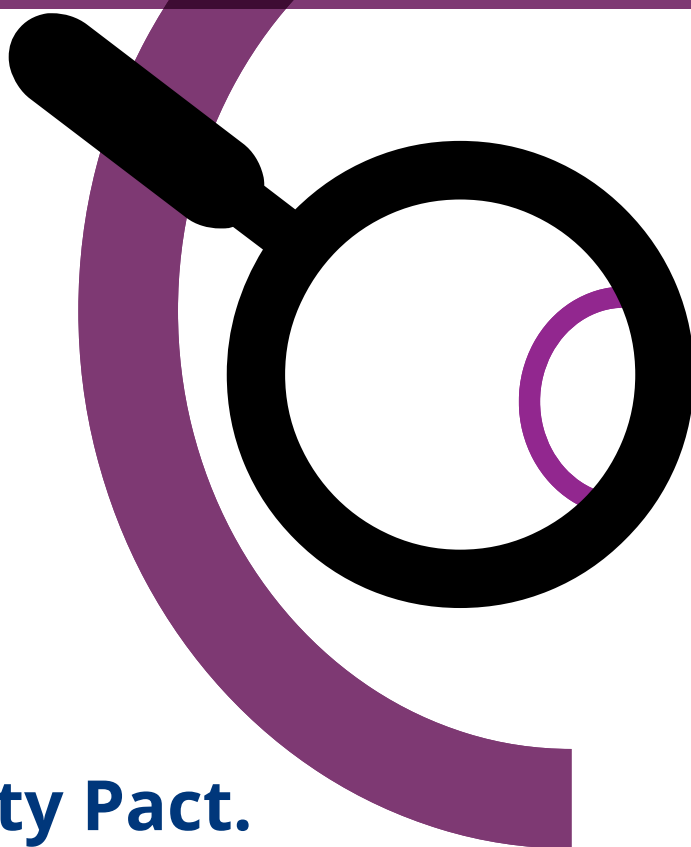




STEFAN **BATORY**  
**FOUNDATION**

ideaForum



# **The Integrity Pact. A Civil Society Monitoring of Public Projects**

Designing an Integrity Pact and the Contractor Selection

# **The Integrity Pact. A Civil Society Monitoring of Public Projects**

## **Designing an Integrity Pact and the Contractor Selection**

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Prior to publication, this report was available for review to institutions working together in the framework of the Integrity Pact, i.e. PKP PLK S.A, ZUE S.A. (the Contractor for work on the project), MP-Mosty S.A. (the Contract Engineer), the Ministry of Funds and Regional Policy and the Centre for EU Transport Projects. PKP PLK S.A. has submitted its comments and a dissenting opinion which has been partly included in the report. Comments not included in the report are discussed separately. The Ministry of Funds and Regional Policy has also provided comments.

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## **GLOSSARY OF TERMS AND ABBREVIATIONS**

CBA: Central Anti-corruption Bureau

Contract: contract No. 90/106/0072/17/Z/I in the open tender for the development of design and the performance of construction works in the "Design and Build" formula in the "Works on railway line No. 1 on the Częstochowa–Zawiercie section in the framework of the IEOP 5-2.6 project"

DG Regio: Directorate General for Regional and Urban Policy of the European Commission

ESPD: European Single Procurement Document

EU: the European Union

FIDIC: Fédération Internationale Des Ingénieurs-Conseils/International Federation of Consulting Engineers

FOP: the Functional and Operating Programme, a technical specification included in the tender dossier

Foundation: the Stefan Batory Foundation in Warsaw

IEOP: Infrastructure and Environment Operational Program

Legal consultant: TOGATUS Trojanowski Sławomir and Partners law firm

NAC: the National Appeals Chamber

NIK: the National Audit Office of Poland

NRP: the National Rail Programme adopted by the Council of Ministers in Poland in September 2015 and in force until 2023

Pact: the Polish Integrity Pact, an agreement concluded between the Stefan Batory Foundation and PKP PLK and signed on 8 November 2016, extended to include obligations covered by agreements between PKP PLK and ZUE S.A., the General Contractor, on 20 July 2017 and with a consortium of companies: MP-Mosty Sp. z o.o. and DROGOWA TRASA ŚREDNICOWA S.A., the Contract Engineer, on 4 August 2017

PKP PLK S.A.: Polish Railways S.A.

PPO: the Public Procurement Office of Poland

Public Procurement Law: the Law of 29 January 2004 on Public Procurement, Journal of Laws of 2019 Section 1843, as later amended)

ToR: Terms of Reference

Technical consultant: JPL Project Sp. z o.o.

## Abstract

The Integrity Pact is a mechanism designed by Transparency International ([www.transparency.org](http://www.transparency.org)) to include citizens in decision-making processes in public procurement. It is also a mechanism for civil society to monitor public procurement for the risks of irregularities, corruption or fraud. The goal of the Integrity Pact is to ensure the protection of the public interest in public procurement, and it pursues this goal by involving a civil society observer in the process of awarding public sector contracts.

The European Commission decided in 2016 to test the Integrity Pact concept in several Member States to help protect public contracts funded by cohesion funds. In Poland, the pilot has covered the following selected contract: “The Development of Design Documentation and the Performance of Construction Works in the Design and Build formula in the Framework of the Project Involving Works on Railway Line No. 1 on the Częstochowa–Zawiercie Section”. The Contracting Authority in this project is the government-owned company PKP Polskie Linie Kolejowe S.A., and the role of the Civil Society Observer has been played by the Stefan Batory Foundation with the support of external technical and legal consultants.

This report contains a detailed account of the development of the Integrity Pact pilot in Poland and its implementation in a specific public procurement case.

Part One discusses several topics that surfaced in the Pact design phase. They may prove essential for the success of the pilot and for the success of integrity pact legislation, if drafted and adopted. The report offers observations regarding the formula of the Pact, the structure and logistics of the monitoring exercise, the terms and conditions for the Observer’s involvement in the Tender Committee proceedings, communication issues regarding interactions with the Contracting Authority and the whole public procurement system.

Key issues addressed in the design phase of the Pact included guaranteed access for the Observer to information about the public contract, security for whistleblowers (especially the Contractor personnel who may report irregularities) conflict of interest management, controlling tender collusion and sanctions for breach of the Pact. Negotiations of the Pact draft lasted several months, a luxury reserved for a pilot test only. While the negotiations were a success if pacts were to be mainstreamed and embedded in the public procurement system, they should be aligned and standardised in national legislation.

The second phase of the pilot discussed in the report consisted in the monitoring of the contract award process. The report provides a general background to the tender, schedule and the chronology of events leading to the award of the contract. It outlines key monitoring activities during the tender process and highlights issues that were found to be controversial. Two such issues were: the conflict of interest management during the assessment of bids, and access to the public information contained in the bids and the tender dossier (in particular the excessive use of trade secrecy legislation by bidders). This part contains our observations and criticism with respect to the organisation of the tender process, including the unavailability of an environmental conditions decision upon the award of the contract, inconsistencies and inaccuracies found in the tender dossier, and poor communication between the Contracting Authority and contractors who were bidding for the contract.

In order to maximise the benefits from this pilot, the Batory Foundation has decided to consult contractors who were bidding in this and other projects in the railway market to understand their perspective on the project being monitored and compare it with our findings as the Observer. Consequently, the



report also discusses the outcomes of anonymous interviews conducted with four such contracting companies.

Each of the mentioned phases has been reviewed, and detailed findings from our observations have been provided. Here are some of the findings we believe should be highlighted:

- **The Pact Formula and Standardisation.** The Pact should take the form of a civil contract between the Observer and the Contracting Authority. The provisions regarding the Contractor should be an integral part of the tender dossier including the contract template. We believe that this kind of modular or hybrid formula of the Pact would be a sufficiently strong foundation for the civil society monitoring of a public sector contract and would be well harmonised with Public Procurement Law. Some of the core components of the Integrity Pact – including the enabling legislation, the formula and the major rights and obligations of the parties (especially of the Civil Society Observer) – should be properly legislated. Moreover, the government purchasing policy and management strategy for all purchasing categories should prioritise a wider application of integrity pacts.
- **The Pact Kick-off.** The Pact should cover the public procurement development phase, including the Contracting Authority's needs assessment. This will allow the Observer to review all the commissioned reports and the feasibility study, the organisation of public consultations of the project options and the decision-making process leading up to the Contracting Authority's acceptance or rejection of the available options and also the process of designing the tender, including contract valuation.
- **"Design and Build".** The "Design and Build" formula appears to be Integrity Pact-friendly in large infrastructure projects where the Observer cannot be involved in project design. Design and Build creates space for monitoring before the construction actually starts.
- **Access to Information.** The Integrity Pact should provide for guaranteed, easy and timely access for the Observer to all documents, actions and procedures in relation to the development and implementation of the contract. General legislation on access to public information is not a sufficient monitoring tool.
- **Scope and Deliverables and Terms of Reference.** A clear description of the scope and deliverables under the contract is essential in order to ensure that the principle of fair competition is upheld and in order to mitigate the risk of claims at later stages of implementation.
- **Whistleblower Protection.** The Pact should contain obligations for contractors and contracting authorities in terms of ethical management and whistleblower protection policies. Such obligations should strengthen whistleblower protection legislation, if available, or internal regulations which may be adopted by the Contracting Authority and contractors.
- **Conflict of Interest Management.** Early phases of the pilot have demonstrated that the Pact works well as an instrument for the management of conflicts of interest. Therefore, it should also contain provisions on conflict of interest risk management so as to prevent escalation to fraud that could compromise the project. This is particularly desirable in situations where national legislation does not apply or is too general.
- **Trade Secret vs Access to Tender Information.** Contractors tend to abuse trade secrecy legislation by unlawfully restricting part or the entirety of their bids and/or additional information provided during the assessment of bids. Contracting authorities, on the other hand, find it challenging to examine the grounds for restriction. Both factors not only limit access to public information but they compromise freedom of competition and may distort the contract award process. Transparency and openness should be the general principles observed in public tenders, and trade secret claims should be an exception to the rule. Meanwhile, we recognise that

national legislation on trade secrecy is not very clear, as is the case law in the NAC and general courts. Amendments to national legislation are highly recommended to ensure that businesses have clear rules and can easily define the scope of their trade secrets in practice without compromising the democratic principles of access to public information.

- **Communication between the Contracting Authority and Contractors.** PKP PLK has a dedicated procurement platform which helps manage tenders and communicate with contractors. This is definitely a solution worth recommending to other Contracting Authorities. However, the public project which was monitored shows that such platforms may also disrupt communication and compromise the transparency of the whole process. Having a platform like this and using it properly are two different things.
- **Dialogue between the Contracting Authority and Economic Operators** in the Railway Market. PKP PLK has launched an Investment Forum, a mechanism that we recommend for future pacts. The Investment Forum has provided a platform of continuous dialogue with contractors since 2013. Its purpose is to develop systemic policies that are later applied in specific public sector contracts, e.g. with respect to non-price bid assessment criteria. If given a higher profile, the Investment Forum seems to be an appropriate vehicle of change in the Contracting Authority's contract development and implementation practices.

This report does not constitute a review of the entire Integrity Pact pilot in Poland. At the time of its publication, the project was still being monitored. The second report, due to be released by the end of 2021, will present findings from the project monitoring and our final recommendations regarding the mainstreaming of integrity pacts as instruments of the civil society monitoring of public procurement. All key developments in connection with the pilot are regularly published on: <http://paktuczciwosci.pl/>.

## 1. Introduction

The Integrity Pact is a means of involving citizens in public procurement processes and a mechanism for monitoring public procurement for the risks of corruption and other irregularities that could lead to the loss of taxpayers' money.

This report covers the first period of the Integrity Pact pilot in Poland which started in 2016 and ended when the contract for the project was signed on 20 July 2017. It describes the process of negotiating and designing the Pact jointly with the Contracting Authority (PKP Polskie Linie Kolejowe S.A.) in the presence of the Managing Authority (currently, the Ministry of Funds and Regional Policy), and then the Pact pilot during the tender publication, contract award and contracting.

We hope this report will not only be interpreted as a mere account of the project but will also inform a wider discussion regarding the methods of the civil society monitoring of public procurement and the use of an integrity pact as a relevant instrument of such monitoring. While the Pact pilot is due to end in 2021 all interested parties are now in a position to implement an integrity pact using documents posted on <http://paktuczciwosci.pl/> and build on our experience shared in this report.

The pilot is wholly funded by the European Commission in the framework of project contract No. 2015CE16BAT098. Transparency International is its European coordinator and the Stefan Batory Foundation is its sole operator in Poland.

## 2. The Integrity Pact Concept

The Integrity Pact is an instrument created by Transparency International in the 1990s. Following the well-known Corruption Perception Index that measures the perceptions of corruption and supports meaningful comparisons between countries, pacts have long been a flagship anti-corruption tool developed by this organisation.<sup>1</sup>

Initially, pacts were known as the 'islands of integrity'. The name was not meant merely as a catchy marketing phrase attracting the attention of citizens and governments. While its promotional aspect is unquestionable, the name's major strength is that it faithfully illustrates the original agenda. Initially, integrity pacts were offered to countries and organisations that in principle operated on the basis of corruption rather than law or the standards of transparency. The underlying concept was to help convert the rule into an exception and build 'islands of integrity in the sea of corruption', i.e. good practice in public expenditures. The goal was to demonstrate to decision makers that they could act differently and support the public interest and themselves by doing so. Society could see this good practice as a light at the end of the tunnel; it could make a case for government business that is done differently: more transparently, fairly and with respect for taxpayers' money. The first integrity pacts were established in developing countries that did not have adequate public procurement legislation, regulators of the public procurement market or licensing/permitting processes (originally integrity pacts were also applied to this type of government business). Integrity pacts later found their way into more developed countries, including European countries such as Germany, Latvia and Bulgaria. In Mexico, integrity pacts became part of the country's legislation as they were imbedded in the Mexican

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<sup>1</sup> See: G. Makowski, *Partycypacja ekstremalna, czyli udział obywateli w decyzjach dotyczących zamówień publicznych. Na przykładzie pilotażu paktów uczciwości* (in print).

Public Procurement Law in 2009. It is estimated that pacts have been applied to over one hundred diverse public procurement contracts since the 1990's.<sup>2</sup>

## 2.1. Major Integrity Pact Characteristics

The Integrity Pact is an open source tool developed by Transparency International and it is not subject to any copyright restrictions. It is not a close-ended formula confined by strict guidelines and it can be flexibly adapted to the specific situations of countries and regulatory regimes. Following the pilot pacts organised by the European Commission, a more standardised formula tailored to the European public procurement market was created. While it is construed according to EU regulations it is still quite diverse as EU directives leave a great deal of freedom to design public procurement systems in EU Member States.

Integrity pacts are not formalised but our practical global experience has demonstrated they tend to have common elements.<sup>3</sup>

## 2.2. Integrity Pact Objectives and Functions

Integrity pacts are designed to create a public procurement framework in which the public interest receives maximum protection. The goal is predominantly to prevent fraud and other irregularities that could be detrimental to the public interest. The goal is pursued by ensuring the involvement of civil society observers in public sector tenders. Observers can be civil society organisations or informal groups of experts, the local community affected, or activists that show an interest in a specific public sector contract. Observers are not merely 'corruption prevention watchdogs'. Their involvement, which is in fact the primary role of civil society observers, has an educational and communication dimension. As originally proposed, they also build confidence in the projects being monitored and in the public procurement system as a whole. After all, public procurement is a vast sector worth hundreds of billions of public money. From the point of view of the European Commission integrity pacts may be seen as vehicles of improved public awareness of the nature of EU funds and adequate spending mechanisms.

Moreover, integrity pacts are expected to support the integration of the public procurement sector by promoting common standards. Not all aspects of public procurement can reasonably be decreed by directives, laws and regulations. There will always be gaps leaving a degree of freedom in interpreting and applying legal provisions. Integrity pacts are expected to integrate law with practice, both at the level of specific contracts and the whole public procurement market, by creating and strengthening good practices.<sup>4</sup>

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2 G. Makowski, *Integrity Islands and integrity pacts – Concepts and Application*, Transparency International, Berlin 2012.

3 See: *The Integrity Pact. The Concept, the Model and the Present Applications: A Status Report*, Transparency International, Berlin 2002; *Pakty uczciwości. Podręcznik wdrażania*, Public Procurement Office, Warsaw 2014, [https://www.uzp.gov.pl/\\_data/assets/pdf\\_file/0025/29833/Podręcznik-TI-dot.-The Pactow-uczciwosci-in-zamowieniach-public-pl-23.12.2014.pdf](https://www.uzp.gov.pl/_data/assets/pdf_file/0025/29833/Podręcznik-TI-dot.-The Pactow-uczciwosci-in-zamowieniach-public-pl-23.12.2014.pdf) [accessed: 7 July 2020].

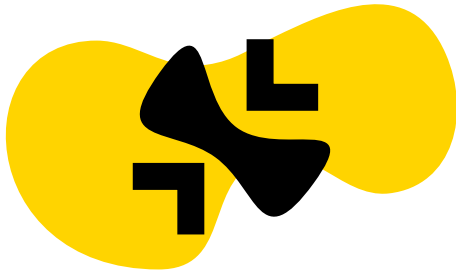
4 See: G. Makowski, *Partycypacja ekstremalna...*, op. cit.

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## MAJOR INTEGRITY PACT GOALS

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**FLEXIBILITY.** It can be adapted to diverse legal frameworks.



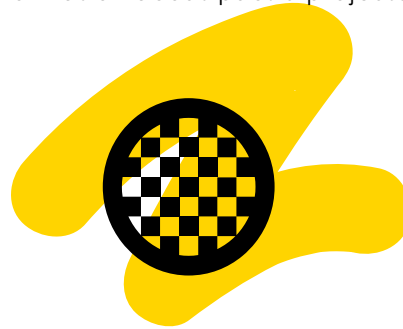
**CITIZENSHIP.** The Pact is a public participation and watchdog mechanism.



**PREVENTION.** It helps prevent fraud in public contracts.



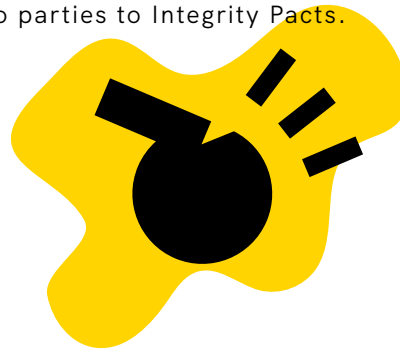
**TRANSPARENCY.** It is easier for the general public and citizens to access information about public projects.



**TRUST.** Build a collaborative network of civil society organisations, public institutions and the private sector to combat corruption.



**WHISTLEBLOWING.** Protection for individuals who report any irregularities or negligence they witness in public projects attributed to parties to Integrity Pacts.



### 2.3. Types and Typical Components of Integrity Pacts

Generally, integrity pacts are contracts between three parties: the contracting authority, the contractor and the civil society observer. Depending on the regulatory framework, the will of the parties, political factors etc., the contract may take the form of a formal civil contract or a set of clauses embedded in the contract documentation (specifically, in the contractor contract template). The softest form of an integrity pact is a general commitment of the parties to comply with the law and abstain from a range of different practices which may pose a public interest risk. Finally, there are hybrid pacts that combine all the three formats. The Polish Pact is a hybrid pact and this will be further discussed in the report.

Contracts of this type usually include a catalogue of the rights and obligations of each party. The Contracting Authority and the Contractor undertake to comply with the law, never to stretch or avoid it and to be guided by the public interest. As obvious as it seems, a written declaration is an additional publicly expressed assurance that the entities responsible for a particular project will implement it with maximum respect for the laws and regulations. Moreover, the pact is expected to provide an additional guarantee that there will be no temptation to take unfair advantage of gaps in applicable laws and regulations, if any, to the detriment of citizens.

Some pacts provide for additional special sanctions for any violation of the law or the standards set out the pact. Such sanctions are often found in pacts where the local public procurement or criminal law lack any such provisions. Notably, contractual sanctions (e.g. liquidated damages or contract termination due to the Contractor's breach of contract) help respond to irregularities of varying gravity sooner than through the time-consuming criminal law procedure, which is in fact limited to criminal offences. What matters most to the Civil Society Observer is the guaranteed access to all contract information and guaranteed co-operation with the Contracting Authority and the Contractor in each phase, in particular by receiving answers to queries and requests for clarification. The success of the monitoring exercise is strictly dependent on this and it is the core part of the entire integrity pact even where there is local legislation regarding access to public information or press law.

