

Minute of the Minister for Finance
on the Committee of Public Accounts - First Interim Report 2007
Access to the Private Element of Public Private Partnerships – An International
Comparison

The Minister for Finance has examined the Committee's first Interim Report of 2007 and has taken account of its conclusions. In relation to the Committee's recommendations, his response is as follows:-

Recommendation No. 1

Consideration should be given to overcoming difficulties in relation to the Committee's access to commercially sensitive material by legislative means.

Recommendation No. 5

Commercially sensitive papers relating to contracts on major PPPs should be available for inspection by members of the PAC on a confidential basis where necessary for the discharge of the Committee's functions.

These recommendations raise similar issues. The Minister notes that the report does not identify any specific deficiencies in existing legislation empowering the Committee to examine reports of the Comptroller and Auditor General (C&AG) on Public Private Partnerships (PPP) projects.

The Minister for Finance notes that the Committee of Public Accounts is the Committee of Dáil Éireann established under the Standing Orders of the Dáil to consider a report of the Comptroller and Auditor General on the Appropriation Accounts and to make a report thereon to Dáil Éireann in relation to that report (referred to in Section 11 (4) of the Comptroller and Auditor General (Amendment) Act 1993). He would point out that in discharging its responsibilities in this regard, the Committee can call for "persons, papers and records" – thus giving its members considerable scope to enquire in great detail into public spending and matters of public interest. The Minister would expect all concerned to respond positively to such requests from the Committee, subject to considerations of commercial sensitivity, confidentiality and/or of legal professional privilege. This expectation has already been borne out by the appearance of representatives from National Toll Roads plc before the Committee in 2006 in relation to an examination of the West Link Toll Bridge project.

The Minister for Finance would further point out that all documentation held by State authorities entering into PPP projects is fully available for review by the Comptroller and Auditor General for reporting by him, as appropriate, whether these relate to PPP projects funded by Exchequer unitary payments or projects funded by user charges.

For example, in the case of the VFM Report on the Bundled Schools Project the Comptroller and Auditor General was provided with access to a substantial amount of relevant information, including the financial model used by the winning bidder in the PPP arrangement. The financial model includes the discounted cash flows for the project, based on the risk transfer to the private sector consortium reflected in the

project contract and also includes information on the internal rates of return on private sector investment in the project.

The Minister would further point out that the Committee has significant powers of inquiry at its disposal to access commercially sensitive material on a confidential basis by exercising compellability powers under the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997. In the case of information produced under the 1997 Act and presented to the Committee in private session, at which no evidence is taken, the information cannot be disclosed without the consent of the Chairman (see Section 16 of the Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act, 1998).

The Minister considers that the existing powers referred to above provide adequate possibilities for the C&AG to examine and report on, and for the PAC to consider, all relevant PPP matters. If the Committee has a specific concern about these provisions, the matter would need to be presented in detail.

Recommendation No. 2

The future liabilities associated with PPPs should be computed and a transparent means of accounting for them should be developed in line with best practice.

The Minister would draw to the Committee's attention the current arrangements regarding the calculation of future liabilities associated with PPPs and the accounting arrangements for such projects.

In regard to the accounting aspects, the annual Estimates for each relevant Vote include a dedicated, ring-fenced subhead for each Department/Agency engaged in PPP contracts involving unitary payments from their Vote to provide for the projected annual unitary payments for PPP projects. Both the annual estimate and the annual outturn on this subhead is shown in the Appropriation Accounts.

The Minister notes that his Department has issued a Circular to Departments about future costs of PPP projects. Under this Circular, notes to the Appropriation Accounts for 2007 and thereafter will include a note under 'Commitments' entitled 'Capital Cost of Public Private Partnership Projects'. The note will detail the future liabilities on the capital cost of PPP projects in respect of which capital expenditure has been incurred to complement the information on the ongoing annual cost.

The note under 'Commitments' will deal only with the Capital cost of PPP projects – i.e. not commitments involved on the current side e.g. in regard to the maintenance and operation components of the contract. In this respect, PPP projects will be treated similarly to other forms of government procurement.

