests to participate or tenders shall be published in SEAP; and
- remedial measures adopted in relation to acts subsequent to the submission of tenders shall be communicated to the complainant, the other Economic Operators involved in the procedure, and the Council.

In the case of an awarding procedure not initiated through publication in SEAP, the remedial measures adopted by the Contracting Authority shall be communicated by any other means provided under the public procurement legislation.

Where the complainant considers that the measures taken by the Contracting Authority are sufficient to remedy the alleged harm, they shall submit a request for withdrawal of the Complaint (to both the Council and the Contracting Authority), in accordance with Article 9(3) of Law No. 101/2016.

In such cases, the Contracting Authority is no longer required to submit Observations, and the Complaint will no longer be refereed by the Council.

[8] D. D. Şerban, *Remedii şi căi de atac în domeniul achiziţiilor publice*, Hamangiu Publishing House, Bucharest, 2019, pp. 275-276.

The legislator's choice to dispense with the Contracting Authority's Observations when the complainant withdraws the Complaint following the adoption of remedial measures has been criticized in the legal literature, with the argument that these "*should still be present in the case file, at least as an expression of the right to defence*."[9]

In our opinion, the communication of remedial measures adopted by the Contracting Authority is equivalent to an acknowledgment of the complainant's claims and of the Authority's own fault in the conduct of the awarding procedure.

Where the remedial measures adopted by the Contracting Authority are partial and do not fully address all the claims raised in the Complaint, the complainant is not obliged to withdraw the Complaint before the Council.

The complainant may submit a partial withdrawal request to both the Council and the Contracting Authority, while continuing to seek a ruling on the remaining unresolved issues.

If the remedial measures cover all claims in the Complaint, but the complainant considers the measures themselves to be harmful, we consider that these can be challenged separately, through a new Complaint, as they constitute a new harmful act of the Contracting Authority and involve different grounds for Complaint.

There have been cases where, further to the remedial measures adopted by the Contracting Authority, the Council dismissed the Complaint as without object, even in the absence of a formal withdrawal request by the complainant[10].

In such situations, it is considered that the tenderer has the right to file an appeal against the Council's decision, if they consider that the remedial measures adopted by the Contracting Authority are themselves harmful.

In practice, it is common for the Contracting Authority to adopt remedial measures after a Complaint has been filed.

6. The Elements of the Complaint

According to the provisions of Article 10 of Law No. 101/2016, the Complaint must be filed in writing and must include the following elements: (i) the identification details of

[9] *Ibidem*.
[10] *Ibidem*.

the complainant, including email address and telephone number for the communication of any procedural documents; (ii) the name and registered office of the Contracting Authority; (iii) the subject matter of the contract, the awarding procedure applied, the number and date of the participation notice published in SEAP; (iv) specification of the act challenged; (v) the object of the Complaint; (vi) factual and legal grounds of the Complaint; (vii) evidence supporting the Complaint; and (viii) the signature.

When the Complaint is submitted through a representative, it must be accompanied by a power of attorney (or other legal instrument proving representation), as applicable.

Regarding the object of the claim, the Complaint may challenge either acts prior to the final evaluation or the final report of the awarding procedure. Intermediate decisions issued by the Contracting Authority during the evaluation stage may not be challenged by Complaint, except for requests for clarifications or responses to such requests.

The reasoning of the Complaint is an essential element, with the parties obliged to present the facts underlying their claims and defences accurately and completely, without distorting or omitting any known information.

According to Article 21(3) of Law No. 101/2016, no new grounds for Complaint may be submitted or presented in written or oral pleadings after the legal time limit for their submission.

Doctrinally, it has been held that merely stating an alleged legal violation is insufficient; the complainant must specify the concrete circumstances on which their claims are based. A Complaint limited to generalities (e.g., simply reproducing the requirements of the awarding documentation and alleging their breach by the winning Economic Operator) cannot be admitted in the absence of specific arguments and relevant evidence[11].

However, Article 11(1) of Law No. 101/2016 provides for the possibility to supplement the Complaint, where the Council considers that the Complaint does not include all the elements required by Article 10 and requests the complainant to complete it.

