

Chapter 17 Courts Service

The Criminal Courts of Justice Building

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17.1 The Courts Service was established in 1999 with responsibility for managing court administration, supporting the judiciary and providing court buildings and accommodation. It took over a portfolio of court accommodation much of which was of a poor standard. Consequently, in 2002, the Service commenced a seven-year capital building programme to upgrade and modernise court facilities.

17.2 In April 2007, the Courts Service entered into a Public Private Partnership (PPP) contract with a private sector consortium led by Babcock & Brown to build a new central Criminal Courts of Justice complex on a State-owned site and to operate the complex for a period of 25 years.

17.3 The Courts of Justice complex is being built on a green field site provided by the Office of Public Works, on the corner of Parkgate Street and Infirmary Road, and beside the entrance to the Phoenix Park. This development is expected to cater for all criminal court business currently undertaken in and around central Dublin. The new complex will increase the number of courtrooms available for criminal court business from the current 16 to 22. The space currently used for criminal court business will be available to be used by other courts or will be disposed of⁵³. It is expected that the Criminal Courts of Justice will become available for use by the Courts Service by the end of 2009.

17.4 The scope of the contract includes the development of the new court building, including accommodation for judges, staff and other court users as well as maintenance of the building, waste management and traffic management and some elements of security and IT support services. Payment under the contract is based on an annual unitary charge, which will commence when the complex becomes available for use, and continue for 25 years thereafter. The Courts Service estimates that for the first full year of operation (2010), the payment will be just under €20 million.

17.5 In addition, the contract provides for certain other services to be delivered by the PPP company and paid for by the Courts Service on a usage basis. These include jury minding, utilities such as water, sewerage, electricity and gas, and costs relating to catering for juries, judges and prisoners. The Courts Service expects to reach final agreement with Babcock & Brown on the charge structure for these services by September 2009. The cost to the Courts Service will depend on the prices charged and the volumes of service used, and is expected to amount to about €2 million a year.

Developing a PPP Project

17.6 In order to ensure that good value is achieved in PPP projects, the public body sponsoring a project has to address a series of decisions in sequence. The key decisions are

- Is the proposed project worthwhile?
- How should the State procure the project — by PPP or by conventional means?
- How much should the State be prepared to spend on the project?
- Among the interested tenderers, whose is the best offer?
- Is the final deal with the PPP company a good one from the State's perspective?

⁵³ The buildings not required as a result of the new development are Smithfield Children's Court, Bow Street, Riverbank Courts, Green Street, Kilmainham, Kings Inns and Conynham Road.

17.7 Assessments of a PPP deal typically rely on detailed financial models that are based on assumptions about uncertain future events over long time periods. The Department of Finance has developed and published a number of guidance documents designed to help project sponsors work through the decision making process to arrive at good decisions.

17.8 Due to the size and complexity of the Courts of Justice project, it was important that expert advice was available at all stages of the process leading to the signing of the main contract. Advice was provided by the National Development Finance Agency (NDFA) in relation to finance, risk and insurance matters⁵⁴. The Office of Public Works (OPW) assisted the Courts Service in relation to technical aspects of the project.

Audit Focus

This examination looked at how the Courts Service evaluated the Courts of Justice project in the course of its development and at the negotiation of the PPP deal. The examination considered whether the Department of Finance guidelines were complied with and whether, having complied with the relevant guidance, sound conclusions were reached about the project and about the PPP deal. The examination also sought to identify lessons learned for application in future projects where procurement by PPP is proposed.

Establishing the Business Case

17.9 The Department of Finance guidelines require the preparation of a comprehensive business case prior to initiating a capital project. The aim is to ensure that where a public sector agency is proposing to commit resources to a project, it is clear about the costs involved and the benefits the project is expected to deliver in return. The business case should therefore analyse the nature of the problem the project is designed to tackle, set out the feasible options to address the problem and, for each option, identify the expected business benefits and the expected costs.

17.10 Ideally, the project sponsor should undertake cost benefit analysis of the options, which is designed to assess whether the likely economic and social benefits of a project are greater than the projected costs. This is not always possible. Where the benefits of a project cannot be fully quantified or their value cannot be identified, cost effectiveness analysis is undertaken to determine the least-cost way of achieving the project objectives.

Identification of Options

17.11 A business case analysis for the Courts of Justice project was completed in May 2004. This identified a number of critical concerns with the current operation of the criminal courts. The main concerns centred around too few courtrooms, insufficient facilities for court users, insufficient space for ancillary services and inadequate segregation, circulation and prisoner holding areas. In response to these problems, it identified three options for the future accommodation of criminal court business.

⁵⁴ The NDFA was established in 2003 to help public sector agencies to evaluate capital investment proposals. Under Department of Finance rules, public agencies sponsoring investment projects with a capital value of €30 million or more are required to seek the advice of the NDFA.

