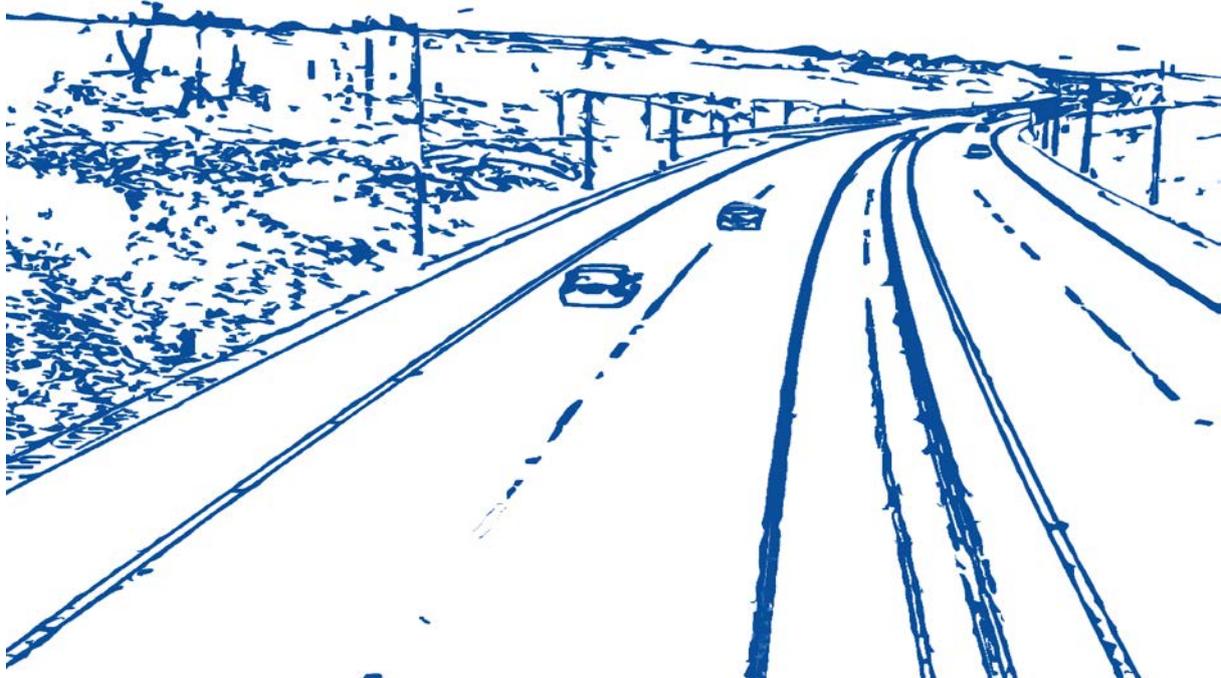


PUBLICITY AND TRANSPARENCY OF THE AWARDING AND IMPLEMENTATION OF PROJECTS OF SUBSTANTIAL PUBLIC INTEREST

REPORT

on

the monitoring of the contractor selection procedure
and the implementation of the construction contracts
for the “Trakia” Highway



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INTRODUCTION

The present Report reflects the results from the monitoring conducted by Transparency International – Bulgaria on the contractor selection procedure for the construction of and additional engineering for the “Trakia” Highway /A-4/ “Orizovo – Burgas”, section: Lot 2 “Stara Zagora – Nova Zagora”, section: Lot 3 “Nova Zagora – Yambol”, and section: Lot 4 “Yambol – Karnobat”, as well as the results from the contract implementation monitoring.

The monitoring was conducted between November of 2009 and February of 2011, using an independent public monitoring methodology, developed by Transparency International – Bulgaria. The basis of the approach adopted for the monitoring project integrates the experience of the organization gained from the implementation of similar procedures during the 12 years of operation, as well as the monitoring methodologies of the international anti-corruption organization Transparency International, a part of which is TI – Bulgaria, acting as its Bulgarian national representative.

The present Report is not the first expert assessment by the organization with regard to the realization of this major infrastructural project. At the end of 2004 Transparency International – Bulgaria initiated a monitoring procedure on the construction of the “Trakia” Highway due to the fact that a concession was awarded for it without any tender or competition. The numerous media publications, alerts and commentaries by experts, political leaders and citizens motivated Transparency International – Bulgaria to implement the mechanism of independent civil monitoring, resulting in the publication of a report assessing the transparency, legality and expediency of the governmental decision for the “Trakia” Highway to be constructed via a concession contract¹.

The work of the expert team was hindered by the classified documentation on the ongoing procedure and the lack of willingness on the part of the Simeon Saxe-Coburg-Gotha government to provide access to information on the transaction and the documents related to it. Despite the scant documentation, from November of 2004 till April of 2005 Transparency

¹ The monitoring report from April, 2005 is available at www.transparency-bg.org

International – Bulgaria conducted an investigation and developed a report reflecting the results.

In the published and publicly presented report, the procedure was regarded as non-transparent and incompliant with the standards for the realization of public infrastructural projects of such major scope. The most significant criticism in the report was focused on the problem with the legality of the transaction – the decision to award a concession was adopted without announcing any tender or competition, in violation to the requirements envisaged in the State Aid Act and in Directive 2004/18/EO of 31.03.04. Based on various expert assessments (due to the lack of access to the complete official documentation, assessments are only approximations), the value for the construction of the highway was inflated between 3 and 7 times. Moreover, the state budget, and respectively – the Bulgarian tax payer, had to provide funding that would ensure the profit, and support the activities, of a private economic operator for 30 years.

Unfortunately, under the next coalition government, led by Sergey Stanishev, Transparency International – Bulgaria once again was not granted access to the information pertaining to the scheduled construction of the “Trakia” Highway, but this time the adopted pathway for the realization of the project was via public procurement. Despite the intervention of the Deputy Prime Minister for European Affairs, Meglena Plugchieva, who made a public commitment to the case, the Ministry of Regional Development and Public Works and the Road Infrastructure Agency once again did not allow the effective monitoring of the procedure.

For the first time the full access to the documentation and the opportunity for effective monitoring of the procedure for the construction of the “Trakia” Highway were provided by minister Rosen Plevneliev in October of 2009 when Transparency International – Bulgaria was officially invited by the Ministry of Regional Development and Public Works to conduct independent civil monitoring over the process of preparation and construction of the “Trakia” Highway. The invitation was extended in the context of establishing a partnership system between state institutions and civil society, based on the principles of transparency, publicity and public control over the realization of projects of substantial public interest.

On 6 October 2009 a Cooperation Agreement was signed between Transparency International – Bulgaria and the Ministry of Regional Development and Public Works, regulating the opportunities to exercise independent civil monitoring of the work of the ministry, and in particular – on the realization of infrastructural projects of substantial public

and economic significance. In line with this agreement, the Ministry has made the commitment to grant access to information, and TI – Bulgaria – to conduct independent expert assessment on the transparency and legality of procedures related to the realization of specific infrastructural projects. A contract was signed on 8 January 2010, establishing the specific rights and commitments of both parties with regard to the monitoring of the transparency and publicity of the awarding and implementation of the construction contracts for the “Trakia” Highway.

During the aforesaid period, Transparency International – Bulgaria was presented, for the first time, with the opportunity to officially monitor the contractor selection procedure for the “Trakia” Highway. It was able to observe the process of tender document development, to attend the open meetings of the tender assessment committee, and to receive copies of the outgoing documentation of the Contracting Authority. In this regard, Transparency International – Bulgaria appreciates the efforts of the team of the Ministry of Regional Development and Public Works, headed by Rosen Plevneliev, aimed at ensuring publicity and transparency. Another stage of no lesser importance is the monitoring of the implementation of the contracts signed. In fact, this stage is of key importance for the development of a comprehensive assessment based on the monitoring. During this stage the team of Transparency International – Bulgaria encountered obstacles of legal and administrative nature, which created certain difficulties and limitations to their work.

In its capacity of an independent observer and as the Bulgarian national representative of Transparency International, TI – Bulgaria made the commitment to provide an assessment on the documentation in an impartial and professional manner. The purpose of the present Report is to support the efforts of Bulgarian institutions, and in particular of the Ministry of Regional Development and Public Works, to prevent and limit corruption in the work of the administration through the development and implementation of clear rules ensuring accountability and transparency with regard to public procurements, as well as effective control over the implementation of the contracts signed.

METHODOLOGY OF THE INVESTIGATION MONITORING

In the course of its practice in monitoring privatization and investment projects initiated by the Bulgarian state during the last twelve years, Transparency International – Bulgaria has always observed the rules that the international anti-corruption organization Transparency International applies while working in cooperation with democratic state institutions around the globe. These rules include extending an invitation and establishing an official relationship with the government with regard to the specific project or transaction, signing a cooperation agreement ensuring the access of the experts to the full documentation, all the while observing the rules of political impartiality and confidentiality.

The present Report reflects the results from the monitoring conducted during the period: November of 2009 – February of 2011. It was done using a methodology for independent civil monitoring, taking into account the fact that the procedure is based on the Public Procurement Act². The legal basis of the monitoring includes two main documents: a Cooperation Agreement between the MRDPW and Transparency International – Bulgaria, signed on 6 October 2010, and a “Trakia” Highway Construction Monitoring Contract, signed on 8 January 2010.

A significant aspect of the monitoring was the mobilization of the civil support of local non-governmental organizations, whose cooperation was employed as the basis for the contract implementation monitoring of the construction of Lots 2, 3 and 4 of the “Trakia” Highway.

MONITORING METHODS

The monitoring process includes the following methods:

² Public Procurement Act, promulgated – SG, issue 28 of 6 April 2004, amended – SG, issue 53 of 22 June 2004, amended – SG, issue 31 of 8 April 2005, amended – SG, issue 34 of 19 April 2005, amended – SG, issue 105 of 29 December 2005, amended – SG, issue 18 of 28 February 2006, amended – SG, issue 33 of 21 April 2006, amended – SG, issue 37 of 5 May 2006, amended – SG, issue 79 of 29 September 2006, amended – SG, issue 59 of 20 July 2007, amended – SG, issue 94 of 31 October 2008, amended – SG, issue 98 of 14 November 2008, amended – SG, issue 102 of 28 November 2008, amended – SG, issue 24 of 31 March 2009, amended – SG, issue 82 of 16 October 2009.

1. Documentary analysis – involving the investigation and assessment of documents provided through the official channels by the institutions. The analysis also encompasses the working versions of the documents, as far as specific recommendations and commentaries can be made in the course of their development. The conclusions and the assessment are based on the final versions of the documents.

2. Direct monitoring and assessment of the whole course of the procedure – including on-site monitoring conducted by an authorized expert team of the organization, with the cooperation of local monitoring teams.

3. Media monitoring and assessment of publications – a necessary component in view of drawing up a monitoring assessment, reflecting different points of view and positions in the public discussions on the topic.

4. An assessment on the participants in the competition procedure – a survey among the participants aimed at obtaining their opinions regarding the procedure conducted.

MONITORING STAGES

The monitoring methodology envisages three main stages of assessment:

1. Preparation of the documents for the competition procedure.
2. Realization of the competition procedure and signing of a contract.
3. Implementation of the contracted activities.

At each of the stages Transparency International – Bulgaria engages expert teams, local non-governmental organizations and media.

MONITORING SCOPE

The monitoring methodology includes monitoring and assessment on the transparency and publicity of the public procurement competition for the construction of Lot 2, Lot 3 and Lot 4 of the “Trakia” Highway and the transparency and publicity of the implementation of the contracts signed with the Contractors. The performance quality of the construction works goes beyond the scope of the present Report. Pursuant to the effective legislation, performance quality control is within the competence of state institutions and specialized companies for construction supervision that are entrusted with the performance of this activity.

For the assessment made at the aforesaid stages, Transparency International – Bulgaria takes into account the following three groups of **assessment indicators**, serving as the basis for the present analysis as well:

1. Publicity of the procedure and access to information.
2. Transparency of the procedure, equal treatment and non-discrimination.
3. Management of conflicts of interest.

The indicators have been developed in adherence to the principles under Art. 2, Par. 1 of the Public Procurement Act³.

SOURCES OF INFORMATION

For the performance of its monitoring and assessment, Transparency International – Bulgaria only uses and refers to official documents and publicly accessible sources of information.

PRINCIPLES OF WORK FOR THE PERFORMANCE OF INDEPENDENT CIVIL MONITORING:

³ **Art. 2.** (1) (Previous text of Art. 2, amended – SG, issue 37 of 2006, effective as of 01.07.2006) Public procurements shall be awarded under the procedures envisaged in this Act, in adherence to the following principles:

1. publicity and transparency;
2. (amended – SG, issue 37 of 2006, effective as of 01.07.2006) free and fair competition;
3. (amended – SG, issue 37 of 2006, effective as of 01.07.2006) equal treatment and non-discrimination.

1. Independence of the organization (and in particular of the monitoring team) in the course of the assignment.

2. Confidentiality, in view of respecting the legal interests of the participants in the procedure.

3. Political impartiality in both the monitoring and the expert assessment.

The monitoring and assessment process ends with the publication of an official report containing an assessment on the observance of the criteria: transparency, publicity, equal treatment and non-discrimination with regard to the monitored transaction.