Poland has fairly extensive access to public information legislation and a long backlog of the case law of the high-level courts (including the Supreme Court and the Constitutional Tribunal). However, the reliance on legislation while obtaining timely information about an ongoing project would be totally ineffective given that, for instance, the standard time for receiving access to public information is 14 days, not to mention the tendency to prolong the deadline, which often leads to litigation. Furthermore, access to public information legislation contains limitations or exemptions and contracting authorities often call on these provisions. Some of the information to which the Observer has direct access under the Pact would probably never be disclosed under access to public information legislation alone. Therefore, it would be entirely counterproductive to rely solely on access to public information legislation to monitor any public procurement contract because the Observer would learn nearly all the facts with a delay. Consequently, the pact would stand no chance of actually becoming an instrument of monitoring and prevention. Pact provisions that guarantee the Observer unfettered access to all the information, correspondence, documentation or decision-making processes related to a specific contract are absolutely vital, subject to data protection and confidentiality. Certain meetings, correspondence or documents may be confidential and must not be disclosed to the public. However, the Observer must have access to such confidential information under the integrity pact to ensure civil society scrutiny of a project of this kind.

Observers under integrity pacts have a duty of care when monitoring projects, informing the public and protecting the public interest and ensuring that citizens receive timely information about any actual or potential irregularities or fraud.

### **3. Integrity Pact Pilots in the European Union**

The pilot Integrity Pact covered by this report has been proposed by the European Commission's Directorate General for Regional and Urban Policy (DG REGIO). The Commission has for several years been developing mechanisms and policies to combat corruption and fraud against the interests of the European Union and to involve EU citizens in decision-making processes.

The European Commission began to assess the feasibility of pilot testing integrity pacts as early as in 2013. It invited Transparency International to develop a preliminary plan to implement integrity pacts in Europe. The concept of integrity pacts was presented mainly to national institutions that managed EU funds in several EU Member States where Transparency International has local chapters or partner organisations (such as in Poland) between 2014 and 2015. The objective of the presentations was to encourage public institutions to become involved in pilot implementations in the future. Subsequently, the Commission formally asked the governments of the Member States in 2015 whether they would be ready to implement Integrity Pact pilots in their countries. It also requested governments to identify EU funded projects that could potentially be covered by the pilots. Projects could also be proposed by regional management authorities – regional governments in the case of Poland. Poland proposed several infrastructure and IT service projects. In parallel, the Commission called for open tenders from civil society organisations wishing to join the pact pilot as pilot coordinators. In Poland, only the Stefan Batory Foundation responded to the call and it was subsequently approved by the Commission.

# INTEGRITY PACT IN EUROPE

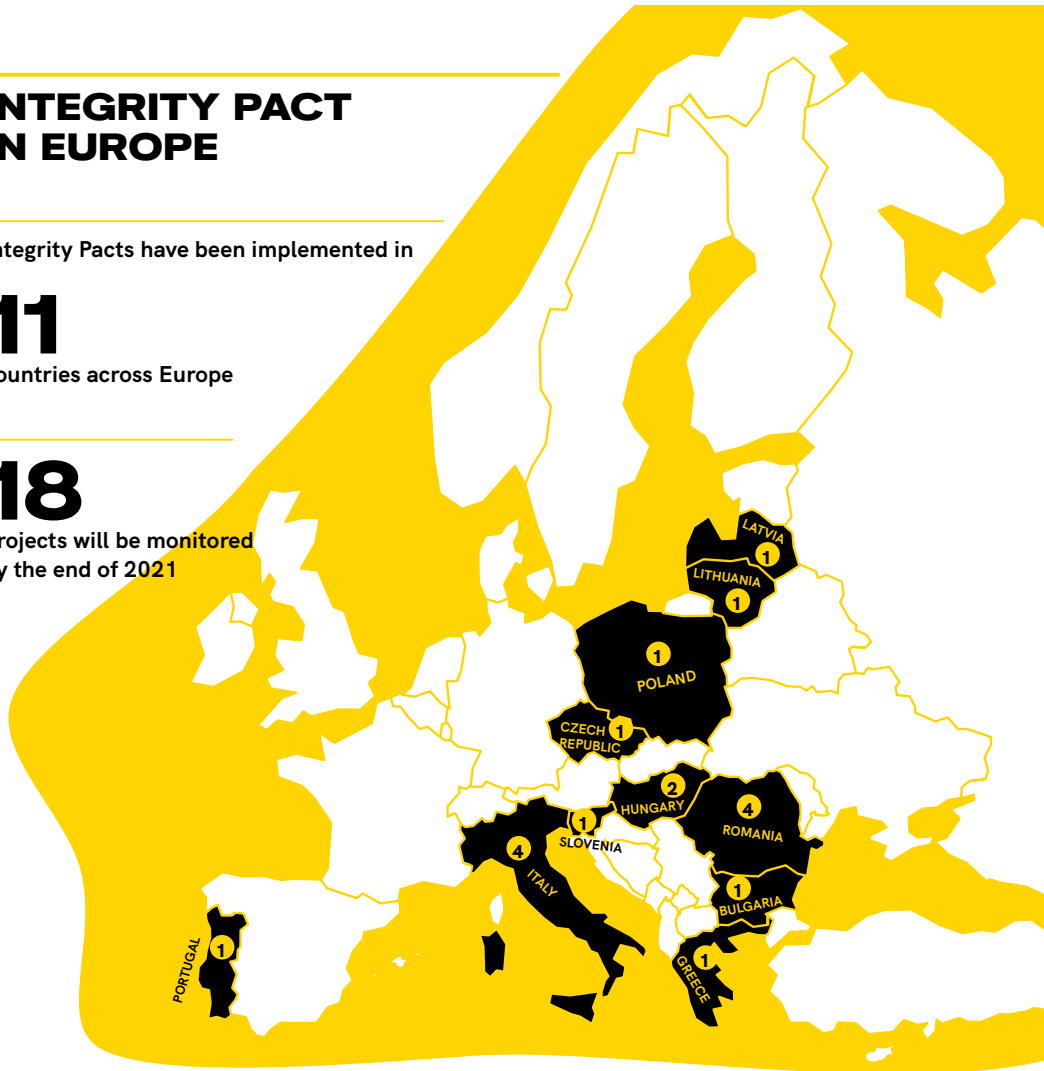
Integrity Pacts have been implemented in

# 11

countries across Europe

# 18

projects will be monitored by the end of 2021



Public projects in the following sectors are monitored in Integrity Pacts in Europe:

- |                                 |                                 |
|---------------------------------|---------------------------------|
| Transport                       | Research and development        |
| Culture                         | Energy                          |
| Healthcare                      | Environment                     |
| Education                       | Audit                           |
| Integrated territorial projects | Institutional capacity building |

The total value of all participating public projects is

**€920 million**



This is how the European Commission managed to establish 15 partnerships between governments or local governments that use European Union funding and civil society organisations in 11 countries. Their task was to develop integrity pacts for projects funded by the EU Cohesion Fund selected by the Commission. In Poland, following the signing of a Memorandum of Understanding between PKP Polskie Linie Kolejowe S.A. and the Stefan Batory Foundation in November 2015, the European Commission selected the public project called “The Development of Design Documentation and the Performance Construction Works in the Design and Build formula in the framework of the “Works on railway line No. 1 on the Częstochowa–Zawiercie section” project. The Managing Authority and the Contracting Authority in the project is PKP Polskie Linie Kolejowe S.A.

## RAILWAY LINE UPGRADE

### AREA

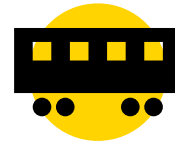


Railway line

### THE UPGRADE

will allow passenger trains to travel at a speed of

**160 km/h**



### JOB



Upgrade of a 44 km railway line section between Częstochowa and Zawiercie



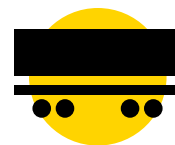
The journey on the upgraded 44 km railway section will be

**10 minutes**

shorter

cargo trains will travel at a speed of

**120 km/h**



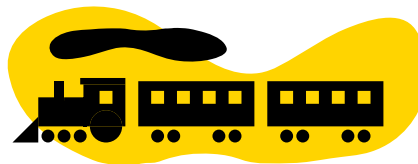
### EXPECTED NUMBER OF USERS

**3.4 million**  
passengers  
in 2015

**9.3 million**  
passengers  
in 2047



Most of the approximately 20,000 kilometres of railway lines were built in Poland



in the late **19th**  
and early **20th century**

# RAILWAY LINE UPGRADE

## LOCATION



## TIMELINE

- 1 January 2016**  
Integrity Pact launch
- 8 November 2016**  
Integrity Pact signed between Contracting Authority and Batory Foundation
- 17 November 2016**  
Call for tenders for monitored project and start of monitoring
- 20 July 2017**  
Project contract signed and contractor joins the integrity pact
- 2 September 2018**  
Start of construction works
- 3 March 2020**  
Original project completion date
- 15 November 2020**  
Tender monitoring report
- 29 December 2020**  
Revised project completion date

## COST OF MONITORED PROJECT

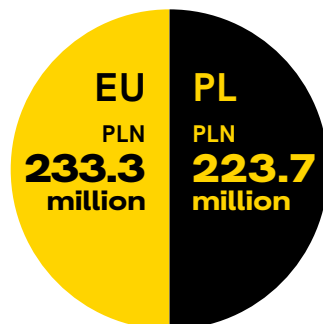
**PLN 604.9 million**

Cost of monitored project

**PLN 457 million**

Total project budget

## STRUCTURE OF FUNDING



According to guidelines, an integrity pact should commence as soon as the intention exists on the part of a government contracting authority to buy a specific service. In practice, this may mean the start of a feasibility study or an even earlier phase when a project concept is formed involving the procurement of goods, service or construction works. Public sector tenders are often preceded by decisions at the political level. In this specific case, it was not possible to link the timing of the Commission decision to launch a pilot and the political decisions made by Member States regarding operational programmes, or even specific projects implemented under these programmes. The earliest moment the pilot could be launched therefore coincided with the decision to call for tenders on a specific date.

When the pilot began in early 2016, there was a real risk of not being able to negotiate the Pact formula with the Contracting Authority and the Managing Authority for European funds (then the Ministry of Development, currently the Ministry of Funds and Regional Policy). The pilot had been planned for a project with a known estimated launch date so the negotiations of the Pact could not substantially delay the call for tenders. In fact, any failure to reach an agreement over the Pact formula could be a source of information regarding the possible application of this tool. On the other hand, such a failure would eliminate the opportunity to test the concept in the later phases of the project's implementation. Fortunately, the Pact was successfully negotiated and the tender was not delayed in Poland.

A detailed account of the preparations for the Pact and our initial experience during the tender process (call for tenders, bid evaluation and selection and contracting) will be provided later in the report.

## 4. Integrity Pact Pilot Implementation in Poland

### 4.1. Stage I: Pact Development

The Foundation and PKP PLK, with the support of the then Ministry of Development (Managing Authority for the Infrastructure and Environment Operational Program), commenced the development of the Pact in May 2016. The process had involved several dozen people until the first part of the Pact was signed by PKP PLK and the Batory Foundation on 8 November 2016. They included the Foundation and PKP PLK staff and external lawyers, technical consultants and public administration employees.<sup>5</sup> The composition of the project group fluctuated depending on the situation and the nature of challenges that emerged in the process. The sheer number of people who took part in developing the Pact contents and the time needed for the design of the Pact formula demonstrate that the exercise was not an easy one. **The first lesson learned is that if pacts were to become a widely used instrument they must be standardised to a certain degree to avoid months of negotiations of the Pact's content, a luxury only a pilot can afford.**

Again, there was no guarantee whatsoever the Pact would be drafted when we started. The risk of failure was high for objective and subjective reasons and because we encountered internal barriers. For example, it was not certain whether the Pact would be appropriately placed in the complex system of the Public Procurement Law to ensure that it did not overlap or collide with existing measures available in the Polish legislation and that it would not end up a loose expression of wishful thinking and rounded declarations. Each of the parties had its own expectations and concerns regarding the Pact. They were often debated in a lively fashion within the project team and some had the potential of creating an irresolvable conflict that might have grounded the pilot in its early days. Tensions were overcome, however, leaving the team committed to achieving an understanding and driven by the

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5 The agreement between the Stefan Batory Foundation and PKP Polskie Linie Kolejowe S.A. forms Appendix No. 1 to this report.

curiosity about the project's final outcomes. It must be stressed that all parties did their best to make a constructive contribution throughout the process. Repeated cases of strong polemic brought no party to the brink of walking away from the negotiation table. The discussions tended to focus on issues and the commitment to reach an agreement was evident. The team successfully developed a formula that was well positioned in the existing regulatory framework and which satisfied all parties.

This report will not provide a full and detailed account of the Pact negotiation process. Nonetheless, several of the most challenging issues that surfaced during the Pact design process will be highlighted to inform a future effort to legislate the Pact mechanism or to simply replicate the formula based on our experience.

#### 4.1.1. Pact Formula

The team faced the fundamental question about the most effective formula of the Pact. There were three alternatives: a civil contract, an integral part of the tender dossier, or the voluntary commitment of the parties. The softest alternative was rejected right away as team members agreed a Pact worth testing should be firmly based.

An alternative was proposed to conclude three civil contracts: (i) between the Observer and the Contracting Authority, (ii) between the Observer and the Contractor, and (iii) between the Observer and the Contract Engineer. Following closer legal analysis, however, the option of three separate contracts was rejected as being too complicated. Moreover, it was not clear how the selected the Contractor or the Contract Engineer could be 'forced' to sign the project contract and an additional contract for the Pact, and what measures could be taken in case the Contractor refuses to sign. A format of a separate tripartite contract would also lead to another chapter of negotiations with the selected Contractor and the Contract Engineer after the award of the project contract. Even if the Observer and the Contracting Authority agreed a framework contract the selected Contractor could still renegotiate it. This could mean that monitoring would not commence or would be solely confined to the observations of the relations between the Foundation and PKP PLK, which would double the workload of the legal consultants and increase the cost of the exercise. Communication would be at risk, too, if the Pact were to be split into three agreements. The Pact and the additional agreements could be announced in the call for tenders but it is unlikely bidders would attach any importance to them if faced with a need to assess hundreds of pages of the remaining part of the tender dossier. The quality of the resulting pilot could thus suffer.

Ultimately, a hybrid format for the Pact was agreed, where module one would be a civil contract between the Foundation and PKP PLK<sup>6</sup>, module two would be imbedded in the contract template with the contractor (a permanent part of the tender dossier available to each bidder<sup>7</sup>, and module three

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6 Module one of Integrity Pact, which is an agreement between the Stefan Batory Foundation and PKP PLK S.A., <http://the Paktuczciwosci.pl/wp-content/uploads/2017/08/Porozumienie-pomi%C4%99dzy-Fundacj%C4%85-im.-Stefana-Batorego-and-PKP-Polskimi-Liniami-Kolejowymy-S.A.pdf> [accessed: 7 July 2020].

7 Module two of Integrity Pact embedded in the contract with the Contractor, <http://the Paktuczciwosci.pl/wp-content/uploads/2018/02/II-modu%C5%82-The Pactu-Uczciwo%C5%9Bci-with-Wykonawc%C4%85.pdf> [accessed: 7 July 2020].

(also embedded in the contract template) to ensure communication between the Contract Engineer and the Observer.<sup>8</sup>

This approach eliminated the need to re-negotiate the Pact between the Observer and PKP PLK, i.e. between the Contractor and the Contract Engineer. The Contractor and the Contract Engineer had to simply accept the contract template with embedded clauses regarding the Pact. The only concern was the risk of protests during the tender process, which could delay the contractor selection, and thus delay the entire project. Furthermore, it was not clear how the National Appeals Chamber would react to any protests regarding the Pact clauses. Contractors could use the extra clauses as a pretext to file a protest just to delay the contractor selection, signing a contract, and project commencement. Hypothetically, the NAC could actually challenge the Pact provisions, even though the lawyers assessed this risk to be low. If that were to happen, however, the whole monitoring framework could collapse. In the end, these concerns were exaggerated. There were no queries about the Pact and no protest was filed during the bidding process.

**The hybrid structure of the Pact is a good approach successfully tested in Poland both during tendering and project implementation and it may be recommended for the future if integrity pacts were to be mainstreamed. It is also recommended that a clear legal basis and structure be defined in the public procurement system for integrity pacts.** This should be framework legislation that would leave a degree of flexibility for each pact to be customised to specific contracts, sectors or the requirements of individual contracting authorities', contractors' and potential observers'. **We would recommend placing integrity pact provisions in the Public Procurement Law as an option for civil society monitoring of public expenditures in large-scale public-sector contracts.**

Our report will present further recommendations with respect to specific components of the legislation and possibly regulation regarding integrity pacts after the monitoring has been completed. We will then have better insights into all aspects of monitoring and see which part of the exercise should perhaps be more standardised and regulated. While integrity pacts can be implemented without such a regulatory framework in place, successful mainstreaming may actually require more than a voluntary 'manual' or good practice. There will be contracting authorities who will as a matter of principle avoid implementing any measures which are not directly mandated by law or are optional, because they entail additional costs and workload. Moreover, without any regulatory framework each aspect of integrity pacts can be intensely negotiated, which is time consuming and expensive. Having a clear indication of the core components of an integrity pact in the legislation (e.g. major Observer's rights or obligations of the parties to a pact) will narrow down the scope of negotiations and encourage this tool to be applied more frequently for civil society monitoring of public procurement. Finally, integrity pacts embedded in generally applicable legislation may mean the parties are less prone to oppose or marginalise them.

#### **4.1.2. Guaranteed Access to Tender Information**

Mandated with the role of the Observer, the Foundation was committed to ensuring broad and unfettered access to all materials and procedures associated with the tender and the contract. Access to information is a condition precedent to successful monitoring. In contrast, the Contracting Authority,

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<sup>8</sup> Module three of Integrity Pact embedded in the contract with the Contract Engineer, <http://the.paktuczciwosci.pl/wp-content/uploads/2018/02/III-Modu%C5%82-The-Pactu-Uczciwo%C5%9Bci-with-In%C5%BCynierem-Kontraktu.pdf> [accessed: 7 July 2020].

PKP PLK, a commercial company, was determined to limit the access on the grounds of trade secrets, security, or the all-important personal data protection. This was one of the main points of controversy and long debates during Pact negotiations. Ultimately, the problem was solved as follows:

- A number of the Pact provisions discuss access to tender information, starting from general commitments in Paragraph 2 Sub-paragraph 2 of the Pact (part of the contract with the Contracting Authority) through to a detailed list of the types of information that can lawfully be accessed by the Civil Society Observer in Paragraph 5 of the Pact. Similar provisions were adopted in the contract with the Contractor (sub-clause 3.6 of the contract and Paragraph 8 of the contract with the Contract Engineer). Under the above-mentioned provisions, the Observer was given unlimited access to all types of records and procedures in the monitored contract.

Moreover, Paragraph 3 of the Pact (part of the contract with the Contracting Authority) which defines deadlines explicitly stipulates the exchange of information and documents between the Observer and the remaining parties to the Pact will, as a matter of principle, be performed instantly. However, in exceptional cases, where extra time is required for such information to be collated, a deadline of ten days was agreed.

Unfortunately, this arrangement has not been flawlessly kept by the Contracting Authority over the past four years since the Pact became effective. During the tender process in particular, the Contracting Authority stalled a long time twice before replying to repeated queries submitted by the Observer.<sup>9</sup> Communication improved only after the Parties met to discuss that particular issue. In fact, communication has continued to be improved ever since and a dedicated FTP server has been enabled and used to exchange documents with the Observer, which gives the Observer the freedom to select documents for in-depth analysis.

- A confidentiality clause contained in Paragraph 6 of the Pact (part of the contract with the Contracting Authority) which prohibits any disclosure by the Observer of any protected information without the consent of the Contracting Authority, including personal information that could be part of the monitored documentation. The Observer has also been obligated to read and comply with the Contracting Authority's internal security policy and not to disclose any information deemed to be a trade secret. Non-disclosure agreements were signed as part of the Pact as well as authorisation to access trade secrets and a contract of outsourcing personal data processing in cases where such data were to be exchanged. Any breach of these obligations could result in a court dispute and claims filed by the Contracting Authority, the Contractor or the Contract Engineer against the Observer.

**Finally, the Observer was invited to join the process of drafting the final version of the tender dossier when the draft of the Pact itself was being finalised.** The Contracting Authority was open to this option provided that additional clauses were included regarding trade secrets in relation to this phase of the public procurement process. The Foundation decided to decline the invitation because of the high complexity of the process and insufficient time to make a good quality contribution to the tender dossier. **The reason the report mentions this development is that a legal framework could be developed for future integrity pacts in Poland where the Civil Society Observer could be invited to monitor the early stages of the procurement process.**

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<sup>9</sup> Correspondence with the Contracting Authority in the bidding phase (I-II 2017), <http://the.Paktuczciwosci.pl/wp-content/uploads/2018/06/Correspondence-the-Foundation-PKP-PLK-I-II-2017.pdf> [accessed: 7 July 2020].

