

Chapter 27 Department of Transport

West-Link Buy-Out

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27.1 The M50 is a 40 kilometre orbital motorway around Dublin, running from the M1 at Dublin Airport to the N11 at Bray. A 3.2 kilometre section of the motorway, from the N3 (Navan Road) to the N4 (Sligo Road) includes two side-by-side bridges spanning the River Liffey (West-Link Bridge). This section of the M50 is a toll road that was built by National Toll Roads (NTR)⁸³ and operated and maintained by them since 1987. The first bridge opened in March 1990 and the second in September 2003.

27.2 Under agreements with the State, NTR had exclusive rights to operate and toll the bridge section of the M50 motorway until 2020.

27.3 Arising from increased traffic volumes the M50 motorway suffered from inadequate road lane capacity with bottlenecks at junctions and at the toll plaza. To address this, an upgrade scheme was developed which provided for widening to three lanes in each direction of 31 kilometres of motorway, the upgrade of ten interchanges and junctions and the development of an electronic 'free flow' toll facility.

27.4 In order to facilitate this development a decision was taken to buy-out the contract with NTR and run a tender competition to design, build and operate a new barrier-free tolling system.⁸⁴ Following this competition the NRA, in March 2007, appointed BetEire Flow (a consortium of two French firms) to design, build and operate the tolling system.

27.5 In the financial year 2008, €8.9 million was received from NTR in respect of M50 toll revenue and brought to account as appropriations in aid. Under the agreements with NTR an annual payment of the State's share of the toll revenue was made by NTR to the Department in April each year in respect of the previous calendar year. An amount of €17.8 million was paid by NTR in April 2008 for the year ended 31 December 2007. As part of the buy-out arrangement it was agreed that the income due to the State from NTR for 2008 would be paid 75 days after the buy-out agreement came into force and this accelerated payment of €11.1 million was paid by NTR in October 2008.

27.6 As a result of revised arrangements put in place in 2008 any future M50 toll income will accrue to the National Roads Authority (NRA).

Audit Focus

The audit reviewed the arrangements for the buy-out.

Buy-Out of NTR Rights

27.7 Under the agreements with NTR, the State could abolish or reduce tolls or limit any increase in them. However, this would trigger compensation which under the terms of the agreement would, in the event of abolition, give rise to an annual payment equivalent to the total amount of toll revenue in the 12 months immediately preceding the date of the abolition of the tolls less the licence fee payable to the State. This annual compensation would be subject to adjustment in accordance with indexation provisions.

⁸³ Formerly West-Link Toll Bridge Ltd.

⁸⁴ Separate contracts were tendered to provide for the M50 upgrade works.

27.8 If the tolls were abolished with effect from 31 July 2008 and under the terms of the existing agreements the compensation payable would have been as set out in Figure 94.

Figure 94 Compensation Based on Toll Revenue, August 2007 - July 2008

Basis Period	Gross Toll Revenue (Cash and HGV Subsidy)	State Licence Fee Payable (% of Gross Toll)	Annual Compensation due to NTR ^a
	€m	€m	€m
August 2007-July 2008	68.63	21.52	47.11

Note:

a The annual compensation was payable until March 2020.

27.9 An alternative to implementing the strict terms of the agreement was to negotiate a separate arrangement with NTR under which a compromise figure would be payable in lieu of the rights under the agreements. This option was the course chosen and an annual sum of €50 million was settled for the remaining agreement term⁸⁵. The buy-out gave rise to a VAT payment by the NRA of €21.9 million in 2007. Further VAT payments estimated at €19 million will arise in the period 2009-2020 as will rates payable to Fingal and South Dublin County Councils. Rates paid in 2008 amounted to approximately €2.7 million.

Audit Concern

The State negotiated a stream of payments that was higher than that to which NTR would have been entitled in the event of toll abolition under the original agreements. In addition, cessation of operations would have reduced the fixed and operating costs of NTR. On the other hand, account had to be taken of the fact that the mere abolition of tolls would not eliminate NTR rights to the bridge section of the motorway.