I. FINDINGS ON THE PUBLIC PROCUREMENT BASED CONTRACTOR SELECTION PROCEDURE FOR THE CONSTRUCTION OF THE “TRAKIA” HIGHWAY

1. PUBLICITY OF THE PROCEDURE⁴ AND ACCESS TO INFORMATION

1.1. Monitoring of the work of the tender assessment committee

In its capacity of an independent observer, Transparency International – Bulgaria monitored the work of the tender assessment committee regarding the “Contractor selection for additional engineering for and the construction of the following site: the “Trakia” Highway /A-4/ “Orizovo – Burgas”, section: Lot 2 “Stara Zagora – Nova Zagora”, section: Lot 3 “Nova Zagora – Yambol”, and section: Lot 4 “Yambol – Karnobat” from km 276+200 (coinciding with km 277+597 of Lot 3) to km 325+280”.

Pursuant to the provisions of the Public Procurement Act (PPA), the mandate to monitor the work of the competition committee **is limited to the monitoring of the open meetings** during which the tender documents submitted by the participants, including the price bids, are opened. **Pursuant to the currently effective act, non-governmental organizations do not have at their disposal the legal opportunity to monitor the closed meetings of tender assessment committees.**

At this stage, the law only provides for the participation of observers in the situation envisaged in Art. 20a of the PPA⁵ – experts from the Managing Authority for the respective program may be included in the committee as members or as non-voting observers. Due to the

⁴ In terms of brevity, in the present Report the three procedures for the selection of a contractor for the “Trakia” Highway for Lot 2, Lot 3 and Lot 4 will be called “the Procedure”, and the specific aspects of each of the three procedures will be clearly highlighted.

⁵ Pursuant to Art. 20a, Par. 2, item 4 of the PPA, one of the forms of preliminary control is the option for the participation of an expert of the Managing Authority for the respective program or the Intermediate Body as a member or **observer** in the public procurement committee.

fact that these individuals monitor and assess the process only in terms of the requirements of the Managing Authority for the respective program, they obviously don't have the status of independent observers, but rather form a part of the team of the Contracting Authority. That is particularly clear in the situation where the aforesaid experts are appointed by the Contracting Authority as members of the tender assessment and ranking committee.

At the end of the Report there is an outline of specific proposals by Transparency International – Bulgaria for changes to the Public Procurement Act, enabling independent observers to attend the closed meetings of the committee, under certain conditions.

The present Report reflects the findings of the monitoring team, formulated on the basis of the conducted direct monitoring of the open meetings of the competition committee and of the documents provided by the MRDPW.

The monitoring was done by an expert team of Transparency International – Bulgaria, comprised of specialists working in the fields of legal, social and political sciences, as well as of specialists on infrastructural construction.

The assessment of the tenders submitted by applicants participating in an open public procurement procedure with the following subject matter: “Contractor selection for additional engineering for and the construction of the following site: the “Trakia” Highway /A-4/ “Orizovo – Burgas”, section: Lot 2 “Stara Zagora – Nova Zagora”, from km 210+100 to km 241+900, section: Lot 3 “Nova Zagora – Yambol”, from km 241+900 to km 277+597, and section: Lot 4 “Yambol – Karnobat” from km 276+200 (coinciding with km 277+597 of Lot 3) to km 325+280”, lasted a total of 44 days. This period covers the activities of the committee since its formation, including the holding of the open and closed work meetings and the announcement of the decision regarding the selected contractor for the subject matter of the announced competition.

The dates and locations where the meetings of the Committee would be held were chosen in adherence to the ones specified in the documentation for the tender procedure. The meetings were held in the presence of all members of the committee, representatives of the applicants, the management of the Ministry of Regional Development and Public Works and the Road Infrastructure Agency, experts of Transparency International – Bulgaria and journalists from leading national print and electronic media.

COMPOSITION OF THE TENDER ASSESSMENT COMMITTEE

All three compositions of the Tender Assessment Committee were set in accordance with the provisions of Art. 34, Par. 2 of the PPA. Pursuant to the aforesaid provision, the Committee consists of at least five members, one of which must be a qualified jurist, and the remaining members must be individuals possessing the necessary professional qualification and practical experience applicable for the project and the complexity of the procurement.

The work of the committee on all three procedures started in accordance with legal requirements, with the announcement of the order appointing the chair and members of the committee, followed by their signing of the declarations under Art. Art. 35 Par. 1, item 1, item 2 and item 3 of the Public Procurement Act.

As provided by law, all attendees of the open meeting presented the documents establishing their status and entered their names in the list of attendees.

Within the first open meeting, the tenders of all applicants participating in the competition procedure were opened.

OPENING OF THE TENDERS AND EXAMINATION OF THE DOCUMENTS SUBMITTED

The process of opening of the tenders submitted by the applicants starts right after the signing of the declarations by the members of the committee, in the presence of representatives of the Contracting Authority (the Road Infrastructure Agency and the Ministry of Regional Development and Public Works), representatives of the applicants, journalists and representatives of Transparency International – Bulgaria.

The tenders of the applicants were examined in accordance with the order of their receipt at the Road Infrastructure Agency. The procedure of tender contents examination involved the following steps: announcing the official name of the participant (an independent legal entity or a grouping of two or more legal entities), opening the package with the submitted documentation (an original and a copy of the tender), conducting a general verification on the

correspondence between the list of submitted documents and the actual documents present in the folders, in adherence to the overall sequence and numbering in the list⁶.

With the opening of the tenders submitted by the applicants participating in the competition procedure, the agenda of the first open meeting of the committee was exhausted.

As provided by law, the price bids were packaged separately, and the packages were sealed via a wax stamp of the Road Infrastructure Agency. The same approach was adopted for the packaging of the remaining documents of each applicant (the originals and copies of the technical proposals).

The procedure on the assembly, transportation and safe-guarding of the documents was done in complete transparency and under exceptional security measures.

OPENING OF THE PRICE BIDS OF THE APPLICANTS

The price bids of the applicants were opened at the previously announced dates and venues by the Contracting Authority.

The meetings were held in the presence of members of the committee, representatives of the applicants, the management of the Ministry of Regional Development and Public Works and the Road Infrastructure Agency, experts of Transparency International – Bulgaria and journalists from leading national print and electronic media.

The committee, due to discrepancies between the technical proposals and the requirements envisaged in the competition procedure, did not open the price bids of the excluded participants and respectively announced the price bids of the remaining applicants.

After the announcement of the price bids of the applicants, the representatives of the media were given the opportunity to ask their questions.

The next stage in the procedure is the adoption of a Decision of the Chair of the Board of Directors of the Road Infrastructure Agency on the ranking of the applicants and the selection of contractors in the public procurement procedures with the following subject matter: “Contractor selection for additional engineering for and the construction of the following site: the “Trakia” Highway / A-4/ “Orizovo – Burgas””.

⁶ Specific information on the participants in the three procedures has been published in the Interim Reports of Transparency International – Bulgaria.

The last stage of the procedures under the PPA was the signing of contracts for the realization of the procurement between the Road Infrastructure Agency and the applicant that was selected and announced as the contractor for the respective section.

GENERAL NOTES AND FINDINGS

The open meetings of the assessment committee examining the tenders submitted by the applicants for the construction of the “Trakia” Highway were conducted in compliance with the legal requirements and in adherence to the principles of publicity and transparency. It should also be noted that the Contracting Authority – the Road Infrastructure Agency – and the Ministry of Regional Development and Public Works made the effort to organize and conduct the procedure in such a manner as to ensure that it would not be discredited in any way. In this regard and in view of the substantial public interest to the topic, enhanced security measures were implemented to ensure the reliable safeguarding of the tenders of the participants in the competition procedure, as well as guarantees against information leaks before the completion of the work of the committee.

In this regard, we can draw the conclusion that the first component of the assessment, pertaining to publicity and the access to documents, reflects the high degree of transparency of the conducted procedure, as well as the full access of the experts of Transparency International – Bulgaria to the documents needed for the analysis.

The meetings of the committee were conducted under increased media interest and in the presence of journalists from national print and electronic media. In order to document the work of the committee, a full video recording was made, covering the whole process – from the formation of the committee to the sealing of the tenders and their transportation to the building of the Ministry of Defence where the work of the committee continued.

Based on the conducted monitoring of the work of the tender assessment committee regarding the construction of the “Trakia” Highway, we can conclude that the procedure was carried out in compliance with the standards of publicity, and that the expert team of Transparency International – Bulgaria was granted access to the official information related to the work of the committee.

2. MANAGEMENT OF CONFLICTS OF INTEREST

The second component in the methodology of Transparency International – Bulgaria on assessing the transparency of the procedure involves assessing the policy on the management of conflicts of interest.

The policy on the management of conflicts of interest is a central component of the measures aimed at preventing corruption practices (such as trading in influence) that can distort any public procurement procedure.

The policy on the management of conflicts of interest is a process where an existing conflict of interest is managed in order to achieve incorruptibility, transparency and protection of the public interest. In some cases specific organizations are legally bound to manage the conflicts of interest in a very specific manner.

For the purposes of civil monitoring, Transparency International – Bulgaria defines the following **basic components** of the policy on the management of conflicts of interest for the realization of the public procurement procedure for the award of the construction of the “Trakia” Highway:

1. presence of a mechanism for the identification of a potential conflict of interest by the members of the committee;
2. a mechanism for the registration of a potential conflict of interest by the members of the committee;
3. a mechanism for the management of a potential conflict of interest by the members of the committee;
4. a mechanism for monitoring of the management of a potential conflict of interest by the members of the committee.

In order to realize the full extent of civil monitoring for the implementation of the aforesaid elements of the policy on the management of conflicts of interest, Transparency International – Bulgaria made an assessment on the regulatory framework and the practice of its application within the public procurement procedure for the award of the construction of the “Trakia” Highway.

The analysis and assessment of the adopted policy on the management of conflicts of interest is based on the following provisions:

- Art. 35 of the PPA, regulating the conditions to be met by the members of the committee responsible for the realization of the public procurement procedure (paragraph 1), including the absence of any material interest (item 1 of paragraph 1), the absence of connections with an applicant or participant in the procedure (item 2 of paragraph 1), the absence of any private interest (item 3 of paragraph 1), as well as the order for declaring a change in the declared circumstances (paragraph 3)⁷;
- Art. 2 of the Prevention and Detection of Conflicts of Interest Act, providing a legal definition for the notions of "conflict of interest" and "private interest"⁸;
- § 1 of the Supplementary Provisions of the Commercial Act, providing a legal definition for the notion of “related parties”⁹;

⁷ **Public Procurement Act, amended – SG, issue 37 of 2006, effective as of 01.07.2006**

Art. 35. (1) (Amended – SG, issue 37 of 2006, effective as of 01.07.2006) Members of the committee or consultants can only be persons who declare that:

- 1. they have no material interest in the award of the public procurement to any specific applicant or participant;*
- 2. they are not “related parties”, as defined in the Commercial Act, with any applicant or participant in the procedure or with any subcontractor nominated by them, or with any of the members of their management or control bodies;*

3. (New – SG, issue 94 of 2008, effective as of 01.01.2009) they have no private interest, as defined in the Prevention and Detection of Conflicts of Interest Act, in the award of the public procurement.

(3) (Amended – SG, issue 94 of 2008, effective as of 01.01.2009) The members of the committee and the consultants shall present to the Contracting Authority a declaration confirming the correspondence of the circumstances under Par. 1 and the observance of the requirements under Par. 2, after the receipt of the list of applicants or participants and at each stage of the procedure where any change to the declared circumstances is introduced.

⁸ **Prevention and Detection of Conflicts of Interest Act**, effective as of 01.01.2009, promulgated – SG, issue 94 of 31 October 2008, amended – SG, issue 10 of 6 February 2009, amended – SG, issue 26 of 7 April 2009, amended – SG, issue 101 of 18 December 2009.

Art.2 (1) A “conflict of interest” arises when a person holding a public office has a private interest that could affect the impartial and objective realization of their powers or official obligations.

(2) A “private interest” shall refer to any tangible or intangible benefit to a person holding a public office or to related parties, including any commitment made.

⁹ **Commercial Act**, § 1. (New - SG, issue 63 of 1994) (1) "Related parties" under this act shall refer to:

- 1. the spouses, relatives of direct descent – without limitation, collateral relatives – to the fourth branch, inclusive, and in-laws – to the third branch, inclusive;*
- 2. an employer and an employee;*
- 3. one person or entity participating in the management of another entity;*
- 4. partners;*
- 5. a company and a person or entity holding more than 5 per cent of the voting stakes or shares in the company;*
- 6. entities whose activity is directly or indirectly controlled by a third party;*
- 7. persons or entities that jointly control, directly or indirectly, a third party;*
- 8. a company and a commercial representative of the company;*
- 9. persons or entities, one of whom has made a donation in favor of the other one.*

(2) "Related parties" shall also encompass the persons or entities participating directly or indirectly in the management, control or capital of another entity or entities, and as a result capable of negotiating between them terms and conditions differing from the customary ones.

- Art. 10 (2) of the Administrative Procedure Code, introducing the principle of impartiality in the conduct of administrative proceedings.¹⁰

For the purposes of monitoring, Transparency International – Bulgaria requested from Mr. Bozhidar Yotov, Chair of the BoD of the Road Infrastructure Agency, in its capacity of the Contracting Authority awarding the public procurement, to provide to the civil monitoring team a copy of the declarations under Art. 35 of the PPA for each member of the appointed committee for the realization of the Procedure.

In the course of the analysis on the provided documents, the team of Transparency International – Bulgaria established the following:

A. In the course of the procedure there were available mechanisms for identifying potential conflicts of interest based on the declarations under Art. 35 of the PPA, signed by all members of the committee.