The complainant is obliged, within 3 days of notification, to supplement the Complaint as required by the Council; otherwise, the Complaint will be annulled.

[11] M. A. Nicolau, *Părțile și obligațiile lor în procedura de soluționare a contestațiilor pe cale administrativ-jurisdicțională, Achiziții publice. Idei noi, practici vechi*, University Publishing House, Bucharest, 2020, pp. 194-195.

Pursuant to Article 20 of the Law, the Council may request from the complainant additional information or documents other than those initially submitted with the Complaint, in accordance with the principle of the active role applicable in the procedure for settling Complaints. These additional documents must also be submitted within 3 days from the request.

Failure to submit additional documents does not prevent the settlement of the Complaint, but entails that such documents cannot be submitted later and the Complaint will be settled exclusively based on the documents on file at the expiry of the time limit, pursuant to the provisions of Article 20(5) of Law No. 101/2016.

7. Supplementing the Grounds of the Complaint. Reinstatement of the Time Limit for New Grounds Identified After Reviewing the File at CNSC

In practice, it is frequently encountered that a complainant identifies new grounds of illegality only upon consulting the procurement file at the headquarters of the CNSC, after having previously been denied access to these documents by the Contracting Authority.

In such cases, the deadline for submitting the Complaint cannot be opposed to the complainant, and the reinstatement of the time limit provided under Article 186 of RCPC[12] applies.

This interpretation is supported by the practice of the CNSC and the case law of the CJEU, which has held that sanctions concerning the tardiness of new grounds are not justified when access to the file was unlawfully restricted, and the complainant did not have a real opportunity to become aware of irregularities in the awarding procedure[13].

[12] Art. 186 RCPC: *"(1) The party who has missed a procedural time limit shall be reinstated in the term only if they prove that the delay was due to well-founded reasons. (2) For this purpose, the party shall perform the procedural act within no more than 15 days from the cessation of the impediment, while also requesting their reinstatement in the term. In the case of exercising remedies, this period is the same as the one provided for exercising the remedy. (3) The request for reinstatement in the term shall be resolved by the court competent to settle the request concerning the right not exercised within the term."*

[13] E. Sârbu, T. Timofticiuc, *Completarea Contestației formulate în fața CNSC*, online available on: https://www.universuljuridic.ro/completarea-contestatiei-formulate-in-fata-cnsc/.

Access to the file compiled at the CNSC is regulated by Article 19 of Law No. 101/2016, which provides that such access is not contingent upon prior access to the documents of the Contracting Authority.

The Council may allow consultation of those documents that the Contracting Authority considered confidential, except for those declared and proven as such by the Economic Operators, which are accessible only with their written consent.

The practice of the courts, including the Bucharest Court of Appeal, has confirmed that the grounds of the Complaint may be supplemented after consulting the file if the restriction of access was unlawful and if the new grounds were discovered only on that occasion[14].

8. Setting, Lodging, and Refund of the Security Deposit

Pursuant to the provisions of Article 11(3) of Law No. 101/2016, a Complaint filed through the administrative-jurisdictional procedure is not subject to fees, unlike Complaints settled through judicial means.

However, for the resolution of the Complaint by the CNSC, it is necessary to submit a security deposit in the amount and under the conditions established by Article 611 of Law No. 101/2016.

The amount of the security deposit is determined with reference to the estimated value of the contract and the stage of the awarding procedure:

- 2% of the estimated contract value, when it is lower the thresholds requiring mandatory publication in the Official Journal of the European Union[15], but not exceeding:

[14] *Ibidem.*

[15] Art. 7 (1) Law No. 98/2016: *"The Contracting Authority has the obligation to publish a contract notice and/or a contract award notice in the Official Journal of the European Union for procurements whose estimated value, excluding VAT, is equal to or greater than the following thresholds: a) 27,334,460 RON, for public works contracts/framework agreements; b) 705,819 RON, for public supply and service contracts/framework agreements; c) 1,090,812 RON, for public supply and service contracts/framework agreements awarded by the county council, local council, the General Council of the Municipality of Bucharest, as well as by public institutions subordinated to them; d) 3,701,850 RON, for public service contracts/framework agreements having as their object social and other specific services, as provided in Annex No. 2*."
Art. 12 (1) Law No. 99/2016: "The Contracting Entity has the obligation to publish a contract notice and/or a contract award notice in the Official Journal of the European Union for procurements whose estimated

- RON 35,000 (approx. € 7,000) for Complaints submitted before the deadline for submitting tenders; and
- RON 88,000 (approx. € 17,600) for Complaints submitted after the deadline for submitting tenders.

