



REPORT

on

**the Public Procurement Procedure for the Design and Works
of Struma Motorway, Lot 3.1 Zheleznitsa Tunnel with three
lots, opened with the Decision no. 92/01.09.2017**

(terminated)

SUMMARY

INTRODUCTION

This summary presents the key findings of Transparency International Bulgaria, an independent observer of the public procurement procedure¹ for the design and works of Struma motorway lot 3.1, Zheleznitsa tunnel.

The first tender for this segment of Struma motorway was launched back in 2015 by the National Company “Strategic Infrastructure Projects” (NCSIP) and continued by the Road Infrastructure Agency (RIA) after amendments in the 2016 Roads Act with which the NCSIP has been terminated.

In April 2017, just few days before the deadline for completion of the evaluation phase (assessment of submitted offers and decision about the contractor), RIA terminated the procedure² and started preparation of the second one.

The Contracting Authority launched a new tender (hereinafter referred to as the “second tender”) on 1 September 2017. The two tenders differ in a number of aspects due to both objective reasons (new procurement legislation³, approach of the succeeding contracting authority to organisation of tenders) and pragmatic rationale (fixed timeframe for implementation of projects funded by the operational programmes within the current EU programming period).

The procedure, subject of the present report, was also terminated shortly after its launch. The monitoring team therefore decided to analyse the key features of the tender design and documentation in comparison to its predecessor. The report also includes an overview of the reasons for termination of the second tender.

To prepare the analysis we used publicly available information, including media sources regarding preparation of the procedure. The signed Integrity Pact between TI-Bulgaria as the Independent Observer and the Road Infrastructure Agency as the Contracting Authority allowed our experts access to additional information, provided by RIA both in writing and during a number of meetings. Finally, we sought for the private sector point of view on the design and the development of the procedure.

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KEY FEATURES OF THE SECOND PROCEDURE, FINDINGS AND CONCLUSIONS

Split of the Tender into Three Lots

One of the key distinctions between the second and the first tender is the split into three lots. While the first procedure covered the design and construction of the tunnel and both short road

¹ By the time of publication of the present report yet another one (third) procurement procedure is on-going. It will be subject of separate analysis and report/s by TI-Bulgaria.

² Monitoring reports regarding the first tender as well as a legal analysis of the Decision for termination are available at the dedicated TI-Bulgaria webpage: <http://integrity.transparency.bg/en/publications/>.

³ The new Public Procurement Act has entered into force as of 15.04.2016. Thus, while for the first procedure the old PPA was applicable, the new law was already in force for the second procedure.

segments at its exits, the second tender provided for selection of separate contractors to implement these three components of the project.

Thus, although the procurement procedure is one, in practice after the selection phase there will be three separate tenders to implement – with three separate contractors, separate timeframes (including different start dates), and separate construction consultants to supervise the works.

The motivation expressed by both the Road Infrastructure Agency and the Ministry of Regional Development and Public Works as to why the procedure was split into three lots followed the assumption that the three contractors would work simultaneously, and this would allow for quicker implementation of the entire segment.

On one hand, such an approach has its rationales bearing in mind the prolongation and outcome of the first tender, as well as the timeframe of the Operational Programme Transport and Transport Infrastructure 2014-2020⁴ (OPTTI 2014-2020). On the other, it would require precise planning of works and synchronisation of the execution between the three contractors, which to our opinion would brought more burden on the Contracting Authority.

Eligibility for Participation in Separate Lots

To ensure the selection of three separate contractors for the three lots, the Road Infrastructure Agency set a condition that limits the possibility to submit an offer for more than one lot.

According to the Public Procurement Act (PPA) “bidder” is any natural or legal person or their partnerships and the contracting authority does not have the right to require the partnerships to have a certain legal form in order to participate in awarding a procurement. When the tender is split into lots, the law perceives them as separate “small” tenders and even if the Contracting Authority sets rule that one bidder can participate in one lot only, there is no way to ban a company from forming different partnerships for the different lots. The applicant is the partnership, not the company itself. This allows a company to independently submit an offer for one lot and to participate in a consortium for another. Same principle is applied in case the same company participates in separate consortia which submit offers to different lots. These rules were reconfirmed by the Contracting Authority in answer to questions to perspective bidders during the bidding phase. Thus, in practice, notwithstanding of the set condition, the legal framework does not allow for guaranteed selection of separate contractors for the three lots.

From an economic point of view, the comparatively small national construction market and the complex project, as the 2 km tunnel is, predetermine the assumption that the same companies will participate in the tender and the same companies will be involved in the implementation in one or another role (lead contractor, partner in consortium, sub-contractor).

⁴ The deadline for implementation of activities and eligible costs of the OPTTI 2014-2020 is 31 December 2023.

Reduction of the Timeframe for Execution

To compensate the time spent for conducting of the first procedure⁵ and to ensure implementation of the project within the deadlines of the OPTTI 2014-2020, the Road Infrastructure Agency reduced the timeframe for execution phase in the second procedure. In the first tender it was 1400 days both for the design and the works. In the second procedure the timeframe for the most complicated part – lot 2 (the tunnel) was reduced with approximately a third – to 1060 days. The timeframes for the road parts at the exits were 600 and 660 days respectively.