B. In the course of the procedure there were available mechanisms for registering potential conflicts of interest – there was one such case, with a member of the contractor selection committee for Lot 2 as of 20.01.2010, in the course of examining the technical proposals of the applicants. The committee member fulfilled their obligation under Art. 35 (3) of the PPA by promptly declaring a change in the circumstances resulting in a possible non-compliance with the requirements of Art.35 (1) of the PPA regarding the absence of connections and private interest in the outcome of the procedure.

C. In the course of the procedure there were available mechanisms for monitoring potential conflicts of interest – the person who declared the possible non-compliance with the requirements for impartiality (during the contractor selection competition procedure for the construction of Lot 2), promptly requested to be taken off the committee, and a reserve member was appointed for active duty on the committee in their place. According to the minutes from the meeting of the committee, “the observations, opinions, conclusions and proposals made by the person who requested to be taken off the committee in the course of the procedure have not been taken into account for the adoption of the decisions of the committee”.

¹⁰ **Administrative Procedure Code, amended – SG, issue 35 of 12 May 2009**

Art. 10. (2) A person who has vested interest in the outcome of the proceedings or who is engaged with some of the interested parties in a relationship giving rise to reasonable doubts to their impartiality may not participate in the proceedings as an official. In such cases the person can be released from duty – on their own initiative, or by a request of any of the interested parties.

D. In the course of the procedure there were no available mechanisms for monitoring the management of potential conflicts of interest by the members of the committee – the provided documents don't make it clear in what way the Contracting Authority has verified the authenticity of the circumstances under Art. 35 of the PPA stated in the declarations by the members of the committee.

3. TRANSPARENCY OF THE PROCEDURE, EQUAL TREATMENT AND NON-DISCRIMINATION

The third component of the assessment – transparency, equal treatment and non-discrimination – is based on an analysis on the provided documents. In compliance with the methodology of Transparency International – Bulgaria, the monitoring of the procedure starts from the creation of the documents for the procedure. The experience from previous monitoring projects, as well as the observations on a number of public procurements, shows that a significant part of the violations are related exactly to the preparation of the tender documents, where it is possible to predetermine the outcome of the procedure by setting manipulated admissibility criteria for the participants. The assessment is based on the analysis on the draft documents in the course of their preparation, as well as on the final version of the documents.

In the course of preparing the present commentaries on the draft documents related to the procedure for the award of a public procurement for the construction of the “Trakia” Highway, the experts of TI – Bulgaria examined the following provided documents:

1. Documents for participation in an open procedure for the award of a public procurement with the following subject-matter: “Contractor selection for additional engineering for and the construction of the following site: the “Trakia” Highway /A-4/ “Orizovo – Burgas” (for all three sections – Lot 1, Lot 2 and Lot 3).

2. Documents for participation in an open procedure for the award of a public procurement with the following subject-matter: “Consultant selection for the realization of: additional engineering for and the construction of the following site: the “Trakia” Highway /A-4/ “Orizovo – Burgas”, section: Lot 2 “Stara Zagora – Nova Zagora”, from km 210+100 to km 241+900”.

The experts of Transparency International – Bulgaria have focused on and analyzed primarily Section IV: Technical Specifications, Section V: Requirements and proof for the

economic and financial status and the technical capacity of the participants, Appendix 16: Draft Contract and Section VII: Assessment criterion: the lowest price among the submitted draft documents for participation in an open procedure for the award of a public procurement with the following subject matter: “Contractor selection for additional engineering for and the construction of the following site: the “Trakia” Highway /A-4/ “Orizovo – Burgas””. The remaining parts of the documentation have been examined in terms of completeness of the submitted documentation.

In the present Report Transparency International – Bulgaria expresses its opinion on the observance of the basic principles of the Public Procurement Act, such as publicity, transparency, equal treatment and non-discrimination. The specific observations of the experts of Transparency International – Bulgaria do not cover the technical and economic aspects of the documentation.

Firstly, Transparency International – Bulgaria welcomes the method chosen by the Road Infrastructure Agency (RIA) under the Ministry of Regional Development and Public Works for the realization of the public procurement via **an open procedure**, since this format enables all interested parties (Art. 16, Par. 4 of the PPA) to submit technical and financial tenders for participation in this transaction of strategic importance to Bulgaria.

Having reviewed the requirements and the proof of the economic and financial condition and the technical capacity and/or qualification of the participants in the public procurement (Section V of the documentation), the experts of Transparency International – Bulgaria reached the following conclusions:

The requirements set for the potential applicants participating in the procedure are not of discriminative nature. Furthermore, the experts found no requirements that would put some participants in a more favourable position than others. The conclusion of the absence of discrimination is indirectly confirmed by the following facts:

- There were no complaints filed with the Commission on Protection of Competition against the decisions of the Contracting Authority regarding the opening of the public procurement procedure under review, and the choice of participation conditions.
- Another important indication in this regard is the number of the submitted tenders (between 8 and 13), which shows that the requirements set by the Contracting Authority are substantial enough so that no “random” applicants would participate

and at the same time do not contain any conditions that would prevent the participation of established local and foreign companies and groupings.

- The third indication in this regard is the fact that only the companies that won the competitions for the construction of the “Trakia” Highway responded to the inquiries sent by Transparency International – Bulgaria to the participants in the competition procedure. The experience of the organization shows that in cases of violation the remaining applicants take advantage of their right to express their opinions and assessments.

This is an appropriate place to point out that the initial version of the documents for Lot 2 contained requirements of turnover and completed first-class construction, which would make it objectively impossible for local construction companies to participate in the procedure. **Based on the recommendations made by Transparency International – Bulgaria, these requirements were edited, which resulted in the attainment of the balance that was needed for the procedure to become compliant to the principle of fair competition between economic operators.**

In the Procedure under review the assessment of the tenders was based on the “lowest price” criterion (Tender Assessment Criteria – Section VII).

In a statement addressed to the MRDPW, Transparency International – Bulgaria expressed its concerns that its experience regarding the realization of similar public procurements shows that the selection of the “lowest price” as the leading criterion often results in problems and even in the suspension of the operations on the implementation of the procurement due to insufficient financial resources for its completion. Our country has had negative experiences with the construction of important infrastructural projects when the selection criterion for the tenders was the lowest price – for instance the construction of the “Sofia” Airport, the “Lyulin” Highway and other infrastructural projects.

In this regard we should take into account the fact that the parties to a public procurement contract cannot amend it, except in the cases (exceptions) expressly stated in Art.43 of the PPA, and in particular:

1. when a force majeure and/or unforeseeable circumstances necessitate changes to the terms of the contract, or
2. if the contracted prices are reduced in favour of the Contracting Authority, or

3. in the event that state regulated prices are amended, when the primary subject matter of the public procurement contract is an activity whose price is subject to state regulation and whose term of performance is more than 12 months.

This means that it is completely possible for the price bid of the participant winning the award to be appropriate at the time when the tender is submitted and/or the contract is signed, but a subsequent change in the economic conditions, such as an increase in the price of raw materials and other materials, could render it inadequate for the changed conditions. In such a case, the most logical outcome is poor quality of performance or even complete failure to complete the procurement.

Admittedly, this development is also possible when the other criterion – “most economically advantageous tender” – is employed, but in the case of the “lowest price” criterion the opportunities for the contractor to react to the changed conditions are more limited and therefore the risk of the procurement not getting realized is significantly higher. The opinions of the participants in the procedure, expressed in the inquiries sent to TI - Bulgaria, support these comments. The participants point out that the “lowest price” criterion may result in the decapitalization of the construction companies or to the use of substandard materials.

Last but not least, we should take into account the substantial possibility, given the global economic crisis, for construction companies to be tempted to win the procurement at any cost by offering a dumping bid. Furthermore, it is a well-known fact that the lower price often leads to lower quality of performance. The purpose of the procedures under the Public Procurement Act is to find the optimal balance between the price and the quality of performance of the subject matter of the procurement.

To a certain degree the concerns of Transparency International – Bulgaria came to pass during the realization of the current procedure for the construction of the “Trakia” Highway as well, since the value of the submitted tenders was considerably lower than the value of those for other European highways. Information to that effect was presented by minister Rosen Plevneliev during the press conference after the opening of the price bids for Lot 2.

The question of whether or not the price of the winning tenders is economically sound goes beyond the mandate of the monitoring carried out by Transparency International – Bulgaria. In any event, the question of whether or not this is a case of the so-called dumping bid will remain open till the final completion of the three sites of the “Trakia” Highway. Such

a question would not be applicable to the Procedure to such an extent if the other assessment criterion was chosen, and namely – of the “most economically advantageous tender”.

In its current edition, the Public Procurement Act does not regulate the status of independent observers participating in public procurement procedures, as in the case of Transparency International – Bulgaria. In two of its provisions (Art. 68, Par. 4 and Art. 69a, Par. 3) the Act succinctly states that representatives of not-for-profit legal entities also have the right to attend the opening of the tenders and of the price bids. This puts the independent observer in full dependence on the goodwill of the respective Contracting Authority – goodwill that was present in the current procedure, but was absent from the previous two unsuccessful procedures for the award of the construction of the “Trakia” Highway via a concession – by the government of Mr. Saxe-Coburg-Gotha, and via an open procedure under the Public Procurement Act by the government of Mr. Stanishev.

It is clear that such a dependence on the goodwill of the Contracting Authority acutely contradicts the function and the purpose of the independent observer and in this regard Transparency International – Bulgaria extended the respective recommendations, as appended to the present Report.

STATUS OF THE INDEPENDENT OBSERVER

A review of current legislation shows that non-governmental organizations do not have at their disposal the legal opportunity to monitor the closed meetings of the tender assessment and contractor selection committees. In this regard, Transparency International – Bulgaria recommends the introduction of changes to the Public Procurement Act that would officially regulate the status of the independent observer.

A similar change was proposed in connection with the need for the independent observers to be present during the whole contractor selection procedure and to monitor the work of the committee regarding tender assessment. For their part, the expert established as an independent observer undertakes to not disclose any facts and circumstances that became known to them in the course of the procedure, as long as they are not subject to public disclosure. This obligation, however, currently has no legal basis as well.

Due to the absence of any explicit regulation to resolve this problem, the experts of Transparency International – Bulgaria monitoring the procedure sign confidentiality

declarations developed in compliance with the monitoring methodology of Transparency International. The basis for their signing is Section II, item 1 and item 2 of the Agreement between Transparency International – Bulgaria and the Ministry of Regional Development and Public Works from October 6, 2009.

Based on the long-standing experience of Transparency International – Bulgaria, as well as on the ongoing monitoring of the procedure for the award of a public procurement for the construction of the “Trakia” Highway, specific proposals were developed for the amendment of the Public Procurement Act. These amendments refer to the status of the independent observer and are aimed at regulating their status and their right of access to all stages of the procedure.

Transparency International – Bulgaria has the status of an independent observer of the contractor selection procedure for the construction of the “Trakia” Highway, based on the Cooperation Agreement signed with the MRDPW. The legislation allows the participation of representatives of non-governmental organizations at the open meetings of the contractor selection committee (the meetings where tenders and bids are opened).

Art. 68, Par. 4 of the Public Procurement Act¹¹ envisages the opportunity for not-for-profit legal entities and media to be granted access to the meetings of the commission for the opening of the tenders of the participants, in compliance with Art.68, Par. 3¹². However, neither the PPA, nor the PPA Implementation Rules expressly provide for an opportunity for independent observers to attend the closed meetings of the committee and to monitor the discussions and the decision making process on the selection of the winning applicant.

Therefore, in the course of the monitoring of the procedure, our experts had no right to monitor the closed meetings of the committee.

Still, we should point out the effective cooperation and the desire to provide assistance on the part of the management of the MRDPW. In a series of conversations and meetings, we were seeking a way for a representative of Transparency International – Bulgaria to attend the closed meetings of the committee. In this regard, we even discussed the possibility for a representative of Transparency International – Bulgaria to be appointed as a member of the

¹¹ New – SG, issue 37 of 2006, effective as of 01.07.2006, amended – SG, issue 94 of 2008, effective as of 01.01.2009: The actions of the committee under Par. 3 shall be public and the right of attendance shall be granted to the participants in the procedure or their authorized representatives, as well as representatives of the mass media and of not-for-profit legal entities.

¹² Art. 68, Par. 3 The committee shall open the envelopes in accordance with the order of their receipt and shall verify the correspondence of the tenders with the list under Art. 56, Par. 1, item 12.

contractor selection committee. This option, however, proved to be unacceptable for us, since it would discredit the status of our expert as an independent observer.

The appointment of the independent observer as a member of the committee of the Contracting Authority, even when it comes to a non-voting member, takes away their independent status of a person who does not participate in the selection discussions but rather only monitors and takes note of potential violations to the procedure, in adherence to a previously developed monitoring methodology and assessment indicators. Along with that, the participation of an independent observer in the committee would deprive it of a full-fledged member and would rather hinder its work. The status of the independent observer does not presuppose being a part of the committee and participating or intervening in any way in the work of the committee.

In connection with the established difficulties regarding the monitoring of the procedure, specific proposals were developed, in cooperation with experts of the MRDPW, for changes to the effective Public Procurement Act. The proposals were presented in the context of the current amendments to the PPA in the spring of 2010. In March of 2010 the proposals were made on behalf of the MRDPW, in order to be included in the drafting of the bill amending the Public Procurement Act. Furthermore, Transparency International – Bulgaria also presented its proposals to the Committee on Legal Affairs of the 41st National Assembly.¹³

Unfortunately, both the amendments suggested by the MRDPW and the proposals made by Transparency International – Bulgaria were disregarded and were not included in the amendments to the Public Procurement Act adopted at the end of June of 2010. In this regard, the matter of the official status of independent observers and their access to all stages and documents of the procedure remains open.

