



Transparency International - Bulgaria

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. 115/17.10.2017

PHASE IV

Implementation of the public procurement:
Amendments to contractual agreements

Sofia, 2020

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I. INTRODUCTION

1. This Report presents the findings of Transparency International - Bulgaria from the independent civil monitoring of the implementation of the contracts assigned within the public procurement procedure for the design and construction of Zheleznitsa Tunnel on Struma Motorway¹. The civil monitoring of the procedure to build the longest motorway tunnel in Bulgaria is implemented in the framework of the European Commission initiative “Integrity Pacts – Civil Control Mechanism for Safeguarding EU Funds”. The monitoring was implemented by a team of observers – experts in law, social, and engineering sciences – in the period March 2019 – June 2020 based on the Integrity Pact concluded between the independent observer, Transparency International - Bulgaria, and the contracting authority, Road Infrastructure Agency (RIA)².
2. The Report covers the activities related to the implementation of the contracts with the contractors chosen for the three lots of the public procurement which include design and construction for the respective lots³.
3. The monitoring of the implementation of the three public contracts concluded for the design and construction of the three lots of the public procurement is related to the use of two main methods: a) document analysis related to the examination of diverse information of technical, organisational and financial nature which is important to the implementation of the project; b) on-site monitoring – monitoring and participation in working meetings with the contracting authority and the contractors as well as visits to the construction site.

II. COMMUNICATION AND PROVIDING INFORMATION WITHIN THE INTEGRITY PACT

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4. The report is developed on the basis of documents and information accessible on the website of the Road Infrastructure Agency; documents and information provided by the contracting authority as per the Integrity Pact and under the Access to Public Information Act; direct observations of the monitoring team from on-site inspections; participation in the monthly meetings between the contracting authority and the contractors; summarised information provided by the contractors.
5. To achieve the purpose of monitoring – transparency in project implementation, preventing potential conflicts between parties to the contract and improving the administrative framework in which the contracting authority functions, the contracting authority should

¹ Procedure to assign the public procurement with the subject matter “Design and Construction of Struma Motorway, Lot 3.1 Zheleznitsa Tunnel with Three Lots” launched by virtue of Decision No. 115 of 17.10.2017 of the Chair of the Management Board of the Road Infrastructure Agency.

² The Integrity Pact for the public procurement making up the subject matter of this report was signed on 16.10.2017. The full text of the pact in English is available here:

http://integrity.transparency.bg/en/wp-content/uploads/sites/2/2017/11/IntegrityPact_20171016_FinText_EN.pdf.

³ To make it easier for the readers, this report uses [both in Bulgarian and English] the term “lot” (Lot 1, Lot 2 and Lot 3), which has become popular, to refer to Subsections 1, 2 and 3 implemented as sites under the respective items 1, 2, and 3 of the public procurement for the construction of Zheleznitsa Tunnel.

provide the necessary information to the independent observer in reasonable time, in the form requested and under the conditions of mutual trust.