- **Option 1: do nothing** — This option entailed the continuation of the current arrangements, whereby criminal court business continued to be accommodated in the Four Courts complex, and in other sites and buildings in the vicinity. While this would entail no upfront capital costs and would not disrupt current court business, it would not address the operational problems identified.
- **Option 2: refurbish existing accommodation** — This option would involve the refurbishment of a section of the Four Courts complex to provide a consolidated facility for criminal court business. It was estimated that, although this would provide approximately 13,800 square metres of floor space, the usable area, given layout and other constraints, would be substantially less than this and it would not provide all the required courtroom and ancillary requirements. As a result, the Special Criminal Court would continue to sit at Green Street and criminal cases from the Dublin District Court would be held at three separate buildings (Chancery Street, and the Richmond and Riverbank Courts).
- **Option 3: new court complex** – This option entailed building a new criminal courts complex of around 17,000 square metres on a green field site, but within reasonable distance of the Four Courts site, to deal only with criminal court business.

17.12 The Courts Service evaluated the expected benefits and projected costs of the options (see summary in Figure 61) and concluded that option 3 — developing a new Courts of Justice complex — was the preferred option.

Figure 61 Summary of Business Case Analysis of Options for Criminal Courts Accommodation in Dublin

	Benefits score ^a	Projected cost (NPV) ^b
	%	€m
Option 1: do nothing	33%	na
Option 2: refurbish existing accommodation	54%	€229
Option 3: new court complex	90%	€253

Source: Report on Development of a Criminal Courts Complex in Dublin, Courts Service, May 2004.

Notes:

- a The benefits of each option were ranked using 35 separate criteria with a total of 1,380 marks available. This percentage reflects the proportion of the total marks achieved by each option.
- b Net Present Value (NPV) estimates are used to aggregate and compare cash flow amounts that arise at different points in time. In this case, the projected payments by the Court Service over 25 years are discounted at a rate of 4.64%.

Expected Project Benefits

17.13 Each of the identified options was assessed under a total of 35 criteria, grouped under five main headings i.e.

- the provision of facilities for court users, including judges, members of the legal profession and members of the public involved in criminal cases e.g. jury members, witnesses and victims (36% of the total marks)
- the number and quality of courtroom space required (35%)
- the impact of the option on the efficient management of court business (including non-criminal cases) during the development and in the longer term (22%)
- the provision of support services for judges (6%)

- the provision of information to the public (1%).

17.14 The option of building a new Courts of Justice complex scored significantly higher than either the option of refurbishment of existing accommodation or the ‘do nothing’ option. This was mainly because it was expected to provide more courtrooms and facilities of better quality, as well as better segregation of victims, jurors, persons in custody, judiciary and witnesses.

17.15 The expected business benefits of the options were not quantified. While the business case report identified the benefits in qualitative terms, more quantification of expected business benefits in relation to criminal cases would have been possible such as the expected increases in the numbers of cases processed, reductions in waiting time for criminal cases and changes in the unit costs. It might also have considered the effects on non-criminal court business arising from the freeing up of additional space.

17.16 The Courts Service have pointed out the difficulty in attributing financial values to significant features of the administration of justice (beyond the provision of courthouse accommodation) that have societal but not direct economic benefits. It was of the opinion that this would have been a highly subjective assessment and in its view would not have resulted in the selection of a different option.

Projected Costs

17.17 Based on the relative benefits analysis, the Courts Service eliminated the ‘do nothing’ option from further consideration, and did not examine the likely future costs to be incurred by the Courts Service in delivering criminal court business in the current accommodation structure.

17.18 The Courts Service estimated that carrying out the required refurbishment under option 2, and of subsequent operation of the court complex over a 25 year period would cost a projected €29 million in NPV terms. It estimated that construction and operation of a new courts complex over a similar period would cost a projected €53 million in NPV terms — a difference of €4 million or 10% between the options. The Courts Service concluded that the difference in cost was far outweighed by the additional advantages of developing the complex on a greenfield site.

Projected Savings

17.19 The Courts Service projected savings of about €2 million in NPV terms that were expected to accrue if the greenfield site option was pursued. These were expected to arise from the sale of surplus property and the surrender of leases, and reduced maintenance and operational costs. The comparable savings under the refurbishment option were projected at € million in NPV terms. These potential savings were considered to narrow the gap in the cost of the options.

17.20 The Courts Service also speculated in its business case analysis on the possibility of achieving substantial savings for the Exchequer under option 3 if the new Courts of Justice complex was built on a site physically connected to a prison facility, thereby reducing the cost to the Prison Service of transporting prisoners. The projected saving for the Prison Service was around €100 million in NPV terms. The Prison Service was of the opinion that little if any of this saving could be achieved if the Courts of Justice complex was not physically attached to a prison. Notwithstanding this, the Courts Service are satisfied that significant savings will be achieved from the centralisation in one facility of criminal business and the increasing use over time of prison video links negating the need for significant numbers of defendants in custody to be physically transported to court.