While we accept the motives of the Contracting Authority, there still remain concerns about such a large time reduction, especially taking into account the complexity of the project and the tough terrain.

Eligibility Criteria

After the new PPA entered into force, the contracting authorities across the country started using the European Single Procurement Document (ESPD), a self-declaration for fulfilment with the conditions required in public procurement procedures. Also, the provisions of the Public Procurement Act explicitly set a range of eligibility criteria which the contracting authorities can require by bidders. There is a number of differences between the old and new legislation in this regard.

One of those differences is the economic and financial state of the eligible bidders. The old legislation allowed the contracting authorities to require evidence for availability of or access to liquid financial resources to guarantee that the contractor would be able to cover any potential costs exceeding the received advance payments. The new legislation does not provide for such option, however it allows for three criteria – minimum amount of annual turnover, professional liability insurance, and positive asset-liability balance. The contracting authorities may choose to apply one, two or all three of them.

The requirements for the economic and financial state to the bidders set in the second tender only covered the minimum amount of annual turnover for the last three financial years, including overall turnover and “specific” turnover, the latter being accomplished within activities related to design, construction or repair of roads. The amounts differ for the separate lots, in accordance to their scope and budget.

In our opinion, the access to liquid funds for a certain amount, which was one of the financial criteria in the first tender, provides for better guarantee that the contractor would be able to perform all necessary activities. While we recognise, that in the second procedure the RIA followed the law, imposition of only one of three optional criteria in such complicated infrastructure project is not sufficient to ensure selection of a reliable contractor. Instead, the Contracting Authority might have required two or all three available options.

⁵ More than 16 months.

Next, the requirements for both experience of the bidders and experience of the project management team were reduced.

In the first tender the Contracting Authority required experience in new construction of motorway roads and supporting facilities like bridges along with a background in tunnel building. That is, companies with experience in construction of smaller roads or reconstructions only were not eligible to participate. In the second tender the experience requirements included alternatively building of new roads or reconstruction of existing ones. Furthermore, the range of roads which would be recognised as eligible evidence included smaller scale and local roads.

As to the criteria for project management team, again, comparison between first procedure and lot 2 of the second procedure (the tunnel) shows that requirements were decreased. While in the first procedure project manager was required to possess at least 10 years of experience in road construction and 2 implemented projects for new motorway construction as a project manager, in the second procedure the set criteria required only one implemented project for new construction or repair of a road.

We recognise that in this way the Contracting Authority enhanced probability for increased competition. However, in this particular case of the most complex infrastructural project in country, the eligibility criteria should have been imposed carefully.

RIA motivated including of the reconstructions and the expansion of range of roads with their experience, when some procedures with more restrictive criteria were either returned by the Public Procurement Agency or challenged in the Commission for Protection of Competition on grounds of limited competition. While we tend to accept the CA motives, the more restrictive criteria in the first tender were neither challenged, nor did they affect the number of bidders (seventeen in the first tender).

Methodology for Evaluation of the Submitted Offers

The evaluation methodology differs strongly from that in the first tender. The NCSIP methodology included two components – technical score (40%) and financial score (60%). Technical score was calculated according to a scale of indicators, maximum sum of which reached 40 points. Financial score was calculated as a proportion between the bidder's price and the lowest offered price, and its weight in the overall evaluation was 60%.

While keeping the general proportion of technical and financial scores, the Road Infrastructure Agency uses a model methodology, which is much more complicated.

The technical score is calculated as a sum of two grades – for design (max. 9 points) and for construction (max. 31 points). The grade for construction in turn is divided into two categories of indicators – for construction per se (max. 26 points) and for ecological measures (max. 5 points). The RIA predefined in each indicator a minimum score, given for compliance with the minimum requirements. The offers which further develop the minimum requirements are awarded higher scores, based on expert opinion of the evaluation committee.

Although we acknowledge the reasoning behind the method for calculation of the technical score, we consider the wording of some of the minimum requirements to be unclear and confusing. The explanation of the CA in this regard were the instructions given by the Public Procurement Agency and the established practice.

The financial score also is a sum of three grades – price for design (max. 5 points), price for construction (max. 35 points) and balance of unit prices (max. 20 points). Each of these indicators is separately calculated as a proportion between the bidders' price and the lowest offered price, with the respective coefficient. In addition, the "balance of unit prices" compares offered and lowest unit prices one-by-one.

The reason for including of the balance of unit prices in the financial score, as explained by the CA, was to restrain the bidders from offering higher prices for "insubstantial" activities. Also the proposed unit prices serve for valuation of all works and materials after the detailed design of the project is done. Using it as a component of the financial score however may reduce the advantage for companies with better know-how and innovative technologies, who could offer more competitive "non-balanced" prices.