In particular, the proposed changes to the Public Procurement Act sent to the National Assembly are related to two issues – the formal regulation of the opportunity for independent observers to participate at all stages of the procedure and the one pertaining to the responsibility and independence of observers.

The first proposed amendment refers to the text of Art. 34, Par. 4 of the PPA, which should be amended as follows:

¹³ The proposals on behalf of Transparency International – Bulgaria were sent to the Committee on Legal Affairs on 26 April 2010. To date, the proposals have been sent to Minister Tomislav Donchev and to the working group responsible for the development of a new PPA.

“(4) Contracting Authorities may involve independent observers who shall have the right to attend the meetings of the committee and shall have access to the minutes from its work.”

Such a text would provide the contracting authorities with the opportunity to allow the participation of independent observers to all meetings of the committee, including those that are not open to the public. This would also allow for the provision of access to all documents related to the contractor selection procedure. Such an amendment would enable the observer to personally ascertain the adherence of the participants to the principles of transparency, equal treatment and non-discrimination, as well as the absence of conflicts of interest among the members of the committee during the closed meetings.

Secondly, an amendment to the provision of Art. 35 was also proposed, involving the introduction of a new Par. 4. This provision is aimed at regulating the responsibility of independent observers and their obligation for impartiality, independence and prevention of conflicts of interest in the course of the monitoring process.

In accordance with the proposed text, independent observers, like the members of the committee, would declare the absence of any material interest in the award of the public procurement to any specific applicant or participant; they would also declare that they are not “related parties”, as defined in the Commercial Act, to any applicant or participant in the procedure or to any of the subcontractors specified by them, or to any of the members of their management or control bodies; further, the observers would declare that they have no private interest, as defined in the Prevention and Detection of Conflicts of Interest Act, in the award of the public procurement. The same regulation would serve as the legal basis for the obligation of independent observers to keep secret the circumstances that have become known to them in connection with their work.

The text of the proposed new Par. 4 is as follows:

“(4) Declarations under the preceding paragraph shall also be presented by the independent observers specified in the act of the Contracting Authority under Art. 34.”

After the completion of the aforesaid proposal for changes to the PPA, Transparency International – Bulgaria did not discontinue its work on developing proposals for changes in this area. Based on the immediate experience from the monitoring conducted during the previous year, in April of 2011 Transparency International – Bulgaria developed a considerably expanded list of proposals for legislative changes in the area of public procurement.

In connection with the definition of the observer in the PPA or the PPA Implementation Rules, specific selection criteria should be included (such as experience, period of existence, current registration, observance of the legal requirements of accountability, etc.)

RECOMMENDATIONS

Based on the examination and analysis of tender documents, as well as on the conducted monitoring of contract implementation, we can formulate several conclusions and recommendations.

With regard to the award procedure for the construction of the “Trakia” Highway, Transparency International – Bulgaria maintains that the so chosen tender assessment criterion (based on “the lowest price”) poses far more risks for the successful completion of the procedure in comparison to the criterion of “most economically advantageous tender”.

Furthermore, we should point out that there are some shortcomings with regard to the implementation of a consistent policy on managing potential conflicts of interest. Firstly, the legal framework does not envisage a mechanism ensuring the verification of the authenticity of the declarations under Art. 35 of the PPA, submitted by the members of the committee. Secondly, the principles of publicity and transparency of the public procurement procedures, proclaimed in Art. 2 Par. 1, item 1 of the PPA, should be further developed with the adoption of a publicity mechanism for the declarations submitted by the members of the committee pursuant to Art. 35 of the PPA. Such an approach would allow for a maximum degree of protection for the public interest, ensuring the access to information in real time for each interested party.

The third recommendation addresses the need for legislative changes that would allow the official participation of independent observers in public procurement procedures. The status of the independent observer needs to be regulated in the Public Procurement Act. Such an amendment to the act would ensure the access of observers to all stages of the contractor selection procedure and would regulate their responsibility in the event of potential violation of the principles of impartiality, confidentiality and prevention of conflicts of interest.

One of the most significant recommendations of Transparency International – Bulgaria is related to the need for changes to Art. 82 of Section XXIV “CONFIDENTIALITY” in the

Public procurement contract for additional engineering for and the construction of the “Trakia” Highway.

Pursuant to Art. 82 of Section XXIV (“Confidentiality”) in the Contract for the “Trakia” Highway, *“Each of the parties to the Contract undertakes to not disclose any information regarding the other party that has become known to it during or in connection with the signing of the Contract, including in the course of the Public Procurement, that the party to which the information refers to has designated, in writing, as confidential. (Par. 1).”*

All maps, drawings, sketches, photographs, plans, reports, recommendations, assessments, notes, documents, contracts and other data, irrespective of the medium (paper, magnetic or any other medium), irrespective of the format (textual, graphic, auditory, visual, analogue or digital format), collected or received by the CONTRACTOR in connection with the implementation of the Contract, shall have the status of confidential information (Par. 2).

The information that the CONTRACTING AUTHORITY should submit to the Public Procurement Agency in adherence to the Public Procurement Act shall not represent confidential information.” (Par. 3).

We believe that this wording of the clauses concerning the confidentiality of the information related to the implementation of the contract for the construction of the “Trakia” Highway does not provide a clear answer as to which information is confidential, and generates problems regarding the transparency during the implementation of the contract.

This is so because, first of all, the quoted provisions do not make it clear what exactly will the parties mean by “Confidentiality”, since Section I of the Contract (“Definitions”) does not contain a definition of the notion of “Confidentiality”.

At the same time, the attempt to derive the definition of the notion by analyzing the provisions of Par. 1 and Par. 2 of the Contract results in two completely different understandings of the notion of “confidentiality”:

- According to Par. 1, “confidential” is the information that has become known during or in connection with the signing of the Contract and has been designated as confidential by the party to which the information refers.
- According to Par. 2, however, “confidential information” is absolutely any information that was gathered or received by the CONTRACTOR in connection with the implementation of the Contract.

On the other hand, the comparison of Par. 2 and Par. 3 shows that they incorporate two incompatible approaches to establishing a definition to the notion of “Confidentiality”: Par.2 specifies which information is considered confidential, and Par. 3 – which information is not confidential. Thus the question of whether the cases not specifically settled in Art. 82 should be treated as confidential or as non-confidential information remains open.

It is obvious that it is objectively impossible for all information related to the implementation of the Contract to be confidential, least of all because of the legal requirements for the publicity of some of this information.

Furthermore, in this case a balance has to be found between the right to protect the commercial secrets of the parties and the principle of publicity and transparency, which is of fundamental importance for both the PPA and any procedure related to the absorption of considerable public resources, which clearly is of substantial public interest.

In this regard, Transparency International – Bulgaria suggested to the MRDPW and the RIA that they should initiate a change to section XXIV of the Contract toward a clear definition of the notion of “Confidentiality”, while retaining the requirement that the party that the information refers to must state in writing the fact that it is confidential, along with the added obligation that the party must justify the reasons why it considers that information to represent a commercial secret.

We believe that a good basis for such a definition is the provision of §1, item 8 of the Competition Protection Act, according to which “An industrial or commercial secret represents facts, information, decisions and data related to a business activity, whose secrecy is in the interest of the rightful claimants, for which they have taken the necessary measures”.

In any event, though, we strongly recommend that the provision of Art. 82 of the Contract is not used during subsequent procedures related to the construction of large infrastructural sites.

II. FINDINGS FROM THE CONTRACT IMPLEMENTATION MONITORING

The second component was related to the monitoring of the implementation of the contracts signed. In compliance with the chosen methodology, the activity of the monitoring team was focused in the following main directions:

1. On-site inspections – visits to the construction sites.
2. Visits to the monthly coordination meetings between the Contracting Authority and the Contractors, dedicated to progress reporting on the implementation of the contracts.
3. Examination of the documents related to contract implementation – visits to the office of the Road Infrastructure Agency.

1. ON-SITE INSPECTIONS – VISITS TO THE CONSTRUCTION SITES

This component was carried out by a monitoring team of Transparency International – Bulgaria and by representatives of partner non-governmental organizations from Stara Zagora, Nova Zagora and Yambol.

The main objectives of the monitoring were to establish:

- Whether the Contracting Authority and the Contractors ensure transparency and publicity of implementation;
- Whether the activities envisaged in the contract are being carried out;
- Whether the Contracting Authority is exercising effective control;

The monitoring of the construction activities for Lot 2, section: “Stara Zagora – Nova Zagora” was conducted in cooperation with the “Alternative 55” Association; on Lot 3, section: “Nova Zagora – Yambol” – with the “Business Centre/Business Incubator”, Nova Zagora; for Lot 4, section: “Yambol – Karnobat” – with the “Centre for Educational Programmes and Social Initiatives”, Yambol.

The first on-site inspection was carried out on 4 November 2010 by an expert team of Transparency International – Bulgaria. The monitoring teams surveyed the progress of the construction and assembly works carried out at the construction sites in comparison with the envisaged schedule, as well as the degree of effective control exercised over them.

The inspection was conducted in parallel with the inspection by the Ministry of Regional Development and Public Works, the Road Infrastructure Agency and journalists from national and regional print and electronic media.

The goal of the expert team of Transparency International – Bulgaria was to establish whether the rate of work at the construction sites corresponded to the envisaged schedules / work programs, and what were the resources deployed by the contractors – teams, construction machinery and materials. The other primary focus of the monitoring was to find out whether the Contracting Authority (the RIA and the MRDPW) ensured the necessary level of publicity and whether it exercised effective control over the implementation of the activity assigned.

The on-site inspection established that there was no delay from the planned schedules for the construction and assembly works. At the same time, the construction of all three sections encounters similar problems which currently do not have any significant negative impact on the implementation of the project. Existing third party networks and facilities and archaeological finds that were established in the course of work represent the main prerequisites for the delay of individual elements of the envisaged works. According to minister Plevneliev, all emerging issues are being resolved in good cooperation between state institutions and within the shortest possible time. The overall assessment of the Contractors for the three Lots is that so far the Contracting Authority is providing full cooperation.

In connection with the performance of the financial commitments of the state, the minister of regional development and public works declared that each of the contractor companies has received an advance payment of 5% of the value of the site under construction, the total amount being BGN 20 million. The minister also declared the readiness of the MRDPW and the RIA to conduct regular monthly on-site inspections that would establish the framework for an effective system of control over the construction of this major infrastructural project.

During the on-site inspection to the three sections, the experts of TI – Bulgaria had the opportunity to observe the progress of the construction and assembly works and to draw their

conclusions. The findings from the on-site inspections cover the period since the start of the construction works at the respective section till March of 2011.

Lot 2: The Contractor, “Magistrali Trace” Group, is performing the construction and assembly works in line with the schedule. The road-bed has been postponed; the primary activities carried out involve earth work – excavations and embankments. Pile foundations are being prepared for a bridge facility over the Orehovska river, overpasses and drainage facilities are also being built. At the time of the inspection the teams were working on the completion of stage 4 and the start of stage 5. The Contractor and the Contracting Authority commented that the implementation of the planned activities was progressing approximately two weeks ahead of the work schedule.

Lot 3: The Contractor, “Aktor,” has made the necessary preparations for the upcoming winter season. The primary activities are focused on earth works and smaller facilities. The Contractor and the Contracting Authority declared that the implementation of the planned activities was progressing ahead of the schedule envisaged in the contract (by about two months).

Lot 4: The “Trakia IV” Association, with the “Roads” Holding as the leading partner, is performing the construction and assembly works in line with the schedule. To date, the following preparatory works are being performed – the surface humus layer is being stripped, land masses are being removed and rock excavations are being performed within the road-bed.

The inspection established that to date the progress of the planned activities was in line with the schedule, and by 18 November the construction works on the first stage should be completed.

In connection with the problems that have arisen due to the bankruptcy of the company “Moststroy” (a member of the consortium selected as the Contractor for Lot 4) the MRDPW and the RIA have demanded that the “Trakia IV” Association submit two additional bank guarantees ensuring the timely financial performance of the contracted commitments, as well as a declaration on behalf of the consortium, stating that the funds paid for the construction of Lot 4 will not be used to repay other liabilities.

The overall assessment of the monitoring team of Transparency International – Bulgaria is that to date the implementation of the contractual activities by the contractors selected for the three sections of the “Trakia” Highway is in accordance with the schedule. In turn, the MRDPW

and the RIA are observing the declared readiness to provide publicity and are upholding their commitment to exercise control over the implementation of the contracts.

Monitoring of the construction sites by local monitoring teams and representatives of Transparency International – Bulgaria

Monitoring of Lot 2

On 2 February 2011 a monitoring procedure was conducted along the route of Lot 2 by local monitoring teams and by representatives of Transparency International – Bulgaria. As a result of the monitoring procedure and the discussions with representatives of the Contractor, it was established that the construction works have progressed to such a degree that stage 6 is fully completed, and the performance of stage 7 is at 95%. In December of 2010 a bitumen foundation was successfully laid onto an experimental/ test section in order to prove that the equipment and the construction methods that the Contractor was offering would enable them to implement the asphalt layers in compliance with the established requirements.

At the time of the monitoring, a considerable number of small facilities have been completed and the teams are working on many others – relocation of power lines, drainage facilities and measures ensuring the free passage of small animals under the highway route. The large facilities are currently being constructed.