Assessment of Business Case Analysis

The Courts Service carried out a business case analysis that conformed with the requirements set out in the Department of Finance's guidelines. This focused on the relative merits of the options, rather than the absolute costs and benefits of a preferred option. It carried out cost effectiveness analysis that allowed it to conclude that a greenfield development was likely to deliver better value than refurbishment of the existing accommodation.

Selecting the Best Procurement Method

17.21 Having decided to go ahead with a long-term project, the next requirement is to decide the best procurement mechanism. Traditionally, long-term public sector projects have been procured by sponsoring agencies through significant up-front capital investment funded by the Exchequer with the running costs of the project funded from annual budgets. The advent of PPP contracts introduced the option of having a private sector partner provide some or all of the project elements for a defined period, in return for a series of regular payments.

17.22 In practice, the option of procuring the Courts of Justice project by traditional means does not appear to have been available. The Courts Service did not have a capital budget that could accommodate the up-front costs involved in developing a new complex on the scale proposed. Consequently, analysis of the project was always approached on the basis that, if it were to proceed, it would have to do so as a PPP project⁵⁵.

Suitability for PPP Procurement

17.23 The guidance issued by the Department of Finance stipulates that where a PPP approach is being considered, a PPP procurement assessment should be conducted. The assessment should address a number of key issues including whether the project is of sufficient scale and has the right risk and operational profile to justify a PPP approach, and whether the project has the potential to deliver value for money if procured as a PPP. The guidance sets out the questions that should be answered and the typical characteristics of a PPP project. The required PPP assessment is based on qualitative as opposed to quantitative criteria.

17.24 In its business cases analysis, the Courts Service concluded that the Courts of Justice project had a number of characteristics that made it suitable for procurement as a PPP.

- The project would be a large strategic infrastructural investment of a scale likely to attract private sector interest and involvement.
- The project required a high level of design, architectural and ICT skills and inputs, not all of which could be provided by the public sector.
- Key elements of the project (e.g. design and construction) were non-core functions of the Courts Service.
- The proposed project included a significant operational component.
- There was scope for the cost-effective transfer of risk to the private sector.

⁵⁵ For example, the costings in the business case analysis (Figure 62) were prepared on the basis of a twenty-five year project life — the normal life of a PPP — as opposed to the 50/60 year timescale that would be expected for a major building project of this type. In the context of choosing between similar options, this is unlikely to have made much difference.

Form of PPP

17.25 The Courts Service proposed a design, build, finance and operate (DBFO) structure for the PPP project. This was the same kind of structure as that in the project for the Laganside Courts in Belfast, which opened in 2002. In deciding on the structure for the Courts of Justice project, the Courts Service also took account of developments and improvements in more recent PPP projects including the UK Department of Constitutional Affairs Courts PPP project.

Transfer of Project Risks

17.26 Risk is an inherent aspect of any large project. In PPP projects, considerable effort has to be invested by the sponsoring authority to identify who should manage which project risks. The aim is to allocate the risks between the public and private partners based on who is best placed to manage them.

17.27 A workshop to evaluate the project risks, involving Courts Service staff and the financial and technical advisors, was held in March 2004. The purpose of the exercise was to identify major risks attached to the project to assess the potential likelihood of those risks occurring and assess their impact on costs. The workshop then allocated the risks between the private sector partner and the Courts Service.

17.28 The Courts Service concluded that the main risks to be carried by the PPP company should be design, construction, operational and financial risk. The Courts Service retained the risk in relation to planning, and the risk that the project would be on the wrong scale (demand risk). This allocation of risk is relatively standard for projects of this type.

17.29 The value of the risks to be transferred was factored into the projected cost of the project. In quantifying the risk, a range of values was identified under each risk heading and a weighted adjustment was applied to arrive at a projected value. Effectively, this treatment aims to ensure that the full amount the State would expect to pay for the project over its lifetime is identified.

17.30 The business case analysis estimated that if the Courts Service had to manage the risks that it was proposed to transfer to the PPP company, this would add €1 million to the estimated public sector reference cost, bringing the risk-adjusted cost to €314 million (in NPV terms). The projected value of risks transferred was based on a 90% confidence level.

Assessment of the Procurement Approach Analysis

The Courts Service's analysis of the suitability of the Courts of Justice project for procurement by means of PPP was consistent with the Department of Finance guidelines.

The suitability of the Courts of Justice project for procurement as a PPP was assessed in a qualitative rather than a quantitative way. The form of PPP selected – DBFO – was in line with structures that had been used elsewhere.