6. This is the place to note that the team of the independent observer is fully bound by strict obligations of confidentiality arising from the legislation and the Integrity Pact and any information published does not include sensitive commercial information which is not public, information which is personal data or information in current inspections and criminal proceedings underway and, where necessary, the information in the reports is presented only in an anonymised and analytical form. In addition, it should be noted that the team of the independent observer provides justification why it needs additional information and which aspect of the monitoring it refers to.
7. Despite the existence of good communication and adequate best practices for exchange of information with the RIA (submission of questions in writing and receiving responses to them, again in writing), with respect to some of the aspects concerning the implementation of the three contracts for design and construction, the contracting authority postponed the provision of the necessary information or failed to ensure the practical possibility for access to it, especially after the outbreak of the first wave of the pandemic caused by the spread of COVID-19.
8. In this regard, an example of a communication problem is the matter related to obtaining real access to information about the subcontractors engaged in activities under the three lots. After the adoption of the latest⁴ legislative amendments to the Public Procurement Act (in force as of 01.01.2020), the contracts with subcontractors are public information and they should be published in the purchaser profiles of the contracting authorities.
9. The team of the independent observer asked the RIA for this information, including in line with the procedure under the Access to Public Information Act. By virtue of its Decision RD-OI-24/12.03.2020, the contracting authority provided the independent observer with access to the information concerning the subcontractors engaged in the project implementation. According to the decision, due to the presence of personal data, the information cannot be sent electronically and access to it must be provided for review only, at the premises of the contracting authority. It is important to note, that the decision does not deal with the matter how the personal data would be protected in the event of access at the CA's premises and fails to consider the circumstance that such personal data are protected by means of redacting. At the same time, due to the restriction measures in the country in relation to the epidemic situation and the state of emergency, according to the order of the RIA Chair, the access of external parties to the building was limited. In view of these circumstances, the use of electronic communication is the only possible channel of access to documents and the respective personal data can be redacted and the other requirements of the legislation and the Integrity Pact would be observed.
10. The independent observer exercised the right to refer to the court the issue with the provision of access to public information. By virtue of Judgment No. 4108 of 23.07.2020, Sofia City Administrative Court obligated the Road Infrastructure Agency to provide the information to the independent observer in the form requested, namely electronically with redacted data.
11. In this regard, in the situation of a heightening pandemic, the independent observer makes a general recommendation to the contracting authority for a greater flexibility in providing

⁴ As of June 2020.

information and digitising some of the document flow in order to facilitate the remote work and comply with the main measure of infection prevention – ensuring a physical distance and avoiding people crowding in premises. As a result of the communication issue, the preparation of this report was delayed several months.

12. At the same time, emphasis should be placed on the adequate assistance of the team of the contracting authority during the construction stage of the site under monitoring. In the period of monitoring of the construction works, an interaction mechanism was established between the contracting authority and the independent observer: the contracting authority set the practice to send regular information about the upcoming monthly meetings, to provide information during the monthly progress meetings, to assist with obtaining information from contractors and to carry out direct monitoring on location. We assess positively this approach of the team of the contracting authority, because it helps with the civil control over the construction of this important infrastructure project, including having a disciplining effect on the contractors.

III. AMENDMENTS TO CONTRACTS AND THEIR IMPACT ON DESIGN AND CONSTRUCTION ACTIVITIES – LEGAL ASPECTS

13. The analysis of the design and construction activities in the public procurement raises several areas of questions which need to be discussed.

1. Amendments to the contracts for the public procurement

14. It is notable that for the period from the signing of the contracts to assign the public procurement until now⁵, they have been amended a total of 7 times:

- The contract to assign the public procurement for Lot 1 was concluded on 16.10.2018 and was then amended three times – by means of annexes⁶.
- The contract to assign the public procurement for Lot 2 was concluded on 11.02.2019 and was then amended two times – by means of annexes⁷.
- The contract to assign the public procurement for Lot 3 was concluded on 28.09.2018 and was then amended two times – by means of annexes⁸.

15. The reasons for the amendments are diverse – from removing obvious factual errors (inconsistency when an amount is stated in numbers and words in a contract which has already been signed) to changing an essential part of the provisions for the contractual relations (change in deadlines due to the delay to conclude the contracts with the consultants or restructuring in pricing).

16. In view of the complexity, the amount and the nature of the public procurement, amendments and refinement of the contractual relations cannot be entirely excluded. Still, the contracting authority needs to resort to such an approach only if there is a need for

⁵ In the report we use “now” in the meaning of “by the time of drafting of the report”, which is 20 June 2020.

⁶ Respectively on 31.10.2018, 09.01.2019 and 28.02.2020.

⁷ Respectively on 18.04.2019 and 28.02.2020.

⁸ Respectively on 09.01.2019 and 28.02.2020.

amendment as a result of unforeseen events such as, for example, the pandemic caused by the coronavirus; while circumstances which could be taken into account upon the signing of a contract should be avoided by means of a flexible and adequate contractual framework. The emphasis of this report is the amendment to the contractual framework of 28.02.2020 which poses a number of important questions related to the assignment and implementation of the project.

