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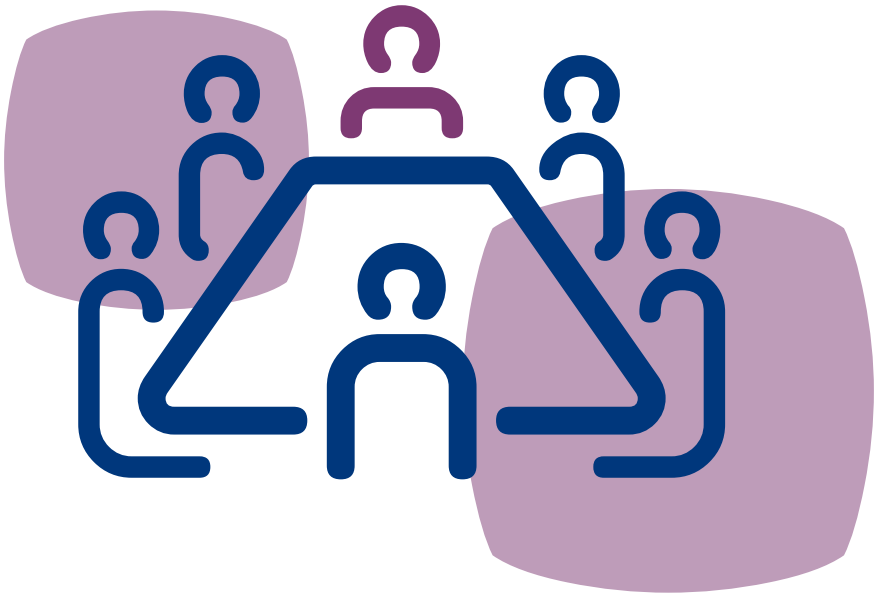
The Integrity Pact. A Civil Society Monitoring of Public Projects

An Overview of the Investment and the Pilot Project



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The Integrity Pact. Social Monitoring of Public Procurement

An overview of the Investment and the Pilot Project

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Contents

Executive Summary

The Integrity Pact is a mechanism created by Transparency International (www.transparency.org) to involve citizens in decision-making processes such as public procurement. It is a mechanism for civic participation and monitoring public procurement for the risk of irregularities, corruption and other types of abuse. The aim of the Pact is to ensure that public procurement is carried out with the public interest in mind. This is achieved by involving the public as observers in the procurement process.

In 2016, the European Commission decided to put the Integrity Pact to the test in several Member States. It was tested as a solution that could help protect public projects financed from the Cohesion Fund. In Poland, a contract called the Development of Design Documentation and Performing Construction work in the "Design and Build" Format as part of work on the Częstochowa-Zawiercie section of railway line No. 1 was selected for the pilot pact. The Contracting Authority in this project was the PKP Polskie Linie Kolejowe S.A. company and the role of the Civil Society Observer was played by the Stefan Batory Foundation and its external technical and legal advisors.

This report, the second on the implementation of the Integrity Pact pilot in Poland, covers the period from July 2017, when the contract for the project was signed, to the end of September 2021 (the first report, published in autumn 2020, described the process of creating the Pact and observing the tender procedure).[1] During this period, the monitoring covered the design and implementation of the project in the field.

The Integrity Pact pilot project was the first of its kind in Poland. When we started, we only had general guidelines on structuring an agreement between the Observer, the Contracting Authority, Contractors and other entities that might be included in the Pact (in our case, the Project Engineer, the entity supervising the project's implementation). The drafting of the agreement, or the Pact proper, was one of the pilot's first objectives. We described the process the first pilot report. Similarly to the content of the Pact itself, the observation techniques that would be applied in the monitoring project had to be defined.

In the first part of this report, we present the monitoring methodology developed within the framework of the Integrity Pact pilot. We discuss the main principles that should guide a Civil Society Observer. Professionalism is the most important of these principles: if the Observer does not have all the essential skills needed to assess developments in the monitored project, it ought to work with external experts or organisations with the relevant expertise. Other principles include transparency, which includes openness to the general public, inclusiveness, i.e. all those interested in a particular contract must be encouraged to become actively involved in monitoring it, and confidentiality. While monitoring is impossible without free and uninterrupted access to all the information about the monitored contract, the Observer must respect the fact that the Contracting Authority and the Contractor have the right to protect data that they deem sensitive, such as business secrets. Furthermore, the methodology sets out in detail components of public procurement that ought to attract special attention, the most important risks, sources of information, documenting techniques, and standard responses to real and potential irregularities.

1 K. Baryła, G. Makowski, M. Waszak, *The Integrity Pact. A Civil Society Monitoring of Public Projects. Designing an Integrity Pact and the Contractor Selection*, Batory Foundation, Warsaw 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/01/Integrity_pact_A-Civil-Society-Monitoring.pdf [accessed: 11 February 2022].

Most sections of the report discuss major problems that came to light during the monitoring exercise and ways in which the Observer responded to them. These included the **huge increase in the prices of materials and services needed to implement the monitored contract, which could not be balanced in any way**, as the rules on inflation adjustment set out in the contract proved inadequate. A serious dispute arose between the Contracting Authority and the Contractor. The Observer encouraged the parties to resolve it through mediation, but the contracting parties decided to take legal action. It should also be stressed that, although it concerned the monitored government project in a specific way, this problem was of a systemic nature and required a response at the level of planning the state purchasing policy. This led us to conclude that the **purchasing policy of the state, as well as that at the level of individual contracting authorities, lacks mechanisms for the systematic monitoring of price increases, procurement planning and pricing. The rules on the inflation adjustment of contract values should also be made more realistic**.

Another issue was the **dispute between the Contracting Authority and the Contractor concerning the need (or lack thereof) to construct acoustic screens**. The specificity of this problem was that, when the tender documentation was being assessed, the Observer pointed out that there were no clear provisions concerning the performance of this component of the project. Moreover, when the tender was announced, there had not been a decision on environmental conditions, where this requirement could have been formulated unambiguously. This allowed the Contractor to submit an attractively priced bid, which did not include the construction of screens. However, the Contracting Authority strongly demanded that this component be completed during the work. Apart from the fact that a conflict broke out between the contract parties against this backdrop, an interesting dimension relating to access to information within the public procurement system and communication between the Contracting Authority and Contractors emerged. Unable to obtain full data justifying the need to build noise barriers from the Contracting Authority, the Contractor decided to resort to the administrative courts, arguing that the data it wanted to access was simply public information. The Observer – guided by the principle that access to information should be as broad as possible – supported this argument, including at the court stage, by sending *amicus curiae* to the Supreme Administrative Court in this disputed case. **Experience on this point leads to the conclusion that there should be changes in the legislation on access to public information to eliminate barriers (related, for example, to the unclear concept of an "internal document", which often serves as a pretext to deny access to public information) and to broaden the possibility to obtain information on the implementation of contracts in general. The dispute over noise barriers, in relation to a project covered by the Pact, also leads to the conclusion that procurement procedures and the implementation of projects (especially infrastructure projects) should not be launched without a full set of documents, especially in the absence of crucial elements such as the decision on environmental conditions.** Contracting authorities should not allow this to occur, even if it is lawful, because designing and managing calls for tenders hastily and the accompanying gaps or inconsistencies in files are likely to generate more serious problems, disputes and delays once the project begins.

Once again, **the issue of managing a conflict of interest arose, this time at the level of relations between the Contractor and the Observer**. At the final stage of the contract implementation, the Observer decided to present a legal opinion on the legality of issuing a Taking-Over Certificate for the monitored project. In the Observer's opinion, the combination of circumstances that accompanied this event meant that this kind of document should not have been issued. It would create a risk for public interest (for example, in terms of the accrual of contractual penalties or the start of the guarantee period). The Contractor believed that the Observer's action was dictated by the desire to extend the monitoring (which could have ended with the issuance of the Taking-Over Certificate)

and maintain the availability of financing for the entire pilot. The dispute had not been fully resolved by the end of the monitoring exercise. Meanwhile, as part of the pilot, it was an excellent lesson in managing conflicts of interest for the benefit of future Integrity Pacts. **It is recommended that a long-term communication and education programme be developed so that public procurement market players can learn how to define, avoid or manage the conflict of interest, with a view of preventing the irregularities and abuse that may result from it.**

Another significant problem discussed in the report concerned construction work without the required documents, in particular without a building permit. At the initial stage of the construction work, the Contractor (with the Contracting Authority's consent) started the work based on a "notification". The Observer questioned this procedure, which was later confirmed by the Silesian Voivodeship Construction Inspector. Fortunately, the infringement, which could have had significant consequences, turned out to be just a procedural irregularity. The inspector found that the commenced work met all the requirements and was carried out in accordance with construction best practices. No one suffered any consequences. This revealed two systemic problems: unclear legislation regarding the notification procedure and a lengthy building-permit process. **The Observer submitted requests to the relevant ministries, thereby contributing to amendments to the Construction Law that streamlined the requirements relating to construction work by notification. Architecture and Construction oversight agencies' capacity should be strengthened.**

The monitoring focused on two more problems concerning the management of counterclaims and the final acceptance procedure. Many other, minor difficulties, which we do not consider in this report, were noted during the observation. In addition to the monitoring activities, the pilot envisaged many communication and education activities (conferences, workshops, meetings with the inhabitants of the areas where the project was carried out, and so on), which are also summarised in the report.

Although the report mostly considers certain violations and contentious or controversial issues, it should be noted that the pilot also created space for positive developments, such as the above-mentioned changes in the Construction Law. In addition, the pilot inspired the Contractor to launch a whistle-blower protection system at the start of the monitoring implementation in 2017. This should be emphasised because, as part of Member States' obligation to implement Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of whistle-blowers (PE/78/2019/REV/1), the creation of these systems will be mandatory for medium and large companies. The Contractor involved in the pilot will therefore be much better prepared.

It should also be noted that all the contracting parties persevered in the pilot study until the end of its financing by the European Commission. Although sometimes difficult and subject to tensions, cooperation between the Contractor, Contracting Authority and Observer generally proceeded in a good atmosphere and, above all, in conditions of great openness, without which the monitoring would not have stood any chance.

The overall experience of the pilot project leads to the conclusion that Integrity Pacts could become a valuable tool for involving the public in an area as difficult as public procurement procedures (without necessarily becoming mandatory for every procurement or a mass mechanism). Integrity Pacts could also be a good complement to official state mechanisms of supervision and control over the public procurement market. In the final recommendations, we elaborate on how the Pacts' legal status could be regulated and how their financing could be ensured.

Ultimately, it will be up to the European Commission and individual governments to decide how to apply the lessons of the Integrity Pact pilot project in Poland and other participating countries. Time will tell whether Integrity Pacts become one of the standard mechanisms of public participation and control over public procurement.

1. Glossary of Terms and Acronyms

CBA: Central Anti-Corruption Bureau
CUPT: Centre for EU Transport Projects;
DG Regio: Directorate General for Regional and Urban Policies of the European Commission;
DEC: Decision on Environmental Conditions;
FIDIC: Fédération Internationale Des Ingénieurs-Conseils, International Federation of Consulting Engineers;
Foundation: Stefan Batory Foundation in Warsaw;
SP: Statistics Poland;
IGTL: Land Transport Chamber of Commerce
NAC: National Appeals Chamber;
Legal consultant: TOGATUS Kancelaria Prawna Trojanowski Sławomir i Partnerzy;
Technical consultant: JPL Project sp. z o.o. /MLN Team sp. z o.o./WIN Kamil Baryła;
Contract: agreement No. 90/106/0072/17/Z/I for an open tender for the development of design documentation and execution of construction work in the Design and Build formula as part of the work on Railway Line No. 1 on the Częstochowa-Zawiercie Section in the framework of the Infrastructure and Environment Operational Programme project 5-2.6;
NCP: 2023 National Railway Programme adopted by the Council of Ministers in September 2015;
Ministry: the Ministry in which the Managing Authority of the Infrastructure and Environment Operational Programme is established (as of the day of preparing the report it was the Ministry of Development Funds and Regional Policy);
SAO: Supreme Audit Office;
Observer: also referred to as the social partner: a monitoring team of the Stefan Batory Foundation staff and consultants;
OECD: Organisation for Economic Co-operation and Development
EIA: Environmental Impact Assessment;
OPZ: description of the subject of the contract included in the tender documentation;
Pact: Polish Integrity Pact, an agreement between the Stefan Batory Foundation and PKP PLK signed on 8 November 2016, extended by the obligations laid out in PKP PLK's agreements with ZUE S.A. as a General Contractor on 20 July 2017 and with the consortium of MP-Mosty Sp. z o.o. and DROGOWA TRASA ŚREDNICOWA S.A. as Project Engineer on 4 August 2017;
FUP: Functional and Utility Programme, technical specification included in the tender documentation;
PKP PLK S.A.: PKP Polskie Linie Kolejowe S.A., the company referred to in the report as the Contracting Authority;
I&EOP: Infrastructure and Environment Operational Programme;
PRM: requirements related to the accessibility of the EU railway system for people with disabilities or with reduced mobility;
PPL: Public Procurement Law of 29 January 2004 (Journal of Laws of 2019, Section 1843, as later amended);
ToR: Terms of Reference;
SCC: Special Contract Conditions
TI: Transparency International
Contractor: ZUE S.A.;
EU: European Union;
ULLK: decision on the location of a railway line;
ULICP: decision on the location of a public purpose project;
PPO: Public Procurement Office;
ZOPI: Investment Project Advisory Panel.

2. Introduction

This report marks the end of the civic monitoring of a public project as part of the Integrity Pact in Poland. The Batory Foundation played the role of the Civil Society Observer. In 2020, it published an evaluation report covering the tender stage of the contract. This study completes the evaluation cycle by covering the period after the signing of the contract with the Contractor in July 2017. The project monitoring was extended to cover the final approval of the work after the European Commission agreed to extend the Integrity Pact pilot in Europe for two more years (the pilot was originally scheduled until 2019). The extension of the monitoring of the PKP PLK S.A. project as part of the Integrity Pact clearly helped the Observer to assess all the project stakeholders' decisions and behaviour more thoroughly, in terms of the potential risk to public interest. The consequences of inadequate decisions or negligence compounded as the final approval drew nearer.

While there was no shortage of best practices in the project, this report concentrates on what did not go well. The Observer believes some of the actions or omissions could have negative consequences for the users of the upgraded railway line and nearby communities. The Civil Society Observer's presence was also supposed to help avoid the wasting of public resources and EU funds. This role often required interventions and disputes with the other participants in the contract. This report reflects the key differences in opinion between the participants, giving voice to the Contractor and the Contracting Authority in the form of separate comments. The outcome of the Observer's actions did not always turn out to be positive for the parties, as exemplified by the suspension of certification and reimbursement for the project in early 2021. This decision was related to the Observer's reaction to the irregularities identified, the toleration or concealment of which could have had much more serious consequences, both for public finances and for the project's managers. In this sense, the Observer sought to defend the interests of the participants in the contract, even when criticised. Yet the parties to the Integrity Pact, who declared their commitment to fair and transparent principles for conducting public projects, did not evade the Observer's questions and requests, and showed their commitment to the process. Undoubtedly, the participants of the Integrity Pact deserve to be thanked by the Observer for their long-term cooperation and attitude.

Finally, the Integrity Pact pilot in Poland has done much more to foster public reflection on responsible procurement than monitoring alone might suggest. Communication and education activities proved to be important, broadening horizons when it comes to thinking about procurement in terms of interconnected vessels, and showing that practices during a single contract cannot be considered in isolation from the institutional and legal environment, or a given sector's characteristics. Other contractors, procurers and specialists were presented with the Observer's diagnoses during open conferences, seminars or as part of a series of podcasts. Through the activities repeatedly mentioned in this report, the concept of civil society scrutiny of public procurement has had a chance to become more comprehensible to the public. The paktuczciwosci.pl website offered an opportunity to follow the project's progress. The pilot became a source of in-depth knowledge about the government project being monitored and the Observer's responsibilities. With future monitoring organisations in mind, a monitoring methodology has been developed, showing how it can be conducted effectively and responsibly.

This report gives testimony to the transparency of monitoring activities. It also does not escape the parties' accusations against the Observer. It is in the public interest to take as full stock as possible of the entire pilot period and draw the right conclusions. The results will determine whether Integrity Pacts become more accessible and widely recognised by the law and public institutions. That is why all the difficulties and challenges accompanying the monitoring deserve to be presented in the following

pages. Bearing in mind that the report will also be read as a *sui generis* guide for EU and Polish decision-makers, the authors formulated their conclusions with a sense of great responsibility for the future of similar initiatives.

3. Monitoring Methodology[2]

When the Observer embarked on the Integrity Pact pilot, there were no ready answers to the question of how to monitor public procurement effectively, where to focus attention and how to access relevant information. It was possible to use some of the monitoring framework published by Transparency International based on its experience with Pacts in other countries.[3] However, these provided only general idea of what an Integrity Pact was supposed to be, rather than practical guidance. It soon became apparent that country specifics and features such as the legal system, institutional governance (for example, regarding the distribution of EU funds) and the state of civil society were of great importance. The socioeconomic characteristics of the region are also relevant, as well as whether local communities are easy to reach and mobilise, and whether the local media are powerful. Further, the methodology depends on the type of project being monitored. The fact that the Polish pilot of the Integrity Pact was a rail infrastructure project – and one of the most expensive projects in the entire European pilot – had a direct bearing on the expected level of expertise that the Observer had to demonstrate and on the monitoring process. The project's experimental nature meant that the methodology was essentially developed and revised during the project. This was a major area of discomfort for the Observer. Once the Integrity Pact is recognised as a regular tool for the public scrutiny of public procurement in Poland, all the Civil Society Observers involved in future monitoring projects should have an "instruction manual" for the Pact before they start their engagement.

The starting point for developing the monitoring methodology was its primary objective – the protection of the public interest. By "public interest", we mean the rational, legal and beneficial allocation of resources within the framework of public procurement.

The Pact pilot had a preventive, educational and evaluative character. Its objective was to reduce the risk of the loss of public funds as a result of the poor management of the awarding and implementation of the contract covered by the Integrity Pact (and possible future contracts) and abuse, in particular corruption. **It focused on increasing the transparency and public availability of information about the public procurement process being observed and intervening in cases where there is a breach of public interest** or a risk of such a breach. It also had an educational dimension, seeking to raise the awareness of the parties to the Integrity Pact of how and why it is worth implementing anti-corruption mechanisms and increasing transparency standards. We viewed the Pact as a potential tool for civic education that can help involve local communities in monitoring, encourage them to engage in public project design and implementation, and improve popular awareness of the process. The Civil Society Observer's assessments were meant to show the possibilities for improving how the monitored government project was carried out, but also to result in the fairer and more efficient organisation of similar procurement by the Contracting Authority in the future (for example, by pointing out risks, formulating recommendations for the future, identifying best practices, and so on). **Meanwhile, the Observer could not take responsibility for how the PKP PLK S.A. project was**

2 Chapter based on the guide to monitoring public procurement based on the conclusions of the Integrity Pact pilot: G. Makowski, M. Waszak, *Obserwacja zamówień publicznych. Poradnik obywatelski*, Stefan Batory Foundation, Warsaw 2021, https://www.batory.org.pl/wp-content/uploads/2021/08/Metodyka-monitoringu_Poradnik.pdf [accessed: 14 September 2021].

3 See *Integrity Pacts: A How-To Guide From Practitioners*, Transparency International 2016, https://images.transparencycdn.org/images/2016_IntegrityPacts_HowToGuide_EN.pdf [accessed: 10 August 2021].

implemented. Many decisions influencing the course of the project were made before monitoring had started, during the preparation of the contract. Even later, they were often agreed without the Observer being present. The ability to prevent all the problems or violations in the contract was merely an illusion, especially considering the size of the documentation and the fact that the Observer did not receive the majority of it in real time. In most cases, it was only possible to react ex post to breaches, once enough information was available. An example of this is when the Observer voiced Contracting Authority its objections about how the Contractor proceeded to carry out the work by notification, prior to obtaining a building permit, to the Contracting Authority. The Observer felt that this practice was not entirely appropriate. However, the situation was so complex (even the legal conditions alone) that a more decisive reaction was not possible until it had familiarised itself thoroughly with the documentation and all the parties' positions.

The civic character of the monitoring means that it taps into expert knowledge, as appropriate, while seeking to create the widest possible opportunities for citizens' involvement. Citizens do not need expertise, but may be fully committed to the proper implementation of the public project covered by the Pact. A single organisation is usually responsible for monitoring, but its initiative and efforts should focus on stimulating interest and watchdog activities by the direct beneficiaries of the project (the local community, media, local authorities, and so on). An immanent feature of monitoring is therefore the effort to increase civic participation in the awarding and implementation of public contracts.

The Observer sought to establish regular channels of communication with local communities. The goal was to provide the local community directly affected by the project with information about the monitoring process and the project. Options included the local media, posters and announcements at the site of the project, official announcements, or meetings with residents, depending on their interests and needs. In its communication efforts, the Observer focused on the scope of the monitoring and involving residents to make a difference. Above all, this meant observing the Contractor's activities at the construction site daily.

Key Principles of Public Procurement Monitoring

Regardless of the specifics of the monitored project, there are several underlying rules[4] that should guide the Observer at all times:

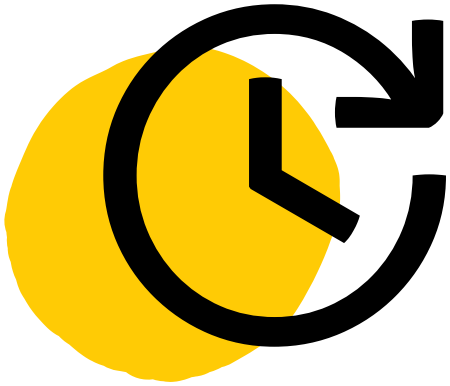
1) The Observer should maintain an **independent position** throughout the whole monitoring. The monitoring organisation and the people working for it should not have family, professional or personal ties to the monitored entities that might lead people to suspect that the Observer is biased and has a hidden agenda, rather than being committed to the public interest. Furthermore, the very way in which monitoring is funded is meant to exclude cases in which cutting the funding could be used to put pressure on the Observer. The principle of independence therefore means that the Observer cannot be financially dependent on the entities whose activities it is observing. With only independent financing, it will not be afraid to enter into disputes with them, which are inevitable when irregularities occur. The Observer's independence also lies in its right to make its

4 See *Integrity Initiative. Indicators for Transparency and Integrity Under Public Procurement Procedures*, Transparency International – Bulgaria, Sofia 2013, p. 14, https://integrity.transparency.bg/en/wp-content/uploads/sites/2/2016/03/TI_Book_IndikatoriEN_web_m.pdf [accessed: 30 September 2021].

own assessment of developments in the monitored contract. Assessments will usually favour the position of one of the contract parties; for instance, the Contractor or the Contracting Authority. But that does not mean that the Observer can be reasonably accused of bias or conflict of interest. There is only one way for the Observer to defend itself against these kinds of accusations: through assessments that are balanced, rational and factual. Hence the next point.

2) Observation must be carried out in a **professional** manner, even if it is voluntary and performed by an organisation that is not linked to the industry or familiar with the practice of implementing public projects. By using the resources available, and outsourcing to procurement law professionals, technical or economic consultants, the Observer should be able to correctly interpret facts and circumstances investigated in connection with suspected irregularities. It is the Observer's duty to verify risks, and to collect and thoroughly corroborate all the information before making any judgements.

INTEGRITY PACT IN FIGURES



The consultants **worked on the Pact for 2,616 hours**, which equates to one person working full-time for over a year.

3) The Observer's activities must remain **transparent to the public**. Monitoring activities and findings were traceable due to regular reporting and the Observer's regular statements on social media, at open meetings and at public conferences. Correspondence, minutes or opinions drafted by the Observer were generally disclosed to the public. In doing so, we did not evade questions from the media, requests for access to public information, or enquiries from anyone with an interest in a particular procurement project. Information had to be disseminated as widely and proactively as possible and the Observer responded to any questions to the best of its knowledge.

4) Monitoring must be **inclusive**; that is, it should leave room for citizens who may wish to become involved in the Observer's work at any time. The monitors' role is to encourage cooperation from anyone who may want to support them with information or activity for whatever reason, such as personal interests, hobbies or networking. The Pact was intended to foster a sense of responsibility for the quality of public projects among citizens. It is supposed to broaden the scope of social control and enable observers to obtain information that would not be available otherwise.

5) Sometimes, because of the broad access to information granted to the Observer, it needs to **maintain confidentiality** when the documents obtained concern, for example, company secrets or personal data. The Observer was prepared for this and had appropriate procedures in place for storing sensitive information. It also obliged its collaborators, including consultants, not to disclose

and not to use legally-protected information obtained in connection with the Integrity Pact for purposes other than monitoring.

Monitoring Objective

The main objective of the monitoring was to observe the activities of the contract parties. This included the Contracting Authority and then, after the project contract was signed, the Contractor and the Project Engineer. Because the pilot involved a large infrastructure contract, the group of entities involved in its design and implementation was much wider. The Observer had to take into account their influence on events taking place within the framework of the contract. The list of entities that the Observer was supposed to monitor was open and could expand depending on where reports of potential violations came from. Below is a list of the key actors in the procurement process whose conduct affects the integrity of the process.

1) Contracting Authority – from the point of view of the Pact's implementation, observing the Contracting Authority's actions is a priority; in particular, at the beginning of the contract, as irregularities may occur at the tender design, call for bids and awarding of the contract stage. During project implementation, much still depends on the Contracting Authority's decisions; for example, in terms of negotiating changes to the contract with the Contractor, revising the work schedule, or other activities performed with the Project Engineer's assistance. It could be argued that the Observer's interest is closer to the Contracting Authority's during the project's implementation. It should be in the Contracting Authority's interest to execute the contract efficiently, on time, in compliance with legislation and standards, and for the benefit of the public. However, solutions accepted by the Contracting Authority may not satisfy the end recipients of the project (such as local communities). Much depends on the efficiency of the decision-making procedures adopted by the Contracting Authority, and on whether its executives are capable of correctly assessing and managing the project.

2) **Contractor** – it seems natural for the Contractor and subcontractors to be at the centre of the Observer's attention during the project. In the monitored contract, observation of the Contractor's activities began when the tender committee began evaluating its bid and when the Contractor was providing supplementary information and explanatory notes at the committee's request. The Contractor may seem more tempted to look for unconventional solutions or even to circumvent contractual provisions and legislation at this project stage. This is fostered by working under time pressure, with the intention to minimise costs and maximise profits, and with additional adversities that arise from working with subcontractors, for example. In the Polish pilot, the Contractor took on the obligations of the Integrity Pact with the signing of the contract. The Integrity Pact gave the Contractor the opportunity to develop its own ethical infrastructure, which included establishing a company-wide whistle-blower protection policy for the first time.

3) **Project** Engineer – plays an important role in infrastructure projects. It is defined in the FIDIC contractual conditions applied in Poland. The Engineer supervises the project on behalf of the Contracting Authority and focuses primarily on the technical side of the implementation of the contract. The Engineer is jointly responsible for the completion of the work on time and in accordance with the Contracting Authority's requirements and technical standards. It verifies technical documentation, provides opinions on building designs and monitors the work at the construction site. It is a source of valuable information that the Observer would not otherwise have access to, as it is a result of the Engineer's continuous presence at the construction site, ongoing communication with the Contractor, and participation in various opinion panels. Its role in the Polish pilot of

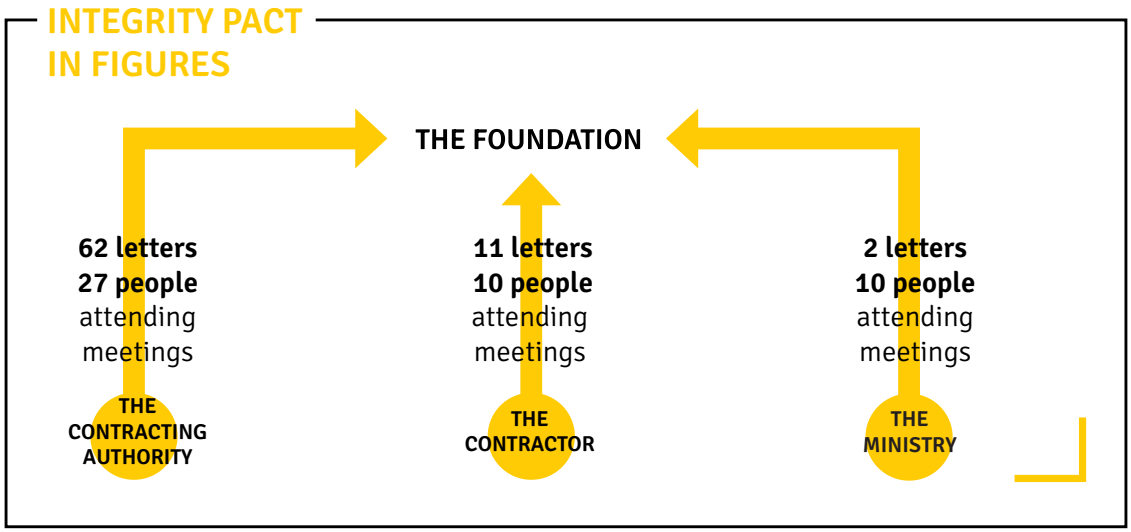
the Integrity Pact was included in the project supervision contract, which obliged the Engineer to share with the Observer any information on amendments to the work contract, along with the accompanying correspondence and documentation on claims submitted by the contracting parties. This had the advantage that documents from the Engineer reached the Observer without delay, at the same time as they were received by the Contracting Authority and the Contractor.

The Polish pilot did not expect the Observer to verify the correctness of the Engineer's findings. The latter has much more qualified resources for assessing the contract's technical aspects at its disposal. It also has a methodology for validating project documentation and assessing its compliance with the contract. This means that, if the Observer were to try to emulate the Engineer, it would be inefficient and doomed to failure. Civic monitoring is not designed to duplicate the Engineer's duties; rather, it uses the Engineer's findings to identify and assess behaviour by the Contractor and the Contracting Authority that may threaten the fair and socially-acceptable execution of the contract. Meanwhile, given the fact that the Engineer should perform its responsibilities independently of both the Contracting Authority and the Contractor, how this independence is maintained is critical for monitors. The Engineer's behaviour and interactions with the Contracting Authority and the Contractor were therefore observed at least to some extent, and the terms and conditions of its role were assessed. The Observer paid special attention to the Engineer's position in the final approval and its rationale for issuing the Taking-Over Certificate for the work. When in doubt, the Observer had the opportunity to verify that background and track record of members of the Engineer's core team to check whether they matched the size and nature of the public project that the Engineer was meant to supervise.

4) **Subcontractors** – The Observer has the opportunity to monitor when, with whom and for what amount the Contractor involved subcontractors and what it expected of them in terms of combating fraud. In the Polish Integrity Pact pilot, the Contractor obliged subcontractors to protect whistle-blowers as part of the monitored contract and to implement secure channels for reporting abuse. The Observer's attention was drawn to interactions with and the supervision of subcontractors, especially when the contracting parties blamed subcontractors for poor or untimely construction work or actions that led to non-compliance. The Observer tried to anticipate whether conflicts with subcontractors could escalate to a level at which they would threaten the project schedule and work quality. Furthermore, the industry as a whole would suffer if subcontractors experienced financial problems as a result of late payments. Finally, the value of contracts concluded with subcontractors helps estimate the actual project costs and is an important point of reference when negotiating amounts for additional or replacement work performed by the Contractor. It illustrates the general state of play of the construction market and helps assess whether the fees and costs charged by the Contractor are excessive.

5) **Contractors submitting bids in tender proceedings** – in the Polish public procurement system, companies that showed interest in the tender and in submitting bids could not be forced to join the Integrity Pact and accept its obligations. Nevertheless, as the Observer, we attempted to reach tender participants during the call for tenders and listen to the complaints and questions addressed to the Contracting Authority. In addition, participants in the tender process shared information with the Observer after the tender was completed about barriers and mistakes in the organisation of the tender from contractors' point of view. Interviews with contractors conducted in the Polish Integrity Pact for the purposes of the monitoring report made it possible to identify behaviour and omissions by the Contracting Authority that threatened to limit the procedure's competitiveness and transparency.

In the course of the pilot project, the Contracting Authority maintained by far the most intensive correspondence with the Observer. It addressed a total of 62 letters to the Observer, and 27 people from the PKP PLK S.A. company participated in meetings held within the Integrity Pact framework.



Scope of Observation

When undertaking monitoring, it was extremely difficult to predict in advance whether we would have to deal with violations of the contract – and what kind of violations. However, it must be stressed, that the absence of identified breaches does not necessarily mean that the Observer has failed. The Observer's presence also sought to ensure that the risk of potential violations was spotted sufficiently early and that preventive measures could be taken. Without any doubt, any case in which an Observer issues a timely warning and thereby protects participants and beneficiaries of public procurement from inadequate decisions should be perceived as success. As the guardian of the public interest, the Observer focused on all the actions or omissions whose negative consequences could directly or indirectly affect citizens as users of the project and/or lead to the wasting of public and EU funds. The list below identifies undesirable behaviours of varying degree of severity:

a. **Offences/suspected offences.** The list of possible offences that may ultimately affect the public interest is essentially unlimited. It ranges from health and safety breaches to fraud, theft, VAT evasion and corruption offences. The scope of observation was difficult to describe *ex ante*.

   Nevertheless, the monitoring exercise was initially designed to focus primarily on the risks of corruption offences, i.e. acts outlined in the definition of corruption in the Law on the Central Anti-Corruption Bureau, in Article 1(3a) and Article 2(1)(4): bribery, patronage and unlawful decision-making during public procurement.

b. Acts that are **not of a criminal nature**, but that pose an actual or potential threat to the public interest. This category includes acts that, in principle, fall within the scope of the law, but that, for example, reflect poor organisation when implementing a project, reduce its transparency, expose the Contracting Authority (in the broad sense of the term; this may be the public or communities that are the contract's direct beneficiaries) to additional costs of implementing the project, or threatening other important values (such as workplace safety, public safety, the environment, and so on). These also include bad practices related to the treatment of workers, including discrimination

and labour law violations, which may affect migrant workers from Poland's eastern neighbours and people recruited for a specific job in the local community. The Observer tried to warn against putting excessive pressure on the local community during the project and the inconveniences of missing substitute transport during the construction work, poorly marked detours, closed crossings, and so on.

In this case, the range of behaviour theoretically covered by the monitoring was even wider than in the case of offences. It included delays and problems with the transfer of information between the Contracting Authority, the Engineer and the Contractor (through the fault of all the parties) concerning answers to the parties' queries, applications, requests for explanations and various kinds of demands. The Contracting Authority and Contractor may have poorly engaged in communication with non-participants or external stakeholders, as illustrated by failure to respond to requests for public information or an ineffective information policy on the purpose of the work and how it is being carried out. This may cause additional tensions and social protests. Attempts to conceal inconvenient facts may have appeared in the Contracting Authority's and Contractor's interactions with regulators; for this reason, the Observer monitored contract implementation inspections and their findings.

This category of conduct also includes violations (or attempted violations or circumventions) of the provisions of the project agreement and design requirements. While the work went ahead, not all the required permits had been secured, including the building permit, the decision on the location of the public-purpose project, or the decision on the location of the railway line, before the commencement of the construction work (the Contractor refers to this issue in its comment [8]). The environmental legislation was also exposed to irregularities. There were concerns about meeting the environmental requirements; for example, on waste disposal, the rising cost of which could lead to a search for ways to circumvent legislation inconvenient for the Contractor.

In the monitored contract, there was also a risk of the work being delayed, affecting not only the contract implementation schedule, but also causing additional track closures and unplanned changes in the train timetable. The Observer deemed any disruptions in payments for work – not only between the Contracting Authority and the Contractor, but also between the Contractor and subcontractors, and between the Contracting Authority and the Engineer – undesirable.[5]

c. **Actions aimed at improving the contract implementation process.** Finally, monitoring also covered procurement participants' behaviour that was not so much risky, but that aimed to reduce risk. Monitors should also identify best practices and even promote them with a view to have them replicated in other public procurement processes. This area of monitoring focused on reviewing the implementation of the Pact's provisions concerning the development by contracting authorities and contractors of compliance policies, mechanisms for protecting whistle-blowers and ways to prevent conflict of interest. The Integrity Pact led ZUE S.A. to implement a corporate whistle-blower protection mechanism, which was later extended to other public projects carried out by the company.

The basis for assessing whether a particular behaviour was in the Observer's interest was whether it involved (potentially or actually) a breach or risk of breach of the law, contract

5 See correspondence with PKP PLK S.A. regarding delayed payment, https://paktuczciwosci.pl/wp-content/uploads/2021/03/op%C3%B3%C5%BAnione-p%C5%82atno%C5%9Bci-2.pdf [accessed: 30 September 2021].

provisions or standards for project delivery. We wrote about the method for responding to abuses in the first monitoring report.[6]

RECOMMENDATIONS CONCERNING INTEGRITY PACT IMPLEMENTATION

Each pact should **include procedures for responding to suspicions of fraud and irregularities**, and observers should carefully analyse their own observations, media coverage, and whistle-blowers' reports.

Main Risk Foci

Certain deviations from the Contracting Authority and Contractor's routine conduct or from the standard scope of performance of a public contract may guide the Observer to areas where violations are somewhat more likely to occur. Experience gained during the Polish pilot of the Integrity Pact will enable distortions specific to construction projects to be recognised more easily. They have their own technological sequence, involving extensive requirements for obtaining necessary approvals and permits. These projects also involve significant interference in the everyday life of residents and passengers. Many organisations take part in the project in various capacities, including inspection, review and consulting. These projects are also very expensive, with numerous disputes between the Contractor and the Contracting Authority about additional payments, sometimes provoked by the contracting parties' decisions, but also resulting from external conditions, such as changes in the relevant laws or in material prices. With this caveat in mind, "red flags" for this type of project, which civic monitoring should focus on, can be found in the following areas:

1. Information on public consultations and how they were conducted during the contract preparation phase.
2. The procurement and process of preparing a feasibility study for the project.
3. The procedure for applying for a decision on environmental conditions and supplements.
4. The procedure for preparing tender documentation and verifying it.
5. The method for publishing the contract notice and posting the information on the purchasing platform.
6. Making modifications to the tender documentation and the procedure for answering contractors' questions.
7. Appointing members to the tender committee.
8. The evaluation of tenders and the accompanying investigations; from example, into abnormally low prices.
9. Contractors' appeals to the National Appeals Chamber.

6 K. Baryła, G. Makowski, M. Waszak, *The Integrity Pact. A Civil Society Monitoring of Public Projects. Designing an Integrity Pact and the Contractor Selection*, *op. cit.*, pp. 25–26.

10. The process and outcome of the public procurement of the supervision of the project.
11. Preparation of the documents accompanying the signing of the contract with the Contractor.
12. Preparation of the Spatial Programme Concept documentation and opinion.
13. Acceptance and rejection of construction designs drafted by the Contractor.
14. Pressure to accelerate or slow down the work.
15. Revision of the work schedule for the entire project and individual areas.
16. Collisions with other projects.
17. Agreeing the scope of work with the managers of nearby infrastructure.
18. Pressure to make payments ahead of legally-required deadlines in the contract or financial plan.
19. Repeated, irregular, accelerated and/or delayed payments.
20. Methods of evaluating and accepting additional and replacement work.
21. Deviations from the Contractor's original calculations or market rates in the rate or cost of specified work.
22. Changes to the provisions of the contract with the Contractor and unclear descriptions of these changes (reasons, justifications, expected results, and so on).
23. Material changes to contracts between the Contractor and subcontractors (and further subcontractors).
24. Changes to the provisions of the functional-utility programme.
25. Deviations from the agreed scope of work without confirming them by change orders (a procedure of implementing changes in a contract).
26. Undertaking additional analyses and investigations of the project site to undermine or confirm contractual provisions, such as ones concerning acoustic conditions, geological conditions or dendrological expertise.
27. Starting construction work without completing the administrative procedures for obtaining approval and permits.
28. Using substitutes or replacements for materials or construction solutions previously included in the bid or in detailed outlines of specific work.
29. Transparency of correspondence, communication and negotiations between the contract parties, in particular in connection with changes: in the contract, FUP or other essential elements of the contract.
30. Communicating claims to the contracting parties.
31. The time the parties take to react to each other's submissions.
32. Accepting the grant agreement and requesting appendices to it in the case of beneficiaries of EU funds.
33. Carrying out any additional, supplementary or replacement work.
34. Work involving significant environmental risks.
35. Complaints from residents, local government representatives and users of the railway line about the way in which preparation and the work has been carried out.
36. Organising the work of diagnostic and surveillance inspectors in the field.
37. Internal and external checks and audits on the project.
38. Appointing members of the Acceptance Committee in light of their professional background and possible conflicts of interest.
39. The procedure for operational acceptance and the final acceptance of the work.
40. Compliance with safety rules (in terms of health) by the main participants in the Contract and providing all the stakeholders in the Contract (e.g. rail users, transport operators) with safety.

The list above outlines potential risk areas and the types of undesirable behaviour that are more likely to occur or worth observing and possibly developing into best practices. The list is not exhaustive, even for infrastructure projects, let alone other types of public project, including those concerning services or supplies, which will have other potential red flags.

Sources of Information

At the start of the monitoring exercise, the Observer identified a list of documents of interest and requested in the Integrity Pact that partners share them by default, regularly and without reminders from the Observer. The remaining documents fell into the category of contractual material, which the parties should share with the Observer on request, within the timeframe set by the Integrity Pact; that is, promptly, but no later than within 10 days. The Observer collected the missing documentation by requesting it in numerous letters, which the Contracting Authority did not always reply to within the agreed timeframe. The maximum waiting time for an answer from the Contracting Authority to questions about the company's actions relating to the work was 105 days. The average waiting time for a response from PKP PLK S.A. was 15 days.

[1] Contracting Authority's comment: The circumstance that can be considered a justification for PKP PLK S.A.'s occasionally long response times was the fact that the Observer sent letters in packages (for example, several letters at the same time) with one response deadline. The topics raised were problematic and often required consultation with other offices. The deadline for all the letters could not be met while only two people remained on the contracting team. Every time, the contracting team tried to respond as quickly as possible. Nonetheless, the Observer occasionally had to wait several weeks for a reply.