- 2% of the estimated contract value, when it is equal to or greater than the thresholds requiring mandatory publication in the Official Journal of the European Union, but not exceeding:
  - RON 220,000 (approx. € 44,000) for Complaints submitted before the deadline for submitting tenders; and
  - RON 2,000,000 (approx. € 400,000) for Complaints submitted after the deadline for submitting tenders.

The security deposit must be lodged within a maximum of 5 days from the date the CNSC is seized, i.e., from the date the Complaint is filed. Failure to pay the security deposit within the legal deadline results in the rejection of the Complaint.

It is important to recall that by the CNSC Plenary Decision of 8 February 2024, the Plenary Decision of 5 June 2018 was repealed. The latter had provided that in cases where Complaints filed with the CNSC were not accompanied by proof of the security deposit, the panel would request the complainants to submit proof of payment within 3 days of receiving the request[16]. Thus, repealing the Plenary Decisions of 2018 ended the practical uncertainties regarding the deadline for submitting the security deposit.

value, excluding VAT, is equal to or greater than the following thresholds: a) 2,186,559 RON, for sectoral supply and service contracts, as well as for design contests; b) 27,334,460 RON, for sectoral works contracts; c) 4,935,800 RON, for sectoral service contracts having as their object social and other specific services, as provided in Annex No. 2."

[16] As a result of the entry into force on June 4, 2018, of Emergency Ordinance No. 45/2018, which introduced Article 611 into Law No. 101/2016 and established the obligation to submit a security deposit for the resolution of a Complaint before the CNSC, without regulating the time limit for its constitution, the Plenary Decision of June 5, 2018 was adopted, which provided that: in the case of Complaints registered with the CNSC that are not accompanied by proof of the security deposit's constitution, the CNSC panel shall request the complainants to submit proof of constitution within 3 days from receiving the request, in the form established by the Annex to the Decision. Subsequently, Article 611 of Law No. 101/2016 was amended, first by Emergency Ordinance No. 23/2020, which regulated for the first time the deadline for lodging the security deposit — 3 working days — and then by Emergency Ordinance No. 114/2020, which modified the deadline to 5 days from the date of notification of the Council. Therefore, starting from 2020, the Plenary Decision of June 5, 2018 no longer reflected the current form of the provisions of Article 611 of Law No. 101/2016, which is why it was repealed (by Plenary Decision No. 1 of February 8, 2024).

If the person who filed the Complaint and lodged the security deposit to the CNSC appeals the Council's decision, they will not be required to pay an additional security deposit during the appeal.

However, if the appeal is filed by a different interested party than the one who paid the security deposit before the CNSC, the appellant must deposit a security amounting to 50% of the original security deposit paid to the CNSC.

The procedure for reimbursing the security deposit depends on the final decision on the Complaint and any compensation claims filed by the Contracting Authority.

If the Complaint is granted, the security deposit shall be refunded upon request submitted after 30 days from the finality of the decision (including after the exhaustion of any appeal procedures, if applicable).

If the Complaint is dismissed, the complainant may also request the refund after 30 days from the final decision. However, in this case, the refund is conditional upon the Contracting Authority's decision to file a compensation claim against the security deposit, based on general law proceedings, seeking reparation for any damage caused by the abusive filing of the Complaint, including damages due to delays in the awarding procedure.

In such a case, pursuant to Article 1064 of the RCPC[17], the security deposit shall remain unavailable until the settlement of the Contracting Authority's claim for damages resulting from the abusive Complaint.