Since there was insufficient budget to procure the project by conventional means, conventional procurement was not formally considered.

Project Approval

17.31 Based on the business case and PPP suitability analysis, the Courts Service sought the approval of the Department of Justice, Equality and Law Reform for the Courts of Justice project to proceed to procurement as a PPP, to include acquisition of a site and a building of

approximately 17,000 square metres, the ongoing maintenance and operation of the building including waste and traffic management, security, ICT services and the provision of catering services for juries, judges and prisoners. Approval for the proposal was granted by the Department of Justice, Equality and Law Reform in November 2004.

The Public Sector Benchmark

17.32 Before a PPP project is offered on the market, the sponsoring authority is required to develop a Public Sector Benchmark (PSB). This aims to assist the sponsoring authority to identify what it would cost to deliver the required facilities and services by conventional (i.e. non-PPP) procurement means. This provides a reference cost for assessing the deals being offered by potential private sector partners.

17.33 The cost projections for option 3 developed at outline business case stage were used as the basis for the PSB. The Courts Service finalised its PSB analysis in November 2005. Based on this, it projected that it would cost €436 million in NPV terms⁵⁶ to develop and operate the Courts of Justice complex over 25 years using a conventional procurement approach.

17.34 The projected cost that emerged from the PSB analysis was significantly greater than the cost projected in the original business case analysis i.e. €114 million (in NPV terms). The increase in the projected cost was partly due to inflation and changes in interest rates between May 2004 and November 2005 but most of the increase was related to changes in the scope of the project relative to that presented in the outline business case. (See Figure 62.)

Figure 62 Comparison of business case and PSB cost projections (NPV terms)

	Business Case	PSB	Change
	€m	€m	€m
Capital Costs			
Site Costs	16	—	(16)
Design, Construction and Professional Fees	101	128	27
Recurrent Costs			
Furniture Replacement over Project Life	14	23	9
IT Replacement	23	8	(15)
Security Costs	16	89	73
Other Operating Costs (cleaning, IT running costs, etc)	43	58	15
Annual Maintenance	40	54	14
Total Cost excluding Risk	253	360	107
Risk Costs	61	76	15
Risk-adjusted Cost of Project	314	436	122

Note: Business case (May 2004) discount rate 4.64%, PSB (November 2005) discount rate 3.6%.

⁵⁶ Cashflows over the life of the contract, discounted to a November 2005 base using a discount rate of 3.6%.

Scope of the Project

17.35 The main changes in the scope of the proposed Courts of Justice project between May 2004 and November 2005 were

- The site near the entrance to the Phoenix Park that was judged to be suitable for the project was already in State ownership. The business case analysis had included an amount of €16 million for site acquisition. This element of cost was correctly excluded from the PSB because the private sector partner was not required to provide a site.
- The proposed size of the building was increased from 17,000 square metres to 20,000 square metres. This had implications for the projected construction costs and for area-based recurrent costs. A key reason for the increase in the size of the building was a decision by the Courts Service to provide and fit out 1,750 square metres of accommodation for Bar Council facilities in the Courts of Justice complex. The agreement is to provide library and working space for up to 150 barristers, and includes utilities and services. The Bar Council will pay an annual licence fee to the Courts Service for the facilities. The initial fee amount is €450,000 a year (subject to periodic review). The rest of the increase in the size of the building was intended to provide spare capacity for future expansion.
- The proposed scope of the IT provision in the project was reduced, with the Courts Service separately taking on responsibility for most IT equipment replacement after the fifth year of operation. This kind of arrangement is relatively standard in PPP projects, because potential private sector partners are usually reluctant to take on significant technological risks associated with long-term IT provision. Where required to do so, the price charged by the private sector partner is likely to be high.
- There was a significant increase in the security elements of the project, the projected cost of which increased from €16 million to €89 million in NPV terms. The Courts Service decided that responsibility for jury-minding should be brought within the scope of the project. In addition, the Courts Service's view was that in the period after the business case had been completed (in May 2004), domestic and international security risks had increased and that there was a consequential requirement for increased security levels for courts that was likely to continue for the foreseeable future. It was considered that airport-style security was required, leading to increased capital and life-cycle costs.

Construction Costs

17.36 The Courts Service projected that the total public sector cost of constructing and fitting out the Courts of Justice complex would be €128 million in NPV terms (excluding construction risk). This projection was based on the expected average construction and fit out costs for four other major projects, including two public sector projects being planned at the time.

17.37 The estimated construction cost per square metre was €5,117. The PSB report noted that, based on a comparison of the unit construction cost with their construction cost norms, and the construction cost estimates for another similar project, the Office of Public Works was of the opinion that this level of expenditure should result in a building of landmark quality.