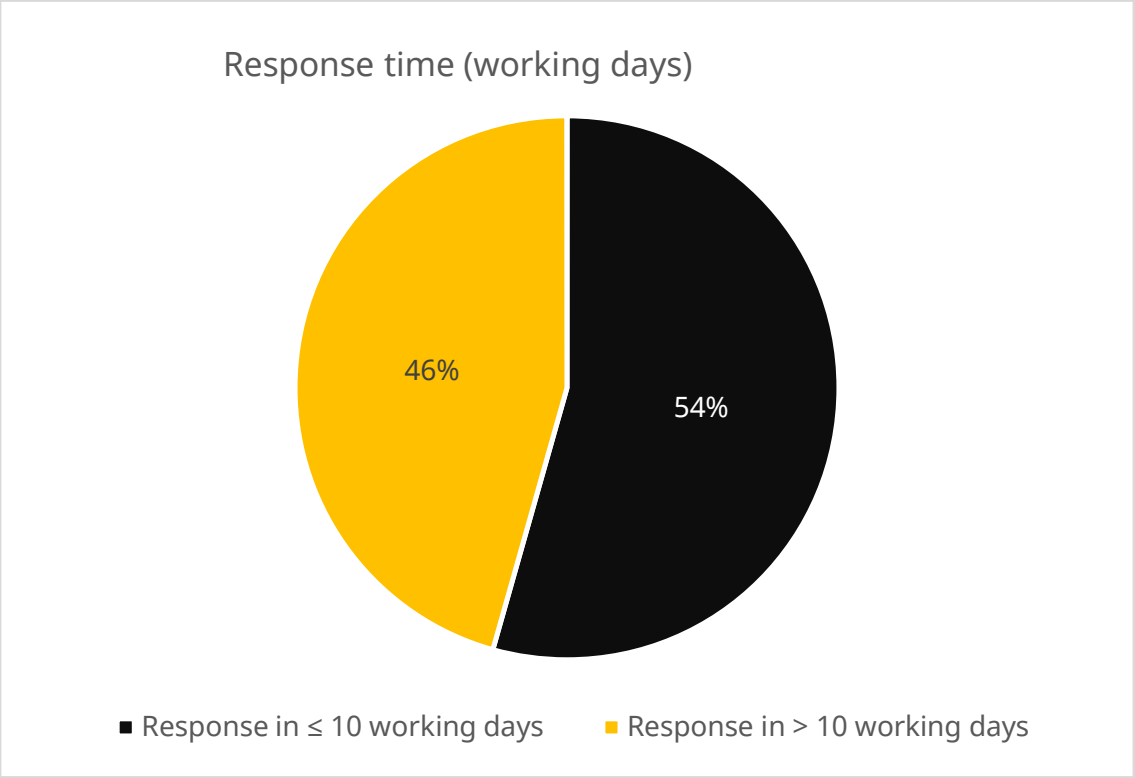


Chart 1. Time waiting for a response to the Observer's letters to the Contracting Authority between 20 January 2017 and 30 September 2021. Source: authors' own statistics.

It should also be mentioned that the Contracting Authority granted the Observer access to a server where it collected contractual documentation on an ongoing basis. This server was used when further documentation was shared.

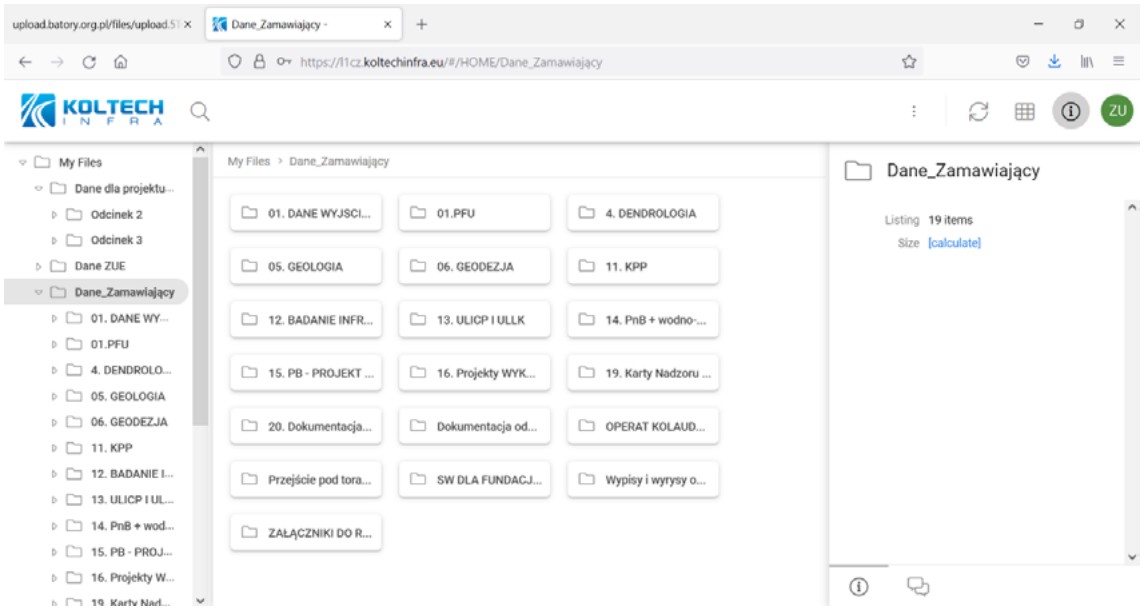


Figure 1. View of the server with contractual documentation. Source: authors' own files.

The consultants' knowledge of public procurement standards and practices helped them interpret the contract documents. Knowledge of FIDIC contractual terms also proved invaluable.

In addition to interpreting documents, the **personal experience of** the individuals carrying out the monitoring plays an important role. By this, we mean the numerous conversations and meetings between the Observer and the parties to the Integrity Pact on various occasions. These included project meetings, such as Tender Committee or Site Council meetings, that the Observer could attend. The Observer initiated an equally large number of discussions. The pilot developed a regular format of meetings between a wide range of Pact stakeholders to discuss it and answer questions. The quarterly discussions, which later resulted in extensive minutes, were an important point of reference when evaluating events during the contract. In addition, the Observer initiated a number of other meetings in smaller groups, focused on specific issues, which provided clarifying comments that had been overlooked in official correspondence. With the introduction of coronavirus-related restrictions, these meetings continued online, which allowed the Observer to participate. This included online Site Council meetings. The Observer started using similar platforms when organising its own internal and public events. This proved very convenient, as the Observer did not operate in the project region on a day-to-day basis, which would have made physical interactions a big challenge.

INTEGRITY PACT IN FIGURES

Over the years, **76 people participated in meetings** discussing the pilot implementation, 20 of whom were involved in developing the content of the Integrity Pact alone.

Additional information that could be highly relevant was routinely provided by Pact stakeholders that were not formally its members, such the Centre for EU Transport Projects or the Ministry of Development Funds and Regional Policy. Former employees of the Contracting Authority's project team also shared their insights. The Observer learned a great deal about the conditions and weaknesses of the procurement process by discussing the topic with industry associations, chambers of commerce and external experts.[7]

The monitoring team's visits to the construction site offered a special experience, which resulted in separate reports for the project website and photo documentation. These visits provided a unique opportunity to talk to people working on the contract, who could only be met there.

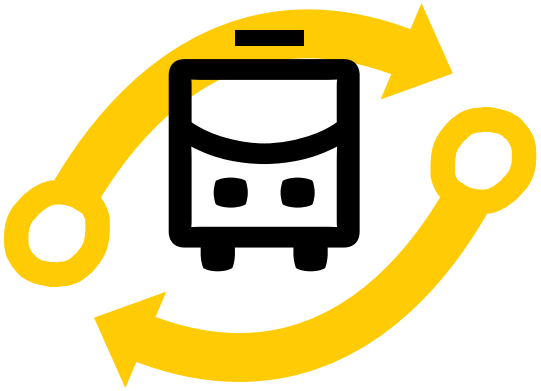
In addition to the information gathered while interacting with the contract parties, the Observer had to remain open to reports from people who were not involved in the contract. A channel for reporting suspected irregularities, similar to the one we launched as part of the Integrity Pact pilot on the project website, is an effective technique. It was a way of communicating with the Observer anonymously available to anyone. Whistle-blowers were able to report information using alternative channels created by the Contractor and subcontractors. These reports were meant to be shared with the Observer under the whistle-blower protection policy. The Observer also requested access to the complaints about the work submitted to the Contracting Authority and the Contractor by residents via official channels.

Meetings organised at the project site with the participation of the local community, local authorities and local media allowed a more open exchange of views on the project. It also enabled representatives of the Contracting Authority and the Contractor to be asked questions reflecting inhabitants' expectations and concerns. This element served to activate the local community. The Observer used it to present the principles of monitoring, how to report cases of abuse, and the risk of them occurring. The meetings also proved to be a valuable source of knowledge about potential adverse actions. Cooperation with local community organisations helped attract more people to the meetings initiated by the Observer. In particular, the Observer counted on involving residents with free time and strong motivation – such as pensioners, passengers and drivers, and people living near the construction site – in the monitoring. Representatives of the Contractor and the Contracting Authority were persuaded to

7 *Procurement monitoring guide: A tool for civil society*, Transparency International-USA 2021, pp. 31–63.

attend the meetings, where they were asked many questions about the progress of the work and the difficulties involved. The questions were answered both at the meetings and in a written follow-up, and were later forwarded to the meetings' participants by the Observer.

INTEGRITY PACT IN FIGURES



In the course of the monitoring, the Foundation's employees and consultants **travelled 25,860 km across Poland**. This is a greater distance than from Warsaw to New York and back.

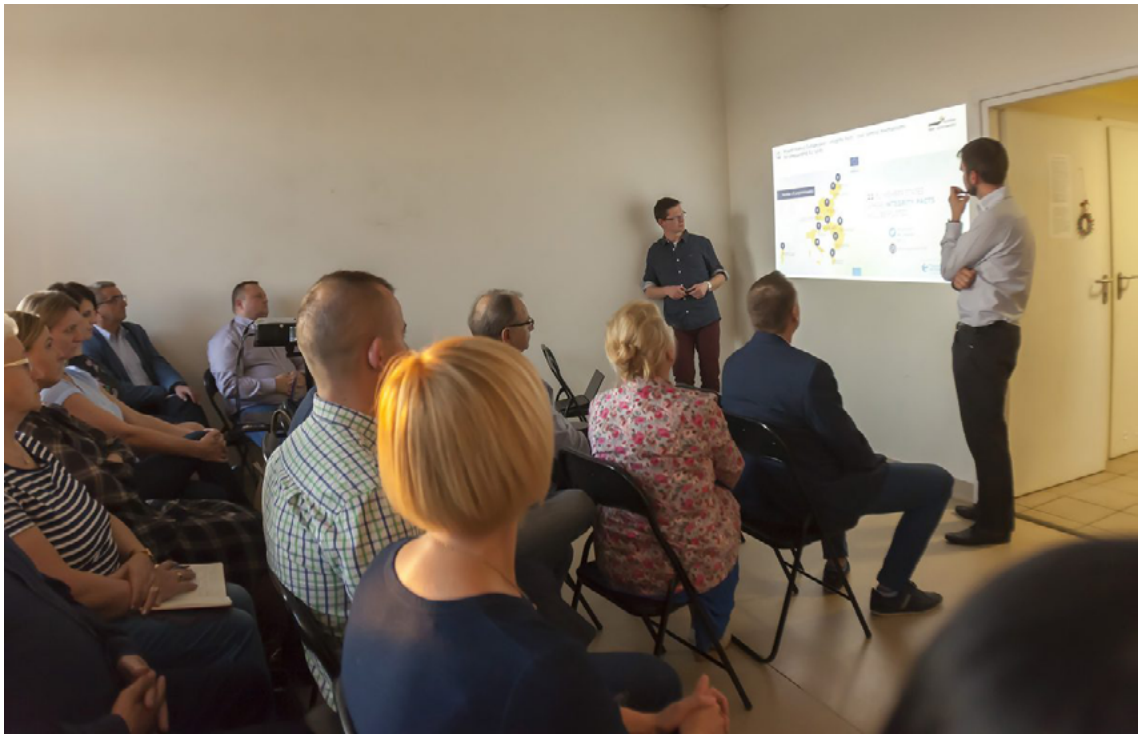


Photo 2. Meeting with Myszków residents on 24 October 2019. Source: https://paktuczciwosci.pl/bez-kategorii/za-nami-spotkanie-w-myszkowie/.

The Internet was also an immense source of information for the Observer. There are communities of people who study infrastructure projects, such as www.skyscrapercity.com. Some of those people share current information about the status of projects, including photographs of construction sites. For the Observer, interacting with these communities was extremely valuable, because some of their members have a high level of technical expertise on construction projects and are able to spot project shortcomings that could affect end users.

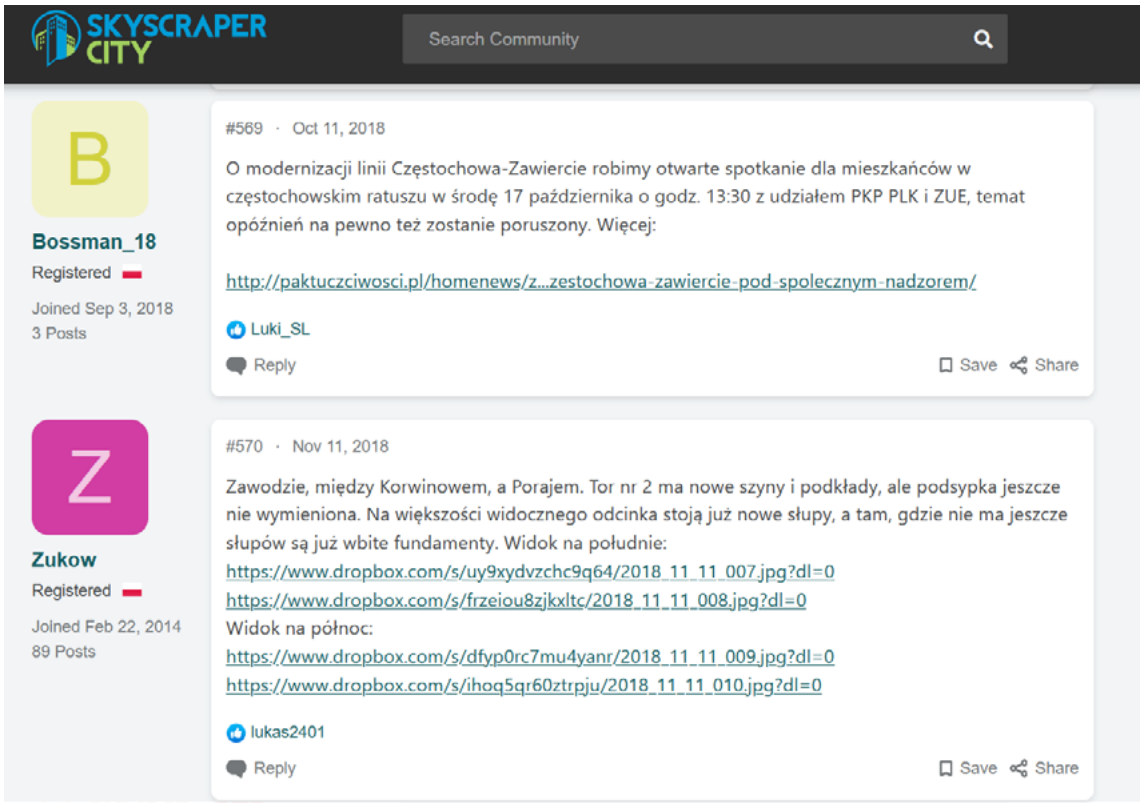


Figure 2. Screenshot from the skyscrapercity.com Internet forum. Source: authors' own files.

It should be emphasised that, despite everything, the Contracting Authority and the Contractor are often the fastest to signal activities that do not comply with the contract. **It would be worth ensuring that the obligation to report abuses, irregularities or suspicions thereof to stem directly from the Integrity Pact rules. This is what happened, as – by implementing the whistle-blower protection policy – both the Contracting Authority, based on an agreement with the Observer, and the Contractor took on the obligation to notify the Observer directly about disturbing events that had come to their attention.**

Observation Techniques and Resource Management

Monitoring was conducted on an ongoing basis during the Integrity Pact pilot. Essentially, the Observer followed the actions of contracting parties at all times. However, the Observer was largely limited to following the project files and records, and its reactions to steps and decisions made by contracting parties were delayed. Nevertheless, in its direct interactions with the Contracting Authority and the Contractor, the Observer was able to raise the contracting parties' awareness of the risks and to present recommendations for solutions in challenging cases before they were adopted. These recommendations were mainly offered to the Contracting Authority.

No single monitoring technique is universal and applicable to every situation. Discussions with technical and legal consultants, reviewing contract audit and oversight guidelines applied by other Polish and international institutions, or techniques recommended by international organisations, such as the World Bank or the OECD, suggest that, while contracts are generally similar, they must be assessed on an individual basis. The choice of specific techniques also results from the powers granted to the Observer as part of the Integrity Pact, legal conditions, available sources of knowledge and the monitoring team's competence. The following techniques were used in the Integrity Pact pilot:

1. **Analysis of information describing the general framework of the procurement process** (if produced by participants), such as schedules, information on project-management systems and lists of necessary documents;
2. **Analysis of documents** or, where possible, draft documents relating to specific decisions by the contract participants;
3. **Ongoing analysis of correspondence** between project participants, normally sent to the Observer;
4. **Analysis of documents relating to payments and settlements** funded from the implementation of the contract;
5. **Formal written submissions from the Observer to contract parties** with questions about specific situations, decisions and events during the course of the project;
6. **Participating in committees set up by the Contracting Authority, such as tender or negotiating committees**, where the Observer can voice its opinion;
7. **Observing and documenting the coordination meetings, Site Council meetings** and other relevant regular and extraordinary coordination meetings between contracting parties on the monitored project;
8. **Verifying progress during site visits**;
9. **Attending regular meetings organised by the Observer with the Contracting Authority and the Contractor** on the implementation of the Pact;
10. **Individual interviews with stakeholders** who have a relationship with the parties to the Integrity Pact, such as contractors wishing to tender or operate in a particular industry.

These techniques worked best when applied in parallel. It turned out that it was worth asking and repeating the same questions about the basic issues for each partner separately, at different stages of the contract, and in different forms; correspondence, meetings or telephone conversations. The answers we received were not always the same but, over time, we were able to identify misunderstandings, inconsistencies or statements indicating that one party was trying to present the circumstances of the case in a favourable light.

The Observer should be informed by the parties to the Integrity Pact about new contractual correspondence. It would be very helpful if the Contracting Authority were to create special lists of documents for this purpose. However, there were cases when representatives of the PKP PLK S.A. contracting team were unaware of the current status of documentation; for instance, because they had not received documents and information obtained by the Contractor from public administration bodies, which were only circulated between the Contractor and the Engineer, or were sent or addressed to a unit or level other than the Contracting Authority's operational one. In any case, the Observer aimed to at least be aware of all the files and records, so that it could realistically assess which ones to examine in detail. Being aware of one's own limitations led to the question of how to select the material for monitoring activities. In principle, there were three possible approaches, and each of them was followed in part:

- **Targeting:** the Observer and its consultants reviewed the list of documents and selected specific documents for in-depth analysis. The selection of documents was occasionally inspired by the contract stakeholders. In particular, the Contracting Authority may ask the Observer for an opinion pursuant to the Pact, but others – including parties not directly linked to the contract or whistle-blowers – can make suggestions as well.
- **Systematic selection**: carried out based on precise criteria for selecting documents or draft decisions, decisions, applications, and so on, which should be automatically subjected to analysis. They can be defined by the monetary value associated with a decision, the subject of the decision (such as the work mode), the time (for instance, the periodic review of a selected type of documents), and so on. When selecting specific documents, a size (e.g. documentation from the negotiation of work worth over PLN 100,000) or time threshold (e.g. letters concerning a change in the scope of work lasting more than 50 days) can be used.
- **Random selection**: from lists of documents or other collections, the Observer may also select the documents to be examined within a given period in this way.

The consultants were actively involved in selecting points of interest for the Observer. They would fill out a "risk table" containing sensitive issues and then each of the consultants would assess the gravity of perceived risk in the issue at hand and recommend whether the Observer should mobilise additional resources to address it.

Potential Risks	Case Status	Type	Source of Information	Risk Assessment	Grounds for Assessment
Contractor's claim, revision of schedule, change order, additional work	Accepted by the Contracting Authority, rejected by the Project Engineer	Claim/ amendment of contractual terms/ payment/ price negotiations	Correspondence/ meeting minutes/Site Council/legal opinion	1. A real threat that requires observer action. 2. Not a potential threat. 3. Hard to tell, the case should be further examined.	

Table 1: Risk register for the monitored project. Source: authors' own files.

When planning consultants' work, especially with a limited budget, it is worth bearing in mind that there will be times of intense activity for the Observer during the project and times when there is much less work. The experience of the Integrity Pact shows that the late phase of the project, when construction work is advanced or ready for acceptance, is particularly demanding. In our case, this was a period when we were in particular need of technical consultants' support. In addition, the preparation of the two monitoring reports, which were issued in 2020–2021 with support from consultants, proved to be extremely time-consuming.

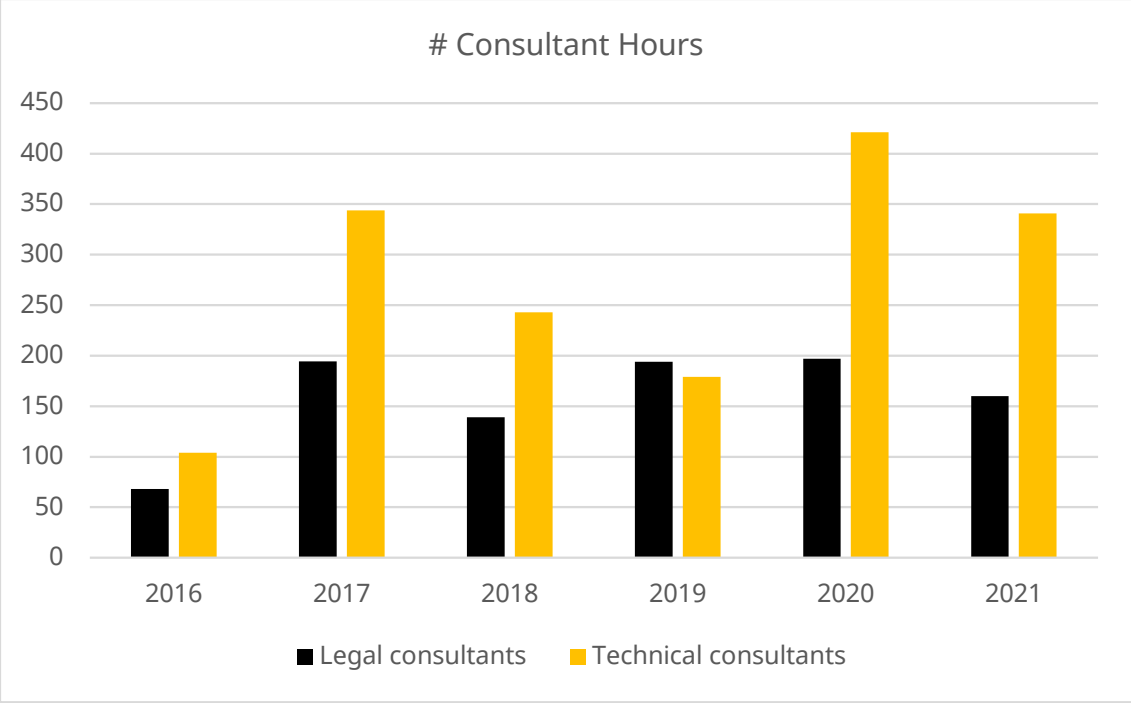
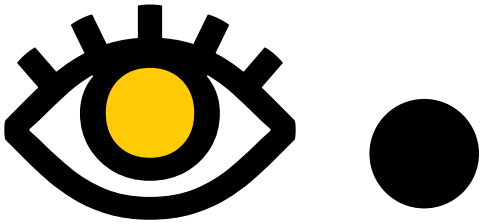


Chart 2: Hours worked by consultants, based on service acceptance sheets for December 2016 – September 2021. Source: authors' own statistics

Labour costs for specialists are the most serious item in the Integrity Pact budget. If they are particularly sought-after on the market, such as railway engineers, it is very difficult for the Observer to recruit them and retain them throughout the entire multi-year project. During the 1,752 days when consultants took part in the monitoring, the expenses for legal and technical specialists amounted to PLN 101,861 and PLN 243,709, respectively. On average, the Observer spent PLN 58 per day on legal consultants and PLN 139 per day on technical consultants. The gross rate per hour of work paid to legal consultants was PLN 97.17; for technical consultants, it was PLN 172.

INTEGRITY PACT IN FIGURES



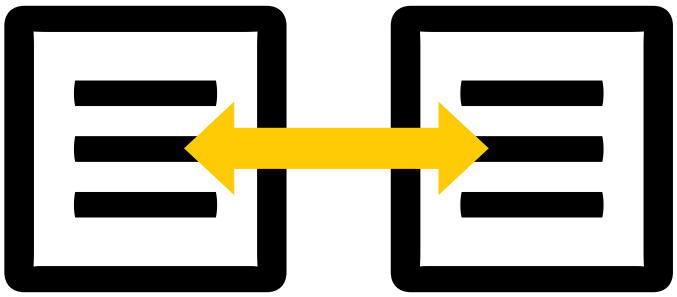
The total cost of monitoring amounted to **PLN 1,246,784**. By comparison, the contract between the Contracting Authority and the Contractor cost PLN 457,043,400, and the contract for investment supervision PLN 11,750,647, so **the cost of the five-year-plus integrity pact is less than 0.3% of the value** for the execution of works and engineering supervision.

Documenting the Monitoring Process

For monitoring to be carried out transparently, it must rely on a specific system for reporting the results of the monitoring team's work. The starting point for this type of communication was the preparation of channels for sharing information about how the monitoring was progressing; first of all, via its own website.

We published our monitoring records – including minutes of meetings, regular reports and summaries – regularly at pactuczciwosci.pl. In the Pact pilot in Poland, they included monthly monitoring reports submitted by consultants, along with financial reports. Relevant information was further processed and converted into recommendations submitted by the Observer, a log of information received and recorded irregularities. This processed information was shared with Transparency International-Secretariat and, indirectly, with the European Commission.

INTEGRITY PACT IN FIGURES



The Foundation and the Pact partners **exchanged 142 letters totalling 306 pages**. This is almost as many as in the Public Procurement Law.

When publishing content on the project website, the Observer followed the principle that all correspondence sent by or addressed to the Observer should be posted there, as long as it does not violate business secrets or other legally-protected information. This is because it provides a record of the monitoring history and contains many important findings for the project.

4. Relationship between the Observer and the Contracting Parties

Before we move on to discuss the key problems identified by the Observer, it is essential that one indisputably positive outcome of the pilot project be highlighted clearly. The fact that it was possible to design, launch and implement an Integrity Pact and to maintain it almost until the end of the project, for over six years, is in itself an achievement of all parties involved: PKP PLK S.A., ZUE S.A, the Project Engineer and the Managing Institution (at the time this report was completed, it was the Ministry of Development Funds and Regional Policy). The following chapters are mainly devoted to the problems encountered by the Observer during the monitoring. Nevertheless, the report's authors wish to make it clear that they appreciate the constructive involvement of all the parties. Without it, the project could not have been carried out or it would have ended prematurely. It is worth stressing the primary goal of the Integrity Pact, as expressed directly in the Observer's agreement with PKP PLK S.A.: to contribute to creating the contracting authorities' and contractors' good reputation. It is no coincidence that in 2019 the European Ombudsman awarded the European Commission's DG Regio

Integrity Pacts initiative for building cooperation between civil society organisations, public institutions and business to combat corruption in tenders.[8] A unique feature of the Integrity Pact recognised by the pilot participants is how it creates a space for dialogue and enhances mutual trust between contracting parties.[9]

The Observer did not embark on the monitoring phase with the attitude that it was dealing with entities motivated by bad will or more prone than others to commit criminal or corrupt acts (this conviction remained unchanged, even at the end of the pilot project). On the contrary, from the very beginning, the Observer tried to convince partners that participation in the Integrity Pact's first pilot was a kind of ennoblement for its participants and a chance to present themselves to the public from the best possible side. Sometimes, cooperation between the Integrity Pact partners came up against significant obstacles when the Observer was convinced that the proper implementation of the project and the public interest was threatened. This happened in the notified work or the unfinished underground crossing in Poraj, described elsewhere in the report. The crises were accompanied by reshuffles in the PKP PLK S.A. team, which meant that the Observer had to meet the team again and again, so to speak. However, it should be stressed that, at the "operational" level, the PKP PLK S.A. team always made sure that the Observer's requests were met and communication was generally smooth. Relations with the Contractor were put to the test when the Observer presented its opinion on the issuance of the Work Taking-Over Certificate by the Engineer and on the final acceptance certificate signed by ZUE S.A. The Observer questioned both documents' validity. The allegations of conflict of interest raised against the Observer in response to the opinion are described in more detail in Subsection 6.2.

However, friction between the parties to the Pact was unavoidable, given that the undertaking's very essence is identifying errors made by different parties to the process. However, it is worth appreciating the fact that – despite disputes, conflicts and misunderstandings – none of the partners participating in the Integrity Pact ever sought to break it. This meant that the monitoring ended when the whole pilot project ended. Nevertheless, it is worth supplementing this picture of uneasy relations with that of best practices in the Observer's cooperation with the Contracting Authority, the Contractor and the Ministry, of which there are many examples collected over the course of almost six years.

Both the ZUE S.A. and the PKP PLK S.A. contract team were involved in observer activities addressed at the local community. At meetings in Częstochowa, Słowik and Myszków, they interacted with inhabitants, answering questions about the difficulties the latter faced in connection with the construction work. Informed by the Observer of residents and councillors' dissatisfaction with the unfinished Poraj crossing, representatives of PKP PLK S.A. adopted accelerated measures to solve the problem[10] and presented them at a meeting organised by the Observer.

The Pact's partners were also present at seminars organised by the Observer for public procurement market participants, which addressed issues relating to the problems highlighted by civic monitoring. They demonstrated their commitment to the aims of the Integrity Pact by also speaking at

8 *Ombudsman awards Integrity Pacts as excellence in the field of open administration*, https://ec.europa.eu/regional_policy/en/newsroom/news/2019/07/07-01-2019-ombudsman-awards-integrity-pacts-as-excellence-in-the-field-of-open-administration [accessed: 11 August 2021].

9 M. Szymański, *Fight Against Fraud in the EU Funds. Tools Used in European Funds Spending – Part II*, "Kontrola Państwowa" ("State Auditing"), Issue 4 (July–August 2021), p. 88, https://www.nik.gov.pl/plik/id,24743.pdf [Accessed: 11 February 2022].

10 See letter from PKP PLK S.A. to the Foundation of 23 August 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Fundacja-dot.-przejscia-podziemnego-w-stacji-Poraj.pdf [accessed: 30 September 2021].

international events organised by Transparency International in Brussels and Bucharest. They hosted the delegation of Latvia DELNA, Transparency International 's Latvian partner, and shared their opinions on the pilot itself.[11] Finally, they also took part in the evaluation of the Integrity Pact.[12]

When it came to promoting the project and communication, PKP PLK S.A.'s press service collaborated with the Observer by including information about the Integrity Pact in their press releases. The Observer also cooperated directly with the company that won the PKP PLK S.A. tender for promotional and information activities. Many trade and local portals later used this information and shared it on their websites. In addition, references to the Integrity Pact, including the project website, were included in the company's leaflets describing the scope of the railway line upgrade.

Figure 3. PKP PLK S.A. leaflet on the project. Source: https://multimedia.plk-sa.pl [accessed: 26 November 2021].

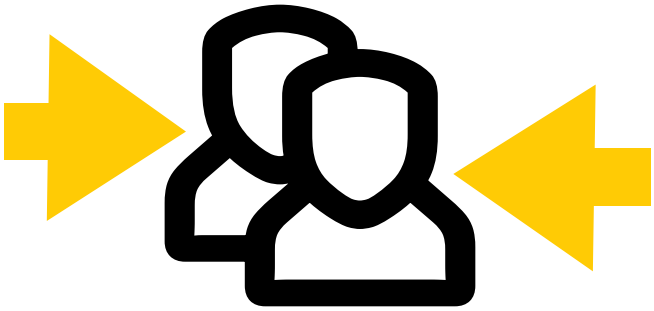
An extremely important achievement of the Integrity Pact was to encourage ZUE S.A. to develop its internal ethical infrastructure and culture of integrity. In the previous monitoring report, we already described how it came about that the signatory of the agreement with PKP PLK S.A. was obliged to adopt its own whistle-blower protection policy. However, it should also be mentioned that the company did not stop at the mere obligation to implement the legislation, which, thanks to the template developed earlier by the Observer, was ready to be adopted from the very start of the contract. However, the Contractor did not delay the implementation of this obligation, either. Earlier, the Contractor's

11 See *Pakt uczciwości na Łotwie*, https://paktuczciwosci.pl/aktualnosci/pakt-uczciwosci-na-lotwie/ [accessed: 12 August 2021].

12 M. Dudkiewicz, *Evaluation of the Integrity Pact Pilot. Final Report*, Stefan Batory Foundation, Warsaw 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/12/ENG_Pilotaz-Paktu-Uczciwosci.pdf [accessed: 8 November 2021].

representatives consulted the Observer about what they considered the biggest challenges of adopting the legislation. The Observer provided the Contractor with detailed information on the retention of data from whistle-blower reports. ZUE S.A. Management launched a process to develop the whistle-blower Protection and Ethics Management Policy. Initially, it only covered the monitored contract. It became part of ZUE S.A.'s Ethical Management Policy, along with other anti-corruption standards on conflict of interest or the acceptance of gifts. The policy became mandatory throughout the company in 2019.[13] The Contractor also consulted the Observer and the latter offered its comments on the draft Policy.[14] To educate its employees about the new legislation, ZUE S.A. also asked the Observer to conduct a training course on preventing corruption in public tenders. The pandemic-related lockdown prevented the course from being held.

INTEGRITY PACT IN FIGURES



Since the launch of the Integrity Pact, **141 meetings** with the monitoring parties and 13 external meetings took place, totalling 231 hours, i.e. almost one and a half months of work.

It is also worth noting the contribution of the Managing Authority of the Operational Programme Infrastructure and Environment (I&EOP), which, while not formally a party to the Integrity Pact, played an important role in stabilising the pilot process. The Ministry supported the Observer on many occasions. Its representatives often took the floor, promoting the concept of the Integrity Pact at events organised by the Foundation and Transparency International. They also gave the Foundation's representatives an opportunity to talk about the results of the pilot project, hosting them at a special seminar for the beneficiaries of the funds and the institutions that audit expenditures.[15] In a questionnaire addressed to I&EOP beneficiaries, they asked about their readiness to join this kind of initiative.[16] First and foremost, the Ministry's involvement in the entire project led to opportunities to expand the field of implementation for Integrity Pacts in the EU multiannual financial framework for 2021-2017, at least as regards the Operational Programme Infrastructure and Environment. In this matter, the officials consulted the observer's representatives, who, at the Ministry's request, checked among

13 See letter to Vice President of ZUE S.A. dated 14 August 2019, https://paktuczciwosci.pl/wp-content/uploads/2019/07/Sz.P.-M.-Nowak_14.08.19.pdf [accessed: 12 August 2021].

14 *Ibid.*

15 *Pakt uczciwości w nowym POIiŚ? Bardzo możliwe!*, https://paktuczciwosci.pl/aktualnosci/pakt-uczciwosci-w-nowym-poiis-bardzo-mozliwe/ [accessed: 12 August 2021].

16 *Raport z ankiety na temat przeciwdziałania i zwalczania nadużyć finansowych w wydatkowaniu środków UE*, https://www.funduszeeuropejskie.gov.pl/media/100311/2021_04_15_raport_z_badania_fraud.pdf [accessed: 12 August 2021].

others, the rules of the competition for organisations wishing to be involved in the social monitoring of procurement in the future.[17]

The report on the Integrity Pact pilot project in Poland should not be perceived as a criticism of one or another party involved in this undertaking. Rather, it is first and foremost an attempt to convey knowledge about how public procurement may proceed, how the process can be improved, what mistakes to avoid, and the potential for civic monitoring during these undertakings.

17 Conference: "Integrity Pact pilot in the European Union. Results and perspectives. Discussion panel: Integrity Pact in Poland. What have we learned about the Pact and public procurement?, 23 November 2021, https://www.youtube.com/watch?v=fI2jSoysw5E&t=4353s [accessed: 11 February 2022].

5. Key Findings

5.1. Challenges during the Procurement Phase

5.1.1. Contract Price Adjustment Inadequate to Price Increase

Problem Description

In November 2017, the Contractor filed a *force majeure* claim of restricted availability of goods, means of transport, equipment and labour.[18] The claim was filed by the Contractor more than four months after the contract was signed. The Contractor cited an extraordinary increase in the price of delivering the construction contract, which could not have been foreseen during bidding. The Polish economy was reacting to a combination of developments unfavourable to contractors, including the lowering of the retirement age, an increase in the minimum wage, the introduction of anti-dumping duties on steel, and the skilled labour shortage. What also mattered was the size of Poland's National Railway Programme (NCP): the number of railway projects launched at the same time pushed the price of services and materials upwards. For example, the price of ballast gravel (including transport), which is widely used in the railway industry, reportedly increased by 30% within a very short period of time, just a few weeks after the contract was awarded. The Contractor referred to Sub-Clause 19.1 of the Contract Conditions, which defines *force majeure* as any exceptional event or circumstances beyond a party's control (1), the party cannot reasonably protect itself against it before entering into the contract, (2) if it occurs, it cannot be avoided or overcome, and (3) it cannot be attributed to the other party (4). Examples of these kinds of events listed in the FIDIC include war, riots or natural disasters, but also, according to the Contractor, a change in economic relations on an extraordinary scale.

This increased demand for materials, goods and services would not have limited their on such a scale had it not been for the momentum of the increase in the number of procurement contracts executed as part of the NCP. The 2018 Programme Report acknowledges that the accumulation of modernisation work on railway lines has fuelled demand for construction services. The delayed start of the Programme led to pressure to launch even more tendering procedures at the same time. Reduced capacity on rail routes resulting from the increasing frequency of repairs limited the ability to transport aggregates. The aforementioned report noted the risk that companies that historically began contracts at prices significantly lower than they are today would start complaining about the contracts' profitability and request that they be adjusted for inflation.[19] This scenario materialised even sooner in the monitored contract.

At the tender stage, ZUE had to defend itself against accusations of an abnormally low price formulated by another bidder, which concerned part of ZUE's valuation of the construction of noise barriers. At the time, the tender committee accepted the Contractor's explanation that the screens would be installed if the alternative solutions did not turn out to be effective according to FUP, and only to the extent really needed. The Contracting Authority decided that there were no grounds to reject the offer for this reason, and this position was also presented in the National Appeals Chamber. After the contract had been signed, ZUE S.A. continued to defend the price stated in its bid, claiming that it

18 Letter from PKP PLK to the Foundation dated 24 January 2018, https://paktuczciwosci.pl/wp-content/uploads/2019/07/Pro%C5%9Bba-PKP-PLK-w-sprawie-roszczenia-5_24.01.18.pdf [accessed: 7 August 2021].

19 *Sprawozdanie z wykonania planu realizacji Krajowego Programu Kolejowego do 2023 roku za rok 2018*, p. 18, https://www.gov.pl/web/infrastruktura/krajowy-program-kolejowy [accessed: 30 September 2021].

corresponded to costs at the time, took into account standard risks connected with price fluctuations, and moderate profit for the Contractor.[20]

SYSTEMIC RECOMMENDATIONS

Contracting authorities should continuously **monitor contracts** for the risk of increases in the prices of labour, services, materials and related claims.

Admittedly, the cost of installing screens was not a significant part of the PLN 457 million bid offer presented by the company. Appealing against the tender committee's decision, the applicant claimed that installing screens could cost PLN 7.5 million, although, in its bid, it was valued at "just" PLN 4 million. Even assuming the former, probably overestimated value, and adding it to the price of ZUE's bid, it would still be significantly lower than competitors' offers. The discrepancies illustrate the problem: in such a formula, contractors have considerable scope to lower their bid price without having to justify the reductions. Contracting authorities find it hard to assess whether or not an abnormally low price is being applied in these cases.

RECOMMENDATIONS REGARDING PUBLIC PROCUREMENT

Concerns regarding abnormally low prices of bids submitted by contractors **should be examined by independent experts**.

20 *Minutes of Special Meeting on Analysis of Contractor's Claim Regarding Restriction on Availability of Goods, Transportation, Equipment, and Labor in the Rail Market*, dated 21 June 2018, https://paktuczciwosci.pl/wp-content/uploads/2018/07/Notatka-Spotkanie-Specjalne-21.06.2018.pdf [accessed: 05/08/2021].

Assuming that objective economic conditions gave the Contractor grounds to lodge claims for contract inflation adjustment, separate analysis was required to determine whether there were grounds to consider ZUE's bid price risky. Firstly, the price proposed by ZUE was significantly lower than that of the three competing bids, including over PLN 70 million lower than the second-lowest bid, submitted by Torpol. Secondly, as shown by the dynamics of changes in the construction market, price increases for construction materials could be seen in both Q2 and Q3 2017.[21] However, information later obtained from the Contractor on the prices of specific materials needed for the railway infrastructure, such as broken aggregate and ballast, indicated that these started to increase the most after the contract was signed, in Q4 2017 and Q1 2018. In the end, the Observer's representatives on the tender committee deemed the explanations concerning the valuation of the screens submitted by the Contractor sufficient.

At meetings with the Observer in 2018, ZUE S.A. representatives argued they were unable to foresee the price hike upon bidding.[22] If this had been possible, the winning contractor might have not signed the contract, especially after the bid binding period of 90 days had expired.[23] However, the Contractor maintained that its bid corresponded to the actual cost of the job between 10 March and 20 July 2017. It actually presented Sekoncenbud statistics that recorded radical price increases for the materials most applicable to the project only from Q4 2017. Naturally, the launch of the National Railway Programme in 2016 increased the demand for railway-related materials and services. This is also reflected by the percentage of bids that exceeded PKP PLK S.A.'s budget, which increased in 2017 by 34 percentage points compared to the previous year, to 51% of all submitted bids.[24]

The sudden unexpected increase in the cost of railway contracts began to receive publicity in trade publications. Foundations, associations and institutions with an interest in civil engineering, entrepreneurship (such as the National Road Construction Chamber of Commerce, the Land Transport Chamber of Commerce and the Federation of Polish Entrepreneurs) and financial entities engaged in the construction process – for instance, by providing performance bonds for contracts – also became involved in the issue at the end of 2017.