[17] Art. 1064 RCPC: *"(1) The security deposit lodged shall be returned, upon request, after the case related to which the security was established has been finally resolved by a definitive judgment, or after the cessation of the effects of the measure for which it was lodged. (2) The security deposit shall be returned to the person who lodged it insofar as the entitled party has not filed a request for payment of the due compensation within 30 days from the date the judgment became final or, as the case may be, from the date of cessation of the effects of the measure referred to in paragraph (1). Notwithstanding the foregoing, the security deposit shall be returned immediately if the interested party expressly declares that they do not seek to hold the person who lodged the deposit liable for damages caused by the granting of the measure for which the security was lodged. (3) The court shall rule on the request for return of the security deposit by summoning the parties, by means of a decision subject only to appeal before the superior court. The appeal has a suspensive effect. The decision issued by one of the panels of the High Court of Cassation and Justice is final. (4) If the request for which the security was lodged is dismissed, the court shall also order ex officio the return of the security deposit."*

9. Settlement Procedure. Admissible Evidences

9.1. Time Limit for Settling the Complaint

In accordance with the principle of celerity, Article 24 of Law No. 101/2016 establishes that the Council shall settle the Complaint within: (i) 20 days from the date of receipt of the procurement file, in case of a substantive settlement of the Complaint; respectively (ii) 10 days from the date of receipt of the file, in case of an exception that prevents the substantive judgement of the Complaint.

In duly justified cases, the time limit for the settlement of the Complaint may be extended by a maximum of 10 days, which shall be communicated to the Contracting Authority in accordance with the provisions of Article 24(2) of Law 101/2016.

Failure to comply with the time limit for the settlement of the Challenge shall not affect the resolution of the Complaint, but may entail disciplinary liability of the members of the panel.

9.2. File Allocation

Complaints shall be settled in accordance with the principle of random allocation of cases.

In the case of Complaints involving classified information, the panel must be authorized according to Law No. 182/2002 on the protection of classified information.

Also, with regard to the allocation of cases, in order to ensure uniform solutions, Article 17(1) of Law No. 101/2016 provides that:

- Complaints filed by the time limit for the submission of tenders shall be settled by the same panel; and
- Complaints filed after the time limit for submission of tenders shall be settled by the same panel, but different from the panel dealing with Complaints filed before the time limit for submission of tenders.

Article 17(2) of the Law provides that, at each stage, Complaints filed in the same procedure shall be joined.

As soon as the cases are joined, the parties in the original files will be able to express their position on all the documents in the newly formed file, in accordance with the adversarial principle.

9.3. Publicity of the Complaint

According to the provisions of Article (2)-(3) of Law No. 101/2016, the Contracting Authority has the obligation to publish the received Complaint within one day from the communication in SEAP, respectively to communicate the Complaint also to the other Economic Operators involved in the procedure, in the case of tender procedures for which publication in SEAP is not required.

Failure to publish the challenge in SEAP prevents the commencement of any time limits triggered by that moment, including those applicable to the filing of requests for intervention.

9.4. Intervention by Third Parties in a CNSC Complaint

The legislator has regulated, in Article 17(3) of the Law, the possibility for both the Economical Operators interested in participating in the awarding procedure and the Economical Operators already participating in the procedure to file a request for voluntary intervention within 10 days from the date of the publication of the Complaint in SEAP, or from the date of communication of the Complaint, in cases where the procedure is not carried out through publication in SEAP.

According to the provisions of Article 17(4) of Law No. 101/2016, the request for intervention shall be communicated both to the Council and to the Contracting Authority and the complainants within the same time limit for its filing.

With regard to the type of intervention (main or accessory), a doctrinal issue arises concerning the filing of a request for voluntary main intervention[18] and the possibility that such a purported intervention may in fact be a disguised Complaint, aiming to circumvent the Complaint filing time limit[19]. Such a request, although labelled as a

[18] Art. 61 (2) RCPC: *"Intervention is considered main when the intervenor claims, in whole or in part, a right that is the subject of the proceedings or a right closely connected thereto"*.
[19] D. D. Şerban, *Remedii şi căi de atac în domeniul achiziţiilor publice,* Hamangiu Publishing House, Bucharest, 2019, p. 412.

request for intervention, should be reclassified by the CNSC as a Complaint and dismissed as late filed.