Recommendation No. 3

Value for money should remain the sole justification for consideration of PPPs in Ireland

The Minister for Finance would point out that the basis for deciding on capital projects, and the method of procurement, is a policy matter for the Minister concerned. Where a policy decision is taken to have a PPP process, the Department of Finance guidelines on the PPP procurement process provide that four formal value for money tests should be carried out during the PPP procurement process at the following points:

- (i) at PPP Procurement Assessment – a test carried out to determine whether, and in what form, a PPP arrangement has the potential to offer a value for money solution by reference to a number of criteria;
- (ii) at Completion of the PSB – to determine whether, in light of the quantifications in the PSB, the conclusion reached in the PPP Procurement Assessment still holds;
- (iii) at Tender Evaluation stage - to compare the highest ranking bid against the PSB, allowing for the differing impact of taxes, etc., to assess whether the highest ranking bid offers a potential value for money solution; and
- (iv) at Financial Close – a final test carried out (a) to assess the impact of any changes in the interest rate(s) and/or discount rate and (b) where the project has been procured using the Negotiated Procedure, to examine the effect of any proposed changes in the contract terms.

Recommendation No. 4

Contracts should eventually, after an appropriate time interval (say three months after completion) be disclosed in their entirety which would allow ongoing assessment of a project and reassurance to the public that their interest was being respected.

The Minister for Finance considers that this recommendation would need to be considered by the relevant sponsoring agency on a case by case basis, having regard to protecting the State's negotiating position and the statutory, civil and legal rights of contracting parties. The Minister considers that the question of publication is time-sensitive and linked to whether there are similar tender competitions in the offing or underway. For instance, the Minister understands that the National Roads Authority (NRA) has on occasion had concurrent and subsequent tender competitions running and the pricing has been extremely keen, beating the Financial Comparators by significant amounts. So, publication could be problematical. All of the PPP documentation and analyses are available to the Comptroller and Auditor General.

Recommendation No. 6

Prior to tenders being submitted for PPPs, agencies should ensure applicants are aware of the limits of what will and will not be considered as “commercial in confidence” in relation to PPP contracts.

Recommendation No. 7

The onus of proof whether a claim to commercial confidentiality is justified should be with the tenderer. It should not be up to the public body. The Comptroller and Auditor General should have the last word in this decision.

These recommendations are dealt with together.

The Minister for Finance would point out that if agencies are required to determine what is “commercial in confidence” this would remove the onus on tenderers to justify clauses of commercial confidentiality.

It is important to distinguish between two different usages of the term “commercial confidentiality”. The first is when it is used in the context of protecting the financial interests of the State in the procurement of a project (or future similar projects), by not making public information which could provide an unwarranted advantage to bidders. This information could prejudice the negotiating position of state authorities and result in increased costs to the State.

The second usage of the term “commercial confidentiality” - and the main focus of the report - is when used ‘post procurement’, in reference to the commercial interests of the successful bidder. The Minister for Finance agrees that it would be optimal if parties could be clear at the outset about matters attracting commercial sensitivity but, given that these matters are not straightforward, this issue would have to be considered on a case by case basis taking into account the statutory, civil and legal rights of contracting parties. Having regard to this, the Committee’s recommendation will be brought to the attention of the relevant Departments and Offices.

As regards the role of the C&AG, this matter is prescribed both in the constitution and legislation.

Recommendation No. 8

After the contractual arrangements relating to a PPP project have been finalised, the relevant Department and / or the National Development Finance Agency should, if requested, make themselves available for briefing the PAC.

The Minister for Finance notes that the arrangements for scrutiny by the Oireachtas that apply to conventionally procured projects apply also to projects procured by means of a PPP.

Parliamentary oversight of individual Ministerial portfolios is exercised by the relevant Select Committees of the House, who may examine all issues within the ambit of Ministers. In addition, the Select Committees of the House and the Public Accounts Committee can request documentation from State Authorities in the course of their proceedings and the Minister for Finance expects that authorities would

respond positively to such requests, addressing, where relevant, considerations of commercial sensitivity or confidentiality and of legal professional privilege. The Committee of Public Accounts has the power to call for persons, papers and records.

The Minister for Finance is satisfied that relevant Departments and the National Development Finance Agency (NDFA) are fully accountable to the House under these arrangements.