On 28 February 2011 the local monitoring team conducted the next inspection along the route of Lot 2, with the cooperation of the Contractor of the Lot.

The group travelled along the entire route of Lot 2 from Stara Zagora to Nova Zagora. The monitoring established the progress made on the completion of earth and road works, including on the construction of road embankments, drainage trenches, and the realization of large facilities. The Contractor assured the monitoring team that the works were in line with the adopted work schedule.

At the final work meeting held at the office of the “Magistralni Trace” Group, the TI team was presented with and examined documents substantiating the quality of the materials and products invested into the site, including certificates of origin for construction materials, protocols from tests on materials and mixtures conducted in accordance with requirements envisaged in the Technical Specification, requests for the inspection of the construction works, acts and protocols drawn up in compliance with the requirements of Ordinance 3 of the MRDPW on Drawing Up Acts and Protocols in the Course of Construction. The monitoring

team was also shown payment certificates issued by the Contracting Authority. The Contractor stated that the laboratory for the Lot was established at the village of Bogomilovo, and that all documents from the tests conducted were kept in the records of “Magistrali Trace” Group.

The Contractor demonstrated the established work performance control program where each visit to the site is recorded by a team of the construction supervision and the recordings (photographs) are stored for further reference.

Monitoring of Lot 3

During the period from 01.10.2010 till 28.02.2011 the construction activities were monitored on a monthly basis. The visits, conducted by the local monitoring team, were carried out on the following dates: 25.11.2010, 21.12.2010, 26.01.2011 and 25.02.2011.

During the visits it was established that construction and assembly works were being carried out at the site. The conducted visits to the construction site without access to the construction documents could only establish the general similarity between the physical and projected progress.

One of the issues arising during the monitoring was the destruction of the road pavement due to the passage of heavy trucks servicing the site through the villages in the vicinity. To date no repairs to them have been undertaken. Such examples can be given for the village of Ezero, the village of Stoil Voyvoda, the village of Zagortsi and the village of Sabrano. For the last three villages the monitoring team observed that trucks and auxiliary transport vehicles were also passing through the planted fields, which caused damage to the agricultural producers.

Monitoring of Lot 4

During the period from 01.10.2010 till 28.02.2011 the progress of the construction works was monitored on a monthly basis. As a result of the conducted monitoring, we could draw the conclusion that the construction of Lot IV is being performed in line with the schedule. Based on information provided by the Contractor, in the course of the planned construction and assembly works they are encountering areas that “have not been properly studied” and could pose future difficulties. One of the reasons for that is the top layer of soil which has a high humus content and needs to be removed to a greater depth in order to reach the soil with appropriate physical and mechanical properties.

A substantial part of the local population perceives the construction of the highway positively and express hopes for a favourable impact on the economic development of the

region. There is some discontent among the residents of the village of Drazhevo who submitted their complaints to the mayor of the Tundzha municipality regarding the detrimental effect on their agricultural lands, situated in the area of the highway construction route. The complaints relate to the fact that in the process of construction is accompanied by the flooding of agricultural lands which will adversely affect the expected yields from the sown areas. The mayor and the deputy mayor of the village stated that they would inspect the areas and hold talks with the Contractor urging them to take action for the drainage of these areas and for the prevention of any future damage to private properties.

2. VISITS TO THE MONTHLY COORDINATION MEETINGS DEDICATED TO PROGRESS REPORTING ON THE IMPLEMENTATION OF THE CONTRACTS

The visits to the monthly meetings dedicated to progress reporting became possible after the receipt of an official written permit granting access to information, provided by the Contracting Authority – the Road Infrastructure Agency (a letter by the RIA with outgoing № 5300488/26.01.2011, respectively incoming № of Transparency International – Bulgaria № 7/26.01.2011). In this regard, Transparency International – Bulgaria received the following notifications for upcoming meetings:

- A letter by the RIA from 26.01.2011 regarding a monthly coordination meeting scheduled to be held on 27.01.2011 at the city of Yambol (Lot 4).
- A letter by the RIA from 01.02.2011 regarding a monthly coordination meeting scheduled to be held on 02.02.2011 at the city of Stara Zagora (Lot 2);
- A letter by the RIA from 08.03.2011 regarding a monthly coordination meeting scheduled to be held on 09.03.2011 at the city of Stara Zagora (Lot 2);
- 2 oral notifications, by phone, regarding upcoming monthly meetings on Lot 3 (scheduled to be held within the same day – respectively on Lot 3 and on Lot 2).

A major shortcoming (with regard to the visits to the monthly meetings) were the extremely short notification deadlines for the team of Transparency International – Bulgaria. In almost all cases TI – Bulgaria was notified about the scheduled meetings on the day before the actual meeting. Nevertheless, Transparency International – Bulgaria mobilized its teams and participated in the work meetings for which it received a one-day written notification.

Monitoring of the Monthly meeting on implementation progress for Lot 4, held on 27 January 2011

The monthly meeting on the progress of the construction and assembly works for Lot 4 of the “Trakia” Highway was held on 27 January 2011 in the city of Yambol. An expert team of Transparency International – Bulgaria participated in the meeting, based on an invitation by the Contracting Authority – the Road Infrastructure Agency – and the Consultant – “Plan Invest – Plovdivinvest – Lot 4”. The meeting was attended by representatives of the Contractor – the “Trakia IV” Association, of the Consultant – “Plan Invest – Plovdivinvest – Lot 4”, as well as by representatives of the author’s supervision, exercised by the Designer of the Lot – the “Via Plan – Burda” Association.

The representative of the contractor consortium, Eng. Kovachev, briefly presented a report on the work done: as of 15 March 2011 the schedule involved the completion of a significant part of the construction work on individual positions of stage 5 of the project, which is expected to be completed within the contracted term.

The leader of the team of the Consultant, Eng. Bozov, presented his summary assessment on the performance of the construction and assembly works and extended recommendations regarding the further work. It was mentioned that in the course of work on the construction site the teams occasionally establish the need to cross existing engineering networks and facilities that are not described in the tender documents for the Lot. It was clarified that the networks and facilities can be allocated into three groups – ones with an issued Use Permit under the Spatial Planning Act, ones with an issued Construction Permit that are not reflected in the documents for the Lot, and ones without a Construction Permit. On this matter the author’s supervision expressed the following position: that the crossings implemented without an issued Construction Permit are not lawful. All ducts and shafts lawfully constructed before the designing of the Lot fall within the expropriation under the plot plan. All irrigation fields have been coordinated with “Irrigation Systems”. Once the Contracting Authority adopts the respective decisions on the matter, designs should be developed for all omitted elements.

The recommendations of the Consultant fell into three main directions: 1) better preliminary planning and organization of the preparatory works is necessary as it appears to be a key prerequisite for the implementation of further work in compliance with the contracted terms; 2) special attention should be paid to maintaining effective and timely communication with the Contracting Authority – the RIA, and to the improved maintenance of the

documentation related to that communication; 3) a leading principle for the implementation of the work should be the strict adherence to the parameters of the project and the performance of the activities in compliance with the contract and the project documents.

Monitoring of the Monthly meeting on implementation progress for Lot 2, held on 2 February 2011

On 2 February 2011 in the city of Stara Zagora experts of Transparency International – Bulgaria participated in the monthly coordination meeting on the progress of the construction and assembly works for Lot 2, based on an invitation by the Contracting Authority - the Road Infrastructure Agency and the Consultant company – “Patinvest-Engineering” AD, city of Sofia. The meeting was attended by representatives of the Contracting Authority (the RIA), of the Contractor (“Magistrali Trace” Group) and of the Consultant (“Patinvest Engineering”). The parties discussed the current progress and problems on the implementation, and then conducted an inspection of the construction site. It became clear in the course of the meeting that “Magistrali Trace” Group is performing the construction of the section in accordance with the schedule and that there were no unforeseen circumstances hindering their operations. To date, stages 1 to 5 have been fully completed and accounted for, and stages 6 and 7 have been realized at 100% and pending certification. The expectations were that the work on the following stage 8 would be completed within a shorter term than the one envisaged in the contract.

Another topic of discussion was bringing the landscape in alignment with the measures envisaged in connection with the Environmental Impact Assessment.

Overall, “Magistrali Trace” Group is not facing any difficulties in meeting the schedules and is maintaining timely communication with the Contracting Authority – the RIA – and with the construction supervision.

3. EXAMINATION OF THE DOCUMENTS RELATED TO CONTRACT IMPLEMENTATION

The examination of the documents related to the implementation of the contracts for the construction of the “Trakia” Highway is an extremely important element of the monitoring. It plays a key role for the development of an impartial and professionally justified assessment of the transparency and publicity of the overall monitoring process. In addition, it allows for effective public control over the subject of monitoring.

With regard to this aspect of the monitoring, the team of Transparency International – Bulgaria encountered a number of difficulties of legal and administrative nature.

First of all, we should point out the existence of confidentiality clauses encompassing the entire information related to implementation of the construction contracts for the “Trakia” Highway. As outlined in detail in the first part of this Report, the confidentiality clause is regulated in Art. 82 of Section XXIV (“Confidentiality”) of the contracts between the Contracting Authority and the Contractors of the three public procurements.

The presence of such a limitation of legal nature became the first major obstacle to the work of the expert monitoring team of Transparency International – Bulgaria. This motivated the legal team of the organization to conduct an in-depth analysis on the clauses of the Cooperation Agreement between Transparency International – Bulgaria and the Ministry of Regional Development and Public Works, the effective Bulgarian legislation relevant to the issue under consideration, as well as the contracts between the Contractor companies and the Road Infrastructure Agency.

On this basis, Transparency International – Bulgaria addressed the Contracting Authority in a series of official letters with the request to provide the information that is essential to the monitoring process:

- A letter by Transparency International – Bulgaria with outgoing № 100/05.10.2010 to the RIA and the MRDPW regarding the development of a mechanism for the realization of joint inspections and a request for access to the sites and the respective construction documentation;
- A letter by Transparency International – Bulgaria with outgoing № 103/28.10.2010 to the RIA and the MRDPW with a request for access to documents on the implementation of the construction works;
- A letter by Transparency International – Bulgaria with outgoing № 106/12.11.2010 to the RIA and the MRDPW with a request for access to documents on the implementation of the construction works and for cooperation regarding the provision of access to the documents by the Contractor companies;
- A letter by Transparency International – Bulgaria with outgoing № 109/3.12.2010 to the MRDPW – Opinion of Transparency International – Bulgaria regarding the need for changes to Section XXIV (“CONFIDENTIALITY”) of the public procurement contracts;

- A letter by Transparency International – Bulgaria with outgoing № 117/20.12.2010 to the MRDPW with a request for information regarding the construction of the “Trakia” Highway (questions regarding the construction documentation);
- A letter by Transparency International – Bulgaria with outgoing № 2/19.01.2010 to the RIA and the MRDPW with a request for access to documents on the implementation of the construction works.

As a result of the systematic efforts of Transparency International – Bulgaria over a 4-month period to gain access to information, at the end of January of 2011 the Contracting Authority – the Road Infrastructure Agency – granted us official written access to the necessary documents (a letter by the RIA with outgoing № 5300488/26.01.2011, respectively incoming № of Transparency International – Bulgaria № 7/26.01.2011).

The examination of the documents was done by experts – members of the monitoring team, engaged by Transparency International – Bulgaria. Within the month of February, 2011, they reviewed the documentation kept at the offices of the Road Infrastructure Agency.

In February of 2011, monitoring was conducted at the office of the Contracting Authority – the Road Infrastructure Agency – of the documents created in the course of the realization of Lots 2, 3 and 4 by early February. The documentation reviewed included folders containing correspondence between the parties participating in the investment process and reports by the Contractors and the Consultants, as well as additional information from the Team of the Contracting Authority.

Comments on the results from the examination of the documents supporting the investment process

In the correspondence provided by the Contracting Authority there are documented initiatives of the CA on all three lots regarding on-site inspections on the part of the Central Institute of Road Technologies, National and European Norms and Standards (CIRTNENS) under the RIA. The documents also indicate the performance of planned inspections on the implementation of the project for the completion of the “Trakia” Highway, Lots 2, 3 and 4 – BG161PO004-2.0.01-0004, with the additional participation of representatives of the Managing Authority under the “Transport” Operational Programme (MA under the TOP) – the Ministry

of Transport, Information Technology and Communications – and the Contracting Authority – the Road Infrastructure Agency – in three stages:

- assessment of the established management and control system under the “Transport” Operational Programme, assessment of the established organization for project management, examination of the available documentation related to the implementation of the contracts under the project, verification of the reporting documents for the project and comparison with the information provided by the Contractors;
- on-site inspection of the construction site for: supplied materials, mobilized machinery and manpower, preparatory and primary construction works along the route, assessment of the physical progress attained and comparison to the schedules envisaged in the contracts, verification of the compliance to the applicable regulations, as well as to the rights and obligations of the parties under the contracts signed, implementation of the measures for information supply and publicity;
- examination of the available documents at the offices of the Contractors to whom the procurement was awarded.

A Management Team was appointed to the project for the completion of the “Trakia” Highway, under the Contracting Authority – the RIA. The team was structured as follows: a manager, a deputy manager, a technical coordinator, a jurist, an economist and officials from the regional road administrations of Stara Zagora, Sliven and Yambol for the realization of the regional monitoring for the Team.