### **4.1.3. Participation in Tender Committee Proceedings**

The Observer's participation in the Tender Committee proceedings had several aspects. First, it was not clear what legal basis existed for this participation. At the time, the Public Procurement Law did not prevent the Tender Committee from having members who are not employed by the Contracting Authority. The matter was somewhat controversial, however, in light of the PKP PLK's internal regulations. What was not clear was whether the Observer could be a member of the Committee, an appointed expert or have some other status and what the Observer's responsibilities and mandate would be. Ultimately, it was agreed that the membership of the Committee without the right to vote on Contractor selection was a reasonable option that required no amendment of the Contracting Authority's internal regulations. Consequently, the Observer representatives were obliged to attend all Tender Committee meetings, observe confidentiality rules, avoid conflicts of interest and not engage in any conduct which would violate the Contracting Authority's internal regulations and/or Polish legislation, subject to criminal liability. The same obligations applied to the remaining Committee members.

Meanwhile, the Observer wondered whether being a member of the Committee without having any say on Contractor selection would not be too big an image risk. Should the Observer fail to notice some flaws or even fraud among the remaining members of the Committee and the Contractor be selected unlawfully, it could compromise both the Observer and the whole Pact concept if revealed after a period of time. The Observer would find it very hard to avoid shared responsibility for the misconduct of the Committee even if it had no influence on Contractor selection. This posed a dilemma even though the Contracting Authority welcomed the Observer's participation in the Tender Committee. Should the Observer detach itself somewhat from this phase of the tender process while losing the opportunity to monitor the process directly or should it take the risk of being part of the process and become fully accountable? The Foundation decided to sit on the Committee by seconding one of its employees and a technical and legal consultant. This was a good decision. In our opinion, the Observer's participation in the Tender Committee should become a standard in each pact. The role and responsibilities of the Observer should be clearly defined in legislation or the Public Procurement Law should introduce a separate category of tender process participants, i.e. an observer in the framework of the Integrity Pact. Further details of the practicalities of sitting on the Committee are provided later in the report.

### **4.1.4. Guaranteed Security for Whistleblowers**

There were initially some concerns about ensuring adequate protection for potential whistleblowers on both the Contractor's and the Contracting Authority's side. The Foundation had an ambitious plan to add extra safeguards in the Pact to help protect individuals who report fraud or irregularities, or the risk of such misconduct in a monitored project. The Foundation put forward several provisions in the Pact regarding the Contracting Authority (Paragraph 5 Sub-paragraph 6 g), and a comprehensive process for the Contractor.

It was agreed that the template contract with the contractor would have a sample ethical management policy and a whistleblower protection procedure attached to it.<sup>10</sup> The policy was drafted by the Foundation's experts to be adopted by the Contractor, if the Contractor had not implemented similar procedures earlier. Clauses regarding safeguards to protect whistleblowers were embedded in

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<sup>10</sup> The ethical management policy and a whistleblower protection procedure drafted by the Stefan Batory Foundation forms Appendix No. 2 to this report.

contracts with subcontractors. The Contractor was expected to adopt such measures in the main contract. Ethical management and whistleblower protection were not new to PKP PLK. The PKP Group had already put a similar process in place. Strangely enough, the process did not apply to PKP PLK, clearly a subsidiary in the Group. However, being a beneficiary of EU funds, the company was covered by whistleblower protection rules imposed by the Managing Authority IEOP.<sup>11</sup>

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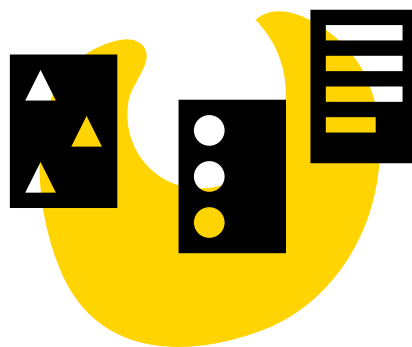
## CIVIL SOCIETY OBSERVER

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**1.** An Integrity Pact ought to provide for the involvement of an observer from the early stages of the project life-cycle.

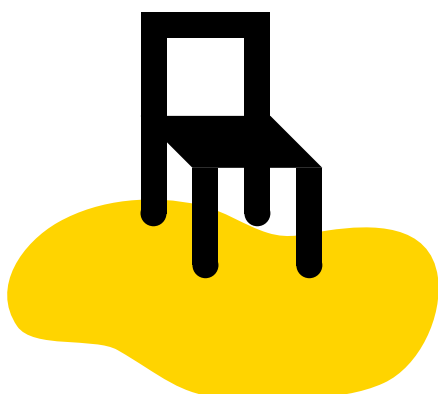


**2.** An observer's non-voting membership of the selection board ought to become a standard practice.



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**3.** It is vital that an observer should have broad, easy and timely access to documents and procedures.



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**4.** An observer must be guaranteed the freedom to express its views and communicate openly with the other parties regarding any irregular conduct.



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<sup>11</sup> *Fraud Prevention Manual for Projects Implemented within the Infrastructure and Environment Operational Program*, Warsaw 2019, pp. 14–17, [https://www.pois.gov.pl/media/68365/Poradnik\\_01\\_2019.pdf](https://www.pois.gov.pl/media/68365/Poradnik_01_2019.pdf) [accessed: 21 April 2020].



Despite all that, the Contracting Authority was rather sceptical about embedding provisions into the contract that would impose an obligation on the Contractor to adopt a policy of reporting fraud. The Contracting Authority was concerned that additional non-standard components and obligations not directly related to the terms of reference in the contract could again provoke contractor protests. This was exactly the same type of concern that was described earlier with respect to embedding Pact provisions in the main contract. The resistance was even stronger with respect to the protection of individuals who may compromise the company's image, a perception too often attached by employers to whistleblowers. Ultimately, PKP PLK did accept the Foundation's proposal. The Foundation abandoned the idea of charging the Contractor with liquidated damages for failure to adopt an ethical management policy and whistleblower protection procedures (liquidated damages will be discussed further later in the report). The Contracting Authority's unease about protests proved unnecessary later. Requirements regarding whistleblowers and ethical management not only failed to provoke any protests during the tendering process, they did not provoke any queries regarding this part of the tender dossier. **In conclusion, whistleblower protection and ethical management clauses may become standard components of integrity pacts in Poland even in the framework of the country's dense legal environment and demanding contractors.**

#### 4.1.5. Conflict of Interest Definition

The conflict of interest was an intensely debated aspect of the Pact. A risk associated with intertwined private and business interests, a conflict of interest may compromise impartiality and independence. This may or may not lead to misconduct or even corruption. The social sciences often define a conflict of interest as an actual or potential collision between business and personal obligations or other interests of a person responsible for public resources, where the pursuit of personal goals may impinge on the public good or detrimentally affect the performance of job related or official duties.<sup>12</sup> In Polish legislation, including Public Procurement Law, there are provisions regarding impartiality. However, no definition of the conflict of interest is provided and this hampers the qualification of specific cases. Similarly, an even broader definition is provided in EU directives on public procurement.<sup>13</sup> A conflict of interest will be defined in the new Polish Public Procurement Law from 1 January 2021.<sup>14</sup>

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12 See: G. Makowski, N. Mileszyk, R. Sobiech, A. Stokowska, G. Wiaderek, *Konflikt interesu w polskiej administracji, rząd – prawo, praktyka, postawy urzędników*, Stefan Batory Foundation, Warsaw 2014.

13 The term "conflict of interest" is defined in Article 24 of Directive 2014/24/EU of the European Parliament and the European Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC as: any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure. Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

14 Pursuant to Article 56 of the Public Procurement Law of 11 September 2019, a conflict of interest in the contracting authority covers all persons performing actions in connection with the conduct of award procedures or who may influence the process if: 1) they are competing for a contract; 2) remain in family relations, including legal custody or guardianship or cohabitation with the economic operator or his/her representatives competing for a contract; 3) during the three years prior to the date of the start of the contract award procedure they remained in a relationship of employment or service with the economic operator or were members of managing or supervisory bodies of economic operators competing for a contract; 4) remain in such a relationship with the economic operator, which may raise justified doubts as to the impartiality or independence of their conduct for reasons of vested financial, economic or personal interest in a specific contract award decision.

A compromise was reached after intense discussions; the conflict of interest clause was embedded in the part of the Pact that constituted a contract between PKP PLK and the Foundation (Paragraph 2 Subparagraph 4). The provision lists types of sensitive situations where any conflict of interest should be immediately disclosed. The approach to conflict of interest management is flexible – if detected, a conflict of interest must not paralyse the entire project or the monitoring exercise, and should not lead to any break-ups of professional relationships. Moreover, there appears to be a popular belief in the railway market that it is hard to avoid potential conflict of interest situations even in a country as big as Poland and in such a large sector as railways. The professional community, in particular railway engineers, is relatively small. It might be hard to exclude from the Pact all individuals who have previously worked for PKP PLK, the Contractor or a subcontractor and this would likely be detrimental to the Project. Therefore, the Pact asked the winning Contractor to submit a statement before signing the contract to certify that the Contractor did not have any conflict of interest with members of the Tender Committee<sup>15</sup> during the tender process. This was an additional measure over and above the standard conflict of interest statements submitted by members of the Tender Committee under law.

**The pilot soon demonstrated the adequacy of this approach. The definition of the conflict of interest and the adopted management process proved effective both in terms of filling gaps in legislation and in terms of practical outcomes to be discussed further in the report. It is firmly recommended that the Pact should contain a definition of a conflict of interest. It should be as detailed as the legislation is general. It is an absolute must wherever there is no specific definition in the national legislation at all.**

Incidentally, IEOP beneficiaries, including the PKP PLK project covered by the Pact, are under an obligation to ensure that the Contracting Authority actively avoids any conflict of interest under the co-funding agreements. The agreements make a reference to a definition of conflict which is derived from the EU Financial Regulation.

#### **4.1.6. Sanctions and Collusion Control**

There are two other topics covered by the Pact which were intensely debated in the Pact design phase: sanctions in general and, specifically, sanctions against the Contractor that could potentially take the form of liquidated damages. The Polish Pact ultimately does not contain any sanctions for breach of pact. There are several reasons behind this, the main one being possible issues with enforceability. Following long discussions, all parties agreed that in the type of relationship that existed between PKP PLK and the Foundation, the enforcement of such sanctions would have to be litigated in a civil case, an arduous and costly exercise. Should there be any sanctions for the Contractor they could theoretically be classified as liquidated damages that are provided for in the contract template. However, this would be yet another factor provoking protests, and the enforcement of liquidated damages would entail long court litigation in this case.

The underlying reason for the parties to abandon the idea of formal sanctions was the concept of the Pact itself, which relies on collaboration and trust rather than repression. It should be recognised that the Pact was a pilot implemented within a specific time and financial framework. It would therefore be a challenging task to determine who would continue to be involved with court litigation or any other

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<sup>15</sup> The Contractor Conflict of Interest Statement proposed by the Stefan Batory Foundation forms Appendix No. 3 to this report.

form of enforcement, if appropriate, after the pilot was completed and the Commission funding was discontinued. All parties felt sanctions for breach of pact were unnecessary and incompatible.

Two more aspects must be addressed in this context. First, the distinction between irregularity and fraud. We rely on the definitions used by the European Parliament and Council and the European Commission.<sup>16</sup> Briefly speaking, irregularities are instances of failure to comply with defined rules which result or may result in damage to the public interest, and (from the point of view of the European Commission) in damage to the financial interests of the Community. In contrast, fraud is any unlawful and premeditated conduct that constitutes a crime. The latter category includes any type of corruption which is a criminal offence. Secondly, what should the response to irregularities and fraud be in the framework of a monitoring exercise? The monitoring team agreed on a set of guidelines on responding to irregularities and fraud which can be summarised in the bullet points below:

- Dialogue with parties to the contract is the underlying principle of responding to risks.
- The Contracting Authority is the core partner in the Pact and is held responsible for the project implementation and will therefore be the first party to approach about an identified risk.
- In case the Contracting Authority's response is unsatisfactory and/or in case the risk is attributed directly to the Contracting Authority, we will contact government agencies, first and foremost the relevant ministry which manages EU funds for the project.
- In case there is suspicion of a crime we will make an internal legal and engineering assessment, notify the Foundation's Council (Zarząd) and Management (Dyrekcja), identify the next steps and response, we share our assessment with the Contracting Authority (PKP PLK), and if the crime is obvious, we should in principle notify the relevant agencies, in parallel to the aforementioned steps.
- For non-criminal risks, we will make a legal and factual assessment and report our findings to the Contracting Authority along with recommended solutions to the problem and a request for a formal statement and a follow-up on the case by the Contracting Authority; if the reaction is not sufficient, the next steps will include the following: we will approach PKP PLK management; we will approach the relevant ministry; we will approach other regulators (e.g. the Public Procurement Office, NAO); we will approach the European Commission after consulting Transparency International;
- Depending on the nature of the case, we will make it public/release the story to the media, following a prior risk assessment for any threat of violating the personal rights of PKP PLK and the threat of breaching the Pact.<sup>17</sup>

It must be emphasised that more specific guidelines can hardly be defined for a pilot implementation of a monitoring scheme and a broad spectrum of possible violations in the process. Prior to our monitoring activities, we attempted to make the rules more specific but the task of anticipating all types of events and our response to them simply proved too difficult, too costly and too time consuming. Meanwhile, it was with some degree of consolation that we had learned that agencies such as the

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<sup>16</sup> See: Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests; Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999; <https://www.europarl.europa.eu/factsheets/en/sheet/32/zwalczanie-naduzy-c-i-ochrona-interesow-finansowych-unii-europejskiej>.

<sup>17</sup> See: G. Makowski, *Partycypacja ekstremalna...*, op. cit.

Central Anti-Corruption Bureau or the National Audit Office, which we had consulted, did not have any more detailed guidelines, either.

Ultimately, in cases involving fraud or irregularities (i.e. breach of pact), the role of the Observer defined in the Pact is to bring the case to the attention of the relevant party. The Observer may, if appropriate, go further by notifying the relevant institutions and government agencies, whose role is to be the stewards of law and public opinion. In extreme cases where the pilot revealed major fraud, the European Commission could also become involved, having received background information from the monitoring team, in which case it could suspend the payments or demand that the funds be returned. Be that as it may, the main rule while responding to irregularities and fraud in the framework of the Pact (also referred to in the said manuals regarding Pact implementation) is to gradually escalate the Observer's response and not to immediately notify the media or law enforcement agencies, except for obvious cases, which are extremely rare as the pilot has demonstrated to date. **We do not recommend sanctions for breach of pact as a standard component of the Pact.**

Finally, we wish to address the topic of tender collusion. The contract template contained a dedicated clause which imposed an obligation on the winning Contractor to represent that it had not sought to act in collusion with other contractors upon bidding.<sup>18</sup> Such statements are applied in some public procurement systems in other countries. In case bid-rigging is identified they may be helpful when holding contractors accountable for breaking the law. In our Pact, the non-collusion declaration is covered by the contract in Sub-clause 4.1 Paragraph 26. The provision stirred some controversy because, not unlike the ethical management policy and the whistleblower protection procedure, it was yet another non-standard requirement. **It could have provoked protests but it did not. It could reasonably be concluded that such contractor statements could become a standard component of integrity pacts in the future.**

#### 4.1.7. Monitoring Logistics

It had been quite obvious since the Integrity Pact was designed that even a relatively large and affluent non-governmental organisation like the Stefan Batory Foundation would not be capable of handling the monitoring of the submitted project to upgrade a railway line alone. Some degree of external support was urgently required from lawyers and engineers experienced in working on infrastructure projects. The financial guidelines for an EU project demanded an open and competitive selection of these consultants. The timing of the selection was somewhat unfortunate in late 2016 which saw a peak of railway projects in the market extensively draining the available pool of professionals. Their availability was dramatically low and the market rate was repeatedly above the budget of the Pact pilot. Moreover, the selection was narrowed as a result of the requirement that consultants must not be in any relationship with the Contractor or the Contracting Authority to avoid suspicions of a conflict of interest. Our experience has demonstrated that potential conflicts of interest are hard to avoid in the railway industry because the pool of professionals is fairly small. The only viable approach is to put in place sound conflict of interest management practices and a high level of transparency. The Pact contained extensive provisions to that effect. We had considered the option of hiring foreign consultants but the extra cost of translating large volumes of technical documentation affected our ultimate choice of domestic consultants.

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<sup>18</sup> A signed Contractor's statement of bidding in compliance with fair competition rules is attached as Appendix No. 4 to this report.

We posted vacancy notices on industry websites and actively approached institutions and associations that employed such experts, and even extended the recruitment deadline but we finally only attracted one bid for technical consultancy. As far as the legal consultancy was concerned, we received four bids. Consultancy contracts were finally awarded in December 2016 to JPL Project Sp. z o.o., engineering consultants from Warsaw and TOGATUS, a law firm from Olsztyn. PKP PLK was notified of the selection. Beside consultancy contracts, our consultants signed a personal data sub-processing agreement and a non-disclosure agreement with the Foundation. Under these agreements, the consultants were required to comply with a PKP PLK's information security policy and ensured the lawful transfer and protection of personal data received from the Contracting Authority for the purpose of observation.

The rights and obligations of the Foundation's consultants with respect to monitoring were determined by the earlier provisions of the Integrity Pact. Their work had always been accounted for based on a submitted service acceptance report and observation reports that summarised the consultants' activities and presented their findings and conclusions. The Foundation had developed a template for reports from these consultants, containing sections on the reviewed correspondence, communication with the Contracting Authority, suspected irregularities and general opinions on the contract. In practice, consultants would receive all the ongoing correspondence via the Foundation, except for documents available on PKP PLK's external server. In addition, the consultants also had the right to ask questions of the Contracting Authority and to obtain clarification and letters directly.

The biggest dilemma, perhaps, was whether the Observer should be passive or active as an observer. The passive approach would entail a silent observer and a chronicler who screens the project, records its post factum observations in reports and keeps an equal distance to the remaining parties to the Integrity Pact. Conversely, an active role would mean the Observer would actively manage risks identified during the monitoring process by making timely interventions or advising the parties to the Pact, i.e. it would not only identify problems but also contribute to identifying solutions and influence the process by doing so.

The agreed wording of the Pact had strongly suggested that the Foundation would opt for the active role. The Pact envisaged scenarios where PKP PLK would seek the civil society partner's opinion or where the Observer would make on-the-record comments in the Tender Committee meetings. This participatory observation approach was maintained after the Foundation hired its consultants. For example, the Observer presented the Integrity Pact to the 4th Plenary Investment Forum on 8 December 2016 to communicate to contractors that the Foundation would be in control of the process to ensure the proper conduct of companies submitting their bids, even though they were not a party to the Pact at that stage. After the best bid had been selected by the Tender Committee, the Foundation's legal consultants presented their opinion about the appeal filed by one of contractors against the Committee's decision, at the request of PKP PLK.

The first task of the consultants was to assess the entire tender dossier to identify all the questionable, unclear and inconsistent provisions that could have negative consequences in the later contract phases as a result of limited competitiveness, transparency or a risk for the public interest. The correspondence with PKP PLK regarding the outcomes of the monitoring conducted by the Foundation was regularly published on [paktuczciwosci.pl](http://paktuczciwosci.pl). The Foundation was mainly preoccupied with passing the consultants' comments to PKP PLK's tender dossier before the bidding deadline, which will be discussed in detail later in the report. The objective was to allow space for making modifications and amendments that would eliminate the identified issues. In its correspondence, the Foundation also

recommended the immediate publication of contractors' queries and PKP PLK's replies, rather than in batches released with a delay. Ultimately, the proposals were not accepted even though PKP PLK addressed the issue in a separate letter and during a meeting with the Observer after the bidding deadline.<sup>19</sup> The concerns expressed by the Observer were to some extent caused by the lack of any background knowledge that would help understand the underlying rationale for the specific content of the tender dossier. The Foundation had not monitored the preparations for the tender nor had it any insight into the environmental permit process; it had a chance to read the feasibility study only when the contract was in the implementation phase.

The monitoring team had from the beginning intended to avoid duplicating measures taken by external regulators, preferring to build on their work as a valuable source of expertise. For example, the President of the Public Procurement Office launched an enquiry into the monitored tender. The regulator had earlier shared the questions to the Contracting Authority with the Foundation where they were discussed by its consultants to assess whether or not they might indicate any Contracting Authority practices that were in violation of Public Procurement Law.