In addition, the Contractor argued that the clauses on adjustment in the contract, which state that it can submit a request for adjustment covering the last four quarters from the date of the request if the SP index for capital goods increases by at least 2% on average during that period, are a sham. This is because the index covers too wide a basket of goods, instead of being limited to those actually used in railway projects. The president of the Land Transport Chamber of Commerce (IGTL) called inflation adjustment using SP indices a "sham".[25] During a meeting with representatives of the Observer, the

21 *Dynamika cen na rynku budowlanym w latach 2017–2018. Raport Gleeds Polska*, pp. 12–15, https://pl.gleeds.com/globalassets/news--media/publications/dynamika-cen/2019_04_dynamikacen_raportgp.pdf [accessed: 9 August 2021].

22 *Minutes of special meeting on analysis of the Contractor's claim of reduced availability of goods, means of transport, equipment and labour in the rail market*, *op. cit.*

23 These kinds of cases occurred later in the construction market. For example, the consortium that won the contract for the construction of a tunnel in Świnoujście pulled out of the deal as a result of the sharp increase in construction costs, which would have caused the Contractor to the finish the project with a loss, https://www.gospodarkamorska.pl/porty-logistyka-problemy-z-budowa-tunelu-w-swinoujsciu-wykonawca-wycofal-sie-z-podpisania-umowy-32621 [accessed: 14 September 2021].

24 Report *Analiza zmiany kosztów realizacji kontraktów budowlanych w ramach modernizacji sieci kolejowej w latach 2016–2018 with z komentarzem prawnym kancelarii Jara Drapała & Partne drafted for the Land Transport Chamber of Commerce*, 3 October 2018.

25 IGTL letter to the Batory Foundation, 10 September 2018, https://paktuczciwosci.pl/wp-content/uploads/2018/09/Pismo_IGTL-10.09.18.pdf [accessed: 13 August 2021].

president of ZUE S.A. demonstrated that this index has a significant methodological defect, as it is based on contractors' sales reports, rather than cost reports. The SAO report on contracts for railway infrastructure confirmed that the inflation adjustment clauses used by PKP PLK S.A. in 2016–2019 actually made it impossible to adjust the value of contracts, despite a clear increase in prices for construction materials during that period.[26]

Another measure aimed at reducing problems related to the increase in the cost of railway projects was the advance purchase and storage of materials by PKP PLK S.A. during the design phase to secure their supply. It is difficult to estimate whether the scale of the problem of reduced access to materials would have differed significantly without these measures, as there is no evidence based on empirical data. This solution was adopted in the monitored contract, yet the Contractor complained that the supply of network materials had halted. However, according to industry representatives such as IGTL, the Contracting Authority's efforts did not have the expected effect, as they made it possible to reserve materials to be used in the work over several months, but limited access to supplies for ongoing projects.[27]

Response to the Problem

The Observer addressed the issue of inflation adjustment at PKP PLK S.A.'s request. Referring to the provisions of the Integrity Pact, the Project Director asked it in January 2018 to issue an opinion on ZUE S.A's notification of claim No. 5 on the limited availability of goods, means of transport, equipment and labour. The request was motivated by the fact that the issue touches on a problem that goes beyond a single contract, which is of great importance for purchasing practice and the public interest.[28] Following this request, the Observer initiated a dialogue with the Contractor and the Contracting Authority to mitigate the negative impact of the inflation adjustment claims on the implementation of the contract. While presenting its own assessment of the problem[29] at PKP PLK S.A.'s request, it pointed out that the applicable value-adjustment index was not helpful and that a dedicated index for the railway sector must be developed by SP. In its opinion, the Observer stated that it did not believe that contractual inflation could be adjusted for on the grounds of *force majeure*. It did notice a statutory premise on an extraordinary change in relations, though, which opened the way to inflation adjustment in court. This is possible pursuant to Article 357 of the Civil Code, which stipulates the *rebus sic stantibus* principle; that is, the influence of external circumstances on contractual obligations. It may protect the Contractor against the risk of loss when the circumstances leading to it could not have been foreseen. In addition, there is Article 632 Paragraph 2 of the Civil Code, which enables the rate of performance to be changed or even the contract to be terminated if both parties – at the time when the agreement was signed – did not foresee that its completion could involve excessive difficulties or a gross loss for one of the parties. In both cases, only a common court of law can revaluate a contractual relationship. Of course, the parties can avoid court proceedings by reaching a compromise and amending the terms of the contract in relation to the contents of the bid with an appropriate appendix. According to the Public Procurement Law, this is permissible under certain conditions, which require separate

26 Inspection Findings: *Zabezpieczenie interesu Skarbu Państwa w zakresie waloryzacji i solidarnej odpowiedzialności inwestora w umowach na realizację obiektów infrastruktury liniowej*, Warsaw 2021, p. 25, https://www.nik.gov.pl/plik/id,24698,vp,27446.pdf [accessed: 30 September 2021].

27 Letter from IGTL to the Batory Foundation of 10 September 2018, *op. cit.*

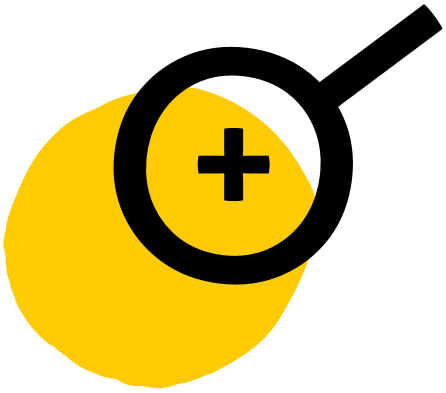
28 Minutes of the 1st Quarterly Meeting (Częstochowa, 14 March 2018), https://paktuczciwosci.pl/wp-content/uploads/2018/07/Notatka-Spotkanie-Kwartalne-14.03.2018.pdf [accessed: 13 September 2021].

29 Stefan Batory Foundation analysis of claim 5, 27 April 2018, https://paktuczciwosci.pl/wp-content/uploads/2018/07/Analiza-i-opinia-prawna-nt.-roszczenia-nr-5-Wykonawcy.pdf [accessed: 13 August 2021].

analysis. In its opinion, the Observer also pointed out that, in the case of a project financed using EU funds, one must be particularly careful to avoid any actions that might be considered a breach of the principle of fair competition and equal treatment of contractors. Accepting a contractor's claims for inflation adjustment shortly after its selection, solely based on a lower-price bid, could be viewed as discriminatory by its competitors.

It was difficult for the Observer to decide unequivocally whether the Contractor really could not have foreseen the circumstances that significantly changed the terms of the contract at a time when the PLN 76 billion National Railway Programme had already been underway for months and the boom in railway projects had become a fact. However, it was not the Observer's objective to answer this question; rather, it wanted to present the risks connected with accepting or rejecting the Contractor's claim. The Observer pointed out in its opinion that lack of agreement with the Contractor could result in its subcontractors' bankruptcy, which raises questions about the work's continuity. Moreover, rejecting the claim entails long and costly litigation for damages, which the Contracting Authority may lose. Accepting the claim would have created a precedent, which would mean that similar claims could be accepted in other Design and Build infrastructure projects. If this were to become common practice, it could cause a chain of events with unpredictable systemic consequences for the entire market and the eligibility of EU funds.

SYSTEMIC RECOMMENDATIONS



A more open and competitive market can be ensured by increasing access to materials and equipment, **after evaluating the procedures** for admitting foreign manufacturers and suppliers to the Polish market.

The Observer called on the contracting parties to engage in dialogue in the spirit of the FIDIC standards, which could help identify the risks to the contract associated with price spikes for materials and services, and formulate solutions to the problem, such as a different way of sharing risk between the parties to protect the public interest. The Observer also declared that it was willing to continue to participate in discussions on this topic. In June 2018, the Observer also hosted one of the meetings between the contracting parties to discuss the inflation adjustment of the monitored contract.[30] The Observer further noted the need to develop a unified position on these kinds of claims by contractors appearing in other PKP PLK contracts, with the participation of producers, suppliers, the Investment Forum, industry associations and institutions. The Observer also received voices from the industry, such as the speech of the president of the Land Transport Chamber of Commerce in September 2018,

30 Minutes of the special meeting on the analysis of the Contractor's claim on the limited availability of goods, means of transport, equipment and labour in the railway market dated 21 June 2018, *op. cit.*

who pointed out that the contracts concluded in 2016–2017 are becoming increasingly scarce, from contractors' perspective, as a result of the rapid increase in the price of materials, transport, labour and subcontracting services. The industry therefore insisted on solutions that would work retroactively, not only in relation to contracts that are yet to be signed. According to data cited by ZUE, in December 2016 – November 2017, this problem affected at least 90% of railway contracts between companies and PKP PLK.[31]

In addition, the Observer decided to meet the Contractor's expectations and understand the EU institutions' position on the price crisis in the infrastructure market while working in a project initiated by the European Commission's DG Regio. It sent the Commission queries asking whether settlements in disputes over inflation adjustment were as acceptable as court rulings and what the acceptable level of modification was in price-adjusted contracts. The Observer did not receive an official and specific reply that it could to pass on to the Pact partners and include in this report.

The problem of inflation adjustment revealed other systemic shortcomings in the sector, which caused the costs of contracts to rise even faster than anyone could predict. One such problem is the restricting producers and suppliers admitted to the Polish market and the protracted procedures for certifying their goods. Access to materials such as turnouts, ballast, rails or sleepers is therefore limited by definition, and their producers are dependent on the market regulator's decisions. Another serious challenge is the shortage of qualified staff with appropriate seniority and experience, which PKP PLK usually sets as a condition for participation in tender procedures. It is no coincidence that, among the reasons for the increase in labour prices, contractors cited the lowering of the retirement age in Poland, which has resulted in older specialists leaving the market. Meanwhile, there is a shortage of younger staff with similar qualifications and authorisations who could replace them.

SYSTEMIC RECOMMENDATIONS

Market regulators and public policy makers **should train a new pool of rail industry professionals** and increase opportunities to develop competences and gain experience.

The Contracting Authority's approach to inflation-adjustment claims did not differ substantially from the practice adopted in other construction projects. A report on construction disputes in Poland revealed that the underlying cause was an increase in project costs, and that the dominant reaction to

31 *Ibid.*

them was… no reaction at all.[32] According to survey respondents, disputes are usually not resolved while the contract is being implemented, mainly for fear of accountability (or even criminal responsibility) for such decisions.[33] The most popular dispute-resolution techniques, albeit not the most effective ones, according to some respondents, include litigation in a common court and the wait-and-see approach. Amicable dispute-resolution methods are used much less frequently. However, some respondents believe negotiations between the parties bring better results. So does mediation. Scepticism about the use of alternative dispute-resolution techniques (ADRs) with regard to inflation adjustment was clear in comments made by the Integrity Pact partners.[34] However, even though decision-makers believe ADR is risky in public procurement contracts, some lawyers are very enthusiastic about using it to claim disputed receivables.[35] Recommendations on the use of amicable dispute resolution and settlement negotiations have also been issued by the The General Counsel to the Republic of Poland.[36]

At this point, it should be noted that the Contracting Authority could use the contractual provisions and its own procedures to bring the dispute over inflation adjustment with the Contractor onto a conciliatory path. It did so in the dispute over the Poraj undercrossing, when it invited the Contractor to engage in dialogue with the negotiating team, and later to take part in mediation at the Court of Arbitration at The General Counsel to the Republic of Poland. However, in the inflation adjustment dispute, for reasons unknown to the Observer, these possibilities were not used. The Contractor applied to the court for conciliation, with no result. Finally, on 27 April 2020, it filed a lawsuit against PKP PLK S.A. at the regional court for an increase in remuneration of nearly PLN 35 million. This lawsuit is waiting to be considered. Inertia in decision-making was evident on the part of both the Contracting Authority and the Project Engineer, who never referred to claim No. 5, even though it was presented by the Contractor as complete and final on 5 March 2021. In addition, ZUE S.A. decided to make two additional claims for failure to consider inflation-adjustment claims submitted after 12 and 24 months. In doing so, the Contractor requested consultations under Sub-Clause 3.5 with the participation of the Contracting Authority. The consultations were not held. The Engineer, who did not accept the claims and rejected both of them, asserted that the conditions for recognising the inflation adjustment had not been met and that the Contractor miscalculated the value of the quarterly SP indices for the preceding months.

After many months of talks between PKP PLK S.A. in cooperation with GDDKiA and with the participation of industry organisations, contracting authorities' association, The General Counsel to the Republic of Poland, PPO, CUPT and SP on working out systemic solutions, an agreement was reached. As a result, PKP PLK S.A. has applied monthly inflation adjustment limited by the amount of 5% of the signed contract since 1 February 2019.[37] The Statistics Poland data that the indicators are based on was used to create "inflation-adjustment baskets", separate for railway and road projects. PKP PLK S.A.

32 See *PODCAST #5 Rozwiązywanie konfliktów w zamówieniach publicznych*, https://www.youtube.com/watch?v=lQG5fFGIkWE&t=2s [accessed: 28 November 2021].

33 See *Raport o sporach budowlanych w Polsce*, Contract Advisory Services 2019, p. 4, https://www.caservices.pl/aktualnosci/raport-o-sporach-budowlanych-w-polsce-2019/ [accessed: 5 August 2021].

34 Minutes of the 3rd Quarterly Meeting (Warsaw, 11 December 2018), https://paktuczciwosci.pl/wp-content/uploads/2019/01/Notatka-Spotkanie-Kwartalne-11.12.2018_OST.pdf [accessed: 13 September 2021].

35 Seminar report *Settlements in procurement – will they become the norm?*, https://paktuczciwosci.pl/aktualnosci/ugody-w-zamowieniach-czy-stana-sie-norma/ [accessed: 13 September 2021].

36 *Recommendations for amicable dispute resolution*, Polish Attorney General's Office 2021, https://www.gov.pl/web/sp-prokuratoria/rekomendacje-prokuratorii-generalnej-rp-dotyczace-postepowania-w-zakresie-polubownego-rozwiazywania-sporow [accessed: 26 November 2021].

37 PKP Polskie Linie Kolejowe S.A., *Raport roczny za 2019 rok*, https://www.plk-sa.pl/files/public/raport_roczny/Raport_Roczny_2019_.pdf [accessed: 7 August 2021].

SYSTEMIC RECOMMENDATIONS

Contracting authorities **should announce tender plans with a notice period of more than one year**, which would enable the industry to make more rational business decisions.

also decided to implement a risk matrix to ensure a fairer distribution of risks in the project process. In the description of the contract, the Engineer's responsibilities include processing the Contractor's claims using the risk matrix. However, according to information provided by CUPT, no systematic or collective "retrospective" inflation adjustment was possible such that it would cover the monitored contract, too.[38] At the consultation stage of this report, the Contracting Authority also indicated that the law did not provide for this kind of possibility. The problem of the scope of changes in contracts that are loss-making for contractors was left to be solved within the framework of individually-submitted claims for inflation adjustment. Fortunately, the worst-case scenario, which occurred in other contracts – that is, the Contractor leaving the construction site – did not materialise.

5.1.2. Noise Abatement Dispute

Problem Description

While implementing the project, the parties encountered a contentious – and socially significant – issue. It concerned protecting the areas adjacent to the project from noise from the railway line. The form of protection that was the subject of the dispute between the Contractor and the Contracting Authority was acoustic screens.

[2] Contractor comment: The Contractor's position is that screens were defined as noise-abatement measures to be used as a last resort, according to the FUP. This interpretation by the Contractor is based on the provisions of the FUP (excerpt on p. 143), which stated: *In order to ensure that acceptable environmental noise levels are met, "at source" noise-mitigation solutions should be applied first.* Consequently, it should be concluded that the noise abatement was first of all supposed to eliminate noise at its source. Protection in the form of noise barriers was only meant to serve as a last resort – which must be clearly emphasised – from the very beginning of the description of the dispute between the Contracting Authority and the Contractor.

The Decision on Environmental Conditions (DEC) of July 2017 specified the obligation to build acoustic screens in the project framework. Specifically, it determined that the implementation of the project on a section of approximately 44 km of railway line No. 1 in the Częstochowa-Zawiercie section must include the installation of around 4.5 km of acoustic screens. Despite the fact that the DEC was issued

38 Minutes of the 4th Quarterly Meeting (Warsaw, 3 June 2019), https://paktuczciwosci.pl/wp-content/uploads/2019/08/Spotkanie_kwartalne_3_06_19_FIN.pdf [accessed: 13 September 2021].

after the deadline for submitting offers, the Contracting Authority expected each bidder to determine the price of installing acoustic screens of the defined length of 4,462 m as early as during the tendering phase.

[3] Contractor's comment: The Contracting Authority did not yet have the DEC in the tendering phase, as the Contracting Authority explicitly pointed out when responding to question 124 in the ToR submitted by the Contractor. The DEC itself was only provided to the Contractor in September 2017 – and only after the Contractor's written request for the Contracting Authority to provide the decision. Hence the screens were not required by the DEC during the bidding or contract-signing phase (July 2017).

Furthermore, it was clear from the Contracting Authority's comments at the time of the appeal at the NAC on 29 May 2017 that the DEC could be amended and that the Contractor had the right to carry out its own studies to modify the noise-abatement method, as evidenced by the FUP on page 143, and by doing so seek to amend the DEC in terms of the noise abatement-method set out there.

This is because the screens' parameters (location, height, etc.) were specified in the summary environmental impact report, which was part of the tender documentation.

The requirement to install screens was not definitive but, as the Contractor stressed, it was mentioned on page 143 of the FUP. Upon review of this report, the Contracting Authority admittedly argued that the number and length of screens had been specified in detail in the tender documentation and that there had been no queries about the matter during the proceedings. In its opinion, this proved that there could have been no ambiguity about the screens. However, according to the Contractor, the statement on page 143 of the FUP (see the Contractor's comments) could be interpreted differently, and in the tendering phase, an alternative noise-abatement method could have been proposed. In fact, the winning contractor did propose an alternative method and the Contracting Authority accepted this option at that stage; that is, proceedings before the National Appeals Chamber. However, a dispute arose after the contract was signed as to whether or not it was actually possible to build a smaller number of noise barriers than that indicated in the decision on environmental conditions.

[4] Contractor's comment: The Contracting Authority made a fairly clear statement on this point during the proceedings at the NAC, in May 2017. The Contracting Authority stated then that: *The Contracting Authority clarifies that, from the content of the environmental report, a summary of which was attached to the answer to question 124, it follows that the Contractor must first carry out the relevant studies and only on the basis of these studies choose the correct solution for minimising noise*.[39] Consequently, from this oral statement by the Contracting Authority, recorded in the proceedings at the NAC, the Contractor deduced that it is up to the Contractor to make the final choice as to what should be implemented in terms of noise abatement, after the appropriate research has been conducted.

Moreover, according to the Contractor's analysis, there was no need to build screens, and windows only had to be upgraded at two points, 112 and 113. As a result, according to the Contractor, the dispute was not about whether fewer screens should be built, but about a more fundamental problem: whether the construction of screens is an appropriate way to protect people from noise. The Contractor's position was that it was authorised to perform its own research (which it did) in order to ensure, according to the FUP, "at source" protection against noise. Consequently, in the Contractor's view (supported by studies carried out by independent bodies and submitted to the Contracting Authority), there were sufficient arguments to justify amending the DEC.

However, in the Contracting Authority's opinion, the Contractor took inadequate and unauthorised action to present documentation and other arguments to sanction this optimisation. The Contracting Authority also refused to accept the option to construct a smaller number of acoustic screens than the number indicated in the DEC and specified the Contractor in the offer.

39 Minutes of the meeting and hearing of 29 May 2017, ref: NAC 966/17, pp. 5–6.

The parties were involved in dialogue and correspondence on this issue for a long time (between 2018 and 2020). However, this dialogue did not result in an agreement. The Contractor took the position that it had every prerogative to take steps to amend the DEC as early as in 2018. Meanwhile, it claimed that, by withdrawing the power of attorney of the Contract Director, who could initiate such a change, the Contracting Authority had led to the conflict.

Regardless of which of the parties was ultimately right, the dispute resulted in delays in the design work and, consequently, in obtaining the building permit for noise barriers. These delays, and subsequent problems with access to the materials needed to complete the noise barriers (in December 2020 and in subsequent months of 2021, there was an aluminium shortage, which was beyond the Contractor's control), made it impossible to complete the noise barriers and, by the contractual deadline for completing the work (the end of December 2020), not all the noise barriers specified in the DEC had been built.

Incidentally, it is worth noting that this dispute seemed even more controversial in the context of the PKP PLK S.A. president's announcements in the public domain that the use of acoustic screens as a noise protection should be abandoned and used as a last resort.[40]

Photo 2. Unfinished noise barriers at Poraj Station. Photo from monitoring visit on 18 February 2021. Source: authors' own files.

40 J. Madrjas, *PLK chce skończyć z "ekranozą"*, https://www.rynek-kolejowy.pl/mobile/plk-chce-skonczyc-z-ekranoza-91220.html [accessed: 13 September 2021].

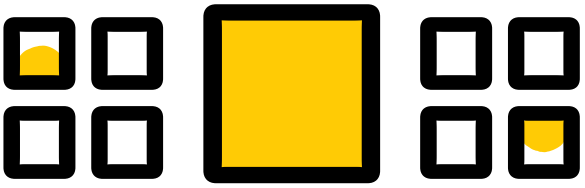
Response to the Problem

The subject of noise barriers had already been discussed by the Observer and the Contracting Authority at the stage before the tender procedure and later, when the offers were being evaluated. During the tender procedure, noise barriers were mentioned in the context of:

- The absence of a decision on environmental conditions at the start of the tender procedure;
- Prices submitted by bidders for this part of the work.

The first issue was described in detail by the Observer in the first monitoring report, noting the recommendation and positive measures adopted by PKP PLK S.A. to minimise risk – the procedure for awarding a public contract should not be started if there are significant deficiencies in the tender dossier. Needless to say, the lack of DEC was major omission in the tender dossier and it created uncertainty among contractors as to how parts of the bid should be priced.

RECOMMENDATIONS REGARDING PUBLIC PROCUREMENT



When commencing a tender procedure, the **contracting authority should publish all the documents** that may have an impact on the bids and the project completion. **Proceedings should not begin without the complete set of documents.**

The second issue was addressed, somewhat in passing, in the first monitoring report. The Contractor quoted the relatively low price of installing a specific number of noise barriers as part of the total contract amount. This was why other contractors protested over the unduly low price, with the protest reaching the National Appeals Chamber. After the Contractor had explained its position, the Contracting Authority accepted it, as did the Observer. The appeal was dismissed by the NAC. In fact, the NAC ruling confirmed the Contractor's position that the contract was concluded with the assumption that noise barriers would be constructed within the Contractual Amount.

[5] Contractor's comment: The contents of the FUP (page 143) and the Contracting Authority's statements indicate that, in a "Design and Build" contract, the Contractor selects the appropriate design solutions, including for noise abatement. The contract does not stipulate that screens be constructed. On the contrary, screens should be installed as a last resort and the Contractor is authorised to conduct its own research to identify the best form of noise abatement and thus also to apply for an amendment to the DEC.

Shortly after the contract was signed, the Contractor sent a request to the Contracting Authority asking it to consider reducing the number of screens to be built as part of the contract. The issue of optimising the number of screens was discussed bilaterally by the parties from 2018 onwards. It was also

addressed at Quarterly Meetings held by the Observer[41] throughout the Pact. The documents presented by the Contractor indicated that there was no need to build screens, and that noise would be abated in other ways; in particular, by upgrading the railway track. Moreover, the Contractor already had assessments indicating that it would not be necessary to build noise barriers. However, the Contracting Authority assessed all these documents negatively, in terms of merit. Moreover, the Contracting Authority claimed that there is a risk that the change of the scope of noise-barrier construction in relation to the requirements specified in the DEC could cause delays in obtaining a building permit for the entire project. In the Contracting Authority's opinion, delays concerning final decisions on potential changes in noise abatement could last until the contractual deadline for building the railway line.

The lack of agreement between the parties concerning the environmental studies presented by the Contractor resulted in the latter's decision to separate the construction of the screens, including design development and applying for a permit, from the main contract in 2018. During the Quarterly Meetings, the option of including noise barriers in the reassessment of the environmental impact was mentioned. Moreover, in its letter to the Contracting Authority on 25 January 2019 (ZAW/2019/01/1934/TF/AWO), the Contractor explicitly stated that: *The* [*DEC*] *decision must be amended*. However, the DEC was not amended.

Another thread in the dispute over the acoustic screens concerned the Contracting Authority's belief that the Contractor had abused its power of attorney. The Contractor, authorised to represent the Contracting Authority in the matter at hand, submitted a request to amend the DEC to the Regional Director for Environmental Protection in Katowice at the end of 2018. The request drafted by the Contractor suggested limiting the number of acoustic screens. The Contracting Authority pointed out that the main issue, had been the lack of dialogue, to which the Contractor was obliged under the contract. The Observer noted that there was indeed a problem of interpretation of the Contracting Authority's power of attorney granted to the Contractor. It is therefore recommended that the powers of attorney for the Contracting Authority's representatives should be clearly drafted and specify any limitations, as appropriate. Based on the information available to the Observer when this report was drafted, the Contracting Authority had already applied powers of attorney in a literal manner for some time. These did not authorise the proxy to take any steps to amend or indeed obtain a decision on environmental conditions.

41 Minutes of the 2nd Quarterly Meeting (Warsaw, 23 May 2021), https://paktuczciwosci.pl/wp-content/uploads/2018/07/Notatka-Spotkanie-Kwartalne-23.05.2018.pdf [accessed: 8 October 2021].

[6] Contractor's comment: In a letter dated 5 March 2019 (ZAW/2019/2227/TF), the Contractor provided the Contracting Authority and the Project Engineer with a legal opinion that clearly stated that the power of attorney given to the Contract Director authorised the Contract Director to submit requests for DEC modification.

The power of attorney granted to the Contract Director was reviewed by law firm RBM and others, and they agreed that the Contract Director was authorised to act within the limits of the power of attorney and to demand a modification of the DEC. The scope of the power of attorney granted to the Contract Director by the Contracting Authority was therefore the subject of a dispute between the Contractor and the Contracting Authority.

Moreover, the FUP guaranteed that the Contractor could "choose" a solution offering adequate protection against noise – and screens were only a last resort. In fact, it was the Contracting Authority that violated the contractual bond between it and the Contractor by unjustifiably requiring the construction of screens – by limiting the mandate – despite the fact that the Contractor was supposed to be guaranteed the right to choose the adequate noise-abatement method.

Moreover, an analysis of the FUP provisions (for example, clause 4.1, clause 4.5 or clause 7.2) leads to the conclusion that the Contractor was not obliged to submit to the Engineer for review or approval the proposal to amend the DEC. In fact, the FUP specifies documents that must be submitted to the Engineer for approval, but the list does not include a request to amend the DEC.

Ultimately, however, the Contractor did not obtain the Contracting Authority's approval to amend the DEC. It did not obtain the Contracting Authority's approval to apply to amend the decision, either – despite the fact that, in light of the contract's provisions, the Contractor was obliged to do so. The Observer is of the opinion that the process of agreeing on the request to change the environmental requirements regarding noise barriers with the Contracting Authority was not carried out correctly by the Contractor.

As the parties could not agree on noise-abatement optimisation for a long time, the Observer convened a special meeting in early 2019.[42] The result of the meeting was an agreement between the parties on further proceedings aimed at reaching an agreement on the subject. In response to the Contractor's arguments, the Contracting Authority – specifically, the PKP PLK Environmental Protection Office – presented its own position (the Office is an internal support unit for the Design Team, which was directly responsible for the implementation of the project covered by the Pact). However, the Observer noted a certain lack of consistency in positions expressed by representatives of the Environmental Protection Office and the Project Team implementing the project. Consequently, there was no clear Contracting Authority position Contracting Authority on the Contractor's arguments. In this context, there was a recurrence of the said issue concerning the fact that the Contracting Authority (or, more precisely, its other organisational unit) accepted, in the bid evaluation phase, the Contractor's explanations regarding the need for screens (or the lack thereof) and later additionally upheld this acceptance during the proceedings at the NAC. The Observer is of the opinion that continuous cooperation between separate PKP PLK S.A. units is extremely important, especially in case of projects under a program in which protection of natural environment is so important.

In early 2019, having interpreted the Contractor's actions as exceeding its powers of attorney, the Contracting Authority exercised its contractual right and filed a claim against the Contractor, an important development in the dispute in question. The claim demanded that the Contractor desist from breaching the contract with respect to its actions taken in relation to the amendment of the DEC. Meanwhile, the Contracting Authority informed the Contractor that it would file further claims if any damage was caused to the Contracting Authority. Subsequently, the Contracting Authority informed

42 Minutes of the special meeting held on 27 February 2019, https://paktuczciwosci.pl/przebieg/notatka-ze-spotkania-specjalnego-27-02-2019/ [accessed: 1 October 2021].

the Observer that no damage to the Contracting Authority was caused by the Contractor's actions covered by the claim.[43]

Note that the Contractor also submitted notices of claim to the Contracting Authority regarding the following:

- The Contracting Authority allegedly preventing the completion of the contracted work, i.e. the optimization of noise-abatement specified in the DEC, March 2019, claim No. 44. This claim was based on the Contracting Authority's position (see earlier sections of the report) expressed at the NAC and, according to the Contractor, supported by the FUP. The position was that the Contractor was authorised to conduct its own research to determine the most effective noise control and to implement it;
- The Contracting Authority allegedly not cooperating and preventing the Contractor from carrying out work in accordance with the contract, March 2020, claim number 64.[44] This claim was related to the Contracting Authority refusing to provide the acoustic model (this development is accounted for in detail further below). The Contractor emphasised that it was forced to take the matter to court (District Court in Częstochowa, 8th Commercial Division – Ref. No.: VIII GCo 2/20) to secure evidence, i.e. the acoustic model, to determine the scope of the acoustic impact.

The Observer made a preliminary assessment of the merits of the documents submitted by the Contractor to confirm the limitation of the construction of noise barriers. The Observer presented its comments to the stakeholders in April 2019. The Observer expressed concerns about the cumulative impact of all the railway lines on the environment and failure to include the calibration adjustment for rolling stock moving along railway line No. 1 and on railway lines included as cumulative impact. Furthermore, it noted the absence of information on whether noise measurements were made at the current stage of the project.[45] In response to the above, the Contractor presented its position, which showed that the documentation had been done correctly and, above all, that the construction of noise barriers was unnecessary.

One major contentious issue relating to the acoustic screens was access to the "acoustic model" that feeds into the project environmental impact report. In the Contractor's opinion, access to the acoustic model prepared by the Contracting Authority upon obtaining the DEC was necessary for the Contractor to carry out its own assessment, as per the contract. The Contracting Authority did not agree with this position. The dispute concerning this issue is discussed in detail later in this report.

The events described above resulted in a deadlock and no agreement on how to optimise the construction of noise barriers could be reached. During the Quarterly Meeting in March 2020, the Observer was informed that the Contractor had brought the noise-barrier dispute to court. The court filing sought to securing evidence in the form of noise surveys (prior to project construction/screens). Meanwhile, the Observer was informed that the designs and decisions obtained by the Contractor

43 Letter from PKP PLK S.A. to the Observer of 5 May 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/IRR4-3-0815-POIi%C5%9A-5.2-6-112-2020.pdf [accessed: 1 October 2021].
44 Letter from PKP PLK S.A. to the Observer of 12.03.2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Odp.-89-2021-Roszczenia.pdf [accessed: 1 October 2021].
45 Community Partner's briefing on discussion on the need for noise barriers, 8 April 2019, https://paktuczciwosci.pl/wp-content/uploads/2019/07/Informacja-Fundacji-w-zakresie-ekran%C3%B3w_08.04.2019.pdf [accessed: 1 October 2021].

were and would be in line with the DEC.[46] It should be noted, however, that at the time of completing the report the Observer was not aware of any binding instructions issued by the Engineer to the Contractor during the course of the contract. By the time the report was completed, the Contractor had not abandoned its claims, because it believed that it was the Contracting Authority that had breached the contract by "imposing" the obligation to build screens on the Contractor.

The dispute between the Contractor and the Contracting Authority resulted in the Contractor failing to complete the design work relating to noise barriers before the deadlines provided for in the contract. The deadline for obtaining the last building permit was specified in Appendix No. 1 to the contract as 26 May 2020, and the last permit for the construction of noise barriers was issued several months later, in the fourth quarter of 2020. What is more, the delay of construction work resulting from the ongoing dispute made it difficult for the Contractor to obtain the necessary materials (aluminium acoustic panels) at the end of the project. As a result, the construction of noise barriers was not completed by the contractual deadlines. The absence of noise controls was one of several reasons why the parties had another dispute. It started in connection with the issuance of the Taking-Over Certificate, the document confirming that the work had been carried out in accordance with the contract (see later sections of the report for more detail).

According to the information shared by the Contracting Authority during the review of the report, the construction of acoustic screens by the Contractor was completed and received with an appropriate certificate. Meanwhile, the Contracting Authority's Project Team shared at the end of the monitoring that another acoustic analysis is set to be performed within one year of the completion of the project.

5.2. Managing Conflicts of Interest

Problem Description

Conflict of interest was an issue during the Integrity Pact pilot, almost from the start. In fact, it was one of the most sensitive items during the initial negotiations. Questions concerned the definition, rules and possible sanctions. There was no legal definition of conflict of interest at the time (in 2016); it only came into the Polish legal system with the entry into force of the new Public Procurement Law in 2020. A broad definition of conflict of interest inspired by the provisions of the EU Directive (Article 24 of Directive 2014/24/EU of the European Parliament and of the Council of 26.2.2014 on public procurement, repealing Directive 2004/18/EC) was therefore adopted for the purposes of the pilot. In Paragraph 2.5 of the Pact Module I – Agreement between the Observer (i.e. the Foundation and/or the Consultant) and the Contracting Authority (referred to as the Company), conflict of interest is defined as follows:

A conflict of interest is understood to mean any situation where impartial and objective performance in the project is compromised due to family, emotional, political sympathies, economic interests or any other interests, in particular those of the Foundation, the Consultant, the Company or their employees and associates:

1) Compete for the project;

2) Provide their capacities to contractors or subcontractors competing in the procurement procedure;

46 Minutes of the 6th Quarterly Meeting (Warsaw, 5.03.2020), https://paktuczciwosci.pl/wp-content/uploads/2020/04/Notatka-Spotkanie-Kwartalne_05.03.20_OST.pdf [accessed: 1 October 2021].

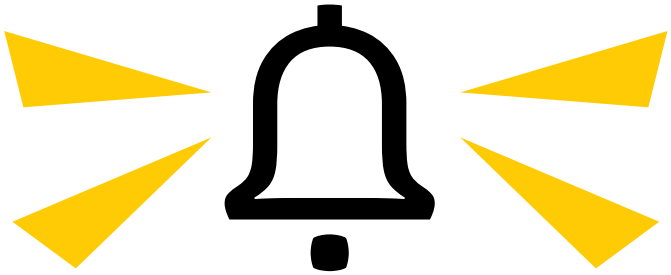
3) *Compete for the contract of Engineer for the supervision of the Contract;*

4) *Grant their capacity to contractors or subcontractors competing for the contract for the Engineer to supervise the Contract;*

5) *Are in litigation with the Company.*

The definition, as it can be seen, has a general part, concerning the implementation of the whole pilot, which is covered by general criteria for assessing whether or not a conflict of interest has occurred, and specific criteria, mainly concerning the relationship between the Observer and PKP PLK S.A., which focuses mainly on preventing the Observer and/or the Contracting Authority from playing dual roles. The Pact includes a procedure for managing conflicts of interest, recognising that they may arise unintentionally; for example, as a result of the rather narrow circles in which engineers or lawyers operate. Openness was adopted as the guiding principle. Conflicts of interest, both potential and actual, had to be disclosed. Secondly, the Observer and the Contracting Authority undertook to adopt measures that would prevent the negative consequences of a conflict of interest, or at least reduce its scale, if it could not be eliminated without detriment to the pilot, and especially to the monitoring, an essential part of it. It was also agreed that problems arising from the appearance of conflicts of interest would be resolved through dialogue. Both the Observer and the Contracting Authority were supposed to have the right to give each other recommendations on measures to minimise or eliminate conflict of interest, while reserving the right to terminate the relationship if they reached a stalemate.

SYSTEMIC RECOMMENDATIONS



The Public Procurement Office should implement a **communication and education programme** on conflict of interest and access to public information for contracting authorities and contractors.

Both the definition of conflict of interest and the mechanisms for managing it were tested during the public procurement procedure. At the tender-evaluation stage, a technical consultant involved in monitoring activities was found to have breached a pact provision that prohibits the sharing of resources with contractors or subcontractors bidding for a contract to supervise the project that will be covered by the Pact. After several weeks of the suspension of monitoring activities, the consultant terminated the project-supervision contract and returned to monitoring with the Contracting Authority's consent. In addition, the chief designer suggested by the one of the contractors, who would later become the winning bidder, was closely related to the head of the Department of Railway Lines in Częstochowa. According to the Observer, there was a conflict of interests here. The Contracting

Authority did not share this opinion, but it did commit to take additional measures to prevent any potential negative consequences.

In addition, at the final acceptance stage, the Contractor alleged that the Observer had acted in conflict of interest by providing a legal opinion on the Work Taking-Over Certificate issued by the Project Engineer.

Response to the Problem

As mentioned earlier, the first conflict of interest – concerning the Observer's technical consultant – was resolved through dialogue with the Contracting Authority before the project was implemented.[47] As a result of internal miscommunication, the technical consultant involved in the monitoring had shared its human resources with a bidder for the contract-supervision job in the project covered by the Pact. The issue was spotted at the bid-evaluation stage, when the Contracting Authority awarded the contract to the Contractor with whom the technical consultant had shared its human resources. In the face of a possible conflict of interest, a joint decision was made to suspend the consultant's involvement in monitoring activities and to resolve the conflict by replacing the shared resources. Eventually, the Contractor restructured its team, the technical consultant terminated its involvement in contract supervision, and returned to monitoring with the Contracting Authority's consent.

The second conflict of interest situation between the Contracting Authority and the Contractor, red-flagged at the stage of tender evaluation, was resolved as soon as it came to light. Even though the Contracting Authority did not agree that there was a conflict of interest, it committed to take additional measures to protect the project against possible negative consequences upon the handing over of work, when the risk of irregularities or abuse is the highest.

Furthermore, in its letter Ref. ZAW/2017/09/25/AWO of 7 September 2017, the Contractor communicated a change in the post of Chief Designer. The Contractor did this right after hearing that the Observer saw a potential conflict of interest. The Observer communicated the move to ZUE's CEO upon signing the public procurement contract.

When the final acceptance was about to take place, at the end of 2020, the Observer sent a query to the Contracting Authority asking about the status of this conflict of interest.[48] PKP PLK S.A. responded by indicating that the acceptance process was primarily coordinated by the Project Implementation Centre of PKP PLK S.A.[49] The Director of Zakład Linii Kolejowych in Częstochowa, who was directly affected by the problem, played a supporting role in this process. The Contracting Authority also stated that the director of the company did not participate in the work of the Team for the Assessment of Investment Projects, which was responsible for implementing the monitored project. Further, he was not a member of the Acceptance Committees or otherwise involved in their proceedings. In addition, it was stated that the chairs of the Acceptance Committees were also appointed by the Project Implementation Centre of PKP PLK.

47 G. Makowski, M. Waszak, *The Integrity Pact – or Citizens in Tenders*, Stefan Batory Foundation, Warsaw 2021, pp. 11–12, https://paktuczciwosci.pl/wp-content/uploads/2021/12/The-Integrity-Pact-%E2%80%93-or-Citizens-in-Tenders.pdf [accessed: 11 February 2022].

48 Letter from the Observer to PKP PLK S.A. of 15 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/05/Sz.P.-J.-Pawluk-pismo-ws.-konfliktu_final.pdf [accessed: 1 October 2021].

49 Letter from PKP PLK S.A. to the Observer of 13 January 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/05/pismo-J.-Pawluk-ws-konfliktu-interesow_13.01.21.pdf [accessed: 1 October 2021].

Meanwhile, the Contracting Authority indicated there were a number of internal conflict of interest rules at PKP PLK S.A., the most important being the *Zasady postępowania w kontaktach i relacjach biznesowych z interesariuszami PKP Polskie Linie Kolejowe S.A.* [*Principles of Conduct in Interactions and Business Relations with Stakeholders of PKP Polskie Linie Kolejowe S.A.*] of 2020. We emphasise the date that this document was released – PKP PLK had already been involved in the implementation of the Pact for a long time, and this experience may well have been reflected in the principles adopted by the Contracting Authority. The document contains a whole chapter on the conflict of interest in relations between the Contracting Authority and contractors, defining the concept and outlining the procedures to be followed in these circumstances. Like in the Pact, the Contracting Authority adopted an open process of managing conflict of interest in its own rules. The documents present the main rule, which is – rightly – the exclusion of the person concerned from any activities that may be affected by the conflict of interest. However, the procedure adopted by PKP PLK S.A. also provides for consultations with superiors and risk managers at the company. The procedure leaves an open door – whenever, because of human resource deficit or for any other reason, it is impossible to bar an individual from a particular decision-making process, the conflict of interest is disclosed and may be controlled to avoid irregularities or abuse. This is the right approach, because there is no shortage of cases where the conflict of interest cannot be eliminated completely, so it should simply be disclosed and controlled. Additionally, the Observer issued recommendations based on the case, at the request of PKP PLK S.A., which may prove helpful when managing conflict of interest in the future.

The Contractor's allegations against the Observer regarding the conflict of interest need to be presented separately, given that the Observer is the author of this report. Below, we present the Contractor's position as it was presented in the comments on this report, followed by the Observer's position.