Operating Costs

17.38 The recurrent costs involved in running the Courts of Justice complex over 25 years were projected in the PSB at €232 million (NPV). This included the costs of building security and jury minding, maintenance of the building and its services, replacement of furniture, IT running costs, cleaning, and utilities.

17.39 Cost estimates for most of the recurring cost elements were provided by the technical advisors, based on Irish market prices. The Courts Service provided estimates of the likely recurrent IT costs and of security costs. The security cost estimates were derived from an assumed staffing level for the Courts of Justice complex, with prices based on those being paid under a recently awarded contract for the provision of security services in the Four Courts campus.

17.40 The recurrent costs of projects are subject to price changes over time. This is normally dealt with in financial modelling by building assumptions relating to price changes into the model.

17.41 In developing the PSB, the Courts Service assumed that most of the recurrent cost elements would increase in price by 4% a year, on the basis that services inflation in the economy would continue at the current levels over the life of the project. Other rates of increase were applied to some recurrent cost elements, as indicated in Figure 63.

Figure 63 Assumed rate of increase in recurrent costs over life of project

Recurrent cost element	Projected NPV	Assumed Annual Cost Increase
	€m	%
Security	89	4
Annual maintenance	54	4
Furniture replacement	23	5
Energy, utilities	7	4
Cleaning	15	4
IT hardware replacement	8	3.5
IT running costs	20	5
Other recurrent costs	16	4
All recurrent costs	232	4

17.42 The PSB model also included an assumption that the long-term rate of general price inflation as calculated by the Consumer Price Index (CPI) would be 2% a year over the life of the project, based on the long-term target for consumer price inflation set by the ECB. The 4% projected increase, therefore, effectively assumed that the Courts Service's recurrent costs would increase at a margin of 2% over CPI.

17.43 Central Statistics Office time series data indicate that for a long period prior to the compilation of the PSB, the cost of services in the economy had increased faster than the CPI generally. Between 1994 and 2004, the overall CPI increased at a rate of just over 3% a year on average, while the services element of the CPI increased by an average 4% a year. This implies that the long-term differential was around 1%. The historical differential was similar over 20 years (from 1984 to 2004).

17.44 In light of the long-term movement in relative prices, it would seem to have been reasonable to assume that services inflation would continue at 1% above the CPI over the long term. In the context of the PSB model for the Courts of Justice project, this suggests that a 3% annual increase assumption for recurrent costs would have been consistent with the assumed average CPI increase of 2% a year. Using a 3% assumption would have resulted in a projected benchmark cost for the project of around €403 million in NPV terms, rather than the projected €436 million based on the 4% assumption.

17.45 In its review of the PSB model, the NDFA examined the sensitivity of the projected benchmark cost to the assumptions made in relation to recurrent costs. It found that if the recurrent costs were assumed to increase at the same rate as CPI (i.e. 2% a year), the projected cost

of conventional procurement of the Courts of Justice project would be €377 million in NPV terms i.e. about €59 million (14%) below the benchmark figure of €436 million based on a 4% assumption.

17.46 Both the Courts Service and the NDFA have stated that they considered the assumed average 4% a year increase in recurrent costs used in the PSB model was appropriate. In support of their view, they pointed out that

- Services inflation in the year to September 2005 was 3.9%.
- The OPW had advised in April 2003 that building and maintenance costs increased by 4.2% in 2002, and was expected to be 4% in 2003.
- Recurrent cost elements have a high public sector employment component. Average public sector wages increased by 8.5% between 2003 and 2004, and by an average of 5.35% a year over the period 1988 to 2004.
- Actual CPI was historically above the 2% long term target. Adding the 1% differential to the long term trend rate for CPI results in a rate at or above the 4% utilised in the PSB analysis.
- Under conventional procurement as represented in the PSB analysis, the Courts Service bears full inflation risk including any differential between CPI and actual inflation.

Assessment of the Public Sector Benchmark Analysis

The Courts Service developed a reference cost by way of a public sector benchmark (PSB) for the Courts of Justice project. The underlying model included all the required elements, and reflected the scope of the project for which potential private sector partners were asked to tender.

The PSB is inevitably developed based on a set of assumptions about uncertain future events. Some assumptions are more critical than others because they significantly affect the projected reference cost. To take account of this, sensitivity analysis is required in order to identify the most significant assumptions and to take their financial effects into account in the final decision.

The public sector reference cost of the Courts of Justice project was very sensitive to the assumption made about the rate at which recurrent costs would increase. The sensitivity of the cost projection to this assumption was noted by the NDFA in its report on the PSB.

Ultimately, the public sector reference cost for the Courts of Justice project assumed that there would be an increase of an average 4% a year for most recurrent cost elements.