The Foundation formulated requirements for the consultants to ensure they remained independent while making their assessments.<sup>20</sup> The contracts concluded by the Foundation with the consultants included a conflict of interest prevention clause inspired by the provisions of the Integrity Pact. In the course of the monitoring, the technical consultant, JPL Project, informed the Foundation in April 2017 that it had provided its services to another bidder for the PKP PLK Contract Engineer tender designed to select a party to supervise the public contract covered by the Integrity Pact. These types of activities literally qualified as a potential conflict of interest defined in the agreement between the Foundation and the Consultant. The conflict of interest was communicated to PKP PLK by the Foundation. Following consultations with the parties to the Pact, the technical consultant (including the Tender Committee member nominated by the technical consultant) was suspended. It became obvious that the public call for tenders for supervision over the development of the design documentation and construction works announced in February 2017 bore a major direct impact on the Pact even though it was not covered by it. Following the completion of the tender for the Contract Engineer and the signing of a contract with PKP PLK on 4 August 2017, the consortium of MP Mosty and Drogowa Trasa Średnicowa terminated the relationship with JPL Project as a subcontractor providing its expertise. The cause of the potential conflict of interest no longer existed, which meant that the technical consultants could be reinstated in their contractual rights and obligations with the understanding and consent of PKP PLK in November 2017. This is how the conflict of interest management approach from the Observer's perspective was tested in practice, albeit indirectly.

#### **4.1.8. Major Lessons Learned and Recommendations from the Integrity Pact Design Phase**

Major lessons learned and recommendations from the design of the pilot Integrity Pact in Poland include:

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<sup>19</sup> Correspondence with the Contracting Authority, January–February 2017, <http://the.Paktuczciwosci.pl/wp-content/uploads/2018/06/Correspondence-the-Foundation-PKP-PLK-I-II-2017.pdf> [accessed: 7 July 2020].

<sup>20</sup> The requirement to perform services in an objective manner and to be perceived as independent is one of the most important expectations of the Civil Society Observer. See: M. Beke, R. Blomeyer, F. Cardona, *Learning Review: integrity pacts for Public Procurement*, Blomeyer & Sanz 2015, p. 46, <https://images.transparencycdn.org/images/Integrity-Pacts-Procurement-Learning-Review.pdf> [accessed: 21 August 2020].

- **The Pact Formula.** It is recommended that the Pact is structured in two parts: an agreement between the Contracting Authority and the Observer to be concluded as early as possible in the contract development process as a civil contract (e.g. as soon as the proposal is made or, optionally, before starting to describe the job) or at least before the call for tenders. Part two of the Pact should be an agreement with the Contractor. For large infrastructure projects, the third optional part should be an agreement between the Observer and the Contract Engineer. Parts two and three should be embedded in the contract templates as part of the tender dossier. We believe such a modular or hybrid formula of the Pact would be a sufficiently strong foundation for the civil society monitoring of a public sector contract and would be well harmonised with Public Procurement Law.
- **The Pact Commencement.** The monitoring exercise should commence before the call for tenders, when all major decisions affecting citizens have been made, i.e. the scope of the project and its target parameters. An Integrity Pact should inherently cover the whole public tender cycle, including the Contracting Authority's needs assessment. This would give the Observer an opportunity to take a look at the commissioned opinions and the feasibility study, public consultations of the project alternatives and the decision-making process leading to the acceptance/rejection of the project alternatives, and the process of designing a call for tenders and contract valuation. Furthermore, the Observer may review other processes that accompany the project, including the environmental permitting process for scheduling the job.
- **Standardisation.** The core components of the Integrity Pact, such as the formula of the Pact, the major rights and obligations of the parties (especially those granted to the Civil Society Observer) should be covered by legislation. We will share our detailed recommendations after the pilot has been completed.
- **Access to Information.** It is vital that the Pact should contain provisions that ensure broad, easy and timely access for the Observer to all documents and procedures related to contract development and implementation. General legislation on access to public information is not sufficient to enable monitoring. The Pact should rely on them but should provide for extended and facilitated access for the Observer to information held by the Contracting Authority and the Contractor. Access to information is a condition precedent to conducting a monitoring exercise.
- **Participation in Tender Committee Proceedings.** The Pact should guarantee the Observer's participation in the Tender Committee proceedings. It is more than sufficient for the Observer to be a member of the Committee without the right to vote on Contractor selection but with the right to present statements and opinions in the process. The Observer's status should be clearly defined in Public Procurement Law in order to facilitate access to Tender Committee proceedings.
- **Whistleblower Protection.** The Pact should impose requirements on contractors and the Contracting Authority to adopt ethical management policies and whistleblower protection. Such policies should at least apply to the contract covered by the Pact. As in the case of access to public information, the requirement should be reinforced by whistleblower protection legislation, if available, or internal regulations which may have already been adopted by the Contracting Authority and contractors.
- **Conflict of Interest Management.** The Pact should contain provisions regarding conflict of interest risk management to ensure that such conflicts never lead to fraud. This is particularly desirable in case the national legislation fails to address this issue or does so vaguely.
- **No Sanctions for Pact Violations.** The Pact does not need to provide for sanctions, liquidated damages or other, for breach of the Pact. The underlying principles remain: goodwill of the parties and their commitment to uphold the strictest integrity standards, and for government

contracts to remain open to public scrutiny. Needless to say, no sanctions for breach of the Pact would be enforceable by the civil society Observer because of the cost and time needed for successful court litigation. It would also be quite challenging to prove to the court the extent of the damage caused to the Observer as a result of failure by another party to the Pact to perform in accordance with its provisions, a step that is key in bringing legal action.

- **Non-collusion Statement.** The Pact imposed an obligation on the bidders to file non-collusion statements, a soft prevention instrument based on a good faith representation. A non-collusion statement may prove helpful in dealing with actual collusion cases in the monitored project, if appropriate. Non-collusion statements had been filed in the form of the ESPD form throughout the monitored project. The Public Procurement Law of 2019 that will become effective in 2021 includes provisions that make it mandatory.
- **The Civil Society Observer and the Relationship with Consultants.** If the Civil Society Observer needs to use external experts it should make an early market review to prepare for a possible shortage of available professionals or an increase in their compensation – by far the largest item in the monitoring budget. Consultants should be vetted for conflicts of interest. This is particularly relevant in niche markets where the likelihood of professional relationships with various businesses to be covered by observation is quite high. Consultants should be recruited and onboarded as early as possible in the monitoring design phase. The terms and conditions of the relationship, including accountability, should be clearly laid out in a contract to structure and facilitate the operations of the whole monitoring team. A 'strictly business' approach of external experts may not be adequate for this type of assignment, which puts the stress on the social aspects of government contracts and requires sensitivity to the public interest, and not the interests of the Contractor or the Contracting Authority.
- **The Pact Communications.** Even if the Integrity Pact does not cover the contractors before signing the contract, the Observer should do its best to be visible to all the relevant market players showing an interest in bidding for the project. Such visibility may offer a number of benefits to the Observer. First, it will reinforce prevention and send an early warning to contractors interested in bidding for a specific contract to refrain from any potential misconduct. Secondly, the early exposure of contractors to the Pact may help reduce the risk of their protests should they feel opposed to the extra arrangement. Thirdly, gaining contractors' trust and recognition may help gain access to additional information about any suspicious conduct the Contracting Authority may exhibit in connection with the tender arrangements. Such information can be hard to obtain without whistleblowers who work for contractors or without engaging in interviews with bidders to discuss issues in the tender process. The Civil Society Observer should ensure the same early visibility towards government regulators and agencies that may wish to use some of the observations of the civil society partner.
- **Active Monitoring.** It is in the public interest that the Civil Society Observer should be proactive and help prevent risks in public tenders before they materialise. This makes a strong case for a broad mandate for the Observer in an Integrity Pact in order to encourage it to express its views and engage in open communication about undesirable conduct. Its strong mandate allows it to act in a timely fashion or even anticipate the process of contractor selection. Subject to the goodwill of the Contracting Authority, the Observer's comments may result in improved transparency and competitiveness of the ongoing tender.



## 4.2. Stage II – Tendering Process

### 4.2.1. Background

Before the tender covered by the Pact was announced, PKP PLK had developed pre-project documentation. It had been put together both directly by PKP PLK and third-party contractors selected in three tender processes:

- Works on the Selected Railway Lines in the 2014–2020 EU Perspective: Preparatory Works”.<sup>21</sup> This job involved the development of certain parts of the pre-project documentation that were essential for the implementation of the monitored contract, mainly the feasibility study and the Functional and Operational Programme (FOP).
- “Collection of Data about the Natural Heritage in the Immediate Vicinity of the Railway Line and its Valuation in the Framework of the IEOP 7.1–102 Project: The Development of an Environmental File for Selected Infrastructure Projects in the 2014–2020 Financial Perspective”.<sup>22</sup> The job involved developing a natural heritage inventory for railway line No. 1 on the Częstochowa–Zawiercie section to be used for the development of background documents required in the process of obtaining an environmental conditions decision.
- “The Development of Background Documents to Support the Application for an Environmental Conditions Decision for Stage III Railway Projects Implemented by PKP Polskie Linie Kolejowe S.A. in the 2014–2020 Perspective”.<sup>23</sup> This contract was for the development of an application for an environmental conditions decision and appendices, including a Project Data Sheet, for the “Works on railway line No. 1 on the Częstochowa–Zawiercie section” project.

The documents were being drafted since 2014. Once complete, they were used by PKP PLK to define the terms of reference (ToR) of the project covered by the Pact. There were four separate monitored documents (a total of over 2,000 pages):

- Contractor Manual (CM).
- Contract Terms (CT) including FIDIC general international standards for infrastructural project contracts developed by the International Federation of Engineering Consultants along with specific terms that expand on or modify certain clauses in general terms.
- Functional and Operational Programme (FOP) – including a summary of the feasibility study.
- Bid Price Breakdown (BPB).

Notably, the monitored project is part of the National Railway Programme (NRP) scheduled to end in 2023. When the monitored call for tenders was developed in 2016 (in parallel to the development of the Integrity Pact), PKP PLK was developing several hundred other projects. PKP PLK accepted bids for ‘statutory contracts’, i.e. public sector contracts under the Public Procurement Law, for over one hundred projects in 2016 alone.

<sup>21</sup> [https://zamowienia.plk-sa.pl/servlet/homeservlet?mp\\_module=main&mp\\_action=publicnoticedetails&noticeidentity=3495&expired=1](https://zamowienia.plk-sa.pl/servlet/homeservlet?mp_module=main&mp_action=publicnoticedetails&noticeidentity=3495&expired=1) [accessed: 7 July 2020].

<sup>22</sup> [https://zamowienia.plk-sa.pl/servlet/HomeServlet?MP\\_module=main&MP\\_action=publicNoticeDetails&demandIdentity=64857&noticeIdentity=2776&expired=1](https://zamowienia.plk-sa.pl/servlet/HomeServlet?MP_module=main&MP_action=publicNoticeDetails&demandIdentity=64857&noticeIdentity=2776&expired=1)

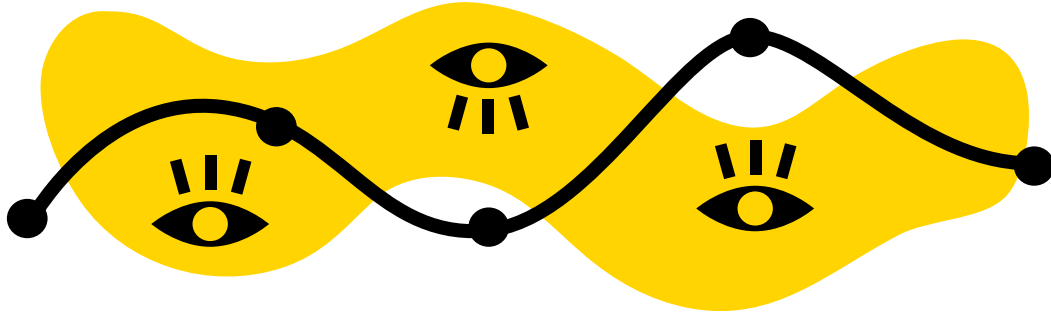
<sup>23</sup> [https://zamowienia.plk-sa.pl/servlet/HomeServlet?MP\\_module=main&MP\\_action=noticeDetails&demandIdentity=125224&noticeIdentity=5082&expired=1](https://zamowienia.plk-sa.pl/servlet/HomeServlet?MP_module=main&MP_action=noticeDetails&demandIdentity=125224&noticeIdentity=5082&expired=1) [accessed: 7 July 2020].

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## RECOMMENDATIONS BASED ON THE INTEGRITY PACT DESIGN PROCESS

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- 1.** The entire life cycle of a public project must be monitored, including the needs assessment of the contracting authority before a tender.



- 2.** Key Integrity Pact parameters such as the formula and the key rights and obligations of parties ought to be outlined in legislation.



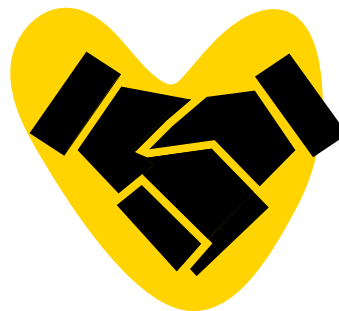
- 3.** An Integrity Pact ought to require that contractors and the contracting authority implement and apply ethical management and whistleblower protection policies.



- 4.** An Integrity Pact ought to clearly define the concept of conflicts of interest and provide relevant conflict management guidelines. They ought to be as detailed as necessary if legislation is general.



- 5.** An Integrity Pact does not have to include sanctions for being violated, but should rely on open collaboration and the commitment of the parties.



The monitored contract is one of many contracts implemented in the framework of the NRP in the “Design and Build” formula (known as Yellow FIDIC, i.e. a set of standards for design and build contracts). In simple terms, these types of contracts involve a contractor which executes projects that it has designed earlier. All the design works and construction works (including the supply of essential equipment) are delivered to the Contracting Authority’s requirements (e.g. FOP). The design and construction performed by one contractor in the framework of one contract has many advantages and disadvantages, both from the point of view of the Contractor and the Contracting Authority. This largely depends on the Contracting Authority’s requirements set out in the terms and conditions of the contract. For example, one disadvantage from the point of view of the Contractor may be an unfair contract risk distribution. Not infrequently, it may seem like a major advantage for the Contracting Authority to shift nearly all the risks onto the Contractor, a format often encouraged in the “Design and Build” formula and engrained in the contracting authority mentality. For the Contractor, however, it is an obvious disadvantage often leading to a decision to abstain from bidding, which ultimately affects the Contracting Authority as well.

**However, the “Design and Build” formula appears to be more advantageous for the Observer who, as in our case, has no opportunity to take part in the earlier phases of the contract development. The Observer is in a position to play a preventive role at the structural design stage as it can prevent potential violations or irregularities in later project phases. Nonetheless, a Pact that covers a “Build” contract, where the Contractor relies on construction blueprints developed by the Contracting Authority, allows the Observer to ensure greater transparency of the contract (e.g. disputes over unforeseen developments in the project which may affect the project cost and timeline). Therefore, each construction project formula may be covered by the Integrity Pact.**

**As mentioned in the section discussing the first phase (see: Chapter 4.1.8.b), the Pact should be operational as soon as possible and the Observer should take part in the development of the public procurement process and in the entire project development and implementation cycle. It will no longer be so relevant whether or not the contract at hand is done in the “Design and Build” formula.**

#### **4.2.2. Call for Tenders**

Pursuant to Polish Public Procurement Law, an open call for tenders was announced on 17 November 2016 for “The Development of Design Documentation and the Performance Construction Works in the Design and Build formula in the framework of the ‘Works on railway line No. 1 on the Częstochowa–Zawiercie section’”.<sup>24</sup> Both the call for tenders and the tender dossier mentioned the Integrity Pact as part of the process. The agreement between the Foundation and PKP PLK was attached to the ToR. Moreover, the contract for the Contractor included general obligations towards the Foundation and its consultants, and the ethical management policy and whistleblower protection were attached to the ToR.

PKP PLK initially announced the deadline for the submission of bids by contractors on 27 December 2016. Contractors had 40 days to develop and submit their bids. The Contracting Authority replied to queries filed by bidders and occasionally modified the ToR, and ultimately extended the bidding deadline.

<sup>24</sup> [https://zamowienia.plk-sa.pl/servlet/HomeServlet?MP\\_module=main&MP\\_action=noticeDetails&demandIdentity=189894&noticeIdentity=8805&expired=1](https://zamowienia.plk-sa.pl/servlet/HomeServlet?MP_module=main&MP_action=noticeDetails&demandIdentity=189894&noticeIdentity=8805&expired=1) [accessed: 7 July 2020].

During the tender process, PKP PLK replied to 402 queries filed by contractors. Most of them were about the FOP. In fact, more queries were filed than replies given. PKP PLK decided not to address 55 requests/queries stating that some of them had been filed after the statutory deadline. Meanwhile, the Contracting Authority decided to reply to selected late queries. The Contracting Authority's approach to this matter was lawful. Nonetheless, there had been no obstacles preventing the Contracting Authority from replying to all the queries for the sake of transparency and better communication with contractors. It could have at least explained by posting a note on the tendering platform why it was answering only selected queries. Soon before the publication of this report, PKP PLK explained to us that it had decided to reply to queries where the Contracting Authority attached importance to the valuation of the bids, the selection of the best bid or for maintaining competitiveness in the tender process.

The Terms of Reference were modified eleven times as a result of bidders' queries. Modifications included the deletion of inaccurate provisions, correcting typing errors, the breakdown of the offered price, i.e. splitting costs into types of works. For example, the installation of acoustic screens on a specified length was added. The contract template was also modified. Liquidated damages were added for failure to present the Contracting Authority with the required documents regarding individuals employed on a contract of employment basis. The provisions regarding changes in the contract were amended to allow such changes to be made in accordance with the specific and general terms and conditions of the contract. Moreover, the Contracting Authority modified the technical requirements for the Contractor: it allowed a broader scope of tools and equipment which the Contractor must demonstrate it is in possession of in order to meet ToR requirements.

The President of the Public Procurement Office launched an enquiry into the monitored public procurement process on 15 February 2017. The enquiry examined the Contracting Authority's controversial requirements regarding the allowable types of slabs in rail crossings. As a result of this enquiry, PKP PLK modified its requirements by allowing alternative road/railway pavements that met the requirements in the road manager's guidelines. PKP PLK sent comments on the matter to PPO, which found them sufficient.

Consequently, the original bidding deadline was extended several times: 9 January 2017, 25 January 2017, 6 February 2017, 16 February 2017, 21 February 2017, 3 March 2017. The final deadline was on 10 March 2017. The time for contractors to place their bids was extended from the original 40 days to 113 days, so by more than 70 days. Consequently, the originally received schedule was not in sync with the actual schedule of the job presented in the appendix to the ToR. The Foundation felt that the failure to stick to the original project implementation schedule had resulted from the multiple extensions of the bidding deadline. Notably, our belief is not reflected in the information presented in the National Railway Programme annual report for 2018, which attributes the untimely performance of the project tasks to the delays in environmental permitting and the change in the scope of the project.<sup>25</sup>

The number of amendments to the tender dossier, shifting deadlines for the submission of bids, hundreds of contractors' queries (and the lack of the Contracting Authority's replies to all of them) and the PPO President's enquiry launched at the request of a third party (no irregularities had been identified) may indicate some headroom for transparency in the tender process arrangements. More attention

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25 The 2018 National Railway Programme Annual Report, the Ministry of Infrastructure, Warsaw 2019, p. 8, <https://www.gov.pl/web/infrastruktura/krajowy-program-kolejowy> [accessed: 12 February 2020].

should have perhaps been given the process management. We recognise it may be challenging for the Contracting Authority to be bombarded by contractors' queries, often the same ones in different tenders, which is not infrequently the contractors' way of buying more time or trying to influence a change in the project scope or attitude to the project in general. The Contracting Authority is aware of the practice and we feel it ought to do a better job of developing the tender files more thoroughly to reduce the margin of uncertainty or to modify the tendering platform so as to physically limit the volume of queries.

All in all, the Observer believes the monitored tender was not significantly different from other similar tenders. **The nature of issues that surfaced in this phase does not suggest the risk of fraud or even irregularities (again, none have been identified by the Observer or in the course of the PPO enquiry, or indeed in the course of the ex-ante audit). This generally points toward possible room for improvement in certain aspects of the tendering process, including communication between contracting authorities and contractors and some transparency or thoroughness gaps in the tender dossier. In all fairness, PKP PLK did improve its tendering platform after the monitored tender had been completed.**

Our observations suggest that the public procurement process should be organised more efficiently and transparently with more thoroughly drafted tender dossiers to make sure there are no inconsistencies within the FOP or that an environmental conditions decision be in place to avoid questions at the tendering stage and claims and disputes during project implementation. (The latter will be further discussed in the report).