[7] Contractor's Position On Observer's Alleged Operation in Conflict of Interest

One of the key principles of Integrity Pacts is the impartiality and independence of the Observer civil society organisation. Both the Observer and its consultants are obliged to exclude themselves in case of a conflict of interest. This obligation arises from the current EU legislation. The relevant conflict of interest clauses are included in the Integrity Pact agreement signed with the European Commission. The Observer are obliged by the European Commission to respect them and to ensure consultants' compliance. Conflict of interest is broadly defined as a situation in which the impartial and objective implementation of project tasks is compromised due to family, emotional, political, economic or any other interests. The definition is therefore open, covering any interest.

According to the agreement between the Foundation and PKP PLK S.A. implementing the Integrity Pact in Poland, the contract monitoring (and the agreement itself) is valid until the date of issuing the Taking-Over Certificate as part of the contract. The Taking-Over Certificate was issued by the Project Engineer on 8 February 2021. On 22 February 2021, 24 February 2021, 03 March 2021, 17 March 2021 and 23 March 2021, letters were exchanged between the Foundation and PKP PLK S.A., in which:

- The Foundation requested an extension of the agreement until 30 September 2021;
- PKP PLK S.A. refused to agree to the extension of the agreement, asking the Foundation to comment on the validity of the Taking-Over Certificate and pointing out that, since the Taking-Over Certificate is invalid, the monitoring of the contract continues.

Under the circumstances, the Foundation should have abstained from sharing its opinion on the validity of the Taking-Over Certificate as a result of a conflict of interest, as the content of the opinion affected its own rights and obligations as the Observer of the Integrity Pact:

- A legal opinion approving the Engineer's issuance of a Taking-Over Certificate would confirm the expiry of the contract monitoring carried out by the Foundation on behalf of the European Commission on 8 February 2021, i.e. a key part of the Integrity Pact;

- A legal opinion negating the Taking-Over Certificate would have prevented the Foundation's contract monitoring from expiring.

Moreover, on 03 March 2021, the Foundation – working on its own legal opinion – asked PKP PLK S.A. for access to legal opinions drafted by PKP PLK S.A.'s lawyers. A similar request was not addressed to the Contractor. In the Contractor's opinion, it shows an at least careless approach to the requirements of impartiality. The Foundation claims that it asked ZUE S.A. whether the Contractor had a legal opinion and whether it would share it, but it should be pointed out that the questions were not sent to ZUE S.A. until 24 May 2021, after the Foundation had issued its legal opinion on 30 March 2021.

The contents of the legal opinion also had an impact on the legal consultant, who, in accordance with the agreement, is remunerated on an hourly basis (per hour of work). The content of the legal opinion had an impact on the scope of work provided by the legal consultant (and therefore also on the remuneration), as recognising the legitimacy of issuing the Taking-Over Certificate would be tantamount to the expiry of the contract monitoring, a key part of the Integrity Pact.

Moreover, in the case of a legal opinion confirming the legitimacy of issuing a Taking-Over Certificate (and therefore the end of the monitoring on 8 February 2021), the legal basis for settling with the EU the expenses already incurred by the Foundation/legal consultant for the monitoring of the contract after 8 February 2021 would at least be called into question.

For these reasons, there was a conflict of interest, as referred to in the agreements implementing the Integrity Pact, and both the Foundation and the consultant should have removed themselves from the case and refused to issue a legal opinion on a matter that affected their own rights and obligations.

The Contractor has repeatedly stressed that conflict of interest clauses are objective in nature and independent of subjective considerations, such as the motivations or intentions of those with a conflict of interest.

The Contractor also drew the Foundation's attention to the provisions in the Polish legal system concerning conflicts of interests of judges and employees of public administration bodies, which set exemplary standards and patterns of conduct, and according to which, if a judge or official is in a legal relationship with one of the parties that means that the decision may affect his or her rights or obligations, then her or she is subject to exclusion from its consideration by virtue of the law itself.

The Contractor also questioned the opinion issued by the Foundation; in particular, pointing to the legal consequences of the fact that the railway line for which the Taking-Over Certificate was issued had been actively used for railway traffic by the Contracting Authority.

Observer's View on the Contractor's Allegation of Conflict of Interest

First of all, it should be stressed that, when the Pact was defined, it was not even clear which specific railway project would be covered (the selection process was concurrent). It was all the more difficult to predict how this hypothetical investment, and thus the pilot project itself, might turn out. When creating the Pact, all the parties involved therefore tried to design it as flexibly as possible. Without knowing how the pilot would be implemented, it was not possible to predict the approximate timeframe for the Pact. It was agreed that the Pact would last "*from the date of its conclusion until the issuance of the Taking-Over Certificate (or another equivalent document) for the Contract*". Beyond that, the Pact could of course be terminated at any time. It could also have ended with the end of the European Commission's funding of the entire pilot (it is worth noting here that, during its implementation, the Commission decided to extend the pilot for two more years once, in 2019).

When the dispute over the construction of the Poraj undercrossing emerged in September 2020 (see Chapter 6.6), some very paradoxical scenarios could be anticipated. One involved removing the construction of the Poraj undercrossing from the major contract and completing it as a separate project, possibly with a different tender for this job only (for this option, a new pact or more complex appendix covering the a "new" contract would most likely have to be adopted). The paradox is as follows: the main part of the monitored contract would be completed, but the important and expensive part – the undercrossing in Poraj – would continue. The investment would formally end, but in practice continue.

The Observer faced the question of whether it should continue monitoring the Poraj crossing, even though it would formally become a separate investment. Following analysis and consultations with the Ministry of Development Funds and Regional Policy and Transparency International (the European coordinator of the pilot project), the Observer decided that the monitoring should be continued, if only due to the controversy surrounding the Poraj crossing. Given the value of all the work, it was not the most expensive part. Its estimated cost ranged from PLN 5 million (according to the Contracting Authority's assessment in early 2018) to over PLN 15 million (according to the Contractor's bid in early 2020). These were not trivial amounts. Meanwhile, if the undercrossing in Poraj had in fact been separated from the main contract, and that contract had ended with the issuance of the Taking-Over Certificate, the Observer would have lost the opportunity to conduct monitoring activities. Importantly, the Observer was no longer certain about the timely completion of the remaining parts of the contract, including the renovation of Towarowa Street in Myszków, which it had

red-flagged to the partners at the Quarterly Meeting.[50] The Observer approached PKP PLK S.A. at the end of 2020 to suggest adding an appendix extending the Pact until 30 September 2021, when, according to the agreement with the European Commission, all monitoring or information activities as part of the pilot were supposed to be completed. This date was set regardless of whether or not the project itself would eventually end. The Contracting Authority responded positively to this request, recognising the need for monitoring regardless of the form in which work on the Poraj crossing would continue. Accordingly, the Observer approached the Contracting Authority on 22 February 2021 with a proposal for a simple appendix extending the duration of the Pact and providing the possibility of carrying out monitoring activities.[51]

However, before the content of the appendix between the Foundation and PKP PLK was agreed on, unexpectedly the Project Engineer issued a Taking-Over Certificate after unilateral acceptance by the Contractor and at the Contractor's request (submitted on 8 February 2021). The circumstances and legal controversies surrounding this event are described in detail in Section 6.7. Note that the Contracting Authority argued that it did not consider the final acceptance of the project to have taken place, pointed out that some of the project's significant components had not been completed, and refused to accept the Taking-Over Certificate. PKP PLK S.A. went even further and accused the Project Engineer of acting to the Contracting Authority's detriment by issuing the Taking-Over Certificate. In view of the above, pursuant to Paragraph 5, Section 1.6a of the Pact, PKP PLK S.A. asked the Observer to adopt a position on the matter. Concerning the appendix, the Contracting Authority withdrew from its earlier declarations and refused to sign it. The Contracting Authority's main argument was that, as it does not recognise the validity of the Taking-Over Certificate, there is no need to prolong the agreement with the Observer. The Observer did not consider this a clear situation because the validity or invalidity of the Taking-Over Certificate was a matter of dispute between the Contracting Authority, the Contractor and the Project Engineer. This could have created grounds for challenging the status of the Observer. The Contracting Authority's argument was also incomprehensible in view of the fact that the project was still underway anyway, as was the whole pilot project (until the end of 2021), so signing an appendix specifying a specific date of completion of the monitoring was neutral from this point of view. However, despite repeated requests to sign the appendix, PKP PLK S.A. did not change its position. The Observer perceived this resistance (perhaps wrongly) as a desire on the part of the Contracting Authority to leave itself the possibility to "cut off" the monitoring at a convenient moment, should the Contracting Authority suddenly change its mind and recognise the validity of the issued Taking-Over Certificate or issue a new certificate after the change in Project Engineer, which took place on 9 June 2021. It should be noted, however, that despite subsequent perturbations relating to this issue, no event of this kind occurred and the monitoring continued until the end of September 2021.

Regarding the controversy surrounding the Taking-Over Certificate issued in January 2021, the Observer assessed the situation and decided that it required an in-depth legal opinion. This was not one of the "usual" disputes between contracting parties, of which there have been many over the years. The unfinished pedestrian undercrossing in Poraj also posed a threat to the safety and comfort of passengers, who had to access the platform via a relatively remote, inconvenient and less safe temporary crossing. Furthermore, the lack of clarity about the core of the conflict and its legal ramifications again raised a legitimate question about whether or not public, especially EU, funds were at risk. In short, there were fundamental questions concerning whether the timing of the Taking-Over Certificate was compliant with the law and whether it served the public interest. These questions appeared relevant in the context of unfinished work (such as the noise barriers), the failure to obtain certification for certain project components, or the issue in Poraj. The Observer felt that it needed to develop a better understanding of the situation and that an in-depth legal assessment was critical. In fact, the Observer actually commissioned the legal consultant to draft a legal opinion.

The opinion was sent to all the pilot participants on 1 April 2021. It essentially stated that the Project Engineer should have rejected the Contractor's request for a Taking-Over Certificate. Moreover, the Contracting Authority should have been consulted about decisions on the matter, but it was not.[52] Meanwhile, the Contracting Authority could have refused to participate in the final acceptance – which it did, but failed to document properly. This gave the Contractor some space to continue the acceptance procedure unilaterally. However, the unilateral acceptance by the Contractor had no legal or factual basis because some of the work had not been completed. Neither party used the option to take "corrective" actions after the unilateral

50 Minutes of the 7th Quarterly Meeting, https://paktuczciwosci.pl/wp-content/uploads/2021/01/Notatka-ze-spotkania-kwartalnego_17.11.20_OST.pdf [accessed: 13 September 2021].

51 Letter from the Batory Foundation to PKP PLK S.A. of 22 February 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/pismo-Fundacji-ws.-aneksu_22 February 21.pdf [accessed: 16 August 2021].

52 In its comments on this report, the Contractor notes that the Engineer is not expected to obtain the Contracting Authority's consent to this decision as part of the public contract. The public contract exhaustively lists all the cases in which the Engineer must obtain the Contracting Authority's consent before making certain decisions. The issuance of a Take-Over Certificate is not one of them. According to the Contractor, the Engineer is legally obliged to act objectively and fairly as part of an applicable FIDIC public contract, rather than to follow the Contracting Authority's instructions indiscriminately. However, this argument is disputed by the Observer (see Section 6.7).

acceptance and the issuance of what the Observer and the Contracting Authority considered a defective Taking-Over Certificate. One of the "corrective" actions proposed by the Contracting Authority to the Engineer was to waive the consequences of the breach by issuing the Taking-Over Certificate in breach of the contract, which would have allowed the acceptance activities to be repeated in the future in accordance with the laws and legislation governing the acceptance and issuance of the Taking-Over Certificate. Instead, the parties escalated the dispute. It was not possible to answer the question relating to the unfinished work in Poraj, because the status of this project component remained undefined until the completion of the opinion. The Contractor strongly rejected the Observer's opinion, accusing the Observer of conflict of interest and presenting the arguments summarised above.

In response, the Observer deemed the Contractor's position unfounded, rejecting it in several letters and at the Quarterly Meeting in April 2021. The Observer was not motivated by any financial gain while seeking to sign an appendix to extend the implementation of the monitoring. Above all, the efforts to extend the appendix began before the controversy surrounding the Taking-Over Certificate issued in January 2021 for the reasons described earlier. Even in December 2020, when the Observer first proposed an appendix, no one was able to foresee the problems that eventually surfaced after the controversial Certificate was issued in January 2021. Moreover, it became quite clear as early as in September 2020 the main part of the project would be completed but the work in Poraj would spun off to a separate job. This job should be further monitored and this was the main reason behind approaching the Contracting Authority with a proposal to sign an appendix extending the monitoring until the end of September 2021. The decision to approach the Contracting Authority followed consultations with the Ministry of Development Funds and Regional Policy,[53] which initiated and managed the pilot of the Pact in Poland. Hence the allegation that the Observer was motivated by the desire to extend the monitoring and obtain a financial benefit from it is untenable, in the context of the controversial Taking-Over Certificate. The efforts to sign an appendix with the Contracting Authority predated the controversial Certificate.

Moreover, the Observer decided to draft a legal opinion on the circumstances of issuing the Taking-Over Certificate and asked the Contracting Authority for its position, even before the latter approached the Observer on the matter. Both parties therefore saw the need to address the issue. As mentioned earlier, from the Observer's point of view, the crux of the problem and the main motivation behind commissioning this opinion was not so much the dispute between the Contracting Authority and the Contractor as a wish to get a big picture of the situation to assess the potential threat to the public interest, especially in terms of the possible loss of domestic and EU public funds.

Although it was an essential element of the pilot, monitoring was not the Observer's only activity. It engaged in analytical, communication and education activities concerning the public procurement market. There were so many of these activities in the final year of the pilot project that it would have continued until the expiration of the agreements with the European Commission and Transparency International, i.e. the end of 2021, even if the Contracting Authority had accepted the controversial Taking-Over Certificate. The Observer would therefore not have lost its funding, although it would no longer have engaged in monitoring activities or only engaged in a limited number of these projects. Therefore, the allegations of financial self-interest are completely misplaced.

In addition, the Contractor's claim that the legal advisor who drafted the opinion was guided by financial interests was misconceived, too. First of all, the Contractor seems to have ignored the fact that the Observer's legal consultant was not an individual but a law firm that internally appointed its employees to draft legal opinions for the pilot and later paid them for the service. Moreover, the law firm's hourly rate for providing legal services for the pilot (PLN 97.17 incl. VAT) was far below its commercial rates.[54] The pilot was a not-for-profit undertaking, so it was possible to obtain legal assistance services below market rates. Therefore, it can hardly be argued that the legal consultant was motivated by profit when deciding to draft the opinion. The consultant viewed being part of the Pact more in terms of its Corporate Social Responsibility engagement than a profit-making project, which allowed it to accept lower rates for its services.

Finally, the Observer's impartiality was unduly questioned because it had apparently requested the legal opinion drafted by the Contracting Authority, but not one drafted by the Contractor. Firstly, the Contractor's rationale, along with legal arguments, was presented in the decision to issue the Taking-Over Certificate and in extensive correspondence with the Contracting Authority. It should be emphasised here that, in preparing its opinion, the Observer used the documentation provided to it by all parties to the dispute. In the aforementioned correspondence, the Contracting Authority did not refer in equal detail to the arguments of the Contractor and the Project Engineer. When asked by the Observer why, the Contracting Authority replied that it had its own analysis, which it did not disclose to the parties to the dispute. Hence the request from the Observer, which wanted to know more about the Contracting Authority's position. Secondly, the Contracting Authority refused to provide the Observer with access to its own analysis, arguing that it did not want it to influence the opinion drafted at the Observer's request. The Observer only became acquainted with the PKP

53 Minutes of a special meeting with representatives of the Ministry of Development Funds and Regional Policy on problems in the Integrity Pact (22 December 2020), https://paktuczciwosci.pl/wp-content/uploads/2021/03/Notatka_spotkanie_z_MFPR_22.12.2020_OST.pdf [accessed: 1 October 2021].

54 https://gptogatus.pl/doradztwo-prawne-cennik/ [accessed: 1 October 2021].

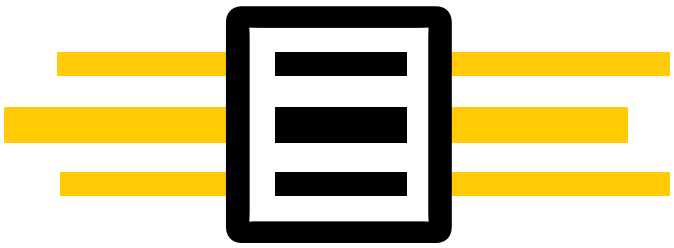
PLK S.A. analysis several weeks after it had submitted its own opinion. This did not change the Observer's position on the issue in question. Thirdly, the Observer also expressed its readiness to familiarise itself with the legal opinion in ZUE S.A.'s possession and to revise its view on the case on its basis.[55] However, the Foundation was never presented with such a document.

In conclusion, it should be noted that none of the other parties involved in the Integrity Pact pilot project saw any signs of the Observer acting in conflict of interest. No objections were made by the Ministry of Development Funds and Regional Policy or by the Contracting Authority, which would have had additional powers resulting from the content of the Pact.

The Contractor did not drop its objections to the Observer or its demands to withdraw the legal opinion. The Observer rejected the Contractor's arguments. In this stalemate, the Contractor sent a complaint concerning the Observer's actions to Transparency International and to the European Commission. Meanwhile, before the Contractor even sent the complaint, the Observer had informed its contractual partners, the European Commission and Transparency International, of the nature of the allegations against it.

At the time when this report was being completed, Transparency International had reviewed the Contractor's position and the Observer's explanatory comments, and indicated that it had not find merit in the claim that the Observer had acted in conflict of interest when commissioning the legal opinion. The position of the European Commission was not known at the time.

RECOMMENDATIONS CONCERNING INTEGRITY PACT IMPLEMENTATION



The content of the Integrity Pact should contain a **precise definition of conflict of interest** and **the procedures for managing the risk of it occuring.**

5.3. Access to Public Information During the Project

Problem Description

The question of access to public information was experienced during the pilot from the very beginning. Our first report discussed the details of the guarantee for the public Observer to have unfettered access to information about the contract at each stage of the project, from bidding to completion. Even if it is relatively well developed (at least in Poland), the general statutory framework for access to public information is not enough to ensure fast and uninterrupted access to monitoring information.

55 Letter from the Observer to ZUE S.A., 24 May 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/04/pismo_ZUE_24.05.21.pdf [accessed: 13 September 2021].

This problem was solved through good cooperation with the Contracting Authority at the stage of preparing the Pact.

When the tender was being evaluated, the first practical problem relating to access to public information emerged, requiring a reaction not only from the Observer, but also from other entities related to the government project being monitored. It was of a systemic nature and involved the need to resolve a dilemma between the freedom of access to public information and company secrecy, an argument cited by the winning contractor when it wanted to reserve a confidential part of its bid. This dilemma was finally resolved by a ruling issued by the National Appeals Chamber, which leaned towards broadening access to public information during calls for tenders and bid evaluation.[56]

Access to public information became an issue again when the project began. This was not so much a challenge to the monitoring exercise as a systemic problem. The challenge now was to ensure access to public information while the project was in the implementation phase. A dispute had existed in the background between the Contractor and the Contracting Authority about whether or not it would receive a mandatory to secure an environmental decision to install acoustic screens along four kilometres. The details of the dispute are presented in section 6.2, above. In a nutshell, the Contractor decided that there was no need to build noise barriers in the section because its expert had concluded that noise levels did not exceed the norm. This was in line with the bid where, as the Contracting Authority observed, the construction of noise barriers was included, but the amount was very low. The Contractor therefore did not believe that noise barriers were necessary, even though FUP had included this option. Again, the Contractor thought that it was meant as a last resort, with reference to the EIA Report, and expected the provisions of the decision on environmental conditions (DEC) to be issued in the future. The Contracting Authority did not agree with this approach and demanded that screens be installed, which led to a dispute.

The Contractor suggested comparing the noise-intensity calculations in its possession with those the Contracting Authority was referring to while demanding that noise barriers be built. For this to happen, the Contracting Authority would have to share an editable version of the "acoustic model", a digital file containing the calculations that determine the nature of noise barriers along specific sections of the upgraded railway line. The model can also be defined as a digital representation of the "acoustic climate (noise condition) in a selected space".[57] During discussions, including regular quarterly monitoring meetings, the Contracting Authority refused to share the file. On 14 August 2019, the Contractor decided to send the Contracting Authority a request for access to the acoustic model, based on the legislation on access to public information. PKP PLK S.A. is a government-controlled company and there were grounds to make this request, provided that other attempts to obtain the model had failed. This was fully in line with the Polish law on access to public information and the case law in cases concerning these kinds of entities.

This is a peculiar situation. The Contracting Authority and the Contractor are contractually bound to cooperate and they are referring to access to public information legislation to solve what is essentially a communication problem between the contract parties. This is how this standoff was interpreted by

56 K. Baryła, G. Makowski, M. Waszak, *The Integrity Pact. A Civil Society Monitoring of Public Projects. Designing an Integrity Pact and the Contractor Selection*, *op. cit.*, pp. 41–43.

57 Legal opinion (view of civil society organisation) of 3 November 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/06/list-przewodn-amicus-curiae-Fundacji-Batorego.pdf [accessed: 1 October 2021].

the Observer and by external experts consulted on the matter.[58] This is controversial in itself – also because the obligation to cooperate, and thus to exchange information, results not only from the contract, but also from the provisions of civil law (specifically, the provisions of Article 354 of the Civil Code). Similar conclusions can be drawn without even referring to legal arguments or the provisions of the contract. The Contractor and the Contracting Authority, when executing a public contract the is meant to serve the public, should simply exchange all the necessary information or data that may be useful to carry out the project as well as possible. However, this did not happen in this case, and the Contractor's request for access to the acoustic model was the start of a long legal procedure.

The Contracting Authority twice refused a request for access to public information, arguing that the model is not public information within the meaning of the Act and is merely an "internal document"; that is, working material that does not determine one decision or another, or the course of action. This is quite a popular argument used by public entities in Poland when they want to evade the obligation to share public information. It is not uncommon for it to be rejected during court proceedings, but even if this is eventually the case, the matter may drag on for months, if not years.

The Contractor reacted to the refusal to release the model by filing a complaint against the Contracting Authority's inaction to the Voivodship Administrative Court in Warsaw in early December 2019. The court considered the complaint in a closed session surprisingly quickly, without hearing the parties. On 23 March 2020, a ruling was issued in which the court upheld, first and foremost, the Contracting Authority's position that the model was an internal document and, for this reason alone, does not constitute public information. The Contractor disagreed with this position and filed a cassation appeal at the Supreme Administrative Court.

Response to the Problem

The Contractor began constructing the screens despite the ongoing dispute over the acoustic model. From the perspective of the Observer and the goals of the pilot, it was an important moment, it was worth going beyond purely monitoring activities. When the Contractor sent the cassation complaint, the dispute over access to public information turned into a kind of strategic litigation. The outcome of this court case may contribute to changes in access to public information enforcement practices in public procurement and other areas.

Guided by its mission to advocate transparency in public life and by the Pact's objective to "explore the feasibility of using Integrity Pacts to improve transparency and accountability of EU spending, in structural and cohesion funds," the Observer decided to send a friend-of-the-court opinion (*amicus curiae*) to the Supreme Administrative Court presenting the legal arguments in favour of sharing the acoustic model.

In the opinion, the Observer mainly argued that PKP PLK S.A. is a company wholly owned by government, so it is only natural that it should be obliged to share public information. In fact, PKP PLK S.A.

58 See: *PODCAST: Dostęp do informacji w zamówieniach publicznych*, https://paktuczciwosci.pl/aktualnosci/podcast-dostep-do-informacji-w-zamowieniach-publicznych/ [accessed: 1 October 2021]; *Czy łatwo jest uzyskać dostęp do informacji publicznej? – Relacja z debaty*, https://paktuczciwosci.pl/aktualnosci/czy-latwo-jest-uzyskac-do-step-do-informacji-publicznej-relacja-z-debaty/ [accessed: 1 October 2021]; P. Bogdanowicz, *Dostęp do informacji w zamówieniach publicznych w prawie polskim i jego główne ograniczenia*, Batory Foundation, Warsaw 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/08/P_Bogdanowicz_Dostep-do-informacji-w-zamowieniach_Analiza.pdf [accessed: 10 October 2021].

appears to support the claim by regularly publishing its own Public Information Bulletin or by presenting the access to public information procedure on its website.

Secondly, the friend of the court's opinion pointed out that the acoustic model was not only part of the project documentation, but also one of the inputs for the environmental impact report, based on which the environmental impact assessment was conducted and the decisions on the environmental conditions necessary for the completion of the monitored project were issued. The model was therefore an analytical document that fed into other activities – that is, other documents, administrative approvals, and so on – and should be considered a deliverable of the public project. The acoustic model therefore falls within the definition of public information, the interpretation of which was presented several times by the Supreme Administrative Court, clarifying the statutory definition. The opinion cites one of the Supreme Administrative Court's rulings, which states that: *Public information is the content of all kinds of documents relating to a public authority and concerning the sphere of its activities.* ***It is irrelevant how these documents came to be in the possession of the authority and what matters they concern. What is important, however, is that such documents serve the purpose of fulfilling public tasks by the authority and relate directly to it.***[59] The acoustic model is this kind of document because neither the Contracting Authority nor other public entities could fulfil their jobs without it.

Thirdly, the opinion argues against treating the acoustic model as an internal document. According to the extensive case law concerning the provisions on access to public information, it is assumed that *an internal document is a document serving the exchange of information, the collection of necessary materials, the reconciliation of views and positions, documents that are not binding as to the manner in which the matter is settled and are not an expression of the authority's position*.[60] A similar definition of an internal document was also presented in one of the rulings of the Polish Constitutional Tribunal.[61] This definition mainly covers (as is apparent from the case law of Polish courts) correspondence between public entities' employees or handwritten, working minutes of meetings. In the face of this jurisprudence, it is difficult to agree with the claim that the acoustic model – a document based on which, as already mentioned, other documents were drawn up and specific administrative decisions were made – is an "internal document". In this regard, a Supreme Administrative Court ruling from 2017 was cited, in which it unequivocally stated that: *Materials in possession of a public authority that may be used in the decision-making process must not be considered "internal documents".*[62]

The Observer considered these the most important arguments for sharing the acoustic model with the Contractor. When this report was being finalised, the Supreme Administrative Court had not considered the case and, taking into account Polish realities, it was difficult to say when it would be resolved and what the verdict would be. It is also difficult to predict whether the court will take into account the opinion submitted and how it will refer to it. A favourable ruling in terms of access to public information would be a major contribution to Polish jurisprudence concerning not only the access itself, but also the transparency of the public procurement process. The friend-of-the-court opinion has a chance to make this scenario plausible. Even if the Supreme Administrative Court ruling does not resolve the dispute between the Contracting Authority and the Contractor or increase transparency in the monitored project, it may be important in similar developments in the future, and there is a chance that it will increase the transparency of the entire public procurement market.

59 The ruling of the Supreme Administrative Court of 27 March 2012, file Ref. No.: I OSK 155/12.

60 Legal opinion (view of a civil society organisation) of 5 November 2020, p. 10, https://paktuczciwosci.pl/wp-content/uploads/2021/06/list-przewodn-amicus-curiae-Fundacji-Batorego.pdf [accessed: 27 November 2021]

61 Ruling of the Constitutional Court of 13 November 2013, ref: P 25/12.

62 Ruling of the Supreme Administrative Court of 31 January 2017, ref: I OSK 1690/15, per *amicus curiae*.

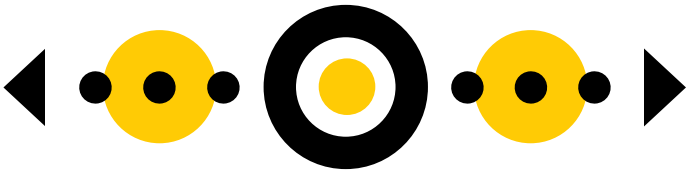
SYSTEMIC RECOMMENDATIONS

Change in legislation is needed to broaden the opportunities **for access to procurement information**.

In addition to sending the opinion to the court, a seminar was organised on 26 October 2020 as part of the communication and education activities accompanying the monitoring. The seminar, which addressed access to public information in public procurement, was attended by experts and professionals who were not involved in the pilot.[63] The seminar attracted considerable interest. In addition, a podcast on the same topic was produced with the involvement of Professor Piotr Bogdanowicz, an expert on European legislation specialising in access to public information. He was also commissioned to draft an expert opinion on the barriers to accessing public information in procurement.[64]

In conclusion, the *amicus curiae* observation filed by the Observer, as well as the education and communication materials, will remain a valuable resource for helping resolve disputes over access to information in public procurement for many years to come after the end of the pilot project.

RECOMMENDATIONS CONCERNING INTEGRITY PACT IMPLEMENTATION



The Observer should be the **steward of access to public information** on the contract in question.

63 *Czy łatwo jest uzyskać dostęp do informacji publicznej? – Relacja z debaty*, *op. cit.*

64 P. Bogdanowicz, *Dostęp do informacji w zamówieniach publicznych w prawie polskim i jego główne ograniczenia*, *op. cit.* [accessed: 10 October 2021].

5.4. Work Completed without Required Permits

Problem Description

A significant problem that emerged during the monitoring was the start of construction work without the necessary documentation (in particular, without building permits). This circumstance was unequivocally confirmed in administrative proceedings initiated by the Silesian Voivodeship Inspectorate of Building Control (more on this later). The problem recurred several times almost from the start of the project; the individual cases had different scales and different consequences. In this report, we focus on two particularly interesting cases.

The first case involving work carried out without adequate permits that attracted the Observer's attention occurred in early 2018. The monitoring team was looking at the prolonged process of the Contractor obtaining the building permits needed for the work to begin. Quite unexpectedly, in August 2018, it emerged that the work was about to start any moment, although the permits had not been obtained. An additional circumstance that caused the Observer to look more closely at the matter was the unexpected change in the Project Director on behalf of the Contracting Authority.

The lack of proper building permits for several key sections of the project where the work was scheduled to start was raised by the Project Engineer as early as July 2018. Later, on several occasions, in correspondence and during contract meetings, the Engineer raised the issue, pointing out to the Contractor that the latter could not begin the work without the necessary approval, as this would not only be a violation of the Construction Law, but also of the terms of the contract.[65] The Engineer went on to express its deep concern about the Contractor undertaking the work without consulting it or the Contracting Authority. The Contractor argued that it had the right to start the work simply by filing a "notification of execution of construction work".[66] A notification of construction work, or simply a "notification", is filed where a building permit is not required. It communicates the intention to commence specific construction work to the competent Architecture and Construction Authority; in this case, at the regional level. The notification is subject to review by the regional construction inspector. This mechanism covers a narrow selection of types of construction work, pursuant to the Construction Law of 7 July 1994, and is much faster than the full building permit process. The scope of work subject to a building permit is specified in a separate catalogue in the articles of the Construction Law and requires in-depth analysis of the documentation by the regulator. In contrast, the notification, "becomes legally binding" and opens the way for the work to begin if the regulator does not react within 21 days from the date that the information is sent to it. Meanwhile, as the Contracting Authority pointed out, even simple work, for which a notification would suffice, may require a building permit. For example, as a result of contractual obligations or by force of law – for instance, if an assessment of the project's impact on the natural environment needs to be conducted before a decision on environmental conditions is issued – and this was the case with the monitored contract. Nevertheless, as far as the idea is concerned, both modes of performing construction work (notification and permit) are permissible and are supposed to complement each other.

65 Letter from the Project Engineer to PKP PLK S.A. Ref. MP/PKP/B0/jk/MO/526/18 dated 8 August 2018; staff minutes of the meeting on 9 August 2018 conducted by the Project Engineer.

66 Letter from ZUE S.A. to the Observer dated 21 May 2019, https://paktuczciwosci.pl/wp-content/uploads/2019/06/W-2796-Fundacja-Batorego-Dot.-Pisma-Fundacji-im.-Stefana-Batorego-z-9-maja-2019r.pdf [accessed: 1 October 2021]; letter from ZUE to the Project Engineer Ref. ZAW/2018/08/829/AWO dated 1 August 2018.

The Contractor informed the construction supervision about the commencement of work on three sections of the project. More precisely, between May and August 2018, the Contractor reported the start of seven pieces of construction work on these three sections of the project.[67] In a letter dated 8 August 2018, the Project Engineer categorically objected to the starting of work without first obtaining building permits. Additionally, it alleged that the Contractor, when filing the notifications, should have sent a full set of documents to the Silesian Voivode, including the information on environmental conditions. In the Engineer's opinion, if the notification had included the information that such a decision had been issued, the oversight agency could have objected to the start of work and told it to obtain the permit. However, the Site Development Plan attached to the notification included information about the issuance of the decision on environmental conditions, so the Contractor considered the Engineer's allegation unfounded. In view of this alleged loophole in the Contractor's submission, the Engineer recommended that a resubmission be sent to avoid accusations of Construction Law violations and the associated consequences, which could potentially be far-reaching (more on this in a moment). Furthermore, in the same letter, the Engineer pointed out that the Contractor had deliberately misled the Investment Project Opinion Panel (ZOPI) by failing to inform its members that the submissions had been made. In response to the above, the Contractor pointed out that there was no obligation to inform the ZOPI about submissions because, in the Contractor's opinion, the panel's role is to verify and accept the design documentation, rather than applications/notifications within the scope of performed work.

This development can be interpreted in various ways. One possible explanation, which was seen by the Observer, was that the Contractor wanted to make up for delays in the project-implementation schedule in this way. Interestingly, this supposedly happened with some kind of acquiescence from the Contracting Authority (i.e. after the formal and legal dispute between the Contractor and the Contracting Authority regarding the unclear contractual provisions had been resolved), and eventually also of the Project Engineer. Events that followed the Project Engineer's intervention support this point. On the very next day, 9 August 2018, an urgent meeting of the parties directly involved in the project was convened, after which the Contractor stated, both verbally and in writing, that the notification was *a preliminary activity on the way to obtaining all the required [...] building permits.*[68] At the meeting, the Contractor also presented a legal opinion, drafted at its request, which indicated the legitimacy of its conduct and compliance with the terms of the contract and the law. The Engineer then accepted the Contractor's arguments as valid and withdrew its earlier reservations about the legality of the construction work. The Engineer also gave permission for the construction work to begin. At the Observer's request, the Contracting Authority, specifically the new Project Director, shared information about the meeting and its findings. Meanwhile, in the same letter, the Contracting Authority expressed its approval of these findings, emphasising that the Contractor would be assigned "track closures". These are traffic stoppages on sections of the upgraded line, planned months in advance, which have a direct impact on the project schedule.

Having analysed the circumstances, the Observer believes that all the parties to the contract were anxious to start the construction work as soon as possible, even if it meant pushing the boundaries of legality or violating legislation. In the Observer's opinion, legal formulas that could help avoid the possible negative consequences of such action and did not lead to project delays were sought. The Architecture and Construction Authority might not have been alert enough, either. Apparently, it did

67 Letter from ZUE to the Project Engineer, *op. cit.*

68 Letter from PKP PLK S.A. to the Batory Foundation, 4 December 2018, https://paktuczciwosci.pl/wp-content/uploads/2019/02/Ad_pismo_nr_3_Odpowiedz_PKP_PLK_z_dn_4_12_2018.pdf [accessed: 26 November 2021].

not analyse the notification sent to it thoroughly enough. It could and should have demanded, for example, additional explanations from the Contractor. If it had done so, it would have had a proper idea of the scale and nature of the work, and could have objected to them beginning without a building permit.

Regardless of this particular problem, certain risks are associated with these kinds of circumstances. The Observer considered various hypothetical scenarios (which did not materialise). The consequences of breaching of the law could potentially have been severe in this case. Apart from breaching the Construction Law or the contract terms, there might have been other risks involved, including the risk of corruption. Imagine (even if this scenario seems highly unlikely) that work without the proper permits – that is, the full approval process, including the building permit – were to be performed defectively (this did not happen, in this case). The Contractor, the Project Engineer or even the Contracting Authority could theoretically strive to conceal the legal or construction defects, moving to subsequent violations. The creation of this spiral of violations is a real, almost textbook risk often described in expert and academic literature on corruption, public policy or public management.[69] Another type of risk that could realistically occur in these circumstances is a hazard for the project's end users. A permit to commence construction work was essential because, following an environmental impact assessment, the project was covered by a decision on environmental conditions. At the end of the day, where the law is violated or circumvented, there will always be a "temptation" to create a spiral of steps designed to conceal the offence.[70] This is where the threat of corruption increases. In the Observer's opinion, there were real risks related to the violation of the law, potential corruption, a risk to public safety and the environment. Moreover, the legal opinion drafted for the Observer suggested that regulatory non-compliance could lead to risks of criminal liability for the people carrying out the work without the proper permits, such as the site manager. A real risk could also be the loss of the subsidies from EU funds, as the European Commission could deem the cost of work carried out in breach of the law an ineligible expenditure. There were enough reasons (actual and potential) for a more resolute reaction from the Observer, which will be discussed later in this report.

The case led to one of the biggest crises during the monitoring and the most serious problem with enforcing all the relevant procedures during the project. There was another similar, but less significant, issue concerning construction work conducted without the appropriate arrangements or permits.

In September 2020, the Observer was approached by a journalist from the *Gazeta Myszkowska*, who asked general questions about the Pact and a specific development that a member of the local community in Myszków had reported to the newspaper. The resident claimed that the Contractor had been carrying out work on his private plot along railway line No. 1 in Myszków, in the area of Nierada and Kręciwilk, for several months. According to the journalist, the work significantly interfered with the condition of the plot (for example, a trench was dug to lay a cable trunk line, and trees and bushes were uprooted) and was carried out without permission to enter the plot. This was allegedly confirmed by representatives of the Regional Directorate for Environmental Protection in Katowice, and by PKP PLK S.A. employees visiting the plot in question. The Observer offered *Gazeta* a fairly general reply because it had only found out about the issue from the journalist's question. Following the press inquiry, the Observer asked the Contractor and the Contracting Authority to comment on the incident.

69 See: N.A. den Nieuwenboer, M. Kaptein, *Spiralling down into Corruption: A Dynamic Analysis of the Social Identity Processes That Cause Corruption in Organizations to Grow*, Journal of Business Ethics 2008, Vol. 83, No. 2, pp. 133–146.

70 M. Kosewski, *Kiedy urzędnicy naruszają wartości moralne i jak można to ograniczać?*, *Służba Cywilna* 2001/2002, Issue No. 3, pp. 9–22.

The outcome of this intervention will be discussed later in the report. At this point, it should only be noted that a potential consequence of the Contractor trespassing on a private plot of land, without permission or the required consent, could be criminal and civil liability (the person reporting the damage filed claims and announced his intention to sue; a criminal case was opened, but then dropped, as no evidence of an offence was found).

Response to the Problem

The Observer reacted to the first situation with some delay. The monitoring had focused on the increasing risk of delays in the start of construction work until the first Project Director was replaced. As late as the end of August 2018, it looked like the biggest problem during the implementation of the project would be the delays related to the protracted procedures for obtaining building permits and other administrative decisions. The biggest risk concerned the railway line location decision, known as ULLK, and/or the public purpose project location decision, known as ULICP. Some of the building permits could not be obtained until March 2019 (the original deadline for obtaining all the necessary approval was 20 August 2018), which would mean a huge delay in the implementation of the project. Correspondence available at the time showed that, at the end of August 2018, the Contractor had only obtained just around a third of the necessary approvals, which was the cause of the tensions evident during Site Council meetings and in contractual correspondence. Meanwhile, according to the original schedule, construction work was supposed to start in early September 2018.[71]

Meanwhile, it was very clear in mid-August 2018 that work could actually begin, regardless of whether or not permits and other decisions would be obtained. It was difficult to understand from the conversations how the work would actually start without violating the law. As late as September 2018, the Observer did not have correspondence showing that the work had begun, although it was already underway. The Observer continued to question the Contracting Authority, the Contractor and the Project Engineer about the increasing pressure on the project timetable and how delays could be reduced, while being aware of the ongoing process of obtaining a building permit.

The fact that the Contractor went down the "notification path" and intended to start some of the work using this process became fairly clear during a conversation with the Contract Director in early September 2018. The construction work had already started without what Observer believed were the appropriate decisions and permits. Shortly afterwards, the then Project Director left his post and PKP PLK S.A. decided to restructure the Contracting Authority's project team, which confused matters even further. Subsequent meetings with the new Project Director and representatives of the Centre for EU Transport Projects in early September 2018 cast more light on the situation. There were first-hand accounts that discussions were being held on both the Contractor's and the Contracting Authority's side about the growing delays and about mitigating the risk by commencing the work "by notification". It was also known that the CUPT expressed concern about this idea, pointing out that work commenced

71 Until the completion of the report, the Contractor consistently maintained that there could be no question of any delay in obtaining the necessary documents. In its opinion, pursuant to Sub-clause 1.1.6.13 of the Special Contract Conditions, "Building Permit" means a document entitled "The Building Permit Decision" or other approval issued in the form of an administrative decision by a competent Architecture and Construction Authority pursuant to Chapter 4 of the Construction Law. A "Building Permit" shall also mean, depending on the circumstances, a "Notification of Construction Work". A notification on performing construction work is understood as "a notification to a competent authority on the type, scope and manner of performing construction work and the date of its commencement pursuant to Art. 29–31 of the Construction Law, to which the said authority did not object".

without permission, and therefore with a legal defect, may turn out to be ineligible costs, in terms of the rules on spending EU funds. However, it was still difficult for the Observer to comment because it lacked access to the full correspondence on the matter. Nevertheless, in early October, the Observer's legal consultant was asked for an opinion on the possibility of carrying out construction work "by notification", and provisionally found that it would breach the provisions of the Construction Law (later, the Observer commissioned a detailed legal opinion on the subject, which is discussed later).[72]

The Observer's concerns about construction work performed without the required permits were not confirmed until the end of October 2018, when the first package of contractual correspondence relating to the issue was obtained. It showed that the scenario of carrying out construction work "by notification" had been analysed three months earlier. For example, at the end of July 2018, the Contractor had the aforementioned legal opinion indicating that it could start part of the construction work solely "by notification". At that time, this possibility was categorically rejected by both the Contracting Authority and the Project Engineer. Eventually, it turned out that, despite their earlier objections, the Contracting Authority and the Project Engineer changed their minds about the possibility of commencing work by "notification", confirming (at that time) the correctness of the Contractor's actions. Accordingly, work began in early September 2018, without the required building permit.