In practice, requests for intervention filed generally by the successful tenderers are reclassified by the CNSC as accessory voluntary interventions[20], since those Economical Operators do not submit their own claims but merely support the Contracting Authority, having an interest in preserving their status as winners of the procedure.

9.5. The Observations of the Contracting Authority

According to Article 18(1) of Law No. 101/2016, the Contracting Authority has the obligation to prepare Observations regarding the filed Complaint (similar to a statement of defence in common procedures), which must be submitted both to the CNSC and to the complainant within 5 days from the receipt of the Complaint.

Failure to submit the Observations results in the forfeiture of the Contracting Authority's right to propose evidence or raise objections (with the exception of those concerning public order), pursuant to the express provisions of Article 18(3) of the Law.

At the same time, the absence of the Observations does not constitute an acknowledgment of the complainant's claims[21].

9.6. Transmission of the Procurement File to CNSC

According to Article 18(2) of Law No. 101/2016, the Contracting Authority has the obligation to transmit to the CNSC, within 5 days from the receipt of the Complaint: a copy of the procurement file; proof of submitting the Observations to the complainant; as well as any documents the authority deems relevant.

However, the legislator did not establish any sanctions for the failure to transmit the copy of the procurement file.

Regarding this aspect, legal doctrine has noted that:

[20] Art. 61 (3) RCPC: "*Intervention is accessory when it merely supports the defense of one of the parties.*"
[21] M. A. Nicolau, *op. cit.*, pp. 200-201.

"the absence of a sanction is based on the fact that, by not submitting the file, the time limit for resolving the Complaint (...) does not begin to run, and the existence of a Complaint pending before the CNSC leads to the legal impossibility of concluding the contract; (...)

in view of these aspects, the legislator considered that the failure to comply with the obligation to submit the procurement file does not require express sanctioning, as the extension of the time limit for resolving the Complaint and the impossibility of concluding the contract are, in fact, attributable solely to the Contracting Authority."[22].

9.7. Admissible Evidence

Theoretically, for the resolution of the Complaint, any means of evidence may be administered, provided they are permitted by law, relevant, and conclusive.

Nevertheless, given the written nature of the procedure[23] and the short time frame for settling the Complaint, in practice, witness testimony and expert reports are not administered.

An atypical situation is the submission of an extrajudicial expert report. In such a case, in the spirit of the principle of establishing the truth and the right to evidence, we consider that this type of evidence is admissible and should be taken into account by the Council in determining the facts.

From a procedural standpoint, an extrajudicial expert report will be qualified as documentary evidence and will be administered as a document submitted by the party that filed the evidence.

The evidence must be presented and filed together with the Complaint or the Observations, insofar as possible, in accordance with Article 10 and Article 16 of Law No. 101/2016, as previously analysed.

[22] *Ibidem*.
[23] Art. 21(1) Law No. 101/2016: *"The procedure before the CNSC is conducted in writing; the parties shall be heard only if the panel considers it necessary."*

9.8. Request for Additional Evidence and Information by the CNSC

Article 20 (3)-(4) of Law No. 101/2016 regulates the right of the Council to request from the parties any information and means of evidence it deems necessary for resolving the Complaint.

The complainant or the Contracting Authority, as the case may be, is obligated to transmit the information and means of evidence requested by the Council within 3 days from the date of the request.

According to the provisions of Article 20 (5) of Law No. 101/2016, the settlement of the Complaint shall continue even if the parties do not submit the requested documents or information.

Nevertheless, the failure to submit the documents and information requested by the Council within the time limit provided by law is sanctioned by the forfeiture of the parties' right to submit such documents, the Complaint being resolved solely on the basis of the documents existing in the file.