Four bids were submitted within the final deadline. The Contracting Authority opened them in the presence of the Foundation's representatives in the capacity of non-voting members of the Tender Committee on 10 March 2017. Here is a summary of the bids:

The following bids were submitted:

Bid No.	Name of Company	Gross Price PLN	Warranty Period	Completion Date
1.	Consortium: BUDIMEX S.A. FERROVIAL AGROMAN S.A.	565,475,622.06	72 months	36 months
2.	Consortium: TORPOL S.A. Przedsiębiorstwo Usług Technicznych INTEBPBR Sp. z o.o.	527,922,612.86	72 months	36 months
3.	ZUE S.A.	457,043,400.00	72 months	36 months
4.	Trakcja PRKiI S.A.	531,875,529.90	72 months	36 months

Before the opening of the bids in line with Article 86 Paragraph 3 of the Public Procurement Law, PKP PLK had announced that it intended to spend a gross amount of nearly PLN 605 million to fund the project.

### 4.2.3. Bid Evaluation, Selection and Contracting

Pursuant to the ToR, PKP PLK's initial job was to evaluate all submitted bids and then to assess whether the most advantageous bid could be disqualified (a reverse procedure was applied under Article 24aa of the Public Procurement Law). The Contracting Authority used the following bid assessment criteria:

- Total Gross Price: 60% weight;
- Completion Date: 20% weight;
- Warranty Period: 20% weight.

The criteria are in line with the laws and regulations. However, the general statutory requirement is to use non-price criteria in order to ensure that the assessment of bids is more comprehensive and qualitative in nature.<sup>26</sup> The selection of the said criteria implied that price was in fact the only meaningful deal-maker. It was quite predictable. Contractors proposed their own project completion dates and warranty periods for works. They were allowed to do this but only within pre-defined ranges defined by the Contracting Authority in the ToR. When reviewing the report, the Contracting Authority observed that it had applied the criteria in accordance with the then applicable guidelines set out in the core documents applicable in PKP PLK. This is even more disconcerting because it seems the overall statutory and tender management framework does after all allow contracting authorities not to differentiate between bids, based on criteria other than price. Moreover, the Contracting Authority also asserted that PKP PLK had applied other criteria which were much better instruments for a qualitative assessment of bids, such as track closure times or the Contractor's personnel background and experience. The question is then why such criteria had not been applied in the monitored tender.

While evaluating the bids, the Contracting Authority exchanged correspondence with bidders to request further information from contractors on matters including unreasonably low prices in their quotations, e.g. for the installation of acoustic screens or land purchase. Following the completion of the assessment process by the Tender Committee and an expert appointed by PKP PLK on 5 May 2017, PKP PLK selected ZUE S.A. One appeal against the selection was submitted and then dismissed by the National Appeals Chamber. This case is further discussed later in the report. The Contracting Authority, PKP PLK, and the Contractor, ZUE S.A. signed the project contract in Katowice on 20 July 2017.

### 4.2.4. Major Observer's Activities during the Tender Process

We began monitoring the tender process by reviewing the tender dossier. We focused on competitiveness, the accurate description of the job, fair risk distribution and compliance (especially compliance with Public Procurement Law). The Foundation's team and technical and legal consultants believed these aspects were key to the successful implementation of the Integrity Pact in terms of its goals and format.

**Our initial findings were included in a letter to PKP PLK on 20 January 2017, where we summarised the Foundation's observations and possible issues with the tender. Most of them addressed the lack of an environmental conditions decision; an inconsistent FOP and discrepancies in this part of the documentation (it is these types of flaws in the tender dossier that**

<sup>26</sup> See: D. Koba, *Pozacenowe kryteria oceny ofert. Poradnik z katalogiem dobrych praktyk. Część II* [https://www.uzp.gov.pl/\\_data/assets/pdf\\_file/0031/39775/Pozacenew-criteria-oceny-bids-cz.II.pdf](https://www.uzp.gov.pl/_data/assets/pdf_file/0031/39775/Pozacenew-criteria-oceny-bids-cz.II.pdf) [accessed: 3 September 2020].

often create the risk of fraud and irregularities);<sup>27</sup> stringent and/or ambivalent requirements imposed on the Contractor; poor communication between the Contracting Authority and contractors taking part in tender process.

The fact that no environmental conditions decision had been issued at the commencement of the tender process seemed to be the biggest problem. As mentioned before, the monitored project is implemented in the “Design and Build” formula, yet PKP PLK had not obtained a key decision defining the environmental requirements for the project by the day the tender process for works was launched; an application for the said decision was submitted by PKP PLK to the relevant agency on 30 March 2016.

The conditions stipulated in the decision issued after the environmental impact assessment were not known to contractors even at the time of bidding. We assessed that the lack of clear environmental requirements (at least in terms of options to address environmental constraints during implementation) would force contractors to develop and evaluate their bids not knowing the ultimate hurdles they might face when an environmental conditions decision was finally available.

We were not the only party to see these circumstances as a major drawback in the tender arrangements, as this could potentially lead to disputes during the design and construction works process. Disputes of the parties to the contract may later lead to irregularities.

Hypothetically, this risk could be mitigated by providing a summary of the environmental impact assessment report developed by PKP PLK to contractors. However, we were not sure the document would be a sufficiently robust preventive tool helping to avoid subsequent issues because the scope of requirements for the project covered by an environmental conditions decision that is to be issued after the environmental impact assessment may actually differ from the scope of the environmental impact assessment report. The validation of the said report by an independent agency is only one of the elements of the environmental impact assessment. The final wording of an environmental conditions decision to deviate from or change the perspective of the environmental impact assessment report may be affected by the public or other government agencies e.g. sanitary authorities’ opinions while reviewing the decision. **In the light of the above, we strongly believe that no tender should start if key documents are unavailable, even if it is allowed under law.**

**While assessing the tender dossier we were also struck by the rather ambivalent description of the job itself, including engineering and the electricity lines.** A clearly defined job is absolutely essential for fair competition and for mitigating the risk of subsequent claims later in the project. In fact, we identified an alternative that could improve competitiveness by reducing the Contracting Authority’s requirements concerning the technical or professional capacity of the Contractor (a requirement to demonstrate experience in managing highly demanding jobs with a large number of tools and equipment). The Contracting Authority did actually modify the ToR, and by doing so it eliminated some of the requirements for contractors.

**We observed during the tender process that both the amendments/modifications of the ToR and the replies to contractors’ queries were published by PKP PLK on its procurement platform in an unstructured manner.**

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<sup>27</sup> H. Nowak, *Przeciwdziałanie nieprawidłowościom w zamówieniach publicznych na gruncie przepisów Ustawy o zamówieniach publicznych*, Stefan Batory Foundation, Warsaw 2017, <https://www.batory.org.pl/upload/files/pdf/Zamowienia.pdf> [accessed: 7 July 2020].

Figure 1. Print screen with content posted by PKP PLK on the procurement platform

www.plk-sa.pl Kontakt

PKP POLSKIE LINIE KOLEJOWE S.A.  
Zarządca narodowej sieci linii kolejowych

PLATFORMA ZAKUPOWA

Zaloguj jako kontrahent | Zaloguj jako pracownik PLK S.A.

[Ogłoszenie](#)
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[Informacje o wyniku postępowania](#)
[Dokumenty dodatkowe](#)

### Pobieranie Specyfikacji

Nazwa pliku	Opis pliku	Wersja	Data publikacji	Akcje
Adres strony z udostępnionym SIWZ.docx	Adres strony z udostępnionym SIWZ	1	2016-11-17	
ESPD LK1 Częstochowa Zawiercie 20.01.2017.xml	JEDZ skorygowany	1	2017-01-20	
Informacja z otwarcia ofert 10.03.2017.pdf	Informacja z otwarcia ofert 10.03.2017	1	2017-03-10	
Linia 1 RCO.modyfikacja.pdf	RCO modyfikacja	1	2017-02-13	
Linia 1 RCO.modyfikacja.xlsx	RCO modyfikacja	1	2017-02-13	
Modyfikacja SIWZ cz. IV.pdf	Modyfikacja SIWZ cz.IV	2	2017-02-01	
Modyfikacja SIWZ cz. VIII.pdf	Modyfikacja SIWZ cz.VIII	1	2017-02-17	
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Modyfikacja SIWZ CZ.2.pdf	Zmiana terminu2	1	2017-01-04	
Modyfikacja SIWZ cz.V.pdf		1	2017-02-10	
Modyfikacja SIWZ cz.VI.pdf	Modyfikacja SIWZ cz. VI	1	2017-02-13	
Modyfikacja SIWZ cz.VII.pdf	Modyfikacja SIWZ cz. VII	1	2017-02-14	
Modyfikacja SIWZ cz.X.pdf	Modyfikacja SIWZ cz.X	1	2017-02-21	
Modyfikacja SIWZ cz.XII.pdf	Modyfikacja SIWZ cz.XII	1	2017-03-01	
Modyfikacja SIWZ I.pdf	Modyfikacja I zmiana terminu	1	2016-12-21	
Modyfikacja3.pdf	Modyfikacja3 SIWZ	1	2017-01-20	
PFU Linia 1 na odcinku Częstochowa - Zawiercie 17.11.pdf	PFU	1	2016-11-17	
Pytanie nr 6 - HRZZ_LK1_Częstochowa-Zawiercie_ver 2016_11_15.zip	Załącznik do modyfikacji SIWZ cz. V	1	2017-02-10	
RCO Linia kolejowa ne 1 Częstochowa-Zawiercie.pdf	Rozbicie Ceny Ofertowej	1	2016-11-17	
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Zal. 2 Opis stanu istniejącego.pdf	Opis stanu istniejącego	1	2016-11-18	
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Zal. do pyt. nr 5 Linia 1 RCO.xlsx	Załącznik do modyfikacji SIWZ cz. V	1	2017-02-10	
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Zal. nr 2 do pytania 124 -Streszczenie Raportu o oddziaływaniu na środowisko.docx	Załącznik do modyfikacji SIWZ cz. V	1	2017-02-10	
Zal.do pyt 79. lokalizacja dzikich przejść.pdf	Załącznik do modyfikacji SIWZ cz.V	1	2017-02-10	
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Załącznik nr 7 do IDW JEDZ.doc	Załącznik do modyfikacji SIWZ cz.V	1	2017-02-10	

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PKP PLK would not publish queries until the reply was ready. In fact, Article 38 of the Public Procurement Law stipulates that queries are to be published along with the replies. However, the Law does not prohibit the publication of just the queries. It would have been more than practical for the Contracting Authority to use this opportunity to publish the received queries as soon as they had been submitted using the SMART Public Procurement Portal (<https://portal.smartpzp.pl/>). In fact, the Contracting Authority had occasionally done so in the past, in which case it would indicate it was working on the reply. Moreover, whenever PKP PLK was not statutorily required to reply, it would still reply but it would not explain why it did so with respect to some queries and not others. The Foundation sent a letter to PKP PLK addressing the issue on 6 February 2017.<sup>28</sup> We asked the Contracting Authority to consider posting all the queries filed by contractors as soon as it had received them on the procurement platform. The Foundation received a reply to the said letter only on 28 February 2017, i.e. not long before the bidding deadline. It was much too late by then and our intervention did not result in any modification of the tender dossier even though it was one of the requests expressed in the letters. The matter was brought to the attention of the parties at meetings between the Foundation, PKP PLK and the then Ministry of Development.

PKP PLK explained its reasons for not publishing the queries only shortly before the report was fully drafted. It revealed it had only published queries it deemed material enough to potentially affect the contract valuation, bid selection or competitiveness. We received a list of 'rejected' later queries filed after the statutory deadline. We were still not sure how PKP PLK qualified them as material. For example, some 'rejected' queries PKP PLK (a) did reply to; (b) replied to but notified that the query had already been answered; and (c) did not reply to. Here are some examples:

- (a) Question 386: Sub-clause 15.2 – the penultimate paragraph states that: "In case the Contracting Authority terminates the Contract for reasons listed in this Sub-clause the Contractor shall pay a liquidated damage of 30% of the Accepted Contract Amount to the Contracting Authority...". We request removing this provision because liquidated damages are already dealt with Sub-clause 8.7 Letter r).  
Reply: The Contracting Authority refuses to meet the request.
- (b) Question 375: Will the Contracting Authority confirm that the Contractor which has completed and signed a European Single Procurement Document, Part IV: Qualification Criteria, may be allowed to just complete Section a (general statement regarding all qualification criteria) without having to complete Section A-D Part IV? The Contracting Authority has not included a relevant provision in ToR.  
Reply: The Contracting Authority has replied to this query in query 115.
- (c) Question 389: Re: traffic control. The Częstochowa Mirów–Poraj route. Please advise if additional pipes and/or cables will be required over and above the new cable for axle counter interlock/transmission.  
No reply.

In its dissenting opinion to this report, PKP PLK suggested the excessively lengthy process of obtaining the environmental conditions decision. The authors of this report do not have any knowledge or documents to corroborate this assertion. What the report can attest to is that PKP PLK has not filed any formal complaint to the relevant agency (RDOŚ) about excessively lengthy procedures. PKP PLK admitted in the same dissenting opinion that the environmental conditions were known during the tender process. The authors of this report

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28 Correspondence with the Contracting Authority, <http://the Paktuczciwosci.pl/wp-content/uploads/2017/09/Sz.P.-J.Pawluk-pismo-with-06.02.2017.pdf> [accessed: 7 July 2020].

hold the view that the environmental conditions decision contains some of the information which was missing in the summary report, e.g. the scope of wildlife crossings.

#### **4.2.5. Conflict of Interest Management in the Tender Process**

We wish to highlight particularly interesting conflict of interest situations that occurred during the assessment of bids. One related to the identification of a conflict of interest between the Contractor and the Contracting Authority. In the course of the Tender Committee's proceeding the Observer, having studied the submitted bids, found that the team of one of the contractors included a chief designer who was a lineal relative to the Director of Zakład Linii Kolejowych PKP PLK S.A. in Częstochowa. This fact was publicly disclosed in the European Single Procurement Document (ESPD).

Whereas the Częstochowa-based company is responsible for the acceptance of works in the monitored project we assessed that this did not meet the definition of a conflict of interest adopted in Paragraph 2 Sub-paragraph 5 of the Pact. We presented our opinion to the Contracting Authority in a letter of 4 May 2017. The conflict of interest is not a legal offence in itself. The concept of a conflict of interest has not even been defined in Polish law (a definition of the concept is found in EU directives on public procurement, and conflict of interest will be more clearly regulated by Poland from 1 January 2021 in the new Public Procurement Law). It is always a risk factor potentially leading to irregularities and criminal offences such as fraud or corruption, which are against the public interest. Therefore, each conflict of interest that cannot be eliminated must be properly managed by means of disclosure and a tighter control of the decision-making processes it affects (see earlier comments on the conflict of interest in the EU directive).

Besides red-flagging the conflict of interest, in our letter to PKP PLK we requested tighter supervision of the works acceptance process in the monitored project. In response to our intervention (letter of 17 May 2017), PKP PLK provided assurances that it was doing its utmost to reduce the risk of fraud and irregularities but it did not agree with our assessment suggesting the existence of a conflict of interest. PKP PLK did in fact demonstrate their openness to the Observer's argumentation and, in the same letter, it declared it would "consider additional monitoring measures" while accepting the project works.

There was another conflict of interest in the bid assessment phase of the project. It involved the Observer's technical consultant and the Contracting Authority. We have described it earlier in the report in the section that discusses monitoring organisations. We mention it here merely to reiterate the significance of conflict of interest management for fraud prevention.

**The pilot has demonstrated that the Pact has been successful both as an instrument facilitating the identification of conflicts of interest and as a process describing the response. The procedure is neither excessively restrictive nor does it prescribe specific and detailed management measures. This approach seems quite helpful especially in cases where there is no relevant legislation in place.**

#### **4.2.6. The Contractors' Statements vs Access to Public Information**

In a protest submitted in the framework of the tender process, an allegation was made that the access to public information law was being violated and the freedom of competition, a fundamental principle on the public procurement market, was being limited. The Contracting Authority had not agreed to

disclose the clarifying comments submitted by the winning the Contractor claiming the statement was that Contractor's trade secret. The appealing party claimed to have been disadvantaged in the tender process because of the lack of access to the documents.

In advance of the hearing before the National Appeals Chamber, we were asked, as members of the Tender Committee, to issue an opinion on the appeal, including the issue of access to information. We reviewed the laws and regulations and we presented a statement in which we said the Contracting Authority could refuse to disclose the requested documents. That was our preliminary legal opinion, even though it contradicted our own belief that broad access to information in public procurement was fundamental. Our statement was discussed by the Tender Committee. Ultimately, a detailed assessment was conducted concurrently by an expert appointed by PKP PLK. The conclusion was that confidentiality should not have applied in this case. The Contracting Authority's alertness must be commended for this was a positive turning point in terms access to public information. This situation illustrates how difficult it is to assess the relevance of trade secret restrictions in the course of tender processes.

Consequently, in its reply sent to the NAC, the Contracting Authority revised its earlier position and stated that the said comments should have been shared because they did not contain any information subject to trade secrecy. The NAC supported that view and stressed that "the Contracting Authority illegitimately assumed that the content of Contractor Z.'s letters of 31 March 2017 and 6 April 2017 could be restricted as a trade secret".<sup>29</sup> Notably, the NAC explained its position by stating that "the Contracting Authority's examination of the effectiveness of Contractor Z.'s restriction of information as a trade secret had not been thorough and it had failed to address all the grounds outlined in the Public Procurement Law and the Law on Combatting Unfair Competition, as a result of which the Contracting Authority had wrongly concluded that both the grounds of restriction and the information restricted in the comments of 31 March 2017 and 6 April 2017 were trade secret as defined in Article 11 Paragraph 4 of the Law on Combatting Unfair Competition". The Chamber ruled that Article 8 Paragraph 1 and 3, Article 96 Paragraph 3 and Article 7 Paragraph 1 of Public Procurement Law had been breached. The Chamber also generally concluded that, "the burden of proof of the effectiveness of information restriction is on the Contractor. The Contracting Authority must thoroughly examine the impact of the restriction imposed by the Contractor in the course of the tender process".

The Chamber has indeed revealed a systemic problem beyond the monitored project: a generally poor culture of transparency. **Contractors tend not to provide mandatory grounds for restricting information under trade secrecy legislation, and contracting authorities tend not to examine such restrictions carefully enough because they are motivated to complete their tenders as soon as possible**, even though this approach may lead them straight to the National Appeals Chamber, as our case has clearly demonstrated.

**These are the two most important conclusions in the NAC ruling. First, contractors tend to abuse trade secrecy legislation by unlawfully restricting part or the entirety of their bids and/or additional information provided in the course of bids assessment. Secondly, contracting authorities may find it challenging to examine the grounds for restriction which lead to actual limitations in access to public information and the freedom of competition. Disputes over this issue may delay the contracting phase or cause tenders to be invalidated whenever the NAC finds sufficient grounds to do so. It is therefore recommended that serious consideration be**

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<sup>29</sup> Case Ref.: NAC 966/17.

**given to amending trade secrecy legislation to make it watertight and to prevent disputes over rejected requests for access to the tender dossier in public sector tenders.**

Fortunately, there was no major delay before signing the project contract caused by the issues described above. The delay that occurred had other causes. The tender was not cancelled. While the NAC found access to public information had been limited, it concluded that, on the whole, the case under appeal and the link between the said offence and other considerations brought to its attention in the appeal had not been sufficient grounds for rejecting the selected bid.

**We consider this practice to be risky and one that does not build confidence in the public procurement market. We believe that the transparency of the entire tendering process should be the overarching principle. Hence, as the NAC finally assessed it, the Contracting Authority must always assess the grounds for bid content restriction and reject restriction requests where no such grounds exist in order to avoid being accused of compromising the transparency of the selection process. The burden of proof is on the contractor. The contractor must demonstrate that specific content is a trade secret as defined in the relevant legislation (Article 8 Paragraph 3 of the Public Procurement Law). The Contractor is not free to restrict access to information at its discretion.**

#### **4.2.7. Contractors' Opinions about the PKP PLK Tendering Process**

The Foundation approached the bidders for the monitored project to consult them on its findings from the monitoring exercise in 2018. We proposed a round of anonymous interviews with all the companies that had submitted their bids or had expressed an interest in the project by at least asking questions regarding the ToR. Such proposals were sent to seven entities but only three guided interviews were finally conducted.

Our interviewees included bid managers, contract managers and management board advisors. An additional interview was held with a vice-president of a contractor that had not been involved in the monitored project. He had volunteered to be interviewed claiming to have expertise and ongoing involvement in public procurement in the railway market. His opinions are included in this chapter.

All interviews were conducted in 2018–2020. The time gap between the tender and the interviews being fairly large, our interviewees did not focus on their opinions about the monitored tender but shared their general insights and expectations about PKP PLK's tender practices, tender dossiers and communication with contractors. The interviewees shared our own observation about the tender for the Częstochowa–Zawiercie section job as being largely typical of PKP PLK.