As a side note, it is worth noting that one of the arguments in the aforementioned legal opinion commissioned by the Contractor was that the tender documentation contained misleading provisions, from which the possibility of starting work without a permit supposedly arose. The Project Engineer argued that the Contractor's actions seemed inconsistent with the terms of the contract, as the applicable Construction Law clearly stated that the work must be carried out based on a building permit because of the DEC obtained after the environmental impact assessment.[73] However, the Contractor referred to the definitions in the ToR and not to Section 4.7.5 of the FUP on "Construction Permits", which set out the requirement. The content of the ToR was different and this was a major inconsistency. According to the Contractor's legal opinion, the description of the work was unclear; therefore the Contractor interpreted the requirement to obtain a building permit before starting the work differently. The Contractor argued that the discrepancies between the ToR and the SCC (a higher-ranking document) allowed it, in certain circumstances, to treat the "notification" as a building permit, so that, by performing the work by "notification", it would not be in breach of the contract. To put it more bluntly, in the Contractor's opinion, the contract unambiguously indicated that the building permit also meant the notification of construction work. The Contractor's legal opinion also noted that, when the tender was awarded, the Contracting Authority still did not have a DEC, which, in the Contractor's opinion, meant that the requirement to obtain a building permit was undefined.

Leaving aside the validity of the arguments on both sides, it is worth emphasising that the Observer warned the Contracting Authority, before the tender was even announced, that the discrepancies in the documentation and the lack of DEC could cause problems and irregularities while the project moved into the implementation phase. Unfortunately, the Contracting Authority ignored these objections,[74] what resulted in the problem, as described in detail in the first Integrity Pact Pilot Project Report.

72 Legal opinion of 10 October 2018, https://paktuczciwosci.pl/wp-content/uploads/2021/11/OPINIA-BATORY-terminy-ulcip-roboty-dodatkowe.pdf [accessed: 29 November 2021].

73 Letter from the Project Engineer to PKP PLK S.A. Ref. MP/PKP/B0/jk/MO/526/18 dated 8 August 2018.

74 K. Baryła, G. Makowski, M. Waszak, *The Integrity Pact. A Civil Society Monitoring of Public Projects. Designing an Integrity Pact and the Contractor Selection*, *op. cit.*, pp. 34–36.

Note that the Observer was only able to start analysing the problem in more detail at the end of October 2018. The information provided to the Observer was unclear, incomplete or late, and much of the documentation was only obtained in response to detailed queries to the Contracting Authority and the Contractor. This gave the unmistakable impression that the Contracting Authority, the Contractor and the Project Engineer were avoiding their information obligations to the Observer, which stemmed directly from the Pact, and heightened suspicions that there might be more to the matter than meets the eye.

When analysing the submitted documentation, the Observer's attention was particularly drawn to a letter from the Project Engineer dated 8 August 2018 (i.e. already after the Contractor had obtained its own legal opinion). In this letter, the Engineer categorically rejected the possibility of carrying out construction work "by notification", while presenting in detail the legal conditions and possible consequences of taking these steps, both for the Contractor and for the whole Project. The main question that arose in this context was how it was possible that the work began without the proper approvals, with the acceptance of the Contracting Authority and the Project Engineer, which, after all, strongly opposed this variant. The review of the correspondence between the parties and the documentation gave strong reasons to believe that the legal issue related to the possibility of performing work by notification is open and requires in-depth analysis by the Observer. The Observer 's legal consultant was therefore commissioned to draft this kind of opinion. Following thorough analysis, the opinion was drafted on 22 March 2019.

Meanwhile, it became clear that performing work on a notification basis was a systemic problem, not only caused by factors specific to the monitored contract. The Observer also noticed that the lengthy building permit procedures are project-specific, but it did not have any assessments or studies on the matter. However, it received this information from experienced contractors in infrastructure projects and had no reasons to question their judgement. According to these reports, delays were often caused by the poor quality of project documentation, which could be a consequence of limited project resources and very short contractual deadlines for the preparation of documentation. The reason might also be the overload of voivodeship offices responsible for issuing building permits, underfunding and staff shortages.[75] It should also be noted that 2017-2019 was a period of high intensity in the National Railway Programme. Dozens of railway projects were launched, requiring hundreds, if not thousands, of building permits and other documents. Meanwhile, the authorities did not receive adequate support from the government during this period. The investment covered by the Pact also faced these problems. When the government is not delivering services fast enough (by failing to issue administrative decisions), but government contractors are unconditionally expected to meet all the requirements in a timely fashion and are threatening with penalties for delays, it is not surprising that both contractors and contracting authorities seek "creative" solutions to the problem. However, from the point of view of the monitoring objectives and the Integrity Pact, this approach is clearly a risk that may lead to violations, abuse or corruption. The situation's other "systemic" dimension was that

75 In the context of the consultation on this report, the Ministry of Development Funds and Regional Policy recalled that the Minister of Infrastructure had stated, in response to the Observer's question on the matter, that the average time for issuing a building permit was 42 days. This would imply that there was no problem, as a large part of the building permits were issued within the statutory deadlines. Without questioning this figure, it should be noted that average values describe the phenomena in a very general way, and that referring to them alone can lead to the wrong conclusion (a much better single indicator is the median, at least). However, the problem must have been real, since, for the next EU multiannual financial framework, for 2021–2027, the Ministry planned funds for strengthening of the administrative bodies involved in the implementation of EU projects, influenced by the monitoring findings.

of the inadequate legislation and regulation of construction work notification. The legislation applicable then allowed several different options to circumvent the permit during certain construction work by sending "notifications" to the oversight agencies. Moreover, to the best of the Observer's knowledge at the time, in the context of overburdened construction supervision authorities and unclear legislation concerning both "notifications" and deadlines for issuing building permits, the practice of circumventing the obligation to obtain permits was common. Again, the Observer had no surveys or quantitative research to understand the extent of the problem. It relied on the testimony of experienced infrastructure procurement market operators and its own technical consultants, who also had a long track record. Moreover, the Contractor pointed out, while reviewing this report, that the performance of work "by notification" was common practice. Neither the Ministry of Infrastructure nor the Ministry of Development Funds and Regional Policy questioned the estimated scale of these practices or presented quantitative arguments to the contrary.

SYSTEMIC RECOMMENDATIONS

The capacity of government bodies responsible for oversight and other decisions related to infrastructure projects **should be strengthened with additional funding and human resources.**

This is a classic case of what the social sciences call an "anomie".[76] These are conditions in which the social system (here, the public procurement system) sets certain goals for its participants and imposes certain obligations (executing the contract within a certain time limit), but does not itself provide the means (legal and institutional solutions) for those goals to be achieved and the obligations to be fulfilled. This is a recipe for fraud and corruption. The gap between objectives and means must be narrowed to reduce these risks. One way is to change the relevant legislation. Hence, irrespective of the actions targeted in the monitored project, the Observer decided in mid-November 2018 to communicate the problem to then Ministry of Investment and Development, which acted as the Managing Authority in the monitored project. It asked the Ministry to identify the extent of the problem, consider legislative amendments and strengthen the relevant government agencies as soon as possible. At that time, the Observer did not recommend any specific changes to legislation as it did not have sufficient knowledge to ascertain whether the problem could be solved by tightening or liberalising the existing legislation.[77]

76 R.K. Merton, *Social Structure and Anomie*, *American Sociological Review* 1938, Vol. 3, No. 5, pp. 672–682.

77 Letter from the Observer to the Minister of Investment and Development, 15 November 2018, https://paktuczciwosci.pl/wp-content/uploads/2018/11/Sz.-P.-J.-Kwieci%C5%84ski_15.11.18-1.pdf [accessed: 1 October 2021].

There was another systemic risk that expenses incurred in connection with unlawfully-performed construction work (without the relevant permits) could be regarded as ineligible for EU funding. This risk was identified by the Observer and the Contracting Authority, the Project Engineer, and CUPT.

In parallel with the letter to then Minister of Investment and Development, the Observer, which had already conducted a thorough analysis of the correspondence and documentation concerning the work by "notification", sent an official enquiry to the Contracting Authority asking for clarification. The Contracting Authority's response did not arrive until December 2018. It showed that, as a consequence of the exchange of correspondence and meetings between the Contracting Authority, the Project Engineer and the Contractor, it had been agreed, as early as August 2018, that the notification of work procedure was merely *"a preliminary activity to obtain all the building permits required under the terms of the contract* [...]*"*. Meanwhile, the parties agreed that this was a sufficient prerequisite for the work to commence and it offered the further advantage of enabling the project to go ahead and meeting the contractual deadlines. The Project Engineer finally agreed to start the work "by notification". By doing, so it appears to have contradicted itself, as it maintained that *"the procedure [...] of notification of work, as defined by the Construction Law, is neither lawful nor in line with the terms and conditions of the contract for this project"*. It demanded that the Contractor obtain the building permits as soon as possible. In practice, this meant that the Contractor was supposed to start the construction work without a proper legal basis, and that this work would then be "legalised" by obtaining a building permit a second time. In this context, the obvious question arose as to what would happen if the work carried out "by notification" did not comply with the requirements of a building permit already issued during or after it. From the Observer's point of view, this procedure increased the risk of irregularities or abuse, as there were naturally further levels of "temptation". An example of these negative consequences could be putting pressure on a government agency to "legalise", by means of a building permit, work that had already been performed or conceal information that permits had been obtained for work in progress or that had already been completed. It remained an open question whether the strategy adopted by the contract parties was lawful. The Contracting Authority seemed in favour of the Contractor's claim that this did not violate the applicable laws and regulations, as its own legal opinions suggested. The Project Engineer clearly distanced himself from the question and the Observer was still waiting for its own legal opinion.

The situation became increasingly complicated every week. Amid growing concerns, the CUPT stopped the reimbursement of expenses to the tune of PLN 22 million. The legal opinion commissioned by the Observer arrived on 22 March 2019.[78] The legal consultant firmly concluded that the work in progress had been commenced and continued in breach of the Construction Law. It also pointed to the possibility of criminal liability, at least on the part of the Contractor, the Architecture and Construction Authority, if the latter was found not to have checked the applications thoroughly enough and not to have objected, thus possibly committing a crime of negligence or abuse of office (one of the types of corruption offences). The work that had already been carried out could even be treated in terms of "arbitrary construction", with all its consequences (even, in extreme cases, the need to liquidate; that is, demolish the unlawfully-executed project components). The opinion also confirmed that the cost of the work carried out in this way may be treated as ineligible for financing as part of the EU grant, which could mean the loss of significant amounts of EU funds. The opinion also stated unequivocally that a building permit could not be issued for work already in progress or completed, such as that which had previously required a permit. In short, it would not be possible to "legalise" it with a second

78 Opinion of the Observer on conducting work by "notification", 22 March 2019, https://paktuczciwosci.pl/wp-content/uploads/2021/06/opinia-prawna-ws.-prowadzenia-rob%C3%B3t.pdf [accessed: 1 October 2021].

permit, as no such mechanism exists in Polish law. According to the opinion, the Construction Law did not provide for a corrective procedure in these kinds of cases, either. Meanwhile, after in-depth analysis, the opinion indicated that the voivodeship governor was wrong not to raise objections to the notifications sent to it by the Contractor, so it should develop a procedure to legalise the work itself, while not seeking to stop them or to demolish the completed facilities; that is, to take responsibility for the situation a large extent. The opinion therefore contained proposals for a way out of the problem, too. It should be noted here that the Contractor disagreed with the opinion and responded by sending a letter outlining the key points from its own legal opinion of July 2018.

Meanwhile, the Minister did not respond to the Observer's first letter in November 2018 (the response only came after a request had been sent under the provisions of the Code of Administrative Proceedings, in early 2019, which we write more about below). However, the Ministry's Department of Infrastructural Programmes devoted considerable attention to the problem of notification, holding discussions on the subject with the Main Office of Building Supervision, the Silesian Voivodship Office and the Silesian Voivodship Inspector of Building Supervision.[79] These institutions adopted measures with a view of solving the problems outlined in the report, while eliminating legal inaccuracies so as to minimise the probability of similar problems in the future.

In fact, plans to amend legislation affecting "work by notification" were announced in early 2019. The Observer approached the Ministry again, this time addressing a request under Article 241 of the Code of Administrative Procedure (the provision describing the procedure for administrative proceedings with requests addressed to public authorities) on 26 March 2019. This was all the more justified because, with its own legal assessment in place, it considered the problem even more pressing. It was only in response to the request, within the statutory deadlines, that the Ministry confirmed that, in response to the Observer's notification, legislative work had been initiated to introduce clear provisions regarding "work by notification". The Ministry stated that it had no data to assess the extent of the misuse of the "work by notification" formula to circumvent the need for a building permit. In any case, the Observer's intervention, for which the monitoring of the project covered by the Pact was the starting point, led to a change in the Construction Law. It contained a revised list of construction work that could be commenced and carried out "by notification". The amendment also obliged those filing the notification to attach a complete set of documents concerning the project, and required the supervisory authorities to review the notifications more closely. The drafting of the new legislation took until late December 2019. The Sejm passed it in February 2020 and it came into force in September 2020.[80] Of course, amending legislation cannot be expected to immediately improve market practices and eradicate the pattern of circumventing building permits by "notifying" the authorities about construction work, especially in the context of continued pressure to deliver infrastructure projects quickly. Nevertheless, this and the decision to strengthen the construction oversight authorities within the EU's multiannual financial framework for 2021–2027 are significant achievements of the pilot and can guide future system improvements.[81]

79 Minutes of the 5th Quarterly Meeting (Warsaw, 30 September 2019), https://paktuczciwosci.pl/wp-content/uploads/2019/11/Notatka_spotkanie_30.09.2019_OST.pdf [accessed: 1 October 2021].

80 *Jakie zmiany w procesie inwestycyjno-budowlanym obowiązują od września 2020*, https://www.biznes.gov.pl/pl/firma/inwestycje-budowlane/chce-zalatwiac-sprawy-przed-rozpoczeciem-budowy/od-wrzesnia-2020-r-rewolucja-w-prawie-budowlanym#8 [accessed: 1 October 2021].

81 Response from the Minister of Investment and Development to the Observer, 7 May 2019, https://paktuczciwosci.pl/wp-content/uploads/2019/05/Odp.-MIiR-dla-Fundacji_07.05.19.pdf [accessed: 1 October 2021].

Following a series of meetings and an intense exchange of letters that lasted until the end of May 2019, the Contracting Authority admitted that there were reasonable doubts about the administrative procedures used and adopted additional monitoring measures. In October 2019, the Regional Building Inspector in Katowice announced an administrative enquiry into the PKP PLK S.A. decision to perform construction work based on a notification, rather than a building permit, and into the decision by Silesia's Voivode to accept the notification without any objections. The inquiry was inconclusive and no party suffered any consequences. Meanwhile, the inspection showed that the work was started and carried out in violation of the Construction Law, which was also mentioned in the legal opinion drafted at the Observer's request. The regulator stated that *"the construction work carried out based on the above-mentioned notifications were carried out in violation of the provision of Article 30(1) of the Construction Law, because, as indicated above, it was supported by a prior building permit, but completed by notification"*. Meanwhile, the regulator took into account the fact that the Contractor had obtained the required permits in the meantime and that all the work had been carried out in accordance with construction best practices, technical standards and other legal conditions (for example, in accordance with local development plans and other legal requirements). In the face of this, the regulator deemed the breach of law a formal error and allowed the Contractor to continue the work. However, the decisions to discontinue the administrative proceedings seemed contradictory. Since a breach of law was found, the competent authorities should draw at least minimal consequences for those responsible for the breach.

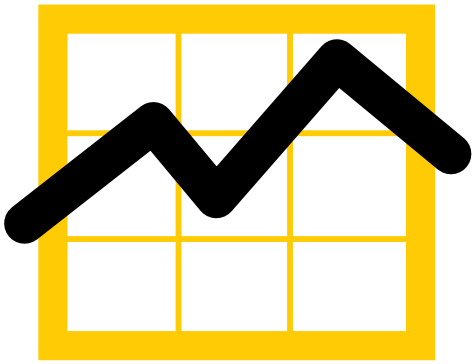
[8] Contractor's comment: ZUE S.A. takes the position that one cannot speak of work being carried out in breach of the law or the contract. The Contractor and the other parties to the project had the right to adopt an interpretation of the provisions of law, as well as to carry out work based on decisions made by public administration bodies. In the Contractor's opinion, the administrative and legal decisions made in the case confirm that the work was carried out properly. The provisions of administrative law should not be interpreted in a "formalistic" manner, but in the light of public objectives, which constitute the public interest, broadly understood. One important, legitimate and socially-approved public purpose is the need for to implement infrastructure projects efficiently. The reconstruction of the railway line is not a private undertaking; it is a public project carried out to meet the needs of the local and regional community and the country. Article 29, Section 2 of the Construction Law (in its then wording) allowed work consisting in the reconstruction of roads, tracks and railway equipment on a notification basis. There was a conflict between Article 29(2) and Article 29(3) of the Construction Law. The way it was resolved was not obvious in a situation where the decision on environmental conditions clearly stated the requirement for an environmental impact assessment, and pursuant to Art. 72 Sec. 1a of the Law on Access to Environmental Information, Public Participation in Environmental Protection and Environmental Impact Assessments, the decision on environmental conditions may also be issued before the notification of construction or execution of construction work. In the Contractor's opinion, the conflict-of-laws rules and interpretation directives justified the interpretation where work can be performed by notification, pursuant to Art. 29 Sec. 2 of the Construction Law. To sum up, the Contractor argues that, while the dispute may be considered in the context of the conflict of public interest objectives and the correctness of interpretative choices, presenting it in terms of violations is too far-reaching and, in the circumstances of this case, unauthorised.

The Observer's activities heightened the vigilance of both the Contracting Authority and the CUPT to similar cases of circumventing the Construction Law. In their letter to the Observer, the PKP PLK S.A. Management stated that it had emphasised in communication with contractors the need to obtain appropriate decisions and permits before going ahead with construction work and that PKP PLK S.A. had monitored compliance in this area.[82] In August 2018, the CUPT sent a reminder and instruction to PKP PLK stating that work covered by the DEC should be pre-approved in the form of a building permit in case an environmental impact assessment is released. In the monitored project, the payment of expenses was temporarily suspended until the construction oversight authority had addressed the concerns when expenses related to work completed by notification appeared in requests for payment.

82 Letter from PKP PLK S.A. to the Observer of 22 November 2018, https://paktuczciwosci.pl/wp-content/uploads/2019/12/pismo-PKP-PLK_22.11.2019.pdf [accessed; 16 August 2021].

To sum up, although this case seems like a "great cry and little wool", it cannot be ignored. The Observer reacted to indications that the law had been broken in the monitored project, which could have had further negative consequences in the form of further violations or even fraud and corruption, criminal liability or the loss of EU funds. Ultimately, none of negative events occurred. Indeed, the Observer's intervention was taken constructively by the contracting parties, in particular the Contracting Authority. The issue of work that should have been based on building permits, rather than "by notification", was examined thoroughly again by both the Contracting Authority and the regulators it had notified. The regulators took what could be interpreted as "corrective measures". The inspections confirmed that the work that had been completed or was still in progress complied with the Construction Law and construction best practices. The administrative proceedings were discontinued. Thus, the risk of abuse or threat to the users of the project and the environment was reduced. The regulator's decision also protected the project against the risk of some of the costs being ineligible based on EU rules. The added value of this intervention were the changes in the provisions of Polish Construction Law clarifying the conditions for carrying out construction work based on "notification" and guaranteeing support for Architecture and Construction Authority bodies in the next EU multiannual financial framework for 2021–2027 (in addition, since 2019, regional construction oversight agencies have received financial support from the EU for their performance relating to EU-funded projects).

SYSTEMIC RECOMMENDATIONS



After the financial closure of projects in the current EU multiannual financial framework, **the extent to which construction permits requirements have been circumvented and replaced by work performed by notification should be assessed**. It may inspire change in legislation.

Meanwhile, let us review the other case involving the performance of work without the required approvals – a somewhat similar, but less significant, problem. The case involved work on plot No. 70 in Myszków and was brought to the Observer's attention by a journalist at the local *Gazeta Myszkowska* when the newspaper sent the Foundation a query under the press law in early September 2020.[83] The journalist asked for a comment about the Contractor having allegedly trespassed a private plot. According to reports, the Contractor allegedly destroyed protected vegetation during the construction work and prevented the owner from using the property. By the time the Observer became aware of this problem, it already had a history, judging by the correspondence between the landowners and the Contractor and the Contracting Authority, and a site visit by the local authorities and the Regional

83 The *Gazeta Myszkowska* journalist included the Batory Foundation's answers in the article *Inwestycja kolejowa bez pozwoleń. Kto odpowie za bezprawne wejście na tereny prywatne?*, https://www.gazetamyszkowska.pl/wiadomosci/6710,inwestycja-kolejowa-bez-pozwolen-kto-odpowie-za-bezprawne-wejscie-na-tereny-prywatne [accessed: 27 November 2021]

Directorate for Environmental Protection. Despite the importance of the case and the involvement of public authorities and institutions, the problem had not been disclosed to the Observer, although the Pact clearly obliged the parties to inform each other about these kinds of developments. Unfortunately, this was one of several similar situations in which there were disruptions in communication, or perhaps unwillingness to share information with the Observer, if it suggested issues in the implementation of the project (see the section on work "by notification", above).

Since the Observer was not aware of the case at the time, it could not comment on the irregularity when answering the journalist's question. Several weeks after the notification from the *Gazeta Myszkowska*, it managed to obtain some correspondence and documentation on the matter.[84] It transpired that, between March and April 2020, the Contractor (to be precise, one of its subcontractors) had carried out construction work on the plot in question, consisting in the emergency replacement of a damaged tele-technical cable and removal of vegetation interfering with the work. The cable already appeared on maps from 1944 and, as a result of the damage, had become wet and thus endangered the safety of railway traffic. In May 2020, the Contractor was contacted by the current owner of the land, who complained that the work had caused irreparable damage and therefore demanded compensation. It should be noted that the applicant had acquired the plot more than a month after the work was carried out. The payment of compensation expected by the current owner was supposed to consist of the payment "in hand", without any documents, of PLN 15,000 (a proposal made to the Contractor's representative), and then, on similar terms, of PLN 30,000. Finally, in November 2020, the new owner of the plot, through a law firm representing him, sent the Contractor a demand for the payment of PLN 400,000 in compensation and damages. The Contractor argued that (1) the current owner lacked the necessary legitimacy – after all, the previous owner of the plot could be entitled to possible compensation – and (2) the amount of compensation was grossly excessive and had not been proven at all. The Contractor further explained that attempts had been made to contact the owner of the plot disclosed in the land and mortgage register, even before the work began, but that these attempts had been unsuccessful. The Contractor's subcontractor, Kolejowe Zakłady Automatyki S.A. in Katowice, made the repair because the damaged infrastructure cable posed a safety hazard to traffic. Meanwhile, in the context of the removed vegetation, the aforementioned subcontractor argued, citing the provisions of the Act on Nature Protection of 2004, that it could perform this work without a permit if the vegetation impeded the operation of railway equipment or threatened traffic safety. Moreover, the vegetation removed included self-sown trees, non-protected species with trunk circumferences that did not exceed the values specified in the Act on Nature Protection of 16 April 2004, and shrubs not located in the cluster specified in the aforementioned Act (25 m²). Therefore, there was no breach of environmental protection legislation, as confirmed by the Regional Directorate for Environmental Protection in Katowice in its decision [on 20 October 2020, the Regional Directorate for Environmental Protection in Katowice informed the Contracting Authority that, in the course of a problematic inspection in the field of environmental protection (concerning the removal of trees on plot No. 70, precinct Nierada in Myszków) "no irregularities or shortcomings were found"]. It can therefore be concluded that the Contractor acted in "a state of necessity", having to carry out this work, while not being able to contact the landowners. There was concerns about the intentions of the plot's new owner. The Contractor suggested that the new owner could have acquired the plot after

84 The Observer first organised an urgent meeting to hear comments from the interested parties (see the minutes of the meeting on 14 September 2020, https://paktuczciwosci.pl/wp-content/uploads/2020/09/Notatka-ze-spotkania-online_14.09.20_OST-1.pdf), and then engaged in a lengthy exchange of letters with PKP PLK S.A. on the matter (see https://paktuczciwosci.pl/wp-content/uploads/2020/09/korespondencja-ws.-Myszkowa-2-1.pdf).

the work had been carried out to use it for financial gain in the form of compensation for damages. However, when this report was completed, this version of events had not been confirmed.

Although the Contractor's explanations seemed reasonable, the fact remains that, when that work began, it did not have the consent of the owner of the private plot.[85] Moreover, as it turned out from the explanations provided by the Contracting Authority, the Contractor did not inform it about the performance of this work in an emergency procedure. Neither the Project Engineer nor the Contracting Authority's design team supervising the work in the field were aware of this fact.

While this report was being drafted, the matter had not been resolved through a settlement between the owner of the plot, the Contractor and the Contracting Authority, or a criminal or civil litigation. The owners of plot No. 70 sent complaints to the authorities of the Myszków municipality, the Regional Directorate for Environmental Protection (the case was concluded "without finding any irregularities or violations") and to the Contracting Authority, and also presented their case to the police (the case was dropped) and the local media. None of the public authorities approached by the landowners found grounds to initiate any proceedings against the Contractor or the Contracting Authority. Until the completion of the report, however, the landowner had not brought a civil case against the Contractor or the Contracting Authority, although this move had been announced. It is worth noting that the Observer met on site with the owner of the plot in February 2021, but the meeting was inconclusive. The owner of plot No. 70 promised to send additional information after the meeting, but no new facts in the case were ever received.

It is difficult to determine how the dispute between the owners of plot No. 70 and the parties to the monitored project will end. However, this was another development, along with the much more serious problems of work "by notification", that exposed project management problems, mainly poor communication between the Contractor, the Contracting Authority and the Project Engineer. This led to another crisis that could have had significant negative consequences for the project, the contracting parties and the public interest in less favourable circumstances.

85 As argued by the Contractor, according to Article 29, Paragraph 2/17 of the Construction Law of 7 July 1994, *"the construction of telecommunication cable lines shall not require a building permit decision or a notification referred to in Article 30:* […] *17)"*. Moreover, it should be noted that entities carrying out work on railway tracks are obliged to strictly comply with the provisions of the Railway Transport Act of 28 March 2003 and the related secondary legislation, including the Regulation of the Minister of Infrastructure of 18 July 2005 on general conditions for railway traffic and signalling. According to Paragraph 48 (1) of this regulation: *"In the event of a threat to traffic safety, all available means shall be used to prevent an accident, and when this is impossible, to reduce the consequences of the accident"*. Taking into account the aforementioned legislation and circumstances, and the provisions of the Construction Law of 7 July 1994, ZUE believes there was no need to obtain a building permit to remove the failure in question.

5.5. Change Orders and Claims

Problem Description

Changes to the Contracting Authority's Requirements specified in the contract, mainly in the FUP, introduced in the work to be performed by the Contractor were an interesting field of observation in the Pact. The Observer focused on two types of changes that illustrate the general nature of the Observer's concerns about contract modifications, or indeed the lack thereof:

1. Changes in the scope of work to be performed in the Częstochowa Towarowa station area. The reason for introducing these changes was the need to maintain the sustainability of construction works in connection with another investment planned by PKP PLK. However, according to the Observer, the problem was the large scale of the changes that the parties decided to make to the contract.

2. Changes in the area of Partyzantów Street in Myszków. In this case, the essence of the problem was the lack of amendments to the contract, despite the performance of work that differed from that in the Contracting Authority's requirements.

Response to the Problem

As regards changes in the scope of the work around Częstochowa Towarowa station, the value of the changes to the contract exceeded PLN 31 million net. The value of the changes consisted of additional work amounting to around PLN 46 million net, minus work that was not performed, amounting to around PLN 15 million net. With the total original contract value of PLN 337.8 million net of VAT, the change seemed puzzling to the Observer. The amounts alone suggest that the scope of the contract change in the area of Częstochowa Towarowa station was very large compared to the size of the whole project.

The process of amending the scope of work to be performed began in early 2018. The parties agreed for several months on the scope of work covered by the amendment proposal. During these arrangements, and after the parties had amended the contract, the Observer raised several important questions concerning:

1. **The change's compliance with the environmental decision.** The Observer was assured by the Contractor that the provisions of the environmental decision regarding the reconstruction of the station track system are so general that an amendment to the environmental decision will not be required.[86]

2. **The change's impact on the project schedule.** The Observer tried to explain the change's impact on the contract implementation deadlines/stages (primarily with regard to design work). On the one hand, the Observer received information from the Contracting Authority that the scope of work covered by the change at Częstochowa Towarowa station was turned into a separate element of the design scope, without affecting the main scope. On the other hand, the documentation

86 Minutes of a special meeting on the application for a change in the environmental decision sent to Regional Directorate for Environmental Protection by the Contractor and its assessment by the Contracting Authority (Warsaw, 27 February 2019), https://paktuczciwosci.pl/wp-content/uploads/2019/03/Notatka_spotkanie_specjalne_27_02_19.pdf [accessed: 11 October 2021]; Minutes of the 5th Quarterly Meeting, *op. cit.*

concerning the change indicated that it affected the deadlines for particular stages of the implementation of the whole contract. The final information shows that the change order related to work at Częstochowa Towarowa station resulted in the correction of deadlines for the majority of the stages of the contract (appendix No. 1 to the contract), including the design stage for the whole contract. It is worth emphasising that the whole contract was originally supposed to take until July 2020; this change resulted in it being extended to December 2020.

3. **The change's legal basis and foreseeability.** The Observer received a written explanation from the Contracting Authority that, in its view, there were grounds for such a change.[87] However, this explanation was not sufficient. On the one hand, there were assertions that this type of change could not have been foreseen when awarding the contract. On the other hand, there were indications that the infrastructure that was going to be replaced was already 50 years old and becoming more unreliable every year. Since it had been known for years that this work was essential, it could reasonably be described as foreseeable. Moreover, the scope of the work covered by the amendment was limited to performing only the work needed to avoid work lost while carrying out the planned new project. Another question arose: why hadn't the Contracting Authority decided to include (all or part of) the scope of work at Częstochowa Towarowa station in the contract? Meanwhile, according to the information received by the Observer from the Contracting Authority, the new project in the area of Częstochowa Towarowa[88] had not begun by the time this report was being written. This raises another question: why was the idea finally abandoned, after the need for this work suddenly became apparent and a rather controversial attempt to combine this work with the monitored project? As the Contractor later reported while this report was being drafted, the idea had not been abandoned, but there were not enough resources to carry it out in the main contract.

Finally, the planned date for announcing the tender for work in the area of Częstochowa Towarowa station was November 2021. Again, this was quite surprising, given that PKP PLK must have already been prepared for these developments in 2018, when it asked the Project Engineer to make sure that this type of change could be made to the contract referred to in the Pact.

As for the work in the area of Partyzantów Street in Myszków, the Observer was informed by an anonymous whistle-blower at the end of December 2020 about a possible inconsistency between the scope of the work performed by the Contractor and the Contracting Authority's requirements specified in the contract. The whistle-blower's information concerned the scope of work related to the reconstruction of Partyzantów Street and the railway crossing in Myszków.[89] The Observer asked the Contracting Authority for comments in connection with this notification.

Correspondence with the Contracting Authority indicated that the scope of work indicated in the Contracting Authority's requirements concerning Partyzantów Street had not been completed, and that

87 Letter from PKP PLK S.A. to the Batory Foundation on 4 December 2018, https://paktuczciwosci.pl/wp-content/uploads/2019/02/Ad_pismo_nr_1_Odpowiedz_PKP_PL_z_dn_4_12_2018.pdf [accessed: 1 October 2021].
88 Letter from PKP PLK S.A. to the Batory Foundation on 12 March 2021, *op. cit.*
89 Letter from the Observer to PKP PLK of 11 January 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Sz.P.-J.-Maga-ws.-przejazdu-przy-ul.-Partyzant%C3%B3w-w-Myszkowie_11.01.21.pdf [accessed: 1 October 2021].

the parties had not made and did not plan to make any changes[90] on this account. Regardless of the actual reasons for abandoning the work on Partyzantów Street covered by the contract, the Contracting Authority's explanation was surprising, to say the least. It is surprising to note the ambiguity in the Contracting Authority's approach in the contract to changes in the scope of the work to be performed by the Contractor. The Contracting Authority and the Contractor made changes to the contract in connection with insignificant work (such as a change in the order for the additional replacement of windows in the railway control room building). In contrast, the change in the scope of work of a significant magnitude – the work on Partyzantów Street in Myszków – was not deemed important enough for formal changes in the contract. The Contracting Authority's comments on the matter, received before the drafting of this report, were utterly inconclusive.

In the Observer's opinion, it is unacceptable that changes in the scope of the work – especially those of a scale and value that are significant from the point of view of the average citizen, the final beneficiary of the project (around PLN 120,000) – were not reflected in the contract documents. The Observer did not receive documents of this kind. When the report was prepared, the Observer was still waiting for an answer as to why this was the case (the Observer's request was addressed to the Contracting Authority at the end of July 2021). To clarify the issue, the Contractor stated that the main work on the crossing had been completed and that additional components would require modifications in the Myszków zoning plan, which would take a very long time. In addition, to straighten the road, a large area of land would be required, for which a ULLK decision had to be obtained. The Contracting Authority expressed no intention to buy the additional land.

Irrespective of the two issues presented above, the problems with reaching agreement over changes submitted by either party resulted in the Contractor making claims. For example, the cancellation of the two-level crossing at kilometre 235.958 of railway line No. 1[91] was submitted by the Project Engineer as a change order in 2019, but the contract appendix was not signed until 2020, three years after the contract was signed. If it is assumed that the Contractor should act in accordance with the contract, the Contractor should have started implementing the design work according to the amended scope of work in 2019 at the earliest. As shown in the section on the Poraj undercrossing, processing changes in the contract efficiently is critical. The contracting parties should be made aware of the algorithm (10 documents inside the Contracting Authority's structures) right at the start of their relationship, before bidding, and it should be included in the project schedule. If either party faces obstacles during the consultation process, the problem should be communicated to the other party immediately, before a change is introduced. Furthermore, the Engineer issued four change orders (No. 10, 11, 12, 13) in 2020. They were implemented, but never followed up on with a proper appendix to the contract until the draft of the report was completed in September 2021.

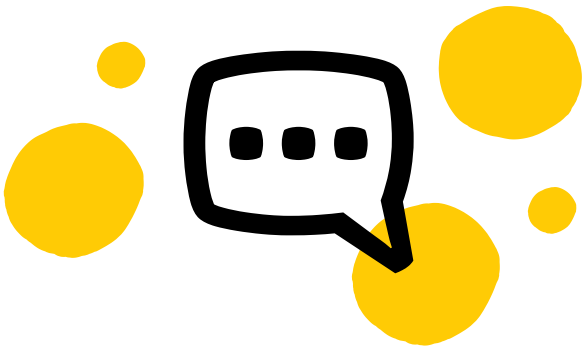
Moreover, there were visible problems in communication between the contracting parties regarding claims. The Observer had no correspondence from the Contracting Authority indicating its readiness to work together to resolve this problem and reduce the risks involved. It is puzzling why it would be considered appropriate to communicate about claims by waiting for a final claim from the Contractor, so that the Project Engineer could express his position. Anyway, for some of the claims, the Engineer

90 Letter from PKP PLK to the Batory Foundation on 18 February 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/odp.-ul.-Partyzant%C3%B3w_18.02.21.pdf [accessed: 11 October 2021], Letter from PKP PLK to the Batory Foundation on 31 March 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/111-2021.pdf [accessed: 11 October 2021].

91 While reviewing this report, the Contracting Authority emphasised that the option to abandon the junction was included in the FUP.

presented it position before receiving the final claim from the Contractor; for some, it did not. The Observer felt that there was no formal dialogue between the Contracting Authority and the Contractor during the implementation of the project to make arrangements or agree on the subject of the claims.

RECOMMENDATIONS REGARDING PUBLIC PROCUREMENT



Communication skills should be **strengthened through training and workshops** for contracting authorities and contractors.

In addition, it is worth mentioning a change in the name of one of the contract implementation stages. With Appendix No. 1 to the contract, the parties introduced changes in the designation and name of individual stages of the contract. The name of the last stage was also modified as follows:

Stage 8 [version before amendments].	**Stage 11** [version as amended by Appendix 1].
Other Work, including all necessary acceptance and obtaining required decisions and permits	Other work, including all necessary acceptance

Table 2: Comparison of the nomenclature of the last stage before and after the conclusion of Appendix No. 1 Source: authors' own research.

This seemingly trivial change may have significant consequences; for example, from the point of view of the guarantee period. The Observer, despite several requests to the Contracting Authority to explain the reasons for this change, did not receive clear answers in this case, either.[92] As can be seen above, this change consisted in removing from the name of the last stage the provision on the need to "obtain the required decisions and permits". Meanwhile, the Contracting Authority confirmed that, within the framework of the last stages, the required decisions and permits must be obtained, which made the change in naming all the more puzzling to the Observer. The Observer considers changes to

92 Letter from the Observer to PKP PLK S.A. on 28 April 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Sz.P.-R.Krok_terminy-etap%C3%B3w-kontraktu-w-aneksie-1.pdf [accessed: 1 October 2021]; Letter from PKP PLK to the Batory Foundation on 12 May 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/PKP-PLK_terminy-realizacji-kontraktu.pdf [accessed: 1 October 2021]; Letter from the Observer to PKP PLK on 15 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Sz.P.-J.-Maga-pismo-ws.-ostatniego-etapu-OST-1.pdf [accessed: 1 October 2021]; Letter from PKP PLK to the Batory Foundation on 28 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Odp.-PKP-PLK-dot.-realizacji-ostatniego-etapu-1.pdf [accessed: 1 October 2021].

the contract without a justified basis indicated in the appendix unacceptable. Any change (including a clerical error) in its basis should be clearly and transparently presented in the documents implementing the change to the contract. The Observer did not believe that these grounds existed and was not shown any.

5.6. The Poraj Underpass

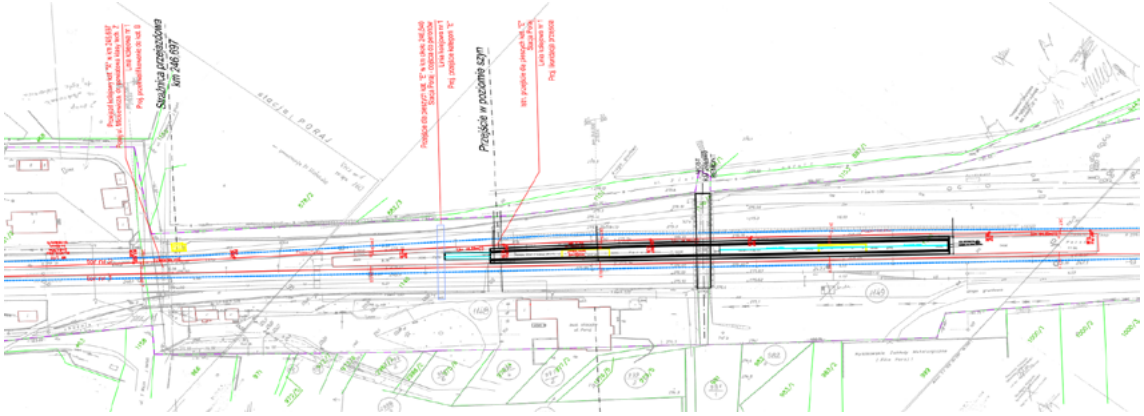
Problem Description

An unanticipated problem emerged at Poraj, the 246.840th kilometre of rail line No. 1, regarding the lack of access to platforms and track crossing at the station. The crossing had not been built, even though it was part of the contract. The underpass was not completed due to a dispute between the Contractor and the Contracting Authority. Instead, temporary access to the platforms was built, but this caused significant inconvenience to passengers and local residents who wanted to cross the tracks (access far from the transfer centre via an unpaved road, without a separate pedestrian route). This temporary setup and extended route for crossing the tracks posed – and still poses – a significant health hazard. The temporary crossing is shown in the following photographs taken by the Observer in February 2021.

Photo 3 and 4. Temporary platform crossing at Poraj Station during a monitoring visit on 18 February 2021. Source: authors' own files.

According to plans included by the Contracting Authority in the Terms of Reference developed for the implementation of the Contract covered by the Pact in 2016, a new level crossing had to be designed and built in place of the pre-existing crossing as part of the project. The Observer is of the opinion that the Contracting Authority's requirements set out in the contract with regard to the Poraj crossing were defined relatively precisely in the tender documentation, as shown in the figure below.

Figure 4. Design of a level crossing at Poraj Station.



The decision on environmental conditions issued for the project – or, more precisely, the attachment to the decision in the form of the characteristics of the planned project – indicates the material scope of the project. This scope was indicated in the division into railway crossings and engineering structures. However, there was a certain discrepancy in the content of the said appendix to the decision. It resulted from it that the subject of the project was two facilities:

a) Level crossing: Section III Table 1 Line 7 of the appendix to the decision, and

b) Underpass: Section IV Table 3 Line – 35 of the appendix to the decision.

Meanwhile, in the summary of the environmental impact report drafted by PKP PLK S.A. for the purpose of obtaining a DEC, which the Contracting Authority shared with the contractors in the tender procedure (at that time, there was no DEC and the Observer repeatedly pointed out that this was a risk factor), the construction of a undercrossing in Poraj was not indicated, despite the fact that plans to build other crossings were indicated there. At the tender stage, the Contractors could not, therefore, based on available documents (primarily the FUP, but also additional documents; that is, the summary of the environmental impact report), predict that there might be a need for a undercrossing in Poraj. This solution was finally included in the DEC after the awarding of the contract. In the previous monitoring report, the Observer pointed to the need to obtain the DEC in time to allow the Contractors applying for the contract to familiarise themselves with its content.

At the tender stage, PKP PLK S.A. could be seen as intending to build a level crossing near the platforms in Poraj. It is not clear why the DEC contained a "reduction" of project components to be completed. Nor is it entirely clear whether the undercrossing in Poraj was part of the assessment. The Contracting Authority claimed, during the consultation of this report, that it had been included as an additional crossing option in Appendix No. 1 to the report on environmental impact (the Observer had no access to this document). It is not clear why and on what grounds the DEC extended the project scope to include a undercrossing.