An external consultant, appointed by the Managing Authority, carries out regular audits on the project, in accordance with the so called annual plan of the MA for on-site inspections. The documents provided by the Contracting Authority indicate that the CA has conducted “Monitoring of the Managed Risks in the Schedule for 2010” on the lots of the project for the completion of the “Trakia” Highway. Potential risks were analysed and controlled in the following directions: untimely signing of contracts for author’s supervision, poor quality of the work of the Contractor (delays, failure to meet the parameters set out in the contracts, etc.), technical issues and difficulties in the course of project implementation, inefficient legal procedures (permits, licenses, on-site access, visas for employees, etc.), poor and untimely interaction with the respective offices and institutions, failure to comply with the construction technology, amendments to the technical design during its implementation, slow processing of

the certificates, delay of the project – going beyond the timeframe of the Financial Memorandum, running the risk of loss of funds, exceeding the budget; additional financial claims by the Contractor, changes to the prices of materials and raw materials resulting in greater costs, quantitative discrepancy between the project accounts and the actual construction and assembly works done, utilization of substandard materials, as determined by test protocols or via on-site sample analysis, inaccurate bills of quantities prepared by the Designer, insufficient production capacity of the Contractors, delays in the construction works due to unfinished archaeological surveys and expropriation procedures, required timely receipt of a supplement to a construction permit in the area of engineering infrastructure (relocation of electrical and telecommunication cables), rendering ineffective control over the construction works due to the use of a joint project management team by the RIA (ESE).

At this stage, none of the circumstances related to the identified risks affects the primary time and financial parameters of the construction contracts.

The Consultant regularly prepares an action plan with guidelines, measures and timetables.

Lot 2

For the site there is an issued Construction Permit, No. 19 of 08/04/2010, by the Minister of Regional Development and Public Works. By protocol model 1 (pursuant to Ordinance 3 of the MRDPW on Drawing Up Acts and Protocols in the Course of Construction) of 04/06/2010 the Builder was given the project documentation and an effective construction permit.

Protocol model 2a (pursuant to Ordinance 3 of the MRDPW) for the start of the construction was drawn up on 09.06.2010.

The Technology and Construction Programme and the Schedule for the performance of the construction and assembly works envisage the completion of the additional engineering and construction within 25 months since the Start of Construction. The construction and assembly works have been grouped into 16 Stages. The Contractor has presented their opinion on amendments to the work schedule on 28.01.2011. The amendments were approved by the Contracting Authority on 02.02.2011, without any change to the deadline. The adopted amendments to the project were reflected in the new Schedule.

Close to the end of the monitoring process, seven out of sixteen stages have been fully completed, which represents approximately 25% of the value of the works, with 28% of the

term for the performance of the construction having elapsed, which allows us to conclude that there is no delay in comparison to the adopted stage schedule or as a whole.

During the period from December of 2010 till January of 2011 the Contractor has applied for the settlement of five interim payments, for stages from I to V respectively.

No delay has been established in comparison with the terms envisaged in the terms and conditions of the Contract with regard to the payments to the Contractor.

The expropriation procedures for a direct route have been completed in 2005. As of November of 2010 the route is free from established archaeological sites.

In the course of construction, the teams have established constructed and functioning facilities of other institutions, whose route has not been coordinated the RIA. In such cases the instructions of the Contracting Authority are to invite the owner of the respective facilities to relocate and protect them at their own cost.

At this stage there are no established and unresolved issues for the Lot related to design.

The provided documents contain no data on claims of the parties, formulated as such, that have any time and/or cost impact on the contract.

There is no data of registered safety-related accidents during the inspection period.

Lot 3

For the site there is an issued Construction Permit, No. 37 of 28.07.2010, by the Minister of Regional Development and Public Works. By protocol model 1 (pursuant to Ordinance 3 of the MRDPW on Drawing Up Acts and Protocols in the Course of Construction) the Builder was given the project documentation and an effective construction permit.

Protocol model 2a (pursuant to Ordinance 3 of the MRDPW) for the start of the construction was drawn up on 20.08.2010.

The Technology and Construction Programme and the Schedule for the performance of the construction and assembly works envisage the completion of the additional engineering and construction within 25 months since the Start of Construction. The construction and assembly works have been grouped into 18 Stages.

The Technology and Construction Programme and the Schedule for the implementation of the Lot have been amended at the beginning of February of 2011 without any change to the deadline. The adopted supplements to the project – in the parts “Engineering Networks” and “Irrigation and Drainage Facilities” were reflected in the update.

Close to the end of the monitoring process, four out of eighteen stages have been fully completed, which represents approximately 17% of the value of the works, with 24% of the term for the performance of the construction having elapsed, which allows us to conclude that there is no delay in comparison to the adopted stage schedule or as a whole.

By the period when the inspection was carried out, the Contractor has applied for the settlement of two interim payments, for stages I and II respectively.

According to the Contracting Authority, the settlement applications of the Contractor for these stages have been received and the payments to the Contractor have been made. No delay has been established regarding the payments to the Contractor.

After the start of the construction works on Lot 3, the Contractor established the presence of cultural riches within the land of the village of Bikovo and the village of Chokoba, and there are plans for their release in the process of the construction works in a manner that does not disrupt the schedule for the completion of the site.

At this stage there are no established and unresolved issues for the Lot related to design, for which the Contracting Authority has not expressed a position and has not issued the appropriate guidelines.

There is no data of registered safety-related accidents during the inspection period.

Lot 4

For the site there is an issued Construction Permit, No. 48 of 30.08.2010, by the Minister of Regional Development and Public Works. By protocol model 1 (pursuant to Ordinance 3 of the MRDPW on Drawing Up Acts and Protocols in the Course of Construction) of 01.09.2010 the Builder was given the project documentation and an effective construction permit.

Protocol model 2a (pursuant to Ordinance 3 of the MRDPW) for the start of the construction was drawn up on 06.10.2010.

The Technology and Construction Programme and the Schedule for the performance of the construction and assembly works envisage the completion of the additional engineering and construction within 28 months since the Start of Construction. The construction and assembly works have been grouped into 9 Stages.

Close to the end of the monitoring process, the completed work represents approximately 15% of the value of the works, with 14% of the term for the performance of the construction having elapsed, which allows us to conclude that there is no delay in comparison to the adopted stage schedule or as a whole.

The Contractor has applied for the settlement of one interim certificate for stage I. According to the Contracting Authority, the settlement application of the Contractor for this stage has been received and the payment to the Contractor has been made. No delay has been established regarding the payments to the Contractor.

Rescue archaeological excavations have been carried out within the main route. As of the period of this monitoring procedure, the affected areas have been freed up for construction but are being monitored by the National Institute of Archaeology and Museum and the Bulgarian Academy of Sciences.

The provided documents contain no data on specific claims of the parties that have any time and/or cost impact on the contract.

At this stage there are no established issues for Lot 4 related to design, for which the Contracting Authority has not expressed a position and has not issued the appropriate guidelines.

CONCLUSIONS AND RECOMMENDATIONS

The comprehensive assessment of the level of publicity and transparency regarding the implementation of the construction contracts for the “Trakia” Highway within the monitored sections was based on a streamlined system of indicators incorporated into the monitoring methodology employed by Transparency International – Bulgaria and the partnering teams.

Activity	Goal	Means for the realization of the goal	Description	Indicators	<u>Indicator attainment</u>
A1 Monitoring of the progress (1)	Identifying delays (by the contractor)	On-site visit	Establishing the correspondence between the physical and the projected progress	Access to the site	✓
				Access to the current schedule of the contractor	

A2 Monitoring of the progress (2)	Identifying performance problems	Participation in the monthly meetings	By attending monthly progress meetings we can establish the current performance issues and the parties responsible for them	Access to monthly on-site meetings	✓
B Monitoring of quality	Ensuring the necessary quality (by the Contractor and the supervision)	Examination of the construction documentation	Examination for the presence of the necessary certificates and test documents on the materials utilized in the course of construction	Access to the construction documentation	✗
C Monitoring of the quality of supervision	Ensuring supervision corresponding to the requirements of the SPA and the supervision contract	Examination of the construction documentation and on-site visits	Examination for the presence and completeness of the construction documents kept by the supervision. Inspection of the physical exercise of control over the site by the supervision.	Access to the construction documentation	✗
				Access to the site	✓
D Monitoring of the Contracting Authority	Ensuring the timely fulfilment of the obligations of the Contracting Authority	Participation in monthly meetings, examination of documents of the Contracting Authority	Inspection on the provision by the Contracting Authority of the areas for the implementation of the project, construction permits, etc. Timely payments. Timely assistance to the Contractor before other administrative authorities. Inspection on whether control is being exercised over the operation of the supervision, etc.	Access to monthly on-site meetings	✓
				Access to minutes from the monthly meetings	✓
				Access to documents of the Contracting Authority	✓

The summarized information presented above shows that the contemporary Bulgarian practice suffers from a number of shortcomings regarding the level of publicity and transparency in the performance of construction works. Independent civil control is practically impossible without the presence of the political will and the consent of the specific Contracting Authority. This is clear from the fact that on the one hand access was granted to the construction sites, and on the other hand it was impossible to formulate an objective opinion on the quality of the works being performed due to the absence of a mechanism ensuring access to the construction documents kept by the Contractor and the supervision.

A1 Monitoring of the progress – Identifying delays (by the Contractor)

The first inspection was organized by the MRDPW and was intended as an extraordinary inspection. The MRDPW invited journalists, and therefore the information about the inspection

was widely publicised in the media. Subsequent inspections differed only marginally from the first one in terms of procedure and results.

All three sites have complete and operational site offices of the contractors and the construction supervision.

The number of the mobilized workers and machinery established during the inspections seems to correspond to the planned numbers (provided that no categorical conclusion could be drawn due to the fact that the construction schedules were not presented to the inspecting team).

On the question of whether there were types of construction works that should have started according to the schedule but were not visible at the site, no clear answer can be given due to the fact that the construction schedules were not presented to the inspecting team.

Due to the same reason, no answer can be given to the question of whether there was a delay from the work schedules. The team was informed that in general there were delays only in sections where there is a crossing of other engineering infrastructures.

A2 Monitoring of the progress – Identifying performance problems

The Contractors have identified the need for redesign (for instance for the large facilities), and for Lot 2 the RIA has granted its approval.

B Monitoring of quality

The civil monitoring team was informed that archives were being maintained, containing certificates of origin for the materials and test protocols, but no documents were presented.

The team was informed that archives were being maintained, containing requests for inspection on the completed work, addressed by the contractors to the supervision, and that a meticulous archive of the acts and protocols issued in the course of construction (under the SPA) was being maintained, but no access to documents was granted.

The primary reason given for that was the confidentiality clause in the contracts between the Contracting Authority and the respective Contractors and the construction supervision.

During the meeting that was held, it was explained that in order to examine the documents at the office of the Contractor, the monitoring teams must have the express written consent of the Contracting Authority.

C Monitoring of the quality of supervision

No clarity was given on the matter whether the companies exercising construction supervision presented to the Contracting Authority the certificates for payment within the term envisaged in the contract (10 days pursuant to Art. 10, Par. 1), despite the fact that they declared that a complete archive was being maintained.

The situation with the directions and instructions given by the supervision to the contractor was very similar; it was declared that they were being meticulously archived.

Despite the readiness to provide full access to the documentation, declared by the Contracting Authority (expressed at the site on 4 November 2010) and by the Contractor and the construction supervision (on 4 and 5 November 2010), in practice the team did not get the opportunity to examine the documents making up the construction dossier.

No clarity was given on the matter of who maintains the construction dossier – the Contractor or the supervision, as well as to what degree control is being exercised over the immaculate keeping and the electronisation of the construction documents.

D Monitoring of the Contracting Authority

The inspection team was admitted for monitoring to the offices of the Contracting Authority (the RIA). In compliance with the monitoring methodology, a number of matters were reviewed, as outlined below.

Financial control procedures

No access was provided to financial documents, with the explanation that they were not available to the Project Management Team but rather were located at the financial department.

Current control procedures

Progress control meetings are being carried out at the sites, and access to the minutes from them was granted. There is an annual schedule for on-site inspections but there is no

information on whether the frequency of the envisaged inspections takes into account the degree of risk on the project (as required under Art. 12 of the current control instruction).

The annual schedule for on-site inspections is being carried out and reports from them are available. Unplanned on-site inspections have also been carried out. There are interim progress reports available for the three projects.

Risk assessment and management procedures

A risk management plan, approved by the BoD of the RIA, was presented to the team.

No information was obtained on whether quarterly risk assessment meetings and risk assessment work meetings for the project were being held, as required by the internal rules of the RIA.

Given the significance and scope of the project, there are reasons to believe that attention should be paid to the need for increased staff allocation for the teams involved in the performance of the project, as well as to the need for clear and accurate definition of the functions of each member, and the respective provision of continuous monitoring, control and expert's opinion on the activities performed.

During the monitoring of the documentation of the Contracting Authority no specific data was established regarding the systems adopted at the Lots – for quality control over the construction and assembly works performed, systematised backup of the acts and protocols drawn up in the course of the construction works pursuant to Ordinance 3 of the MRDPW, and detailed reporting of the activities of the Consultant – issued instructions, orders, schedules for activities performed on-site by each of the members of the team. Due to their mention in the documents provided to the monitoring expert, it is clear that these documents and/or parts thereof are kept at the on-site offices of the Contractors and the Consultants. In view of the significance and scope of the Project, we recommend that attention should be paid to the need to introduce a quality control system regarding the gathering and storage of the construction documents, as well as regarding the realization of exchange of documents/correspondence between the participants in the investment process, and the establishment and maintenance of a separate archive. It should be clearly defined how and who is forming and keeping the construction dossier for the Lots.