All the interviewed contractors also admitted that PKP PLK tenders were fair and free from deliberate fraud. They did, however, mention a number of flaws in the PKP PLK approach that could compromise the competitiveness of railway tenders and pose problems to contractors. The interviews painted a picture of haphazard and careless tenders with a clear suggestion that it reflected the general management practices in PKP PLK.

**It must be underlined that this chapter is merely an account of interviewees' opinions. The opinions and attitudes about PKP PLK and/or other entities are the personal views of our interlocutors rather than the official position of the authors of this report. They are views legitimately expressed by economic operators in the railway market. The authors of the report have**

**not modified or validated any of the opinions for factual or legal accuracy. A dissenting opinion submitted by PKP PLK is included at the end of the chapter explaining why the company disagrees with some of the views presented herein.**

### **Tender Dossier Evaluation**

The low quality of the tender dossier is the most frequent criticism of PKP PLK expressed by the interviewed contractors. Inconsistencies, gaps and errors were often described. One of respondents explained that during the long period of nearly two years of developing the tender it was reviewed, updated and constantly replenished with new requirements by the various decision makers at PKP PLK, a group that was reshuffled at times. Besides, railway line users have their own agendas and often leverage line upgrade projects to meet some other objectives at the same time.

Our interviewees shared their belief that the quality of the tender dossier had suffered from haphazard input from designers hired by the Contracting Authority. PKP PLK outsourced design services on a competitive basis to the lowest cost contractors. If the price could not be proven to be unreasonably low, the lowest bidder would be awarded the contract to develop the tender dossier and draft replies to potential contractors' queries. PKP PLK has no in-house personnel to perform this task and it only passes on the replies to contractors. This may be the reason why some of the replies were found by contractors to be unsatisfactory, which will be further discussed later in this Chapter.

Contractors feel misled by some of the concepts included in the documentation if they have no clear definition in legislation. Examples include 'aesthetisation', 'revitalisation' or 'modernisation' (upgrade). Vague as they are, they may be the source of confusion and excessive expectations from the Contracting Authority. The condition of some facilities is not accurately described in the tender dossier, which forces the Contractor to file change orders to stay in compliance. The Foundation expressed its concerns regarding the insufficient scope of works to be performed in some facilities covered by the FOP. The interviewed contractors complained that uncorroborated and 'non-binding' information had been supplied in the documentation. They mentioned inconsistencies in the schedule or the priority of documents that are applicable if the FOP proves inconsistent. A specific example was quoted of inconsistent parameters of existing flyover clearances in the monitored tender. Vague or inaccurate information in the tender dossier leads to a large number of claims filed by the Contractor's lawyers.

Bidders may want to account for the risk of unclear provisions by raising their price but have otherwise no influence on their quality. Public contracting authorities do not negotiate the contract terms with contractors if they are part of the tender dossier. Besides, the winning bidder, upon signing the contract, must state that it has no objections regarding the provisions in the dossier. By doing so, it assumes the liability for errors and flaws which may strongly distort implementation of the contract. Some contractors who raise issue with the contract documentation have heard a response from the Contracting Authority which argues that contractors are not forced to enter into any contractual arrangement because Polish law guarantees the freedom of contracts. Moreover, it is the Contract Engineer that will have the decisive voice in dealing with inconsistencies that may surface later in the project. Because the Contract engineer is employed by the Contracting Authority it is easy to argue that the Contract Engineer is biased and favours its principal's interest.

One of the interviewees stated that the only way known to him from his past experience of forcing a contracting authority to modify the unfavourable contract provisions was for all potential contractors to agree not to bid in the contracting authority's tender. Another contractor remarked that in terms of

the application of FIDIC international contractual templates for “Design and Build” projects, PKP PLK had habitually made significant modifications in them yet in countries such as the Netherlands the pre-defined standard contracts were never modified.

### **Communication with Contractors**

Unclear issues in the tender dossier may be explained by the Contracting Authority by replying to queries. “Design and Build” generates the highest number of queries. The sheer number of queries may serve as a measure of the lack of clarity of the tender dossier to contractors. In fact, our interviewees claimed PKP PLK’s replies were often disappointing. There are too many vague responses such as “in line with the ToR”, The “ToR remain unchanged” which are not helpful to contractors putting together their bids. In the monitored tender, we observed PKP PLK’s replies that were confined to such statements as “the Contracting Authority continues to apply the ToR” or “in line with the FOP”.

In the opinion of the interviewees, major modifications of the tender dossier were usually made at the last minute, even three days before the deadline for the submission of bids, even though only minor changes can be made at such short notice. The late introduction of modifications prevents contractors from making queries about them because the Contracting Authority is expected to only consider queries filed with half of the remaining deadline for the submission of bids remaining. PKP PLK is under no obligation to reply to queries if they have been sent after the deadline or if PKP PLK believes they have already been answered. Contractors do not know how many and what queries remained unanswered, including the ones they themselves have sent.

As far as the tendency for PKP PLK to reply to contractors is concerned, two radically opposed opinions were expressed: (i) PKP PLK does a good job of replying to all queries, even if submitted with a delay; (ii) contractors may occasionally be forced to refer to the NAC to obtain the Contracting Authority’s reply to their queries, each time having to pay a deposit of PLN 20,000 in the case of tenders over EU thresholds, where the deposit may be withheld if the NAC dismisses the appeal. In the monitored tender the Foundation received a list of 65 queries which were rejected by the Contracting Authority. In addition, interviewees complained that PKP PLK was introducing changes to its earlier replies and this was adding to the chaos. Finally, contractors found it confusing to see PKP PLK publish its replies all at once just before the bidding deadline.

### **Time for Bid Preparation**

One of interviewees stated that the original period of 40 days to develop a highly professional bid in the monitored project was sufficient provided no major modifications are made in the tender dossier. Other interviewed contractors shared the view, adding that the extension of the final deadline more than ten times was not a problem in itself. On the contrary, it was a sign of PKP PLK being thoughtful and committed to answering as many questions asked by contractors as possible and giving them enough time to modify their bid in response to the tender dossier modifications.

Contractors expressed their frustration, however, regarding the announcement of the deadline extensions which were made at the last possible moment. Since contractors are expected to pay a deposit in order to bid they are financially exposed up front: they often secure a bank guarantee or a performance bond. Multiple deadline extensions imply multiple requests for a deposit annex amendment, which increases the cost of bidding. Moreover, it is cumbersome for contractors to maintain a bidding team on standby not knowing when the bill may actually be submitted.

### **Bid Evaluation Criteria**

Price remains the priority bid assessment criterion in the monitored tender and other railway tenders. Contractors perceive this as a curse of infrastructural contracts. Some of them have suggested that bid selection criteria should be reviewed to reduce the dominance of price while protecting contracting authorities from price padding. Our interviewees recommended a rule whereby the lowest and the highest bid should be rejected right away. They said that the current approach to the unreasonably lowest price was not working well in practice. PKP PLK's "Design and Build" projects were in their opinion the most challenging in terms of the contractors' ability to defend against accusations of unreasonably low bidding prices. One interviewee observed that contracting authorities were increasingly using electronic auctions for purchasing goods and services which encouraged contractors to compete on price even more strongly. After all the bids had been submitted, bidders could reduce their bidding price. This helps reduce the contract cost but has a negative impact on the quality of other aspects of the bids.

All interviewees took the view that neither of the qualitative criteria applied in the monitored tender (i.e. project duration and warranty period) played any role in the selection of the best bid. The top and bottom limits imposed in the said criteria did not make sense to them because contractors would always commit to the highest-scoring alternatives. It was observed that the Contracting Authority should not require warranty periods for works in excess of the life cycle of the products used in the course of such works. The interviewees questioned the relevance of other criteria applied in other tenders, such as the site manager's experience or the availability of adequate personnel. As the number of railway projects implemented by PKP PLK in the framework of the National Railway Programme is rapidly growing, the pressure on the availability of professionals in the market is even greater. Contractors are forced to poach talent from each other, especially highly specialised or certified professionals who tend to dictate rates to the whole market. One of interviewees observed it led to what he referred to as 'human trafficking' and absurdities such as four different concurrent bids offering the same site manager.

Historically, PKP PLK used to apply fewer qualitative criteria and less electronic document exchange in its past projects. Today, its projects appear to put a lot of weight on the contract completion date to ensure the timely disbursal of EU funding. An interviewee said that one genuinely relevant and increasingly popular bid selection parameter since 2016 has been the time needed for the completion of works by the Contractor at track closure times imposed by PKP PLK.

### **Valuation vs Actual Cost**

In 2017, companies began to include in their bids actual invoiced prices for materials rather than prices offered to them by suppliers. Realistic input prices found their way into bids submitted by some contractors, leading to large differences in bid amounts.

Contractors felt that the existing approach to contract valuation in a market characterised by rapidly growing prices of building materials, transport, equipment and labour was an illusion designed to communicate commitment to following market trends. The reliance on general price indices published by the National Office of Statistics was by no means a way to reflect the actual price levels in the construction market. Costs increase as a result of the coincidence of a large number of major railway projects. Contractors point to other factors as well, such as the limited number of manufacturers of such components as railway sleepers, which is the result of a long and costly market entry for them in Poland. Any material purchased abroad must comply with Polish standards. We were told PKP PLK

was making ineffective attempts to mitigate the risk of materials shortages in the market by pre-emptively purchasing large quantities of some items, e.g. railway turnouts.

The ability of contractors to put a value on their bids is hampered by the long intervals between contract award and contract signing. The longer the interval, the higher the risk that the price quoted by the contractor based on existing market conditions will become untenable. Although they are forced to wait for the contract for months and see input prices go up above the levels adopted for the contract quote, contractors often finally do sign the contracts. They do this in order not to lose the deposit. One of our interviewees mentioned another reason: some CEOs and executives will prioritise revenue over profit in order to receive more loans and maintain their jobs. Besides, losses can be compensated in the current market. If they have loss-making contracts in their backlog, Contractors value new contracts using a principle that is captured by the following statement: 'I have lost in the old contract so I need to make up for it in the new one'.

Besides realistic valuation measures, contractors recommended that additional works be valued based on quantity surveying rather than a flat amount at the highest price, the latter method being customary in PKP PLK contracts. Conditional amounts that lead to more flexibility when negotiating a new scope of works to be performed by the contractor are set by PKP PLK at the level of 10% of the contract value, whereas even the EU regulations allow as much as 15%. Another explicit expectation expressed by contractors was for a mandatory down payment to be disbursed to the Contractor upon signing the project contract to avoid the contractor having to finance the works up front.

### **Onerous Expectations of the Contracting Authority**

One of the contractors stated that the Contracting Authority was using vaguely defined concepts in the tender dossier on purpose to force more expensive solutions than those proposed by cost optimising bidders. The initial options considered for the upgrade of the railway line on the Częstochowa–Zawiercie section included the economy, medium and up-market option. At the time the call for tenders was announced, PKP PLK selected the first option, i.e. the replacement of existing infrastructure. Based on observations, however, it could be argued that the Contracting Authority wanted the Contractor to actually implement the up-market option within the same budget.

PKP PLK is shifting the responsibility onto contractors to obtain information that the Contracting Authority earlier revise and supplement in the tender dossier. Steps including geological testing and measuring the contamination level of the aggregate can be completed by PKP PLK without leaving it to contractors in line with its relatively vague expectations. The Contractor was also responsible for developing geological records according to PKP PLK guidelines in the monitored tender.

The interviewees complained about PKP PLK imposing additional red tape on them. For example, they said they were forced to obtain building permits for structural elements which are otherwise statutorily subject to notification only. The permitting chain was even more extended for contractors as they were expected to obtain a Public Interest Project Location decision and a Railway Line Location decision that must first be reviewed by various PKP PLK departments and units such as the Railways Surveyors. New internal standards, guidelines and policies are habitually introduced by PKP PLK in the course of the project and PKP PLK enforces them on an equal footing as national laws and regulations. The Contractor is expected to comply with them even though the Contractor will often have reasonable doubts about the effective dates of such internal regulations. Upon submitting their bids, no contractor can predict what new PKP PLK regulation will bind them once the project starts so they



are in fact expected to account for the risk in their bids. Contractors fail to understand why they are expected to be held accountable for internal PKP PLK structures and policies.

### **Disputes**

As a matter of principle, PKP PLK chooses to litigate its disputes with contractors and never accepts alternative dispute resolution mechanisms such as arbitration or mediation. In the opinion of one respondent, this approach is a function of the inherent risk associated with PKP PLK contracts that such contracts may possibly be subject to accusations of violations against 'public finance discipline'. PKP PLK appears sensitive to that and has a policy of never entering into any forms of settlement.

One of the contractors criticised this approach and said there were other models of resolving disputes with contractors, as can be observed in certain local government projects. The construction of the Northern Bridge in Warsaw revealed such a good practice. There was political pressure on the completion date and all contractors' claims were satisfied by court settlements paid by local government.

One of the interviewees observed that the very existence of the General Counsel to the Republic of Poland relieves public sector contracting authorities from the responsibility of managing their legal actions, which is an added motivation to refer all disputes to the courts. The General Counsel is understaffed and has no capacity to play the role of mediator in a large number of cases.

### **About Environmental Requirements**

Contractors agreed about the significance of the environmental conditions decision being available to bidders before they submit their quotes because this type of government decision may have far reaching consequences such the possible limitation of the times at which works are allowed to progress. The decision may lead to modifications in the Contracting Authority's requirements. One of interviewees observed that in its latest contracts, PKP PLK had adopted a contractual option for contractors to modify their completion date and fee if the environmental conditions decision is not available at the tendering stage. Indeed, it had recognised that the prior availability of the decision should be a standard in tenders. In the monitored tender, the environmental conditions decision had only been issued by the Regional Environmental Protection Director in Katowice two weeks before the signing of the contract with the Contractor.

Besides, PKP PLK imposed a requirement in the tender for works on the Częstochowa–Zawiercie section for entire upgraded line to support train speeds of up to 160 km/h even though the environmental impact assessment report recommended lower speeds in several sub-sections. It must be added that PKP PLK's replies to queries filed by contractors on this matter during the tender process were rather vague.<sup>30</sup>

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<sup>30</sup> Read query no. 158 and PKP PLK's reply: "Please, provide designed speeds for upgraded tracks in all stations and stops". Reply: "Pursuant to FOP, 160 km/h. The guidelines for design speeds are set out in Section 6.2 of FOP".

### **The Role of the Investment Forum**

In the opinion of contractors, the PKP PLK Investment Forum has been established in order to change PKP PLK's habits, standards and instructions, to make their contracts run more efficiently. The Investment has indeed focused on the process of railway project development and implementation and has identified measures to ensure they are completed on time. Contractors repeatedly expressed their belief that it was not the laws and regulations but market practices that were the biggest problem. The Investment Forum has been committed to encouraging PKP PLK to start evaluating bids based on realistic non-price criteria. The Forum's task force deliberations have successfully helped reduce the number and amounts of liquidated damages imposed on contractors. The Investment Forum has recently discussed a risk matrix that is being designed to encourage PKP PLK to share some of the risks with contractors rather than have contractors assume all of them.

Some interviewees were critical of the Investment Forum as not being effective enough in promoting change. For example, it has failed to convince PKP PLK to announce its project budget earlier than just before opening the received bids. Nor has the Forum formulated its proposals regarding the ethical management policy. Some believe it is a helpful tool for protecting minor contractors' interests in connection with claim recognition, but not a vehicle of systemic change.

### **Attitudes to the Integrity Pact**

None of the interviewed contractors were concerned about the Integrity Pact being part of the contract and none of them felt there was any ambiguity as to whether they should consider filing a bid and agree to signing special clauses. Contractors took the requirements of the public sector contracting authority for granted, they trusted they followed the relevant legislation and did not feel they were really up for discussion. One interviewee only admitted he was concerned that, once a member of the Integrity Pact, PKP PLK would try to shift additional workload of producing more documents onto the Contractor.

PKP PLK could read the draft report before its publication and decided to present **a dissenting opinion** opposing some of the statements made by contractors that we had interviewed. Here are some of PKP PLK's points:

- Contractors request ToR modifications and propose their own requirements with respect to the amount of the deposit and security or the terms and conditions for bidding. This is a standard approach to each tender. Each request is examined by PKP PLK S.A. based on its experience and the understanding of risks in other tenders. Contractors' requests for ToR modifications often force the Contracting Authority to modify the ToR to correct errors or inconsistencies and to eliminate the risk of differences of interpretation. On the other hand, honouring each request for change would mean that it is the contractors and not the Contracting Authority who develop the ToR. There are technical and legitimate queries but there are also queries that could be summarised as wishful thinking. The Contracting Authority is held responsible for the requirements described in the ToR and for the selection of a contractor who is experienced and unquestioned and one that guarantees adequate performance. Meanwhile, the Contracting Authority provides assurances that the tender process it has designed and managed will adhere to the principles of fair competition, transparency and the equal treatment of all bidding contractors. The application of the principles does not mean that any contractor may bid for the contract, but only a contractor which meets the requirements defined by PKP PLK S.A. in accordance with the Public Procurement Law, i.e. minimum capacity levels or the proportionality principle. To sum up, if PKP PLK S.A. decides to "maintain the validity of ToR content/requirements" it is fully legitimate and supported by analysis. Equal access to the contract does not mean that each contractor will have the capacity to implement it.

- The Contracting Authority regularly publishes all queries and its replies on the procurement platform in a structured manner, including chronological numbering. All the posted letters and replies as well as ToR modifications are also numbered and indexed.
- Except for projects subject to the environmental impact, assessment requirement building permits are mandatory. PKP PLK will never request contractors to obtain permits if the performance of works on the notification basis is lawful.
- PKP PLK's policy of previewing applications submitted on behalf of the company to external agencies, as was the case in the application for a Railway Line Location decision to the Province Governor (Voivode), must be recognised as legitimate. Powers of attorney granted to contractors to deal with permitting do not strip PKP PLK of the right to view the applications before submission.
- Contractors' concerns regarding speed limits in the upgraded railway line section do not seem legitimate. Note that trains will not move at the same and equal speed of 160 km/h along the entire section; for safety reasons, trains will slow down near stations.
- Following up on the opinions regarding the implications of the environmental conditions decision, PKP PLK observed that one such implication may be additional requirements during the construction phase (construction site impact reducing measures) and modified Contracting Authority requirements (including requirements regarding the protection of the natural environment).

PKP PLK provided an extensive explanation regarding the process of obtaining an environmental conditions decision. Here is a complete quotation: In the tender at hand, PKP PLK S.A. relied on its past experience with environmental conditions decisions for projects with a similar scope of works and expected to obtain such a decision for this project without having to perform a prior environmental impact assessment sooner. This approach appeared to be legitimate judging by the long time the Regional Directorate for Environment Protection (RDOŚ) in Katowice had taken to review our Project Information Sheet: over 6 months including 2 requests for supplementary information. In cases where the environmental agency intends to order an environmental impact assessment, the Project Information Sheet usually takes no more than 2 or 3 months after the submission of an application for an environmental conditions decision and usually does not involve any requests for additional information in the file. When planning tenders for construction works, PKP PLK S.A. makes sure the environmental conditions decision is in place, i.e. disclosed in the tender dossier, in the bidding phase at the latest. As far as the timing of obtaining environmental conditions decisions is concerned, PKP PLK S.A. relies on its experiences with approximately 160 processed applications for the said decision over the past 7 years. Nonetheless, the ultimate timing of the process is controlled by the independent public administration which makes synchronisation challenging, as manifested in the "Works on Railway Line No. 1 in the Częstochowa-Zawiercie section" project.

#### 4.2.8. Major Lessons Learned and Recommendations Based on Contract Award Monitoring

We have formulated the following conclusions and recommendations based on the monitoring of the tender and interviews with bidders for the PKP PLK project:

- **The Pact should apply to the earliest phases of any public tender.** Generally, the Pact can only be fully effective if it covers the whole process starting from the original decision to spend public money on a specific project. We recognise the challenge and therefore see great potential in the "Design and Build" project formula, which offers the opportunity to observe the process before the actual construction begins, especially infrastructure projects. If monitoring cannot commence during the early project studies and conceptualisation, we recommend that integrity

pacts are enabled no later than at the start of the design process, whether or not it is a “Design and Build” project or consists of separate “Design” and “Build” components.