17. **Comment about the amendments to the contracts:** The contracting authority should analyse the reasons leading to the need to conclude annexes inasmuch as they are not due to unforeseen circumstances and could be avoided by means of adequate and flexible provisions in the contracts from the start. This is valid to an even greater extent for amendments which could be expected due to changes occurring from the time of assignment to acceptance of the Technical Design based on which the project solution is finalised and the bills of quantities (BOQ) for the three lots are approved. This will help to avoid risks resulting in (a) the need for additional contracting and (b) creating risks for the quality and timely project implementation.

2. Issues related to the amendments to the contracts to implement the public procurement caused by tying the task to the approval of the Technical Design

18. As noted above, the emphasis of this report is on the amendments related to changes in the contractual framework which cannot be qualified as ones caused by unforeseen circumstances in the course of implementation of the public procurement, for example the delayed assignment of construction supervision.
19. The review of the three latest annexes⁹ with the three contractors concluded on 28.02.2020 for each of the three lots amending the contracts for assignment of the public procurement reveals a common theme of changes in the contractual framework of the three contracts, namely deviations in the project task caused by differences in the approved technical design when compared to the input data in the conceptual design which lie at the foundation of assignment. Inasmuch as the contracting authority also admits that such complex infrastructure projects will inevitably exhibit substantial discrepancies between the conceptual design and the technical design, the independent observer considers the said circumstance a risk in the implementation of the project which should be taken into account and minimised as early as the procurement assignment stage.

2.1. Issues in the contractual framework caused by the lack of flexibility in the initial contracts with regard to unforeseen works to complete the public procurement

20. According to the independent observer, a major problem related to the quality and timely completion of the project is the changes in the task resulting from differences in the technical design in comparison to the input data in the conceptual design which were the basis for the price offers of the participants in the bid.
21. The independent observer acknowledges the large number of risks the contractors take on when they submit a price offer based on a design which could differ (often substantially) from the initial scope of the task. It is this assignment of the public procurement as a design

⁹ Ref.no 53-00-1789/28.02.2020, Ref.no 53-00-1791/28.02.2020, and Ref.no 53-00-1792/28.02.2020.

and construction project without having clarity as to the amount and type of final construction works and the materials needed for them that, according to the independent observer, poses significant risks for the deadline and quality of project implementation which should be taken into account during the preparation of the contractual framework from the very beginning. Note should also be taken here of the more general question whether the contracting authority bears any responsibility with respect to the quality and the completeness of the input data in the conceptual design.

22. In the initial provisions of the contracts for the three lots, the contracting authority has laid down a mechanism for the way in which changes caused by differences in the technical design in comparison to the initial task outlined in the conceptual design are to be treated. Pursuant to Clause 13.1.2. of the Specific Terms of the contract, such changes in the initial type of task must be covered by the mechanisms of payment of additional expenses which amount to 5% of the construction expenses for each of the three lots. If this amount is insufficient to complete the works set out in the approved technical design, all other expenses needed for the project implementation are covered by the contractor fully.
23. This approach which is possible in principle and laid down in the initial contractual framework should be substantiated with a detailed analysis which the contracting authority could perform after receiving the coordination opinions of all stakeholders in the process of approval of the technical design. It is only such a detailed analysis that would allow the contracting authority to take the right decision about the amount of unforeseen expenses related to changes in comparison to the initial assignment. The reason for this is that if it is impossible to cover the unforeseen activities with the amount of additional expenses as a result of changes in the technical design, the difference should be covered fully by the contractors. This entails a risk to the quality implementation of the project or for an initial increase in the value of the individual types of works (and hence of the initial profit envisaged) so that the contractor could cover financially such a risk.
24. All this leads to the conclusion that the contracting authority should calculate very carefully the risk of making radical changes in the technical design in comparison to the conceptual one. Otherwise, the amount of additional expenses (5% of the value of the construction and assembly works) may prove quite insufficient to cover the unforeseen activities and the contractors will be forced to work for no profit and even possibly incurring loss. The data provided in written responses by the contracting authority do not make it clear to what extent there is a detailed analysis of the changes in the project due to changes at the stage of technical design where they need to be covered fully by the contractors or what their amount is. Such information would be key not only to the nature of the risk for delayed and poor-quality implementation described above but would also be useful for the contracting authority when assigning future engineering¹⁰ projects as regards the admissible deviations from the initial conceptual task.
25. The independent observer is of the opinion that if the financial risk is too great for the contractors, this could prevent the participation of contractors whose competition could optimise the price for project implementation and improve its quality. If it is impossible to estimate the unforeseen activities, the independent observer recommends that another approach should be sought in assignment (construction after there is definitive input data – approved technical design), larger amounts should be envisaged for additional expenses or