Model Contract Agreement

The Road Infrastructure Agency kept the approach of the former Contracting Authority and used the General Conditions of FIDIC Yellow Book standard as a basis for the contract agreement. Unlike the NCSIP, RIA published a read-only version of the standard, which we consider a good approach in cases when pieces of documentation are subject to intellectual rights and are not disseminated free of charge.

In the Specific Conditions, the Contracting Authority amended some of the provisions so that the contract is in compliance with the national legislation. We recognise the efforts of the RIA in this regard, however, there are still some discrepancies between the contract and the applicable legislation. This is why we reconfirm our position, that while using recognised international standards, the contracting authorities should analyse them more thoroughly and amend all provisions which could potentially contradict the legal framework or be interpreted ambiguously.

One of our main concerns in this regard is the possibility to amend the final price of the contract. The model contract does not provide for such option, although slight amendment is accepted within the so called "additional cost". The additional cost is part of the contract price, being specific percentage of the offered price and is meant to cover costs which could have not been perceived at contracting stage. The law on the other hand allows for amendment of the contract price in specific cases, for instance in case of raise of market prices for materials or raise of prices regulated by the government.

Opinion of the Business Sector

In order to present as many points of view as possible, Transparency International – Bulgaria addressed the two major national business associations in the construction sector to request their opinion on the key features of the second procedure.

The business did not express any concerns over - the division of the tender into three lots and the potential concentration of machinery of three contractors at a comparatively short road section. On the contrary, they envisaged increase of the competition since smaller companies were allowed to participate by submitting offers for lot 1 and/or lot 3 – the road parts at the tunnel exits.

Similarly, private sector did not perceive the decrease of the execution timeframe as challenging. They rather supported the motivation of the Contracting Authority that the project should be implemented within the current programming period and expressed no objections.

Representatives of one of the sectoral organisations recognised that the tough terrain and complex geological structure might cause delays during implementation. This risk supplemented with multiple examples of appeals at all stages within a procedure even added to the confidence that the tender for Zhelenitsa tunnel should be conducted as soon as possible whatever imperfections it might have.

In our opinion, the private sector is cautious and prefer staying on the safe side when publicly expressing positions about public procurement. One reason is the comparatively narrow national market in the construction field and the dependency of the businesses on income from tenders carried out by public authorities. On the other hand, such self-censorship and lack of constructive criticism on the side of companies deter from taking their concerns into account and improve the procurement process.

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Amendments During Bidding Phase and Termination of the Procedure

Two weeks after the launch of the tender the Contracting Authority published amendments in the call and tendering documentation. The amendments were two-fold. Part of them were meant to correct and complete the information in the original call. For instance, in the original call under evaluation methodology, only general proportion of technical and financial scores were noted. The law however requires contracting authorities to indicate detailed evaluation methodology, including all indicators within the call for tender. Thus with the amendment the RIA overcame this mistake, which could be easily classified a technical one.

Other amendments however, were in regard to eligibility criteria for participants. These included both the criteria per se and the eligibility evidence which would be accepted. For instance, in the original call a potential bidder could prove its experience with one implemented project similar in scope to the subject of the tender. In the amended call, the bidders already were allowed to prove experience with several projects of smaller scope and complexity. Thus, the range of perspective bidders changed during the bidding phase, which is prohibited by the law.

The opinion of the Public Procurement Agency was alike and they recommended termination of the procedure.

The Road Infrastructure Agency intentions were to conduct the procedure as soon as possible. Elaboration of the tendering documentation including the ex-ante control procedures (both internal and by the Ministry of Regional Development and Public Works) took approximately five months, although the technical part was not amended. Still the documentation had gaps and inaccuracies which in the end led to cancellation of the tender.

Also, no motivation for the amendments were publicly released by the RIA. Although the law does not require any, we consider it a good practice list the motives in the decision for amendment of the call for instance. This would allow the Contracting Authority to defend their actions and to increase the level of transparency of their decision-making.

Termination of the second procedure led to another delay in the Zheleznitsa tunnel project – the third procedure has been launched in the second half of October 2017, which ones again raised the risk of failing to implement it within Operational Programme Transport and Transport Infrastructure 2014-2020.

The present report has been prepared within the European Commission initiative „Integrity Pacts – Civil Control Mechanism for Safeguarding EU Funds, Phase 2”. The project involves civil monitoring of public procurement procedures funded by European resources in a total of 11 EU Member States. The initiative has been implemented in partnership with 17 non-governmental organizations and is coordinated by the global anti-corruption movement Transparency International.

The initiative aims to establish, through promoting a wider implementation of Integrity Pacts, a preventive mechanism for safeguarding public spending. The application of this instrument in practice demonstrates its importance for complying with the principles of competition, equality and non-discrimination. The Integrity Pact lays down rules for independent civil monitoring of public procurement procedures thus contributing to enhancing transparency and integrity in public procurement.

In Bulgaria the project is implemented by Transparency International – Bulgaria. It conducts monitoring of the call for an open tender for the design and works of Struma motorway, lot 3.1 Zheleznitsa tunnel.

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