9.9. Suspension of the Complaint Settlement Procedure

According to Article 25 of Law No. 101/2016, the settlement of the Complaint may be suspended, either *ex officio* or at the request of one of the parties, in the following situations: (i) when the settlement of the Complaint depends, in whole or in part, on the existence or non-existence of a right that is the subject of another proceeding; or (ii) when criminal proceedings have been initiated for an offence committed in connection with the act challenged by the complainant.

With regard to the second situation, public procurement legislation derogates from the general provisions of civil procedure law by establishing that the initiation of criminal proceedings – not merely the commencement of the criminal investigation[24] – is a ground for suspending the settlement of a Complaint.

Therefore, in order for the Complaint to fall within the scope of suspension, it is not sufficient for a criminal investigation *in rem* to have begun; it is necessary for the prosecutor to have issued an ordinance initiating criminal proceedings.

[24] Art. 413(1) RCPC: "*The court may suspend the proceedings: (...) 2. when criminal investigation has been initiated for an offense that could have a decisive influence on the ruling to be issued, unless otherwise provided by law.*"

10. The Solution on the Complaint. CNSC's Decision

10.1. Decisions that the Council May Pronounce

The settlement of Complaints shall be carried out with respect for the principles of disposition, legality, celerity, adversarial procedure, ensuring the right to defence, impartiality, and independence.

The Council shall prioritize ruling on any exceptions raised, and if these are dismissed, it shall proceed to analyse the Complaint on the merits, assessing legality and substantiation, pursuant to the provisions of Article 25 of Law No. 101/2016.

Article 26(6) of Law No. 101/2016 provides that the Complaint may be dismissed as unfounded, late filed, lacking interest, lacking object, filed by a person without standing or by a person who is not a representative, or on the basis of any other exception whose acceptance prevents the settlement on the merits of the Complaint.

According to Article 26(2) of Law No. 101/2016, by admitting the Complaint, the Council may order one of the following: (i) the annulment in whole or in part of the challenged act; (ii) obliging the Contracting Authority to adopt remedial measures to restore legality (clearly indicating the limits of the remedial measures to be adopted by the Contracting Authority and the time limit for implementing the Council's decision); or (iii) the annulment of the awarding procedure, where remediation is not possible.

The law provides two exceptions to the rule that Complaints are settled in accordance with the principle of disposition.

The first concerns the situation where the complainant requests remedial measures, but the Council considers that these are insufficient to restore legality and orders the annulment of the awarding procedure, pursuant to Article 26(7) of Law No. 101/2016.

The second exception refers to the situation where the Council, observing that there are other acts violating public procurement legislation but not referenced in the Complaint, shall notify ANAP and the Court of Accounts pursuant to Article 26(4) of Law No. 101/2016.

If the subject of the Complaint concerns the awarding documentation, the Council may order, as remedial measures, the modification or elimination, as applicable, of certain technical specifications from the tender documentation or any other documents issued within the awarding procedure.

In this case, the Council must justify the limits of the modification or elimination, as applicable, and the time limit within which the Contracting Authority shall implement the Council's decision.

In one of its cases, the Council held that some requirements in the awarding documentation constituted unwritten clauses and ordered the Contracting Authority to remove them from the documentation:

"*in order to respect the principle of transparency, established in Article 2(2)(d) of Emergency Ordinance No. 34/2006, the removal of those requirements from the tender documentation is necessary because, as unwritten clauses, they are not opposable either to the Economical Operators in preparing their offers pursuant to Article 170 of Emergency Ordinance No. 34/2006 (i.e., the former public procurement legislation in Romania), nor to the evaluation committee in exercising its exclusive duties, established under Article 72(2) of Government Decision No. 925/2006, [within 10 days from communication].*"[25]

Where the CNSC admits a Complaint against the awarding documentation and orders remedial measures, the Contracting Authority has a legal obligation to annul the awarding procedure if it finds that it cannot implement the Council's decision without affecting the principles laid down in the public procurement legislation.

If the subject of the Complaint concerns the result of the awarding procedure, the Council may order, as a remedial measure, the re-evaluation of the offers, in which case the Council is obliged to clearly and precisely indicate the limits of the re-evaluation, including the identity of the offers to be re-evaluated, the stages of the procedure to be re-evaluated, and the concrete measures to be adopted by the Contracting Authority.