- **Description of the Job and Terms of Reference.** The Foundation assessed the tender dossier and found the FOP (e.g. engineering and the electricity lines) to be ambivalent and potentially misleading. A clearly defined FOP is essential to ensure fair competition and the low risk of subsequent claims. The Contractor should have adequate access to a complete geological file and the environmental conditions decision before bidding, especially in “Design and Build” contracts. This part of the contract should be monitored.
- **Project Implementation Schedule.** We believe that the project implementation schedule is one of key elements that should be monitored by the Pact. Regardless of their nature, deviations from the schedule may often be the source of irregularities or fraud and they generally pose a risk to the project, and thus also a risk to the public interest. Moreover, whenever deviations from the schedule occur (mainly delays in the project’s completion), they directly affect public expenditure, both in terms of Contractor compensation and the cost incurred by the public sector contracting authority, which is involved in a long-term project. Delayed projects also imply a social cost, i.e. deferred use of the project deliverables, reduced mobility of citizens or access to facilities etc.
- **Non-price Bid Assessment Criteria.** Non-price bid assessment criteria do not add value to the bid selection process if they are confined to a contractor’s commitment to a project alternative that would get the highest score, such as the shortest time to completion or the maximum warranty period pre-determined by the Contracting Authority. They should be replaced by genuinely qualitative criteria as suggested by the contractors, and indeed by the Contracting Authority (e.g. project team competencies). For railway projects, the track closure time may be one such criterion. Contractors just pressed for price tend to assume high risks of material price or transport cost volatility or the most cost-effective engineering solutions which may later be rejected by the Contracting Authority. Educating contracting authorities to apply non-price criteria should be considered and government agencies such as the Public Procurement Office should offer training to all the different management levels, including decision makers and executives who often lack legal expertise.
- **The Contract Engineer.** Projects of a similar size and complexity to the project covered by the Pact that are implemented in FIDIC’s Design and Build formula will benefit from hiring a Contract Engineer as early as possible, preferably when requirements for the Contractor (ToR) are formulated or in the conceptualisation phase. The Contract Engineer should as a matter of principle be selected before and not after the tender development.
- **PKP PLK Procurement Platform and Communication with Contractors.** We observed during the tender process that both the amendments/modifications of the ToR and the replies to contractors’ queries were published by PKP PLK on its procurement platform in an unstructured manner. We recommend modifying the platform to improve the transparency of the tender dossier and its amendments, and access to contractors’ queries and replies.  
The practice of replying to queries about the tender dossier is far from satisfactory and can hardly be qualified as good practice, even if formally correct. In fact some contractors were not even sure about this latter point. All in all, there is clearly much room for improvement in PKP PLK. First and foremost, the company should consider avoiding casual meaningless replies. Moreover, it should consider a policy of replying without delay, and certainly not at the last minute. PKP PLK would be well advised to publish rejected queries and state its reasons for the rejection.
- **Interval between Contractor Selection and Contracting.** The time interval between the contract award and signing should be as short as possible. The longer the time lag, the later the project may actually start and the Contractor will face unnecessary expenses and/or may consider

cancelling its bid if it no longer reflects the original expectations. Naturally, we do realise this will largely depend on the efficiency of the PPO and the quality of interactions with the Contracting Authority, especially when ex-ante audits are commonly used under the new Public Procurement Law that enters into force in 2021. This a general policy recommendation to be considered by the government, market regulator and public sector contracting authorities.

- **Environmental Conditions Decision.** It is highly recommended that calls for tenders are only announced if the environmental conditions decision is available in the tender dossier. The monitored project has demonstrated that an environmental impact assessment report attached to the tender dossier may not include material information, which may affect decisions, in areas such as waste management, materials storage, cleaning and desludging ditches. Contracting authorities may want to modify project requirements once the decision is issued at a later stage. A missing environmental conditions decision at the tendering stage is a major source of uncertainty for contractors in terms of their eligibility for additional time and money should the requirements change after their bids have been submitted. Contractors will be forced to change their terms and may choose to file claims.

The process of issuing environmental conditions decisions ought to be streamlined and subject to pre-defined deadlines with clearly defined extension options. The communication between the agency issuing the decision and the applicant must be improved by ensuring that timely and accurate information about the following steps and deadlines in the process is available. The expectations regarding the submission of an environmental impact assessment report and other essential information must never be confusing to applicants or else it may prolong the whole process if the government agency issues requests for missing information. This recommendation should mainly be addressed to legislators and the relevant agencies that issue environmental conditions decisions.

- **Trade Secret vs Access to Tender Information.** It has been found that contractors tend to unreasonably apply trade secret protection legislation to restrict access to their bids and correspondence with the Contracting Authority during the selection process. Meanwhile, the Contracting Authority does not always examine such restrictions adequately. Both factors limit the right to access public information and the freedom of competition and may distort the bid selection. The tender process should as a matter of principle be transparent and open, and any trade should be the exception rather than the rule. This may be achieved by ensuring that contracting authorities' staff are well aware of the principles and receive training and educational materials, if appropriate. The concept of a trade secret and its limitations must be well understood and used within reason based on legitimate grounds by contractors at the tendering stage. In addition, it would not be unreasonable to assert that at times unclear legislation may lie at the root of the difficulty in assessing what is and what is not a trade secret and whether restricted access to information is or not legitimate. Trade secret legislation should perhaps be reviewed to ensure the fair and legitimate use of the restrictions mechanism.
- **Conflict of interest management.** The early phase of the pilot has demonstrated that the Pact may be a good instrument to control conflicts of interest. A well-designed conflict of interest management system is essential in the Pact itself to ensure an adequate response to any conflict of interest that involves the Observer as a party to the Pact.
- **FIDIC Standards.** Contractors appreciate and welcome PKP PLK adhering to as many standard clauses as possible in the FIDIC contract template. Contracting authorities will be well advised to rely on the templates as much as possible with only essential modifications on a case-by-case basis if such modifications are designed to ensure compliance with Polish laws and regulation. It is highly recommended that contracting authorities should adopt the good practice of publishing a list of modifications to the original FIDIC terms and conditions.

- **Investment Forum.** The Investment Forum is a formalised communication platform for PKP PLK and its contractors established in 2013. The goal of the Investment Forum is to improve the relationship between parties in projects implemented by PKP PLK following the developments in 2007–2012. As integrity pacts are designed to help build a positive perception of contracting authorities and contractors, we believe the Investment Forum has potential. Enhanced collaboration and communication are goals shared by the Forum and the Integrity Pact and we recommend that the Investment Forum should continue and expand. The role of the Investment Forum is to facilitate communication between the Contracting Authority and the railway market operators and this has clearly been a positive development, although its impact has been limited, judging by the list of contractors' concerns and complaints about PKP PLK, which have not made a difference for years. If given a higher profile, the Investment Forum seems to be an appropriate vehicle of change in the Contracting Authority's contract development and implementation practices.

## 5. Conclusion

DG Regio has decided that the Integrity Pact pilot in Europe will continue till the end of 2021. The European project originally due to end in 2019 has been extended to allow monitoring organisations to complete their monitoring projects. The time horizon of a number of monitored projects has turned out to be longer than originally planned by the European Commission. This is also the case with Poland because the applicable deadline for accepting the works performed on the railway line between Częstochowa and Zawiercie is the end of 2020 at the time of writing this report.

The Batory Foundation continue to perform the civil society monitoring of the performance of works. Outcomes can be followed on [paktuczciwosci.pl](http://paktuczciwosci.pl) which publishes correspondence with the Contracting Authority and the Contractor regarding topics that may affect the cost and time of the railway line upgrade project. The performance of the Civil Society Observer from signing the contract with the Contractor to the commissioning of the works will be reviewed in the subsequent report to be published in 2021.

Findings presented in both reports are to be used by the European Commission to decide whether and how integrity pacts should be embedded in the European public procurement system. They are also expected to demonstrate the mistakes and risks to public interest associated with the development of public procurement projects. We hope our findings will be useful for institutions directly involved in the Pact pilot: PKP PLK, the Ministry of Funds and Regional Policy, the Centre for EU Transport Projects and other public decision makers and contracting authorities, in their efforts to spend public and European funds in an accountable way.

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# MAJOR FINDINGS AND RECOMMENDATIONS

## from the monitoring of the tender for works on railway no. 1 Częstochowa-Zawiercie section

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**1. The most transparent process for contractors is where a call for tenders is published after an environmental conditions decision has been issued by authorities.** An environmental impact assessment attached to the tender dossier may not include all relevant information that will be covered by the said decision.

It is recommended that the process of obtaining an environmental conditions decision be streamlined and shortened, mainly by clearly defining the deadlines and conditions of extension. Communication between the issuing authority and the applicant ought to be improved. Timely and accurate information about all the steps in the process and expected completion dates must be available to applicants.

**2. Non-price bid evaluation criteria are ineffective** if confined to contractors declaring pre-defined highest scoring target values, e.g. the minimum time for project completion or the maximum warranty period.

Apparent criteria ought to be replaced with quality criteria to allow genuine differentiation between bids based on parameters other than price. For example, track closure time could be used for railway projects. Moreover, it is essential that contracting authorities and, more importantly, public sector decision-makers be offered more education on the matter.

**3. The communication with contractors via the PKP PLK procurement platform was haphazard.** Information about ToR modifications and replies to contractor queries were published without a specific order or clear description. Platform users were not informed about unanswered queries or the reasons they were rejected.

The procurement platform ought to be configured so as to ensure greater transparency of the tender dossier, modifications of the terms of reference and easy search for contractor queries and replies. Publishing the rejected queries with a stated reason for rejection would be welcome as a good practice.

**4. Contractors tend to withhold information on the grounds of trade secrecy without stating legitimate reasons.** On the other hand, the contracting authority may find it challenging to verify the legitimacy of such claims by contractors. Access to public information and the freedom of competition are at risk.

Contractors should support their claims with legitimate reasons, and the contracting authority should carefully examine them. Tenders ought to be transparent and open, and trade secret claims should be the exception to the rule. The relevant legislation ought to be amended to ensure a clear definition of a trade secret and eliminate discretionary interpretations of the concept.

**5. Projects where the time between contract award and signing is extended** are at risk of creating project schedule changes and additional cost for the contracting authority. Furthermore, the contractor may find that its offer is no longer viable after an extended period of time and it will not be ready to sign the contract.

Contracting authorities will be well advised to sign contracts as soon after the award decisions as possible. The enhanced institutional capacity of the Public Procurement Office to perform ex-ante audits and its effective communication with contracting authorities may help shorten the time gap.

# Appendices

## 1. Module one of Polish Integrity Pact (signed on 8 November 2016)

**Agreement between the Stefan Batory Foundation  
and PKP Polish Railways S.A on the implementation  
of the "Integrity Pact" in the framework of a public procurement project  
for the design and build of the Częstochowa–Zawiercie section of line No. 1  
between Warsaw and Katowice**

concluded in Warsaw on this day of ..... 2016,

by and between

**the Stefan Batory Foundation seated in Warsaw, ul. Sapieżyńska 10a, 00-215 Warsaw, entered into the register of associations, other non-governmental and trade organisations and foundations and independent public healthcare units at the District Court for the Capital City of Warsaw in Warsaw XII Business Section of the National Court Register under KRS number 0000101194, VAT No. 5261046481, REGON 002188077, hereinafter called "the Foundation", represented by:**

..... - .....

..... - .....

and

**PKP Polish Railways S.A.**, seated in Warsaw, ul. Targowa 74, 03-734 Warsaw, entered into the business register at District Court for the Capital City of Warsaw in Warsaw XIII Business Section of the National Court Register under KRS number 0000037568, VAT No. 113-23-16-427, REGON 017319027, share equity of 16,684,838,000.00 paid in full, hereinafter called "**the Company**" represented by:

..... - .....

..... - .....

hereinafter called the Parties.

### Preamble

In 2015, the Directorate General for Regional and Urban Policy of the European Commission announced a call for pilot Integrity Pact projects to be implemented in EU Member States. An Integrity Pact is an instrument developed by the Transparency International Secretariat seated in Berlin with the purpose of preventing abuse in public procurement.

Implementing authorities and institutions organising public procurement in the framework of projects funded by structural and cohesion funds from all EU Member States have been invited to join the pilot projects. Invitations have also been sent to non-governmental organisations as each Integrity Pact involves mandatory co-operation between purchasing public institutions and social partners, the latter being mainly responsible for monitoring public procurement and public project implementation processes. Applications for the Polish contest were submitted by the Ministry of Development (formerly known as the Ministry of Infrastructure and Development). The Ministry proposed road and railway projects to be covered by the Integrity Pact. The Foundation has also submitted the relevant documents as a non-governmental organisation committed to co-creating the Pact and monitoring its implementation.



On 13 October, 2015, the European Commission made a decision to include a railway project in the Pact, and it selected the Foundation as a social partner for the Integrity Pact pilot project. The Ministry of Development joined the project in partnership with the Management of PKP Polish Railways S.A. as confirmed in a Memorandum of Understanding signed on 19 November 2015 between the Foundation and the Company and initialled by the Ministry of Development.

As a consequence of steps taken by the government, represented by the Ministry of Development, by the European Commission, the Transparency International Secretariat, the Company and the Foundation have jointly undertaken to implement the Integrity Pact, i.e. a civil control mechanism for safeguarding EU funds, Phase II, grant contract No. 2015CE16BAT098 funded by the European Commission.

The Project is designed to:

- 1) Examine the applicability of integrity pacts as a means of protecting EU funds against abuse and corruption while ensuring the robust, efficient and timely implementation of the projects covered by the Pact;
- 2) Examine the applicability of integrity pacts as a means of improving transparency and accountability of spending EU funds, including structural and cohesion funds;
- 3) Ensure savings by strengthening competition in public procurement;
- 4) Improve public confidence in government and public procurement;
- 5) Build a good reputation of contracting institutions and contractors.

The public procurement contract to be monitored in the framework of the Project, in accordance with the decision of the European Commission, shall be the project to design and build the Częstochowa-Zawiercie section of line No. 1 between Warsaw and Katowice (hereinafter called the “**Public Procurement Contract**”). Moreover, the Parties shall strive to ensure that the contract with the Engineer (the term is borrowed from FIDIC and infrastructure projects financed by EU funds) to supervise the Public Procurement Contract contains provisions regarding the obligation imposed on the Engineer to comply with the Integrity Pact rules developed by the Parties and that it takes them into account in communication and publicity measures foreseen in the Project.

For the purpose of Project implementation, several agreements will be concluded between various parties. This Agreement is the first in a series of these agreements and it seeks to define the rights and obligations of the Foundation and the Company during the preparation, launch, processing, award and implementation of the Public Procurement Contract.

### **Paragraph 1. Definitions**

The Parties shall ascribe the following meaning to concepts used throughout this Agreement:

- 1. Integrity Pact** – an agreement (or a collection of constituent agreements) designed to ensure transparency and accountability and to prevent abuse in the framework implementing a specific public contract. The parties to the agreement (a collection of agreements) include the contracting authority, contractors and social partners, the latter being mainly responsible for monitoring the compliance with transparency and public procurement integrity standards.
- 2. Project** – the integrity pacts project – civil control mechanisms for safeguarding EU funds, Phase II, grant contract No. 2015CE16BAT098, funded by the European Commission;

3. **Foundation** – the Stefan Batory Foundation;
4. **Company** – PKP Polskie Linie Kolejowe S.A.;
5. **Agreement** – this Agreement;
6. **Consultant** – a natural person, legal entity or a non-legal entity authorised by the Foundation to assist in the monitoring of the process to prepare, launch, conduct, award and implement a Public Procurement Contract. The Parties do not rule out the involvement of several Consultants (designer, lawyer etc.) hired to assist at specific stages of the Public Procurement Contract or a part thereof;
7. **ToR** – terms of reference as defined in Public Procurement Law, developed for the purpose of a Public Procurement Contract;
8. **Public Procurement Law** – the Public Procurement Law of 29 January, 2004 (Journal of Laws of 2015, Section 2164 as amended);
9. **contractor** – (lower-case letter) a natural person, legal entity or non-legal entity that seeks to secure a Public Procurement Contract or that has placed a bid for a Public Procurement Contract;
10. **Contractor** – (capital letter) a natural person, legal entity or non-legal entity that has, as a result of the award of the Public Procurement Contract, entered into a contract with the Company to implement a Public Procurement Contract;
11. **Public Procurement Contract** – a process leading up to the award of a public contract to the Company to design and build the Częstochowa–Zawiercie section of line No. 1 between Warsaw and Katowice.

## **Paragraph 2. General Provisions**

1. Under this Agreement, the Parties undertake to accomplish the goals and objectives of the Project and respect the interests of the other Party.
2. The Company undertakes to allow the Foundation and the Consultant to monitor the preparation, organisation, processing, awarding and enforcing of the Public Procurement Contract in line with the Integrity Pact.
3. The Foundation undertakes to ensure that laws and regulations, as well as internal Company policies in connection with the Public Procurement Contract at hand, are adhered to by the Consultant, the Consultant's employees seconded to perform the tasks under the Integrity Pact and representatives of the Foundation participating in the preparation, organisation, processing, awarding and enforcing of the Public Procurement Contract.
4. The Company undertakes to provide the Foundation with the requirements and regulations referred to in Section 3 above, and each time inform the Foundation about any changes in such regulations in the course of implementing this Agreement.
5. The Foundation, the Consultant, the Company and their employees or associates shall cease their involvement in case a conflict of interest arises. A conflict of interest is defined as a situation where an impartial and objective implementation of the Project may be compromised on the grounds of family ties, emotions, political sympathies, economic interest or otherwise, especially if the Foundation, the Consultant, the Company or their employees and associates:
  - 1) seek to secure the Public Procurement Contract;
  - 2) share their capabilities with contractors or subcontractors bidding for the Public Procurement Contract;
  - 3) seek to secure the position of Engineer for the Public Procurement Contract;

- 4) share their capabilities with contractors or subcontractors bidding for the Public Procurement Contract regarding the tender for the position of the Engineer in the Public Procurement Contract;
- 5) are involved in a legal dispute with the Company.
6. The Foundation will require that the Consultant submits representations under Section 5 above.
7. In case a conflict of interest is identified or the suspected the Parties shall inform each other within 7 days from the day of becoming aware of the circumstances that cause or may cause a conflict of interest. Such a notification will specify the countermeasures that have been adopted to prevent any potential damage or to remedy damage that has already been caused by such a conflict of interest. Each of the Parties may recommend specific countermeasures to the other parties. The other Party may suspend its performance under this Agreement until such a conflict of interest is removed. The two preceding statements also apply to the situation set out in Paragraph 5 Section 1 Item 6) Letters b), c) and e).
8. Each of the Parties shall be responsible for the actions or omissions of its employees or persons through whom it performs under this Agreement.
9. The Parties state that they have implemented and used internal anti-corruption policies.

### **Paragraph 3. Deadlines**

1. This Agreement shall be implemented from the day it is signed until the day a Hand-Over Certificate (or other equivalent document) is issued with regard to the Public Procurement Contract.
2. The Parties shall share the documents, information and opinions set out in this Agreement without delay, no later than within 10 days. In case such documents and information cannot be shared without delay, the Parties shall be responsible for passing on such documents, information and opinions as soon as possible while giving due consideration to the goals and objectives of the Project and respecting the interest of the other Party.

### **Paragraph 4. Expenses**

1. The Foundation shall cover the cost of the Project participation of its representatives, employees, the Consultant and experts, if any.
2. The Foundation represents that the cost specified in Section 1 above are funded by the European Commission in the framework of the Project.
3. The costs of the Parties in connection with sharing documents, prints, charts, notices, the use of software, fees paid to experts involved in the Project and the Public Procurement Contract etc. shall be covered by each of the Parties at its own expense.