Recommendation No. 9

When a private consortium is entering into a PPP project it should be aware that it will be open to scrutiny by the PAC on the element of its business that relates to the PPP.

The Minister for Finance will draw the attention of Accounting Officers to the Committee's recommendation and to the powers of the Committee of Public Accounts in this regard, which have been set out in the Minute.

Recommendation No. 10

Provision for periodic measurement of the performance of a PPP should be built into the contractual arrangements.

The Minister for Finance would point out that a fundamental feature of PPP contracts is that a payment mechanism is built in to allow performance management of the company against a standard specified in the contract. This payment mechanism allows the State Authority to reduce unitary payments if the PPP Company fails to perform as agreed in the contract. If such a reduction were made it would be highlighted in the Appropriation Account as a variation against the Estimate provided under a specific subhead for unitary payments.

The Public Interest would be greatly served by further study into the following issues:

- **Analysis of the rationale for the PPP allocation in the various parts of the latest NDP**
- **Examine the need for the extensive use of PPP at a time of exceptional exchequer buoyancy**

These recommendations raise questions of policy which are the prerogative of the Minister and the Government. The Minister for Finance would point to Section 156(7)(b) of the Orders of Reference of the Committee of Public Accounts.

- **Value for money assessment on a sample of PPPs across the sectors**
- **Examine the alleged benefits of a sample PPP project over its lifetime compared to a conventionally procured project in the same sector.**

The Minister considers that the reference to "alleged benefits" is not appropriate. The formal examination of value for money in public expenditure has been assigned by

the Oireachtas to the Comptroller and Auditor General. The Minister would welcome any assessment by the C&AG of the value for money of a sample of PPPs across the sectors, which was soundly based on a like-for-like comparison with similar projects traditionally procured.

The Minister for Finance notes that the VFM report by the C&AG which examined the value for money obtained in the 5 schools to contract close, acknowledged that, ultimately, the full value for money represented by the project could only be determined over the 25-year life-cycle of the project. However, the C&AG recommended that the costs and benefits of adopting a PPP approach should be assessed relative to the performance of a comparable group of schools procured conventionally. Formal evaluation of the project over, say, the first five years of operation of the contract would be desirable.

The Department of Education and Science is preparing for a five year review and evaluation of the Schools Bundle pilot PPP project. This review will encompass an audit of the schools, a five yearly review and adjustment of the running costs and an evaluation of the project to date. The rolling programme of Whole-School Evaluation reports will include the pilot schools in order to assess, inter alia, the impact of the PPP contract on the work of the school principal.

- **Evaluate the respective roles of the NDFA, CAG and the sponsoring agencies with a view to assessing whether there are sufficient structures in place to safeguard taxpayers' money/public interest**

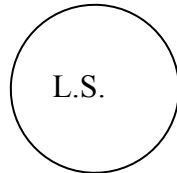
The Minister for Finance is satisfied that there are sufficient structures in place to safeguard taxpayers' money / the public interest in relation to PPPs. Firstly there is the role of the sponsoring agency / department in discharging this requirement. Secondly, the relevant sanctioning authority (usually a Minister) discharges this role. Thirdly, the NDFA, as adviser and provider discharges this role. Fourthly, the relevant Committee of the Oireachtas can examine all issues under the remit of a Minister. Fifthly, the C&AG can undertake full audits of all PPPs in areas falling under his remit. Sixthly, the PAC itself can discharge the role.

Finally, a specific requirement of PPP projects is the appointment of a Process Auditor, whose role is to check, on behalf of the Accountable Officer, compliance with the proper procedures and processes for all projects over €20 million. More generally, for all capital investment, including PPPs, there is a requirement on Departments to put in place a system of spot-checks for compliance with the Value for Money frameworks. The Minister for Finance has also recently established the Central Expenditure Evaluation Unit, which will be reviewing these spot check reports from Departments and will also directly undertake a series of spot-checks of individual capital projects.

➤ **Periodic review of international development in the field of public accountability of PPPs.**

The Minister for Finance accepts the recommendation bearing in mind that forms of government accounting and accountability are linked to the legal, constitutional and government accounting systems in place in the various jurisdictions.

Given under the Official Seal
of the Minister for Finance on
this the 25th day of April, 2007



David Doyle
Secretary General
Department of Finance