In CNSC case law it was held that:

"*in the context where the Contracting Authority identified at the stage of technical proposal evaluation five grounds for rejection of the complainant's offer, which proved unfounded, and the Council ordered the re-evaluation of offers in consideration of the reasons presented in the reasoning, it is clear that the re-evaluation activity must continue with regard to the aspects that constituted the unlawful grounds for rejection, and not with regard to other aspects*." [26]

[25] CNSC, Decision published in CNSC Official Bulletin No. 2173/2015, available online at: http://www.cnsc.ro/wp-content/uploads/bo/2015/BO2015_2173.pdf.
[26] CNSC, Decision No. 1615/2019 of 19 September 2019, available online at: www.sintact.ro.

Romanian High Court of Cassation and Justice has also ruled on the limits of re-evaluation, establishing that a CNSC decision ordering the re-evaluation of an offer:

"*obliges the evaluation committee within the Contracting Authority to proceed with the re-evaluation of the tender by verifying other aspects that characterize its admissibility and that were not examined during the initial evaluation, without extending this verification process to those aspects it already checked during the evaluation stage and which were not subject to any remedial request or challenge; the evaluation report, insofar as it confirms these aspects, viewed as an administrative act, is final and binding in this respect.*" [27]

Therefore, if an offer was rejected for failure to meet certain technical requirements and the CNSC admitted the Complaint filed and ordered the re-evaluation of the offer, the Contracting Authority is obliged to re-evaluate exclusively those technical aspects that formed, unlawfully, the basis for excluding the Economical Operator from the awarding procedure, without extending the re-evaluation to elements already analysed and which did not constitute grounds for rejection.

Regarding the limits of re-evaluation, in the same decision the High Court stated:

"*All the more so, in this situation, the re-evaluation process cannot be extended to other offers declared admissible or inadmissible and with respect to which the evaluation report has not been challenged, as it would be contrary to the principle of legal certainty to declare non-compliant or unacceptable a tender previously declared admissible or vice versa, a conduct equivalent to revoking an administrative act that has entered the civil circuit and produced legal effects.*" [28]

Accordingly, the re-evaluation process cannot be extended to those offers (declared admissible or inadmissible) for which the evaluation report has not been contested.

As a rule, the Council cannot decide to award the contract to a specific bidder; however, Article 26(10) of Law No. 101/2016 provides an exception under which the Council may decide to award the contract to a specific Economical Operator if this operator was designated by the Contracting Authority or if their status as winning bidder results from the information contained in the Complaint resolution file.

[27] Romanian Hight Court of Cassation and Justice, Decision No. 66/2018 of 01 October 2018, available online at: www.sintact.ro.
[28] *Ibidem.*

10.2. Standstill Period

Regarding the decisions that CNSC may issue, it is worth mentioning that the Contracting Authority has the right to conclude the contract only after the decision has been communicated by CNSC and only after the expiration of the legal standstill period provided by Article 59(1) of Law No. 101/2016[29].

A contract concluded in breach of the legal waiting period is subject to absolute nullity, according to the provisions of Article 9(4) of Law No. 101/2016.

10.3. CNSC's Decision on Awarding Legal Costs

CNSC shall rule, at the request of the party, also on the awarding of legal costs. According to Article 26(9) of Law No. 101/2016, the party must file the request and the supporting documents prior to the settlement of the Complaint.

Regarding the parties entitled to request the awarding of legal costs, different decisions have been issued in practice.