The Observer is of the opinion that the scope of the project indicated in the DEC should have been unambiguously determined, without leaving any options open during the realisation of the project, as the contract required that the work be performed in accordance with the DEC. Meanwhile, the lack of clarity on the issue resulted in a dispute over this project component, making it *de facto* impossible to complete it in full within the contractual deadline and generating additional costs.

The project co-financing agreement did not include detailed provisions specifying the material scope of the contract. The "Project Description" appendix to the agreement did not specify what kind of track crossings would be built as part of the project. What was known was the PKP PLK S.A. statement that the Contracting Authority had wanted to build a undercrossing when applying for the DEC in July 2017. At that time, however, this expectation had not yet been made more concrete. Even though the contract had been amended several times since the Contracting Authority and the Contractor signed it in July 2017, the provisions regarding level crossings remained unchanged. Therefore, it can be assumed that the project described in the funding agreement did not provide for the construction of a undercrossing, but only for the construction of a level crossing. In addition, the CUPT indicated

that the level crossing is within the scope of the project, and that its construction is necessary for the settlement of the project.[93]

It was not until early 2018 that the Contracting Authority initiated a change in the scope of the contract to replace the level crossing with an underground crossing. According to the Contracting Authority's preliminary estimates, the job would cost approximately PLN 5 million.[94] However, it was not until Q3 2018 (more than six months after the change was initiated) that the parties took another significant step. The Contractor submitted the first concept of the undercrossing. The selection of the type of undercrossing did not take place until February 2019 (more than a year after the change was initiated).

The Contractor submitted an initial variant as early as June 2018 (3 months after the change procedure was initiated). Subsequently, following meetings and agreements, the Contractor submitted a further 5 variants – 2 in August, 2 in October 2018 and the final one in January 2019. In May 2019, the Contractor communicated the estimated cost of engineering in the selected option of the crossing at PLN 11 million. Subsequently, discussions took place between the Contracting Authority and the Contractor regarding the detailing of the variants for the construction of the crossing.

[9] Contractor's comment: The Contracting Authority and the Project Engineer rejected the submitted quotation, expecting the prior preparation of the design documentation – construction and detailed design by branch. The Contractor proceeded to draft the said design documentation, which was subject to ongoing consultations and opinions at the ZOPI.

In February 2020 (more than two years after the change was initiated), after the detailed design was drafted and approved at the ZOPI, the Contractor submitted a new bid, valued at more than PLN 15 million. Meanwhile, as the price offer, the Contractor indicated a deadline for the completion of the crossing. This offer was not accepted by the Contracting Authority because of the cost and the distant deadline for completing the crossing. Meanwhile, in January 2020, acting based on powers granted to it, the Contractor obtained a building permit for the undercrossing in Poraj. After further talks between the Contracting Authority, the Engineer and the Contractor, it was agreed that the cost of constructing the undercrossing would be around PLN 15 million, and that the deadline for completing most of the work on it had to coincide with the end of the entire investment, at the end of 2020. It was agreed that minor finishing work (painting), landscaping and obtaining the required permits could go on until April 2021.

[10] Contractor's comment: The date of 29 December 2020 was the deadline and the Contracting Authority made the performance of this work conditional on it being maintained. The above was conditioned by the agreed track closures and the fact that the Contracting Authority had started an investment project on railway line No. 131, for which the ring line was meant to be railway line No. 1.

The Contracting Authority announced in mid-2020 that it was initiating an internal process to obtain corporate approval for the final modification of the scope of work in Poraj and to start building the undercrossing. But in August 2020, the Contractor, which did not have these approvals, started construction work. In September-October 2020, the Contracting Authority ordered that the work be stopped because (as it claimed) it had not given its consent. The correspondence from that time, which the Observer had access to, only concerned the securing of the already completed work at the crossing,

93 Minutes of a special meeting with representatives of the Ministry of Development Funds and Regional Policy regarding problems faced in the Integrity Pact, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Notatka_spotkanie_z_MFPR_22.12.2020_OST.pdf [accessed: 28 November 2021]

94 Letter from PKP PLK S.A. Zakład Linii Kolejowych in Częstochowa dated 11 January 2018 Ref. IZIW-210-02/18.

and establishing the possibility of temporarily using the platforms in Poraj. Although it had been more than two years since the change concerning this project component was initiated, neither access to the platforms on the rail line nor the undercrossing had been built by the time the last stage of the entire investment was completed (at the end of December 2020). The final rules on its implementation had not been established either. As part of the consultations on this report, the Contracting Authority pointed out that the Contractor had not been instructed by the Engineer to carry out this scope of work. The Contracting Authority had repeatedly informed the Contractor that, until the corporate approvals required by the Contracting Authority's legislation are obtained, the Contractor cannot carry out the work.

[11] Contractor's comment: When the Contracting Authority announced that it was launching an internal process to obtain corporate approvals and secure PLN 15 million in financing, the parties took further steps: a schedule of work was adopted in June 2020, the Contracting Authority submitted a notification of the intention to start construction work to the Silesian Voivodship Inspector of Construction Oversight in August 2020, the Contractor negotiated and signed contracts with subcontractors and notified the Contracting Authority about them in August 2020. Meanwhile, the valuation prepared by the Contractor was verified and the price conditions were agreed on. The Contractor started the construction work in August 2020, despite the lack of the above-mentioned approvals. According to mutual agreements with the Contracting Authority and bearing in mind the Contracting Authority's informal request to start work immediately or else it could not be completed by the deadline set by the Contracting Authority, 29 December 2020. The work was started and the relevant entries were made in the site log (including entries by supervisory inspectors on the part of the Contracting Authority and the Project Engineer). In addition, the Contractor filed notifications concerning the agreements concluded with the subcontractors who carried out the work. As the schedule was tight, the status of the work was reported on an ongoing basis to the Contracting Authority – specifically, to the Project Implementation Centre – and discussed at Site Council meetings. At the end of September-October 2020, the Contracting Authority ordered that the work be stopped because it allegedly did not agree to it. By then, the work had advanced and could not be stopped overnight. As a result, the parties agreed on the scope of the necessary site safety work, which would not result in the loss of work already performed and enable railway traffic to be restored (the crossing ran under both tracks of a critical railway line). In fact, the Contractor was obliged to build the undercrossing shell, referred to under the working name "site safety work". Instead of completing the entire scope of work, which included access lifts to the platform island, the Contractor completed only some of it – the undercrossing shell at Poraj Station. It was not possible to build a level crossing under the FUP at that time; the undercrossing was built instead of the planned ground level passage and the platform island had already been designed and built based on the project design that envisaged a undercrossing. Hence, temporary access for travellers to the platform island had to be built.

Incidentally, the start and subsequent suspension of the work to build the undercrossing at kilometre 246.853 in Poraj Station, which went beyond the scope of the main contract, prevented the parties from obtaining EC Final Verification Certificates for the "Infrastructure", "PRM" and "Track-side Rail Traffic Control Equipment" subsystems. The procedure for obtaining EC Certificates of Final Verification for these subsystems is linked to the completion of the undercrossing work at Poraj Station at kilometre 246.853 and appropriate changes to the contract; that is excluding the construction of a level crossing from the scope of the work.

Response to the Problem

The Observer considers the proposal presented by PKP PLK S.A. on building an underground passage instead of a level crossing very sound in terms of safety. It was the chaotic and confusing implementation of this option that raised many concerns.

The Observer had already asked PKP PLK in 2018 to clarify whether the proposal to build a underpass, instead of a level crossing, will be possible to implement as a change or a separate order.[95] The Contracting Authority replied that this type of change can be made to the contract in accordance with its provisions.[96] Meanwhile, during Quarterly Meetings within the framework of the Pact and the Site Council, the Observer was repeatedly assured that the dialogue between the Contracting Authority

95 Letter from the Observer to PKP PLK of 15 November 2021, https://paktuczciwosci.pl/wp-content/uploads/2019/02/Pismo_nr_1_z_dn_15_11_18_do_PKP_PLK.pdf [accessed: 1 October 2021].

96 Letter from PKP PLK to the Observer of 4 December 2021, *op. cit.*

and the Contractor would ensure that the change was implemented, an appendix to the contract signed, and the undercrossing completed.[97] Eventually, the Observer deemed the dialogue ineffective. It was not conducted properly, in line with the decision-making process, or with mutual trust between the Contractor and the Contracting Authority.

On the basis of the information available to the Observer, one may risk staying that the Poraj crossing arrangements took a negative turn mainly due to the Contracting Authority's and Contractor's sluggishness and disarray (the other parties disagreed with this assessment by the Observer). From the correspondence available, it appears that, at certain points during the process of available, each party made decisions and/or acted in a protracted manner, failing to inform each other of delays. This is confirmed by the mutual allegations in the project documentation and correspondence between the parties. In the Observer's view, there was no rational reason for the arrangements for this change to take so long. The process took more than two years and still did not end in agreement between the parties, a change order and the signing of an appendix to the contract. It is sufficient to list the parties' main activities, taking into account the timeframe from the initiation of the change process by the Contracting Authority:

1. Contracting Authority's request to the Engineer to submit a change – January 2018.

2. Engineer's request to Contractor to submit proposal for change – March 2018 (after 2 months).

3. The Contractor shall submit a preliminary design (concept) for the construction of the crossing – June 2018 (after another 3 months).

4. Selection by the Contracting Authority of an option for the passage construction concept for further (design) work – February 2019 (after another 6 months, and one year after the start).

5. Presentation by the Contractor of the estimated cost of the construction of the crossing – May 2019 (after another 2 months, and 14 months after the start of the change process).

[12] Contractor's comment: The proposal was rejected because the Contracting Authority and the Project Engineer expected a detailed quotation, which could only be developed after the detailed design documentation had been drafted and shared.

Presentation by the Contractor of the next proposal for the construction of the crossing – February 2020 (24 months after the start).

[13] Contractor's comment: The proposal was presented immediately after the acceptance (release for implementation) at the ZOPI of the last part of the detailed design developed by the Contractor.

The exact reasons for the parties' tardiness and the external factors that impeded agreement over the Poraj crossing are difficult to establish today. The only circumstance that could be relevant was the construction of the Poraj interchange station. But even, in the Observer's opinion, should not have been an obstacle to establishing rules on making a change concerning the crossing. Meanwhile, in the case of other changes (e.g. change No. 2 concerning an increase in the scope of work at Częstochowa Towarowa station, which was valued at more than PLN 30 million, much more than the work relating to the Poraj crossing), the decision-making process did not go on for so long. As the Contracting

97 Minutes of the 6th Quarterly Meeting, *op. cit.*

Authority stated in its comments on the report, it took so long to build the undercrossing at Poraj Station because of the long process of all the parties involved agreeing on the final version of the passage and the coordination of project documentation relating to the Poraj transfer centre.

The tardiness that marked the parties' decision-making and actions also led to the escalation of tensions and disputes between the Contracting Authority and the Contractor. Consequently, the approaching deadline for the construction work caused a negative synergy. On the one hand, there was a risk of missing the deadline for the main work and, on the other, of having to engage more human resources and equipment. The Observer is of the opinion that, if both parties had had less time to make decisions concerning the change, it would have reduced the number of risks associated with the modification of the concept of the Poraj crossing. There would have been significantly less conflict and the chance of the undercrossing being built by the contractual deadline would have been much higher.

Two more issues ought to be addressed here. First, the contract provisions regarding documents that must be submitted by the Contractor to agree on the change were ambiguous in terms of the level of detail in the design and work plan. The Contractor had evaluated the construction of a underpass within the main scope, based on the documentation attached to the call for tenders, mainly the Functional and Utility Program that defined the Contracting Authority's requirements. In contrast, the design study that the Contracting Authority enclosed in the call for tenders was only a concept document. The Observer is puzzled about why the Contracting Authority's expected the Contractor to develop a more detailed design – that is, a general and a detailed design – as a pre-condition for the approval of the change. If PKP PLK S.A. had been ready to accept the bid at a general level of detail, it should have been able to assess and agree on a change proposal at the same level of detail. Why did it expect more detailed documents for the Poraj crossing? The Observer strongly believes the that, by expecting a more detailed design, the Contractor further prolonged the parties' dialogue over the proposed change.

The second issue worth pointing out is the production of design documentation for the scope covered by the amendment proposal and, at the same time, treating it as contractual documentation. When implementing projects in the Design and Build formula, both construction work and design work are part of the work to be performed by the Contractor. Therefore, it is not reasonable to expect some work not included in the contract to be performed before the implementation of the change order. In other words, one must not assume only construction work are covered by the formal change order in the Design and Build formula. The Observer strongly believes that no design documentation that is not in line with the contract should be applicable and/or approved by means of a contract amendment. No design or construction work must be performed, on the assumption that formal contract amendments will be made later, if it does not comply with the Contracting Authority's requirements. These practices may occur when the deadline for individual milestones is close and the project implementation schedule does not provide for changes in the material scope of the project.

Another ambiguous issue is whether the Project Engineer can introduce provisional rates in the settlement between the Contractor and the Contracting Authority. This has also been indicated in the Contract Conditions. However, in the Observer's opinion, the ambiguity of this mechanism lies in the failure to specify when it can be applied – before or after the change order is issued. This notwithstanding, the Observer did not have any correspondence in which the Project Engineer considered the introduction of interim rates for completed work covered by the changes (such as design work),

which, according to the Contract Conditions, sought to improve the performance of the work covered by the change, although this possibility was hinted at by the Contractor.

It should be further noted that not only the performance of the construction design took place before the amendment. The Contractor's representative, as a representative of the Contracting Authority, also submitted a request for approval of the design and, at the same time, for a building permit decision. This is because the Project Engineer insisted on obtaining a building permit decision, pointing to the timeframe for implementing the project. The building permit decision for a scope other than that specified in the contract (the undercrossing in Poraj) was issued in early 2020. The Observer is of the opinion that obtaining a building permit decision for an asset other than the one specified in the contract is not correct. This type of decision should be issued after the parties agree on and formally approve the changes. As a result, the contractual correspondence states that the Contracting Authority (Project Implementation Centre) and the Engineer alleged that the Contractor concealed the fact that the decision on the building permit had been issued for several months, although the decision was received by the procurement unit, Zakład Linii Kolejowych in Częstochowa, right after it was issued. This also indicates a problem in the Contracting Authority's internal communication Contracting Authority between its own organisational units (according to the content of the decision, the Contracting Authority, i.e. Zakład Linii Kolejowych in Częstochowa, received this decision, which the Contracting Authority's other units did not know about).

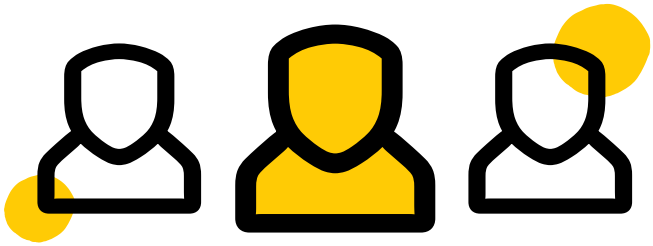
The timing of the construction work is another problem. The correspondence shows that the process was rather unconventional. Allegedly, only the Contractor knew that the work commenced in August 2020 and continue for over a month. This is quite surprising because, for construction work to commence, statements from the Contracting Authority and the supervising inspector (not only the construction manager, on behalf of the Contractor) are essential. It should be emphasised here that these documents were issued and that the start of the work was documented in the site log. The notification of the intention to commence construction work to the Silesian Voivodeship Construction Supervision Inspector was signed by the Project Director on the part of the Contracting Authority. In the opinion of the Observer, all parties to the contract should be aware that work to build the undercrossing have commenced. Again, the Observer felt this should not have taken place at all, since there was no agreement on the change in question.

The start of the work was connected with dismissal of people managing the project on behalf of the Contracting Authority, directly in the investment area, in a way that was sudden and completely incomprehensible for the Observer. According to the information available to the Observer, the Director and the Contract Manager were generally dismissed for non-performance, failure to supervise the project, thereby acting to the detriment of PKP PLK. The Observer has several problems with this conduct. Firstly, a management team reshuffle is always difficult, complicated and risky when the project is 90% completed. Secondly, the Director and the Contract Manager were not the only people aware of the start of the construction work. Other people higher up in the Contracting Authority's organisation were also aware of plans to go ahead with the work. This reveals internal communication issues at PKP PLK. Note that the Observer was only informed about the replacement of the Director and the Contract Manager, with whom it had permanent and direct communication, more than a month later.[98]

98 Letter from PKP PLK to the Observer of 20 November 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/pismo-dot.-przej%C5%9Bcia-w-Porajuzmiana-dyrektora_20.11.2020.pdf [accessed: 1 October 2021].

This was probably the most flagrant breach of the Integrity Pact that occurred during the pilot, as the Contract Director was also directly responsible for communication with the Observer.

RECOMMENDATIONS REGARDING PUBLIC PROCUREMENT



Any change of the contracting authority's representatives responsible for implementing the investment should be communicated to the contractors, project oversight and management institutions.

At this point, it should be added that the Poraj undercrossing was the subject of an internal audit commissioned by the Contracting Authority. The audit report is confidential, so it cannot be reproduced in this report. Nevertheless, the Observer had the opportunity to read it. The fact that the Contracting Authority shared the report should be noted as a major positive in mutual relations. Suffice it to say that the conclusions presented in the audit are only partly in line with those reached by the Observer. However, the audit did not describe, in precise terms, how the problem was communicated within PKP PLK when the change was agreed on. It focused largely on the project managers' responsibility. Nevertheless, it was a valuable source of information that gave the Observer a better understanding of the problems associated with the construction of the Poraj crossing.

Finally, it is worth noting that it that the Observer found out that the Contracting Authority had filed a notice to the public prosecutor's office against the now-former Contract Director from the media. The Observer did not receive any additional information from PKP PLK S.A. on this matter, despite its queries concerning the content of the notification.[99]

Regarding the mandate of the individuals managing the Contracting Authority's project, one cannot but wonder why such an important aspect was not adequately defined in the contract. The contract does not contain clear and precise provisions defining the mandate and responsibilities of the Contract Director, Contract Manager and Region Director when it comes to making decisions. What is more, the contract does not describe the process for making changes; in particular, signing appendixes. The procedure for agreeing on appendixes (both within PKP PLK and with contractors) was not described, nor was the procedure for agreeing on changes to the contract within corporate approvals, which significantly slowed down the process of change concerning the Poraj crossing. The lack of an action plan and deadlines, as specified in the contract, create risks, affects the time of the change procedure and the subsequent start of the work in accordance with the amended scope agreed on. Parties may be confused about whom to engage in dialogue with if decision-makers' mandates are not

99 D. Tokarz, *PKP PLK pod lupą prokuratury i CBA*, *Puls Biznesu* 11.03.2021, https://www.pb.pl/pkp-plk-pod-lupa-prokuratury-i-cba-1110835 [accessed: 1 October 2021].

clearly defined. Otherwise, dialogue and arrangements will be conducted only with the high-ranking officers of the Contracting Authority's organisation. As the Poraj crossing shows, there is no guarantee that this approach will help avoid confusion and project management issues. The Observer is of the opinion that these shortcomings could have affected the course of communication between the parties regarding the Poraj crossing. Clear and transparent rules that the Contractor is aware of could improve decision-making processes and help the contracting parties avoid bitter disputes.

Due to the parties' failure to reach an agreement on the amendment and, above all, the Contracting Authority's failure Contracting Authority to obtain corporate approval for the construction of the Poraj undercrossing, in view of the approaching deadline for the construction work covered by the contract and the fact that the construction work had begun before the amendments were agreed on, the Contracting Authority decided to suspend the work and carry out an inventory of the completed work. The stop work order was issued in early October 2020. Apparently, the Contractor had largely completed the civil work related to the undercrossing by then. It had not, of course, completed the level crossing covered by the contract. The parties made arrangements to secure the work that had already been carried out. The next step, as a result of the lack of final access to the platforms (either a level crossing, in line with the contract, or the undercrossing covered by the amendment under consideration), was to ensure the usability of the platforms in Poraj. The parties agreed that temporary access to the platform, entirely located on the opposite side of the platforms from the Poraj Interchange, would be provided.

As indicated above, the Observer drew the Contracting Authority's attention to the question of providing a contractual basis for the change in the construction of the Poraj undercrossing. The Contracting Authority assured the Observer (back in 2018) that the contract contained this legal basis and that there were no legal obstacles to making this change to the contract. Over time, however, it became apparent that the Contracting Authority did not have a clearly-defined path for the work relating to the construction of the undercrossing in Poraj. There was information that, on the one hand, this work would be the subject of an amendment, but that, on the other hand, it would be the subject of a similar (separate) contract. In the Observer's opinion, when the change was initiated, the Contracting Authority should have already established the legal possibility of performing the requested work and presented it to the other party to the contract – especially as discussions on this element of the monitored project were held at the management level at both entities.

It is also important to note that the Contractor informed the Observer about irregularities regarding the Contracting Authority agreeing on a change related to the construction of a undercrossing in Poraj. This took place in early December 2020 (less than a month before the completion of the construction work covered by the contract). Following the notification, and based on facts gathered during meetings and discussions, the Observer sent a memo to PKP PLK presenting its concerns about the lack of agreement between the parties regarding the construction of the undercrossing in Poraj. The Observer asked it to clarify some of the measures adopted by the Contracting Authority to date, and some of the measures planned to avoid a dispute on the matter.[100] Meanwhile, the Observer wrote a letter to the PKP PLK Management requesting a meeting on the lack of access to the platform in Poraj.[101] This was still a significant problem for the local community when the draft of this report was be-

100 Letter from the Observer to PKP PLK S.A. of 3 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Sz.-P.-J.-Maga_03.12.2020_OST.pdf [accessed: 1 October 2021].
101 Letter from the Observer to PKP PLK S.A. of 11 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Sz.P.-I.-Merchel-11.12.2020.pdf [accessed: 1 October 2021].

ing completed.[102] According to the answer provided by the Contracting Authority, a meeting with the managers of the Project Implementation Centre at PKP PLK was held in December 2020, where the next steps to be taken by the Contracting Authority were presented, allowing the dispute between the parties to be settled and the undercrossing to be built as soon as possible.[103] In addition, the Observer received a letter from the PKP PLK Management, in which the Contracting Authority presented its position on the lack of agreement between the parties regarding the change in the construction of the undercrossing in Poraj. Meanwhile, the Observer was invited to participate in a meeting of a specially-appointed negotiating team, which was supposed to clarify the dispute over the Poraj crossing.[104]

By the contractual deadline for the Contractor to complete the construction work, 29 December 2020, the Contracting Authority still had not concluded an agreement with the Contractor regulating the construction of the undercrossing in Poraj. Still, at the end of December 2020, the Observer met with representatives of the Ministry of Development Funds and Regional Policy (the Managing Institution for the project), who presented their observations on the situation in Poraj.[105] At the beginning of 2021, the Ministry reported that, as a result of the meeting, a request had been sent to CUPT to suspend the reimbursement of the project. The Ministry also asked the Supervisory Board of PKP PLK to place the project as carried out as part of the Integrity Pact under special supervision.[106] According to the information available to the Observer when this report was being finalised, the refund had reached a level of approximately 90% of the eligible expenditure by the time it was suspended. In addition, at the Ministry's request, the Observer provided its own written assessment of the problematic issues that came up the project, including the Poraj undercrossing.[107]

The lack of agreement between PKP PLK and ZUE on settling the work on the Poraj undercrossing on time – by 29th December 2020, which marked the end of the contract –prompted the Contracting Authority to seek alternative methods to resolve the dispute. The discrepancy in the valuation of the work performed between the two parties to the dispute was considerable: ZUE demanded PLN 15 million, whereas PKP PLK was able to agree to PLN 8.5 million.[108]

In a letter dated 23 December 2020, PKP PLK informed the Observer for the first time of its plans to set up a special negotiating commission to determine the value of the work in Poraj and formally resolve the matter. The Observer accepted the invitation to join the commission as an observer. On its part, four people, including consultants, were invited to participate in the work of the commission.

102 J. Strzelczyk, *Kiedy będzie gotowe przejście pod torami w Poraju?*, https://myszkow.naszemiasto.pl/kiedy-bedzie-gotowe-przejscie-pod-torami-w-poraju-zdjecia/ar/c15-8392905 [accessed: 1 October 2021].

103 Letter from PKP PLK S.A. to the Observer of 7 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/pismo-PLK_07.12.2020r.pdf [accessed: 12 October 2021]. Minutes of the meeting of the Batory Foundation and its consultants with representatives of PKP PLK S.A: Director of the Project Implementation Centre and Deputy Director of the Project Implementation Centre (online meeting 17 December 2020), https://paktuczciwosci.pl/wp-content/uploads/2021/03/Notatka_z-rozmowy-z-dyr.-Pawluk_17.12.20_OST.pdf [accessed: 12 October 2021].

104 Letter from PKP PLK to the Observer of 23 December 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/03/odp.-PKP-PLK-do-Fundacji-Batorego_23.12.20.pdf [accessed: 1 October 2021].

105 Minutes of a special meeting with representatives of the Ministry of Development Funds and Regional Policy on problems that occurred during the Integrity Pact (22 December 2020), *op. cit.*

106 Letter from the Ministry of Development Funds and Regional Policy to the Observer, 11 January 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/21-01-11-pismo-MFiPR-do-FSB.pdf [accessed: 1 October 2021].

107 Letter from the Batory Foundation to the Director of the Department of Infrastructure Programmes, 12.03.2021, https://paktuczciwosci.pl/wp-content/uploads/2021/07/pismo-FB-do-Ministerstwa_12.03.21.pdf [accessed: 12 October 2021].

108 Letter from PKP PLK to the Observer of 23 December 2020, *op. cit.*

The Observer's involvement in observing the negotiations was motivated by the Contractor's earlier request for the Observer to become involved in resolving the dispute. On 2 December 2020, ZUE S.A. sent the Observer a letter reporting abuse, in which it accused the Contracting Authority of failing to draft an appendix concerning the commissioned (and partially executed) additional work consisting in building a undercrossing at Poraj Station.[109] The Contractor expected the Observer to contribute to the fair settlement of the work at the undercrossing in Poraj and asked for help in resolving the situation constructively. In addition, at a special meeting with the Observer's representatives, the Ministry of Development Funds and Regional Policy expressed its expectation that the Observer would further analyse the situation concerning the Poraj undercrossing to clarify the causes of the related crisis and issue recommendations in this regard to the Managing Authority.[110] From the Observer's perspective, it was important that, with the completion of the commission's work, the fundamental issue it had called for at the Quarterly Meeting on 17 November 2020 be clarified – in order words, that the date when the work on the undercrossing would be definitively completed should be established. The Observer also took the view that it was particularly important to clarify whether an appendix to the construction of the Poraj undercrossing would be drafted and to resolve any formal and legal doubts regarding the qualification of these work. These expectations were communicated clearly by the Observer's representatives from the start of the team's work.

The negotiating team held a total of eight online meetings between January and February 2021, including one with two parts. Note that the format of these online meetings, unfortunately accepted by all the participants, was audio-only, without video. This format was not conducive to mutual understanding and conflicts frequently escalated.

Throughout the project, the main focus was the assessment of the cost estimates submitted by ZUE S.A. and verification by the PKP PLK S.A. team. Moreover, this was the only topic of the talks. Meanwhile, they proceeded to the rhythm at which subsequent requirements for the Contractor relating to in the scope of preparation and improvement of cost estimates were formulated. These obligations were strictly obeyed by the negotiating team leader. ZUE was asked to send cost estimates prepared by PKP PLK, which were never submitted (the negotiations were conducted solely based on cost estimates developed by the Contractor, to which PKP PLK added its comments, objections and amendments). This illustrates the style of the commission proceedings and the PKP PLK team's tendency to patronise other members, as illustrated by further examples below. An elementary part of classical negotiations was missing: the parties to the dispute should have formulated their expectations for a satisfactory resolution.

What was the 'negotiating commission, later renamed the PKP PLK S.A. "negotiating team" (after the work had begun)? There seems to have been some confusion about its status and objectives, both on the side of the Observer and the Contractor. First, there were serious concerns about the mandate to appoint the commission. The concept had not been familiar to the Observer's consultants or to the Contractor, who had a long track record of railway contracts. The team's status was not explained to participants at the negotiating team's first meeting. It was unclear why a similar commission had not been appointed to deal with other contractual disputes between the Contractor and the Contracting Authority in the past, if PKP PLK S.A. had had this tool at its disposal.

109 Letter from ZUE S.A. to the Observer of 2 December 2020 on the notification of abuse, https://paktuczciwosci.pl/wp-content/uploads/2021/03/ZAL.-1-W-6614-Fundacja-Batorego-Dot.-Braku-zawarcia-Aneksu-w-zakresie-prac-dodatkowych.pdf [accessed: 3 August 2021].

110 Minutes of a special meeting with representatives of the Ministry of Development Funds and Regional Policy on problems that occurred during the Integrity Pact (22 December 2020), *op. cit.*

The Observer made attempts to specify the basis for establishing the commission. Meanwhile, it reported an urgent need to define its rules of proceeding.[111] PKP PLK S.A. sent an email to the Observer explaining that the team was established pursuant to one of the company's internal document, i.e. the Manual for the Management of Investment Disputes at PKP Polskie Linie Kolejowe S.A. dated 4 October 2016. The Observer was not informed about its content, just about the team members' tasks set out in the document, which stated that the team verified the costs that were the subject of the Contractor's claim, determined the undisputed amount, and maintained correspondence and held meetings with the Contractor to obtain explanations or collect missing evidence. This actually happened. The team could also have proposed a draft settlement or agreement, which ultimately did not happen. However, it was crucial to clarify that the negotiation team is an internal body of PKP PLK S.A. This meant that people from outside PKP PLK who participate in the team's activities are not its full members; rather they can participate in its activities by invitation only. In addition, the rules communicated clearly stated that the team conducts negotiations with the Contractor to obtain settlement terms that are as favourable as possible for the Contracting Authority. PKP PLK S.A. also referred to Sub-clause 20.5 of the SCC of the amicable settlement agreement.

The Contracting Authority outlined three objectives for the team / commission: (1) to verify the files and records with respect to the valuation of the scope of the Poraj undercrossing and the actual value of the construction work, (2) to verify the formal and legal basis for concluding the dispute, and (3) to determine the viability of making the payment for the work completed and for completing the remaining work. The team only managed to achieve the first objective.

This meant that, from the very start, the team's work was conducted according to dictates and rules determined by PKP PLK S.A. Any discussion on organisational issues, procedures and the team's goals initiated by the Observer and the Contractor was cut off. PKP PLK S.A. also set the agenda at subsequent meetings. While acknowledging that the team is an internal body of PKP PLK S.A., the Observer consistently took the view that this did not justify the form of the talks, which did not resemble negotiations between equal parties. The Observer raised concerns at meetings, in correspondence and in separate letters, including, most extensively, in a letter on 9 February 2021.[112] Similar concerns were raised by the Contractor. The Observer pointed out that the manner in which PKP PLK conducted negotiations from its position as the stronger party to the contract made it more difficult for both parties to reach a compromise. Most of the time, the Contractor was questioned about particular cost items. The lack of clear rules regarding the proposed agenda for meetings, the deadline for sharing resource documents, the approval of minutes and comments on them, the time for statements, interruptions and the cancellation of meetings often resulted in unnecessary disputes. One of the Observer's recommendations was that the discussions be moderated by an external facilitator, who would help avoid conflict and facilitate agreement.

[14] Contracting Authority's comment: the Contracting Authority ensured the participation and active involvement of all the parties, sought primarily to clarify major contentious issues with the Contractor, and deemed organisational issues secondary to reach a compromise as soon as possible.

The team kept evading the questions that the Observer and the Contractor felt should have been the point of departure for reaching an agreement. The main issue was to establish the formal and

111 See Observer's letter to PKP PLK of 7 January 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Sz.P.-J.-Pawluk-pismo-ws.-Poraja_07.01.20-v.2.pdf [accessed: 3 August 2021].

112 Letter from the Observer to PKP PLK of 9 February 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Pismo-FB_zasady-negocjacji_OST.pdf [accessed: 4 August 2021].

legal basis for the work, which would define the relationship between the work in Poraj and the main contract, and make it possible to establish uniform guidelines on the method for assessing the value of the work or classifying work as additional or similar. Both parties presented their positions, but no attempt was made to reach an agreement. ZUE's representatives repeatedly stated that they interpreted the work in Poraj as additional work not covered by the contract. The PKP PLK Management disagreed and argued that it was what is known as "similar work, not included in the scope of the main contract". This dispute was not resolved by the team.

The Observer was puzzled by how the Project Engineer was not allowed to participate in the talks, even though members of the negotiating team repeatedly referred to its decisions and findings. As a rule, PKP PLK S.A. questioned the cost estimates verified by the Project Engineer concerning the proposal to build the crossing, which date back to July 2020. The Engineer's inability to comment on them and the team's lack of direct access to its knowledge and experience made the discussion difficult. The Observer repeatedly insisted that the Project Engineer be invited to join the negotiating team, but to no avail. In addition to the Engineer, the absent former Project Director and the former Project Manager were blamed for the improper execution of the change order and other shortcomings. ZUE S.A.'s comments that the Contracting Authority accepted previously-submitted costs or subcontractors were rejected, as PKP PLK representatives made it clear that they could not take responsibility for former employees who abused their authority. They considered the Project Director, who was dismissed on disciplinary grounds in connection with the developments in Poraj, to be one of them.

[15] Contracting Authority's comment: PKP PLK does not agree with this position. The Company has explicitly indicated that the Engineer's actions with regard to the issuance of the Taking-Over Certificate were unlawful, which ultimately led to the termination of the agreement. The Company states that this is a sufficient reason for the Engineer not to take part in the negotiations. While it may have appeared that the Observer was not taking into account the urgency of resolving this dispute, it is clear that the sooner the dispute is resolved, the sooner the crossing will be available to the public.	**[16] Contractor's comment:** The Taking-Over Certificate had not been issued when the committee launched its proceedings on 8 January 2021. The Taking-Over Certificate was issued on 8 February 2021 and the last negotiation meeting was held on 12 February 2021. Therefore the issuance of the Taking-Over Certificate could not have been the reason why the Project Engineer refused to engage in the negotiations.

From the outset, the Observer stressed the importance of time in the discussions, underlining that they were taking place in an environment where it was unclear what would happen next with the final acceptance and the suspended reimbursement for the project.[113] Not even a rough timetable of the commission's proceedings was given to the participants. All along, how many more meetings would take place and how much longer the committee could work remained uncertain.

At the end of the talks, the Contracting Authority reproached the Observer that its representatives had not taken an active part in the negotiating team's work and that the technical consultant had not joined the discussion on costing.[114] The Observer responded to this allegation by pointing out, first of all, that "active participation" was a relative concept. The Observer's representatives were present at every committee meeting, expressed their opinions and asked questions. However, since they were acting as observers, their primary task was to observe the committee proceedings, rather than take positions on matters of substance. Secondly, the committee discussions focused on what the Observer thought were technical details and issues of secondary importance. Its representatives repeatedly

113 Minutes of the negotiating team meeting on 14 January 2021.

114 Letter from the Observer to PKP PLK dated 16 March 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/pismo-PKP-PLK_16.03.21.pdf [accessed: 4 August 2021].

expressed what they intended to discuss at the committee meetings, but the discussions did not focus on matters recommended by the Observer. Instead, team participants deliberated at length on the increasing cost of contaminated soil disposal and why the project needs to hire more security guards. We felt that the use of the Observer's limited resources for such matters was completely out of synch with the objectives of the Integrity Pact. In contrast, PKP PLK representatives avoided replying to questions of higher significance, such as why the Contractor's mark-up was being challenged, even though the same amount was readily accepted for other change orders.

Ultimately, the team's work can hardly be considered successful. Admittedly, both parties agreed on what they called the "undisputed amount", which was set at PLN 10,384,388.36. However, this did not help end the dispute. The negotiating team evaluation memo emphasised that ZUE S.A. had not given up its claim for the additional PLN 5 million. It was also pointed out that the legal basis for calculating the amount in question remained disputed. In addition, it became apparent again that there was no level playing field for all the negotiating parties, as the Contractor could not be sure that the arrangements would hold until they had been deemed legally effective by the PKP PLK Management. Essentially, one party granted itself the right to back off from the agreement. In the end, however, the PKP PLK Management confirmed the negotiating team's conclusions, albeit much later than it had been announced, over a month after the end of the committee proceedings.

RECOMMENDATIONS REGARDING PUBLIC PROCUREMENT

The **procedures for negotiating** with contractors that are available to contracting authorities **should be more widely used**, and the rules governing such procedures should be presented to contractors in advance.

The most important finding (supported by the Observer), apart from the undisputed amount, was the referral of further talks to mediation at the Arbitration Court at The General Counsel to the Republic of Poland. The Observer declared its willingness to monitor this stage of the dispute resolution, but neither party expressed interest. Hence, little can be said about the progress of the Poraj undercrossing talks and whether the parties managed to go beyond the issues discussed at the negotiating team's meetings. Note that the mediation process was subject to a confidentiality clause. The mediation started in April 2021 and lasted until August. Eventually, PKP PLK S.A. informed the Observer that the concluded settlement included determining the amount of remuneration for the Contractor for the work performed and the transfer of the copyright for the drafted project documentation. In addition, the settlement includes the provision of the guarantee for the work carried out by the Contractor. The parties did not reach an agreement on the issues relating to the completion of the undercrossing,

including the work schedule, remuneration for the remaining work, the extension of the contract (time for completion), and the deadlines and rules for the payment.[115]

In addition, a decision was made to appoint another contractor to complete the work in Poraj by the end of 2021. This was a response to the expectations of local residents and councillors supported by the Observer, who felt that the inconvenient temporary access to the platform posed a high safety risk. The contract for the completion of the crossing was signed with a new contractor, Zakład Robót Komunalnych – DOM in Poznań Sp. z o.o., a subsidiary of PKP PLK S.A., on 14 September 2021. By the time the monitoring was completed, this contract had not been shared with the Observer, so the value of the contract could not be compared with ZUE S.A.'s price for the same work. PKP PLK S.A. planned to commission the crossing by the end of 2021.[116]

SYSTEMIC RECOMMENDATIONS

Market regulators and audit authorities **should encourage amicable dispute resolution** by providing training, manuals and guides as well as recommendations during investigations and audits.

5.7. Final Acceptance of the Work

Problem Description

One of the biggest and, apparently, most important problems became apparent during the final phase of the public procurement – namely, the formal and legal dispute between the Contracting Authority and the Contractor and the Project Engineer over the final acceptance of the work. Note that the Observer had foreseen a problem earlier regarding the timely completion of the project and the possibility of final acceptance having to be completed with the current status of the work , and shared its concerns with the participants of the Quarterly Meeting on 17 November 2020.[117]

Before discussing the case, it is worth emphasising that the acceptance of the construction work – and, subsequently, of the entire project – is the key moment in relations between the parties. It confirms the fulfilment of the obligation and entitles the Contractor to claim remuneration. Moreover, the acceptance of the work also marks the start of the warranty period for defects. Pursuant to Art. 3 Section 13 of the Construction Law, a partial or final acceptance certificate is issued as a result of the

115 Letter from PKP PLK S.A. to the Observer on 23 August 2021, *op. cit.*
116 Letter from PKP PLK S.A. to the Observer of 14 September 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Pismo-ws.-podpisania-Umowy_14.09.21.pdf [accessed: 1 October 2021].
117 Minutes of the 7th Quarterly Meeting (17 November 2020), *op. cit.*

acceptance; that is, a confirmation that a service has been performed and a condition for payment. If the Contractor reports that the construction work has been completed, the Contracting Authority is obliged to provide the acceptance. The resulting document (taking-over certificate), which confirms that the service has been performed and constitutes the basis for settlements between the parties, needs to include the arrangements made concerning the quality of the performed work, a list any defects (with the dates for fixing them), or statement by the Contracting Authority on the selection of another entitlement as a result of the Contractor's liability for the defects revealed during the acceptance. Meanwhile, it should be remembered that merely declaring the work ready for acceptance does not automatically mean that the work has been completed. The final acceptance of the work is often conditional on meeting a number of other conditions; that is, the completion of technical inspections, tests or the submission of as-built documentation. The Contracting Authority has the right to verify whether the work have been completed in accordance with the contract. If it finds that some work has not been completed, it should report it in detail in the final Taking-Over Certificate, along with new the deadlines for completion, while refusing to accept the work.

Disagreements on the final acceptance of the construction work are not uncommon during this type of project. The main point of contention between the parties is usually the qualification of defects in terms of their significance, since only these kinds of defects justify the refusal of the final acceptance. The type of defects identified was also one of the aspects of the dispute in the project monitored by the Observer, which will be discussed later.

The prevailing position in the Supreme Court's jurisprudence today is that the Contracting Authority's obligation to accept a project cannot be interpreted mechanistically; that is, independently of the type, scope and severity of the defects found. It is assumed that the Contracting Authority has the right to refuse to accept a project if it was built in violation of the design and good practice, or if it contains material defects (Supreme Court ruling of 21 April 2017, ICSK 333/16). According to the view prevailing in the Supreme Court's case law, the factual grounds justifying the refusal to accept a project should be assessed on a case-by-case basis. The same defect may be significant or negligible, depending on the type and purpose of the project.

Pursuant to the case law of Polish courts, if the work was performed in accordance with the terms of the contract, refusal to accept the work may only be justified if the terms of contract can be qualified as inconsistent with the design and good practice, or the defects are so significant that the asset is unfit for use. Under a construction work agreement, it may be assumed that failure to perform an obligation occurs when the defect prevents the asset from being properly used, in accordance with the purpose defined in the contract, or fails to deliver inherent qualities or qualities expressly stated in the agreement while significantly reducing the value of the asset (material defect).

Turning to the case during the monitoring of the project in question, it should be noted that the dispute primarily concerned the disagreement between the Contracting Authority and the Contractor as to whether the work had been completed in accordance with the terms of the contract; that is, whether it could be subject to final acceptance, and whether the Project Engineer was allowed to issue a Work Taking-Over Certificate, despite the Contracting Authority's express objection.

When this report was completed, the dispute between the parties had not been resolved, as each of them categorically maintained its position. In this chapter, the authors describe the problem as it stood when the report was written.