¹⁰ Technical design and construction within a single procurement procedure.

a possibility for additional assignment should be sought. Therefore, the independent observer cannot side with the opinion of the contracting authority that this approach of assignment is the most appropriate one to achieve optimal performance deadlines and high quality.

26. A brief note should also be taken of the problem related to the possible responsibility for the completeness and reliability of the input data provided by the contracting authority at the stage of announcing the public procurement.
27. This is the place to emphasise that the independent observer is not of the opinion that, in view of the contractual provisions, including the annexes signed, the contracting authority could be responsible, in principle, for incompleteness of the data of the conceptual design because this risk is assigned fully to the contractors for the lots.
28. Still, it should be mentioned that such an approach cannot be deemed to be legally sound and safe as regards the assignment of similar projects in the future. The reason is that the contracting authority has the overarching obligation to contract in a bona fide manner and to obtain as complete and as true data as possible which will be used as the foundation of the conceptual design. Otherwise, the potential contractor could contest the validity of the agreements whereby the full financial burden of the unforeseen expenses (outside those covered by the additional ones) is assigned to it referring to the general principles set out in the Bulgarian law to correct the content of contracts as a result of economic unfeasibility, in particular circumstances resulting in a change in the price of a construction contract. This could complicate the process of renegotiating the terms of the contract and stall completely the implementation of the respective project.
29. **Comment about the lack of flexibility of the initial contracts:** The independent observer is of the opinion that the approach adopted for the assignment of public procurement for design and construction creates objective prerequisites for changes in the initial task and differences between the conceptual design and the technical design developed. Such a solution entails greater flexibility in the contractual framework allowing for adjustments in the amount of envisaged additional expenses, a possibility for additional assignment or announcement of a new procedure with clarity about the final scope of the task. However, such flexibility in the contractual framework in the context of public procurement for engineering is contrary to principle positions laid down in the Public Procurement Act which does not allow for such a flexible approach to change in the contractual framework¹¹. In this regard, it should be reconsidered if the assignment of construction and design within one procurement procedure is the best approach or if it would be more appropriate to complete the design first and then assign the implementation.

2.2. Issues related to the amendment to the contracts of 28.02.2020

30. According to the arguments of the contracting authority, the said annexes were necessary as a result of new circumstances which made it objectively impossible to comply with the requirement set out in the public procurement contract that the values in the individual

¹¹ There are different reasons, including the striving to restrict a number of negative practices which gained attention in the past two decades under previous rules for the assignment of public procurement such as, for example, conclusion of contracts at a low price with a selected contractor in order to eliminate competition and follow-up conclusion of annexes until reaching the actual scope of activities and the actual value; division of the subject matter of public procurement into several tenders, etc.

items laid down in “Breakdown of the proposed contract price by items” must not be exceeded for the individual types of works.