Views of the Department and the NRA

27.10 In response to my enquiries in regard to the negotiations and their outcome the Accounting Officer explained that there were no provisions in the original 1987 West-Link Toll Bridge Agreement for its termination and no provision for compulsorily exercising a buy-out of that Agreement. Both the NRA's solicitors and Senior Counsel advised that there was no basis for implying such a right into the Agreement. Consequently, there were no grounds for asserting that there were contractual provisions, which could or should have been applied. The termination was negotiated by agreement and not enforced, or capable of being enforced, under any contractual terms.

27.11 The West-Link Agreement did, however, provide a basis for compensating NTR in circumstances where the State invoked a zero tolling clause but this mechanism still provided that the tolling rights in respect of West-Link remained with NTR. This clause was not exercised, as the State was not willing to forego the revenue from tolling. Those revenues were earmarked to contribute to the funding of M50 upgrade works and the cost of buying out NTR's rights.

27.12 The Accounting Officer considered that, in these circumstances, it would not be appropriate to compare the sum payable under the Agreement provisions on zero tolling with the amount

⁸⁵ The net present value of this payment is of the order of €488 million based on the amount for which NTR subsequently sold its right to the income stream.

negotiated for the buyout of NTR's interest (i.e. the termination of the Agreement) because the zero tolling option would have deprived the State of future toll revenue.

27.13 The Accounting Officer said that because the Government never intended to use this approach the full cost was not formally quantified by the State side in negotiations. Notwithstanding this, the basis of calculation of the €47.11 million in Figure 94 would have had to take account of a number of important elements in relation to traffic data counts and the heavy goods vehicle toll rates, which would have been applicable in such an event. The traffic volumes on the M50 at West-Link were suppressed in the period 2006-2008 by reason of the road works being carried out to upgrade the motorway. The extent of the suppression is estimated in the range of 4-11%. These elements alone brought NTR's own calculations for this option to a sum in excess of the €50 million per annum subsequently paid for the buy-out.⁸⁶

27.14 In his view, the ultimate price paid for the buyout reflected very closely the then market value of NTR's rights in the West-Link Bridge under the Agreements. This market value would have comprehended the fixed and operating cost savings accruing to NTR.

27.15 The Accounting Officer having noted that the terms of the agreement did not position the State to terminate it, went on to say that NTR had put the NRA on notice in late 2006 that, if the NRA decided to pursue the abolition of tolls under the Agreement rather than negotiate an agreed termination, NTR intended to increase the toll rates on the M50 to a higher rate, as was their entitlement under the Agreement (they had for commercial reasons been kept at a lower rate by NTR for some time previously). This would have raised the levels above those used in the calculation.

27.16 NTR refrained from implementing these increases on the basis that the NRA was not implementing an abolition of tolls. A subsequent change of approach on the State's part would not have avoided the application of the higher rates which would in turn have impacted on the calculation of the compensation payments.

27.17 The Accounting Officer's view was that if the NRA had abolished tolls the estimated cost to the State would have been well in excess of the €50 million per year agreed, in addition to the loss to the State of the toll revenue. NTR in its negotiation stance proposed the toll abolition clauses as a basis for negotiating settlement. Their figure, corresponding to the report's €47.1 million was as high as €4.6 million per year before indexing. On that basis, the Accounting Officer contended that the final deal agreed with NTR represented very good value for money taking account of the policy objectives being pursued (i.e. a very significant improvement to traffic capacity and flows on the M50) and the underlying legal situation.

Conclusions

In order to buy out the rights and entitlements of NTR under the West-Link Concession Agreement, the State will pay €50 million per annum indexed in line with movements in the consumer price index, over the period August 2008 to March 2020 and assume responsibility for VAT of the order of €140 million.

While there was provision for the reduction of tolls to zero in the Agreements, subject to compensation of NTR for lost revenue, there was no provision for outright termination. The absence of a termination clause hampered the State in its negotiations.

⁸⁶ While the State did not produce an estimate relating to zero tolling, NTR did, in fact, for negotiating purposes.