In one case, CNSC held that only the main parties, and not the accessory interveners, may request legal costs:

"*Although the accessory intervener becomes a party to the proceedings after its request is admitted in principle (...), it does not invoke a proprietary claim in the case to become a 'party that wins the case', but only supports the defense of one of the parties (...),*

[29] Art. 59 (1) Law No. 101/2016: "*In the sense of Article 58 (6), the legal waiting period for concluding the contract shall not be less than: a)* ***11 days****, starting from the day following the notification of the contract award decision to the interested Economical Operators, by any means of communication provided for by the legislation on public procurement, sectoral procurement legislation, or legislation on works concessions and service concessions, where the estimated value of the awarding procedure is equal to or greater than the value thresholds for which publication of the participation notices in the Official Journal of the European Union is mandatory, according to the legislation on public procurement, sectoral procurement legislation, or legislation on works concessions and service concessions; b)* ***8 days****, starting from the day following the notification of the contract award decision to the interested Economical Operators, by any means of communication provided for by the legislation on public procurement, sectoral procurement legislation, or legislation on works concessions and service concessions, where the estimated value of the awarding procedure is below the value thresholds for which publication of the participation notices in the Official Journal of the European Union is mandatory, according to the legislation on public procurement, sectoral procurement legislation, or legislation on works concessions and service concessions*."

therefore it cannot obtain the condemnation of the party against whom the claims were rejected to pay legal costs (...)."[30]

In another case, CNSC granted the request for legal costs filed by the intervener, but limited the legal costs to:

"(...) only those strictly necessary for the proper conduct of the settlement of the Complaint."[31]

We consider CNSC's approach of denying legal costs to interveners unjust. An Economical Operator whose intervention was admitted and who demonstrates legal costs incurred in relation to the resolution of the intervention is entitled to legal costs. As long as the intervener justifies the costs, we consider it fair that they be awarded.

10.4. CNSC's Decision

Pursuant to the provisions of Article 27(8)-(9) of Law No. 101/2016, the decision of CNSC shall be communicated to the parties within 3 days from its pronouncement, and within 5 days from pronouncement, it shall also be published on the CNSC's website in an anonymized form, without reference to the identification data of the parties or confidential information.

Regarding the publicity of the decision, the Contracting Authority is obligated to publish the decision issued by CNSC in the SEAP within 5 days from the date of its communication, without referring to confidential information.

The decision of CNSC is binding on all parties involved and acquires the authority of *res judicata* once it becomes final.

According to Article 28(5) of Law No. 101/2016, if the CNSC decision is challenged, the Contracting Authority may suspend the awarding procedure and/or the implementation of the obligations established by the decision; such suspension remains in force until the ruling on the appeal is communicated.

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[30] CNSC, Decision published in CNSC Official Bulletin No. 4628/2017, available online at: http://portal.cnsc.ro/sivadoc/download.aspx?docUID=NDRkYTkwMjQtMjY0OS00ZDdlLTljMjctYzZmNDYyZTI2YmZj&pdfa1=ZmFsc2U=&filename=Qk8yMDE3XzQ2MjgucGRm&action=aW5saW5l

[31] CNSC, Decision published in CNSC Official Bulletin No. 1788 din 2016, available online at: http://portal.cnsc.ro/sivadoc/download.aspx?docUID=ODA3MjVmOTItNjVlZS00YWM1LWIwMDItMWFhOGExZjljNjVj&pdfa1=ZmFsc2U=&filename=Qk8yMDE2XzE3ODgucGRm&action=aW5saW5l

Law No. 101/2016 does not establish sanctions for the case where the Contracting Authority fails to comply with the decision issued by CNSC.

However, pursuant to Articles 224–226 of Law No. 98/2016[32], non-compliance with the final decisions of CNSC constitutes a contravention, and the responsibility for establishing this and applying sanctions lies with the Romanian Court of Accounts.

[32] Art. 224 of Law No. 98/2016**:** *"(1) The following acts constitute contraventions, unless they have been committed under such circumstances as to be considered, according to criminal law, contravention: a) failure to comply with the decision of the National Council for Solving Complaints (CNSC), after the date on which it becomes final; (...) (2) The contraventions provided for in paragraph (1) shall be sanctioned with fines ranging between 5,000 lei and 30,000 lei. (...)".*
Art. 226 of Law No. 98/2016: *"(1) The finding of contraventions and the application of sanctions shall be carried out ex post by persons authorized for this purpose by the Romanian Court of Accounts. (2) The application of the contraventional fine is subject to a statute of limitations of 36 months from the date the act was committed.*"