In response to my query on whether an inflation increase assumption of 3% a year might be more appropriate — representing the 2% assumed CPI increase plus a margin of 1% for the long-term difference between CPI and services inflation — the Courts Service pointed to the fact that a number of short term trends suggested a higher rate and that, historically, the CPI increase had exceeded 2%.

Subsequent to the evaluation of the Courts of Justice project, the Department of Finance issued additional guidance in relation to the compilation of a PSB for a PPP project. This guidance emphasised the importance of conducting sensitivity analysis and recommended that the ten most sensitive values in the PSB should be identified and recorded in the PSB documentation.

Selecting the Best Offer

17.47 The proposal to develop the Courts of Justice project through a PPP procurement was advertised in the Official Journal of the European Union in April 2005. The Courts Service received 11 submissions from possible private sector partners. A pre-qualification process was used to establish which candidates met the minimum requirements and to evaluate and rank their technical capability and financial standing. At the end of that process, three consortiums were short-listed. An invitation to tender was issued to the three consortiums in September 2005.

Selection and Weighting of Evaluation Criteria

17.48 The three tenders were received in February 2006. These were assessed on the basis of standard criteria used to evaluate PPP projects i.e.

- design and technical aspects of the project, which accounted for 60% of the total evaluation score
- financial aspects of the proposed deal, which accounted for 30% of the score and
- legal aspects, which accounted for 10% of the score.

17.49 The guidance issued by the Department of Finance is not prescriptive in relation to the criteria to be adopted or the relative weights to be assigned to the evaluation criteria. For the Courts of Justice project, 30% of the total marks available in the evaluation were awarded on the basis of the financial aspects of the deal. As a result, small differences in the design and technical proposals would potentially outweigh larger differences in cost. The Courts Service noted that courthouses of this scale are technically complex and a suitable balance between the technical and financial/legal criteria had to be achieved in this context. The Courts Service considered the issue in detail and asserts that, in its view, an appropriate balance was struck.

17.50 The Babcock & Brown consortium was selected as the preferred bidder on the basis of a combined score of 75% (out of a maximum of 100%) as compared with 70.8% and 63.1% for the other bidders. Babcock & Brown achieved the best scores on both the technical proposal and (marginally) on the cost proposal.

17.51 The Babcock & Brown tender proposal was for payment of a 'unitary' payment amount of €7.9 million a year (at end 2005 prices), with 44% of that amount liable to change in line with the CPI.

Treatment of Volume-Related Items

17.52 In its September 2005 invitation to tender, the Courts Service asked bidders to submit tenders with a proposed unitary charge to cover the provision and maintenance of the building and a range of operational services including buildings security. It asked tenderers to indicate separately their cost proposals for certain volume-related items. The main items to be treated in this way were security costs in relation to jury minding, utilities and catering for juries, judges and prisoners.

17.53 Some of the volume-related items (e.g. utility costs) will be provided on the basis of costs incurred being passed on a cost recovery basis to the Courts Service. In other cases, the tenderers were asked to provide unit cost proposals. Each of the tenderers proposed differing charging structures. For example, in relation to security costs for jury minding, Babcock & Brown proposed an hourly rate of between €5 and €65; another proposed a rate of €27.50 per hour and the remaining bidder proposed a flat monthly rate of €23,500. Unlike the other bidders, Babcock

& Brown proposed to charge an administrative and handling fee as well as the pass-through and unit charges.

17.54 No account was taken of the potential cost implications of the volume-related items in the evaluation of the tenders, which focused only on the proposals in relation to the unitary charge element of the contract.

17.55 Notwithstanding the different price structures proposed, the Courts Service and the NDFA has stated that it was standard practice to assess bids without taking account of the effect of volume-related items. The Courts Service added that it could elect prior to the start of each contract year to assume responsibility for one or more of the volume-related items, with effect from the beginning of that contract year.

Evaluation of Procurement Approach

17.56 Selection of the best of the PPP tender offers does not necessarily mean that the offer represents a good value way to procure the project. Under the Department of Finance guidelines for PPP projects, a further test of the winning tender is required before a preferred PPP bidder is nominated. This test compares the projections of cost derived from the PSB (i.e. the conventional procurement cost) with the preferred bidder's cost proposal, on a like-for-like basis. Adjustments are made to take account of taxation differences, so that the full Exchequer impacts of choosing between conventional and PPP procurement are taken into account.

17.57 The Courts Service, assisted by the NDFA, carried out an assessment of the Babcock & Brown consortium's proposal for the PPP contract. The PSB model results were adjusted to exclude the costs associated with the volume-related items, and to take account of taxation impacts. The resulting analysis indicated that the Babcock & Brown tender proposal would cost a projected €302 million (in NPV terms), compared to a projected cost of €328 million (NPV) for conventional procurement — a difference of around 8%. On that basis, the Courts Service and the NDFA concluded that the Babcock & Brown proposal would represent better value than procuring the project by conventional means.