CLOSING OBSERVATIONS

Despite the readiness of all parties to provide assistance to the civil monitoring teams, the documents regarding the construction process that were presented were very few. This is attributed to cumbersome coordination procedures in the administration.

A positive indicator is the actual fact that external inspection teams were admitted to the construction sites and to the RIA. If a similar type of inspections is done in the future, special attention should be paid to the provision of a sufficient volume of documents that would serve as the basis for clear and unambiguous conclusions regarding the processes accompanying the construction works.

III. FINDINGS FROM THE MEDIA MONITORING. ASSESSMENT OF THE PARTICIPANTS IN THE PROCEDURE

Media monitoring was done on the basis of the selected publications and materials from national and regional print media and online publications. It encompasses the period from the start of the construction works on Lot 2, Lot 3 and Lot 4 of the “Trakia” Highway till the end of February of 2011.

It was conducted by Transparency International – Bulgaria, in cooperation with four partnering local non-governmental organizations: the “Alternative 55” Association – city of Stara Zagora, the “Business Centre/Business Incubator” – city of Nova Zagora, the “Centre for Educational Programmes and Social Initiatives” – city of Yambol, the “Bulgarian Association for the Promotion of Citizens’ Initiative” – city of Burgas.

A media monitoring form, developed by TI – Bulgaria, was used for the purpose. It tracks the main topics monitored, based on several basic indicators:

- circumstances related to changes to the contract due to unforeseen circumstances;
- fulfilment of the contracted activities/quantities, etc.;
- observance of the terms of performance;
- correspondence of the performed activities/deliveries to those agreed upon in advance.

The main topics established within the conducted monitoring were the following:

- Control over contract implementation – a considerable part of the publications in local and national media during the whole monitoring period concern the inspections that state institutions conduct. The media have reflected the monthly on-site inspections and visits by the Prime Minister, the management of the Ministry of Regional Development and Public Works and the Road Infrastructure Agency, journalists and observers. The representatives of state institutions have declared their intention to exercise rigorous control over the implementation of the

construction works and to conduct on-site inspections to the construction site every 20 days.

The publications from December 2010 contain materials regarding an unannounced inspection conducted by experts engaged by the “Transport” Operational Programme. The information is related to established deficiencies regarding the maintenance of documents.

- Observance of the terms and conditions envisaged in the contracts – the majority of the publications are focused on the observance of the terms of performance for the individual stages of construction, quoting specific percentages of performance for individual stages of work and types of activities.

During the inspection conducted in November of 2010, an announcement was made that by the end of 2010 the Contractor for Lot 2 will have completed 100% of the first four stages of the construction works for the section. The Contractor for Lot 3 – the company “Aktor” – declared that it was prepared to end the year at 30% completion. Due to the fact that a different technology of work is being employed, the activities are performed at about two months ahead of the schedule, and the route has been prepared for work during the winter.

- Financial matters (value of the activities performed, payments, penalties, etc.) – a number of publications take note of the explicit condition in the contract which prohibits any increase in the total value. They also mention that according to the estimates of Minister Plevneliev the chosen selection criterion, based on the lowest price offered, will allow for the redirection of funds to the construction of the route from Sofia to Kalotina.

In October of 2010 a leading news in all media was the declared bankruptcy of “Moststroy” – one of the nine companies participating in the consortium “Trakia IV”. On 6 October 2010 the company and its subsidiaries deposited an application for the initiation of bankruptcy proceedings due to insolvency and excessive debt. Just days after the announced bankruptcy, the Prime Minister and the Minister of Regional Development and Public Works inspected the construction works at the three lots of the highway. In front of the media Minister Plevneliev reiterated that the interest of the state was protected, considering the commitment of the other

members of the consortium to bear the joint liability for the implementation of the contract for the construction of Lot 4.

From the media publications it is clear that in November of 2010 a penalty was imposed on the Contractor “Magistrali Trace” Group amounting to BGN 500 000. The penalty was imposed by the Road Infrastructure Agency due to a delay (by 4 months) in the submission of certificates – reports on the completed work, which serve as the basis for the payments. The reason for the established delay was the delayed issuance of a construction permit by the MRDPW for the surrounding infrastructure of Lot 2 of the highway. That, in turn, delayed the submission of the so-called “certificates” – reports on the completed work, serving as the basis for the payments.

The publications from early 2011 reflect information on payments made to the Contractors for Lot 2, Lot 3 and Lot 4.

During the press conference organized by Transparency International – Bulgaria and the “Alternative 55” Association and held on 11 March 2011, the media presented another issue that was otherwise not addressed in the media publications – the issue concerns whether regular payments were being made to the smaller companies participating in the performance of construction works along the route of Lot 2.

- Established problems of technical nature – in early November of 2010 the major problems for the work of the builders were the unremoved technical infrastructure and the ongoing archaeological excavations; the state made the commitment to resolve these issues as soon as possible (mid-November). Subsequent publications make it clear that the MRDPW has issued the necessary construction permit for the construction of additional routes, which would resolve this issue.

Common topics of publications are the inconsistencies in the data from geological surveys, technical obstacles for the performance of some of the excavation works in certain sections and certain delay in the construction works. Such a problem was established for sections from Lot 4 where, according to assessments made by the contractor, there were discrepancies between the geological surveys and the actual condition of the route in some sections (a deeper humus layer, high underground waters and clay, ruptured channels of Irrigation Systems, etc.).

Quality of the materials utilised – this problem attracted media attention when in mid-March of 2011 representatives of one of the political parties represented in the Parliament declared that the Contracting Authority was using substandard materials for the construction of Lot 2. In the heat of the discussion on the quality of the materials employed there were divergent views and comments, including ones referring to the quality of the construction control exercised during the construction of this infrastructural project.

- Problems of local nature – publications were established in the regional media regarding people’s expectations and the impact of the construction works for Lot 2 on the local villages. The local press of Stara Zagora focused on the problems caused to the residents of the villages, related to the destruction of the road surface and the damage inflicted to their agricultural produce. The publications also reflect the process of expropriation affecting 22 dca of land for the performance of the construction works in the area of the second lane of the Stara Zagora – Dimitrovgrad road to the roundabout for the highway.

ASSESSMENT OF THE PARTICIPANTS IN THE COMPETITION PROCEDURE

In the process of forming its final assessment, Transparency International – Bulgaria also took into account the data from an additional research method – a sociological survey aimed at establishing the assessments of the participants in the tender procedures. To this end, TI-Bulgaria sent out inquiries containing questions focused on a few key topics:

- Assessment regarding the selected approach to the construction of the monitored infrastructural site;
- Assessment regarding the compliance of the procedure with the requirements stated in advance;
- Assessment regarding the transparency of the procedure in compliance with Art. 2, Par. 1 of the Public Procurement Act;
- Assessment regarding the equal treatment of all participants.

Transparency International – Bulgaria received answers from 4 participants in the tender procedures: “Magistralni Trace” Group, “Aktor”, Consortium “Bulgarian Highways – Kabile” and “Alpine Bau”.

The assessments, comments and opinions expressed have been outlined below, as follows:

Assessment regarding the selected approach to the construction of the monitored infrastructural site

To the first question in the inquiry, the applicants have provided comprehensive answers which vary quite widely:

- absence of a categorical assessment due to the fact that the choice of the specific procedure is determined by a number of conditions;

- an assessment of the procedure as sufficiently appropriate and consistent, and therefore representing a suitable method for the selection of a contractor for such a strategic project;

- the magnitude of the endeavour and the degree of readiness of the project determine this type of procedures (i.e. where preliminary selection is possible) as more appropriate; in the specific case, the use of additional engineering as a mechanism to compensate for the lack of sufficient investment readiness for the selection of a builder has been assessed as inappropriate as this increases the risk for both the Contracting Authority and the builder; the low price may be the result of incompetence or deliberate dumping; the criterion of "lowest price" may lead to the decapitalisation of the construction companies or to the utilisation of substandard materials; the requirements regarding the roadmap tend to promote compliance with the formal requirements for the work schedule as a priority over other optimal technical/ organizational/ technological decisions.

- the chosen approach has no basis for comparison: it is determined on the basis of a specific managerial or political decision for the procedure; nevertheless, the "lowest price" criterion has been pointed out as a negative aspect of the procedure.

Assessment regarding the compliance of the procedure with the requirements stated in advance

To this question the applicants have given simple answers – the procedure was assessed as conducted in compliance with the manner stated in advance and no unexpected situations have arisen, which, in turn, has determined the respective decisions regarding the participation in the procedure.

Assessment regarding the transparency of the procedure in compliance with Art. 2, Par. 1 of the Public Procurement Act

With regard to the third question in the inquiry, two of the applicants have assessed the procedure as sufficiently transparent and open; - one of them has assessed it as clearly transparent, but they still cherished doubts about backstage games; - another applicant took the view that the procedure was transparent as far as any interested company could participate, but according to them the chosen approach was contrary to transparency and fair competition, because it would not allow for the objective assessment of applicants' tenders.

Assessment regarding the equal treatment of all participants

The applicants have not established any unequal treatment toward them or toward any of the other participants. One of the participants stated that they were treated equally to all others, but at the same time made the critical remark that foreign companies were at a disadvantage with regard to obtaining the original documents from abroad.

Immediately after the open meeting of the tender assessment committee devoted to the selection of the contractor for Lot 2 (and in particular the second open meeting for the opening of the price bids) Transparency International – Bulgaria received a letter by one of the participants – “Strabag” AD – expressing an objection against the actions of the committee, consisting of the following: the price bid of “Strabag” AD was not opened by the committee and no information was given regarding the reasons for that; within 10 days since the date when the meeting was held they have received no answer regarding the reasons why the bid was not opened; despite that, the applicant lodged a protest with the Commission for Protection of Competition, which was rejected by the CPC; according to the applicant, information about the competition procedure was not announced in the Official Journal of the EU, and according to them leading principles of the EU legislation were not strictly observed.

IV. MAIN CONCLUSIONS AND RECOMMENDATIONS.

CLOSING OBSERVATIONS

CONCLUSIONS AND RECOMMENDATIONS FROM THE MONITORING OF THE CONTRACTOR SELECTION COMPETITION PROCEDURE FOR THE CONSTRUCTION OF THE “TRAKIA” HIGHWAY

In conclusion, it can be noted that the monitored contractor selection competition procedure for the construction of the “Trakia” Highway via the award of public procurements was conducted openly and transparently, and in compliance to the basic principles of the Public Procurement Act – publicity, transparency, free and fair competition, equal treatment and non-discrimination. This finding is based on the analysis on the tender documentation and on the presence of experts of Transparency International – Bulgaria at the open meetings of the committee.

We should pay special attention to the fact that, for the first time during the organization of a procedure related to the construction of this major infrastructural project, state institutions, represented by the Ministry of Regional Development and Public Works and the Road Infrastructure Agency, demonstrated the desire for openness and provided cooperation to the experts of Transparency International – Bulgaria, within the law.

The lack of clear legislative regulations on the status of independent observers interfered to a certain degree with the efforts of the experts of Transparency International – Bulgaria to carry out monitoring in adherence to the methodology of the organization, and as a result the experts consider it necessary to support further changes to the Public Procurement Act.

One of the most significant recommendations of Transparency International – Bulgaria is related to the need for a change to Section XXIV (“CONFIDENTIALITY”) of the public procurement contracts for additional engineering for and the construction of the “Trakia” Highway.

We believe that the current wording of the clauses concerning the confidentiality of the whole information on the implementation of the construction contract for the “Trakia” Highway creates substantial difficulties to the chances of society to be informed about the appropriate management of public funds invested in this major infrastructural project, imposes limitations on civil organizations in the implementation of effective monitoring, and, last but not least, does not comply with the provisions of the Public Procurement Act, as well as the principles of the European legislation in this area.

It was exactly this problem that most heavily influenced the difficulties of Transparency International – Bulgaria during the second stage of our monitoring – the stage of contract implementation monitoring. As a result of the aforesaid obstacles of legal nature, and probably of administrative nature as well, the monitoring team was granted access to the documents only at the end of the monitoring period. Thanks to its consistent efforts and after almost 4 months of waiting, Transparency International – Bulgaria was given access to information when on 26 January 2011 the Contracting Authority – the Road Infrastructure Agency – granted official written access to the necessary documentation.

In this regard, along with the recommendation to not allow confidentiality clauses in contracts involving the spending of substantial public financial resources, Transparency International – Bulgaria extends the recommendation that the administrative rules and procedures ensuring the quick and efficient actions of the administration with regard to information access requests and inquiries received from citizens, the media and organized structures of civil society should be observed.

SOFIA, APRIL OF 2011

TRANSPARENCY INTERNATIONAL – BULGARIA

APPENDICES



Outgoing № 25/30.03.2011

**TO
MR. TOMISLAV DONCHEV,
MINISTER FOR THE MANAGEMENT OF
EUROPEAN UNION FUNDS**

DEAR MISTER DONCHEV,

On behalf of Transparency International – Bulgaria, we bring to your attention proposals for changes to the legislation in the area of public procurement award and implementation. They are formulated on the basis of our long-standing experience in this area, including our monitoring of the procedure for the public-procurement-based construction of the “Trakia” Highway.

In this regard we bring to your attention proposals for changes in several respects.