31. All three annexes provide for a change in the definition of “bill of quantities” laid down in the Contractual Terms, Part B, Subclause 1.1.6.12. The purpose of the amendment is to remove the requirement that each contract must not exceed either the price of implementation of the construction and assembly works or the values in the individual items as per “Breakdown of the proposed price” upon signing the contracts. Each contractor is to be allowed the liberty to propose and change the quantities and values in each item in it as long as the result of the restructuring is such that the total sum of all items does not exceed the price set out in the public procurement contract.
32. First, this approach cannot be deemed to be good because it reveals imperfections in the contractual framework which could have been removed before the signing of the public contracts. An argument to this end is the reasonable assumption that the contracting authority was aware of the possibility of material changes in the task after the approval of the technical design in comparison to the forecasts made in the conceptual design. If this is true, then it is perplexing that the contracting was not aware as early as that time that such changes could impact on the balance of the individual items in “Breakdown of the proposed price” for each lot. In this sense, the independent observer considers the said contractual amendment to be the result of insufficient flexibility of the initial contract.
33. Greater attention should be paid to the issue with the lack of a detailed analysis and justification of how the alteration of values in items, without changing the prices of individual activities, could impact on the implementation of the project. Again, there is no transparency here as to the extent to which the input data allow for “savings” in activities in some items at the expense of other items. The lack of any motivation and mathematical justification of how the alteration of values in items will compensate the contractors for any unforeseen expenses as per the approved technical design is a deficient practice in our opinion. It leaves the suspicion that the unit prices provided by the contractors from the start are not accurate and the same applies to the volume of certain activities by items.
34. As noted above, this could affect the likelihood to attract serious and quality competition as regards the participation in the procedure, the quality of construction and the capital adequacy of the respective contractor. In addition, the independent observer cannot agree with economically unsubstantiated claims that the volume of certain activities does not have a significant impact on their individual price because works in construction depend on planning for significant technical, logistic, and human resources, thus the lack of clarity in planning can result in inefficiency in implementation and increased values of the works completed by the contractors.
35. **Comment about the amendments to the contracts of 28.02.2020:** The independent observer is of the opinion that the annexes amending the contractual framework of 28.02.2020 could have been avoided had there been a more flexible contractual framework from the start. The approach of change the balance in activities by items is essentially a change in the offers of the contractors where the values for individual types of activities were given back at the bidding stage.

2.3. Issues related to the statutory grounds for amendments to the contracts

36. The contracting authority cites the provision of Article 116, para 1, item 7 of the Public Procurement Act as the statutory grounds for the annexes concluded on 28.02.2020. This provision allows for amendments to public procurement contracts when the **amendments are immaterial**. At the same time, the regulatory framework provides exhaustively for all cases where amendments are deemed material because they affect the subject matter or volume of a public procurement contract (Article 116, para 5, item 3 of the Public Procurement Act).¹²
37. The announcements about the amendments to the three contracts does not make it clear why the contracting authority treats the amendments as immaterial. The independent observer is of opinion that the amendments could also be qualified as material because the changes at the technical design stage, and later at the implementation of construction and assembly works stage, could be characterised as such changing the volume and type of activities to be completed by the contractor.
38. If this assumption is true, then such wrongful application of the law is to be avoided in the future and a justified decision should be sought to amend the contracts within the scope of the exceptions laid down in the law.
39. **Comment about determining the statutory grounds to amend the contracts:** A careful review of the decisions to amend the contracts leads to the conclusion that the amendments could also be qualified as material and they should not be based on Article 116, para 1, item 7 of the Public Procurement Act. The contracting authority should avoid the application of such an approach because it sets an unstable foundation for the application of the contractual relations.

IV. CONCLUSION

40. The approach to assign public procurement through engineering (i.e., technical design and construction within a single procurement procedure) aims to ensure the construction of sites within short deadlines and flexibility in the implementation process. The further monitoring of the practical implementation of the project will show whether it will result in attaining these goals. At the time of development of this report¹³, it can be assessed that the differences between the conceptual design and the technical design (and all ensuing differences in the volume and nature of works, additional research, a series of coordination procedures, etc.) do not result in a substantial shortening of the deadlines. In addition, such an approach does not provide sufficient accuracy of the financial offers of the contractors

¹² Article 116, para 1 of the Public Procurement Act: "Public procurement contracts and framework agreements may be amended when: ... item 2. due to unforeseen circumstances a need arises to perform additional supplies, services or construction which are not included in the initial public procurement if the change of a contractor: a) is impossible due to economic or technical reasons, including requirements for interoperability or operational compatibility of existing equipment, services or machinery assigned by means of the original procurement, and b) would cause significant difficulties related to the maintenance, use and servicing or duplication of expenses of the contracting authority; item 3. due to circumstances which the contracting authority, while acting with due care, could not have foreseen and a need arises for an amendment not resulting in a change in the subject matter of the contract or framework agreement; ... item 7. immaterial amendments are necessary."