Assessment of the Evaluation of the Tender Offers

The Courts Service evaluated the tenders received in line with the evaluation criteria it had set out, and concluded that the Babcock & Brown proposal was the best of the offers received. The evaluation of the tender proposals did not take account of the likely costs associated with volume-related items.

The Courts Service, assisted by the NDFA, compared the projected cost of the Babcock & Brown PPP proposal to the projected cost of procuring the project by conventional means, as is required by the Department of Finance guidelines for PPP projects.

The foregoing section on the evaluation of the PSB noted that a lower inflator for recurrent costs may have been appropriate but this is something the Courts Service and NDFA contest. However, the financial effect of any adjustment would not have impacted on the validity of the decision to appoint the preferred bidder.

The Courts Service and the NDFA have stated that it is standard practice to assess bids without taking account of the effect of volume-related items. Where unit prices for significant demand-led services vary between the proposals, there is a risk that the result could be financially significant. It would be preferable to take the financial impact of the cost of volume related items into account in choosing between the offers. The results of this analysis should also be tested for sensitivity to variation in the assumptions about volumes of service required.

Negotiating the Final Deal

17.58 Following the nomination of a preferred bidder, the PPP contract must be agreed between the project sponsor and the private sector partner.

17.59 When Babcock & Brown were selected as the preferred bidder in May 2006, it was envisaged that the contract would be awarded by July 2006. Final closure on the deal was achieved in April 2007. The Courts Service stated that this was a tough and protracted commercial negotiation and additional time was required to work through and agree the complex legal, technical and financial issues outstanding.

17.60 The Courts Service agreed to certain cost increases in the negotiation phase. The combined effect of the changes was that the unitary charge payable to Babcock & Brown increased from €17.9 million a year (at end 2005 prices) to €19.1 million at April 2007 prices — an increase of 6.7% in the cost of the proposal.

17.61 More than half of the agreed increase in the unitary charge was due to the passage of time giving rise to increased cost in the following areas.

- An increase of €600,000 a year in the unitary charge was agreed to reflect changes in interest rates between the tender date and the date the contract was agreed.
- An increase of around €240,000 (1.35%) was agreed to take account of inflation from the time the tender price validity period ran out until April 2007.

17.62 Cost increases of this type are normal in PPP projects. The State typically bears the risk of increases in interest until financial close is achieved, and inflation risk is usually shared.⁵⁷ Additional costs due to the passage of time would have affected all tenders and would have necessitated increases in the proposed unitary charge irrespective of the bid accepted.

17.63 The remainder of the increase in the unitary charge related to changes in construction, design and operational costs. There were also some smaller, offsetting cost reductions.

- Increases in construction cost worth €4.3 million in NPV terms were agreed with Babcock & Brown to take account of increasing the floor area by 422 square metres and of changes in building regulations in May 2006. The unitary charge increased by approximately €280,000 per annum to take account of this.
- Increases in operational cost of €250,000 a year were also agreed primarily for increased security staffing numbers and hours of operation deemed necessary by Babcock & Brown to deliver the required service. This resulted in an increase in the cost of the Babcock & Brown proposal equivalent to €5.2 million in NPV terms.

17.64 The Courts Service is of the opinion that the increased construction, design and operational costs resulted in additional value being added to the original proposal. The Courts Service stated that there was a requirement to optimise the offer to ensure the State got what it required. None of the three bids received met 100% of what was a very complex specification. The preferred bid came closest but still required optimisation through the negotiation process.

17.65 In relation to the agreed increases for security costs, the Courts Service has stated that the Babcock & Brown consortium had underestimated the resource input needed to meet the security

⁵⁷ Tenderers are usually required to hold their offer price for a set period (e.g. three months) to allow time for the tenders to be evaluated. Once that set period expires, the State party carries the risk associated with price increases up to the financial close.

requirements for the Courts of Justice complex. In the negotiations on the deal, the Courts Service agreed on an increased payment as a contribution to meet the cost of providing the necessary resources. It was aware that while it was seeking to outsource the service, it could not outsource the reputational risk that would arise from a significant security failure early in the operational phase. While it negotiated an outcome that provides an additional modest increase in the State's payment, Babcock & Brown retained responsibility for providing sufficient resources to meet the contract security specification.

17.66 In the course of evaluation of the tenders, the evaluation team had noted that the resources for security proposed by Babcock & Brown appeared low, but no cost adjustment was made at that stage to allow for increased resources. While such an adjustment would have changed some of the scores in the evaluation, it was unlikely that it would have resulted in another tenderer being nominated as preferred bidder.