The problem is extremely important from the point of view of the monitored project, as it influences many of the parties' rights and obligations; in particular, the right to close the project, including subsidies, and determine the deadline for the completion of the work, and thus the ability to calculate contractual penalties and claims connected with defects. Bearing in mind the significance of the acceptance of the construction work for the project, the Observer paid special attention to this aspect of the monitored contract and decided that it was necessary to describe it in this report. It should be noted that PKP PLK S.A. had not provided the Contractor with a final position on the calculation of contractual penalties when this reported was completed, waiting with this decision until the end of stage 11.[118] The Contracting Authority's reticence on this matter may be surprising; in separate correspondence on the Taking-Over Certificate, it reproached the Contractor for the fact that, as a result of its actions, part of the work had not been completed on time. In its report, the Project Engineer stated that the penalties for the Contractor for its failure to meet the contract milestones amounted to[119] PLN 3,923,820.17 on 29 December 2020.

The final acceptance of the work became an issue in the following context. Pursuant to Paragraph 2 of the Construction Contract, as amended by Appendix No. 1 of 20 December 2019 (Paragraph 4.2.1), the Contractor undertook to complete the work defined by the contract within the period from the commencement date in accordance with Sub-Clause 8.1 of the SCC, no later than 29 December 2020. On 27 November 2020, the Contractor notified the Contracting Authority of its readiness to carry out the final acceptance (pursuant to Sub-Clause 2.7 and 8.2 of the SCC) and requested the appointment of an Acceptance Committee and the scheduling of an acceptance date in accordance with the contract. On 16 December 2020, the Project Engineer confirmed its readiness for the final acceptance of the overhead traction line. On 21 December 2020, the Contracting Authority appointed a commission for the final acceptance of all the facilities.[120] The commission supposed was to commence work with regard to the traction line on December 22, 2020. Other acceptance inspections in other sectors were meant to take place subsequently on dates set by the Contracting Authority, each time the Project Engineer confirmed the readiness to accept a specific facility. The Contracting Authority was meant to notify all of the Commission's members of the dates of the individual acceptance inspections.

One of the Committee's meetings was held on 22 December 2020. The participants agreed to review the Contractor's final dossier submitted for acceptance. The following meeting was scheduled for early 2021. It was agreed that it would be an online meeting and that a date would be set later. However, on 22 December 2020, the Committee did not accept the work.

In the days that followed, 23-29 December 2020, the Project Engineer confirmed its readiness to accept for all the other trades. Yet shortly afterwards, in a letter dated 11 January 2021, the Contractor requested that the Project Engineer issue a Taking-Over Certificate in accordance with Sub-Clause 10.1 of the SCC for all the permanent work covered by the contract, excluding part of the permanent work under Sub-Clause 11.1 of the SCC.

118 Letter from PKP PLK S.A. to the Observer on 27 September 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/Odpowiedz-PKP-PLK_27.09.21.pdf [accessed: 1 October 2021].

119 Project Engineer's report from 1 December 2020 to 31 December 2020, p. 160.

120 As part of the consultations on this report, the Contractor clarified that the appointment of the Final Acceptance Committee was preceded by an appropriate entry on the completion of the construction work in the Construction Log. The entry was confirmed by the competent supervision inspector, acting on behalf of the Contracting Authority.

[17] Contractor's comment: It should be noted that trains were running without restrictions at scheduled speeds along the whole upgraded section of the railway line (excluding Poraj Station, which was beyond the Contractor's control, as described above) on 29 December 2020. Both tracks were open and the frequency of both passenger and cargo trains could be increased. This is evident based on the Contracting Authority's press releases. The Contracting Authority told the press that *"The travel time between Zawiercie and Częstochowa in the Silesian Voivodeship will be shortened by another few minutes. The fastest trains will cover this distance in 31 minutes. When the upgrade is completed, all the stops will have convenient access for passengers".*[121] There were similar statements from carriers; for example, Koleje Śląskie (Silesian Railways) announced changes in the timetable and stated that *"the most important change in the new timetable will result from the completion of the upgrade of railway line No. 1 on the Zawiercie-Częstochowa section. The travel time on the Katowice-Częstochowa section will be reduced to below 90 minutes for commuter trains and below 70 minutes for fast trains".*[122] The reduction in the train journey times is a direct result of the completion of the essential work and the increase in the speed permitted. The facility, i.e. the upgraded railway line section, was therefore suitable for use.

In a letter dated 12 January 2021, the PKP PLK S.A. Project Implementation Centre for Silesia Region informed the Contractor, the Project Engineer and Zakład Linii Kolejowych in Częstochowa about the suspension of the Final Acceptance Committee's work as a result of failure to complete part of the work covered by the contract and to remove defects after technical and operational acceptance.

Correspondence regarding the invalidity of each other's positions regarding final acceptance continued between the parties. In a letter dated 5 February 2021, the Contractor called on the Contracting Authority to provide a final acceptance certificate by the deadline of 8 February 2021, on pain of drawing up a unilateral final acceptance certificate for the work in question.

Having received no response from the Contracting Authority, the Contractor sent a letter to the Contracting Authority and the Project Engineer on 8 February 2021 presenting unilaterally-signed certificates of the final acceptance of the work and requested the issuance of a Take-Over Certificate for all the work.[123] On the same day, the Project Engineer issued a Taking-Over Certificate, which certified that the work had been commissioned for operation on the dates specified in the individual operational acceptance forms (thereby acknowledging the Contractor's unilaterally-issued acceptance certificate), and was considered to have been taken over as of 8 February 2021, except for minor outstanding work and defects that did not actually affect the use of the work for its intended purpose. The Project Engineer further stated in the Taking-Over Certificate that the work was completed in 1298 days, between 20 July 2017 and 8 February 2021.

[18] Contracting Authority's comment: According to the Contracting Authority, the lack of certification and building permit for the modernisation of the Towarowa Street in Myszków, as well as the lack of complete noise barriers, were the major reasons for suspending the acceptance of the work. The Contracting Authority informed the Contractor of its position regarding the suspension of the Acceptance Committee proceedings. In the letter, it maintained that some of the contractual work had not been completed, even though it had been handed over for acceptance. The Contracting Authority does not agree with the Contractor that the contracted work was completed or that its completion was beyond the Contractor's control as of the date of the suspension of the acceptance.

Moreover, in the Contractor's call on 5 February 2021 (Friday), the Contracting Authority was given a deadline of 8 February 2021 (Monday) to submit the final acceptance certificate. Meanwhile, on 8 February 2021, the Contractor had already handed over the unilateral final acceptance certificate – that is, before the deadline for the reply, the time that the Contracting Authority could use to respond to the Contractor. The deadline set by the Contractor was too short (it was only three days, including a weekend).

121 https://www.plk-sa.pl/biuro-prasowe/informacje-prasowe/nowy-rozklad-jazdy-krotsze-podroze-nowe-przystanki-4954/; post published on 11 December 2020 [accessed: 13 October 2021].

122 https://www.kolejeslaskie.com/od-13-grudnia-2020-zmiana-rozkladu-jazdy/; post published on 2 December 2020 [accessed: 13 October 2021].

123 As part of the report consultations, the Contractor indicated that a list of defects drawn up by the members of the Acceptance Committee and information on the minor work remaining to be done was attached to the acceptance certificate.

In the Taking-Over Certificate, the Project Engineer did not considered the position of the Contracting Authority. In a letter on 9 February 2021, the Contracting Authority asked the Project Engineer to indicate the contractual grounds for issuing the Taking-Over Certificate and stated that it considered this action ill-founded, in breach of both the construction contract and the project-supervision contract. In response to the letter, the Project Engineer maintained its position on the matter in a letter on 15 February 2021.

Shortly thereafter, in a letter dated 23 February 2021, the Contracting Authority informed the Project Engineer that it did not consider the issuing of the work Taking-Over Certificate legally effective and binding. Moreover, the Contracting Authority called on the Project Engineer to reverse the effects of the measure within three days. In a letter on 24 February 2021, the Contracting Authority informed the Contractor that the unilateral final acceptance of the work had been carried out ineffectively and that it did not recognise the Engineer's Take-Over Certificate as legally effective and binding for the Contracting Authority.

[19] Contractor's comment: In response to the said correspondence, the Contractor indicated that the issuance of the Taking-Over Certificate by the Project Engineer was a legally-effective and binding action and that the Contractor will proceed with the completion of the contract, taking into account the position. The Contractor pointed out that drawing up and signing a unilateral Taking-Over Certificate for the work covered by the contract resulted from generally-applicable legal provisions, and not – as the Contracting Authority erroneously indicated – the contract. The Contractor also emphasised that it had sent the Contracting Authority three reminders but that, in spite of this, it had not taken any steps to remedy the breach of the law and of the contract. The Contractor also pointed out that, according to the contract, the Project Engineer was not obliged to obtain the prior consent or opinion of the Contracting Authority with regard to the issuance of the Take-Over Certificate. If the Contractor applied for the issuance of the Taking-Over Certificate, the Engineer was only obliged to verify that the work had been completed and that the project could be used as designated. The Engineer was not in a position to refer to any minor outstanding work and defects that did not actually affect the use of the work or the section for their intended purpose. If this verification was positive, the Project Engineer was obliged to issue a Taking-Over Certificate. In the Contractor's opinion, from the content of both Sub-clause 3.5 and Sub-clause 10.1 of the Special Contract Conditions, the design engineer was not obliged to obtain the Contracting Authority's consent (issuance of the Taking-Over Certificate).	**[20] Contracting Authority's comment:** The Contracting Authority did not consider the action taken by the Project Engineer in issuing the Taking-Over Certificate legally effective and binding. The Take-over Certificate was issued contrary to the provisions of Sub-Clause 10.1 and 2.7 of the contract. There were also no legal or factual grounds to unilaterally sign the final acceptance certificate. In the Contracting Authority's opinion, the Contractor's action was not only contrary to the contract, but also contrary to the provisions of generally-applicable law. According to the Contracting Authority, since there were no prerequisites for the final acceptance, the Contractor was not authorised to perform it unilaterally.

In a letter on 26 February 2021, the Project Engineer informed the Contracting Authority that there were no objective grounds to question the effect of issuing the Taking-Over Certificate in favour of the Contractor. On this basis, doubts arose as to whether the prerequisites and conditions for final acceptance had been fulfilled, followed by the signing of the final acceptance certificate by the parties and the issuance of the Taking-Over Certificate by the Project Engineer, and whether the defects found in the work constituted material defects justifying a refusal to accept it, as well as whether the work had been completed at all, as per the terms and conditions of the contract. Moreover, one may wonder

whether the Project Engineer should have recognised the acceptance certificate signed unilaterally by the Contractor and whether it should have taken into account the Contracting Authority's explicit objection to the issuance of the Taking-Over Certificate.

Response to the Problem

The Contracting Authority and Contractor retained their divergent positions and legal opinions. This was also the case for the Project Engineer, which sided with the Contractor on this issue.

On 24 February 2021, the Contracting Authority, using Paragraph 5(1)(6a) of the Integrity Pact, asked the Observer for its position on the dispute.[124] In response, the Observer decided not to draft a general position, but to issue its own independent legal opinion, which would give a detailed picture of the situation from a formal and legal point of view, and clarify the discrepancies that had arisen. The team monitoring the project was not clear about the nature of the dispute, but perceived that it not only constituted a problem in relations between the contract parties, but also a threat to the public interest, such as the loss of EU subsidies or issues concerning guarantees. The opinion was therefore drafted primarily for monitoring purposes, so that the Observer could have its own position, supported by legal analysis, and not to take sides. The analysis led the Observer to the following conclusions:

1. At least part of the work and the work indicated by the Contracting Authority qualified as unfinished or as material defects under the contract. Accordingly, the Contracting Authority could refuse final acceptance until the work had been completed and the defects removed.

2. The Contracting Authority did not fulfil its obligation to duly document the commencement and acceptance activities, limiting itself to a letter announcing that the Acceptance Committee's work had been suspended, which contributed to the escalation of the conflict with the Contractor and the Project Engineer.

3. There were no grounds for the Contractor to draw up a unilateral acceptance certificate because there were no relevant contractual provisions that would allow this and no grounds for the Contracting Authority to refuse acceptance. Even if the Contractor were seen as authorised to accept the work unilaterally, an acceptance certificate drawn up by the Contractor should include the Contracting Authority's earlier written comments. Furthermore, the certificate was issued prematurely, before the deadline for the Contracting Authority to sign the acceptance certificate.

4. Pursuant to Sub-Clause 10.1 (ii) of the Contract, the Project Engineer had the option to reject the application for a Taking-Over Certificate and indicate which work needed to be completed. The Observer believes this would have been the appropriate course of action. The Project Engineer should at least have consulted the Contracting Authority regarding the Taking-Over Certificate. The Engineer should also have taken into account the comments submitted by the Contracting Authority, which came to light in the correspondence after the start of the final acceptance, and which the Engineer knew about, in particular with regard to uncompleted work and identified defects.

124 Letter from PKP PLK S.A. to the Observer on 24 February 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/03/24-02-2021-FB_aneks-odpowied%C5%BA.pdf [accessed: 16 August 2021].

These conclusions are set out in a legal opinion[125] commissioned by the Observer:

1. **The conditions justifying the notification of readiness to accept the work and the subsequent start of the final acceptance of the work were not fulfilled due to the provision of incomplete as-built documentation and lack of technical acceptance.**

As the Observer's analysis of the facts in this case shows, the Contractor failed to submit the required complete as-built documentation under the terms of the contract in a timely manner. This is evident from the Engineer's correspondence confirming its readiness for acceptance. It explicitly indicates that the as-built documentation for certification of the relevant TSI subsystem has not been provided (as described in detail below). In addition, according to the provisions of the contract and the SCC, the obligation to provide complete as-built documentation also included documents relating to the certification process. Irrespective of the fact that the Contractor supplemented the documentation in the scope of certification at a later time, it must be recognised that, on the day of notification for acceptance and on the day that the Engineer confirmed its readiness, the documentation was incomplete, and thus the job could not be considered to have been completed. Hence the Observer believes that the Project Engineer should not have confirmed that the work was ready for acceptance. Instead, it should have acted in accordance with Sub-Clause 2.7 and 5.6 of the Special Contract Conditions; that is, called on the Contractor to supplement the documentation and waited to confirm readiness for acceptance until it was obtained.

Moreover, as analysis of the correspondence between the parties shows, all the necessary administrative decisions required under the terms of the agreement were missing, including the building permit for the modernisation of Towarowa Street in Myszków. Even though the Contractor took the position that the absence of the permit was attributable to the Contracting Authority, the documentation was still missing, so it should have been acknowledged that the as-built documentation had to be added. The circumstances referred to by the Contractor may have an impact and significance for the possible filing of other claims against the Contracting Authority on this account by the Contractor. However, the very fact that the documentation was incomplete remains undisputed in the Observer's opinion.

Moreover, not all the technical acceptance had been completed at the date of the notification of readiness for acceptance and of the appointment of the Committee, as both the Contractor and the Project Engineer were aware. The technical acceptance must precede the final acceptance. The Contractor had not submitted its final dossier of documents, and the Engineer had not verified and approved it until the day of the Final Acceptance Committee's meeting. The completeness of the as-built documentation and the final dossier of documents (a pre-condition for final acceptance) are contractual obligations, pursuant to Section 4.8 of the Functional and Utility Programme.

125 The remainder of this chapter is based on Legal opinion of the Batory Foundation on the preparation of a unilateral acceptance certificate and issuance of a Work Taking-Over Certificate of 30 March 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/06/opinia-prawna-ws.-wystawienia-%C5%9AP_OST.pdf [accessed: 1 October 2021].

[21] Contractor's comment: The Contractor indicated that reports of the technical acceptance of the main work – the work that had to be completed for the railway line to operate that was part of the final acceptance – were submitted to the Project Engineer before the latter reported readiness for acceptance. The Observer expressed concerns about the work subject to technical acceptance on 20 January 2021 and 25 January, i.e. installation of equipment at the signal box in Myszków and the resurfacing of the level crossing at kilometre 235.958. The official status of this work was "minor outstanding work" on 29 December 2020. The Contractor explained that the failure to complete the work before 29 December 2020 had been caused by external factors. With regard to the work at the level crossing, the Contractor had not obtained permission from the General Directorate for National Roads and Motorways to close the crossing, as it would have clashed with another infrastructure project – the repair of national road No. 701. The time required to complete the work was just one day, so it was completed while the final acceptance procedures were still in progress. The Contractor handed it over for acceptance and it was accepted without additional remarks at the time.

2. Some of the work indicated by the Contracting Authority could be considered unfinished or as having material defects under the contract.

Some acoustic screens were not installed. Pursuant to Section I of the FUP, one of the main project objectives and expected outcomes is the reduction of the environmental impact. Since acoustic screens were not built in accordance with the environmental decision, the Observer does not believe that the completed work can be deemed fit for its intended purpose. It is therefore unreasonable to agree with the Contractor's claim that this was minor outstanding work. In fact, the failure to complete the work amounted to non-performance under the contract.

Other defects that the Observer felt could be considered significant included the lack of fencing at level crossings, the lack of side ditches, and failure to remove traction pole foundations on routes and at stations. Neither the Contractor nor the Project Engineer shared the Observer's concerns. One of the main goals and effects of the implementing the contract was, according to Section I of the FUP, improving of the safety of railway traffic, travellers, transported loads and road traffic at railway crossings. The scope of the unfinished work specified above refers precisely to the safety of railway traffic. Again, in the Observer's opinion, it was a case of failing to meet the main objectives of the contract.

Failure to present full and final certification. According to Section I of FUP, one of the main objectives and deliverables of the contract was to ensure railway interoperability. The lack of complete certification documentation not only prevented this objective from being fully achieved, but this scope should also be considered in the context of the Contractor's obligation to provide complete as-built documentation, pursuant to Sub-Clause 2.7 of SCC, which was not fulfilled. It is also worth emphasising that the Contractor's failure to provide complete documentation, as stipulated in the contract, which was needed to assess the work's compliance with technical requirements, and safety of use and operation, also constituted a material defect in the work, in the Observer's opinion.

[22] Contractor's comment: In terms of the certification process, it must be stressed that the start of the construction of the undercrossing at kilometre 246.853 at Poraj Station and its subsequent suspension, which was beyond the scope of the main contract, prevented the Contractor from obtaining the final EC Certificates for the "Infrastructure", "PRM" and "Track-side Rail Traffic Control Equipment" subsystems. The procedure for obtaining Final Verification Certificates for these subsystems is dependent on the completion of the work relating to the construction of the undercrossing at Poraj Station at kilometre 246.853 and appropriate changes to the contract, i.e. excluding the construction of a level crossing at the station from the scope of the work. A undercrossing was built instead.

The acceptance must be very well documented because of its significance for the final payments between the Contracting Authority and the Contractor, for liability under the warranty for defects and for warranty liability. Note that **the Contracting Authority failed to fulfil this obligation and**

did not document the commenced acceptance process. It only sent a letter on 12 January 2021 announcing the suspension of the proceedings of the Final Acceptance Committee. The Observer is of the opinion that the letter should be interpreted as a refusal to accept the work, and that this refusal and its grounds should therefore have been included in the acceptance certificate, which they were not.

[23] Comment by the Contracting Authority: The Contracting Authority explained that the absence of the said documentation resulted in a check on whether there was documentation for the other branches. This led to suspension of the procedure for continuing the final acceptance. The minutes of the meeting were not drafted because it could not be established whether the documentation was complete. Without prior review of the complete documentation, it is impossible to meet the requirements of proper acceptance.

3. **There were no grounds to draw up a unilateral acceptance certificate under the contract or were for the Contracting Authority to unreasonably refuse to accept the work. Moreover, even if one were to recognise that this right existed, the certificate should have included the Contracting Authority's earlier written comments sent to the Contractor and the Project Engineer. Furthermore, the certificate was issued prematurely, before the deadline set for the Contracting Authority.**

In the case in question, the parties agreed that the basis for the acceptance of the work would be a final acceptance certificate and that, for this purpose, a committee consisting of representatives of the Contractor, the Contracting Authority, the Project Engineer and the user would be appointed. Moreover, the agreement did not give any party the right to issue a unilateral Taking-Over Certificate and did not specify the process if any of the parties were to refuse to accept the work.

The Observer is of the opinion that the Contracting Authority cannot be seen as avoiding the acceptance at all. The Contracting Authority embarked on the process, but the work had not been completed and defects were identified, so it interrupted the acceptance and called on the Contractor to do the work by a specified date. In a letter on 5 February 2021, the Contractor summoned the Contracting Authority to submit a certificate of final acceptance of the work by 8 February 2021 on pain of drawing up a unilateral certificate of final acceptance for the work. However, the Observer considers the effectiveness of this call is doubtful. The Contracting Authority had previously informed the Contractor of the need to complete the work and to remove defects before the final acceptance. However, the Contractor did not wait until the deadline and drew up the unilateral certificate of final acceptance on 8 February 2021. Note that, according to the rules for calculating deadlines in civil law, a deadline expressed by a specific date refers to the end of that day (date). Here, the deadline set by the Contractor ended on 8 February 2021 at 11:59 p.m. Consequently, the unilateral report of 8 February 2021 drafted at an earlier time was drawn up prematurely, even if the Contractor was granted the right to issue it. If only for that reason, it could not be effective.

[24] Contractor's comment: The Contractor responded to the statements above (also presented in the legal opinion drafted at the Observer's request and then disputed by the Contractor) by stating that the unilateral signing of the Taking-Over Certificate for the job covered by the contract was fully justified. This resulted from the Contracting Authority remaining "delayed" when it comes to the completion of the final-acceptance process and not responding to urgent requests to remove the legal and contractual non-compliance. In particular, the Contractor noted the different qualification of the work indicated by the Contracting Authority (noise barriers, side ditches), which invariably, in the Contractor's opinion, constituted "minor outstanding work and defects that did not actually affect the use of the work or the Section for its intended purpose". The Contractor's right to draw up and sign a unilateral Taking-Over Certificate for the job covered by the contract resulted from the provisions of generally applicable law, rather than the contract.

4. **Pursuant to Sub-clause 10.1 of the SCC: *The Contractor shall apply for the Taking-Over Certificate by way of notification to the Engineer within 14 days after the Final Acceptance*, as the Final Acceptance of the work had not taken place when the Contractor requested the Taking-Over Certificate; that is, on 11 January 2021,. The Contractor's request was therefore premature and should not have been accepted by the Project Engineer because the deadline or triggering event (the final acceptance) for its submission had not occurred.**

As of 11 January 2021, even this (albeit doubtful) unilateral acceptance certificate was missing, which obliged the Project Engineer not to accept the request – in the Observer's opinion, too. In these circumstances, the Contractor's request of 11 January 2021 for a Taking-Over Certificate should have been rejected. Moreover, in the Observer's opinion, even if one were to conclude that the Project Engineer should have accepted the request for the issuance of the Taking-Over Certificate, in view of the circumstances revealed the following day (concerning the notification by the Contracting Authority in its letter on 12 January 2021 of the non-completion of the work and the detection of defects), including, in particular, the extensive correspondence between the parties, the Observer believes that the **Project Engineer should have rejected the request, specifying the work that needed to be done by the Contractor, pursuant to Sub-Clause 10.1 (ii)**.

The Observer is of the opinion that the Project Engineer should not indiscriminately accept the Contractor's position, having regard primarily to the Contracting Authority's objections to providing final acceptance and to the work that remained to be completed, as reported by the Contracting Authority. However, the Project Engineer ignored the Contracting Authority's comments or assigned them a different meaning. In the Observer's opinion, the Project Engineer's position that it had no other option but to issue a Taking-Over Certificate was incorrect, since Sub-Clause 10.1 of the SCC also gives it the option to reject it.

To sum up the above, the Observer believes that each of the parties acted to serve their own interest and had divergent motivations, which eventually led to a stalemate.

Bound by the deadline for the completion of the construction work in the contract, the Contractor filed a notification stating that the work had been completed to meet the deadline, without taking into account the detailed grounds for filing a notification. According to the Observer, the Contractor may have been motivated by the desire to protect itself from contractual penalties for its failure to meet the deadline for completing the work, and the need to settle and receive payment.

The Contracting Authority realised there were no grounds for final acceptance, largely because of the failure to complete the work covered by the contract and what the Contracting Authority considered material defects. The Contracting Authority was concerned that this could be questioned by the funding institutions and threaten the project's completion and financial closing. Moreover, accepting the work in those circumstances would trigger the warranty period for defects, which would disadvantage the Contracting Authority if it accepted the work before it was actually completed.

The suspension of the final acceptance and its consequences may have been linked to the conflict between the Contractor and the Contracting Authority over the construction of the undercrossing at Poraj Station, described in Section 6.6.

[25] Contracting Authority's comment: PKP PLK S.A. is committed to protecting the public interest, i.e. to completing all the work on time while ensuring the safety and comfort of travellers with the least possible impact on communities, while respecting legal rules, including public finance discipline and rules on EU funding.

The Project Engineer's motives were not fully understandable to the Observer. It seems that it simply wanted to complete the project as soon as possible, as it involved the use of technical and personnel resources, and its completion would mean the final payment of the Engineer's fee.

Observing each party's conduct during the final acceptance suggests that, somewhere along the way, the overarching goal of the project and its value to the public must have been forgotten. Each of the parties exhibited some sort of irregular behaviour, which could have been remedied by acting in agreement and considering the public interest.

However, as noted earlier, according to the Observer's analysis of the facts and legal considerations regarding the issue at hand, the Contracting Authority could have refused to accept the work – regardless of the parties' positions. The dispute is likely to lead to a lengthy court case.

These kinds of actions do not make public procurement and public spending more transparent, or inspire public confidence. The Observer believes that final acceptance should be more clearly defined in contracts and better regulated in the law.

SYSTEMIC RECOMMENDATIONS

Legislation should be put in place to clarify the rules for determining whether or not defects found upon acceptance of the work are significant. Clear conditions for starting the acceptance procedure, and for accepting or rejecting the work, should be defined.

The dispute over the Taking-Over Certificate continued with the termination of the project supervision agreement, first by PKP PLK S.A.,[126] and then by the Engineer.[127] The Contracting Authority informed the parties that it had filed an official report against the Engineer to the public prosecution office. Following the termination of the agreement, an interim Project Engineer was appointed – a group of PKP PLK S.A. employees. The Contractor unequivocally declared that it did not recognise the appointment of the Interim Engineer or its authority to make binding decisions regarding the contract. Hence, the next Taking-Over Certificate expected from the interim Engineer will be contested by one of the

126 Letter from PKP PLK S.A. on 19 May 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/06/dot.-wypowiedzenia-umowy-z-In%C5%BCynierem_19.05.21.pdf [accessed: 14 September 2021].

127 Letter from PKP PLK S.A. on 17 June 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/06/Pismo-nr-IRR-431.217.245.2021.IRE-1764-I-z-17.06.2021r.pdf [accessed: 14 September 2021].

contract parties. This may mean that it will not be possible to reach a consensus on the conditions for completing the entire contract for a very long time.

However, the Contracting Authority has pointed out that the appointment of a temporary Project Engineer is necessary under the FIDIC Conditions and the requirements of the EU institutions (that is, the CUPT), and that the contract does not allow parties to question this option, while the Contractor's actions have hindered the completion of the project.

[26] Contractor's comment: In the Contractor's opinion, the legal opinion drafted by the Observer fails to address the key fact that the Contractor met the project objective by ensuring the operability of the upgraded railway line No. 1. The Contractor feels that the Observer's conclusions and assessments proved incorrect.

The objective of the job (repeatedly emphasised by the Contracting Authority and the Project Engineer; for example, when agreeing on the price and deadline for the undercrossing at Poraj Station), ensuring that railway line No. 1 was passable until 29 December 2020, has been achieved. The arguments for this have already been cited in the comment [17]. The shortening of the train journey time is a direct result of the completion of the essential work and the increase in the permissible speed. The above changes to the timetable were effective from 13 December 2020, so it should be considered that the job had already been completed by the Contractor then. Note that this understanding of the "job objective" (making the line passable/operational) was convergent in the communication presented by the Contractor, the Project Engineer and the Contracting Authority, as confirmed by the content of a memo from the Quarterly Meeting on 17 November 2020, the Contracting Authority's letter addressed to the Observer on 5 May 2020 ("completion of contractual milestones under the provisions of Sub-Clause 8.13 of the contract and Appendix No. 1 to the contract by making the line passable, i.e. making it operate, rather than the full completion of construction work", or on 28 December 2020 ("It is obvious and indisputable that a railway line is intended to carry passenger and freight traffic while ensuring the safe use of all the infrastructure by all travellers. The term ‚line passability' is repeatedly used as a colloquial expression for the purpose of railway line operation.")

In the context of this undisputed (even if only by the Contracting Authority) and easily-verifiable information, one should ask how one can reconcile significant defects in the work, or work that has not been carried out in a way that enables the use of the facility built as part of the project, and the fact that that traffic is running smoothly and at the scheduled speed? Does this not in itself constitute sufficient (objective) evidence that the Contractor had already achieved the objective of the contract on 13 December 2020? Again, the Contractor points out that there were no restrictions on train transit and speed (apart from restrictions at Poraj Station, which resulted from circumstances beyond the Contractor's control), and that no restrictions of this kind were introduced when the Contracting Authority allegedly "noticed" the defects in question or the work that had not been carried out, on 12 January 2021.

In the Contractor's opinion, the fact that trains move without restrictions at scheduled speeds and that both tracks are in operation clearly indicates that there are no significant defects, or that it is wrong to claim that the contract had not been carried out. Furthermore, for the completed work, excluding "minor outstanding work" and the identified defects, the Contractor handed over complete as-built documentation. Both developments clearly suggest that there were no grounds for the Contracting Authority to halt the work on the Acceptance Committee. This caused the Contracting Authority to remain behind in terms of the performance of its contractual and statutory obligations (Art. 647 of the Civil Code; Art. 18 of the Act of 7 July 1994 - Construction Law). Consequently, the Contractor was fully authorised to draw up a unilateral final acceptance certificate and the Project Engineer to issue the Taking-Over Certificate.

The Contractor would also like to point out that it is fairly normal in a railway project for the Contracting Authority to have some outstanding minor work, such as finishing work, repairing side trenches or foundations, commissioning equipment, completing documentation, and performing side work that does not affect railway traffic directly, after the essential work has been completed and the project's objective having essentially been achieved. This applies particularly to very large projects like this one. The Taking-Over Certificates issued for companies other than the Contractor did not differ in content in any way ("minor outstanding work" or identified defects from the Taking-Over Certificate issued for the Contractor). Hence, the Contractor was surprised to learn that the Contracting Authority suspended the final acceptance process, did not respond to reminders, and then challenged the Taking-Over Certificate.

5.8. Monitoring Findings and Recommendations

5.8.1. Systemic

Strengthening public administration and monitoring changes in the Construction Law. The monitoring showed clearly that many of the problems related to the implementation of both design and construction work stem from the fact that part of the public administration (in particular, provincial Architecture and Construction Authority bodies) do not have sufficient resources to handle all projects. This capacity turns out to be insufficient during huge infrastructure investment programmes, such as the National Railway Programme, which covered the projects monitored as part of the Pact. It is surprising that, although similar problems have occurred before (for example, when road projects gathered pace when Poland was preparing to co-host the 2012 UEFA European Football Championship), no lessons were learned from that experience. The Railway Programme caused similar problems, as illustrated by events connected with the implementation of the projects covered by the Pact; in particular, delays in obtaining building permits and other documents needed to implement infrastructure projects for citizens correctly and safely. Although no corruption or fraud was detected during the monitored project, the risk remains real. After all, the project had an unlawful component, largely because both the Contractor and the Contracting Authority sought a way out of the stalemate, even at the cost of non-compliance or near non-compliance, to adhere to the schedule. During the pilot, the government undertook to strengthen the capacity of the Architecture and Construction Authority in the EU's new multiannual financial framework for 2021–2027. According to information provided during the consultations for this report, relevant proposals were included in the draft 2021-2027 European Funds for Climate and Environment Infrastructure programme. Meanwhile, the government reacted to the COVID-19 pandemic by freezing wages in the public sector. Again, it is essential that the public administration responsible for the oversight and regulation of infrastructure projects be provided with more financial and human resources.

The pilot project also contributed to changes in the Construction Law, in terms of the requirements for work subject to a building permit and work that can be carried out by "notification". The new legislation clarified the rules for filing notifications about construction work and monitoring them. However, the Observer was aware at the end of the pilot that the new legislation was also circumvented by some organisations. This brings us back to our earlier recommendation. The changes introduced in 2020 should be seen as a case of "sunset regulation" – where the impact is only assessed some time after the law's adoption . Thus, for example, after the end of the EU multiannual financial framework in 2023, the relevant ministry should research the scale on which the requirements for obtaining building permits are circumvented and construction work is performed based by notification, the consequences, and whether the changes introduced have made it easier or more difficult to carry out projects. Following this assessment, adjustments to the legislation can be considered, whether to make it more rigid or to liberalise it.

Information and education programme on conflict of interest and access to public information. The Public Procurement Office, as the market regulator, should receive support from the government and carry out an intensive, multiannual communication and education programme on conflict of interest and access to public information. The activities should be directed at both contracting authorities and contractors. They should also address problems related to both issues that occur at each stage of public procurement; preparation, tendering and implementation. The programme's aim should be to raise awareness about how to manage conflicts of interest, the rules on access to public information, and citizens' right to be informed about the public procurement market and specific contracts. The

expected outcome should be a reduction in the number of court cases and other disputes concerning access to procurement information, and a reduction in the number of cases (including criminal cases) concerning violations that result from the poor management of conflict of interest.

Changes in legislation to broaden access to information in public procurement. All legislation governing access to public information, not just the Access to Public Information Act, should be reviewed to broaden unfettered access to information. Commercial secrecy provisions should be improved, as noted in the first pilot report. Other changes in legislation that could improve access to information could include mandatory regular project progress reports that would have to be published in format that the average citizen can comprehend. In fact, the new Public Procurement Law of 2020 introduced a number of improvements in this regard. The creation of a system for the ongoing reporting of public procurement contracts has been recommended for years by the OECD and the EU.[128] These kinds of solutions already exist in Portugal, Italy and, until 2012, in Hungary (unfortunately, the government there later withdrew some legislation in this area, significantly reducing the transparency of the public procurement system).[129]

Monitoring the risk of price increases. PKP PLK S.A. should monitor its contracts on an ongoing basis with regard to the risk of increases in the price of work, services, materials and related claims. It would allow the company to react earlier and more rapidly to alarming trends connected with more expensive materials or limited access to labour. This is extremely important, if only for planning the budget of future projects. It could also accelerate the development of systemic solutions for the market amid the crisis in prices, by initiating cooperation with other institutions, organisations representing the industry and market regulators more rapidly, and providing them with the data needed to implement the state's procurement policy rationally.

Training professionals. It is up to market regulators and public policy makers to develop the training of new specialists in the railway industry and to open up more opportunities for newcomers to the industry to develop their skills and gain experience. The apparent shortage of staff and the advanced age of many railway industry specialists make it highly likely that labour costs will rise, especially with many railway projects running simultaneously. The overhead line and signalling industry are particularly affected.

Increasing access to materials and equipment. Simplifying and shortening the procedures allowing foreign manufacturers and suppliers to access the Polish market could reduce equipment prices and delivery costs. We recommend an evaluation of how administrative requirements in this area are implemented and what costs they entail. It cannot be ruled out that they may be a deterrent to market entry and a bottleneck that overly restricts competition and the supply of products for the railway industry.

Incentives to settle. The obstacle preventing contractors and procurers from reaching settlements in contractual disputes over inflation adjustment is still apparent. The drafters of the new Public Procurement Law have provided procurement market participants with tools that encourage a culture of mediation. The number of mediation proceedings that The General Counsel to the Republic of

128 *OECD Principles for Integrity in Public Procurement*, OECD 2009, https://www.oecd.org/gov/ethics/48994520.pdf [accessed: 14 October 2021].

129 M. Mendes, M. Fazekas, *DIGIWHIST Recommendations for the Implementation of Open Public Procurement Data*. An Implementer's Guide, 1 March 2018, https://opentender.eu/blog/assets/downloads/digiwhist_implementers_guide.pdf [accessed: 14 October 2021].

Poland is involved in is growing. Nonetheless, we believe that a stronger incentive is needed from market regulators and oversight bodies to bring contract disputes onto the path of amicable dispute resolution. We believe that determination to move in this direction would be much higher, if accurate assessments of the opportunity cost of avoiding mediation in conflicts between public procurement participants were available. There is no reliable comparison, supported by empirical evidence, of the effectiveness of the two dispute-resolution paths – mediation and litigation. We do not know how much they cost the parties, exactly how long they last, and the burden on public finances and the judiciary. There are many indications, including from market participants, that mediation takes much less time and is much more effective in resolving disputes. Therefore, it may be justified to require contracting authorities to explain why, in the case of specific claims by the Contractor that lead to litigation – as happened in the monitored contract in the case of inflation adjustment – it did not settle the matter and why this is beneficial to public finances and EU funds. In our opinion, there is a need for a stronger incentive on the part of control bodies, market regulators and the institutions manage that public funds to resolve contractual disputes without resorting to litigation. This may take softer forms, for example, encouraging mediation through publicly-available training courses, handbooks or guides, or it may involve hard recommendations formulated during the verification of contractual documents by supervisory bodies such as the CUPT.

Strategic planning of railway projects. PKP PLK S.A. can and should announce tender plans with more than one year's notice. Knowing what they will be like in the next five or ten years will allow the industry to make more rational business decisions, and thus survive both periods of increased demand for railway projects and of market stagnation. With this knowledge, contractors could better prepare to implement projects and manage their resources more rationally. It would also help mitigate the risks associated with participation in public contracts more effectively. Reducing the basic uncertainty in the construction market, as to the timing and value of the public project pipeline, could improve the economic stability of Polish companies and the labour market. If there are any external barriers that make it difficult for the Contracting Authority to make such long-term plans – for instance, relating to national or EU financing – long-term plans should be formulated in consultation with the institutions responsible for granting it.

5.8.2. Public Procurement

Improving communication between contracting parties. Communication issues between the Contracting Authority and the Contractor came up frequently in the reported period, from a simple lack of information in the hands of one or the other party, through delays in communicating important events during the project, to flawed dialogue on contentious issues. In addition, communication was affected by the COVID-19 pandemic and the associated lockdown restrictions. This resulted in conflicts that were often exacerbated by unresolved communication issues and disorganised work at various project stages. The conflict over the construction of the undercrossing at Poraj Station is a perfect example. Ultimately, poor communication is a threat to the public interest, including the safety and comfort of passengers and local community members.

Similarly, there were internal communication problems within the Contracting Authority's organisation. The Observer is of the opinion that these problems resulted from the excessively complex organisation structure. In fact, communication between the contract parties was affected. It seems reasonable to recommend a major review of communication procedures between contracting authorities and contractors, not only with regard to the Contracting Authority and the Contractor for

the project covered by this Integrity Pact. New effective communication mechanisms should be put in place and the existing ones, such as work councils or ZOPI teams, should be streamlined.

Meanwhile, there is a perceptible lack of negotiation and mediation skills on the part of both contracting authorities and economic operators. Of course, some procurement participants acquire adequate communication skills with experience, but it is also the case that bad habits are acquired with experience. These communication and dialogue skills could be strengthened through a programme of training and workshops offered to both procurers and contractors. These educational activities could perhaps be funded from EU funds. Separately, managing authorities, possibly including the Public Procurement Office, should more strongly promote solutions to improve communication between contracting authorities and contractors, and the amicable resolution of disputes in public procurement. Avoiding the escalation of conflicts and the court route, while maintaining the necessary level of formalism and the principle of transparency, would certainly improve the implementation of public procurement, and avoid the additional costs and problems associated with court or prosecutorial proceedings.

A more specific recommendation for improving communication between contracting parties is to include appropriate provisions in the wording of contracts. Each party to the contract (including the Engineer) should be expected to communicate relevant information to each other without undue delay. It would be good practice for the contracting party receiving the notice of claim to communicate with the other party before receiving the final claim; this type of communication may allow the parties to start agreeing on the claims at an earlier stage, and possibly improve project implementation by allowing them to react earlier to circumstances that could affect the time and cost of implementing the contract. During the Pact, it was observed that not all the information communicated between the parties was complete or issued without undue delay (for example, no contractual communication on the reasons for the prolonged process of making decisions when it came to agreeing on changes). In the Observer's opinion, a precise deadline should be set for a contracting party (including the Engineer) to take the actions required by the contract, along with a deadline for a party to communicate the reasons for being unable to perform a required action within the contractual deadline. Accordingly, where one party fails to comply with the communication process, the conferral of rights to the other party for this (e.g. a claim for additional time and/or cost) should be considered.

Optimised rights and obligations of the contract parties. The observations gathered during the Pact make it possible to present several recommendations for the implementation of the contract between the Contracting Authority and the Contractor. When the Contracting Authority grants powers of attorney to the Contractor's representatives, the rights and obligations should be clearly defined – first of all, with respect to the limits of authorisation in specific activities that the Contracting Authority plans to carry out on its own. The applicable legislation should be specified in the provisions of the contract, so that bidders (the Contractor) are aware of it from the moment they apply for the project. These norms will enable the contract parties to avoid disputes concerning the scope of the rights and obligations that the Contracting Authority transfers to the Contractor's representatives to execute the project.

The Observer is of the opinion that the Engineer's role is critical in any project. The Engineer's actions are pivotal in avoiding project delays. It is therefore extremely important that the Engineer have a relatively large area of freedom and independence in contract management. The Engineer should

be allowed more freedom to adopt measures without consulting the Contracting Authority at each step.[130]

In the monitored project, the Observer felt that the Engineer's determination could contribute to the more efficient implementation of the contract. However, there are constraints in the contract that deprive the Engineer of the ability to make prompt decisions for the good of the project. A detailed review of the rights and restrictions that Contracting Authoritys delegate to Engineers is recommended, to remove provisions that may prevent Engineers from acting for the benefit of the project.

Contracts should also clearly define the process and documents that contractors are expected to submit to ensure effective changes to the contract. Otherwise, a dispute between the parties may erupt over contradicting expectations. Furthermore, parties should have clear rules on the deadlines for specific actions during the process. It is unacceptable for a party to refuse to take action for several months during the contract-modification process.[131]

The parties' agreement should also specify when the Contractor is allowed to start the work, according to the amended scope. The case of the Poraj crossing showed clearly that the lack of this contractual provision can lead to serious disputes. If this issue is well legislated, with deadlines specifying when the Contractor can start the work in accordance with the variant covered by the change (a letter from the Engineer, an agreement on additional time, an agreement on additional cost, a change order, a specification or an appendix to the agreement), it will not be necessary to interpret the provisions of the contract and the parties' intentions as to whether or not the changed work should be carried out.