### **Paragraph 5. Specific Obligations of the Parties**

1. The rights and obligations of the Company, over and above those contemplated herein, shall include:
  - 1) Informing the Foundation about the Public Procurement Contract implementation schedule, progress against the implementation schedule and any modifications of the schedule;
  - 2) **The preparation phase of the Public Procurement Contract.** The following information must be provided to the Foundation:

- a) Type of Public Procurement Contract process;
  - b) Implementation schedule;
  - c) Definition of the job under the Public Procurement Contract,
- 3) **The launch and processing phase of the Public Procurement Contract:**
- a) Ensures participation of no more than three persons from the Foundation or the Consultant in the proceedings of the tender committee. These individuals shall take part in the proceedings of the tender committee as non-voting members;
  - b) Ensures that the Foundation and the Consultant have access to correspondence with contractors before bidding (i.e. contractors' questions, the Contracting Authority's answers, modifications in the announcement of the Public Procurement Contract process, changes to the ToR, questions and answers from the contractors' meeting, if any);
  - c) Ensures that the Foundation and the Consultant have day-to-day access to the minutes of the proceedings;
  - d) Ensures that the Foundation and the Consultant have access to submitted applications for participation in the tender (if a closed tender is to be applied to award the Public Procurement Contract) and bids;
  - e) Ensures that the Foundation and the Consultant have access to correspondence with contractors at the time applications for participation in the tender are accepted (if a closed tender is to be applied to award the Public Procurement Contract) and bids are evaluated (questions to application/bid, requests for additional data in the application/bid, request for rationale for price, comments and additional information provided by contractors);
  - f) Ensures that the Foundation and the Consultant have access to the recommendations of the tender committee regarding the evaluation of bids (selection of the best bid, rejection of contractors and rejection of bids);
  - g) Ensures that the Foundation and the Consultant have access to documents submitted by contractors after the best bid has been selected;
  - h) Provides the ToR, including attachments, to the Foundation and the Consultant.
- 4) **The award phase of the Public Procurement Contract:**
- a) Provides the Foundation with a copy of the contract signed with the Contractor;
  - b) Provides the Foundation with a copy of official documents submitted by the Contractor prior to signing the contract (i.e. a copy of the performance bond, powers of attorney for personnel seconded to the Public Procurement Contract, consortium agreement and documents required in the ToR);
- 5) **The implementation phase of the Public Procurement Contract:**
- a) Provides the Foundation with a copy of Public Procurement Contract modifications, including accompanying correspondence (e.g. change request, Engineer's determination, Variation, etc.);
  - b) Provides the Foundation with a copy of contracts with subcontractors and the Contractor's requests for such contracts;
  - c) Informs the Foundation about any claims by the Contracting Authority and the Contractor in monthly intervals, and deliver a copy of accompanying documentation for cases selected by the Foundation;
  - d) Ensures the Foundation or the Consultant are able to make site visits.
- 6) **Each phase:**
- a) The Foundation is asked for its opinion about a specific step in the Public Procurement Contract;
  - b) The Foundation is alerted about any inappropriate conduct by the Foundation, the Consultant or any persons seconded by them to implement the Integrity Pact;

- c) The Foundation alerted about any conduct that results in a conflict of interest involving the Foundation, the Consultant or any persons seconded by them to implement the Integrity Pact;
  - d) Receive copies of progress reports written by the Consultant or other persons commissioned by the Foundation in connection with the Public Procurement Contract;
  - e) The Foundation is asked to replace the Consultant or any other person mandated by the Foundation;
  - f) The Foundation is asked to provide personal details (i.e. the name) of the Consultant or any other person mandated by the Foundation while respecting confidentiality rules set out in Paragraph 6 below;
  - g) Unfettered and an anonymous process of reporting potential breach of the provision and rules set out in Paragraph 2 Section 9 of the Agreement is ensured to each of the Parties to this Agreement. In case the Company receives any such information, the Company shall notify the Foundation about this fact;
  - h) The Foundation is informed about cases of abuse or suspected abuse in connection with the implementation of the Public Procurement Contract and about measures taken by the Company to prevent them and mitigate their negative impact;
  - i) Assurances are provided that all activities in connection with the Public Procurement Contract at every stage are taken by persons who observe the principles of impartiality and objectivity;
  - j) If requested by the Foundation, information is provided about expenditure in connection with the Public Procurement Contract process (hiring external experts, feasibility study etc.), about personnel involved in the preparation, launch, process, award and implement phase of the Public Procurement Contract or persons providing support services to the Company with respect to the Public Procurement Contract;
  - k) The Foundation is provided with other information in connection with the implementation of the Project or the Public Procurement Contract, in particular internal the audit findings, audit findings of the President of the Office of Public Procurement, EU Transport Projects Centre, the European Commission etc.
2. The rights and obligations of the Foundation and the Consultant beyond those specified in this Agreement shall include:
- 1) Requesting additional information from the Company about the Public Procurement Contract implementation schedule, progress and changes thereto;
  - 2) Receiving copies of the documents set out in Section 1 above;
  - 3) Implementing, in conjunction with the Consultant, the Foundation staff and other persons mandated by the Foundation, the measures defined for the Foundation in Section 1 above;
  - 4) Ensuring that the Consultant, the Foundation staff and other persons mandated by the Foundation comply with laws and regulations that apply to Public Procurement Contracts and sign a confidentiality agreement;
  - 5) Ensuring that the Consultant, the Foundation staff and other persons mandated by the Foundation sign a confidentiality agreement and file a statement of inclusion or non-exclusion from the Public Procurement Contract process based on conditions defined in Article 17 of the Public Procurement Law (or relevant laws and regulations which may apply in the future);
  - 6) Excluding the Consultant, Foundation staff and other persons mandated by the Foundation from the Public Procurement Contract process if these individuals meet the conditions defined in Article 17 Public Procurement Law (or relevant laws and regulations which may apply in the future);
  - 7) Presenting opinions about the Public Procurement Contract process upon request of the Company;

- 8) Sharing with the Company reports about the Public Procurement Contract process received from the Consultant, Foundation staff or other persons mandated by the Foundation;
  - 9) Indicating to the Company potentially inappropriate conduct of the members of the tender committee or other persons involved in the award of the Public Procurement Contract;
  - 10) Informing the public about the progress of the Public Procurement Contract award process (in the launch and processing phase) while observing the rules of transparency and timing of disclosure set out in Public Procurement Law, after having consulted with the Company;
  - 11) The Foundation and the Consultant shall not be bound by instructions from the Company except for procedural instructions/recommendations in connection with the Public Procurement Contract;
  - 12) In case information is received by the Foundation under Paragraph 5 Section 1 Item 6) Letter h) Sentence 1, the Foundation shall inform the Company about this fact while preserving the anonymity of the informer.
  - 13) Presenting the Company with the final Project report and the final evaluation report while accounting for dissenting opinions of the Company in the final versions of these documents.
3. The Foundation and the Company undertake to collaborate while developing the next component of the Integrity Pact. The Parties do not decide at this stage whether this will be a separate agreement that forms an attachment to the Public Procurement Contract's ToR or specific provisions inserted in the draft contract integrated into the Public Procurement Contract's ToR.
  4. The Foundation and the Company undertake to collaborate and agree all communication and promotional activities (not covered in Section 2 Item 10 above) in connection with this Agreement.

**Paragraph 6.  
Confidentiality**

1. The Parties of the Agreement and persons who are employed by them to implement this Agreement undertake to observe confidentiality and to refrain from any disclosure to third parties of protected information acquired in the course of implementing this Agreement, in particular information that constitutes commercial secrets.
2. The Parties undertake to comply with all applicable data protection laws and regulations while implementing this Agreement.
3. No use of the information set out in Section 1 for purposes other than those set out in the Agreement or any publication thereof shall be allowed without the prior written consent of the other Party.
4. The obligation set out in Section 1 shall not apply to publicly available information or to any release of information in compliance with unconditionally applicable laws and regulations, in particular upon the request of a court, or the prosecution, tax or audit authorities.
5. No protection will be extended to information if it has been:
  - 1) Made public not as result of an unlawful act or one that is in breach of the obligations of the Parties under this Agreement, or
  - 2) Approved for circulation based on a prior written consent of the Party to whom this information is related.
6. Each of the Parties shall exercise the duty of care to prevent the disclosure or use by third parties of the protected information of the other Party. Each of the Parties undertakes to restrict access to protected information exclusively for such employees or associates of the Party for whom such information is indispensable to perform the task for the other Party and who have accepted the obligations arising out of this Agreement.

7. The Foundation shall become familiar with the applicable "Information Security Policy in PKP Polskie Linie Kolejowe S.A. for Business Partners the SZBI-Ibi-1a" hereinafter called SZBI-Ibi-1a, as posted on the Contracting Authority's website [www.plk-sa.pl](http://www.plk-sa.pl) and shall apply its provisions, in particular those which are specified in Paragraph 12.
8. The Foundation shall be liable for persons who act on its behalf, in particular for any damage caused by their actions or omissions, for keeping the confidentiality of the information referred to in Section 1 acquired by them in connection with the implementation of this Agreement and for their compliance with the *Information Security Policy in PKP Polish Railways S.A. for Business Partners the SZBI-Ibi-1a* (the document is available on the Company website: [www.plk-sa.pl](http://www.plk-sa.pl)).
9. The Foundation shall sign a non-disclosure agreement with PKP Polskie Linie Kolejowe S.A. based on which it will obtain a specific mandate to access the commercial secrets of PKP Polskie Linie Kolejowe S.A, in case in the course of implementing the Agreement it has to access data, reports, documents and information that is essential to prepare, launch, conduct, award and implement the Public Procurement Contract, hereinafter called the Information, which is a Company secret, as defined in the Law on Combating Unfair Competition of 16 April 1993 (Journal of Laws of 2003, Issue 153, Section 1503, as later amended) or commercial secrets as defined in the Law on Access to Public Information of 6 September 2001 (Journal of Laws 2015, Section 2058, as later amended) maintained by the Company.
10. The Foundation shall ensure the protection of personal data in connection with its performance under this Agreement, in line with the provisions of the Law of 29 August 1997 on Personal Data Protection (Journal of Laws of 2016, Section 922.), the Regulation of the Minister of Internal Affairs and Administration of 29 April 2004 regarding documenting personal data processing and the technical/structural parameters of information systems for personal data processing (Journal of Laws of 2004, Issue 100, Section 1024), including the conclusion of a relevant outsourcing contract for personal data processing, in case personal data stored by the Company needs to be processed in the course of implementing the Agreement.

#### **Paragraph 7. Termination**

1. Each of the Parties may terminate this Agreement subject to a three months' notice, effective on the last day of the calendar month.
2. Prior to filing the notice of termination, the terminating Party should notify the other Party in writing of its intention of doing so and should present its position regarding the termination.
3. The termination of the Agreement shall be effective as of the day of serving the notice of termination to the other Party.
4. The Foundation shall have the right to terminate this Agreement with immediate effect in case the European Commission cancels the Project or cancels the Project funding.

#### **Paragraph 8. Final Provisions**

1. Day-to-day communication shall be maintained mainly in electronic form (e-mails) or in writing, by fax or other means each Party may choose. The following contact details are provided by the Parties:
  - 1) The Company: tel: /34/ 376 32 83, e-mail: [renata.krok@plk-sa.pl](mailto:renata.krok@plk-sa.pl) , fax No. /34/370 52 40, address: ul. Boya Żeleńskiego 7/9, 42-200 Częstochowa;

- 2) The Foundation: tel: /22/ 536 02 00 e-mail: mwaszak@batory.org.pl , fax: /22/ 536 02 20, address: ul. Sapieżyńska 10A, 02-215, Warsaw;
2. All arrangements in connection with the termination or modification of this Agreement must be made in writing. The Parties specify the following addresses for correspondence:
  - 1) The Company – ul. Boya Żeleńskiego 7/9 p. 9, 42-200 Częstochowa ;
  - 2) The Foundation – ul. Sapieżyńska 10A, 00-215 Warsaw
3. The Parties appoint the following individuals for day-to-day communication:
  - a) The Company: Ms. Jolanta Pawluk, phone:..., e-mail:..., address:...
  - 2) The Foundation: Mr. Marcin Waszak, phone: e-mail: address: ...
4. Each of the Parties undertakes to notify the other Party about any modifications in its address, persons or data presented in the previous sections. In case no such notification of a change in address is made, documents served to the existing address shall be considered effectively served.
5. The Parties appoint the following individuals to represent them for the purpose of this Agreement:
  - 1) the Company – Ms. Jolanta Pawluk, phone:..., e-mail:..., address:...;
  - 2) The Foundation: Mr. Grzegorz Makowski, phone:..., e-mail:..., address:...
6. The Parties commit to undertake negotiations in good faith to order to reach an amicable resolution to any dispute if such a dispute arises over the interpretation or implementation of this Agreement.

Signatures:

**On behalf of the Foundation**

**On behalf of the Company:**



## **2. Draft Whistleblower Protection Policy Recommended by Social Partners (attachment to module two of Polish Integrity Pact)**

### **Ethical Management and Whistleblower Protection Policy in the Name of the Entity**

#### **Chapter I – Safeguards against Unethical Behaviour in Bidding for and Implementing Government Contracts**

##### Paragraph 1

1. Acting in the capacity of a bidder, a contractor or a subcontractor in a public tender, [name of entity] undertakes to:
  - a) Maintain high legal, ethical and moral standards, and
  - b) Observe the principles of integrity, objectivity, accountability and honesty.
2. The principles set out in Section 1 shall be enforced by way of:
  - a) Abstaining from any informal or confidential arrangement with representatives of other entities taking part in a public tender;
  - b) Abstaining from any situation in which any financial or personal benefits are offered to or received from any representatives of the Client, auditors, regulators or any other entities taking part in a public tender;
  - c) Abstaining from the use of any information or other resources unlawfully obtained by [name of entity] in order to build its competitive advantage;
  - d) Preventing conflict-of-interest situations where representatives or associates of [name of entity] engage in developing any tender documents prior to awarding the contract.
  - e) Providing accurate information in good faith about the progress of a public procurement process at the request of the Client and interested non-governmental organisations.
  - f) Implementing a whistleblower protection policy and enforcing compliance among [name of entity]'s employees and associates, as set out in Chapter II of this document.
3. All employees and associates of [name of entity] are expected to comply with these rules.

#### **CHAPTER II – Whistleblower Protection Policy**

##### Paragraph 1

1. The whistleblower protection policy in [name of entity], hereinafter called “the Policy”, shall apply to all employees of [name of entity] as well as natural persons, legal persons or units without legal entity that act on behalf of [name of entity].
2. The Policy has been adopted in order to ensure the protection of persons who take action for the good of [name of entity] by reporting irregularities that may be taking place at [name of entity] or in relations with Customers, Associates, Subcontractors, Business Partners and Suppliers providing services to [name of entity] that may lead to damages or losses to [name of entity] or may undermine the good reputation of [name of entity].
3. The Policy forms an annex to the Working Rules applicable in [name of entity] [or a different document outlining the ethical standards and core values to be observed by all employees of the entity].
4. Subcontractors that are legal persons acting on behalf of [name of entity] shall adopt their own internal whistleblower protection policy. Such policy should be tantamount to this present Policy, and the obligation for Subcontractors to adopt it should derive directly from contracts concluded between them and [name of entity].

## Paragraph 2

1. Whenever a reference is made in this document to:
  - a) **The Company** – it shall mean [name of entity],
  - b) **An Employee** – it shall mean a person employed by the Company, a person rendering a service to the Company regardless of the legal basis for his or her actions on behalf of the entity, e.g. short-term service contract, contract of mandate, internship or a civil contract of any kind etc.
  - c) **Malpractise** – it shall mean any unlawful conduct or other conduct in any area of the Company's operations, accounting and reporting and other areas which are in breach of the laws and regulations or internal policies applicable in the Company that may result in damages or losses to the Company.
  - d) **Whistleblower** – it shall mean an Employee who reports abuse.
  - e) **Advisor** – it shall mean a person or unit (e.g. Compliance, Ethical Officer etc.) appointed to handle reports of irregularities.

### Chapter III – Whistleblower Protection

#### Paragraph 3

#### Whistleblower Identity Protection

1. A person or unit is hereby appointed (hereinafter called “the Advisor”) to be responsible for handling reports of about irregularities.
2. The Advisor shall report directly to Company Management.
3. The Advisor shall be responsible for providing consultation about indented whistleblowing at the request of the Employees. The identity of the Employees approaching the Advisor for the purpose of such consultations shall be kept confidential subject to the terms set out in Paragraph 3 Sections 5 and 6.
4. Any information about Employees intending to report abuse or Whistleblowers and any other persons who are victims of abuse shall be kept confidential. Access to such information shall be restricted exclusively to the Advisor and the Company Management, and possibly to other persons appointed by the Management to investigate the report.
5. The protection of the identity of persons intending to report abuse or Whistleblowers and other persons who are victims of abuse shall be ensured by:
  - a) Separating correspondence addressed to the Advisor from the general correspondence handled by the secretariat;
  - b) Restricting the workflow of information about the Whistleblower solely to individuals involved in investigating the report;
  - c) Securing a confidential telephone connection dedicated to the Advisor and ensuring the confidentiality of telephone conversations;
  - d) Ensuring the security and confidentiality of incoming electronic mail to the Advisor;
  - e) Having the Advisor and persons involved in investigating the reported abuse sign a confidentiality statement;
  - f) Ensuring the security of documents related to the investigation of the reported abuse, also after it is closed, and restricting access to such documents exclusively to authorised persons who are involved in the said investigation;
6. In case the reported abuse has the characteristics of a crime and the Company takes steps to report the case to the law enforcement agencies the identity of the Whistleblower will be disclosed to the law enforcement agencies, in which case the Company shall provide the whistleblower with essential legal aid to deal with the law enforcement agencies.

7. The Company shall not take any action that may lead to the disclosure of the identity of persons making anonymous reports, save for the right of the Company to try to encourage such persons to disclose their identity to obtain broader and more specific information about the reported abuse.

Paragraph 4  
**Investigation**

1. Having received a report about abuse, the Advisor shall be responsible for launching an investigation by transferring the case to authorised persons inside the Company, in particular the Management or persons it has authorised to examine the report.
2. Individuals conducting the investigation shall begin the process immediately after being notified by the Advisor about the reported abuse, no later than within 2 weeks from the day of receiving such notification.
3. The Advisor shall inform the Whistleblower about the next steps in connection with the reported abuse and inform the Whistleblower about the outcomes of the investigation.
4. The Advisor shall keep a record of reported abuse cases in a manner that ensures the privacy of Employees intending to report abuse or Whistleblowers or other persons who are victims of abuse. In particular, such records will include information about the date and method of filing the abuse report and about the nature of reported cases. Access to the records shall be exclusively restricted to the Advisor, Management or persons authorised by the Management to investigate reported abuse and the law enforcement agencies whenever the reported irregularities have the characteristics of a crime. The said records will be kept for three (3) years.

Paragraph 5  
**Protection of Whistleblowers against Retaliation**

1. In order to prevent potential retaliatory measures against Whistleblowers, the Company where the Advisor obtains information about possible abuse shall ensure that Employees intending to report abuse or Whistleblowers and other persons who are victims of abuse are:
  - a) protected against dismissal for which no reasonable grounds exist that could derive from an unbiased performance appraisal of such Employees but are instead related to the reported abuse;
  - b) protected against any change of position or place of work resulting in deteriorated employment conditions that has no reasonable grounds nor derives from an unbiased performance appraisal of such Employees but is instead related to the reported abuse;
  - c) protected against an apparent redundancy, i.e. a redundancy which is not supported by any viable need to adjust to new economic or management realities but is only done in connection with reported abuse;
  - d) protected against discrimination and harassment caused by the reported abuse;
2. Under the circumstances outlined in Section 1 Letters a-c, the Company may terminate/restructure or relocate Employees intending to report abuse or Whistleblowers and other persons who are victims of abuse while lowering their employment conditions solely if there are reasonable grounds for it based on an unbiased appraisal of staff performance or other grounds contemplated in the laws and regulations otherwise unrelated to the reported abuse.
3. The provisions of Paragraph 5 shall not apply to Employees who report abuse in ill faith, i.e. they report incidents that do not represent abuse, resort to unsubstantiated slander regarding other Employees, intentionally misrepresent or report abuse committed by themselves.

## **Chapter IV – Final Provisions**

### Paragraph 6

1. This Policy will be presented to all Employees, Customers, Associates, Subcontractors, Business Partners and Suppliers of the Company. They shall have the right to provide their comments and concerns regarding the Policy and its implementation, to be handled by the Advisor.
2. Employees shall adhere to the Policy and any breach thereof shall be subject to sanctions set out in the labour code and in the Working Rules of the Company.
3. The Policy shall enter into force as of the day of its adoption by the Company Management.

### 3. The Contractor's Statement of No Conflict of Interest with Tender Committee Members

Date .....

#### Statement

While acting on behalf of ..... (Name of Contractor), in connection with the bid submitted by ..... (Name of Contractor) having been selected as the most advantageous bid in the tender for the .....(Name of Project), I hereby represent that the Contractor and individuals authorised by the Contractor to sign on its behalf are not in any conflict of interest with members of the Tender Committee at the time of the tender process.

A conflict of interest is understood to mean any situation in which for reasons of business, political, nationality, family, emotional ties or other common interests of any person in the contractor's team the risk exists of a biased performance of the contract or the lack of impartiality in the process.

#### **4. The Contractor's No-Collusion Statement**

The Contractor represents that in the contract at hand it has submitted its bid independently of and without any communication, agreement or understanding with other contractors bidding for the development of the design documentation and the performance of construction works in the Design and Build formula in the framework of the "Works on Railway Line No. 1 on the Częstochowa-Zawiercie Section" project.

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**Marcin Waszak** – political scientist, sociologist, expert of the Batory Foundation IdeaForum think tank, where is in charge of whistle-blower protection activities, including drafting a civil society bill and ensuring compliance with EU Directive; co-author of content at [sygnalista.pl](http://sygnalista.pl); Marcin has focused in the non-governmental sector on corruption, policy financing and the evaluation of government anti-corruption policies for more than a decade; he has authored a number of analytical reports and press articles.

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Can projects funded by Government and the European Union be effectively monitored by the public? Integrity pacts can provide a useful tool of ensuring public participation and scrutiny of the decision-making process, one that involves citizens in monitoring public contracts.

This report outlines civil society observers' early experience with designing an Integrity Pact and monitoring a public tender. This is a case study of a selected railway project that demonstrates the weaknesses and deficiencies of the public procurement process and offers recommendations for improvement.

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