17.67 Agreement had not been reached with Babcock & Brown in relation to the volume-related items at the time that the contract was signed on the unitary payment elements. At end July 2009, agreement had not been reached on the charging structure. The Courts Service informed me that detailed discussions had taken place in relation to specification and price and it indicated that agreement would be reached by September 2009.

Assessment of the Contract Negotiation

The negotiation of the contract with the preferred bidder took longer than was expected. At the end of the process, the Courts Service had agreed to increases in the unitary charge amount related to inflation and interest rate increases, and some project changes. Most of the increases would probably also have been required if the Courts Service had been negotiating with either of the other underbidders.

Final Evaluation of the PPP Deal

17.68 The Department of Finance guidelines require a final evaluation of a proposed PPP deal following the completion of negotiation of the contract details, and before the contract is signed. The Courts Service, together with its advisors, produced a substantial report on a range of aspects of the deal prior to the signing of the contract in April 2007. This report included a further evaluation by the NDFA of the deal in its final negotiated form.

17.69 The NDFA evaluation was based on an updating of the evaluation that was undertaken at the time the preferred bidder was selected, when the Babcock & Brown tender offer was compared to the projected cost of procuring the project by conventional means. The results of the NDFA's analysis indicated that the projected cost of the final PPP deal would be around 6% less than the cost of conventional procurement. The reduction in the estimated differential (from 8% to 6%) reflects the impact of the cost increases agreed in the course of the negotiation period.

17.70 The NDFA's summation of the deal was that '*... based on an evaluation of monetary costs and benefits associated with each option, the PPP option represents better value to the public sector. Furthermore, a qualitative assessment of general benefits to be derived from the new Courts of Justice indicates that the PPP option is best capable of optimally delivering these benefits*'.

Assessment of Final Evaluation of the Deal

The final evaluation of the deal on offer from Babcock & Brown was done by adjusting the earlier test calculations to take account of adjustments agreed during the negotiating process. The conclusion was that the PPP deal would represent better value than procurement by conventional means. The analysis did not explore the sensitivity of the results to the assumptions made.

Overall Conclusions

Courts Service

Overall, the evaluation process followed by the Courts Service in procuring the Courts of Justice PPP project complied with relevant Department of Finance guidelines.

The decision to opt for PPP procurement for the Courts of Justice project took place against a background where conventional procurement was not a viable option due to the lack of an upfront budget.

The extent to which value for money is achieved in the future operation of the Courts of Justice project depends on

- the extent of efficiencies achieved in the running of criminal court business through the new infrastructure
- active management of the cost of volume related items through periodic market testing and control of related demand.

In addition, the realisation of the projected savings of €22 million will also have to occur.

It would be appropriate for the Courts Service to review these after a reasonable interval.

System Wide Considerations

The procedures for evaluating PPP proposals have evolved in recent years with the issue of detailed guidance by the Department of Finance and the provision for technical input from the NDFA. It may be worth considering some additional guidance in a number of areas.

Evaluation of the Business Case for a Proposed Project

In choosing between alternatives it is desirable that benefits be quantified to the greatest extent possible. In general, it would improve assessment if any efficiency gains relating to revised business processes facilitated by each option were calculated.

Overall, any business case should

- identify and quantify to the maximum extent possible the realisable efficiencies under the various project options, including expected increases in output, reductions in the unit cost of outputs, improved quality of service or reduced waiting time
- set out other expected benefits in a qualitative manner
- select the preferred option based on a comparison of the net business benefits of each option.

Evaluation of the Procurement Approach

The key to positioning a service to determine whether a PPP approach will yield best value is the construction, for comparison purposes, of a reliable and accurate public sector reference cost.

Increasingly, services such as building maintenance, security and cleaning are being procured under contract from private sector providers rather than through direct employment. Also, fixed-price contracts, which transfer construction risks to the provider, are increasingly used in procuring buildings and infrastructure. These trends may impact on the construction of a realistic reference cost and the extent to which that cost will inflate over time. It may be opportune to consider the impact of these changes for PSB modelling.

While recognising the value of the certainty provided by a single benchmark figure it may be worth exploring whether it would be preferable to present a projected benchmark cost range, rather than a single reference cost value in order to properly reflect the inherent uncertainty implicit in the process. The extent to which alterations occur in the PSB as a result of varying the assumed values associated with likely scenarios should help establish the range.

A benefit of this approach would be to make explicit when a particular procurement option is clearly preferable on cost grounds as against situations where additional scrutiny should be applied before deciding on the procurement approach in more marginal cases. In these instances, qualitative factors should be carefully weighed in making the ultimate decision.

It is recognised that, in order to implement any such change, additional guidance would be necessary on how comparison of the proposed cost of a PPP deal might be made against such a projected cost range, including how the range might be established.