¹³ June 2020.

which entails risks both for the contractors (due to unforeseen activities and the respective costs) and for the contracting authority (because the submission of requests for additional works is a frequent consequence).

41. **Assignment of construction through engineering and flexibility of the contractual framework:** First, a note should be made of the significance of the matter of the flexibility in the contractual framework which is relevant not only to the specific public procurement but could potentially be relevant to future procedures for the construction of major infrastructure projects. The independent observer finds the approach to assign construction through engineering to be a problem. In such an approach, upon assigning the procedure the contracting authority provides a conceptual design which is subject to significant changes after the design and approval of the technical design. This approach could pose a substantial financial risk to the contractors which are unable to foresee the volume and nature of changes in the project. On its part, this creates prerequisites for a need for additional works for which no financial resources are envisaged and poses risks of 1) performance of poor quality (due to redistribution financial resources from certain envisaged activities to other unforeseen ones); 2) delay in work and even suspension of performance (in the event of a greater issue with liquidity for the contractors). The independent observer believes that the deficiencies of such a form of assignment through engineering could be eliminated only in projects where there is a relative stability of the input data of the conceptual design. The risk could be managed to a certain extent and reduced by means of contractual constructs where the unforeseen expenses could be offset by an initial larger share of additional expenses and the possibility for additional assignment of works unforeseen upon the assignment of the public procurement.
42. In relation to the general conclusion about the lack of flexibility in the contractual framework as regards the mechanism to cover expenses for unforeseen activities coming into being as a result of material differences between the conceptual design and the approved technical design, it should be noted that original problem in the contractual provisions is what necessitates the amendment to the contracts of 28.02.2020. With a high degree of probability, the contracting authority could have foreseen the coming into being of material changes in the task as a result of the approval of the technical design and thereby could have predicted the need to change the definition of “bill of quantities”. However, there is no analysis as to how the alteration of values by items in the breakdown of the proposed price without changing the prices for individual activities could impact on the implementation of the project. In this regard, a question arises as to whether, in its essence, such an approach entails a follow-up change in the offer.
43. **Issues found during the analysis of the amendments to the contracts of 28.02.2020:** There is no transparency as to the extent to which the input data allow for “savings” in activities in certain items at the expense of other activities in other items because the contracting authority does not provide sufficient and specific information. The lack of any reasoning and mathematical justification of how the alteration of values by items will compensate the contractors for unforeseen expenses as well as what their amount is, as per the approved technical design, is a deficient practice which casts doubts about units’ prices and volumes in the original offers. Along with this, the independent observer levels criticism on the account of qualifying these amendments as “immaterial” within the meaning of the Public Procurement Act.

44. **Accurate identification of the statutory grounds for amendments to the contracts:** The contracting authority should duly justify the reasoning for amendments to the contracts with contractors and seek the appropriate legal qualification when the facts necessitate such amendments. In this regard, the contracting authority should refrain from opting for a seemingly easier approach (such as the grounds for immateriality of amendments under Article 116, para 1, item 7 of the Public Procurement Act) which does not require a detailed justification of the amendments but entails a discrepancy between the facts and the circumstances which are formally listed in the amended contract.
45. **Information provided by the contracting authority:** A more significant communication problem has been identified with respect to the access to written information which the observer seeks from the contracting authority. Unfortunately, with respect to some of the aspects of monitoring (for example, provision of information about subcontractors authorised to perform activities under the project), the independent observer faced delay and formal obstacles in obtaining the necessary information both in terms of the deadline and in terms of the form requested, moreover in the conditions of a state of emergency due to the heightened pandemic situation in the country. In principle, this is inconsistent with the good communication between a contracting authority and an independent observer established during the on-site monitoring of the works.

In this regard, the information should be provided to the independent observer in writing electronically and in short terms. This is of special importance in the current pandemic situation which necessitates the use of electronic means as nearly the only possible channel of communication.

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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