I. PROPOSALS FOR CHANGES TO THE PUBLIC PROCUREMENT ACT AIMED AT REGULATING THE STATUS OF THE INDEPENDENT OBSERVER

The proposals of Transparency International – Bulgaria for changes to the Public Procurement Act (PPA) are focused mostly on the creation of realistic and functioning mechanisms that ensure the realisation of the principles: publicity and transparency, explicitly enshrined in Art. 2, item 1 of the PPA. In this regard, a clear definition has been proposed regarding the status of the independent observer as a kind of a guarantor to the public for the transparency of the ongoing procedure under the PPA. We have prepared proposals for the conditions that each NPLE must observe in order to be constituted as an observer, as well as

the order through which the respective organization attains the status of an independent observer within a given public procurement.

Transparency International – Bulgaria is ready to participate in future discussions on establishing specific requirements for the selection of monitoring organizations. In this regard there are two main questions that should be discussed by the working group on the introduction of changes to the act: firstly – what should the conditions and criteria for the selection of NPLEs be; secondly – from what point forward should independent observers begin their monitoring.

Another possible approach is to define the order and conditions for the constitution of independent observers in the PPA Implementation Rules.

Our surveys show that a significant part of the violations in the area of public procurements (21,5%) are committed during the preparatory stage of the procedures – in particular, during the development of the tender documents. Indeed, this period is especially critical considering the fact that it represents the “invisible” stage of administration’s work, when they set the terms and conditions for the applicants under the competition procedure. In a great percentage of the cases it is exactly these requirements that predetermine the further outcome of the competition.

This is the reason why we believe that in particularly important cases of public procurements (where substantial public funds are spent or where significant public interest is focused/triggered) it is appropriate for the observers to begin their monitoring from the stage of tender documents development.

In order to raise transparency, we have prepared some proposals relating to the opening and announcement of the tenders and price bids of the participants in the procedure.

Transparency International – Bulgaria proposes the introduction of new *corpora delicti* for administrative and criminal liability of the persons who commit various violations of the PPA. For example, the right of access of the participants to the minutes of the Committee of the Contracting Authority, is not only their legal right but also an important tool for increasing the transparency in the actions of the Contracting Authority.

At present, however, violations to this right by the respective offender (contracting authority) are not punishable, which creates a real risk for this violation. This is why we propose a new administrative criminal provision Art.131b of the PPA, envisaging that those responsible bear financial liability if they don’t provide access within the envisaged term, respectively a copy of the minutes from the meeting of the tender assessment and ranking committee.

We have envisaged the opportunity for the ranked participants to be able to acquaint themselves with the content of the ranked tenders in order to increase the transparency of the procedure. Furthermore, this is the only way that the participants who were ranked but did not win the award could make an adequate assessment of whether to challenge the ranking done by the Contracting Authority. At present, they are placed in a situation where they either have to appeal “blind”, or waive their right of appeal even though it is possible that the applicant ranked first or their tender would not meet the terms and conditions announced in advance by the Contracting Authority.

The proposals of Transparency International – Bulgaria for changes to the Public Procurement Act are as follows:

§ 1. Art. 34, Par. 4 is amended as follows:

“(4) The Contracting Authorities shall have the option to invite independent observers who will have the right to attend the meetings of the committee and to access the minutes from its work.”

§ 2. A new Art. 34a is created, saying:

“Art. 34a, Par. 1. Independent observers shall only be non-profit associations for the public benefit that have at least 3 years of experience as a NPLE.

Par. 2. The associations wishing to be invited as independent observers shall submit applications to the Contracting Authority.

Par. 3. Contracting Authorities shall have the right to request opinions on the draft documentation from NPLE that fulfil the conditions for independent observers.

Par. 4. With the act for the appointment of a committee to carry out the procedure, the Contracting Authority shall also adopt a decision on the application of the association to operate as an independent observer.

§ 3. In Art. 35 a new Par. 4 is created, saying:

“(4) Declarations under the paragraph above shall be submitted by the independent observers specified in the act of the Contracting Authority under Art. 34.”

§ 4. The following supplement is made to Art. 47, Par. 5, item 1:

After the words: “including a procurator or a commercial agent”, the following words should be added: “with an area of authority – the territory of the Republic of Bulgaria, respectively the territory of the country where the diplomatic or consular representative office

of the Republic of Bulgaria is established – as the Contracting Authority for the public procurement,...”.

§ 5. Art. 69a, Par. 4 is amended as follows:

“(4) Before the opening of the price bids, the committee shall announce to the persons present pursuant to Par. 3 its proposals for the removal of applicants or participants in the procedure, as well as the reasons for these proposals.”

§ 6. In Art. 69a a new Par. 5 is created, saying:

“(5) When the assessment criterion is the “most economically advantageous tender”, after the performance of the actions under Par. 4, the commission shall announce to the persons present pursuant to Par. 3 the results from the assessment of the tenders of the eligible applicants or participants under the other indicators of the assessment methodology.”

§ 7. Art. 73, Par. 3, first sentence is amended as follows:

“(3) The Contracting Authority shall announce in an appropriate manner the decision under Par. 1 and shall dispatch it to the participants within three days since its adoption.”

§8. In Art.73 a new paragraph 6 is created, saying:

“(6) Upon a written request by a participant that was admitted to the ranking phase, the Contracting Authority shall, within three days since the receipt of the request, grant the participant access to the tenders of the ranked applicants. The Contracting Authority may deny access to the tender, or to any part thereof, when granting the access contradicts a statutory act or prevents, limits or distorts competition.”

§ 9. A new Art. 131b is created, saying:

“Art. 131b. A Contracting Authority that does not fulfil their obligation under Art. 73, Par. 4 or 5 within the statutory term shall be liable to a pecuniary penalty amounting to 1000 to 5000 BGN or a fine amounting to 500 to 1500 BGN, and the person under Art. 8, Par. 2 or 3 – shall be liable to a fine amounting to 500 to 1500 BGN.”

II. PROPOSALS ON IMPROVEMENTS TO THE ENVISAGED SANCTIONS FOR VIOLATIONS TO THE STATUTORY ORDER FOR THE REALISATION OF PUBLIC PROCUREMENT PROCEDURES

The social relationships within which the observance of the statutory order for the award of public procurements is guaranteed are not deprived of criminal legal protection.

The currently effective Criminal Code (CC) envisages severe sanctions primarily for the persons representing the contracting authorities in public procurements. In the event of a conceded violation to the established legal order, their criminal liability can be realised for negligent or deliberate mismanagement (under Art. 219, Par. 1 – 4 of the CC), for signing a disadvantageous deal (under Art. 220, Par. 1 or 2 of the CC), for a general abuse of the official position held by them (under Art. 282 of the CC), for an abuse of office (under Art. 283 of the CC), for deliberately allowing a criminal offense related to their work (under Art. 285 of the CC), for a passive bribe (under Art. 225c or under Art. 301 – 302 of the CC) and some others.

Criminal liability is also borne by the persons representing the applicants or participants in a public procurement procedure or the contractors under a public procurement, in the event of realised social encroachment against the category of public relationships under review. Most commonly their liability is realised for embezzlement (under Art. 201 of the CC), abeyance (under Art. 219 of the CC), an active bribe (under Art. 225c or Art. 304 of the CC) and some others.

In this respect, at the present stage of social development there is no need to criminalise a completely new criminal offense ensuring the criminal protection of public relationships and the observance of the legal order for the award of public procurements. Such a criminal law provision would be too complex or too general and would not cover quantitatively new forms of social interference in comparison to those incriminated by the aforesaid corpora delicti.

At the same time, we cannot leave without consideration the fact that the observance of the legal order for the realisation of public procurement procedures and the allocation of public funds, most commonly – of substantial value, pursuant to the PPA, is of key significance to the economy of the country.

The violation of the established rules often reveals a high degree of public hazard, undermines the trust of citizens into public institutions (especially when the public procurements are announced in favour of public entities) and may lead to considerable illegal gain to the guilty parties and to criminal financing for organized criminal groups. Often the establishment of conditions for the violation of the requirements of the PPA is preceded by a substantial corruption influence.

Therefore, it is appropriate to envisage in the system of the most frequent criminal offenses under Art. 219, under Art. 220 and under Art. 282 and Art. 283 of the CC qualified corpora delicti providing for more severe criminal liability for the cases where the offense was committed in connection with the realisation of a public procurement procedure.

Envisaging more severe criminal repression should lead to an increase in prevention and to more successful counteraction against the negative social phenomena under review.

The proposals of Transparency International – Bulgaria for changes to the Criminal Code are the following:

§ 10. Art. 219, Par. 4 (New – SG, issue 28 of 1982, amended – SG, issue 75 of 2006) is amended as follows:

“In the event that the offense envisaged in the paragraphs above was committed in connection with the realisation of public procurement procedures, or if the damage inflicted is of particularly high value...”

§ 11. Art. 220, Par. 2 (New – SG, issue 89 of 1986, amended – SG, issue 75 of 2006, issue 26 of 2010) is amended as follows:

“In the event that the offense envisaged in the paragraphs above was committed in connection with the realisation of public procurement procedures, or if the damage inflicted is of particularly high value...”

§ 12. In Art. 283a (New – SG, issue 62 of 1997) the following text is added after the words “legal entities”:

“or in connection with the realisation of public procurement procedures”.

III. PROPOSALS FOR AMENDMENTS TO THE ADMINISTRATIVE VIOLATIONS AND PENALTIES ACT

The system of administrative corpora delicti ensuring the punishment of offenders committing violations in connection with public procurement procedures through the methods and means of administrative penalties, regulated in Part Four “Appeal and Control”, Chapter

XIII “Administrative Penalty Provisions”, Art. 127 – 133 of the PPA, is relatively well expanded and comprehensive.

In this regard, in our opinion, at this stage we should only supplement or amend the administrative penal provisions under the PPA with a new Art. 131⁶, as suggested in the proposal discussed above (in section I of the present exposition). The current editions of the provisions of Chapter XIII of the PPA pose no difficulties to their interpretation and application by the competent law enforcement authorities and envisage administrative sanctions corresponding to the degree of public hazard of the offenses.

It is necessary, however, to enable the persons engaged in activities related to establishing potential administrative violations under the PPA and the persons supporting the commitment of these violations to properly exercise their powers during a relatively longer period of time.

This is necessary as the detection of violations is often complicated by the office held by the offenders and the mutual benefit to the parties under the affected public connections.

That is why we propose an amendment to the provision of Art. 34, Par. 2 of the AVPA, regulating the maximum period of time within which the control authorities have the legal capacity to draw up an act establishing an administrative violation against the offender. In the cases where a violation has been committed against the order and conditions for the award of public procurements, it is appropriate, in our opinion, to extend this period to six months since the identification of the offender or five years since the commitment of the violation.

This will enable the control authorities to properly exercise their powers irrespective of some objective factors that hinder the successful and timely detection of offenders. The measure will also have a definite preventive effect.

The proposals of Transparency International – Bulgaria for changes to the Administrative Violations and Penalties Act are as follows:

§ 13. In Art. 34, Par. 2 (New – SG, issue 12 of 1996, amended – issue 51 of 1999, issue 92 of 2000, issue 101 of 2002, issue 33 of 2006, issue 108 of 2006) the following text is added before the words “gambling”:

“the order and terms and conditions for public procurements”.

MAIN FINDINGS AND CONCLUSIONS

from a Report on the examination of the documents related to the implementation of construction contracts for the “Trakia” Highway (Lot 2, Lot 3 and Lot 4)



Based on the examination of the documents and the on-site inspections, the following conclusions can be drawn:

1. As of the completion of the monitoring, the project is being implemented in compliance with the contract terms;
2. There are technical conditions causing delays – due to the establishment of networks and facilities that are not marked in the design and accounting documents, the discovery of new archaeological finds, and disputes regarding the geological features of the construction site, despite the fact that the case is clearly defined in the Construction Contracts for Lots 3 and 4 (Art.22).
3. There are reasons to believe that, based on the wordings of the construction contracts, the Builders are experiencing difficulties with presenting a correct, accurate and appropriate to the contractual terms and conditions justification of their claims.
4. There are reasons to believe that the Builder of Lot 4 still experiences difficulties of organizational and technical nature.
5. Given the significance and scope of the project, there are reasons to believe that attention should be paid to the need for increased staff allocation for the teams involved in the performance of the project, as well as to the need for clear and accurate definition

of the functions of each member, and the respective provision of continuous monitoring, control and expert's opinion on the activities performed.

6. During the monitoring of the documentation of the Contracting Authority no specific data was established regarding the systems adopted at the lots – for quality control over the construction and assembly works performed, systematised backup of the acts and protocols drawn up in the course of the construction works pursuant to Ordinance 3 of the MRDPW, and detailed reporting of the activities of the Consultant (issued instructions, orders, schedules for activities performed on-site by each of the members of the team). Due to their mention in the documents provided to the monitoring expert, it is clear that these documents and/or parts thereof are kept at the on-site offices of the Contractors and the Consultants. In view of the significance and scope of the Project, we recommend that attention should be paid to the need to introduce a quality control system regarding the gathering and storage of the construction documents, as well as regarding the realisation of exchange of documents/correspondence between the participants in the investment process, and the establishment and maintenance of a separate archive. It should be clearly defined how and who is forming and keeping the construction dossier for the Lots.
7. There are reasons for concern regarding the consistent on-site presence of the construction supervision.



TRANSPARENCY INTERNATIONAL – BULGARIA

PUBLICITY AND TRANSPARENCY OF THE AWARDING AND IMPLEMENTATION OF PROJECTS OF SUBSTANTIAL PUBLIC INTEREST

Report on the monitoring of the contractor selection procedure and the implementation of the construction contracts for the "Trakia" Highway

Sofia, 2011