The Observer believes that the internal document reconciliation process at PKP PLK S.A. should also be clearly presented in the contractual provisions. Presenting this process, both in terms of timeliness and the people making decisions on particular issues, would be very helpful in establishing PKP PLK's cooperation with both contractors and Project Engineers. The Observer is of the opinion that, in the monitored contract, the representatives of the Contractor and the Engineer did not have full and clear knowledge of the process. It was not clear what decisions were made by the Contract Manager, the Project Director, the Regional Director of the Project Implementation Centre, the Director of the Project Implementation Centre, and the PKP PLK Management. Presenting the document reconciliation process (whether it relates to documentation reconciliation, change order reconciliation or reconciliation of actions taken by the Engineer, for which it has to ask the Contracting Authority for reconciliation) will enable the optimal planning of the project implementation, including this process in the schedule of both the Contractor and the Contracting Authority. Each action inconsistent with the assumptions of this process should be a reason to start the dialogue between the parties and

130 The Contracting Authority pointed out while reviewing the report that giving the Engineer a wide area of freedom may lead to developments similar to those in the monitored project, i.e. unauthorised Taking-Over Certificate. The entity financing the project must have a decisive position on important issues concerning the contract.

131 On this point, the Contracting Authority pointed out that, in its opinion, it is neither possible nor advisable to specify specifically how and with what documents the Contractor would confirm the legitimacy of the changes or claims. This would unjustifiably limit the possibility to modify the contract, in terms of time and remuneration, to the detriment of the Contractor, as well as the Contracting Authority, which would be obliged to accept the claim as a result of a court judgment, which in no way limits the documents that may constitute evidence.

update the schedules. As the monitored project showed, failure to specify this process in the contract led to serious disputes.[132]

As far as the quality of the Contracting Authority's representatives' decisions is concerned, authorisations for people involved in making decisions ought to be defined in the contract or in contractual correspondence. The process should be similar to the one for assistant engineers. Long and indefinite decision-making chains at PKP PLK S.A. do not contribute to efficient investment management. At this point, it will be helpful to assess whether the decision-making path in projects implemented at PKP PLK S.A. is too long and complicated, and whether there is scope for optimisation, which could make decision making in the project more efficient.

Irrespective of the above, each change in the scope of the Contracting Authority's representatives responsible for project implementation must be communicated not only to contractors and engineers, but also to Managing Institutions. At this point, it must be said (based on experience gained while monitoring the project) that replacing the people responsible for implementing the project should be a last resort. In the Observer's opinion, in the project covered by the Pact, changes in the position of Project Director occurred too often and for reasons that were not entirely clear. In the Observer's opinion, the selection of the Contracting Authority's representatives responsible for implementing the contract is extremely important, as the success of the project largely depends on them (the human factor).

Completeness of tender documentation. Even during the tendering phase, the Observer drew attention to the lack of decision on environmental conditions. It is true that the Contracting Authority is not required by law to obtain this decision, but as the monitoring has shown, lack of it may cause serious problems during project implementation. When starting the tender procedure, the Contracting Authority should have a set of the most important documents, the contents of which may affect not only which offers are submitted, but also how the project will be implemented. This approach will help clearly define potentially risky items, such environmental controls, in the contract. In the project covered by the Pact, if the Contractor had been familiar with the decision on environmental conditions when it was submitting its bid, the problem of interpreting the options to optimise the construction of noise barriers could have been avoided.

WHAT SHOULD BE INCLUDED IN THE AGREEMENT?

MONITORING-BASED RECOMMENDATIONS

1. Provide a clear and precise definition of the Contractor's rights and obligations and limitations to their powers of attorney granted by the Contracting Authority.
2. Ensure that the Project Engineer should be empowered to make independent decisions.
3. Provide a precise definition of how long contract amendment negotiations can take and what relevant documents are required from the Contractor.
4. Define the conditions needed to start the work covered by the contract amendment.
5. Define clear workflow rules for the contracting authority with respect to files and records that may be relevant to the contract.
6. Make sure that decision-makers in the contracting authority present their powers of attorney.

132 Meanwhile, the Contracting Authority stipulated that PKP PLK S.A.'s internal procedures indicate which people at the company make decisions on amending the contract, what the decision-making chain is, and contractors are aware which people are authorised to sign the appendix to the contract.

Moreover, pre-project studies by the Contracting Authority to prepare the contract, such as the feasibility study, should be shared with bidders during the tender procedure to identify contract implementation risks. If the Contracting Authority has commissioned the pre-project studies in electronic/editable form, this should be shared, too. All the documents that facilitate the valuation and realisation of the project in the Contracting Authority's possession should be shared with contractors, subject to privacy legislation and any other clauses in the documents that may limit access.

Verification of abnormally low prices. The selection of bids solely based on price, which is still possible despite the legal obligation to use non-price criteria, makes it more likely for contractors that compete on cost to verge on abnormally low prices. If the tender committee accepts a Contractor's bid, which it suspects may not be based on realistic costs at the current prices of materials and services, or suspects that the expected project parameters cannot be achieved with the approach proposed by the Contractor, the problem is more than likely to resurface while the project is being implemented. It will then cause additional problems for the Contracting Authority, related to contractual disputes or demands for additional payment from the Contractor. Solutions presented by the Contractor as cheaper and equally effective cannot always be applied to a given contract later, in practice. Therefore, it is important that these situations be assessed by professional and objective experts from outside the contracting company at the bid-selection stage. It is also necessary to check whether the existing mechanism for verifying doubts and allegations of abnormally low pricing is fully effective.

Use of negotiation tools. The negotiation team is a tool that PKP PLK S.A. should develop and use more often in its contracts and in different types of disputes. While this tool could be used as early as 2016, PKP PLK S.A. did not use it, and one of the major contracting companies, ZUE S.A., was unaware of it. Therefore, it seems that this solution should be promoted via the Investment Forum. However, its formula needs to be transformed into a more conciliatory way of conducting talks with contractors, perhaps with the participation of a third mediating party, which could be a professional, external facilitator.

Amendments to applicable legislation regarding final acceptance of projects. The observation of the final acceptance in the project showed that this is the area with the greatest number of problems and disputes between parties, of the greatest significance for the public interest. The problems are caused by ambiguous legislation, which leaves room for contradictory interpretations. Amendments are therefore highly recommended. First and foremost, changes should be made to the Construction Law. The current provisions on final acceptance are fairly vague, so details must be specified in project contracts. Contracts for government projects are drafted by contracting authorities, which means that contractors are essentially unable to negotiate the terms and conditions. Hence, contracting authorities are legally better positioned, but carry the main responsibility for the wording of contractual provisions. It is recommended that legislation should clearly define the hierarchy of defects identified upon acceptance in terms of their materiality, so that contracting authorities understand when they can and cannot refuse acceptance. Clearly, no finite list of defects can be included in a piece of legislation, but providing detailed parameters of these defects can help identify grounds for refusal of acceptance. Additionally, it seems reasonable to recommend that the acceptance inspection process be clearly legislated. Detailed provisions should outline the conditions precedent to commencing acceptance, the possibility of suspending acceptance and, finally, the process for refusing acceptance. The Observer is of the opinion that disputes between parties will be frequent and may often turn into protracted litigation if the legislation remains unchanged.

5.8.3. Integrity Pact

Managing conflict of interest. The pilot has shown that the Integrity Pact can be a good tool for managing conflicts of interest at very different levels: between the different parties to a contract, in situations involving the Contracting Authority, the Contractor, the Observer or other entities involved in the contract, and between the Observer and the contract parties. The experience of the pilot project shows that these situations must be managed based on open, flexible procedures, rather than restrictive legislation. The guiding principle must be transparency (conflict of interest should always be disclosed) and managing dialogue between the parties. Where conflicts of interest can be eliminated without negative consequences for the implementation of the project, this should be done. Where conflicts of interest cannot be avoided, they should be disclosed and the process should be agreed on between the contract parties and the Observer.

An "external arbitrator" – an entity that is neither a party to the contract nor an observer – is very helpful in managing conflicts of interest. In the pilot, the role of this "arbitrator" was performed by Transparency International, the European coordinator of the project, and/or the European Commission, which funded the pilot. In other cases, the arbitrator could be the Managing Authority for EU funds or other public funds allocated to contracting authorities (for example, the relevant ministry). If there is no entity "external" to the contract that could act as an arbitrator, the contract parties, including the Observer, should identify a review mechanism and add it to the Pact. For example, parties to the contract and the Observer may choose to select a single, joint arbitrator (such as a law firm) that, if the parties fail to agree on how to manage the conflict of interest, will resolve the dispute.

A good definition of conflict of interest and adequate management procedures in the Integrity Pact are absolutely essential. While actively performing its role by providing opinions on specific events during the contract, an Observer will always be exposed to the risk of acting in its own interest or that of one of the parties. Paradoxically, a conflict of interest allegation can be a very effective way to paralyse project monitoring, if no adequate process for managing conflict of interest exists.

Access to public information. As the pilot has shown, access to information during a public project is a complex issue. In the Observer's relationship with the project parties, broad and unfettered access to information can be ensured as part of the Pact's provisions, as can the dissemination of information. Monitoring should not be merely reactive. The Observer should not be content with merely exercising its privileged position, especially in terms of access to information. Conceptually, the Pact is based on the belief that abuse or irregularities can be prevented and that the level of trust in the public procurement market and the state in general[133] can be increased if the public is involved in the process of awarding and implementing public contracts. Participation in the Integrity Pact is gradual: it may be limited mainly to the Observer or it may be broader. For example, the local community that will be the beneficiary of the contract may choose to get involved. However, this may be difficult at times, especially during large infrastructural projects, where access for a larger number of observers is difficult or even impossible due to the construction safety regime and restrictions on unauthorised access to construction sites. "Mass" participation may be a logistical challenge for the project monitoring. It should not be a *levée en masse.* It requires coordination, interaction with the contracting parties, decision making, guidance, and so on. However, when community-based monitoring is not feasible, the "expert" formula may offer an alternative, with the Observer being a selected organisation, civ-

133 See: G. Makowski, *Extreme Participation: Citizens' Involvement in Public Procurement Decisions. The Example of Piloting Integrity Pacts in the European Union*, Stefan Batory Foundation, Warsaw 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/06/Partycypacja_Makowski_OST.pdf [accessed: 11 February 2022].

il society organisation or consortium. According to this formula, the Observer should still strive to widen the field to enable other contract stakeholders to get directly involved in the monitoring, if appropriate. Improved access to public information is the condition for this involvement. It is in this area that the Integrity Pact formula may seek to go beyond typical monitoring activities. If access to information is challenged during the monitoring, the Observer should communicate the problem to the contract parties and recommend changes in project management on the part of the Contracting Authority or the Contractor, or systemic changes. It is reasonable to expect the Observer to propose new or amended legislation and/or join disputes between the contract parties by presenting legal opinions on access to information or engage in litigation to modify compliance practices so as to improve access to information for all stakeholders and create more opportunities to engage in project monitoring.

Responding to fraud and irregularities. The monitoring exercise has shown that what might initially look like abuse (the EU definition of abuse is: intentional actions that are directly contrary to the law, i.e. they are simply crimes) will often turn out to be irregularities (actions that violate certain rules or harm the public interest, although they are not crimes) or minor violations. Observers should therefore analyse their own initial observations, news in the media or whistle-blowers' reports carefully. They should seek clarification from the contract parties and examine the available documentation cautiously. If there is even a shadow of a doubt, these incidents should first be discussed with the parties to the Pact and possibly with the managing authorities, if it is part of the equation (all EU-funded projects will include a managing authority). Again, monitoring as part of an Integrity Pact is a form of participation in making and enforcing public decisions, not an enquiry. The Observer should use instruments such as reporting suspected crimes only in obvious situations, or after having assessed the case thoroughly and received comments from the contracting parties. If these conditions are not met, the Observer will expose itself to civil or criminal liability, and may breach the Pact. Instead, it would serve the public interest better by continuing to monitor the project, as difficult and ambiguous as it might be. This is why it is so important that every Pact set out procedures for responding to suspected abuse and irregularities.

Anchoring the Integrity Pact. The first pilot report that covered the Pact drafting and project tendering phases recommended a "hybrid" pact formula as the best option, at least for infrastructure projects. Pacts should be modular. The Observer and the Contracting Authority will be well-advised to enter into a civil contract. However, the relationship between the Observer, the Contractor and the Contracting Authority will be best defined in the master project contract. There are pros and cons of this approach. The main advantage is that it is quicker and easier to implement. Negotiations regarding the Pact provisions will be between the Observer and the Contracting Authority only. This seems natural, as the Contracting Authority initiates the tender procedure and is the main steward of public funds. The main disadvantage, however, is that it is asymmetrical: the Observer and the Contracting Authority will essentially impose their arrangement on the Contractor. The advantages of this approach may be amplified and the disadvantages weakened if certain concepts are adequately legislated, either in primary legislation (for example, in the Public Procurement Law) or in secondary legislation.

Legislation, in particular, should provide the basis for a Pact. In our opinion, pacts should not be obligatory in any respect, but the law should define them and create incentives to use them. In addition, the law should define the rights and obligations of the Observer, the procedure for selecting observers, and the range of potential entities that can monitor projects. On this last point, although the concept of the Pact originated in civil society (from organisations and social movements involved

in participation and monitoring of the public authorities) and places great emphasis on broad public participation in monitoring procurement, the Polish pilot showed that a kind of "mass movement" cannot be the only monitoring formula. Grassroots, non-formalised entities cannot be the only type of observers. Many projects (such as those covered by the Polish pilot study) are highly specialised. In addition, they are difficult to implement (for example, not everyone can just walk into a construction site and watch the work being carried or obtain documents concerning it). Therefore, it is necessary to allow for the possibility that observers might not be limited to groups of citizens or civil society organisations. Instead, they might include other entities, such as universities, expert centres (for example, research institutes) and even commercial entities, such as consulting companies, provided that they join pacts in consortium with a civil society organisation or other non-commercial entity.

The law could also specify the Pacts' general objectives. On this point, the Pact described in this report could serve as a model. The Pact's objectives included: protecting public funds against irregularities, fraud and corruption; preserving the proper, efficient and timely execution of contracts; increased transparency and accountability in the spending of public funds; savings when awarding the contract, through improved competition; increasing citizens' trust in government authorities and government procurement; helping give contracting authorities and contractors a good reputation.

In addition, the law could contain a framework describing the Pact, including, in particular: the timing of the monitoring; guarantees of free access to documents relating to the implementation of the contract; the timing and modalities of communication between observers, procurers, contractors and other parties directly involved in the implementation of the contract (e.g. oversight bodies); the rights and obligations of the parties during the different stages of the contract (preparing the contract, initiating and conducting the procurement procedure, awarding the contract, implementing the contract and accepting the contract); requirements for access to confidential information and the protection of business secrets; the conditions for interrupting or extending the monitoring; and defining the rules for financing the monitoring. Regarding this last point, the law could also, to some extent, define the rules for financing the Pacts.

In principle, there are three possible ways of financing the monitoring of public procurement within the Integrity Pact formula. In the first, the one used in the pilot, the financing of the Pact was provided completely independently of the parties to the monitored contract, directly by the European Commission. However, this option would not be very practical if pacts were to become standard in the public procurement system, to some extent (even if they were not obligatory). This would mean that the Observer would have to cover the cost of its own monitoring activities on each occasion; in other words, find a grant, subsidy or other external funding source. The mobilisation of these kinds of resources seems unlikely.

The second option is to finance the Pacts from public funds and by relevant public institutions, other than the Contracting Authority. In the case of projects such as the one described in this report, an external entity that could finance the monitoring is the Managing Authority (in this case, the Ministry of the Development Funds and Regional Policy). It is not the implementing authority, it is not the Contracting Authority, but as a holder of public funds allocated to specific contracts, it is committed to spending discipline. In this configuration, this type of entity could finance monitoring as part of its supervisory activities. However, this option is not always feasible, because these kinds of "intermediary" entities do not exist everywhere. Most often, contracting authorities have some public funds at their disposal and simply allocate them to the implementation of contracts. It is therefore difficult for them

to simultaneously finance the monitoring of their own procurement, as this would create an inherent conflict of interest.

A third possible option would be to develop the provisions on the position, powers and duties of the observer in a way similar to how autonomy is guaranteed to, for example, independent, financial auditors. With appropriate legislation, the potential conflict of interest arising from the fact that whoever pays for the contract and the monitoring at the same time might influence the observer could be weakened. In this configuration, the conflict cannot be completely eliminated, but it could be significantly weakened. However, this would require quite extensive legislation at the statutory level concerning the observer's status.

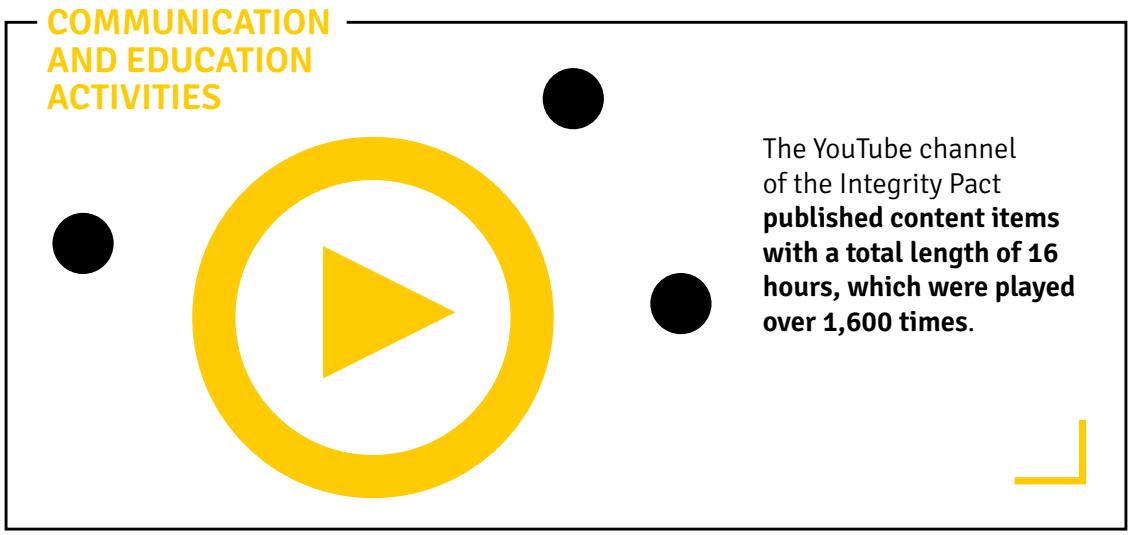
Finally, another option, only available in the case of (certain types of) work contracts, could be to expand the function of the Project Engineer to focus not only on the technical aspects of contract implementation, but also on the "soft" ones, concerning the risk of irregularities, corruption or other abuses. The Contracting Authority would take this requirement into account when recruiting Project Engineers, and the monitoring would be funded as part of the project supervision contract. Again, however, expanding the Project Engineer's function in this way would require support in the relevant statutory provisions.

6. Communication and Education Activities*

Communication Objectives

Communication was designed to reach public procurement stakeholders and professionals, and the local communities directly affected by the project.

The following communication tools were used: a regularly updated website, face-to-face meetings and workshops on topics related to public procurement and the implementation of the Integrity Pact, and publications in trade media. All these activities were supported by the Stefan Batory Foundation's publications on its social media channels: YouTube, Twitter, Facebook, LinkedIn and newsletters, as well as posts on the Observer's blog.[134] A dedicated YouTube channel was also created for the purpose, where materials related to the Pact[135] were published. Each event was meant to be organised with a law firm or other entity with expertise on public procurement law to reach a wider audience. Events were also organised jointly with PKP PLK. Transparency International supported the communication efforts, too. With the onset of the pandemic and limited opportunities to hold face-to-face meetings, podcasts were introduced as an additional communication technique.



Integrity Pact Website

The website http://www.paktuczciwosci.pl/ was launched in September 2017 and is a major source of information about the Integrity Pact pilot. Posts have highlighted the objectives of the monitoring, the progress of the observed project in Poland, and information about specific projects covered by Integrity Pacts in other European countries. Posts have been regular and included summaries of key milestones, minutes of key meetings, and the Observer's correspondence with Pact partners and

* The figures presented in this chapter are as of 30 September 2021, the date on which the monitoring activities were completed.

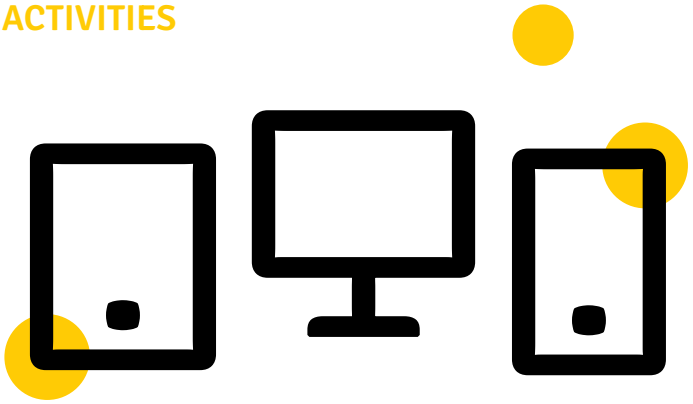
134 See M. Waszak, *Zamówienia do zmiany*, https://www.batory.org.pl/blog_wpis/zamowienia-do-zmiany/; G. Kopińska, *Zamówienia publiczne: czy w kryzysowej sytuacji wszystko jest usprawiedliwione?*, https://www.batory.org.pl/blog_wpis/zamowienia-publiczne-czy-w-kryzysowej-sytuacji-wszystko-jest-usprawiedliwione/; G. Makowski, *Interes publiczny wart jest ugody*, https://www.batory.org.pl/blog_wpis/interes-publiczny-wart-jest-ugody/ [accessed: 14 October 2021].

135 Integrity Pact YouTube channel, https://www.youtube.com/channel/UCJ4nObNaPXC0NQLRMOXlP1Q [accessed: 14 October 2021].

similar documents. Communication has included presentations of educational activities conducted by the Observer, such as meetings and workshops. Episodes *pACT RIGHT*. Podcast on Integrity have been posted regularly. The website also contained a knowledge base of Polish and foreign publications, including articles, guides, manuals and reports on the Integrity Pact, public procurement and countering fraud in public procurement. A form for whistle-blowers was available to anonymously report irregularities or abuse during the implementation of the monitored project.

The website consists of 32 sub-pages with 301 posts published since September 2017. The website has been monitored since early 2020. Between then and 11 July 2021, the website had 16,514 views and 4,122 new users. The most-visited tabs were Pact Updates, News and About the Pact/Documents.

COMMUNICATION AND EDUCATION ACTIVITIES



From January 2020 to September 2021, the **paktuczciwosci.pl** website had over **16,000 hits**.

Open Events

Events organised by the Observer were an important part of the pilot. Their main objective was to promote the concept of the Integrity Pact. The first event was the conference *W stronę przejrzystych i konkurencyjnych zamówień publicznych* [Towards transparent and competitive public procurement], on 1 March 2017, which was also the official launch of the project and a meeting for the media. It was attended by 70 people. In subsequent years, seven debates and seminars were organised. Until early 2020, they were held at the Observer 's headquarters and anyone who wished to attend had to register. Some of them were broadcast live on Facebook and the Batory Foundation's YouTube channel. The live events were usually attended by around 50 people. The social media coverage was followed live by around 20 people. The pandemic forced meetings to move online. People could follow them live on the Observer's social media. The broadcasts were watched by around 70 people. Recordings from the events, from the time of publication until the completion of the report, had had a reach of between 1,000 to 13,500. The final two-day conference of the Integrity Pact pilot, on 23–24 November 2021, was also held online. Reports describing major issues were published at www.paktuczciwosci.pl, and videos were shared on the Integrity Pact's YouTube channel.

The leitmotif of all the events was, of course, public procurement and related issues such as transparency, fraud prevention, access to public information, the functioning of the market during the pandemic, or the acceptance of construction work. Each of the events was also inspired by the monitoring of an investment covered by the Pact. Three events were organised in collaboration with big law firms: DZP, Clifford Chance and KZP Advisory Group. All the seminars emphasised the voice of experts, which

is why the panellists were Polish and foreign experts, lawyers, and people who work on public procurement and deal with it on a daily basis. Invitations to the events were sent directly to people who had expressed interest in the topic, local governments, and institutions dealing with procurement. Invitations to online events were sent to up to 4,000 recipients. Short statements from the *Preventing Corruption in Public Procurement* event were also developed and published separately on the Batory Foundation's social media and on the project website.[136]

Representatives of the Batory Foundation were invited by the Ministry of Investment and Development to present the main principles of the Pact during the seminar Przeciwdziałanie nadużyciom w Programie Operacyjnym Infrastruktura i Środowisko [Counteracting fraud in the Operational Programme Infrastructure and Environment] on 14-15 October 2019.[137] The event was attended by about 100 people. They also spoke about the pilot at a number of open events, including the 2nd Anti-Corruption Conference of the Ministry of National Defence and the Military Police (18 June 2016), the Congress of Regions (20 June 2017) and the 17th Local Government Forum on Capital and Finance (3 October 2019).

COMMUNICATION AND EDUCATION ACTIVITIES

Eight events were organised, lasting a total of over 22 hours. During the meetings, 38 panellists including experts, representatives of national and international institutions and social organisations shared their expertise.

Podcasts

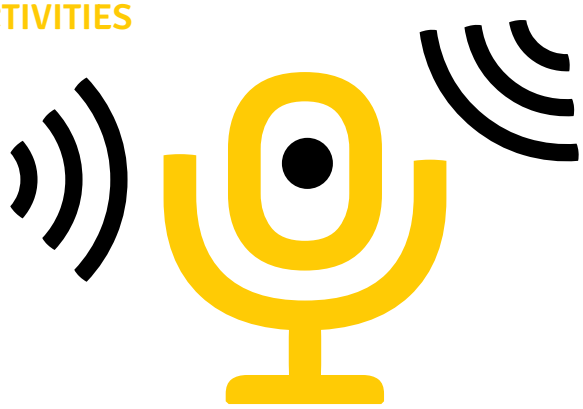
The idea of the Integrity Pact was also disseminated in the podcast pACT RIGHT. Podcast on Integrity, in which Karolina Szymańska, responsible for communication during the project, interviewed experts about access to public information, transparency in public procurement, and ways of monitoring public projects.[138] The podcasts are available at www.paktuczciwosci.pl, on the YouTube channel of the Integrity Pact and on platforms such as Spotify, Spreaker or Podcast Addict. Five episodes were released, with over 300 views.[139]

The podcasts have been promoted on social media and via the Batory Foundation's newsletter (sent to 4,400 individuals and institutions). Posts announcing the podcasts on the Batory Foundation's social media accounts reached some 1,000–2,000 readers.

136 *Zapobieganie korupcji w zamówieniach publicznych – fragmenty debaty*, https://paktuczciwosci.pl/aktualnosci/przeciwdzialanie-korupcji-w-zamowieniach-publicznych-fragmenty-debaty/ [accessed: 14 October 2021].
137 *Pakt uczciwości w nowym POIiŚ? Bardzo możliwe!*, *op. cit.*
138 pACT RIGHT, https://paktuczciwosci.pl/pact-right-podcast-o-uczciwosci/ [accessed: 14 October 2021].
139 https://paktuczciwosci.pl/pact-right-podcast-o-uczciwosci/ [accessed: 27 November 2021].

New episodes were promoted among people interested in the Integrity Pact who had previously participated in events that contained references to the Pact (280 people).

COMMUNICATION AND EDUCATION ACTIVITIES



pACT RIGHT. Podcast on Integrity attracted over **300 listeners**. The episode "Can Public Procurement Be More Transparent?" was rated as the most popular.

Townhall Meetings

Four townhall meetings were held with members of the local community to introduce the concept of the Integrity Pact and its role in the project. People from the Batory Foundation, PKP PLK S.A. and ZUE S.A. spoke at all the meetings.

Meetings were held in Częstochowa,[140] Slowik,[141] Myszków[142] and Poraj.[143] The meeting in Częstochowa was attended by 5 people. The meetings in Slowik and Myszków were organised in co-operation with JOWES (the Jura Region Centre for Social Economy Support, an umbrella for local civil society organisations) and local organisations, which significantly influenced the attendance; each of them was attended by about 20 people. The meeting in Poraj was organised in cooperation with the Poraj Municipality Office, and attended by approximately 20 residents. The meetings were promoted in the local media, posters and by the organisations that co-organised the events. Each time, promoted posts were also published on Facebook.

Media Coverage

The media covered the Integrity Pact throughout the pilot. The *Rzeczpospolita* daily published three articles that mentioned it. These were two interviews *Potrzeba większej transparentności i zaufania w zamówieniach* [More Transparency and Trust Are Needed in Public Procurement] (25 July 2017) and *Za korupcję płacimy wszyscy* [We All Pay for Corruption] (23 August 2020), and the article *Przetargi pod kontrolą obywateli* [Tenders Scrutinised by Citizens] (23.03.2020). Another interview, *O uczciwości, doświadczeniach węgierskich i interesie publicznym* [On Integrity, Hungarian Experience and Public

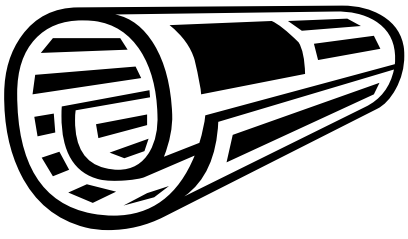
140 *Pakt uczciwości na kolei. Spotkanie z mieszkańcami*, https://paktuczciwosci.pl/aktualnosci/pakt-uczciwosci-na-kolei-spotkanie-z-mieszkancami/ [accessed: 14 October 2021].
141 *Za nami spotkanie regionalne w Słowiku*, https://paktuczciwosci.pl/aktualnosci/za-nami-spotkanie-regionalne-w-slowiku/ [accessed: 14 October 2021].
142 *Za nami spotkanie z mieszkańcami Myszkowa*, https://paktuczciwosci.pl/bez-kategorii/za-nami-spotkanie-w-myszkowie/ [accessed: 14 October 2021].
143 *Za nami spotkanie z mieszkańcami Poraja*, https://paktuczciwosci.pl/homenews/za-nami-spotkanie-z-mieszkancami-poraja/ [accessed: 1 October 2021].

Interest] (March 2018) appeared in the ZUE S.A. employees' magazine *Spinacz*. An article written by the Project Manager and Co-ordinator, *Pakt uczciwości. Czy to może działać w Polsce?* [Integrity Pact. Can it work in Poland?], was published in the *Zamawiający* bimonthly magazine (November–December 2018). Two further articles *Inwestycja kolejowa bez pozwoleń. Kto odpowie za bezprawne wejście na tereny prywatne?* [Railway Investment without Permits. Who Will be Held Responsible for Unauthorized Entry to Private Property?] (21 February 2021, *Gazeta Myszkowska*) and *Pakt Uczciwości à la PKP PLK* [The Integrity Pact à la PKP PLK] (25 March 2021, *Puls Biznesu*) quoted representatives of the Observer.

Figure 5. Screenshots of selected press articles. Source: Authors' own files.

The Integrity Pact received media coverage on other occasions. For example, the conference Towards Transparent and Competitive Public Procurement on 1 March 2017 was covered by *Gazeta Wyborcza* and Polish Radio. Invitations to meetings with residents organised by the Observer appeared in local newspapers, web portals and radio stations. The Pact was also mentioned in PKP PLK S.A.'s press releases published in trade and local media. In each of the communiqués drafted by the Company, a note was added about the coverage of the Integrity Pact.

COMMUNICATION AND EDUCATION ACTIVITIES



76 media articles referring to the Integrity Pact were written, including 21 in trade magazines and 27 in local media.

Graphic Materials

A simple leaflet about the Integrity Pact was produced and distributed at various events at the Batory Foundation and at local townhall meetings. Two posters about the Integrity Pact in Poland were produced in partnership with TI and published on the Integrity Pact website.

Figure 6: The Integrity Pact leaflet. Source: https://paktuczciwosci.pl/wp-content/uploads/2017/07/Pakt_Uczciwosci_w_Polsce.pdf.

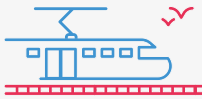
RAILWAY MODERNISATION

INTEGRITY PACTS EU

Funded by the European Commission

RELEVANCE

SECTOR



RAILWAY / METRO LINE

PROCUREMENT

Modernisation of the 44 km section of railway connecting Zawiercie to Częstochowa

EXPECTED # OF BENEFICIARIES

3.4 MILLION
passengers / year in 2015

9.3 MILLION
passengers / year in 2047

KEY STATS

Thanks to the renovation:

passenger trains will travel at **160 KM/H**

freight trains will travel at **120 KM/H**

10 MINUTES
less needed to travel on the renovated 44 km section of the railway

The vast majority of Poland's roughly 20,000 km of railway was built in the:

Late **19TH CENT.**

Early **20TH CENT.**

MAIN RECOMMENDATIONS

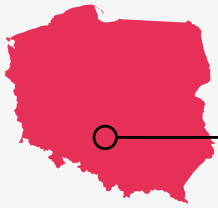
- Participation of the monitor in the tender evaluation committee. Taken on board.
- Code of ethics and whistleblowing procedures in the winning company and its subcontractors. Taken on board.
- Changes in the building law to prevent starting construction works without necessary permission. Taken on board.
- Application of additional control measures on contractors to prevent starting construction works without necessary permission. Not yet taken on board.

IRREGULARITIES

- Inadequate communication between the contracting authority and bidders, including not publishing all replies to bidders' inquiries at the tender stage.
- Delay in the publication of the environmental approval.
- The monitor identified a conflict of interest between the winning bidder's head designer and the representative of the contracting authority's regional unit responsible for accepting construction works.
- Construction works started without the required building permission.

PROJECT

LOCATION



POLAND
Zawiercie, Częstochowa

TIMELINE

01/01/2016 Start of IP project

08/11/2016 Signature of IP by contracting authority

20/07/2017 Signature of design-build contract with winning bidder

20/07/2017 Signature of IP by winning bidder

02/09/2018 Building works have started

03/03/2020 Original end of project

05/2020 Monitoring report from the tender phase

29/12/2020 New end of project

COSTS

€140.7 MILLION ORIGINAL COST

€108.8 MILLION CURRENT EST. COST

EU: €54.2 million | National: €54.6 million

WHAT'S NEXT?

- Publication of monitoring report on tender stage
- Publication of policy paper based on the findings of the monitoring report
- Workshops for the contractor on anti-corruption in public procurement
- Open workshop / seminar on access to information related to public procurement

CSO MONITOR: **STEFAN BATORY FOUNDATION**

FUNDACJA BATOREGO

PAKT UCZCIWOŚCI

Figure 7. An Integrity Pact pilot poster in Poland. Source: https://images.transparencycdn.org/images/SBF.pdf.

Cooperation with Transparency International

Transparency International published news about the Polish pilot of the Integrity Pact at www.transparency.org[144] and on its social media channels; for example, as part of its #CleanContractingWeek campaign.

TI representatives from Latvia also took part in a three-day study visit to Poland, where they met with representatives of the CBA, the Ministry of Investment and Development and PKP PLK S.A. They also attended the Site Council meetings. They shared information about the experience of the Integrity Pact in Latvia. Two videos, in which the Latvian visitors talk about the Pact pilot in Latvia[145] and how it could change public procurement,[146] were made during the study visit and posted on the Integrity Pact YouTube channel and promoted in the Batory Foundation's social media accounts.

The Observer participated in numerous events organised by the TI Secretariat, along with representatives of the Contractor and the Ministry. The cooperation with TI and other organisations implementing Integrity Pacts in Europe resulted in publications including *Ochrona inwestycji finansowanych przez UE w ramach paktów uczciwości*[147] and *Model Monitoring Agreement and Integrity Pact for Infrastructure. An implementation guide for civil society organisations*.[148]

Cooperation with PKP PLK S.A.

Joint communication activities were also undertaken with PKP PLK S.A. The launch of the Integrity Pact in the selected project was added to all the press releases sent out by the Contracting Authority. The Observer took part in events organised by PKP PLK S.A., including a press conference in Myszków.[149] A leaflet was produced and distributed at events organised by the Civil Society Observer and the Contracting Authority. Joint appearances on local radio shows were planned, but did not take place.

Integrity Pact in Publications

The Integrity Pact was referred to in publications by various institutions. For example, *Konflikt interesów w zamówieniach publicznych. Praktyczny poradnik* [Conflict of Interest in Public Procurement. A Practical Guide], published by the Public Procurement Office in 2017, includes a chapter presenting the Integrity Pact as a good practice.[150] The same year also saw the publication by the Military Police Headquarters of the Second Anti-Corruption Conference proceedings, including a chapter by Marcin Waszak presenting the concept, objectives and applicability of the Integrity Pact as a tool for

144 *Integrity Pacts - Civil Control Mechanism for Safeguarding EU Funds*, https://www.transparency.org/en/projects/integritypacts/data/ip-poland [accessed: 14 October 2021].
145 *Integrity Pact in Latvia*, https://www.youtube.com/watch?v=O3WAPXI2NL0&t=7s [accessed: 14 October 2021].
146 *Can the Integrity Pact transform public procurement in the European Union?*, https://www.youtube.com/watch?v=nH46BaQFIa4 [accessed: 14 October 2021].
147 *Ochrona inwestycji finansowanych przez UE w ramach paktów uczciwości*, https://paktuczciwosci.pl/wp-content/uploads/2021/06/AA_IP_publication-01_PL_WEB.pdf [accessed: 14 October 2021].
148 *Model Monitoring Agreement and Integrity Pact for Infrastructure. An implementation guide for civil society organisations*, https://images.transparencycdn.org/images/2018_Report_ModelIntegrityPactInfrastructure_English.pdf [accessed: 14 October 2021].
149 *Myszków Press Meeting*, 11 December 2019, https://paktuczciwosci.pl/aktualnosci/spotkanie-prasowe-w-myszkowie/ [accessed: 14 October 2021].
150 *Konflikt interesów w zamówieniach publicznych. Praktyczny poradnik*, https://www.uzp.gov.pl/__data/assets/pdf_file/0030/35994/Konflikt-interesow-w-zamowieniach-publicznych.-Praktyczny-poradnik.pdf [accessed: 1 October 2021].

preventing corruption in public procurement.[151] The 2019 edition of the *Poradnik w zakresie przeciwdziałania nadużyciom finansowym w szczególności w ramach projektów realizowanych z Programu Operacyjnego Infrastruktura i Środowisko 2014–2020* [Guide to Preventing Fraud in the Projects Completed under the 2014–2020 Infrastructure and Environment Operational Programme] published by the Ministry of Investment and Development includes a chapter on the Integrity Pact, presented as a fraud-prevention tool.[152] The Integrity Pact was mentioned in the *Raport z ankiety na temat przeciwdziałania i zwalczania nadużyć finansowych w wydatkowaniu środków UE* [Survey Report on Preventing and Combating Fraud in the Spending of EU Funds] issued by the Ministry of Development Funds and Regional Policy in 2021. The publication presents the results of a survey in which beneficiaries of 2014–2020 I&EOP were asked whether they were familiar with the concept of the Integrity Pact and whether they would be willing to carry out a project or contract in this format.[153]

7. Conclusion

The Integrity Pact pilot in Poland has had both strengths and weaknesses. Unquestionably, has made the selected public project more transparent and raised awareness of the needs of the local communities that hosted the monitored project. The Observer's activities have reinforced a constructive approach to dispute resolution in the project. Additional meetings and the exchange of letters admittedly helped streamline communication between the contracting parties. However, no convincing evidence has been collected to support the claim that the Integrity Pact is an effective tool for fighting corruption in public procurement. The Observer identified several small-scale irregularities, but they should be seen as mere project-management errors or simply bad public procurement practice. The very fact that the project was covered by an Integrity Pact is likely to have had a preventive effect. However, the entities covered by the Integrity Pact have expressed their discomfort about not being allowed to "appeal" against the Observer's observations and judgements.

All things considered, the Integrity Pact pilot has achieved its objectives by providing unique observations on the relevance of civil society involvement in public project management processes. All the Integrity Pact participants ultimately admitted that it was a worthy initiative and are ready to join similar exercises in the future. The pilot study may have proven an important step towards legitimising social actors' role in the scrutiny of public projects of different sizes. The often-expressed concern that society's interest is not always represented in the public procurement process may decrease and confidence in public tenders may increase. While these goals are yet to be accomplished, the five-year Integrity Pact pilot has made us all much more aware of the challenge. Having learned about the skills and limitations of Civil Society Observers in monitoring public spending, we have more information and skills to design instruments for civic participation and control that will serve their purpose even better. A revised Integrity Pact format, based on the lessons learned in the pilot, could certainly become an instrument of this kind, if it is endorsed by policy-makers.

151 M. Waszak, *Pakt uczciwości jako narzędzia zapobiegające korupcji w zamówieniach publicznych. Koncepcja, cele i zastosowanie*, [in:] Second Anti-corruption Conference. Implementation of Anti-corruption Measures in the Ministry of Defence. Proceedings, https://paktuczciwosci.pl/wp-content/uploads/2017/08/II_Konferencja_Antykorupcyjna_Materia%C5%82y_Pokonferencyjne.pdf, pp. 33–50.

152 *Poradnik w zakresie przeciwdziałania nadużyciom finansowym w szczególności w ramach projektów realizowanych z Programu Operacyjnego Infrastruktura i Środowisko 2014–2020*, https://www.pois.gov.pl/media/68365/Poradnik_01_2019.pdf, pp. 41–42 [accessed: 14 October 2021]

153 *Raport z ankiety na temat przeciwdziałania i zwalczania nadużyć finansowych w wydatkowaniu środków UE*, *op. cit.*

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This final report covers the findings of the Civil Society Observer who spent nearly five years monitoring a major government contract in Poland. The involvement of an independent civil society organisation in a large infrastructure project has helped the general public gain better insights into the public procurement process. The report covers the key challenges identified in the project design and construction phases. It reflects the position of the Contractor and the Contracting Authority. Regular monitoring activities have inspired recommendations for the project parties in question and more generally for parliament and government to consider measures reducing the risk of fraud across the market. The European Commission Integrity Pact concept, which has enabled and guided the process, was full-scale tested for the first time in Poland. The authors of the report are presenting their personal assessment of the mechanism and are offering follow-up ideas.

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